

The Interaction Between Free Movement Law and Fundamental Rights in the (Digital) Internal Market



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Abstract Considering that after about 30 years of the Internet’s existence and continuing appraisals thereof and other technological advances such as new business models, artificial intelligence, etc., the chapter takes as its point of departure that it has little by little having become time to embrace the darker realities of digitalisation. Therefore, in particular, it analyses the interaction between free movement law and fundamental rights by taking Case C-78/18 about the Hungarian NGO Transparency Law as a stepping-stone to assess how the law stands today, both in general terms and with regard to the (digital) internal market in particular, thereby enabling insights into how an old regime embraces new realities. The case is of interest because the Court of Justice of the European Union had to clarify if the Charter should apply to national laws that are not directly implementing EU Law, but are restricting the EU’s fundamental freedoms, and because it constitutes a very important step in upholding the rule of law and democracy in the EU’s Member States.

1 Introduction

Reflecting on how to handle the technology of the future, one of the greatest science fiction authors, Isaac Asimov (1920–1992), formulated more than 80 years ago (in 1942) the following “Three Laws of Robotics” (as quoted as being from the “Handbook of Robotics, 56th Edition, 2058 A.D.”):

1. A robot may not injure a human being or, through inaction, allow a human being to come to harm.
2. A robot must obey the orders given it by human beings except where such orders would conflict with the First Law.

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3. A robot must protect its own existence as long as such protection does not conflict with the First or Second Laws.¹

The “Laws” have ever since then been influential in many different ways, including e.g. in debates as to the ethics of artificial intelligence. Thus, the underlying theme of the present chapter, namely how to strike the right balance between the advantages of digitalisation and the disturbances it may lead to—especially regarding the preservation of the rule of law including fundamental rights—thereby has roots far back in time. Unsurprisingly, no clear solutions have yet truly been found, and the attempts to regulate the area in question has continuously grown with respect to the level of complexity and challenge.

One example of a regulation having a high degree of complexity in this regard in an attempt to face huge challenges in relation to digitalisation is the recently adopted Digital Services Act (DSA). It is based on Article 114 TFEU, which is the legal basis for internal market legislation.² In line therewith, the dominant rationale behind it is from the very outset referred to as the functioning of the internal market:

Member States are increasingly introducing, or are considering introducing, national laws on the matters covered by this Regulation, imposing, in particular, diligence requirements for providers of intermediary services as regards the way they should tackle illegal content, online disinformation or other societal risks. Those diverging national laws negatively affect the internal market, which, pursuant to Article 26 of the Treaty on the Functioning of the European Union (TFEU), comprises an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured, taking into account the inherently cross-border nature of the internet, which is generally used to provide those services. The conditions for the provision of intermediary services across the internal market should be harmonised, so as to provide businesses with access to new markets and opportunities to exploit the benefits of the internal market, while allowing consumers and other recipients of the services to have increased choice. Business users, consumers and

¹Quoted from Asimov (2013). The “Laws” were originally introduced in 1942, but must be seen as having had a “dynamic” role in the authorship as they have been altered over the years by him, who also at some point added a “Fourth Law”.

²See further e.g. van Drunen et al. (2022), pp. 192–193, who explain that: “Article 114 TFEU entitles the European Commission to take measures that are necessary to ensure the establishment and functioning of the internal market. The realization of the European Digital Single Market continues to be a primary objective for the European Commission, . . . on its ‘path to a Digital Decade’ that must ‘ensure that the European Union achieves its objectives and targets towards a digital transformation of our society and economy in line with the EU’s values’ . . . Article 114 TFEU is an important, albeit limited competence. Article 114 TFEU marks a careful balance between the regulatory competences of the European Commission vis-à-vis national competences, and as such touches upon more fundamental questions about the conferral of powers, the interests of the Union vis-a-vis those of individual Member States, but also national sovereignty and democratic legitimacy within the EU. . . The Court of Justice has made it clear that the internal market competence cannot be read as ‘a general power to regulate the internal market’ as this would be contrary to the principle of subsidiarity. . . Instead, the internal market competence must be focused on the ‘abolition of all obstacles to the free movement of goods, persons, services, and capital’.”

other users are considered to be ‘recipients of the service’ for the purpose of this Regulation.³

At the same time, the Charter of Fundamental Rights of the European Union (hereafter the Charter) plays a primary role.⁴

Responsible and diligent behaviour by providers of intermediary services is essential for a safe, predictable and trustworthy online environment and for allowing Union citizens and other persons to exercise their fundamental rights guaranteed in the Charter of Fundamental Rights of the European Union (the ‘Charter’), in particular the freedom of expression and of information, the freedom to conduct a business, the right to non-discrimination and the attainment of a high level of consumer protection.⁵

These recitals lead directly to the expression of the aim of the DSA itself to be, as stipulated in Article 1(1), the following:

The aim of this Regulation is to contribute to the proper functioning of the internal market for intermediary services by setting out harmonised rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected.

Thus, it is quite clear that the (digital) internal market and the Charter are intrinsically interlinked in this new and significant regulation.⁶

Another example of a relevant regulation having a high degree of complexity, yet attempting to face some of the newest challenges of digitalisation, would be the similarly recent and significant Digital Markets Act (DMA), which also has Article 114 TFEU as its legal basis. The very first recital in it thereby rather unsurprisingly refers to the internal market:

Digital services in general and online platforms in particular play an increasingly important role in the economy, in particular in the internal market, by enabling businesses to reach users throughout the Union, by facilitating cross-border trade and by opening entirely new business opportunities to a large number of companies in the Union to the benefit of consumers in the Union.⁷

Its overall aim—as stipulated in Article 1(1)—accordingly is to contribute to the proper functioning of the internal market:

The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses, contestable and fair

³Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, Recital 2 of the Preamble.

⁴Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.

⁵Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, Recital 3 of the Preamble.

⁶There are 21 references to the internal market and 37 references to the Charter in the DSA.

⁷Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, Recital 1.

markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users.

At the same time, it is stated in Recital 109 that the regulation respects the fundamental rights and observes the principles recognised by the Charter, in particular Articles 16, 47 and 50 thereof. Accordingly, it is stipulated that the interpretation and application of the Regulation should respect those rights and principles.⁸

Contributing to the functioning of the internal market also in this area—as it is so clearly seen in the two regulations in question—being at the centre of attention is by no means surprising. However, at the same time, after about 30 years of the Internet’s existence and continuing appraisals thereof and other technological advances such as new business models, artificial intelligence, etc., the regulations are also expressions of it little by little having become time to embrace the darker realities of digitalisation.⁹ As to the foundational aims of strengthening the internal market, big advantages thereof have been seen and supported, but along therewith also an increasing awareness of the challenges have arisen, in particular regarding the protection of fundamental rights. However, finding an appropriate balance between the aims of advancing the internal market and protecting the fundamental rights has often proved not always to be an easy task.

Furthermore, the two regulations are next to other, recent legislative initiatives within the context of the Digital Single Market, including the AI Act, the Media Freedom Act or the Political Advertising Act, illustrative of the change that the EU’s internal market law has undergone over the last decades.¹⁰ Rather than constituting an obstacle, internal market law offers opportunities, perhaps even as a “normative corridor” for the accommodation of objectives such as sustainability, digitalisation, fundamental rights protection or social protection. This development also shows—as put forward by van Drunen and others—how difficult the concept of the internal market as a strictly economic/market law project is to maintain in the digital environment.¹¹ Furthermore, it shows—as also stated by van Drunen and others—that in the digital environment and data-driven services in particular, the economic aspects of the internal market are often two sides of the same coin, and the actors, means and mechanism for political and commercial advertising are increasingly difficult to separate, and often identical.¹² Particularly with respect to the Media

⁸There are 29 references to the internal market, but only 1 to the Charter in the DMA.

⁹See e.g. Neergaard (2020), pp. 83–105.

¹⁰See further e.g.: Proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), COM(2021) 206 final; amendments adopted by the European Parliament on 14 June 2023 at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.html; Veale and Zuiderveen Borgesius (2021). Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act), COM(2022) 457 final; and Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, COM(202) 731 final.

¹¹van Drunen et al. (2022), p. 194.

¹²van Drunen et al. (2022), p. 194.

Freedom Act, media plurality and the internal market, the EU Commissioner for the Internal Market, Thierry Breton, very much to the point has stated that “[t]he EU is the world’s largest democratic single market. Media companies play a vital role but are confronted with falling revenues, threats to media freedom and pluralism, the emergence of very large online platforms and a patchwork of different rules.”¹³

Having these reflections serve as a stepping-stone, the focal point of the chapter is more precisely to explore this interplay between the internal market freedoms and fundamental rights further. However, the exploration is, in principle, limited to primary law, and in that respect even further limited to an analysis of the rather intriguing judgment regarding the Hungarian NGO Transparency Law, which relates to delicate issues of the rule of law.¹⁴ Outlining, exploring and analysing the approach taken by the Court of Justice of the European Union (hereafter the CJEU) in the cross-cutting field of free movement and fundamental rights may enable insights into how an old regime embraces new realities. Thereby, valuable insights as to the impact of fundamental rights on free movement may be gained, which again may have a significance in the area of the more specific digital internal market. In other words, it is of value to understand the general principles of EU Law before moving forward to the more specific layers of law.

In line with that, more specifically, the chapter will first introduce the core issues of the judgment (Sect. 2). Then the focus will turn to a discussion of the judgment and its larger implications (Sect. 3). Finally, the Chapter will provide some general conclusions (Sect. 4).

2 Core Issues of the Judgment

To a large degree, the interaction between free movement and fundamental rights in EU Law is unclear and most of all quite complex as well as unsettled.¹⁵ Overall, rules on free movement and fundamental rights may mutually affect each other, i.e. where fundamental rights, like the freedom to conduct a business, strengthen economic freedoms, or may be in conflict with each other.¹⁶

Historically, fundamental rights are commonly viewed as originally having been introduced in EU Law and developed by the CJEU, mainly in the context of free movement as general principles of EU Law. Nevertheless, free movement may simultaneously be viewed as a general principle and a fundamental right or freedom in its own right. The CJEU has frequently referred to free movement rules as having

¹³European Commission: “European Media Freedom Act: Commission proposes rules to protect media pluralism and independence in the EU”, 16 September 2022. Available via ec.europa.eu/commission/presscorner/detail/en/ip_22_5504.

¹⁴Case C-78/18, *Commission v Hungary*, ECLI:EU:C:2020:476.

¹⁵For a general overview, see e.g. Nic Shuibhne (2017), pp. 215–238.

¹⁶de Vries (2015a), pp. 235–260.

a “fundamental character.”¹⁷ As one reflection thereof, in the Charter there is a reference to free movement in the preamble, as it is here stated that the Union “. . . ensures free movement of persons, services, goods and capital, and the freedom of establishment.” In addition, free movement is mentioned explicitly in Article 45 of the Charter. Although free movement arose in a market law context, today the fundamental right context has gained more and more ground. Under all circumstances, these two sets of legal regimes are today quite intertwined, which is also clearly demonstrated in the Hungarian NGO Transparency Law Case, which will now be further introduced and analysed.

The case results from infringement proceedings launched by the Commission under Article 258 TFEU in December 2017. It is noteworthy—and probably also rather unusual—that the Commission was supported by Sweden. Also worth mentioning is that it is a Grand Chamber decision. It is one of altogether six so-called values-related infringement proceedings against Hungary at the time.¹⁸ Besides addressing the crucial question of how the CJEU should handle infringements of the freedoms of the internal market, which at the same time also impinge on the fundamental rights enshrined in the Charter, it is also of significance for other reasons. One of these is that the CJEU had to clarify if the Charter should apply to national laws that are not directly implementing EU Law but are restricting the EU’s fundamental freedoms. Another is that it constitutes a very important step in upholding the rule of law and democracy in the EU’s Member States.

More specifically, as a result of political changes in Hungary since 2010, media and civil society pluralism have increasingly been under threat in Hungary.¹⁹ One of the elements in that development has been Hungary’s enactment in 2017 of the so-called NGO Transparency Law. This law imposed obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold, and which provided for the possibility of applying penalties to organisations that did not comply with those obligations.²⁰ Although the Hungarian law at the surface claimed simply at ensuring transparency of civil organizations (NGOs) in Hungary that receive foreign funding, the reality was that its requirements were very strict and problematic in a wider context. It immediately gave rise to national protests, and eventually the Commission also reacted, initiating action under Article 258 TFEU for Hungary’s failure to fulfil its obligations. It was more precisely claiming that Hungary had in actual fact introduced discriminatory, unjustified and unnecessary

¹⁷ See e.g. Case C-265/95, *Spanish Strawberries*, ECLI:EU:C:1997:595; and de Vries (2015b), p. 83.

¹⁸ See e.g. Council of the European Union (2018) Annex a Commission non-paper providing factual information on the values-related infringement proceedings in relation to Hungary. Available via asktheeu.org/en/request/61115/response/19716/attach/html/6/st14022.en18.pdf.html. For a broader perspective, see e.g. Bayer (2020).

¹⁹ Kirst (2020).

²⁰ Case C-78/18, *European Commission, supported by the Kingdom of Sweden, v Hungary*, ECLI:EU:C:2020:476. Para. 1.

restrictions on foreign donations to civil society organisations, in breach of its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter.²¹ As to the substance of the judgment, at stake are thus two main sets of rules, namely one free movement rule and some Charter provisions. These two central trajectories of the judgment are now under scrutiny in the following.

2.1 *Free Movement of Capital*

The first trajectory of the judgment in many respects constitutes a classic application of the free movement of capital rules. In general, the free movement rules can be seen as stipulated to exercise control over measures adopted at the national level that are apt to jeopardize the aim of establishing the internal market.²² Common to the CJEU's scheme of thinking applied in the majority of the free movement judgments is—simply expressed and on the condition that the provisions are considered applicable in the case at hand—a two-pronged test. The first prong of the test contains an assessment as to whether a given national measure involves discrimination on the grounds of nationality and/or constitutes a hindrance (restriction of) for the free movement. The other prong of the test includes an assessment of whether a given national measure can be upheld by reference to overriding interests of public interest, which would then cause the measure in question, despite otherwise being in conflict with one or more of the free movement rules, to be considered as justified. Here, the concept of overriding interests is applied as a collective term including both the exceptions foreseen by the Treaty, often referred to as the express exceptions, and the judge-made justifications, as well as the fundamental rights. These interests may—when various conditions, including in particular, the principle of proportionality are fulfilled—serve as implying that an otherwise unlawful measure, after all, can stand as lawful. Thereby, in reality, the rules concern the distribution of competences deciding on when the internal market or the autonomy of the Member States prevail.

Thus, in its judgment, after having stated that there are capital movements with a cross-border dimension under Article 63(1) TFEU,²³ the CJEU examines whether certain provisions of the NGO Transparency Law constitute a restriction on the free movement of capital as prohibited by Article 63 TFEU (i.e. first prong of the test). In that regard, it concludes that the obligations of registration, declaration and publication imposed on the “organisations in receipt of support from abroad” under Paragraphs 1 and 2 of the NGO Transparency Law and the penalties provided for in Paragraph 3 of that law constitute such a restriction.²⁴ In reaching that conclusion,

²¹Case C-78/18, Para. 1.

²²The explanation in this paragraph originates largely from Neergaard (2020), pp. 83–105.

²³Case C-78/18, Para. 51.

²⁴Case C-78/18, Para. 65.

the CJEU emphasizes that the provisions at issue, seen as a whole, treat not only the associations and foundations established in Hungary, which receive financial aid that is sent from other Member States or from third countries differently from those which receive financial support from a Hungarian source, but also treat the persons, who provide those associations and foundations with financial support sent from another Member State or third country differently from those, who do so from a place of residence or registered office located in Hungary.²⁵ In that connection, the CJEU states that the national provisions at issue constitute indirectly discriminatory measures, inasmuch as they establish differences in treatment, which do not correspond to objective differences in situations.²⁶

As to whether the restriction is justified (i.e. the second prong of the test), the CJEU first refers to itself having consistently held that a State measure, which restricts the free movement of capital, is permissible only if, in the first place, it is justified by one of the reasons referred to in Article 65 TFEU or by an overriding reason in the public interest and, in the second place, it observes the principle of proportionality, a condition that requires the measure to be appropriate for ensuring, in a consistent and systematic manner, the attainment of the objective pursued and not to go beyond what is necessary in order for it to be attained.²⁷ After a careful scrutiny of the arguments of Hungary, the CJEU concludes that the NGO Transparency Law can be justified neither by an overriding reason in the public interest linked to increasing the transparency of the financing of associations nor by the grounds of public policy and public security mentioned in Article 65(1)(b) TFEU.²⁸ Therefore, it finds that Hungary has failed to fulfil its obligations under Article 63 TFEU.²⁹

2.2 Articles 7, 8 and 12 of the Charter

Of significance to the issues at stake here—because Hungary had argued that the NGO Transparency Act was justified according to EU Law (namely both by an overriding reason in the public interest and by reasons mentioned in Article 65 TFEU)—the CJEU with reference to its own case-law, held that the Member State therefore must be regarded as implementing EU Law within the meaning of Article 51(1) of the Charter.³⁰ As a consequence, it thus must comply with the

²⁵Case C-78/18, Para. 61.

²⁶Case C-78/18, Para. 64.

²⁷Case C-78/18, Para. 76.

²⁸Case C-78/18, Para. 96.

²⁹Case C-78/18, Para. 97.

³⁰In Case C-78/18, Para. 101, the CJEU more precisely referred to Case C-201/15, *AGET Iraklis*, ECLI:EU:C:2016:972, Paras. 63 and 64; and Case C-235/17, *Commission v Hungary*, ECLI:EU:C:2019:432, Paras. 64 and 65.

fundamental rights enshrined in the Charter.³¹ The “test” hereafter is two-pronged, the first prong entailing an examination as to whether the provisions in question impose any limitations on the rights and freedoms laid down by the Charter, and second, if they do, whether those limitations are justified in the light of the requirements set out in Article 52(1) of the Charter.³²

As to the first prong regarding the existence of limitations on the rights enshrined in the Charter, the CJEU in its analysis more precisely considers: (a) the right to freedom of association as enshrined in Article 12(1) of the Charter, which sets out that everyone has the right to freedom of association at all levels, in particular in political, trade union and civic matters;³³ and (b) the right to respect for private and family life in conjunction with the right to protection of personal data as enshrined in Articles 7 and 8 of the Charter.³⁴ It finds that the provisions of the NGO Transparency Law at stake limit these rights.

As to the second prong regarding the existence of justifications, the CJEU first explained that it is apparent from Article 52(1) of the Charter, *inter alia*, that any limitation on the exercise of the rights and freedoms recognised by the Charter must genuinely meet objectives of general interest recognised by the Union.³⁵ As it had already held—in connection with the free movement of capital trajectory³⁶—that the NGO Transparency Law could neither be justified by an overriding reason in the public interest linked to increasing the transparency of the financing of associations, nor by the grounds of public policy and public security mentioned in Article 65(1) (b) TFEU³⁷—it followed that the limitations on the rights enshrined in Articles 12, 7 and 8(1) of the Charter could not be justified either.³⁸ Accordingly, Hungary was held to having failed to fulfil its obligations under Articles 7, 8 and 12 of the Charter.³⁹

In sum, Hungary was with respect to both trajectories held to having breached EU Law. This has led to several positive comments, among which could be referred to Commissioner Didier Reynders, who has stated:

A strong, vibrant and independent civil society is key to upholding the common European values of the rule of law, fundamental rights and democracy. Civil society organisations in EU must be free to enjoy their right to freedom of association, which includes the freedom to seek, secure and utilise resources. This has been confirmed by today’s judgement. I am

³¹ Case C-78/18, Paras. 101–102.

³² Case C-78/18, Para. 103.

³³ Case C-78/18, Para. 110.

³⁴ Case C-78/18, Para. 120.

³⁵ Case C-78/18, Para. 139.

³⁶ Case C-78/18, Para. 96.

³⁷ Case C-78/18, Para. 140.

³⁸ Case C-78/18, Para. 141.

³⁹ Case C-78/18, Para. 142.

pleased to see that the Court fully upheld the Commission's arguments in its ruling, protecting the freedom of association of civil society organisations in the EU.⁴⁰

3 Discussion: Choice of Legal Avenue

The judgment adds important bricks to the puzzle of the interaction between free movement law and fundamental rights, and in that respect also constitutes a reflection of inherent, yet rather important legal choices directing this interaction. These legal choices are firstly concerned with the CJEU's reinforcement of free movement law as an important "hook" to bring the Charter on board. Thereby, free movement law does not function as a constraining factor for the protection of fundamental rights, but is rather used as a foundation for strengthening fundamental rights. Secondly, the legal choices are concerned with the question as to how the CJEU in cases, where free movement law and fundamental rights are applied simultaneously more precisely should be balanced against one another.⁴¹ These various issues will be further discussed in what follows.

3.1 *Free Movement Law as the Avenue to Protect Fundamental Rights*

Crucially, the judgment confirms—despite it otherwise being well-known that the Charter according to its Article 51 is only applicable, when Member States are implementing EU Law—that the free movement rules may nevertheless have that effect.⁴² In the present case, Hungary did not in an "ordinary" understanding

⁴⁰European Commission, "Statement by Commissioner For Justice, Didier Reynders, on the Judgment of the Court of Justice of the European Union in Case C 78/18 Commission v Hungary", 18 June 2022, <ec.europa.eu/commission/presscorner/detail/en/statement_20_2765>. Others have received it more critically, see e.g. Bárd et al. (2020).

⁴¹See e.g. Kirst (2020). Also see e.g. Case C-390/12, *Pfleger*, ECLI:EU:C:2014:281, Para. 57. In this case, which concerned an Austrian authorization scheme for games of chance, the CJEU did not really clarify its position in this respect, but merely observed that a restrictive national measure within the meaning of Article 56 TFEU (free movement of services) may also restrict the freedom to choose an occupation, the freedom to conduct a business and the right to property simultaneously. It may also be of interest to compare with how the Supreme Court of the United States interprets the freedoms enshrined in the Bill of Rights.

⁴²See about the interpretation of the provision, in particular Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, Paras. 20–21: "That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 DEB [2010] ECR I-13849, paragraph 32). According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is only binding on

implement any EU measures via the disputed NGO Transparency Law. Thereby, not only free movement of capital rules were viewed as violated, but also the Charter, as Member States might fall within the scope of application of the Charter without implementing EU Law as such. As Kirst has explained, this approach may by now be considered as in line with the earlier case law of the CJEU.⁴³ More precisely, it may be viewed as a—far-reaching and rather progressive—doctrine consisting of the following: if a Member State justifies a restriction of the four freedoms by invoking a general interest/justification recognized by the EU, the restriction can be scrutinised against Charter rights.⁴⁴

In a way, this could be claimed to have some roots in the pre-Charter case law of the CJEU, particularly in *ERT*, where in the process of justifying a Greek television monopoly restricting the free movement of services, the freedom of expression as enshrined in Article 10 of the European Convention of Human Rights had to be taken into account.⁴⁵ In that regard, also the *Pfleger* case is of interest, too, as the CJEU here confirmed this approach with respect to the Charter.⁴⁶

In a similar vein, it may be added that free movement law (together with the General Agreement on Trade in Services (GATS)) played a crucial role in the decision by the CJEU to strike down the Hungarian Higher Education Law, also called the “Lex CEU”, which, according to the CJEU, threatened academic freedom, the freedom to fund educational establishments, and the freedom to conduct a business, as enshrined in Articles 13, 14(3) and 16 of the Charter.⁴⁷ This judgment, which was delivered a few months after the judgment concerning the Hungarian NGO Transparency Law, shows how the freedom of establishment, the Services Directive and the GATS triggered the application of the Charter.⁴⁸

the Member States when they act in the scope of Union law’. Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.”

⁴³ Kirst (2020).

⁴⁴ Kirst (2020).

⁴⁵ Case C-260/89, *Elliniki Radiophonia Tileorassi AE (ERT)*, ECLI:EU:C:1991:254.

⁴⁶ Case C-390/12, *Pfleger*, ECLI:EU:C:2014:281.

⁴⁷ Case C-66/18, *Commission v Hungary*, ECLI:EU:C:2020:792.

⁴⁸ It was more precisely decided that (Paras. 212–215): “So far as the actions of the Member States are concerned, the scope of the Charter is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only ‘when they are implementing Union law’. In the present case, first, as has been noted in paragraph 71 of the present judgment, the GATS forms part of EU law. It follows that, when the Member States are performing their obligations under that agreement, including the obligation imposed in Article XVII(1) thereof, they must be considered to be implementing EU law, within the meaning of Article 51(1) of the Charter. Second, where a Member State argues that a measure of which it is the author and which restricts a fundamental freedom guaranteed by the FEU Treaty is justified by an overriding reason in the public interest recognised by EU law, such a measure must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter, such that it must comply with the fundamental

This line of case law, including in particular the Hungarian NGO Transparency Law, may thus be seen as developmental elements in sum having the effect of enforcing the broad scope of application of the Charter into the realm of the four freedoms.⁴⁹ Under all circumstances, this development should be contrasted with the CJEU otherwise having been demonstrating hesitance with regard to the applicability of the Charter, possibly most significantly in cases involving fundamental social rights.⁵⁰ Thereby, the special, one could even say progressive, role of free movement rules in enhancing the scope of application of EU Law has once again been confirmed. This has raised the question in legal scholarship and elsewhere as to whether the EU free movement rules, despite being considered as fundamental rights in their own right, have by now become “over-constitutionalised”.⁵¹

In the EU’s digital order, the public and economic spheres, or market and non-market values, are increasingly intertwined. Thus, it is in a digital environment difficult to maintain the concept of free movement law as a strict economic project. In other words, the digital infra-structure further highlights, how closely economic, political and cultural aspects are intertwined.⁵² Using EU free movement law as an empowering tool for the realisation of fundamental rights’ protection within the EU legal order might thus be considered as understandable, when viewed from such a perspective.

3.2 *A New Standard of Review of Charter Infringements as a Better Avenue?*

According to the two-pronged test—referred to above in Sect. 2.1—which is commonly applied by the CJEU in its free movement case law, fundamental rights have mainly had a role to play in serving as justification to an otherwise unlawful

rights enshrined in the Charter (judgment of 18 June 2020 *Commission v Hungary (Transparency of associations)*, C-78/18, EU:C:2020:476, paragraph 101 and the case-law cited). The same applies with respect to Article 16 of Directive 2006/123. Consequently, the measures at issue must comply with the fundamental rights enshrined in the Charter.”

⁴⁹Kirst (2020).

⁵⁰Case C-333/13, *Dano*, ECLI:EU:C:2014:2358. During the economic and financial crisis, for instance, the CJEU found different referrals by national courts, in particular Portuguese courts, in which questions were asked about the application of Charter provisions, inadmissible on the grounds that the reforms to national labour standards were not a matter for EU law: Case C-64/16 *Associação Sindical dos Juízes Portugueses*; Case C-128/12 *Sindicato dos Bancários do Norte*; see e.g. Case C-264/12, *Fidelidade Mundial*, ECLI:EU:C:2014:2036. See also e.g. Barnard (2015), pp. 174–175.

⁵¹See e.g. Garben (2020), pp. 335–370. Also see Opinion of Advocate General Henrik Saugmandsgaard Øe in Case C-235/17, *Commission v. Hungary*, delivered on 29 November 2018, ECLI:EU:C:2018:971, who advises against such a development.

⁵²van Drunen et al. (2022), p. 194.

restriction (i.e. in the second prong review).⁵³ For obvious reasons, this is not the pathway of relevance here, as what is at stake is rather a breach of fundamental rights than a protection thereof.⁵⁴

Yet, Advocate General Sánchez-Bordona suggests in his Opinion an alternative to the pathway chosen by the CJEU to integrate the fundamental rights more closely into the free movement scheme of thinking. In fact, he proposes a completely new standard of thinking. In that regard, he argues that the two complaints inherent in the case should not be examined “separately”, i.e. along the two trajectories pursued by the CJEU at the end, but rather in an integrated way.⁵⁵ Also, he states that it is possible to link the freedoms laid down in the Treaties and the rights laid down in the Charter in a way, which enables the integration of both in a single set of review criteria.⁵⁶

For a fuller understanding, it is of significance that Advocate General Sánchez-Bordona refers to the Opinion in *Commission v Hungary* (concerning right of usufruct over agricultural land) of Advocate General Saugmandsgaard Øe.⁵⁷ In that Opinion, the latter notes that, for the first time, the Commission was seeking from the CJEU a declaration that a Member State—also Hungary—had failed to fulfil the obligations imposed by the Charter.⁵⁸ Advocate General Sánchez-Bordona also explains that the thorny question at the time was the fact that, according to the Commission, the CJEU was required to rule on an alleged infringement of the Charter independently of, and separately from, an infringement of the freedom of movement, also alleged to have been committed by Hungary in those proceedings.⁵⁹ Against that background, Advocate General Saugmandsgaard Øe maintains that the CJEU could not examine the possible infringement of the Charter independently of the question of the infringement of freedoms of movement, more precisely stating:

⁵³See e.g. Case C-341/05, *Laval*, EU:C:2007:809, Para. 93, where the CJEU stated that: “. . .the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty. . .”.

⁵⁴In *Pfleger* the CJEU, although referring to the Charter next to Article 56 TFEU, did not further elaborate on the infringement of the Charter provisions and focused on Article 56 TFEU instead; see Case C-390/12, *Pfleger*, ECLI:EU:C:2014:281. To some degree, Case C-370/05, *Festersen*, EU:C:2007:59, which dates from before the Charter got binding effect, could serve as an example in this regard.

⁵⁵Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI:EU:C:2020:1, Para. 49.

⁵⁶Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI:EU:C:2020:1, Para. 81.

⁵⁷Opinion of Advocate General Henrik Saugmandsgaard Øe in Case C-235/17, *Commission v. Hungary*, delivered on 29 November 2018, ECLI:EU:C:2018:971, Para. 64.

⁵⁸Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI:EU:C:2020:1, Para. 74.

⁵⁹Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI:EU:C:2020:1, Para. 76.

... That institution takes the view, in essence, that, where national legislation that derogates from a freedom of movement is also capable of restricting the fundamental rights guaranteed by the Charter, the possible infringement of the Charter must be examined *separately*. I do not share that view. As I concluded in *SEGRO and Horváth*,... in accordance with the rule in *ERT*, the question of a potential infringement of a fundamental right guaranteed by the Charter, just like a potential infringement of observance of the principles of legal certainty and legitimate expectations invoked by the Commission in its first complaint,... *cannot be examined by the Court independently of the question of the infringement of freedoms of movement*....⁶⁰

He adds that, under the *ERT* case-law, the question of fundamental rights and that of freedoms of movement are inextricably linked, why it is not possible, from the point of view of both methodology and legislation, to separate those two questions, as the Commission had suggested in that case.⁶¹ In fact, he argues that to follow the Commission does not follow from the simple logic of the *ERT* case-law and is to him a new extension—or even a distortion—of that case-law.⁶²

This main reasoning from the Opinion of Advocate General Saugmandsgaard Øe was not followed by the CJEU. Rather, the CJEU preferred to examine in turn the infringement of Article 63 TFEU and the infringement of Article 17 of the Charter.⁶³ The present case on the Hungarian NGO Transparency Law follows the same logic, thus also rejecting the points of view put forward by the Advocate General Saugmandsgaard Øe.

Advocate General Sánchez-Bordona explains that thereby the CJEU is undoubtedly seeking to link the fundamental freedoms safeguarded by the Treaties and the fundamental rights laid down in the Charter, but that there is a certain risk of overlap in their analysis as Advocate General Saugmandsgaard Øe had also pointed out.⁶⁴ Although Advocate General Sánchez-Bordona does not agree that that overlap would have excessive practical consequences, he believes that it is possible to link the freedoms laid down in the Treaties and the rights laid down in the Charter in a way, which enables the integration of both in a single set of review criteria.⁶⁵ It is against that background that he then suggests an integrated test, which more precisely has the following content:

It will therefore be necessary to establish:

- whether that legislation is concerned with a movement of capital and, if so, the conditions to which it makes that movement of capital subject;

⁶⁰Opinion of Advocate General Henrik Saugmandsgaard Øe in Case C-235/17, *Commission v. Hungary*, delivered on 29 November 2018, ECLI:EU:C:2018:971, Paras. 75–76.

⁶¹Opinion of Advocate General Henrik Saugmandsgaard Øe in Case C-235/17, *Commission v. Hungary*, delivered on 29 November 2018, ECLI:EU:C:2018:971, Para. 91.

⁶²Opinion of Advocate General Henrik Saugmandsgaard Øe in Case C-235/17, *Commission v. Hungary*, delivered on 29 November 2018, ECLI:EU:C:2018:971, Para. 95.

⁶³Case C-235/17, *Commission v Hungary*, ECLI:EU:C:2019:432.

⁶⁴Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI:EU:C:2020:1, Para. 80.

⁶⁵Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI:EU:C:2020:1, Para. 81.

- whether, if it is found that the legislation genuinely places conditions on capital movements, the conditions imposed amount to a breach of the fundamental rights relied on by the Commission, in which case they will constitute a restriction of the freedom safeguarded by Article 63 TFEU;
- lastly, whether that restriction can be justified under EU law, which would preclude it from being classified as improper and would, therefore, rule out the infringement alleged by the Commission.⁶⁶

He explains that the traditional freedoms protected by the Treaties can no longer be interpreted independently of the Charter, and the rights laid down therein must be treated as an integral part of the substance of those freedoms, and in that connection, the EU safeguards those freedoms in a legislative context defined by the fundamental freedoms laid down in the Charter.⁶⁷ Accordingly, he states that:

... if the compatibility of national legislation with any of those traditional freedoms is called into question, the Charter will be applicable both where the Member States seek to rely on one of the exceptions which the Treaties lay down in that regard and in any other situation in which the fundamental rights are affected. In other words, those rights do not come into play by way of Article 65 TFEU but instead do so directly and primarily by way of Article 63 TFEU.

This proposal by the Advocate General fits into the anthropocentric character that EU Law has acquired through a growing focus on the importance of personal, individual rights of EU citizens, first in the CJEU's case law starting far back in time with *van Gend & Loos* and now with regard to the Charter itself. The Advocate General himself also explicitly refers to the importance of the citizen in the EU legal order in his opinion:

The entry into force of the Charter constituted the final transition from the previous legislative system to another which revolves around the figure of the citizen, that is to say an actor who holds rights which afford him a legal framework in which he can live autonomously and have the freedom to pursue the attainment of his own goals.⁶⁸

More concretely and in comparison with the “classic” two-pronged test within the area of free movement law, the proposed new test may be seen as expanding the first prong to include both a free movement review and a fundamental right review, *and* when both may be present then to transform the second prong into one single, identical review.

Already because, as explained above, free movement rules can be seen as fundamental rights in themselves, or as being enshrined in a number of specific provisions of the EU Charter, the integrated test on the surface indeed has some

⁶⁶Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI:EU:C:2020:1, Para. 101.

⁶⁷Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI:EU:C:2020:1, Para. 88.

⁶⁸Opinion of Advocate General Campos Sánchez-Bordana delivered on 14 January 2020, ECLI:EU:C:2020:1, Para. 87.

conceptual and pedagogical attraction.⁶⁹ Furthermore, the proposed integrated assessment of both the EU Charter and Treaty freedoms prevents that Member States in the process of justifying a restriction on free movement on public interest grounds would be able to escape the application of the Charter.⁷⁰

An integrated test does, however, also contain certain drawbacks. Most importantly, it may be problematic to integrate the justification element as suggested, because the review under free movement law is generally considered to be of a lighter character, i.e. in the sense of being easier to fulfil by the Member States, than the test prescribed by Article 52(1) of the Charter.⁷¹ In that regard, it may be recalled that Article 52(1) of the Charter reads as follows:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

However, whereas the Advocate General embroidered on Article 52(1) of the Charter and assessed whether its conditions are fulfilled, as has been explained, the CJEU chose not to introduce the proposed “new” standard of review for integrated Charter and free movement infringements. This may be compared with the CJEU’s reasoning in *Pfleger*, wherein it held that:

... an unjustified or disproportionate restriction of the freedom to provide services under Article 56 TFEU is also not permitted under Article 52(1) of the Charter in relation to Articles 15 to 17 of the Charter. It follows that, in the present case, an examination of the restriction represented by the national legislation at issue in the main proceedings from the point of view of Article 56 TFEU covers also possible limitations of the exercise of the rights and freedoms provided for in Articles 15 to 17 of the Charter, so that a separate examination is not necessary.⁷²

A too strict application of the conditions of Article 52(1) of the Charter in respect to breaches of free movement rules, which as mentioned originates from an economic/market law approach, would, in cases where important other, non-economic fundamental rights are invoked to justify breaches of the Treaty freedoms, endanger the protection of non-market interests, public values and fundamental rights. Hence, carefulness is desirable here.

In the end, though, both the CJEU and the Advocate General in this case reached the same overall conclusion, although to some degree applying different schemes of thinking. Where the CJEU looked at both overriding reasons of general interest and public policy enshrined in the Treaty as justification grounds for the Hungarian Transparency Law, the Advocate General mainly focused on public policy and

⁶⁹I.e. e.g. the freedom to conduct a business (Article 16), the freedom to choose an occupation (Article 15) or the right to property (Article 17).

⁷⁰Kirst (2020).

⁷¹van der Woude et al. (2022), p. 392.

⁷²Case C-390/12, *Pfleger*, Paras 59–60.

placed his key analysis on Article 52 of the Charter. The CJEU quickly came to the conclusion that the Hungarian measure was neither suitable to attain its aim, nor constituted a clear link with public policy, based on the established free movement doctrine. The Advocate General, having his doubts about the causal link between the measure and the policy aim pursued as well, still discussed in rather detail all the conditions of Article 52 of the Charter and the various elements of proportionality. This suggests that the outcome in application of the two schemes may sometimes differ.

Under all circumstances, the above discussion has demonstrated the many complexities and important interpretational choices inherent in the interaction between free movement law and fundamental rights. Certain matters have been settled, but undoubtedly, the last words have not been said.

4 Conclusions

The CJEU has in Case C-78/18 about the Hungarian NGO Transparency Law, as just one example, by now clearly demonstrated its willingness to stand up to its role as protector of the rule of law and in that regard in particular fundamental rights. In line therewith, the digitalisation of societies also emphasizes the growing importance of fundamental rights and the potentially diminishing role of the four freedoms. However, at least in the case at hand, it is demonstrated how the old free movement regime has moved further up in importance in that regard, something which was not necessarily predictable.

In general, the process of digitalisation appears to blur the boundaries between the public and commercial domains, thereby interestingly at times enlarging the (commercial) space of the internal market.⁷³ The economic, cultural and political aspects are by now often very closely intertwined, which is demonstrated in e.g. the DSM.⁷⁴ A fundamental rights approach thus appears crucial in tackling not only actions of public authorities and national legislators, such as in the present case on the Hungarian NGO Transparency Law, but also of private actors, including the big tech firms and platforms, which through their power do not only impact market access but also enable to influence the democratic process.⁷⁵

Against that background, it seems fair to expect that the CJEU will actively do as much as it can, within the limits of EU Law (as it understands these), to protect what it may find needed with respect to the many digital challenges. Somehow, the fundamental rights—“helped” by free movement rules—may thus be seen as

⁷³ See in this respect also Habermas (2022), who (according to Patberg (2023)) explains that it may be detrimental to democracy that the public space is increasingly shaped by social media, which follow the logics of marketing and commodification and not genuine journalistic work.

⁷⁴ van Drunen et al. (2022), pp. 181 and 194.

⁷⁵ Gerbrandy (2020), p. 309.

functioning as a shield with some similarity to Asimov’s “Three Laws of Robotics” at least with regard to a certain degree of “interpretational flexibility”. Under all circumstances, the basic principles developed by the CJEU regarding the interaction of free movement law and fundamental rights in primary law will and should eventually be of essential importance in relation to the interpretations of the DMA and the DSA.

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