Private autonomy at Union level: on Article 16 CFREU and free movement rights

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Abstract

The article explores the potential role and significance of the freedom to conduct a business under Article 16 of the Charter of Fundamental Rights in developing a principled approach towards the protection of private (economic) autonomy at Union level. This has become an issue of particular concern given the uncertainty pertaining to the actual extent of the direct horizontal effect attributed to free movement rights and the lack of consistency in the approach giving effect to the notion of individual economic freedom in this regard. The article, therefore, aims to draw the contours of private (economic) autonomy at Union level by contrasting Article 16 of the Charter against free movement rights and considering their interplay from both conceptual and functional perspectives.

1. Introduction

Since *Walrave*,[1] the scope of free movement rights has gradually been extended to encompass private actors, ranging from national and international sports associations, trade unions, private law associations, professional associations and private standardisation bodies.[2] The approach developed so far rests on two strands. On the one hand, in most instances, the trigger for the application of the free movement provisions has been the specific position held by a private actor, which was not 'unlike a State'.[3] On the other hand, while the Court has explicitly recognised the full direct horizontal effect of the principle of non-discrimination on grounds of nationality under Article 45 TFEU,[4] it has also expressly excluded a private contract from the scope of Article 34 TFEU.[5] Although, as it stands, the horizontal scope of free movement rights may be deemed limited, there are, however, two problematic issues. Despite a series of rulings delivered, there is a lack of, first, a clear outline of the actual extent to which free movement rights apply to private conduct,[6] and second, more importantly, consistency in the approach giving effect to the protection of private autonomy across all free movement rights.[7] A change, could, nevertheless, be envisaged with the so-called 'constitutionalisation'[8] of private autonomy under Article 16 of the Charter of

* Lecturer in EU Law (Leicester University). I would like to express my sincere gratitude to Katja Ziegler, Michael Dougan, Eleanor Spaventa and the anonymous editors of the CMLR for their comments. The usual disclaimer applies.

[1] Case 36-74, *Walrave*, EU:C:1974:140.

[2] See e.g. Case 36-74, *Walrave*; Case C-176/96, *Lehtonen*, EU:C:2000:201; Case C-309/99, *Wouters*, EU:C:2002:98; Case C-415/93, *Bosman*, EU:C:1995:463; Case C-438/05, *Viking*, EU:C:2007:772; C-341/05, *Laval*, EU:C:2007:809; Case C-281/98, *Angonese*, EU:C:2000:296; Case C-94/07, *Raccanelli*, EU:C:2008:425; Case C-171/11, *Fra.bo*, EU:C:2012:453.

[3] Cruz, "Free movement and private autonomy", 24 *E.L.Rev.* (1999), 603-620 at 618.

[4] See Case Case C-172/11, *Erny*, EU:C:2014:157; C-281/98, *Angonese*; Case C-94/07, *Raccanelli*.

[5] Case C-159/00, *Sapod Audic*, EU:C:2002:343, para. 74.

[6] See the inconsistency arising from the Court's reasoning in, for instance, Case 36-74, *Walrave*; Case C-438/05, *Viking* and Case C-281/98, *Angonese* or Case C-159/00, *Sapod Audic* and Case C-171/11, *Fra.bo*. More on this, see Schepel, "Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in the EU Law", 18 *E.L.J.* (2012), 177-200, at 177.

[7] Weatherill, "The Elusive Character of Private Autonomy in EU Law" in Leczykiewicz and Weatherill (eds), The Involvement of EU Law in Private Law Relationships (Hart, 2013), p. 13.

[8] Groussot, Pétursoon, Pierce, "Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights", 01 *Lund University Legal Research Paper Series* (2014).

Fundamental Rights (hereafter as 'Article 16') that enshrines the freedom to conduct a business.[9]

This contribution, thus, explores the significance of Article 16 in developing a principled approach towards the protection of private autonomy at Union level, by focusing on its interplay with free movement rights. What is considered here is the economic or entrepreneurial aspect of such autonomy: autonomy in the sense of individual economic liberty rather than personal freedom or general freedom of action. In this context, the main analytical focus centres on the possible role and potential importance of Article 16 in framing the outer boundaries of free movement rights from a 'horizontal' perspective.

There are conceptual and functional aspects to the interplay between Article 16 and free movement rights. Considering the substantial overlap between them, both Article 16 and free movement rights can be aligned under the broader umbrella of the concept of private (economic) autonomy.[10] On the one hand, the expression of such autonomy in a more general sense could be seen to find its place in Article 16.[11] Drawn from the constitutional traditions of Member States, this provision reflects the customary liberal meaning of individual economic autonomy and protects it as an end itself. On the other hand, a more specific form of such autonomy appears to be manifested through free movement rights. In particular, the argument in favour of much narrower construction of the scope of individual freedom guaranteed under these rights becomes more compelling, if they are contrasted against Article 16. They are not aimed to ensure the freedom to carry out an economic activity *per se*, but only confer the freedom to access the market in a Member State, though its actual extent still remains unclear.

As demonstrated by AG Trstenjak in *Fra.bo*,[12] the co-existence of these conceptually different forms of individual autonomy manifested in Article 16 and free movement rights can lead to a potential clash. Considering the fact that the existing justification regime under the free movement provisions is not tailored to meet pure private interests, Article 16 may transform into a platform for private actors to challenge the potential extent of the horizontal applicability of free movement rights. In other words, this provision could lead to due weight and consideration given to the notion of individual economic autonomy in a general sense, the lack of which, for one, stems from the asymmetry arising from the retention of the existing justification regime despite attributing direct horizontal effect to the free movement provisions. The potential invocation of Article 16 against free movement rights would prompt the need to frame the boundaries of the forms of individual autonomy they respectively manifest. Given the post-Charter judicial landscape, this would require a fair balance being struck against the most appropriate analytical parameters, which are shown to lie within the so-called 'double-proportionality' principle. In this context, it is demonstrated that a

[9] O.J. 2000, C-364/1. (2000/C 364/01), Charter of Fundamental Rights of the European Union.
[10] On the notion of private autonomy in the EU see Grundmann, Kerber and Weatherill (eds.), *Party Autonomy and the Role of Information in the Internal Market* (Walter de Gruyter, 2001), Roth, "Privatautonomie und die Grundfreiheiten des EG-Vertrags" in Beuthien, Fuchsm Roth, Schiemann, Wacke (eds.), *Perspektiven des Privatrechts am Anfang des 21.Jahrhunderts* (Festschrift für Dieter Medicus zum 80 Geburtstag, 2009).
[11] It is inherently linked to the freedom to choose an occupation and the right to property enshrined in Articles 15 and 17 of the Charter.
[12] See e.g. Opinion of AG Trstenjak in Case C-171/11, *Fra.bo*.

'balancing' exercise would imply the confinement of the outer reach of the horizontal applicability of free movement rights to those private actors that possess some form of 'dominance' over others.[13] Considered in this context, Article 16 emerges not only as a provision that simply adds a new fabric to judicial reasoning, but also, more substantially, as an instrument that defines the extent to which free movement rights should be applied to private conduct. In particular, such applicability of these rights finds its natural limits in the reach of Article 16.

This contribution will explore these aspects of the interplay between Article 16 and free movement rights. Section 2 begins by distinguishing the general form of individual autonomy manifested in Article 16 and the specific one expressed through free movement rights. The subsequent parts then focus on the potential conflict between these forms of individual autonomy and its reconciliation. Section 3, thus, highlights the inadequacy of the justification regime under the free movement provisions to protect pure private interests, which raises the prospect of recourse to Article 16. Sections 4 and 5 are then aimed to frame, in general terms, the boundaries of the forms of individual autonomy under Article 16 and free movement rights through a 'balancing' exercise, based on the 'double-proportionality' principle as an analytical framework. The article concludes in Section 6 by stressing the potential significance of Article 16 in conceptually delimiting the scope of free movement rights.

2. Forms of private (economic) autonomy at Union level

Article 16 could be considered as the first provision to explicitly recognise the concept of private (economic) autonomy at Union level. Its textual formulation does not define the freedom to conduct a business. The only guidance is provided in the Explanations relating to the Charter,[14] which merely states that Article 16 is premised upon the Court's jurisprudence recognising the freedom to exercise an economic or commercial activity, freedom of contract and the principle of free competition.[15] These factors also lay the foundation of free movement rights. Whether it is, for instance, the sale of goods or provision of services across borders, it inherently presupposes the freedom to carry out an economic activity and inevitably involves the exercise of freedom of contract.[16] There, thus, seems to be a substantial overlap between free movement rights and Article 16.[17] In particular, what they have in common is that they both are very much rooted in

[13] This line of reasoning could also be extended to Article 45 TFEU, though there are other factors involved: for the fundamental rights perspective, see Prechal and De Vries, 'Seamless Web of Judicial Protection in the Internal Market?', 34 *E.L.Rev* (*2009*), p. 15; for ensuring consistency between primary and secondary Union law, see Davies, 'Freedom of Contract and the Horizontal Effect of Free Movement Law', in Leczykiewicz and Weatherill (eds), op.cit. *supra* note 7.

[14] O.J. 2007, C-303/17. (2007/C303/02), "Explanations relating to the Charter of Fundamental Rights", at 23.

[15] More in this, see e.g., Oliver, "What Purpose Does Article 16 of the Charter Serve?" in Bernitz and Groussot (eds.), *General Principles of EU Law and European Private Law* (Kluwer, 2013).

[16] Verbruggen, "The Impact of Primary EU Law on Private Law Relationships: Horizontal Direct Effect under the Free Movement of Goods and Services", 2 *E.R.P.L.* (2014), 201 – 216 at 202.

[17] Trstenjak and Beysen, "The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the CJEU", 38 *E.L.Rev*. (2013), 293 - 315 at 310.

the idea of an individual's freedom to organise his/her economic life and, accordingly, engage in legal relations of his/her own choice.[18]

Such an intrinsic link between Article 16 and free movement rights raises the issue of conceptual framing of their interplay. From the perspective of the mere expression of individual economic liberty, Article 16 and free movement rights could be construed as general and specific forms of manifestation of private autonomy at Union level. This first derives from a textual reading of Article 16 itself, which stipulates that the freedom to conduct a business is recognised 'in accordance with Union law'. In *Sokoll*,[19] for instance, responding to the question raised by a national court concerning the compatibility of a national rule with Article 16 of the Charter and Article 49 TFEU, the Court confined its analysis to the latter alone. This was explained by the fact that Article 16 refers *inter alia* to Article 49 TFEU.[20] Such a distinction is also in line with the more general Article 52 (2) of the Charter, which states that 'rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'.[21] As further specified in the Explanations to the Charter, it specifically refers to the 'rights which were already expressly guaranteed in the Treaty establishing the European Community'.[22] As a result, a matter involving, for instance, the sale of goods and provision of services would trigger not Article 16, but Articles 34 and 56 TFEU, as they are the specific expression of the ability to carry out an economic activity across borders.[23]

Due to their inherent link, a restriction of free movement rights could equally be construed to constitute a limitation of the freedom under Article 16. In *Pfleger*,[24] for example, the Court found that a national legislation prohibiting the unauthorised operation of games of chance machines was an unjustified restriction of Article 56 TFEU.[25] It was also held that 'national legislation that [was] restrictive from the point of view of Article 56 TFEU, (…) [was] also capable of limiting (…) the freedom to conduct a business'.[26] It thus follows that whenever a given rule or measure is found to be incompatible with the free movement provisions, it is also likely to compromise the freedom to conduct a business under Article 16.[27] However, there is a significant conceptual caveat here. Such an outcome does not, at least not always, seem to be the case in a reverse scenario. It is true that limitations of freedom of contract or, for instance, the ability to freely determine selling prices, which is protected under Article 16,[28] has been found by the Court to amount to a restriction of free movement rights.[29] Nevertheless, what

[18] Comparato and Micklitz, "Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU" in Bernitz and Groussot (eds.), op. sit. *supra* note 15, p. 122.
[19] Case C-367/12, *Sokoll-Seebacher*, EU:C:2014:68.
[20] Ibid, para. 22.
[21] Paragraph 2 of Article 52.
[22] O.J. 2007, C-303/17. (2007/C303/02).
[23] See also C-233/12, *Gardella*, EU:C:2013:449, para. 39.
[24] C‑390/12, *Pfleger*, EU:C:2014:281.
[25] Ibid, para. 54.
[26] Ibid, para. 60.
[27] See also, Davies, "Freedom of Movement, Horizontal Effect, and Freedom of Contract", 3 *E.R.P.L.* (2012), 805–828, at 810.
[28] Case C‑283/11, *Sky Österreich,* EU:C:2013:28 para. 42; Case C‑426/11 *Alemo-Herron*, EU:C:2013:521, para. 32.
[29] See eg Case C-333/14, *Scotch Whisky Association*, EU:C:2015:845, para. 46; Case C-36/02, *Omega,* EU:C:2004:614, para 21; Case C-518/06, *Commission* v. *Italy* EU:C:2009:270, para 71;

might put a limitation on the exercise of the broader freedom to conduct a business would not necessarily constitute a restriction of free movement rights. In the recent ruling of *Pelckmans*,[30] for instance, a compulsory weekly rest day imposed on traders was found to comply with Article 34 TFEU,[31] even though such a requirement could be deemed to limit the exercise of a commercial activity.[32] This emanates from the specific purpose and limited reach of free movement rights.[33] Despite the fact that both matters are rather ambiguous, it is nevertheless possible to draw a few contours.

Much of the uncertainty in this respect is primarily about the correct demarcation of the outer boundaries of free movement law. The lingering question that remains to be resolved here concerns the extent to which one needs to construe the notion of a restriction falling within the scope of the free movement provisions. Do they prohibit anything affecting the carrying out of an economic activity in the internal market? A potential answer lies in the conceptual understanding of the ultimate role attributable to these Treaty provisions and, accordingly, the organisation of the internal market as a whole. In particular, the issue one could raise here is whether free movement law should be understood as a set of rules merely guaranteeing the access to the market of a Member State or as one enabling the exercise of an economic activity in other Member States free from all restrictions.[34]

Such query originates from the very lack of clarity in the approach taken by the Court. In particular, exploring its jurisprudence would not bear much fruit, as it does not seem to form one consistent whole. In some rulings, the Court embraced a broader notion of a restriction that falls within the scope of the free movement provisions.[35] Taken at face value, these provisions can be construed as introducing some kind of 'presumption of incompatibility' of all forms of national regulation that affect the exercise of an economic activity across borders and allowing only those that are objectively justified.[36] In others rulings, however, the Court resorted to an approach along a much narrower concept of a restriction.[37] This suggests that not all factors limiting the exercise of individual economic freedom would

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C-442/02, *Caixa-Bank,* EU:C:2004:586, para. 12; Case C-94/04, *Cipolla*, EU:C:2006:758, para. 56; See also the reasoning of AG Kokott in Case C-59/11, *Kokopelli*, *EU:C:2012:28*.

[30] Case C-483/12, *Pelckmans*, EU:C:2014:304

[31] Ibid, para. 24.

[32] See, to this effect, Case C-391/92, *Commission v Greece*, EU:C:1995:199, para. 15. See also the Court's reasoning in Case C-565/08, *Commission v Italy*, EU:C:2011:188, para. 49; Case C-602/10, *SC Volksbank România*, EU:C:2012:443, para. 74.

[33] Both matters have generated a plethora of academic discussion. See e.g. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP, 2013).

[34] Kingreen, "Fundamental Freedoms" in Von Bogdandy and Bast, *Principles of European Constitutional Law* (Hart, 2009), p. 532.

[35] See e.g. Case 8-74, *Dassonville,* EU:C:1974:82; Case C-55/94, *Gebhard*, EU:C:1995:411. More on the implications of the latter see e.g. Spaventa, "From Gebhard to Carpenter: Towards a (Non) Economic European Constitution", 41 *CMLRev.* (2004), 743–773. See also, C-442/02, *Caixa-Bank*, EU:C:2004:586.

[36] Bernard, *Multilevel Governance in the European Union* (Kluwer, 2002), p. 19.

[37] See e.g. Joined Cases C-267/91 and C-268/91, *Keck and Mithouard*, EU:C:1993:905; The *Keck* line of reasoning has been followed in Case C-441/04, *A-Punkt Schmuckhandels*, EU:C:2006:141; Case C-531/07, *LIBRO*, EU:C:2009:276; Case C-483/12, *Pelckmans*; Case C-198/14, *Valev Visnapuu*, EU:C:2015:751; See also the recent Opinion of AG Wahl in Case C‑221/15, *Openbaar Ministerie v Etablissements Fr. Colruyt*, EU:C:2016:288.

necessarily be caught by the free movement provisions to prompt the need for objective justification. That said, in both contexts, the approach articulated by the Court is very much underpinned by the market access narrative, through without a clear outline of its actual limits.[38]

A far clearer picture, however, emerges from the Opinions of several Advocates General on this matter. In contrast to the Court, the perspective they have individually taken makes a case for narrower construction of the scope of free movement law.[39] In *Hünermund*, for instance, AG Tesauro argued against the extension of the meaning of measures having an equivalent effect under *Dassonville* to include 'a potential reduction in imports caused solely and exclusively by a more general (and hypothetical) contraction of sales'.[40] A similar view was shared by AG Tizzano in *Caixa Bank*.[41] Approaching the issue in the context of Article 49 TFEU, he pointed out the difficulty in describing national measures as restrictions contrary to the Treaty 'for the sole reason that they reduce[d] *the economic attractiveness* of pursuing [an economic activity]', when they merely regulate[d] its pursuit without directly affecting the access to it.[42] In the same vein, in *Marks & Spencer*, AG Maduro categorically stated that 'not every restriction on economic or commercial freedom [was] a restriction on the exercise of the freedoms of movement'.[43]

These arguments were put forward specifically in light of the strictly formulated reach of free movement law. In particular, AG Tesauro contented in *Hünermund* that Article 34 TFEU was not a provision that enshrined the right to freedom of trade or the right to the unhindered pursuit of commerce in individual Member States.[44] Premised upon his reasoning, AG Maduro in *Alfa Vita* went even further by asserting that '[Union] nationals [could not] draw from this provision an absolute right to economic or commercial freedom'.[45] More specifically, in his words, the Court has no desire to interpret the free movement provisions in light of the principle of the freedom to engage in a commercial activity.[46] A similar point could also be observed in AG Kokott's reasoning in *Mickelson and Roos*, where she called for the exclusion of rules concerning product use from the scope of Article 34 TFEU, as otherwise 'individuals [might] even invoke [it] as a means of challenging national rules whose effect [was] merely to limit their general freedom of action.[47]

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[38] Cf eg the discrimination-based market access test in Case C-108/09, Ker Optika, EU:C:2010:725; Case C-198/14, *Valev Visnapuu*, and restriction-based one in Case C-142/05, *Mickelsson and Roos*, EU:C:2009:336; Case C‑456/10, *ANETT*, EU:C:2012:241; Case C-400/08, *Commission v Spain*, EU:C:2011:172; Case C‑443/10, *Bonnarde*, EU:C:2011:641.

[39] This view is not, however, shared by all. See for instance AG Bot's Opinion in C-110/05, *Commission v Italy*, EU:C:2006:646, where he proposed to view the term 'restriction' in broad terms.

[40] Opinion of AG Tesauro in Case C-292/92, *Hünermund*, EU:C:1993:932, para 25.

[41] Opinion of AG Tizzano in C-442/02, *Caixa-Bank*, EU:C:2004:187.

[42] Ibid, para. 58 (italics added).

[43] Opinion of AG Maduro in Case C-446/03, *Marks & Spencer*, EU:C:2005:201, para 40.

[44] Opinion of AG Tesauro in Case C-292/92, *Hünermund*, paras. 1 and 27.

[45] Opinion of AG Maduro in Joined cases C-158/04 and C-159/04, *Alfa Vita*, EU:C:2006:212, para. 37.

[46] Opinion of AG Maduro in Case C-72/03, *Carbonati Apuani*, EU:C:2004:296, para. 42.

[47] Opinion of AG Kokott in Case C-142/05, *Mickelsson and Roos*, EU:C:2006:782, para. 48.

Framing free movement rights in such a manner is rationalised in light of the ultimate objectives of the internal market. For AG Tesauro, 'the purpose of Article [34 TFEU] is to ensure the free movement of goods in order to establish a single integrated market, eliminating therefore those national measures which in any way create an obstacle to or even mere difficulties for the movement of goods.[48] As he continued, 'its purpose [was] not to strike down the most widely differing measures in order, essentially, to ensure the greatest possible expansion of trade'.[49] Similarly, AG Trstenjak in *Idrima Tipou* was of the opinion that free movement rights were primarily understood by the Court as 'instruments for opening up markets'.[50] This point has also been stressed by AG Maduro. In *Alfa Vita*, he held that 'the Treaty provisions relating to the free movement of goods aim[ed] to guarantee the opening-up of national markets, offering producers and consumers the possibility of fully enjoying the benefits of a [Union] internal market, and not to encourage a general deregulation of national economies'.[51] Hence, according to him, the task of the Court is not to question every economic policy of Member States nor engage in challenging them.[52] The rationale for such a restrictive reading is even more apparent in the reflection of the Court's jurisprudence provided by AG Tizziano in *Caixa Bank*. He emphasised the fact that the purpose of the Treaty was not to establish 'a market without rules' or 'a market in which rules [were] prohibited as a matter of principle, except for those necessary and proportionate to meeting imperative requirements in the public interest'.[53]

Viewed in this light, the conceptual difference between free movement rights and Article 16 becomes rather evident. The distinguishing factor here appears to be the varying extent to which the concept of private (economic) autonomy is manifested with the framework of both. The freedom to conduct a business under Article 16, for instance, is drawn from the 'constitutional traditions common to Member States'.[54] As such, its recognition reflects the traditional liberal meaning of the concept of private autonomy present in national legal systems. In particular, it could be seen as sharing the characteristics of the entrepreneurial aspect of the right to individual self-determination,[55] safeguarded against the interference by the State and others.[56] Having acquired a constitutional status in a national context, it is considered to constitute part of the political and social construction of the State;[57] and, in broader terms, it translates to the State's commitment to a specific form of political economy and market.[58] Much like its national counterpart, Article 16, therefore, protects individual economic autonomy as an end itself.[59] Its application is not conditional in the sense that, analogous to other

[48] Opinion of AG Tesauro in Case C-292/92, *Hünermund*, para. 28.
[49] Ibid.
[50] Opinion of AG Trstenjak in Case C-81/09, *Idryma Typou*, EU:C:2010:304, para. 75.
[51] Opinion of AG Maduro in Joined cases C-158/04 and C-159/04, *Alfa Vita*, para. 37; See also, Micklitz, "Social Justice and Access Justice in Private Law', 2 *EUI Working Papers* 2011.
[52] Opinion of AG Maduro in Case C-446/03, *Marks & Spencer*, para. 37.
[53] Opinion of AG Tizziano in C-442/02, *Caixa-Bank*, para. 63.
[54] Case 4-73, *Nold*, EU:C:1974:51, para. 13.
[55] Everson and Gonçalez, "Article 16" in Peers, Harvey, Kenner and Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014), p. 438.
[56] Kaarlo Tuori, *European Constitutionalism* (CUP, 2015), p. 167.
[57] Comparato and Micklitz, op. sit. *supra* note 18, p. 127.
[58] Everson and Gonçalez, op. sit. *supra* note 55, p. 446.
[59] Kaarlo Tuori, op. sit. *supra* note 56, p. 167.

fundamental rights,[60] it is available to everyone,[61] so long as a situation at issue is governed by Union law.[62]

On contrary, free movement rights do not appear to display similar attributes. Unlike Article 16, they are not aimed at protecting individual economic autonomy *per se*. Surely, the ability to freely engage in an economic activity or exercise freedom of contract are the necessary pre-requisites for the exercise of free movement rights. Yet, they are not aimed to guarantee them in a general sense. Instead, derived from the Treaty, these rights serve as a means to attain a rather different purpose - that is the establishment of the internal market by removing all obstacles that specifically hinder the access to the market of a Member State or put certain economic operators at a comparative disadvantage in that market.[63] In the Court's own words, the provisions on the free movement of goods, for instance, 'must be understood as being intended to eliminate all barriers (…) to (…) [intra-Union] trade' and are 'an indispensable instrument for the realisation of a *market without internal frontiers*'.[64] There is, therefore, an element of instrumentality in the nature of free movement rights,[65] which shapes the form of individual autonomy vested in them. One would agree with its description of being 'regulated autonomy' - that has, from the outset, been 'functionalised' to operate as an instrument to conform individual behaviour for the purpose of achieving Union objectives.[66] In particular, in theory, the freedom to access the market in a Member State leads to the optimal allocation of economic factors by allowing goods, services, labour and capital to move to those Member States where they are most valued without being obstructed by national borders.[67] This opens up national markets, ultimately resulting in them forming a unified one.

However, this is not to suggest that the attainment of internal market objectives has no bearing as regards the individual economic autonomy recognised under Article 16. Although, this provision itself is not aimed to achieve and promote the well-functioning internal market, the extent of possible reliance on it is nonetheless framed by specific Union objectives. As the Court has reiterated on several occasions, the freedom to conduct a business 'is not absolute, but must be viewed in relation to its social function'.[68] Thus, it follows that while the

[60] Spaventa, "Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU" in Dougan and Currie (eds.), 50 Years of the European Treaties: Looking Back and Thinking Forward (Hart: Oxford, 2009), p. 355.
[61] See in this regard Case T‑496/10, *Bank Mellat v Council*, EU: T:2013:39, para. 36.
[62] See e.g. Case C-617/10, *Åkerberg Fransson*, EU:C:2013:105, para 19. For more recent analysis in this regard, see Dougan, "Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law", 52 *CMLRev.* (2015), pp. 1201–1245.
[63] Oliver and Roth, "The Internal Market and the Four Freedoms", 41 *CMLRev.* (2004), 407 – 441 at 419. See also the case-law, op. sit. *supra* note 38.
[64] Case C-265/95, *Commission* v. *France*, EU:C:1997:595, para. 30; Case C-112/00, *Schmidberger*, EU:C:2003:333, para. 56 (italics added).
[65] De Cecco, "Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law", 15 *German Law Review* (2014), 382 - 408, at 385.
[66] Comparato, "Private Autonomy and Regulation in the EU Case-Law" in Micklitz, Svetiev and Comparato (eds.), *European Regulatory Private Law - The Paradigms Tested*, 4 *EUI Working Papers* 2014, p. 11.
[67] Flessner and Verhagen, *Assignment in European Private International Law: Claims as Property and the European Commission's "Rome I Proposal"* (Sellier, 2006), p. 67.
[68] See e.g. Case C‑283/11, *Sky Österreich*, para 45.

autonomy under free movement rights specifically serves the internal market ethos, the one under Article 16, however, is only limited to that end.

3. Article 16 as a counter mechanism to free movement rights

Contrasting Article 16 against free movement rights reveals the peculiar nature of the concept of private (economic) autonomy at Union level. They both manifest such autonomy, though they do so to varying degrees. Despite the fact that, from a conceptual point of view, they may overlap considering the factors they are based upon, it is also clear that they do not necessarily fuse. That said, the co-existence of the divergent forms of individual autonomy manifested in them, nonetheless, might lead to a potential clash. This certainly becomes prominent considering the potential extent of the direct horizontal effect of the free movement provisions. More so, this is because Article 16 opens up a clear possibility for private actors to challenge being subject to these provisions. This is particularly the case considering the limitations of the justification regime under these provisions.

3.1. Free movement rights, justification regime and its limitations

The specific form of individual autonomy envisaged by the free movement provisions is not unfettered and can be departed from pursuant to either the express derogations laid down in the Treaty or the so-called mandatory requirements introduced by the Court. Given the main addressees of these provisions, it is no surprise that the available justification grounds are primarily, if not exclusively, tailored to meet the interests of Member States.[69] However, in light of the attribution of direct horizontal effect to these provisions, it is questionable whether and to what extent such justification regime also adequately reflects the interests of private actors.

As it stands, there is now no doubt that the free movement provisions can, to a certain extent, impose obligations binding upon private actors and accordingly limit the autonomy they traditionally enjoy.[70] Even though the actual reach of these provisions in this regard remains unclear, the expansion of their scope in such a way nevertheless has not been followed by the corresponding extension of the available justification grounds.[71] This is quite apparent given the fact that the current justification regime is not equipped to weigh pure private interests against the internal market objectives. With no clear-cut justification reflecting such interests, the free movement provisions could be construed to bear more heavily on private actors than Member States.[72]

In particular, conceptually, two problematic aspects can be highlighted here. First, it is not clear whether private actors can actually invoke the available grounds under the existing justification regime or whether they are confined to Member States. An attempt to find clarification in the Court's jurisprudence would be of no avail due to conflicting rulings. In *Bosman*,[73] for instance, with regard to the

[69] Barnard, "Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected? in Barnard & Odudu, *The Outer Limits of European Union Law* (Hart, 2009), p. 273.
[70] This extends even to Article 34 TFEU. See in Case C-171/11, *Fra.bo*.
[71] Hartkamp, "The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law", 18 *E.R.P.R.* (2010) 527-548, 547.
[72] Schepel, op. sit. *supra* note 6, p. 196.
[73] Case C-415/93, *Bosman*.

objection raised by UEFA that only Member States could rely on the Treaty derogations, the Court held that:

> 'There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question'.[74]

On contrary, the opposite seems to follow from the reasoning in *Laval*,[75] where the Court took a different approach as regards the availability of the Treaty derogations to trade unions engaged in a collective action. According to the Court, 'not being bodies governed by public law, [trade unions] [could not] avail themselves (…) by citing grounds of public policy'.[76] This, however, only seems to concern the Treaty derogations and does not extend to the category of mandatory requirements. In *Viking*, for instance, the Court found that a collective action taken by a trade union was a restriction of the freedom of establishment.[77] Having reached this conclusion, it also conceded that such a restriction might 'in principle, be justified by an overriding reason of public interest, such as the protection of workers'.[78] It therefore follows that within the current justification regime, private actors can at least have recourse to the specific public interests grounds under the category of mandatory requirements.

Indeed, in *Wouters*,[79] for instance, in response to the question on the compatibility with Articles 49 and 56 TFEU of the prohibition of multi-disciplinary partnerships between members of a Bar and accountants, the Court held that it would (…) be justified 'in order to ensure the proper practice of the legal profession'.[80] In *Angonese*, in turn, the Court acknowledged that the language requirements imposed by a private actor such as a private bank could be justified, provided that they 'were based on objective factors unrelated to the nationality of the persons concerned and (…) were in proportion to the aim legitimately pursued',[81] for instance a specific linguistic policy.[82] In a similar vein, in *Olympique Lyonnais*,[83] the restriction on the free movement of young football players was justified pursuant to 'the objective of encouraging the recruitment and training of young players'.[84]

Notwithstanding this, however, the availability of the category of mandatory requirements here comes with an important caveat. There are not many public

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[74] Ibid, para. 86.
[75] Case C-341/05, *Laval*.
[76] Ibid, para. 84.
[77] Case C-438/05, *Viking*.
[78] Ibid, para. 90. Though this could also be construed as a private interest. See Wyatt, "Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold, and the Implications for Community Competence", 4. *CYELP* (2008), 1-48, p. 31.
[79] Case C-309/99, *Wouters*, EU:C:2002:98.
[80] Ibid, para. 122.
[81] Case C-281/98, *Angonese*, para. 42.
[82] De Vries and Van Mastrigt, "The Horizontal Direct Effect of the Four Freedoms: From a Hodgepodge of Cases to a Seamless Web of Judicial Protection in the EU Single Market?" in Bernitz and Groussot (eds.), op. sit. *supra* note 15, p. 271. See also, Case C-424/97, *Haim*, EU:C:2000:357, para. 60; Case C-202/11, *Anton Las*, EU:C:2013:239, para. 25.
[83] Case C-325/08, *Olympique Lyonnais*, EU:C:2010:143.
[84] Ibid, para. 45.

interests grounds that can be invoked by private actors. Moreover, it is neither reasonable nor realistic to expect that. These actors predominantly pursue their own private interests of economic nature, rather than be motivated by concerns of general, public-oriented ones. This, in turn, touches upon another limitation of the existing justification regime. According to the Court's jurisprudence, it does not encompass purely economic reasons. It was first held in *Commission v Italy* that the grounds under Article 36 TFEU are 'directed to eventualities of a non-economic kind'.[85] This meant that Member State could not rely on this provision to plead 'the economic difficulties caused by the elimination of barriers to [intra-Union] trade.[86] The same also holds true for the category of mandatory requirements. In *Verkooijen*,[87] the Court confirmed that 'aims of a purely economic nature [could not] constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty'.[88] Although an economic consideration has been given effect coupled with other public concerns,[89] it has yet to be considers by the Court as a sufficient justification grounds on its own. The rationale behind such limitation rests upon the idea that mere economic concerns of Member States are not significant enough to outweigh the aim pursued by the free movement provisions. Although this reasoning may seem persuasive, the very thought of extending it by analogy to private actors, however, is rather problematic.

With the Charter having acquired a legally binding nature, Article 16 could be construed as one 'way out' in this context. For one, the possibility to rely on a fundamental right as a ground for justification has been acknowledged by the Court and has acquired its own dynamics. As the Court held, 'the protection of fundamental rights is a legitimate interest which, in principle, justifi[ed] a restriction of the obligations imposed by [Union] law, even under a fundamental freedom guaranteed by the Treaty,'.[90] Article 16, can therefore, in principle, be given effect in case of a possible infringement of a free movement right. In this way, Article 16 may address the asymmetry arising from, on the one hand, granting direct horizontal effect to the free movement provisions and, at the same time, on the other hand, retaining the existing justification regime with its limitations.

3.2. Privately enforceable right under Article 16 of the Charter

As the first explicit recognition of private (economic) autonomy at Union level, Article 16, thus, opens up a possibility for purely private interests to be given due weight and consideration. The initial question that arises here concerns the capacity in which the freedom to conduct a business under Article 16 should be placed against free movement rights. Following the Court's own words mentioned above, one could construe it to be a 'legitimate interest', capable of qualifying as a possible justification ground. However, applying this line of reasoning in the present context seems rather problematic. As demonstrated in detail later, it is generally based on a flawed premise, which suggests a hierarchical superiority of

[85] Case 7-61, *Commission v Italy,* EU:C:1961:31, p. 329. See also Case 352/85, *Bond van Adverteerders*, EU:C:1988:196, para 34; Case C-288/89, *Gouda*, EU:C:1991:323, para. 11.
[86] Case 72/83 *Campus Oil*, EU:C:1984:256, para. 35.
[87] Case C-35/98 *Verkooijen*, EU:C:2000:294.
[88] Ibid, para. 48. See also, Case C-398/95, *SETTG*, EU:C:1997:282, para. 23.
[89] See e.g. Case C‑544/11, *Petersen*, EU:C:2013:124, para. 50.
[90] See e.g. C-112/00, *Schmidberger*, para. 74; Case C-36/02, *Omega*, EU:C:2004:614, para. 35.

free movement rights, whereby fundamental rights are demoted to mere 'legitimate interests' that might or might not prevail.[91] As such, this is not a suitable framework to view the interaction of Article 16 and free movement rights that effectively belongs to a private sphere traditionally distinguished by the equality of private actors.[92] The idea of equality in this sense presupposes the existence of competing rights, interests and policies on both sides, which in turn necessitates a balanced weighing-up against one another.[93] Viewed against this background, the elevation of free movement rights, even to a limited extent, to privately enforceable rights, should be met by a corresponding capacity attributed to the freedom under Article 16. As they both manifest the notion of individual (economic) autonomy, though to a different extent, it would hardly be logical to extend the scope of the free movement provisions to private relationships, while Article 16 is considered as a mere 'legitimate interest' confined to the actions of Union institutions or Member States.

The characterisation of Article 16 as a privately enforceable right finds support in the jurisprudence of the Court.[94] At the outset, it is necessary to mention Article 51 that defines the scope of the rights and freedoms enshrined in the Charter. Accordingly, they 'are addressed to the institutions, bodies, offices and agencies of the Union (…) and to the Member States only when they are implementing Union law'.[95] As such, it clearly includes no mention of its possible binding effect on individuals. Thus, based on this, one could indeed consider the Charter, and hence Article 16, to exclude its horizontal application.[96] At the same time, however, this provision on its own might not be decisive,[97] as other factors do not necessarily support such a claim and even point towards the opposite.

The Court has recently touched upon this issue in *Association de Médiation Sociale* (AMS), though in a slightly different context.[98] The case concerned the possible applicability of Article 27 of the Charter on 'workers' right to information and consultation within the undertaking' to a dispute involving two private actors. The main question raised was whether it could produce such an effect alone or in conjunction with a Directive pursuant to the *Kücükdeveci* line of reasoning, whereby a Directive is given effect in a private dispute if it contains a specific expression of a general principle of Union law, which is also enshrined in the Charter.[99] In its response, the Court effectively found that Article 27 of the Charter could not have direct horizontal effect. In reaching this verdict, it considered the wording of this provision, which reads 'that workers must, at various levels, be guaranteed information and consultation in the cases and under

[91] Spaventa, op. sit. *supra* note 60, p. 359.
[92] See, Opinion of AG Trstenjak in Case C-271/08, *Commission* v. *Germany*, EU:C:2010:183, para. 187; Flaherty, "Private Law and its Normative Influence on Human Rights" in Barker and Jensen (eds), *Private Law: Key Encounters with Public Law* (CUP, 2013), p. 217.
[93] Collins, "On the (In)compatibility of Human Rights Discourse and Private Law" in Hans Micklitz (ed), *Constitutionalization of European Private Law* (OUP, 2014), p. 50.
[94] See, Everson and Gonçalez, op.sit. *supra* note 55, p. 451. See also, Case C-12/11, *McDonagh* v. *Ryanair*, EU:C:2013:43.
[95] See, Case C‑617/10, *Åkerberg*, EU:C:2013:105.
[96] See e.g. Opinion of AG Trstenjak in Case C‑282/10, *Dominguez*, EU:C:2011:559, para. 80. See also, Trstenjak and Beysen, op. sit. *supra* note 17, p. 308.
[97] See e.g. Opinion of AG Cruz Villalón in Case C-176/12, *AMS*, EU:C:2013:491, para. 41.
[98] Ibid.
[99] Case C-555/07, *Kücükdeveci*, EU:C:2010:21.

the conditions provided for by European Union law and national laws and practices'. In this regard, the Court held that 'for this article to be fully effective, it must be given more specific expression in European Union or national law'.[100] Furthermore, it also distinguished Article 27 from Article 21 of the Charter, which lays down the principle of non-discrimination on grounds of age and which was at stake in *Kücükdeveci*. According to the Court, they are different in the sense that Article 21 'is *sufficient in itself to confer* on individuals an individual right which they may invoke as such'.[101]

Two conclusions could be drawn from this ruling. First, despite the wording of Article 51, the reasoning provided by the Court could be construed to imply that at least some of the rights enshrined in the Charter may be binding on private actors.[102] Second, such potential is depended upon the 'structural characteristics' of a given provision in the Charter.[103] In particular, a right protected under the Charter is applicable horizontally, if it is '*sufficient in itself*' to confer a right on individuals.[104]

In this light, similar to Article 27, one may consider Article 16 not to be specific enough to be invoked against other individuals. Even though they are not included under the same title in the Charter, both provisions nevertheless have comparable wording. In particular, Article 16 also contains a reference to 'Union law and national laws and practices'. However, a close textual reading also reveals a significant difference in the wording of both provisions. While Article 27 refers to '*conditions* provided for by Union law and national laws and practices', Article 16 only states that 'the freedom to conduct a business in accordance with Union law and national laws and practices is recognised' with no mention of the word 'conditions'. The mere reference to 'Union law and national laws and practices' could thus be deemed as not decisive as such to affect the horizontality of a given Charter provision.[105] This finds support, for instance, in the rulings of the Court in *Viking* and *Laval*. In addition to broaden the extent of the direct horizontal effect of the freedom of establishment and freedom to provide services, the Court's reasoning also suggests the commensurate direct horizontal effect Article 28 of the Charter, which enshrines the right to collective action.[106] What is more interesting is that this seems to be the case despite the wording of Article 28, which identical to Article 16, contains a reference to 'Union law and national laws and practices'. It is true that the Court alluded to the wording of Article 28 that the right to strike 'is to be protected in accordance with [Union] law and national law and practices'.[107] Yet, it appears that such reference was only made to dismiss the

[100] Case C-176/12, *AMS*, para. 44.
[101] Ibid, para. 47 (italics added).
[102] See e.g. the conclusion reached by the UK Court of Appeal in *Benkharbouche* v. *Sudanese Embassy* [2015] EWCA Civ 33 and *Vidal-Hall* v. *Google Inc* [2015] EWCA Civ 311. See also, the Court's reasoning in Case C‑316/13, *Fenoll,* EU:C:2015:200, paras. 45-46.
[103] Lazzerini, "(Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: AMS", 51 *CMLaw Rev.* (2014), 907, 929.
[104] Case C-176/12, *AMS*, para. 47.
[105] Peers, "When does the EU Charter of Rights apply to private parties?" <http://eulawanalysis.blogspot.co.uk/2014/01/when-does-eu-charter-of-rights-apply-to.html> (last visited 26 Oct 2015).
[106] Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights", 8 *ECL Rev.* (2012), 375 - 403, at 400.
[107] See Case C-438/05, *Viking*, para. 44.

alleged unfettered nature of this right, rather than its very capacity of being invoked horizontally.

The application of the Court's reasoning in *AMS* to Article 16 also does not sit well with the extent to which it has already been given effect in disputes between private actors. For instance, in *Scarlet Extended*,[108] the Court considered the compatibility with this provision of the injunction sought by a copyright holder against an internet service provider to install a filtering system in order to monitor and prevent copyright infringements by its customers. The Court found that 'such an injunction would result in a serious infringement' of the freedom to conduct a business.[109] This is because, it would require an internet service provider to install a complicated, costly, and permanent computer system at its own expense; and monitor all present and future infringements with 'no limitation in time'.[110]

In *Alemo-Herron,* in turn, in light of Article 16, the Court examined the effect of collective labour agreements in case of the transfer of an undertaking. It held that in such circumstances passing on the obligations of the transferor arising from an employment contract to the transferee was 'liable to adversely affect the very essence of the [latter's] freedom to conduct a business'.[111] This is because, according to the Court, 'the transferee can neither assert its interests effectively in a contractual process nor negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity'.[112]

In a similar vein, in *Sky Österreich*, Article 16 could, in principle, be invoked, though not successfully, against the obligation imposed on a holder of exclusive broadcasting rights to allow other broadcasters to produce short news reports and not to demand compensation greater than the costs incurred in providing access to a satellite signal.[113] The Court found that this amounted to interference with the freedom to conduct a business under Article 16. As the Court explained, this provision cover[ed] freedom of contract, which 'include[d] the freedom to choose with whom to do business' and 'the freedom to determine the price of a service'.[114] According to the Court, nevertheless, such interference was justified. It held that the freedom to conduct a business was not absolute and could be subject to 'a broad range of interventions'.[115]

In the capacity of a privately enforceable right, Article 16 could be construed to outline the limit where the horizontality of free movement rights naturally ends. However, where and how does one draw a line? This question, in essence, raises the need to delineate the outer boundaries of the forms of individual autonomy they express and, from a conceptual point of view, frame the coexistence of both forms of individual autonomy in the internal market.

4. 'Balancing' Article 16 CFREU and free movement rights

[108] Case C-70/10, *Scarlet Extended*, EU:C:2011:771; See also, Case C-360/10, *Netlog*, EU:C:2012:85.
[109] Ibid, para. 48.
[110] Ibid, para. 47.
[111] Case C-426/11, *Alemo-Herron*, para. 35.
[112] Ibid, para. 34.
[113] Under O.J. 2010, L 95. *Audiovisual Media Services Directive.*
[114] Case C-283/11, *Sky Österreich*, para. 43.
[115] Ibid, para. 46.

Neither free movement rights nor Article 16 are absolute in nature. Hence, an attempt to delineate them necessitates a fair balance being sought between the forms of autonomy they embrace. In particular, the primary aim, here, is to determine the extent to which the effective enjoyment of one form of autonomy demands limiting and 'conditioning' the exercise of another, and vice versa. The point of departure in conducting such a 'balancing' exercise is first to determine the analytical parameters that are most appropriate for resolving a potential conflict. The underlying premise here is that each of the norms in conflict is given due and equal consideration and weight. Hence, depending on the norm at stake, one would likely confine any 'balancing' analysis within the prescribed frame of the possible limitations allowed as regards that norm and the specific conditions attached thereof.

4.1. 'Balancing' under the justification regime of free movement law

One could conduct such a 'balancing' exercise with the justification framework of the free movement provisions. This is what the Court did in *Viking* and *Laval*. It first found that a collective action taken by a trade union constituted a restriction of the freedom of establishment under Article 49 TFEU. The Court then considered the question of justification, by focusing on whether the right to strike was a legitimate interest and whether the protection of workers, inherent in it, was one of the overriding reasons of public interest.[116] This approach has been subject to much criticism by many and rightly so.[117] The main objection lies in the hierarchical relationship it seems to imply to exist between free movement rights and fundamental rights.

On the one hand, this is expressed in the actual characterisation of the exercise of a fundamental right as a restriction of a free movement right, which obviously prompts the need for objective justification.[118] Not only that, those who do so are also required to bear the burden of justifying their actions. Thus, the stress in favour of free movement rights is quite apparent: it is the exercise of a fundamental right that is being construed as interference and must therefore be justified.[119] On the other hand, the subordination of fundamental rights to free movement rights is also evident in the Court's reasoning where the former as such was not even deemed sufficient alone to justify a restriction of the latter.[120] The Court simply subsumed the right to collective action within the traditional mode of analysis followed under the justification framework of the free movement provisions.[121]

This highlights yet another shortfall of this analytical framework. In particular, it is not agreed how fundamental rights considerations should be accommodated within the justification regime under the free movement provisions.[122] While, in

[116] Case C-438/05, *Viking*, para. 77.
[117] See e.g. Davies, "One step forward, two steps back? The Viking and Laval cases in the ECJ", 37 *I.L.J.* (2008), 126-148.
[118] Morijn, "Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution", 26 *E.L.J.* (2006), 15, p. 37.
[119] Spaventa, op. sit. *supra* note 60, p, 359.
[120] AG Trstenjak in Case C-271/08, *Commission* v. *Germany*, para 183.
[121] Ibid, para 181.
[122] See also, De Vries, "The Protection of Fundamental Rights within Europe's Internal Market after Lisbon - An Endeavour for More Harmony" in De Vries, Groussot and Peterson, Balancing

Viking and *Laval*, a fundamental right was considered in light of the category of mandatory requirements, in others, it was referred to under the concept of public policy.[123] Neither system, however, is particularly appropriate for the adequate protection of fundamental rights.[124] Considered under the first alternative, fundamental rights become limited in scope, as according to the traditional orthodoxy this category cannot be relied upon to justify discriminatory measures.[125] The public policy ground, in turn, despite being broad enough, operates in a conceptually different manner. Based on the factor of collectivism rather than the protection of an individual, it is linked to fundamental rights not as a concept promoting them, but more so as their possible limitation.[126]

The limited weight given to fundamental rights, thus, sits at odds with the whole idea of them being, at least, of an equal rank in relation to free movement rights.[127] This is particularly problematic in the context of Article 16, given its intrinsic convergence with free movement rights. It is rather difficult to explain the existence of a hierarchy between them, when they both seem to give effect to the same concept of private (economic) autonomy. To put it a little differently, one could perhaps attempt to rationalise the subordination of fundamental social rights to free movement rights by seeing it as a reflection of the still-remaining precedence of the Union's internal market objective over its social goals.[128] However, the possible extension of this reasoning to Article 16 can hardly be substantiated in a similar light. This is because, the core of the Union's internal market objective, in principle, comprises the values that are protected under Article 16, such as free trade, free competition, freedom to exercise an economic activity and freedom of contract.

4.2. 'Balancing' under Article 52 of the Charter

Article 52 of the Charter (hereafter as 'Article 52') could be considered as an alternative analytical framework to strike a fair balance between free movement rights and Article 16. This provision lays down the conditions for possible limitations of the rights enshrined in the Charter. In particular, according to it, any limitations 'must be provided by the law and respect the essence' of those rights, and must be 'necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.[129] As an analytical framework, Article 52 was for the first time applied by AG Sharpston and the Court in *Volker* to resolve a conflict between the principle of transparency and the right to privacy and data protection under Articles 7 and 8 of the Charter.[130] In both instances, it is evident that Article 52 was triggered by

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[123] See e.g. Case C-36/02, *Omega*.

[124] Schepel, "Freedom of Contract in Free Movement Law: Balancing Rights and Principles in European Public and Private Law", 21 *E.R.P.L.* (2013), 1211–1229 at 1221.

[125] See e.g. Case 113/80, *Commission* v. *Ireland*, EU:C:1981:139.

[126] Morijn, op. sit. *supra* note 118, p. 39.

[127] Opinion of AG Trstenjak in Case C-271/08, *Commission* v. *Germany*, para. 183.

[128] De la Rochere, "Challenges for the Protection of Fundamental Rights in the EU at the Time of the Entry into Force of the Lisbon Treaty", 33 *Fordham Int'l L.J.* (2009-2010), p. 1787.

[129] Peers and Prechal, "Article 52 - Scope of Guaranteed Right" in Peers, Harvey, Kenner and Ward, op. sit. *supra* note 55, p. 1469.

[130] Joined Cases C-92/09 and C-93/09, *Volker*, EU:C:2010:662.

what was at stake. While AG Sharpston took the alleged violation of the right to privacy and data protection as a starting point,[131] the Court turned to Article 52 having established actual interference with that right. The analytical parameters followed by the Court included, first, whether the publication of the data at issue was 'provided for by law'; second, whether it met 'an objective of general interest recognised by the Union'; and finally, whether it was 'proportionate to the aim pursued'.[132]

Given that the freedom under Article 16 is not absolute, any limitation imposed on its exercise certainly has to comply with the conditions stipulated under Article 52. However, a potential resort to them to balance free movement rights and Article 16 is not without uncertainty. For one, there is a lack of consistency in the way Article 52 has been applied by the Court. In some rulings, the Court examined the conditions under it.[133] Other rulings, however, either make no mention of them,[134] or only a very brief one.[135] Add to that, the actual extent to which the conditions under Article 52 have to be complied with as regards the limitations of the freedom to conduct a business is questionable. In *Sky Österreich*, for instance, the Court held that:

> '[This freedom] may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest. That circumstance is reflected, inter alia, in the way in which Article 52 (1) of the Charter requires the principle of proportionality to be implemented'.[136]

On the one hand, this finding has yet to be reiterated by the Court in other instances involving Article 16. For instance, it is in strike contrast with the approach taken by the Court in *Alemo-Herron*, where the Court upheld the freedom to conduct a business without even considering any other relevant rights under the Charter.[137] On the other hand, it is also not clear how broadly the term 'public interest' referred to by the Court should be understood.

4.3. '*Balancing' under the double-proportionality principle*

More refined analytical parameters for 'balancing' free movement rights with Article 16 seem to lie in the so-called 'double proportionality' principle applied by AG Trstenjak in *Commission v Germany*. According to the Advocate General, in order to balance free movement rights and fundamental rights, the realisation of both must be presumed to constitute a legitimate objective. Thus, a fair balance between them is ensured:

> 'when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. *Conversely,* however, nor may the restriction

[131] Opinion of AG Sharpston, EU:C:2010:353, para. 87.
[132] Joined Cases C-92/09 and C-93/09, *Volker*, paras 66-74.
[133] See e.g. Case C-291/12, *Schwarz*, EU:C:2013:670.
[134] See e.g. Case C-70/10, *Scarlet Extended*.
[135] See e.g. C-12/11, *McDonagh*, EU:C:2013:43.
[136] Case C‑283/11, *Sky Österreich*, paras 46-47.
[137] For criticism of this ruling, see e.g. Weatherill, "Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of 'Freedom of Contract", 10 *E.R.C.L.* (2014), 167–182.

on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom'.[138]

This method to balance two norms in conflict, in substance, mirrors the sequence of the Court's reasoning in *Schmidberger*. In this case, the Court was asked to rule on whether a restriction on the free movement goods in the form of 30-hour blockage of a motorway was justified in light of the fundamental right to freedom of expression. In aligning this right with Article 34 TFEU, the Court did not confine its analysis to the question of whether the restriction of intra-Union trade, which resulted from the exercise of a fundamental right, was proportionate to the protection of that right.[139] The Court also looked at whether 'an outright ban on the demonstration would have constituted unacceptable interference with that right'.[140] According to the Court, the imposition of stricter conditions as regards the location and duration of the demonstration would be an excessive restriction, depriving the action of a substantial part of its scope.[141] As the Court concluded, 'an action of that type usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be *tolerated* provided that the objective pursued is essentially the public and lawful demonstration of an opinion'.[142]

The 'double proportionality' principle, as an analytical framework is permeated by the idea of equal ranking between free movement rights and fundamental rights. This is expressed in the underlying premise of this approach, which is based on the absence of a hierarchy between conflicting norms. Moreover, unlike the first two alternatives,[143] the assessment under the 'double proportionality' principle, by its very nature, is not somewhat one-sided.[144] That is to say, the application of the proportionality test concurrently as regards both norms ensures that each is given due consideration and equal weight. This rather evident, for instance, in *Viking*, were the Court's reasoning, unlike *Schmidberger*,[145] does not reflect upon the very substance of the exercise of the right to strike and appears to undermine the significance of its recognition as a fundamental right.[146] First, as mentioned earlier, the exercise of the right to strike was not deemed sufficient on its own to justify limitations of freedom of establishment. Second, the Court did not even engage in the assessment of the importance of that right in the collective bargaining process, instead focusing on its restrictive effect and insisting on means 'less restrictive of freedom of establishment'.[147] And finally, more importantly, there was no consideration of the circumstances where the exercise of the fundamental right at issue would actually require, in the sense of *Schmidberger*, tolerance of limitations imposed on the exercise of the free movement right at issue.

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[138] Opinion of AG Trstenjak in Case C-271/08, *Commission* v. *Germany*, para. 188.
[139] Case C-112/00, *Schmidberger*, para 89.
[140] Ibid, para 89.
[141] Ibid, para 90.
[142] Ibid, para 91 (italics added).
[143] Though it is in accord with the conditions under Article 52 of the Charter. See, Opinion of AG Trstenjak in Case C-271/08, *Commission* v. *Germany*, footnote 101.
[144] Collins, op. sit. *supra* note 93, p. 50.
[145] This is the case regardless of the contextual difference between the two cases.
[146] Davies, op. sit. *supra* note 117, p.
[147] *Viking*, paras 86-87.

More substantially, the 'double proportionality' principle bears close resemblance to the so-called concept of proportionality *sensu stricto*,[148] which is identified as the third limb of the general proportionality principle.[149] It presupposes the presence of a relationship of proportionality between the measure taken and the objective intended to achieve.[150] This is the very context where the true 'balancing' of norms or principles takes place. It involves establishing the necessary equation between 'the degree of non-satisfaction of, or detriment to, one' and the degree of 'importance of satisfying the other'.[151] Thus, to strike a fair balance between two conflicting norms, it is necessary to establish first, 'the intensity of interference' with the first norm; second, the 'degree of importance' of the second; and finally, whether the importance of the second norm justifies the interference with the first one.[152]

5. Article 16 and the limited horizontality of free movement rights

Against the parameters under the double-proportionality principle, an attempt to balance the forms of autonomy under free movement rights and Article 16 leads to the establishment of the extent to which the effective realisation of one necessitates a limitation imposed on another, and vice versa. In particular, the question that needs to be addressed is twofold. First, to what extent should Article 16 be limited in order to ensure the effective exercise of free movement rights? Second, where should the line be drawn on the horizontality of free movement rights with a view to guarantee the ability to effectively exercise the freedom under Article 16? Both of these questions are inherently related to each other. Answering one triggers the resolution of the other. Accordingly, a preliminary observation here suggests that the outer reach of individual autonomy under free movement rights should be stretched only to the point whether its effective enjoyment is at risk of being impaired. Extending it beyond that point, however, would result in unwarranted encroachment upon private autonomy and a clash with Article 16. On that account, it is necessary to outline the contours of the horizontal application of the free movement provisions, bearing in mind not only the importance of these provisions having direct horizontal effect, but also the degree of potential interference with the freedom under Article 16. The line of inquiry in this regard, therefore, concerns the ultimate reason for granting direct horizontal effect to the free movement provisions and the extent to which it should be limited.

If all free movement provisions were attributed with full horizontal direct effect, it would mean that all private actors, similar to a State, would be bound by them. In

[148] De Vries, "Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice", 9 *Utrecht Law Review* (2013), 169 - 192 at 191.
[149] AG Maduro in Case C-434/04, *Leppik*, EU:C:2006:609, para. 26. The first two are 'suitability' and 'necessity'. More on these, see e.g., Opinion of Advocate General Van Gerven in Case C-169/89, *Gourmetterie*, EU:C:1990:227; Groussot and Peterson, "Balancing as a Judicial Methodology of EU Constitutional Adjudication" in de Vries, Groussot and Peterson, op. sit. *supra* note 122; Jan, "Proportionality Revisited", 27 *Legal Issues of Economic Integration* (2000), 239–265.
[150] Kühlung, "Fundamental Rights" in Armin von Bondandy and Jürgen Bast, *Principles of European Constitutional Law* (Hart, 2010), p. 506.
[151] Alexy, *A Theory of Constitutional Rights,* trs. Julian Rivers (OUP, 2004), p. 401.
[152] ibid.

particular, it would negate the very freedom protected under Article 16, as it would imply that every private actor would have to engage, for instance, in some kind of equal treatment of products regardless of their origin or other market participants regardless of their place of establishment.[153] In addition, it would also put them under a burden to justify rational decisions they make or choices they have within a specific market setting.[154] Thus, 'the degree of detriment to' or 'the intensity of interference with' the freedom under Article 16 would be very 'high'.[155] As for free movement rights, the importance of protecting them in this context appears to be 'minor', if non-existent. This is because individual market preferences are not as such capable of restricting free movement. They simply are not sufficient to create a barrier to access the market in a Member State, as generally there is no obligation to accept or comply with them. Sellers of goods or providers of services from other Member States can simply opt for other available possibilities in the market.[156] As a result, in case of the free movement provisions being attributed with full direct horizontal effect, the 'high' 'intensity of interference' with the autonomy under Article 16 would not be met by the 'high' 'degree of importance' of protecting the autonomy under the free movement provisions.

According to the Court's jurisprudence, the extent of direct horizontal effect so far attributed to free movement rights is predominantly confined to those private actors that possess some form of 'dominance' over others.[157] That is to say, they exert power or have capacity for it, the outcome of which other private actors themselves are not able to avoid or do so effectively.[158] This is quite evident in case of a private body having certain regulatory functions, such as sports or professional associations, private standardisation bodies or even trade unions.[159] In this context, similar to the scenario presented above, it is also necessary to measure the degree of potential interference with Article 16. In other words, the main query here concerns the extent of repercussion that would be inflicted on the effective exercise of the freedom under it because of the expansion of the scope of free movement rights. Without going into the analysis of the nature of various economic activities, it appears that the potential interference with the freedom under Article 16 in this context seems 'minor'.[160] This is because not all private actors, but only a specific category is deemed to be bound by free movement rights. This category comprises certain private actors not because of their nature, but more due to the actual or potential effect of their actions or measures.[161] In particular, an important factor here is that, similar to public bodies, they are capable of imposing conditions on others, where there is no recourse but to accept them. This alone can prevent or make the exercise of free movement rights more

[153] Babayev, "Contractual Discretion and the Limits of Free Movement Law", 23 *E.R.P.L.* (2015), 875–898 at 884.
[154] Wyatt, op.sit. *supra* note 78, 1-48 at 24.
[155] This and other expressions in quotation marks are taken from Alexy, "Constitutional Rights, Balancing, and Rationality" 16 *Ratio Juris* (2003), 131–140 at 136.
[156] Such a scenario would most likely concern the Treaty provisions on competition rather than free movement. See eg, Krenn, "A Missing Piece in the Horizontal Effect 'Jigsaw': Horizontal Direct Effect and the Free Movement of Goods", 49 *CMLaw Rev.* (2012) 177-215.
[157] See also De Vries and Van Mastrigt, op. sit. *supra* note 82, p. 264.
[158] Opinion of AG Maduro in *Viking*, para. 48. See also Case C-411/98, *Ferlini*, EU:C:2000:530, para. 50.
[159] See e.g. the case-law, op. sit. *supra* note 2.
[160] Alexy, op sit *supra* note 151, p. 402.
[161] See the reasoning of the Court in Case 36-74, *Walrave.*

difficult or even impossible.[162] This effectively highlights the 'high' 'degree of importance' of the protection of free movement rights, which is expressed in the possible consequences of not extending their scope in such a manner. In this context, it follows that the 'weight'[163] of the effective exercise of free movement rights justifies the 'minor' interference in the ability to exercise the freedom under Article 16.

6. Conclusion

This contribution is aimed to outline the contours of the concept of private (economic) autonomy at Union level by exploring the conceptual and functional aspects to the interplay between Article 16 and free movement rights. It is first argued that they both can be aligned under the broad umbrella of that concept, considering the factors they are premised upon. However, unlike Article 16, free movement rights appear to manifest only a specific form of private (economic) autonomy. In particular, viewing them against the freedom to conduct a business under Article 16 leads to much narrower construction of the nature and extent of individual autonomy expressed through free movement rights. Although their actual scope is not clearly defined in the Court's jurisprudence, these rights are not aimed to guarantee the ability to exercise an economic activity in a general sense, but to ensure access to the market in a Member State that could take divergent forms. The coexistence of these conceptually different forms of individual autonomy manifested in Article 16 and free movement rights can lead to a potential clash, which in turn requires to delineate their outer boundaries vis-à-vis each other. Through balancing exercise based on the 'double proportionality' principles, it is submitted that the applicability of free movement rights to private conduct finds its natural limits in the ability to exercise the right under Article 16. In particular, the effective enjoyment of the autonomy under these rights may prompt the need to limit the autonomy of other private actors. However, the importance of the effective realisation of the freedom under now legally binding Article 16 is argued to constrict this to those private actors that, much alike a State, are in possession of some form of 'dominance' over others and impose obligations on others affecting the ability to exercise free movement rights.

[162] See e.g. Case C-171/11, *Fra.bo.*
[163] Alexy, op. sit. *supra* note 151, p. 402.