Justice, Market Freedom and Fundamental Rights: Just how fundamental are the EU Treaty Freedoms?

A Normative Enquiry based on the Political Theory of John Rawls into whether there should be a Hierarchy between Fundamental Rights and the Treaty Freedoms.

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Table of Contents

I. Introduction

The realisation of an internal market has long been, and remains, one of the primary goals of European integration.[1] The Treaty Freedoms – free movement of goods, persons, services and capital – form the fundamental pillars of this internal market and have been interpreted by the European Court of Justice (ECJ) to give individuals rights to challenge measures that restrict these free movement rights.[2] In a number of relatively recent cases, the protection of the Treaty Freedoms conflicted with another fundamental principle of the European Union (EU), namely the protection of fundamental rights.[3] When, in 1998, an international transport company filed a case against the Austrian government for failing to prevent an environmental demonstration on the Brenner Pas, the ECJ had to rule on the relationship between fundamental rights and the Treaty Freedoms. The case is the renowned *Schmidberger*-case and it dealt with the question of whether the free movement of goods could be restricted in order to protect freedom of expression and assembly.[4] The answer given by the ECJ was affirmative, but at the same time it refrained from establishing a hierarchy between the two types of rights. Rather it held that 'the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests'[5] and so treated the Treaty Freedoms on a par with fundamental rights.[6]

Because the Treaty Freedoms form the basis of the European integration project and the ECJ has consistently referred to the Treaty Freedoms as Fundamental Freedoms, the outcome of the *Schmidberger*-case came as no surprise. In addition, the Charter of Fundamental Rights of the European Union appears to confirm that there is no hierarchy between the different types

[1] See Article 3 (3) TEU.

[2] See Maduro1998, p. 25-30; There is debate over whether the Treaty Freedoms have horizontal direct effect. In ECJ 7 May 1998, no. C-350/96, *ECR* 1998, p. I-2521 (*Clean Car*) and ECJ 6 June 2000, no. C-281/98, *ECR* 2000, p. I-4139 (*Angonese*) the ECJ held that Article 45 TFEU on free movement of workers has direct horizontal effect, see Barnard 2010 p. 233-235. ECJ 11 December 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*) and ECJ 18 December 2007, no. C-341/05, *ECR* 2007, p. I- 11767, 2007 (*Laval un Partneri*) the ECJ ruled that the freedom to provide service and freedom of establishment were restricted by actions of trade unions, but equated trade unions with professional regulatory bodies. See Barnard p. 234-235. In ECJ 8 June 2010, no. C-58/08, not yet published (*Vodafone*) AG Maduro held that the Treaty Freedoms have direct horizontal effect, see paras. 20-23. Freedom of capital is often not believed to have direct horizontal effect, see Barnard 2010, p. 566-567.

[3] See Article 2 and Article 6 TEU.

[4] ECJ 12 June 2003 in, nr. C-112/00, *ECR* 2003, p. I-5659 (*Schmidberger/Austria*).

[5] ECJ 12 June 2003 in, nr. C-112/00, *ECR* 2003, p. I-5659 (*Schmidberger/Austria*), para. 81.

[6] AG Stix-Hackl explicitly affirmed this in Opinion AG Stix-Hackl 18 March 2004, no. 36/02, *ECR* 2004, p. I-9609 (*Omega Spielhallen*), para. 50; it was also affirmed by AG Trsetenjak in *Federal Republic of Germany v. Commission*, para. 81.

of rights, in so far as it qualifies the free movement of workers, services and establishment as part of Article 15 on the freedom to choose an occupation and right to engage in work.[7] Nonetheless, I believe we must ask whether the Treaty Freedoms really *should* be granted the same status as fundamental rights and whether it is right that the ECJ holds no hierarchy between the different types of rights.

Since *Schmidberger*, the ECJ has ruled on the relationship between fundamental rights and the Treaty Freedoms in a number of other cases, most notably the cases of *Omega*, *Viking* and *Laval*.[8] In *Omega*, the ECJ's approach was roughly comparable to that in the *Schmidberger* case. However, in the judgments of *Viking* and *Laval* the ECJ took potentially a more controversial approach. These cases are discussed extensively below.[9]

The case-law of the ECJ has been criticized heavily in the literature on a number of points[10], but the underlying premise in the ECJ's case law that there is no hierarchical relation between the Treaty Freedoms and fundamental rights deserves a more in depth discussion. It is not evident that the Treaty Freedoms are equally essential as fundamental rights and this paper aims to examine this claim more in depth. My starting point is the idea proposed by John Rawls that '[e]ach person possesses an inviolability founded on justice that even the welfare of society as whole cannot override'.[11] It is for this reason that we protect persons' fundamental rights: we take persons to have certain basic interests that are fundamental and therefore deserve special protection. This special protection ensures that such rights cannot be easily overridden on the basis of the general interest, such as maximizing economic efficiency.[12]

The difficulty when considering the Treaty Freedoms as hierarchically equal to fundamental rights is that one common justification for their existence is precisely that they maximise economic welfare. The Treaty Freedoms make possible the free movement of all factors of production, i.e. work, services, goods and capital, within the EU. The aim of this was to lead to an optimal allocation of resources which, in turn, serves to maximise wealth-creation in the EU as a whole.[13] In fact, the creation of an internal market has been characterised by Weiler as 'a philosophy, at least one version of which – the predominant version – seeks to remove the barriers to the free movement of the factors of production, and to remove distortions as a means to maximize utility.'[14] However, in order to see the Treaty Freedoms on the same footing as fundamental rights we must establish that they serve a purpose beyond wealth maximisation.[15] The present wording of Article 3 TEU suggests that the objective of creating

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[7] See the explanatory memorandum from the Convention, CONVENT 49 of 11 October 2000, online accessible at http://www.europarl.europa.eu/charter, last accessed 17 September 2011.

[8] ECJ 14 October 2004, nr. C-36/02, *ECR* 2004, p. I-09609 (*Omega Spielhallen- und Automatenaufstellungs-GmbH/Oberbürgermeisterin der Bundesstadt Bonn*); ECJ 11 December 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*); ECJ 18 December 2007, no. C-341/05, *ECR* 2007, p. I- 11767, 2007 (*Laval un Partneri*).

[9] See below chapter V.

[10] See for example: Joerges & Rödl 2009, Davies 2008, Brown 2003.

[11] Rawls 1999, p. 3.

[12] The idea that theories that take as their normative ideal the maximization of total welfare (the theory commonly known as utilitarianism) or maximizing economic efficiency can provide a normative basis for legal rights is troublesome. See Lyons 1984, pp. 110-136.

[13] See for example: Craig and de Búrca 2008, p. 605; Barnard 2010, p. 3-8.

[14] Weiler 1990, p. 2477.

[15] See also Donnelly 2003, p. 201 who states: '[M]arkets foster efficiency, but not social equity or the enjoyment of individual rights *for all*. Rather than ensure that people are treated with equal concern and respect, markets systematically disadvantage some individuals to achieve the collective benefits of efficiency.'

an internal market is not merely that of creating greater overall utility over and above other goals, but rather serves as a means to achieve other (social) goals. Article 3 TEU links the establishment of the internal market to the project of establishing 'a highly competitive *social* [my italics, NdB] market economy'. Yet a closer look at the interpretation of the Treaty Freedoms by the ECJ is necessary to determine to what extent the Treaty Freedoms can be seen as fundamental rights.[16]

In this paper therefore, I enquire whether the Treaty Freedoms *should* be accorded the same hierarchical position as fundamental rights. Because this question is normative, I wish to answer it from the viewpoint of political philosophy and with particular reference to the political theory of John Rawls.[17] In the following chapter, I first explain in more detail why I believe the use of political philosophy is appropriate and necessary to answer the central question of this paper. I will go on to explain why the political philosophy of John Rawls, in particular, is appropriate. Rawls' theory is the subject of Chapter 3, and on the basis of his theory, I develop the normative framework required to answer the central question of this paper. More specifically, on the basis of Rawls' theory I wish to answer the question of why we attach priority to certain fundamental rights. On this matter, I show that on the basis of Rawls' theory we have reason to recognise two types of fundamental rights, namely the basic rights and liberties associated with the first principle of justice and the rights associated with the second principle of justice necessary to achieve equality of opportunity. Moreover, according to Rawls the rights connected to the first principle have a higher rank than those associated with the second. I go on to use this framework to evaluate whether the Treaty Freedoms can be seen as fundamental rights and the idea that there is no hierarchy between the two different types of rights. I achieve this by initially analysing the interpretation that the ECJ gives to the Treaty Freedoms in Chapter 4. There, I argue that the Treaty Freedoms can be seen to a large extent as fundamental rights embodying the value of equality of opportunity. Nonetheless, the ECJ increasingly seems to rely on a broader market access approach rather than an equal treatment approach in interpreting the Treaty Freedoms. Where equal treatment is not at stake the Treaty Freedoms should not be seen as fundamental rights. In Chapter 5 I then discuss how the ECJ has justified its position that there is no hierarchy between the Treaty Freedoms and fundamental rights. In this chapter I show how the justification that the Court offers is limited and that the Court should at least make a more careful analysis of whether the measures found to restrict free movement are (indirectly) discriminatory or not. It's position, that there is never a hierarchy between the different rights, is too simple.

There are a number of issues I do not discuss in this paper. Left out of the analysis are those rights associated with Union citizenship, my focus is exclusively on the Treaty Freedoms associated with the internal market even though the two are related to each other. I also do not wish to enquire how the balance between fundamental rights and the Treaty Freedoms is to be struck exactly in case of conflict. Although the question of hierarchy matters to the question of balance, space precludes me from discussing in depth how the balance has to be struck in concrete cases. I also do not discuss the ideas associated with the ordo-liberal school of

[16] See Chapter IV of this paper.

[17] One may call this approach one of 'normative constitutional theory' as Stephen Griffin calls it. He regards that as involving 'an examination of our constitutional practices from the perspective of political philosophy in an effort to gain a critical perspective on those practices and hopefully to change those that are unjustified.' See Griffin 1987, p. 778.

thought.[18] Although influential and important, space precludes me from critically discussing these ideas.

Despite these qualifications I aim to offer a number of interesting insights on the question of whether there should be a hierarchical relation between the Treaty Freedoms and fundamental rights.

II. Why political philosophy?

The use of political philosophy to answer the central question of this paper may come as a surprise to readers and therefore requires explanation. One might enquire why the issues considered in this paper should not be dealt with solely by referring to the legal status of the Treaty freedoms. This would mean that we settle the question of whether the Treaty freedoms can be seen as fundamental rights by taking a non-substantive definition of fundamental rights, i.e. to regard rights as fundamental when they are regarded as such by the EU legal system.[19] This approach would give us an easy answer to the question addressed in this paper, namely that the Treaty freedoms are of equal rank to fundamental rights because they are recognised as such in the EU legal order. However, I do not believe that this approach would be satisfactory since it ignores the fact that we attach special importance to fundamental rights, not solely because they are determined as such by law, but because we see the protection of fundamental rights as a requirement of justice. As James Griffin notes 'what would be lost by taking this route would be the idea that certain rights have their foundational status in society not because of conventions or place in the legal system but because of their moral status.'[20] A similar consideration is put forward by Dworkin:

> 'The institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously, and who praises our Government for respecting them, must have some sense of what that point is.'[21]

Therefore, if we wish to justify the claim that a certain right is a fundamental right or is hierarchically equal to it, we must establish that this right protects an interest that is of particular importance to us. The discourse of fundamental rights, and human rights in particular, shows that we regard the protection of such rights as a requirement of justice. This idea is reflected, for example, in reference to the notion of 'human dignity' in the Universal Declaration of Human Rights and the importance given to it in the German constitution. We also see it reflected in the idea that human rights are held to be universal.[22] Theories that provide an explanation of why fundamental rights have special moral value are, therefore, essential in explaining its fundamental status. Concurrently, I am in agreement with Rawls that 'we must not ask too much of a philosophical view'.[23] What I wish to do here is offer

[18] See for example: Gerber 1994,;Streit & Mussler, 1995.
[19] Such a definition is used for example in Torres Pérez 2009, p. 9.
[20] Griffin 2008, p. 19.
[21] Dworkin 1977, p. 198.
[22] The German constitution also explicitly makes this universal claim in Article 1 (2) of the Constitution.
[23] Rawls 2005, p. 368.

insights that can serve as 'a guiding framework, which if jurists find it convincing may orient their reflections, complement their knowledge, and assist their judgment.'[24]

In the following, I draw insights from the political philosophy of John Rawls to answer the question of why we regard certain rights as fundamental. The idea of rights is itself the subject of much controversy and debate in moral and political philosophy and there are an abundance of theories about what rights we ought to have.[25] My enquiry is therefore limited. Nonetheless, Rawls' theory, whilst not flawless, is probably the most influential theory about justice of modern times and his insights remain of continued importance. Rawls was one of the first to offer a systematic and convincing alternative to the philosophy of utilitarianism, he modernised traditional social contract theories and provided a political theory with direct relevance for real political issues.[26] For these reasons I believe my focus on Rawls' work is an excellent starting point when thinking about how we should conceive the relationship of the Treaty Freedoms to other fundamental rights.

III. Rawls' Conception of Justice and Rights

III.1 Justice

One of the main starting points of Rawls' theory is that the requirements of justice must not be dependent on a particular conception of what a worthwhile life consists of. Such a conception of what constitutes a worthwhile life is what Rawls calls a conception of the good, or a comprehensive doctrine. The reason that we cannot base our conception of justice on such a conception of the good, is because the existence of a plurality of incommensurable and irreconcilable conceptions of the good is a pervasive feature of modern democratic societies. In modern democratic societies citizens simply do not agree on what constitutes the best way to live one's life, such as living your life according to the precepts of a specific religion. A consequence of this is 'that a continuing shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the oppressive use of state power.'[27] Rawls, therefore, attempts to develop a conception of justice that is neutral regarding these different conceptions of the good and, in this sense, his theory can be considered liberal.[28] However, in developing a theory of justice, Rawls must make certain minimum assumptions about what constitutes a good life. He therefore relies on what he calls a thin theory of the good, which is further discussed in the next subsection.

One consequence of the fact that Rawls wishes to devise a conception of justice that is neutral to different conceptions of the good, is that Rawls' theory of justice does not apply to all aspects of our lives, but only to what he terms the basic structure of society. That is, the 'the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.'[29] By these major social institutions Rawls means 'the political constitution and the principal economic and social arrangements'.[30] The reason why he takes the basic structure of society as the subject of

[24] *Ibid.*
[25] See for example: Campbell 2006, in particular p. 3-79.
[26] Christman 2002, p. 5; Kymlicka 2002, p. 53.
[27] Rawls 2005, p. 37.
[28] Rawls 2005, p. 35-40 and p. 302-304.
[29] Rawls 1999, p. 6.
[30] Rawls 1999, p. 6.

justice is that the way this basic structure is regulated has a pervasive influence on our social position right from when we are born.[31]

Another important point to note is that Rawls' theory of justice is not meant as a universal conception of justice. Rather, in the eyes of Rawls it is rooted in the political culture of liberal democratic societies, characterised by the existence of a plurality of incommensurable conceptions of the good amongst its citizens.[32] In this paper I work on the assumption that the EU and its Member States as a whole can be taken as the relevant society to which Rawls' principles of justice apply, because the EU Member States share a democratic liberal culture in the sense of Rawls.[33]

Rawls reasons that a particular conception of justice, *justice as fairness*, should regulate the basic structure of society and he argues for this conception on the basis of two arguments. First, he holds that a particular conception of justice is justified if it matches our considered convictions of justice or extends them in an acceptable way.[34] The method here is to start from uncontroversial judgments about justice that we have intuitively and to try to justify these as a coherent conception of justice on the basis of more general principles. In doing so, we are likely to find discrepancies between our set of principles and the weak judgments about justice we started from. We must then choose either to modify our starting points or our set of principles, and the process is one of continuously moving back and forth between concrete judgments and principles until we have found a coherent set of principles that matches our considered convictions on justice. This is what Rawls terms 'a state of reflective equilibrium', which is a state at which we have arrived at by reflection and where our considered judgments and principles are in equilibrium.[35]

Secondly, Rawls places himself in the tradition of the social contract theories and tries to carry these theories to some higher form of abstraction. He argues that the principles of justice that should regulate the basic structure of our society are the ones that we would accept in a position of freedom and equality, the original position. I will explain this idea in the next subsection. Both the argument from reflective equilibrium and the original position are related, because we can see the conditions under which the parties decide in the original position as the conditions we would accept in a state of reflective equilibrium.[36]

III.2 The original position

The original position is a hypothetical situation in which human beings are represented as free and equal, and in which they decide on the principles of justice that are to regulate the basic structure of society. The parties making a decision in the original position must choose from

[31] Rawls 1999, p. 7.
[32] Rawls 2005, p. 13-14 and p. 36-38.
[33] See for Rawls' statement of his international theory of justice Rawls 2002. Rawls holds that his conception if justice as fairness applies to society which he characterizes as 'a more or less self-sufficient association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them.' Rawls 1999, p. 4. This assumption of self-sufficiency does not hold for the single Member States of the EU, because their cooperation in the EU has made them highly interdependent in economic terms. Therefore, I believe taking the EU and its Member State as a whole as the relevant society to which Rawls' principles apply is justified.
[34] Rawls 1999, p. 17
[35] Rawls 1999, p. 17-18 and 40-46.
[36] Rawls says for example that: 'There is, however, another side to justifying a particular description of the original position. This is to see the principles which would be chosen match our considered convictions of justice or extend them in an acceptable way.' See Rawls 1999, p.17, and also p. 18-19.

behind what Rawls calls a veil of ignorance. This veil of ignorance ensures that certain morally arbitrary factors are not taken into account when the parties decide upon the principles of justice and it ensures that the parties decide in a position of freedom and equality. The original position, therefore, excludes the parties' knowledge of circumstances such as their particular social position in society, their natural talents and intelligence. It also excludes their individual conceptions of the good. Nevertheless, in order for the parties in the original position to make a decision on matters of justice, they do need to have some knowledge of what is worthwhile in life in order to be able to make a decision. Therefore the parties do have a general knowledge about society and themselves, in particular they know that they have a particular conception of the good and that they want certain primary goods whatever their particular conception of the good turns out to be. These primary goods are things that any rational man is supposed to want and Rawls refers to them as the thin theory of the good. Roughly they are rights, liberties and opportunities, and income and wealth.[37] On the basis of this knowledge the parties in the original position are then to decide for a set of principles of justice on the basis of rationality and self-interest.[38] The idea is that the principles of justice that are a result of this decision in the original position are the result of a fair agreement, hence the name of 'justice as fairness' that Rawls gives to this conception of justice.[39]

Rawls argues that the parties in the original position would adopt two principles of justice. The first principle is that: 'Each person has an equal right to a fully adequate scheme of equal basic liberties compatible with a similar system of liberties for all.'[40] Rawls' list of basic liberties includes the right to vote and hold public office, freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person and 'the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.'[41] The basic liberties are roughly what jurists would normally call civil and political rights.

The second principle that the parties affirm is the following:

> 'Social and economic inequalities are to be arranged so that they are both:
>
> (a) To the greatest benefit of the least advantaged, consistent with the just savings principle, and
> (b) Attached to offices and positions open to all under conditions of fair equality of opportunity.'[42]

The second principle applies to 'the distribution of income and wealth and to the design of organizations that make use of differences in authority and responsibility.'[43] The first

[37] Rawls 1999, p. 54-55; Here I have not mentioned the primary good of self-respect, to which Rawls often refers as the most important primary good. Self-respect has two aspects. It means first that persons have a sense of that living their life according to their conception of the good is worth carrying out and secondly that we are able to carry out this life-plan. See Rawls 1999, p. 386-387. In the following I do not refer to the primary good of self-respect, because I do not believe a discussion of this primary good is really necessary for our purposes here.
[38] Rawls 1999, p. 18.
[39] Rawls 1999, p. 10-13, p. 118, p. 123 and p. 79-80.
[40] Rawls 2005, p. 291; Rawls' statement of the first principle in a Theory of justice is slightly different. In Political Liberalism he amended it following a criticism by Hart 1978, see n. 48.
[41] Rawls 1999, p. 53.
[42] Rawls 1999, p 266. I do not discuss here the just savings principle.
[43] Rawls 1999, p. 53.

principle affirming basic liberties has so-called 'lexical' priority over the second principle and needs to be satisfied first. In short this entails that the basic liberties can only be restricted for the sake of liberty and that the basic liberties cannot be limited solely for the purpose of achieving greater social and economic welfare. Rawls, for example, holds that 'the equal political liberties cannot be denied to certain social groups on the grounds that their having these liberties may enable them to block policies needed for economic efficiency and growth.'[44] The second principle, in itself also contains a lexical priority, in the sense that fair equality of opportunity is lexically prior to the principle that social and economic inequalities are to be arranged to the greatest benefit of the least advantaged. The latter part of the second principle ((a) in the above) is what Rawls refers to as the difference principle. The difference principle limits considerations of wealth maximization and efficiency, by indicating that such considerations are to be limited by considerations of equality. More precisely, wealth maximization and efficiency has to be to the benefit of the least well-off in society.[45]

III.3 Basic Rights and Liberties

The question that remains is why the parties in the original position adopt these two principles and their respective hierarchy. Let me start with the first principle, the principle that in a just society each person has a set of basic liberties. As we have seen, Rawls affirms that certain basic liberties are to be given priority, rather than affirming a general principle of greatest equal liberty. Affirming such a general principle of greatest equal liberty would mean that we have an interest in maximizing our individual freedom. However, this is highly problematic for two main reasons. Firstly, it is extremely difficult to come up with an adequate definition of freedom that this principle requires. Secondly, it is impossible to measure the quantity of someone's freedom, because we lack a scale for making such quantitative assessments.[46] In order to avoid such difficulties Rawls argues that there are certain basic liberties which are more important, because they protect the fundamental aims and interests of the persons in society. Citizens, therefore, do not wish to exchange a lesser liberty for attaining higher economic advantage. The parties in the original position know that they have a certain conception of the good to which they attach fundamental importance, such as a religion or a particular view on life. On the basis of this they value certain things in life, although in the original position the parties do not have knowledge over their specific conception of the good. The basic liberties, such as freedom of conscience, protect this fundamental interest because it ensures that citizens will at least have the basic freedom necessary to lead a life according to their conception of the good.[47]

This argument for the priority of liberty is subject to a powerful critique given by Hart.[48] The difficulty with the idea that the basic liberties are essential to the parties' ends is that the parties in the original position do not know yet what their particular ends are. Therefore, it

[44] Rawls 2005, p. 295.
[45] See Rawls 1999, p. 131-132; 266-267;
[46] Simmonds 2002, p. 66; Hart 1978, p. 233-239; Kymlicka 2002, p. 143-144.
[47] Rawls 1999, p. 474-475.
[48] Hart also brings forward a second powerful critique of Rawls' first principle, namely that it is unclear what it means to have the 'most extensive total system of equal basic liberties'. Given that citizens have different individual preferences they will disagree over the value of the different liberties. This means that there is no rational way of deciding what is the most extensive interpretation of the basic liberties when these liberties conflict. See Hart 1978, p. 239-244. In *Political Liberalism* Rawls therefore redefines the first principle of justice so that it does not give an equal claim to 'the most extensive scheme of equal basic liberties' but rather 'a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all'. Rawls 2005, p. 5 and p. 291.

seems impossible for them to determine whether the advantages of being able to exercise their basic liberties are outweighed by the disadvantage of other persons exercising the basic liberties. For example, in order to ensure people have a right to vote for their political representatives, resources have to be devoted to setting up a political system in which this is possible. People who value having greater wealth more than political participation are unlikely to favour the priority of this basic liberty if an authoritarian form of government would be more efficient in creating greater total economic prosperity. In other words, people who place less value on basic liberties compared to having a greater amount of wealth, would be willing to exchange liberty for having such a greater share. But this is precisely what the priority of liberty does not allow.[49] Hart thus argues that Rawls' reasoning for the priority of the basic rights and liberties is implicitly based on an ideal of what a worthwhile life consists, i.e. a particular conception of the good. That ideal is that 'of a public-spirited citizen who prizes political activity and service to others as among the chief goods of life.'[50]

Rawls responds to this critique in his later book *Political Liberalism* and links the basic liberties more fully to the conception of the person that forms a basis of his overall theory of justice. He holds that the basic liberties form the necessary conditions for 'the adequate development and full exercise of the two powers of moral personality over a complete life', the development in which citizens take a higher-order interest.[51] With this Rawls does not intend to make controversial anthropological assumptions about what constitutes the essence of man. Rather the two moral powers are closely connected to Rawls' image of society as 'a fair system of cooperation over time'.[52] This means that participants in society cooperate under a public system of rules in which they accept these rules on the condition that others do accept them as well. The idea of a fair system of cooperation thus involves the idea of reciprocity. At the same time, within this scheme of cooperation participants try to achieve their own conception of the good. In depicting society in this manner Rawls hopes to take society as we find it in our ordinary human life as the basis of his theory, which he sees as a middle ground between 'a society of saints' and 'a society of the self-centered.'[53] Because people can be participants in such a society of fair cooperation, Rawls ascribes to them the two powers of moral personality that make possible such fair cooperation.[54] These two powers are 'the capacity for a sense of right and justice' and 'the capacity for a conception of the good'.[55] The capacity for a sense of justice is the 'capacity to understand, to apply, and normally to be moved by an effective desire to act from (and not merely in accordance with) the principles of justice as the fair terms of social cooperation.'[56] This capacity for a sense of justice thus makes possible that citizens accept reciprocal obligations in society. The capacity for a conception of the good Rawls describes as 'the capacity to form, to revise, and rationally to pursue such a conception, that is, a conception of what we regard for us as a worthwhile human life.'[57] Because citizens need the two powers of moral personality in order to be able to be a 'normal and fully cooperating member of society over a complete life' they take a higher-order interest in being able to develop and exercise these two powers.[58] As we saw

[49] Hart 1978, p. 247-255.
[50] Hart 1978, p. 252.
[51] Rawls 2005, p. 293; see also Rawls 1999, p.441-449.
[52] Rawls 2005, p. 15. See also Scanlon 2004, p. 1482.
[53] Rawls 2005, p. 54.
[54] Rawls 2005, p. 15-19. Rawls 2005, p. 300-304.
[55] Rawls 2005, p. 302.
[56] Rawls 2005, p. 302.
[57] Rawls 2005, p. 302.
[58] Rawls 2005, p. 73-74.

before, Rawls also assumes that the citizens represented by the parties in the original position have a determinate conception of the good and that they take special interest in realizing their determinate conception of the good.[59]

Rawls now holds that the basic liberties are necessary for persons being able to fully exercise and develop their two moral powers as well as realising their determinate conception of the good. Therefore, they would be chosen by the parties in the original position.[60] As we know, the parties in the original position choose the principles of justice without knowing their particular conception of the good. But they do know that they will have a particular conception of the good, which is of particular importance to them. Consequently, they would opt for a principle of justice that offers strong protection to liberty of conscience, as this ensures that they will be free from the oppression by others that disapprove of their conception of the good. Moreover, Rawls holds that the development and exercise of our moral capacity for a conception of the good is a means to a person's good and in itself part of a person's good. This means that we do not only wish to lead our life on the basis of a determinate conception of the good, but also that we may wish to revise this conception and strive for a better understanding of why we should live our life in accordance with it. Liberty of conscience protects our exercise and development of this capacity and therefore the parties in the original position would choose to give it strong protection.[61] They would also choose for strong protection of freedom of association because 'unless we are at liberty to associate with other like-minded citizens, the exercise of liberty of conscience is denied.'[62]

Similarly, persons' higher order interest in the exercise and development of their sense of justice means that they attach particular importance to certain basic liberties, in this case the political liberties. Together with a form of representative democracy the political liberties of political speech and press, freedom of assembly and a right to vote ensure that citizens can publicly deliberate and secure the correct application of the principles of justice to the basic structure. In addition, the political liberties ensure that citizens can supplement the principles of justice in public discourse. In exercising their political liberties citizens thus develop and exercise their sense of justice.[63]

Finally, the remaining basic rights and liberties protecting the integrity of the person and those covered by the rule of law are supporting rights, in the sense that these are necessary to guarantee the other basic liberties.[64] The basic rights and liberties protecting the integrity of the person are violated 'by slavery and serfdom, and by the denial of freedom of movement and occupation' and include 'freedom from psychological oppression and physical assault and dismemberment' as well as 'the right to hold personal property'.[65] The basic rights associated with the rule of law include 'freedom from arbitrary arrest and seizure.'[66]

If we accept Rawls' idea that persons have the two important moral powers of the capacity for a conception of the good and the capacity for a sense of justice, then it seems indeed convincing to say great importance has to be attached to the basic rights and liberties. However, Rawls' focus on civil and political rights at the exclusion of social and economic

[59] Rawls 2005, p. 74.
[60] Rawls 2005, p. 304-305.
[61] Rawls 2005, p. 310-314.
[62] Rawls 2005, p. 313.
[63] Rawls 2005, p. 335.
[64] Rawls 2005, p. 335.
[65] Rawls 2005, p. 335; Rawls 1999, p. 53.
[66] Rawls 1999, p.53.

rights appears unjustified. The idea that citizens would choose for the priority of civil and political rights when they do not have the assurance that their basic material wants are fulfilled, such as access to food, clothing, education and medical care, ignores the indispensability of such basic material wants in human life. It would mean that poor people in society, unable to afford food, would prefer their rights of political participation over and above being well nourished.[67] The parties in the original position are therefore more likely to include in the first principle of justice, the requirement that basic social and economic needs are to be met. Without having these basic needs met, citizens are also unlikely to be able to develop and fully exercise their two powers of moral personality. What these basic needs are, will depend to some extent on the particular society in which the citizens live.[68] In general, however, these basic needs will include 'food and drink, clothing and shelter, as well as some interaction including education and care'.[69] A further argument in favour of including in the first principle the requirement that basic needs are to be met, is that only when people have their basic needs fulfilled can they meaningfully exercise their civil and political rights.[70] It is this argument that Rawls himself appears to adopt.[71]

Supplemented with a right to have our basic needs met, I believe Rawls offers a relatively convincing argument for why we would give priority to the basic liberties and rights as a matter of justice. Although Hart's criticism shows that it is difficult to establish which rights and liberties are to be preferred without relying on a particular conception of the good, I believe the total set of basic rights and liberties here described comes close to that necessary to pursue a conception of the good at all and to maintain fair terms of cooperation in society. We may ask, however, whether the strict priority that Rawls gives to these basic rights is not too stringent. To this matter I return at the end of this chapter.

III. 4 Fair Equality of Opportunity and the Difference Principle

Having discussed the justification of the first principle, I now turn to the justification of Rawls' second principle of justice. Rawls maintains that the parties in the original position choose the second principle because they make a conservative choice. Since the parties to the original position do not know their particular position in society but do know that they value primary goods and that they have a particular conception of the good, Rawls argues that they would choose according to the 'maximin rule'. The maximin rule 'tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcome of which is superior to the worst outcomes of others.'[72] This leads to the adoption of the 'difference principle' because it is the most favourable principle for the least advantaged in society when it comes to the distribution of income and wealth. Here, I will assume that the difference principle can be best achieved by income taxation and does not give rise to any specific fundamental rights.[73]

The principle of fair equality of opportunity requires that different social positions remain available to all in society. Rawls distinguishes fair equality of opportunity from formal

[67] Pogge 1989, p. 133-134; see also, although in a somewhat different vein Michelman1975.
[68] Pogge 1989, p. 143-144.
[69] Pogge 1989, p. 144.
[70] Pogge 1989, p. 145.
[71] Rawls 2005, p. 7; Rawls 2005, p. 324-334.
[72] Rawls 1999, p. 133.
[73] Pogge names the choice of income tax rates as a choice 'paradigmatically governed by the difference principle', Pogge 1989, p. 200; see for a more lengthy discussion on whether the difference principle gives rise to certain welfare rights, Michelman 1978, pp. 319-343.

equality of opportunity which is the situation where all persons have only the same legal rights to access different social positions. He takes formal equality of opportunity to be insufficient because it leaves the distribution of income and wealth too much influenced by social contingencies, such as the fact that some people may not have been able to develop their talents because of insufficient means to acquire good education. In order to remedy such contingencies that are arbitrary from a moral point of view, one needs to ensure that all also have a fair chance to attain the higher social positions.[74] According to Rawls this means that 'those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system.'[75] The basic structure of society, therefore, has to be arranged in such a manner that this fair equality of opportunity is maintained. Not only does this mean that education for all becomes highly important, but also that the institutions of the free market have to be arranged in such a manner that the conditions for fair equality of opportunity are maintained.[76]

The difficulty with this notion of fair equality of opportunity is that it is almost impossible to realise. Richer parents are able to spend more on education for their children, and even if they would be unable to do so, differences in upbringing are still likely to have an effect on the development of their children's talents. Evening out such differences that arise from different social positions would require an incredibly expensive educational system. It would require devoting most resources to bringing about such an educational system and thus leave little room for satisfying the difference principle.[77] Pogge, therefore, suggests that a better way of understanding fair equality of opportunity is that all people must have access to a roughly equivalent education, defined as the education the cost of which does not fall far below the middle range of education people get.[78] Next to this he also suggests that justice requires fair equality of employment opportunity. This would require 'minimally adequate employment opportunities', here defined as a percentage of the standard of participation in social cooperation. I do not find this latter requirement perfectly clear, but I believe it would include creating access to jobs for those with less talent, such as social working places for those with severe handicaps.[79] Overall, I believe Pogge's interpretation of the principle of fair equality of opportunity is a plausible one. On this interpretation the principle is not impossible to satisfy and this makes it plausible that the parties in the original position would value such opportunity over a bigger share in total wealth under the difference principle, provided their basic and social economic needs are given priority under the first principle.[80]

III.5 Lexical Priority and Restrictions of Rights

We may ask whether the strict hierarchical ordering between the different precepts of justice and their associated rights, is too rigid.[81] Scanlon asks, for example, whether restrictions on the time and place of demonstrations are not justified by other considerations than protecting from the basic liberties and rights itself such as the need for uninterrupted sleep of people not

[74] Rawls 1999, p. 62-63.
[75] Rawls 1999, p. 63.
[76] Rawls 1999, p. 63.
[77] Pogge 1999, p. 172-173.
[78] Pogge 1999, p. 178-180.
[79] Pogge 1999, p. 180-181.
[80] Pogge 1989, p. 180-181. Pogge supplements Rawls' account also with a principle of fair equality of medical opportunity. I believe this principle is a valuable addition to Rawls' account. However, here I do not wish to discuss it further. For Pogges argument, see Pogge 1989, p. 181-196.
[81] See for a critique Scanlon 1978, p. 181-185; and Hart 1978, p. 244-247.

participating in the demonstration.[82] At first sight Rawls appears not to allow such considerations as reasons to restrict the basic rights and liberties. However, the rigidity of the priority of the first principle of justice is mitigated by two factors.

Firstly, in the original position the parties only decide on the general form of the basic rights and liberties. These have to be further specified in what Rawls calls a constitutional, legislative and judicial stage, the most important of which in specifying these rights is the constitutional phase. The idea is that the basic rights and liberties (and the precepts of justice more in general) are to be specified in light of the particular circumstance of a society.[83]

Secondly, Rawls distinguishes between restricting and regulating the basic liberties and rights. Rawls believes regulation of the basic rights is necessary in order for them 'to be combined into one scheme as well as adapted to certain social conditions necessary for their enduring exercise.'[84] As an example of such regulation, Rawls mentions the rules of order necessary to preserve free discussion. Regulation is possible as long as it leaves intact as far as possible the so-called 'central range of application of each basic liberty.'[85] This central range of application is the application of the right is necessary for the adequate development of the two moral powers. Restrictions on time and place of demonstrations fall within this concept of regulation; they are justified in order to 'secure an effective scope for free political speech in the fundamental case.'[86]

The basic liberties and rights can be made compatible with one another in a scheme of basic rights and liberties, and in which their central range of application is protected.[87] The specification of such a scheme takes place at the constitutional stage and in defining the central range of application of the basic rights and liberties that Rawls draws from the history of constitutional doctrine.[88] Regulating the rights means that they can be adjusted to take into account other interests. The leading principle, however, is the exercise and adequate development of the two moral powers and in adjusting the rights to make them compatible with each other in a scheme of basic rights and liberties, restrictions cannot be allowed when they pose a threat to the full exercise of the two moral powers.[89]

Despite the fact that other interests can be taken into account in regulating these rights, we may still find the priority of the basic rights and liberties as demanding too much. A less drastic version of the priority of these fundamental rights could be perhaps to regard them as Dworkin does, namely as trumps. This involves the idea that fundamental rights can sometimes be overridden but not 'on the minimal grounds that would be sufficient if no such right existed.'[90] This means that if we wish to restrict rights some special justification is required, although it is not directly clear what such a special justification requires. A somewhat similar approach is taken by James Griffin. He also does not rule out that rights may be restricted in order to secure other interests such as greater general welfare, but he similarly holds that rights are resistant to such trade-offs because the values the rights protect

[82] Scanlon 1978, p. 184.
[83] Rawls 2005, p. 293.
[84] Rawls 2005, p. 295.
[85] Rawls 2005, p. 296.
[86] Rawls 2005, p. 341.
[87] Rawls 2005, p. 297-298; and Rawls 2005, p. 334-340.
[88] Rawls 2005, p. 342.
[89] Scanlon 2004, p. 1484.
[90] Dworkin 1977, p. 191-192 ; See also Dworkin 1984, pp.153-167, although I do not wish to express my agreement with the normative basis Dworkin gives for rights.

are of particular importance.[91] Griffin holds that in such cases where rights are in conflict with other interests, we need to look for a bridging notion, that is 'some conceptual background that supplies the terms in which the conflicting items are compared.'[92] Possibly this approach fits better with the way in which fundamental rights in the European Convention on Human Rights and the fundamental rights enshrined in the national constitutions of the Member States often allow for a wide range of possible restrictions.

Too what extent fundamental rights should be resistant to trade-offs is a difficult question that I do not wish to settle here. The crucial point is that fundamental rights protect values that are of particular importance and therefore *are resistant* to trade-offs against other interests.

III. 6 Justice and the Market

Since we are considering, in this paper, what the status of the Treaty Freedoms should be and, because the Treaty Freedoms are essential in the creation of a European internal market, it is important to assess how Rawls perceives the role of markets in his overall theory of justice. One of the core claims of liberalism is that individual rights have priority over the reduction of social and economic inequalities and we have seen that Rawls clearly stands in this liberal tradition. We have also seen that it is a difficult issue to determine which individual rights are to be accorded such priority. What is important is that Rawls does not include an absolute right to property in his list of basic liberties, in the sense that one would have a basic right to freely dispose of one's property without any legal constraints. Rawls explicitly excludes two conceptions of the right to property, namely 'the right to include certain rights of acquisition and bequest, as well as the right to own means of production and natural resources.'[93] Rawls thus rejects the view that one is entitled, as a matter of justice, to the fruits of one's labour and that any violation of a right to property is also a violation of the precepts of justice. Recognising such an absolute property right would make the second principle of justice obsolete, as any redistribution of acquired wealth would conflict with such a right, for example redistribution through income taxes. Moreover, it would be inconsistent with one of the overall premises underlying Rawls' theory, principally that one is not as a matter of justice entitled to have material advantage from natural talents that are not deserved within themselves. This means that interference in the workings of a free market system is not unjust *per se*. It is rather the rules of the overall just system that create an entitlement as matter of legitimate expectation to the product of one's labour.[94] A right to property is necessary for us to have a degree of independence and privacy and is therefore required by the first principle of justice. This is not to say, however, that any redistribution of income acquired through market exchanges is unjust.[95] Rawls, however, is not very clear what his basic right to property includes. John Christman argues that a distinction needs to be made between two sets of rights that we ordinarily understand as part of the right to private property. On the one hand property is taken to include the right to control the good under one's possession, i.e. to use it for one's purposes. This aspect of property is highly important in our self-determination and in retaining our independence, and therefore in realising our conception of the good. For example in order to have a degree of privacy, it is important to have a physical area closed off to other persons. Important, however, is that it is the control of the physical space that is important. On the other hand, property rights are ordinarily understood to have an income

[91] Griffin 2008, p. 79-80.
[92] Griffin 2008, p. 69.
[93] Rawls 2005, p. 298.
[94] Nagel 2003, p. 67-68. See also Rawls 2005, p. 298; Rawls 1999, p. 273-277.
[95] See also Kymlicka 2002, p. 152.

aspect, namely 'the right to increased *benefit* from (relinquishing) the ownership'.[96] Unlike the control aspect of property, the income function is not closely related to the agent's autonomy owning the good. The structure of the income aspect of the right to property is closely connected to 'the overall distribution of goods in the economy.'[97] It is this aspect of the right to property that therefore can be determined by distributional policies.[98] In Rawls' theory income rights would be determined by the distributive policies dictated by the second principle of justice. It is the control aspect of the right to property that receives protection under the first principle, because of its importance in realising our conception of the good. The vision that one is entitled to absolute pre-institutional property rights as a matter of justice is a line of thought commonly known as libertarianism and I believe it is subject to very powerful criticism.[99]

Consistent with this approach, Rawls holds that the right to private property does not extend to the means of production. Therefore, Rawls argues that justice as fairness can be realised both in a private property economy, i.e. an economy in which the means of production are mostly privately owned, and in what he calls a socialist economy, i.e. an economy in which the means of production are mostly publicly owned. He also holds that both types of economy are compatible with a system of markets, that is, a system in which prices of consumption goods are freely determined by supply and demand. Economic arrangements that rely on a system of markets have the advantage of efficiency. But Rawls sees a market system as having a more important advantage:

> 'A further and more significant of a market system is that, given the requisite background institutions, it is consistent with equal liberties and fair equality of opportunity. Citizens have a free choice of careers and occupations.'[100]

Here I believe that Rawls points to the idea that if the basic structure is arranged so that it complies with the principles of justice, market systems are consistent with such a system in a number of ways. Using markets as a system in which prices of consumption goods are freely determined by supply and demand is compatible with the idea that the requirements of justice cannot depend on a particular conception of the good. A just system must allow individual citizens to spend their fair share according to what they think consists of a worthwhile life. I believe it is in this sense that a system of markets is consistent with the requirements of (liberal) justice.[101]

Rawls also says that a system of markets is consistent with free choice of occupation which he sees as a basic right. However, it is not entirely clear what Rawls means by this right. If for example I wish to become a doctor and earn a great income but the State taxes higher incomes more than lower incomes, I could maintain this affects my free choice of occupation as it makes becoming a doctor subject to requirements which other low-income jobs are not subject to. Such a broad reading of freedom of occupation would be wholly inconsistent with

[96] Christman 1994, p. 130.
[97] Christman 1994, p. 133.
[98] See Christman 1994, p. 125-184.
[99] The most famous statement of libertarianism is probably Nozick 1984; For criticism see *inter* alia: Kymlicka 2002, p. 102-159; see for a criticism on some aspects of libertarianism also Waldron 1993, pp. 225-249.
[100] Rawls 1999, p. 241.
[101] Bruce Ackermann formulates it as follows 'They [markets] are a key tool by which people with radically different ideals may coordinate their activities to mutual advantage.' See Ackerman 1989, note 5 on p. 12.

the second principle of justice and therefore has to be rejected. But even if we interpret it so that in a private property economy freedom of occupation entails that everyone equally has the right to choose his type of work or set up a business, it becomes difficult to distinguish it from formal equality of opportunity. The idea that every citizen has an equal right to pursue a career of his choice is already captured in the idea of equality of opportunity on the basis of which the different social positions in society should be open to everyone. For this reason I believe we must give the right to freedom of occupation as protected under the first principle of justice a narrower reading, namely as prohibiting forced labour. This makes sense, since Rawls names free choice of occupation in conjunction with a prohibition on 'slavery and serfdom'.[102] Therefore, I think what Rawls must mean is that provided citizens are not discriminated on grounds other than that of talent and ability, markets are consistent with formal equality of opportunity. Markets are consistent with fair equality of opportunity, if the basic structure also ensures minimally adequate employment opportunities and a right to education as well.[103]

III.7 What Fundamental Rights should we have?

Having discussed the main outlines of Rawls' theory and his account of rights, we are now in a position to answer the question of what rights we should recognize as fundamental rights. As we have seen Rawls' account gives us reason to give special protection to two categories of rights, which are hierarchically ordered. First these are the basic rights and liberties associated with the first principle of justice. Next to the traditional civil and political liberties, they include basic rights to food, clothing, education and medical care. These rights are accorded special protection in the sense that they can only be limited for the sake of protecting another right among this list of basic rights. However, as discussed in *III.5* we may doubt whether this priority should be construed so rigidly.

The second category is that of the rights associated with the principle of fair equality of opportunity. First, there is the right to formal equality of opportunity, which prohibits any discrimination between people apart from their ability and talent in access to different social positions. The second principle also requires recognition of a right to access to a roughly equivalent education and a right to minimally adequate employment opportunities. These rights are given priority over satisfying the difference principle as well as considerations of efficiency. However, if we follow Rawls strictly, these rights cannot limit the application of the first category of rights associated with the first principle of justice. Rawls himself also seems to hold that only the right to formal equality of opportunity is to be given constitutional status. This is because Rawls holds the content of the constitution should be restricted to its constitutional essentials, as the application of the constitution has to be transparent.[104]

III.8 The Treaty Freedoms as Fundamental Rights?

Before I start the discussion of the Treaty Freedoms more in depth, I believe we can conclude here that the Treaty Freedoms are most likely to be rights of the second category. This would mean we have to accord the Treaty Freedoms the status of fundamental rights, but not as fundamental as the basic rights and liberties under the first principle. However, Rawls also holds that there is a basic right to 'freedom of movement'. As with freedom of occupation I believe this right should be construed narrowly. It should be understood as physical free

[102] See also Cohen 2008, p. 196-197 who expresses reservations as to whether free choice of occupation really should be counted as part of the first principle of justice.
[103] See also Rawls' discussion in Rawls 1999, p. 235-242.
[104] Michelman 2003, p. 400-406; see also Sager 2004, pp. 1421-1433.

movement of the person, because it is a right connected to the integrity of the person. To a very limited extent, I believe this justifies us in seeing one aspect of the Treaty Freedoms as fundamental rights under the first principle. This is where the Treaty Freedoms prohibit restrictions on physical movement of individuals between Member States, i.e. refusals of entry or deportation.[105]

The reason to regard the Treaty Freedoms as fundamental rights associated with the second principle of justice would be that they protect the equal opportunity of all market participants to compete and have access to the market of another Member State regardless of their nationality. In so far as the Treaty Freedoms require equal treatment of market participants regardless of their nationality, the freedoms look like a partial codification of the principle of (formal) equality of opportunity. In order to demonstrate that the Treaty Freedoms can be fitted in this mould of equality of opportunity two things need to be shown. First, Rawls' principle of equality of opportunity requires that different social positions are open to all *individuals* of equal talent and ability, whereas the Treaty Freedoms apply not merely to *individuals* but also to *legal persons*, most notably companies. In order to treat the Treaty Freedoms as equal opportunity rights, we must accept that discrimination of companies on grounds of nationality limits equal opportunity of *individuals*. I find this a difficult issue, but I believe that in essence legal persons are no more than a conglomeration of individuals: legal persons represent real persons and companies employ real people. For this reason, it seems highly likely that discrimination on grounds of nationality of legal persons will have a negative effect on the opportunities of real people.[106]

However, we still need to establish that the Treaty Freedoms are in fact interpreted so that their underlying rationale can be seen as promoting equality of opportunity. This is the subject of the following chapter, where I wish to show that the ECJ's interpretation does not always fit the equality mould. In fact, I hope to show that where the ECJ applies a so-called broad test of market access that catches non-discriminatory measures it seems to move beyond this approach. The market access test is justified on the basis of the wealth-maximisation considerations often said to form the basis of the internal market project.

IV. The Treaty Freedoms and their Interpretation by the European Court of Justice

As indicated in the previous chapter, I enquire in this chapter whether and to what extent the Treaty Freedoms can be seen as protecting equality of opportunity by looking more closely at how the Treaty Freedoms have been interpreted by the ECJ. In particular, I wish to do two things: in the next subsection I first explain briefly the general legal framework that governs the interpretation of the Treaty Freedoms, then I will go on to discuss the general characteristics of the Treaty Freedoms as interpreted by the ECJ. This discussion is by no means comprehensive, but serves to outline the general characteristics of the Treaty Freedoms and their conceptual background. I do so by discussing two ways in which the Treaty Freedoms have been interpreted by the ECJ, one based on a discrimination-test including

[105] See Barnard 2010, p. 236-237.
[106] This position is supported by the recent decision of the ECJ in *DEB*, where the Court held that the fundamental right to have effective access to justice could be relied on by legal persons as well. ECJ 22 December 2010, no. C-279/09 (*DEB*), not yet published.

indirect discrimination, the other based on a broad market access test. As will be discussed, this latter test increasingly appears to be the predominant approach of the ECJ. My goal is to show that the market access test appears to go beyond what equality of opportunity requires and that for this reason the Treaty Freedoms cannot always be seen as fundamental rights protecting equality of opportunity. In chapter V I look more closely at how the ECJ has justified its thesis that the Treaty Freedoms are of the same rank as fundamental rights. That discussion also serves to assess whether there any other reasons to grant the Treaty Freedoms the status of fundamental rights consistent with the Rawlsian framework.

IV.1 Legal Framework and General Characteristics of the Treaty Freedoms

Article 26 (2) TFEU defines the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.' The Treaty Freedoms thus form the fundamental pillars of the internal market. The basic provisions laying down these Freedoms are Article 34-35 TFEU for the free movement of goods, Article 45 for the free movement of workers, Article 49 TFEU for the freedom of establishment, Article 56 and 57 TFEU for the freedom to provide services, and Article 63 TFEU for the freedom of capital.

Article 3 of the Treaty on European Union (TEU) states one of the primary objectives of the integration into the EU is the establishment of an internal market. It states, among other things that:

> 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement.'

Article 3 of the TEU thus links the establishment of an internal market to other goals. This makes clear that the establishment of the internal market is not so much perceived as an end in itself, but serves rather to attain other (social) goals such as a high level of employment and sustainable economic growth. Important in this respect is that the Treaty of Lisbon introduced the wording of 'a highly competitive *social* market economy' to Article 3 TEU and has the possible result that the Treaty Freedoms now have to be interpreted in a more 'social' manner.[107] This was signalled by Advocate General Cruz Villalón in the case of *Santos Palhota and Others* where he holds that since the coming into force of the Lisbon Treaty 'it has been necessary to take into account a number of provisions of primary social law which affect the framework of the fundamental freedoms.'[108] However, the effect of this bears not so much on the interpretation of the Treaty Freedoms themselves, but rather on their possible restrictions. As Cruz Villalón holds:

[107] Barnard 2010, p. 30.
[108] Opinion AG Cruz Villalón 5 May 2010, no. C-515/08, not yet published (*Santos Palhota and others*), para. 51.

> 'when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly.'[109]

Since the main question to be addressed in this paper is whether the Treaty Freedoms in themselves should be seen as being on the same footing as fundamental rights, the question of restrictions is less important. What is crucial is to determine whether the interest or value these freedoms protect merit the claim that they can be treated hierarchically equal to fundamental rights.

IV.II Non-Discrimination

One of the key principles underlying the four freedoms is the principle of non-discrimination on grounds of nationality, enshrined as a general principle of EU law in Article 18 TFEU. It requires that goods, persons, capital and services originating from another Member State are treated the same as those originating from the Member State itself. This also means that Member States retain regulatory freedom as long as they treat the domestic factors of production the same as those coming from other Member States.[110] The Treaty Freedoms therefore prohibit measures that directly discriminate on grounds of nationality, so-called distinctly applicable rules. Roughly, these are measures that subject goods and persons from another Member State to a different burden in law as well as in fact.[111]

However, the Treaty Freedoms do not merely prohibit such directly discriminatory rules. This would allow indirectly discriminatory barriers to free movement to remain in existence because goods and persons from different Member States could be subject to different burdens in fact although treated as legally equal. In allowing individual Member States to lay down their own rules regulating goods and persons it may subject those originating from another Member State to an extra regulatory burden. The ECJ has therefore moved beyond interpreting the Treaty Freedoms as merely prohibiting direct discrimination.[112]

This is shown by the development of the ECJ's case law on free movement of goods. In the renowned case of *Dassonville* it held that Article 34 TEU in principle prohibited '[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'.[113] In *Dassonville* the ECJ thus interpreted free movement of goods broadly, making potentially the 'entire spectrum of the national legal order' subject to review under the Treaty Freedoms.[114] The formula requires no discrimination between imported and domestic goods. This was explicitly affirmed in *Cassis de Dijon*, where the Court struck down a German provision laying down that liquers had to have an alcohol content of 25 per cent.[115] In *Cassis* the ECJ also introduced the principle of mutual recognition stating that goods lawfully produced in one Member State should be

[109] Opinion AG Cruz Villalón 5 May 2010, no. C-515/08, not yet published (*Santos Palhota and others*), para. 53.
[110] C. Barnard 2010, p. 18; see also Bernard 1996.
[111] Barnard 2010, p. 85.
[112] See Barnard 2010, p. 18-19
[113] ECJ 11 July 1974, no. 8-74, *ECR* 1974, p. 837 (*Dassonville*), para 5.

[114] Maduro 1998, p. 27
[115] ECJ 20 February 1979, no. 120/78, *ECR* 1979, p. 649 (*Cassis de Dijon*); see also Bernard 1996, p. 91.

allowed on the market of another Member State, unless such restrictions could be objectively justified.[116]

The difficulty with the ECJ approach in *Cassis* and *Dassonville* was its broad scope; it potentially brought all measures that affected trade in some way under the scope of the free movement of goods. The interpretation of free movement of goods in *Dassonville* and *Cassis* therefore, appeared to go far beyond what would be required by a discrimination test.[117] A difference can be made, however, between so called 'dual-burden rules' and 'equal-burden rules'. Dual-burden rules are those that have the effect of subjecting imported goods to an extra regulatory burden. Rules that regulate the content of goods, such as the rule in *Cassis de Dijon*, have such an effect. They make that imported goods have to comply with two regulatory burdens, those of the Member State of origin as well as the Member State into which they are imported. Therefore, they put imported goods at a disadvantage vis-à-vis domestic goods. This is different for equal-burden rules: such rules do not subject imported goods to an extra regulatory burden, but affect both imported and domestic goods equally, although they do have an effect on the total volume of inter-State trade.[118] The idea that the Treaty Freedoms also prohibit such dual burden rules can, unless objectively justified, be seen as a more refined discrimination test. It makes that the Treaty Freedoms not only prohibit formal discrimination but also substantive discrimination.[119]

The distinction between equal-burden rules and dual-burden rules had an influence on the case-law of the ECJ, in particular the case of *Keck*.[120] In *Keck* the ECJ made a distinction between rules regulating the characteristics of goods and provisions concerning selling arrangements. It ruled that Article 34 TFEU did not prohibit provisions of the latter type in so far as they 'affect in the same manner, in law and fact, the marketing of domestic products and of those from other Member States.'[121] Nonetheless, the distinction made in Keck between selling arrangements and the rules regulating the characteristics of goods is not without its problems. This is evident if one looks at the cases *Familiapress, De Agostini* and *Gourmet International*, in which the ECJ refined its ruling in Keck in two important ways.[122] In *Familiapress* the ECJ held that Austrian legislation that prohibited publishers to include prize competitions in their newspapers and magazines restricted the free movement of goods. The reason was that the Court held that 'even though the national legislation is directed against a method of sales promotion, in this case it bears on the actual content of the products, in so far as the competitions in question form an integral part of the magazine in which they appear.'[123] The ECJ thus held that certain selling arrangements affect the product itself and therefore fall within the scope of Article 34 TFEU.

[116] Craig and de Burca 2008, p. 679
[117] Bernard 1996, p. 90-92.
[118] Craig and de Burca 2008, p. 681; see also Barnard 2001, p. 3; see also Bernard 1996, p. 92-93.
[119] Spaventa 2004, p. 744-747.
[120] ECJ 24 November 1993, no. C-267/91 & C-286/91, *ECR* 1993, p. I-6097 (*Keck*).

[121] ECJ 24 November 1993, no. C-267/91 & C-286/91, *ECR* 1993, p. I-6097 (*Keck*), para. 16.

[122] ECJ 9 July 1997, no. C-34/95 & C-34/95, *ECR* 1997, p. I-03843 (*De Agostini*); ECJ 8 March 2001, no. C-405/98, *ECR* 2001, p. I-01795 (*Gourmet International*).
[123] ECJ 26 June 1997, no. C-368/95, *ECR* 1997, p. I-03689 (*Familiapress*), para 11.

In *De Agostini* and *Gourmet International* the ECJ applied the ruling in *Keck* that rules concerning selling arrangements may also restrict free movement of goods if they have 'a differential impact, in law or in fact, for domestic traders and importers.'[124] In *De Agostini* the ECJ considered that a Swedish prohibition on television advertising directed at children under the age of 12 could have such a differential impact, as such advertising could be the only way to penetrate the market for foreign companies.[125] In *Gourmet International* the ECJ held that a Swedish law restricting the advertisement of alcoholic beverages fell within the scope of Article 34 TFEU. This was because the law was 'liable to impede access to the market by products from other Member States more than it impedes access by domestic products'.[126]

In the area of services the distinction between equal burden and dual burden rules is also important. A service provider may be subject to such a double burden because he provides services in a state other than where he is established. He may therefore have to satisfy a dual regulatory burden.[127] However, the distinction between rules that impose a dual burden and rules that impose a single burden is less important in the area of free movement of workers and freedom of establishment. When it comes to establishment and free movement of workers only the regulation of the host state applies and measures that do not impose a dual burden can be indirectly discriminatory.[128] A good example of such measures are language requirements, they do not impose a dual burden on migrants but nonetheless have a particular detrimental effect on them. For this reason the ECJ gave a broad definition of indirectly discriminatory measures in *O'Flynn*, it ruled that indirectly discriminatory are those measures that 'affect essentially migrant workers' or those measures that 'can be more easily satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of migrant workers'.[129] Furthermore, it is not necessary to show that such measures actually have a detrimental effect on migrants, it suffices that the measures are liable to have such an effect.[130]

Regardless the differences between the discrimination test with respect to the different Treaty Freedoms, interpreting the Treaty Freedoms on the basis of a broad discrimination test, including seeing double burden rules as restrictions, is consistent with the idea that the Treaty Freedoms protect the right of market actors to have equal opportunity to participate on the market of any other Member State. Equal opportunity is not only impaired by measures that directly discriminate on grounds of nationality, but also by those rules that subject out of State market participants to an extra regulatory burden. The extra regulatory burden makes that they are in an unequal position vis-à-vis domestic market participants. This is because, insofar as it can be shown, that the rules of a Member State have a differential impact on out of state market participants and domestic market participants. The fact that the EU is characterised by great legal diversity between its Member States, makes that even an interpretation of the Treaty Freedoms based on a model of discrimination grants a broad scope to these Freedoms.

[124] Craig and de Burca 2008, p. 688.
[125] ECJ 9 July 1997, no. C-34/95 & C-34/95, *ECR* 1997, p. I-03843 (*De Agostini*), para. 42-44.
[126] ECJ 9 July 1997, no. C-34/95 & C-34/95, *ECR* 1997, p. I-03843 (*De Agostini*), para. 21.
[127] See also Bernard 1996, p. 96-97.
[128] See also Spaventa 2004, p. 746 and p. 748.
[129] ECJ 23 May 1996, no. C-237/94, *ECR* 1996, p. I-02617 (*O'Flynn*), para. 18-19. See also the discussion in Barnard 2010, p. 239-241; and Barnard 2001, p. 38.
[130] Barnard 2001, p. 37-38.

The crucial point is that on the basis of this model the Freedoms can still be seen as protecting equality of opportunity.[131]

In spite of all this, it is not always possible to fit the Treaty Freedoms only into the equality of opportunity mould. In its case-law the ECJ increasingly adopts an approach focused on market access. This approach, although this depends on the precise interpretation of the notion of market access, goes beyond an interpretation of the Treaty Freedoms based on promoting equality of opportunity.

Another problem is that the Treaty Freedoms do not apply to wholly internal situations, and for this reason do not prohibit so-called reverse discrimination. The Treaty Freedoms do not prohibit measures that favour foreign goods, capital, persons or services over national ones. Allowing such reverse discrimination is incompatible with an underlying rationale of equality of opportunity, as it allows non-national market participants to have a competitive advantage over domestic market participants. This is mitigated by the fact that it may be seen as a rule of jurisdiction: only where there is an inter-state element EU law applies, in other cases domestic law applies.[132] The rule has also been eroded to some extent.[133]

IV.III From Double Burden to Market access

The test laid down by the ECJ in *Keck* was soon criticized for focusing too much on factual and legal equality at the expense of asking whether rules concerning selling arrangements prevented market access.[134] In *Leclerc-Siplec* Advocate General Jacobs criticized the ECJ's ruling and proposed a different test. The case concerned a French petrol distributor that challenged a provision in French law that prohibited the distribution sector from advertising on television. Jacobs held that by applying the *Keck* test, the measure in question could be qualified as a selling arrangement not restricting Article 34 TFEU. Nonetheless, Jacobs argued that the ECJ's reasoning in *Keck* was unsatisfactory. According to him 'the exclusion from the scope of Article 30 [now Article 34 TFEU] of measures which "affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States" amounts to introducing, in relation to restrictions on selling arrangements, a test of discrimination.'[135] Crucially, Jacobs held that if 'an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade.'[136] Moreover, Jacobs held that restricting the application of Article 34 TFEU along the lines of such a test would be incompatible with the aim of establishing an internal market. The guiding principle for the interpretation of the free movement of goods had to be 'that all undertakings which engage in a legitimate economic activity in a Member State should have unfettered access to the whole of the Community market, unless there is a valid reason for denying them full access to a part of that market.'[137] The decisive criterion was to be whether the national measures substantially restricted market access.[138]

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[131] A difficult issue is the possible exit of capital which may undermine national social models, see Bader 2005, p. 337-338. I do not believe this can be said to fall under the protection of equality of opportunity.
[132] Barnard 2010, p. 230-231.
[133] Barnard 2010, p. 232-233.
[134] Weatherill 1996, p. 885-906.
[135] Opinion AG Jacobs 24 November 1994, no. C-412/93, p. I-00179 (*Leclerc Siplec*), para. 39.
[136] Opinion AG Jacobs 24 November 1994, no. C-412/93, p. I-00179 (*Leclerc Siplec*), para. 40.
[137] Opinion AG Jacobs 24 November 1994, no. C-412/93, p. I-00179 (*Leclerc Siplec*), para. 41.
[138] Opinion AG Jacobs 24 November 1994, no. C-412/93, p. I-00179 (*Leclerc Siplec*), para. 42

This proposed market access-test by AG Jacobs is considerably different from an approach that focuses on factual and legal equality. Its underlying rationale goes beyond a prevention of discrimination and therefore to ensure equal treatment of market participants. The interpretation of the Treaty Freedoms based on equality of opportunity leaves open the possibility that markets remain fragmented along national lines and hinder the 'realisation greater economies of scale and wider consumer choice in an integrating market'.[139] Such fragmentation of national markets is problematic in light of the aim of establishing an internal market that serves to maximise overall total efficiency, but is not required by equality of opportunity for market participants. For example, very strict regulation of the use of particular goods in a Member State has an equal effect on the opportunities of foreign and domestic market participants. However, such regulation does have a significant effect on inter-state trade and impedes market access of out-of-state distributors of such goods.[140] In addition, the test focused on market access proposed by Jacobs does not require a differential impact on foreign goods, persons or capital.[141]

Nonetheless, the market-access test increasingly serves as the predominant approach to the Treaty Freedoms, although there is disagreement as to the precise meaning of market access. In *Leclerc-Siplec* the Court simply applied the *Keck*-test and did not adopt AG Jacobs' reasoning, however it appeared to do so in other cases. In *Alpine Investments*, a case concerning the free movement of services, the ECJ did apply a market access test.[142] There the ECJ held that a Dutch rule prohibiting companies from contacting individuals by telephone without their consent to offer them financial services, was contrary to the freedom to provide services. Even though the rule had no differential impact on domestic and foreign service providers, it was nevertheless held to be a restriction on the free movement of services. The ECJ reasoned that it deprived the service providers from 'a rapid and direct technique for marketing and for contracting potential clients in other Member States'[143] and 'directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services.'[144] In *Bosman*, which concerned free movement of workers, the Court similarly focused on market access and required no differential impact on domestic and out-of-state workers in order to find the measure contrary to Article 45 TFEU.[145]

In the interpretation of free movement of services, workers and freedom of establishment, the market access-test is now well established although there is disagreement to how the notion should be interpreted.[146] This focus on market access can be traced back to *Säger*.[147] The Court there held that the freedom to provide services (Article 56 TFEU) required:

[139] Weatherill 1996, p. 895 and 894; see also Jacobs in Opinion AG Jacobs 24 November 1994, no. C-412/93, p. I-00179 (*Leclerc Siplec*), para. 40; see also Barnard 2010, p. 21.
[140] Barnard 2001, p. 46.
[141] Barnard 2001, p. 49.
[142] Weatherill 1996, p. 892; ECJ 10 May 1995, no. C-384/93, ECR 1995, p. I-01141 (*Alpine Investments*).
[143] ECJ 10 May 1995, no. C-384/93, ECR 1995, p. I-01141 (*Alpine Investments*), para 28.
[144] ECJ 10 May 1995, no. C-384/93, ECR 1995, p. I-01141 (*Alpine Investments*), para. 38.
[145] Weatherill 1996, p. 893. En verwijzing naar ECJ 15 December 1995, no. C-415/93, *ECR* 1995, p. I-04921 (*Bosman*).
[146] See section IV.IV.
[147] ECJ 25 July 1991, no. C76/90, *ECR* 1991, p. I-4221 I (*Säger*); see also Barnard 2010, p. 253.

> '[N]ot only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.'[148]

In *Säger* the ECJ thus formulated a broad test on the basis of which all national measures that potentially restrict free movement are caught by the free movement provisions, although the *Säger-formula* leaves open a number of different interpretations. The market access test is now also used in the area of free movement of capital, where the ECJ has accepted the *Säger*-formula as the norm.[149]

The crucial question in applying this market-access test is whether national measures *substantially* hinder market access, in which case the national measures will be seen as a restriction on free movement. An example of a case in which this was not held to be so, was the case of *Graf*. In this case a German national who worked in Austria, Mr. Graf, challenged a rule of Austrian law which entitled employees to compensation in case their employment relationship was terminated without their consent after a period of three years or more. Mr. Graf had voluntarily terminated his employment contract to take up employment in Germany, but argued that the Austrian rule restricted the free movement of workers. In his view it made moving to another state less attractive because by moving to Germany he lost the opportunity of being dismissed in Austria and consequently, the opportunity to claim compensation. The ECJ rejected this view, because the entitlement to compensation was 'dependent on a future hypothetical event, namely the subsequent termination of his contract without such termination being at his own initiative or attributable to him.'[150] Moreover, this was considered to be 'too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers'.[151] In summary, the Austrian rule did not form a restriction on free movement of workers, because it did not substantially impede market access. Commentators have argued that the case of *Keck* should be understood on the basis of this principle, namely that the selling arrangement which was under scrutiny in *Keck* did not substantially hinder market access.[152]

With the rulings in *Commission v Italy (Trailers)* and *Mickelsson and Roos* the ECJ finally appears to have opted for this approach. In these cases, the ECJ chose to apply the market access approach also in the area of free movement of goods.[153] In *Trailers* the ECJ decreed on an Italian law that trailers could not be pulled by motorcycles. A number of Member States argued that the rule laid down in *Keck* should be applied by analogy and that the Italian restriction on the use of trailers should be presumed to be legal. The Court, however, decided that the Italian prohibition constituted a restriction of the free movement of goods. In essence, this was because the Italian prohibition prevented a demand for trailers pulled by motorcycles from arising.[154] The Court distinguished three types of measures that could constitute a

[148] ECJ 25 July 1991, no. C76/90, *ECR* 1991, p. I-4221 I (*Säger*), para. 12.
[149] Barnard 2010, p. 571-574.
[150] ECJ 27 January 200, no. C-190/08, *ECR* 2000, p. I-513 (*Graf*), para 24.
[151] ECJ 27 January 200, no. C-190/08, *ECR* 2000, p. I-513 (*Graf*), para. 25.
[152] Barnard 2001, p. 13-16; Weatherill 1996, p. 12-17.
[153] Spaventa 2009, pp. 919-923; Barnard 2010, p. 103-108.
[154] ECJ 10 February 2009, no. C-110/05, *ECR* 2009, p. I-519 (*Commission v Italy* (*Trailers*)), para 57.

measure of equivalent effect. Firstly, these are 'measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably'.[155] Secondly, measures for 'goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods [...] even if those rules apply to all products alike.'[156] But also '[a]ny other measure which hinders access of products originating in other Member States to the market of a Member State'.[157] It was this latter test that the Court applied in *Trailers*. The Italian rule prohibiting the use of trailers towed by motorcycles did not fall within the first two categories, as it subjected Italian trailers to a similar burden as trailers coming from outside Italy by regulating their use. But, by preventing a demand for such trailers from arising, it did hinder the market access of such products on the Italian market.[158]

The judgment in *Trailers* was confirmed by the ECJ's decision in *Mickelsson and Roos*.[159] In *Mickelsson and Roos* the main question was whether Swedish legislation restricting the use of water jet-skis to specially designated waterways and generally navigable waterways, was compatible with the free movement of goods. Again, the Court held that the severe restrictions on the use of jet skis in Sweden were likely to affect consumer demand for these products and therefore constituted a restriction on market access.[160] The Court did maintain, however, that the Swedish measures for the most part could be justified for the aim of protecting the environment.[161]

IV.IV The Meaning of Market Access

A difficult issue is to determine what the notion of market access means precisely and what the rationale of interpreting the Treaty Freedoms on the basis of a market access test is. Spaventa distinguishes between three possible meanings of the notion market access. Firstly, the meaning of market access can be understood in economic terms. In a narrower view, market access means 'the ability for an economic actor to gain access to a market on an *equal footing* with other economic operators.'[162] In a broader view 'any regulation can be seen as a potential barrier to access, since *any* regulation imposes compliance costs.'[163] Taking this latter approach as the norm the crucial question becomes whether or not such regulation is arbitrary, if it is, the restriction of market access is unjustified. As Spaventa correctly notes and as we have seen in the two previous subsections, the tension between these two economic interpretations is reflected in the case law of the ECJ.[164]

The second possible meaning Spaventa distinguishes is what she calls the meaning based on an intuitive approach. This intuitive approach is a middle way between the two different economic interpretations of the notion of market access. It goes beyond a test based on discrimination, but tries to provide a distinction for rules 'which should be subjected to judicial scrutiny, and rules considered neutral as regards intra-Community trade which should

[155] ECJ 10 February 2009, no. C-110/05, *ECR* 2009, p. I-519, para. 37.
[156] ECJ 10 February 2009, no. C-110/05, *ECR* 2009, p. I-519, para 35.
[157] ECJ 10 February 2009, no. C-110/05, *ECR* 2009, p. I-519, para. 37.
[158] See also the discussion in Barnard 2010, p. 104-108.
[159] ECJ 4 June 2009, no. C-142/05, *ECR* 2009, p. I-04273 (*Mickelsson and Roos*).
[160] ECJ 4 June 2009, no. C-142/05, *ECR* 2009, p. I-04273 (*Mickelsson and Roos*), para. 26-27.
[161] ECJ 4 June 2009, no. C-142/05, *ECR* 2009, p. I-04273 (*Mickelsson and Roos*), para. 34-44.
[162] Spaventa 2004, p. 757.
[163] Spaventa 2004, p. 757.
[164] Spaventa 2004, p. 757-758.

fall together outside the scope of the Treaty free movement provisions.'[165] The problem with this intuitive approach is that it suffers from 'definitional deficiency'[166] because it has no coherent normative underpinning. The intuitive approach therefore fails as a means to distinguish clearly between rules falling within the scope of the free movement rules and those that do not.[167]

The third possible meaning of market access is that based on the formal restrictions approach of Advocate General Fennelly. On the basis approach non-discriminatory measures that form a necessary precondition for taking up a particular activity in another Member State, such as exercising a specific profession or trading certain goods, are contrary to the free movement provisions unless objectively justified.[168] As with the intuitive approach, this approach based on formal restrictions has no clear and coherent normative underpinning: there is no good reason why these formal restrictions are caught under the free movement rules, whereas others are not.[169]

It is doubtful whether there is currently a coherent normative underpinning of the notion of market access. Spaventa argues that the interpretation of the Treaty Freedoms based on a market access test in essence means that the ECJ is protecting a right of the individual not to be subjected to unjustified regulation in exercising an economic activity. In effect, this means that the Court now requires a justification for all restrictions on economic freedom.[170] The real issue, according to Spaventa is not one of market access 'but whether the measure in place regulating use, or any other rule for that matter, is such as to discourage the importer from attempting to penetrate the market either because it reduces the consumer base or it increases costs.'[171] The rationale for this interpretation, according to Spaventa, can be found in 'the broader aim of ensuring the competitiveness of the internal market as a whole, i.e. the competitiveness of the sum of 27 national markets, and the need to dispose such rules which, either because of the way they are drafted or because of economic and technological developments, are sub-optimal or altogether unnecessary.'[172] Snell comes to a similar conclusion and holds that the notion of market access serves to conceal a choice between an interpretation of the free movement rules on the basis of discrimination and anti-protectionism, or an interpretation based on economic freedom.[173] He holds that if the latter option is the rationale for the Treaty Freedoms it means that 'it would as a matter of logic have to ban all rules limiting the commercial freedom of traders.'[174]

Thus, the most coherent justification of the notion of market access seems the broad economic view identified in the above: any regulation is a potential barrier to market access, because it increases costs or reduces the width of the market. It is such an approach that the ECJ seems to apply in cases such as *Trailers* and *Mickelsson and Roos*. In its application, however, the

[165] Spaventa 2004, p. 758.
[166] Spaventa 2004, p. 759.
[167] Spaventa 2004, p. 758-759.
[168] Spaventa 2004, p. 759-760 drawing on the test proposed in Opinion 16 September 1999, no. C-190/08, *ECR* 2000, p. I-513 (*Graf*).
[169] Spaventa 2004, 759-764
[170] Spaventa 2004, p. 764-766; see also Spaventa 2009, p. 924- 925.
[171] Spaventa 2009, p. 924.
[172] Spaventa 2009, p. 925.
[173] Snell 2010, p. 470-472.
[174] Snell 2010, p. 468.

ECJ adopts a more intuitive approach. It does not necessarily engage in an economic analysis of the rules under scrutiny but applies the concept of market access intuitively.[175]

IV.V Evaluation

To what extent are we entitled to see the Treaty Freedoms as fundamental rights? On the basis of the foregoing analysis, we must make a three-fold distinction between the Treaty Freedoms.

Firstly, as established already in section *III.8* the Treaty Freedoms can be seen as fundamental rights associated with Rawls' first principle of justice where they prohibit limitations on the physical free movement of individual persons. This means that the Treaty Freedoms can be seen as such fundamental rights where they prohibit entrance refusals to individual citizens of Member States in the EU or their forcible deportation from the territory of a Member State in which they reside.

Secondly, where the Treaty Freedoms prohibit national measures that are discriminatory, including where they subject out of State persons and goods to a double regulatory burden, they can be seen as fundamental rights associated with the principle of fair equality of opportunity.

If we accept Rawls' lexical hierarchy between his two principles of justice, we would have to accept that there should be a hierarchical relation between these two aspects of the Treaty Freedoms. Where the Treaty Freedoms prohibit restrictions on the physical free movement of individual persons they are part of the basic rights and liberties associated with the first principle of justice that ranks higher than equality of opportunity, as equality of opportunity belongs to the second principle of justice. Only if we reject the lexical ordering between the first principle of justice and the principle of fair equality of opportunity, may we be able to accept that in many cases the Treaty Freedoms are to be treated hierarchically equal as other fundamental rights. At the end of this paper I will consider to some extent whether this is a viable option.

Third, where the Treaty Freedoms prohibit national measures that are not in this way discriminatory but merely limit market access in the broad sense discussed in the two previous subsections, they cannot be seen as fundamental rights. In this interpretation the function of the Treaty Freedoms is to ensure the competitiveness of the markets of the Member States, which does not constitute an interest that justifies these rights being accorded the status of fundamental rights. However, it has to be noted that there is disagreement whether this broad market access test is really what the Court relies on in its case-law. As has been said, the notion of market access leaves open a variety of interpretations among which a test focused more on equal treatment.[176] In fact, the case-law of the ECJ in this respect lacks coherence.[177] Moreover, although some have argued that 'the *Keck* distinction based on the

[175] Spaventa 2009, p. 923.

[176] An alternative understanding of the case-law has been proposed by AG Maduro in *Alfa Vita*, where he argues that the Treaty Freedoms should be seen as prohibiting discrimination against the exercise of freedom of movement. This means that Member States must take 'into account the effect of the measures they adopt on the position of all European Union citizens wishing to assert their rights to freedom of movement. See para. 40 and 46 of Opinion AG Maduro 30 March 2006, no.C-148/04 and C-159/04, *ECR* 2006, p. I-8135 (*Alfa-Vita*)..

[177] Snell 2010, p. 467.

type of rules is no longer relevant'[178], it has not yet been abandoned by the Court. The point I wish to make, however, is that where the Court relies on a broad market access test outlined in the previous two subsections, it cannot claim for the Treaty Freedoms a status hierarchically equal to that of fundamental rights.

Therefore, in cases where there is a conflict between a fundamental right and a Treaty Freedom the ECJ should distinguish between these three different interpretations of the Treaty Freedoms. In the next chapter we will see that the Court makes no such distinctions and offers very little justification for its position that the Treaty Freedoms are hierarchically equal to fundamental rights.

V. The ECJ's Case-law on Conflicts between Fundamental Rights and the Treaty Freedoms

V.I Schmidberger

The obvious starting point is the case of *Schmidberger* as it was the first case in which the protection of a fundamental right was invoked by a Member State to justify restricting one of the Treaty Freedoms. The case concerned a conflict between the free movement of goods and the fundamental rights to freedom of speech and assembly, as the restriction of free movement resulted from an environmental demonstration blocking the Brennerpas. This led Schmidberger, an international transport company, to bring an action before the *Landesgericht Innsbruck*, claiming that the blockade amounted to an unlawful restriction of the free movement of goods. On appeal, the *Oberlandesgericht Innsbruck* raised a number of preliminary questions concerning the application of the free movement of goods to the case at hand.

One of the questions raised by the referring Austrian court dealt precisely with the relative position of fundamental rights and the free movement of goods. The Austrian court had raised the question whether 'the objective of an officially authorized political demonstration' was to be deemed 'of a higher order than the provisions of Community law on the free movement of goods'.[179] The ECJ did not formulate an explicit answer to that question but only ruled on the merits of this specific case. Nonetheless, from the way both the Advocate-General and the ECJ decided the case, it can be inferred that they held that there is no relation of hierarchy between the different types of rights. This can be inferred most easily from the ECJ's statement that in the case of conflict between the two different types of rights that 'the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.'[180] Some have even argued that the ECJ and the Advocate-General's reasoning showed a preference for the free movement rights. Both took the free movement of goods as the guiding principle and then enquired whether restrictions on it could be justified for the protection of fundamental rights. This approach may have the consequence that the burden of proof falls on those willing to exercise their fundamental rights, as they need to justify it as a restriction on free movement.[181] However, I believe such concerns can be alleviated as long as the Court always

[178] Spaventa 2004, p. 10.
[179] ECJ 12 June 2003, no. C-112/00, *ECR* 2003, p. I-5659 (*Schmidberger/Austria*), par. 25.
[180] ECJ 12 June 2003, no. C-112/00, *ECR* 2003, p. I-5659 (*Schmidberger/Austria*), par. 81.
[181] See Brown 2003, p. 1507-1508; Hinarejos in the context of the Viking and Laval-cases argues, however, that the ECJ has little choice in such cases: 'Once the Court had come to the necessary conclusion that the

applies a double proportionality test: it must enquire not only whether the restriction on the Treaty Freedom is appropriate, necessary and reasonable but also whether the restriction on the fundamental right is appropriate, necessary and reasonable (see also section V.V below). The second of these tests would prevent disproportional restrictions of fundamental rights while laying the burden of proof with those wishing to restrict the fundamental right. In *Schmidberger* the Court indeed suggested that such a double test of proportionality should be applied in cases of conflict between fundamental rights and Treaty Freedoms.[182] That it did not enquire in detail whether protection of the Treaty Freedom could justify a restriction of a fundamental right, is perhaps better explained by the fact that such an enquiry was unnecessary after the Court had concluded the Treaty Freedom could be restricted.

What is more troubling is that neither the ECJ nor the Advocate-General offered much in terms of justification for treating the Treaty Freedoms and fundamental rights of equal rank. The ECJ pointed to the 'fundamental role assigned to the free movement of goods in the Community system, in particular for the proper functioning of the internal market'.[183] Advocate-General Jacobs even reasoned against treating the protection of fundamental rights as always providing a legitimate reason for restricting the free movement rights for the following reason:

> '97. Let us suppose however for a moment a (purely hypothetical) legal order of a Member State which expressly recognizes the fundamental right to fundamental right to be protected against unfair competition from other firms and in particular from firms established abroad; or national case-law under which a similar right is recognized as a facet of the fundamental right of free economic activity or the fundamental right of property. It must moreover be borne in mind that despite a basic consensus reflected in the European Convention on Human Rights about a core of rights which must be regarded as fundamental, there are a number of divergences between the fundamental rights catalogues of the Member States, which often reflect the history and particular political culture of a given Member State.'[184]

One reason for not maintaining a hierarchical relationship between fundamental rights and the Treaty Freedoms is therefore that establishing such a hierarchy could be at odds with the whole idea of creating an internal market if there are national constitutional rights that are incompatible with the creation of an internal market. However, if we ground our understanding of fundamental rights on Rawls' political theory, we would have to conclude that the hypothetical constitutional right Jacobs speaks of should not be qualified as a fundamental right at all.

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fundamental right could not be outside the scope of EC law, it followed that the ECJ had to find a way to fit the legitimate protection of fundamental rights within the structure of the EC Treaty, which the Court was set up to apply. The only way to do this was to consider the protection of the fundamental right at stake a possible justification for not complying with the provisions of the Treaty.' See Hinarejos 2008, p. 728.

[182] ECJ 12 June 2003, no. C-112/00, *ECR* 2003, p. I-5659 (*Schmidberger/Austria*), para. 79-81.
[183] ECJ 12 June 2003, no. C-112/00, *ECR* 2003, p. I-5659 (*Schmidberger/Austria*), para 60.
[184] Opinion AG Jacobs 11 July 2002, no. C-112/00, *ECR* 2003, p. I-5659 (*Schmidberger/Austria*), par. 97.

V.II Omega

The next case in which the ECJ dealt with a conflict between a free movement right and a fundamental right was the *Omega*-case. Omega was a German company that operated a so-called 'laserdrome'. In this 'laserdrome' customers could play a game in which they simulated killing each other by shooting at each other with laserguns. The equipment needed for this game was provided by the British company Pulsar International Ltd. The game, however, was prohibited by the German authorities as it offended the constitutional value of human dignity. In the appeal case against this prohibition, the German *Bundesverwaltungsgericht* raised the preliminary question of whether this prohibition unlawfully restricted the freedom to provide services. The ECJ found that there was indeed a restriction of the freedom to provide services, but that this restriction could be justified for the purpose of respect for protecting fundamental rights. In doing so it confirmed its ruling in *Schmidberger*. The Court recognised the respect for human dignity a general principle of Community law capable of restricting the freedom to provide service. However, a difference with the *Schmidberger* case was that the restrictive measure was not based on protection of a fundamental right directly but rather on grounds of public policy. The German conception of human dignity did not correspond 'to a conception shared by all Member States'[185] and therefore could not be equated to 'that of the guarantee of human dignity as recognised in Community law.'[186] And as Advocate-General Stix-Hackl explained, a restriction of a Treaty Freedom cannot be based directly on a specific fundamental right protected by the constitution of a Member State. However, a common conception of a fundamental right was not necessary where the restriction was based on grounds of public policy and indirectly on the protection of a national constitutional right.[187] The ECJ, therefore, held that the German prohibition of the laser game was justified on the public policy exception of Article 52 TFEU (ex Article 46 TEC).[188]

In this case especially the opinion of Advocate General Stix-Hackl is interesting, as she deliberates explicitly on the question of whether there is a hierarchy between the Treaty freedoms and fundamental rights. Stix-Hackl first affirms that both Treaty Freedoms and fundamental rights are primary law and therefore in principle have the same hierarchical rank.[189] Nonetheless, she also asks the further question as to whether:

> 'in view of the fundamental rights safeguarded in general by fundamental law and human rights, in the light of the Community's conception of itself as a community founded on the observance of such rights and, above all, having regard to the need in today's world to have recourse to commitment to the protection of human rights as a prerequisite for the legitimacy of all State orders, fundamental and human rights could in general be afforded a certain precedence over 'general' primary legislation.'[190]

Her answer is negative because, according to her, the Treaty Freedoms 'can also perfectly well be materially categorized as fundamental rights – at least in certain respects: in so far as they lay down prohibitions on discrimination, for example they are to be considered a specific

[185] ECJ 14 October 2004, no. C-36/02 , *ECR* 2004, p. I-9609 (*Omega Spielhallen*), para. 37.
[186] Opinion AG Stix-Hackl 18 March 2004, no. 36/02, *ECR* 2004, p. I-9609 (*Omega Spielhallen*), para. 92.
[187] Opinion AG Stix-Hackl 18 March 2004, no. 36/02, *ECR* 2004, p. I-9609 (*Omega Spielhallen*), para. 71.
[188] ECJ 14 October 2004, no. C-36/02 , *ECR* 2004, p. I-9609 (*Omega Spielhallen*), para. 35-41; see also Opinion AG Stix-Hackl 18 March 2004, no. 36/02, *ECR* 2004, p. I-9609 (*Omega Spielhallen*), para. 92-93.
[189] Opinion AG Stix-Hackl 18 March 2004, no. 36/02, *ECR* 2004, p. I-9609 (*Omega Spielhallen*), para. 49
[190]Opinion AG Stix-Hackl 18 March 2004, no. 36/02, *ECR* 2004, p. I-9609 (*Omega Spielhallen*), para 50.

means of expression of the general principle of equality for the law.'[191] However, according to her this does not mean that in case of conflict both rights have to be weighed against each other per se, as that 'would imply that the protection of fundamental rights is negotiable.'[192] What Stix-Hackl proposes is that in case of conflict, the weighing of the interests takes place with recourse to the specific facts of the case and also that the possible restrictions on the Treaty Freedoms are 'construed as far as possible in such a way as to preclude measures that exceed allowable impingement on the fundamental rights concerned and hence to preclude those measures that are not reconcilable with fundamental rights.'[193] In dealing with conflicts between Treaty Freedoms and fundamental rights, the ECJ therefore has to avoid the situation where a fundamental right is restricted in favour of a Treaty Freedom in a way that is incompatible with the possible restrictions of those fundamental rights. Stix-Hackl here thus suggests a double-proportionality test as discussed in the previous subsection. But as Ackermann correctly notes: 'If a "fair balance" is struck between the interests involved, as was held in the *Schmidberger* judgment, it cannot be ruled out that the fundamental freedom concerned prevails over the fundamental rights.'[194] Stix-Hackl also leaves open the possibility that a fundamental right is restricted in a way incompatible with the fundamental right, as she only states that such restrictions are to be avoided 'as far as possible'. Moreover, the fact that she holds that there is no hierarchical ordering between the two different types of rights makes it possible in theory that such restrictions can be accepted in some cases, such as in a case where the exercise of the fundamental right is contrary to the objectives of the internal market. It was such a situation that faced the Court in the case of *Viking*, where trade unions exercised their fundamental right to collective action in order to prevent a company from using its freedom of establishment. In deciding this case, the Court opted in favour of the Treaty Freedoms.

V.III Viking

The cases of *Viking* and *Laval* were two cases in which the fundamental social right to collective action conflicted with freedom of establishment and freedom to provide services respectively. In *Laval* issues were complicated by what was considered an inadequate implementation of the Posted Workers Directive in the Swedish legal order (Directive 96/71/EC). The most important case for the purposes of this paper is therefore that of *Viking*.

In *Viking* the conflict between the freedom of establishment and the fundamental right to collective action arose because the Finnish ferry operator Viking planned to reflag to Estonia one of its vessels, the Rosella, operating on the route between Tallin (Estonia) and Helsinki (Finland). The Rosella was operating at a loss as a result of competition with Estonian vessels operating with lower wage costs. Viking's attempt to reflag this vessel met with resistance from the Finnish union of seamen (FSU) to which the crew of the vessel was affiliated and the international federation of transport workers (ITF) to which the FSU was affiliated. The policy of the ITF ensured that the only trade union where the Finnish ferry operator could negotiate with was the Finnish FSU. Furthermore, the unions threatened with collective actions in order to prevent the reflagging of the vessel. Viking maintained that this infringed its right to freedom of establishment, whereas both trade unions justified their actions as an exercise of their fundamental social right to collective action. A difficult issue was that the

[191] Opinion AG Stix-Hackl 18 March 2004, no. 36/02, *ECR* 2004, p. I-9609 (*Omega Spielhallen*), para. 50
[192] Opinion AG Stix-Hackl 18 March 2004, no. 36/02, *ECR* 2004, p. I-9609 (*Omega Spielhallen*), para. 53
[193] Opinion AG Stix-Hackl 18 March 2004, no. 36/02, *ECR* 2004, p. I-9609 (*Omega Spielhallen*), para. 53.
[194] Ackermann 2005, p. 1118.

collective actions of the trade unions had the goal of maintaining working conditions of the Finnish personnel, whereas for Viking the whole purpose of reflagging the vessel was to adjust the working conditions to the Estonian level.[195]

In considering this issue, the ECJ first held that the freedom of establishment could be invoked by Viking against the trade unions as their actions were 'aimed at the conclusion of an agreement which is meant to regulate the work of Viking's employees collectively, and, that those two trade unions are organisations which are not public law entities but exercise legal autonomy conferred on them, inter alia, by national law.'[196] It then held that the trade unions' envisaged collective actions were a restriction of the freedom of establishment.[197] The question therefore became whether those actions could be justified and here the ECJ took a roughly similar approach as it had taken in *Schmidberger* and *Omega*. It held that the right to collective action, including the right to strike, had to be considered a fundamental right the protection of which is a legitimate interest capable of justifying a restriction on one of the Treaty Freedoms.[198] The difference with previous case-law, however, was that the ECJ allowed the protection of the fundamental right as such a justification only insofar as its exercise was consistent with the objective of the protection of workers and in accordance with the requirements of proportionality. The ECJ thus took the objective pursued by the exercise of the fundamental right to collective action, the protection of workers, as the relevant legitimate interest and not the exercise of the fundamental right itself.[199] It held that the national court needed to ascertain whether the actions of both FSU and ITF satisfied the principle of proportionality in reference to this goal of the protection of workers. But the Court gave some guidelines and made a distinction between the actions of FSU and ITF. Concerning the actions of the FSU, the ECJ stated that it was for the national Court first to ascertain whether the workers' jobs or conditions the collective action intended to protect, were really under threat. If so, the national court would then have to consider whether the collective action was 'suitable for ensuring the objective pursued and whether it was necessary to attain that objective.'[200] In this respect the Court gave two further guidelines to the national court. On the one hand, it had to take in mind that collective action may be one of the principal ways for workers and trade unions to protect their interests.[201] On the other hand, the national court had to ascertain whether FSU did not have at its disposal less restrictive means to ensure its objective.[202]

This is a stringent test, and by deciding the case in this way, the ECJ made the exercise of the fundamental right to collective action conditional on the requirement that trade unions have no other less restrictive means available for the protection of workers. A problem with this argument is that 'industrial action is intended to cause harm to the employer'[203] and those forms of action that create more harm are likely to be more effective. The danger is that the test laid down in *Viking* makes that unions have to use less restrictive alternatives that are not

[195] See ECJ 11 December 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*), para 72.
[196] ECJ 11 December 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*), para. 60.
[197] ECJ 11 December 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*), para. 72-74.
[198] ECJ 11 December 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*) ECJ 11 December 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*), para. 44 and para. 77.
[199] ECJ 11 December 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*), para. 80. See also Davies 2008, p. 141-142.
[200] ECJ 11 December 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*), para. 84.
[201] ECJ 11 December 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*), para. 86.
[202] ECJ 11 December 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*), para. 87.
[203] Davies 2008, p. 143.

very effective.[204] The reasoning of the Court is therefore in favour of the Treaty Freedoms, the Court goes very far in requiring that the fundamental right is exercised in accordance with the rules on free movement.

Concerning the actions of ITF, the Court held an even stricter test had to be applied. The Court stated that 'to the extent that that policy results in shipowners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified.'[205] The Court objected in particular to the fact that ITF's policy against the reflagging of vessels to a country other than that of its beneficial ownership, applied irrespective of whether that reflagging would be harmful to the work or conditions of employment of its employees.[206]

Interestingly, the Court did little to justify its strict approach. Also Advocate-General Maduro offered little in terms of a justification. Although Maduro interpreted the Treaty Freedoms in a manner consistent with a rational of equality of opportunity, he regards equal treatment of market participants as merely instrumental in achieving allocative efficiency and greater overall welfare in the EU:

> 'Essentially, they [the free movement rights, NdB] protect market participants by empowering them to challenge certain impediments to the opportunity to compete on equal terms in the common market. The existence of that opportunity is the crucial element in the pursuit of allocative efficiency in the Community as a whole. Without the rules on freedom of movement and competition, it would be impossible to achieve the Community's fundamental aim of having a functioning common market.'[207]

Essentially, Maduro brought forward a vision of the internal market where the interests of workers cannot be protected in a way incompatible with the aim of achieving an internal market:

> 'Blocking or threatening to block, through collective action, an undertaking established in one Member State from lawfully providing its services in another Member State is essentially the type of trade barrier that the Court held to be incompatible with the Treaty in *Commission v France*, since it entirely negates the rationale of the common market.'[208]

However, in these statements we do not find any justification for the idea that the internal market is more important than the protection of workers or the protection of fundamental rights. In fact, Maduro comes no further than the assertion that market integration is important for efficiency and greater total welfare, but as we have established before, such reasons do not justify treating the Treaty Freedoms as hierarchically equal to fundamental rights.

V.IV Laval

[204] Davies 2008, p. 143; see also the comments made by Bercusson 2007, p. 304.
[205] ECJ 11 December 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*), para. 88.
[206] ECJ 11 December 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*), para. 89.
[207] Opinion AG Maduro 23 May 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*), para. 33.
[208] Opinion AG Maduro 23 May 2007, no. C-438/05, *ECR* 2007, p. I-10779, 2007 (*Viking*), para. 68.

As stated before, the *Laval* case also concerned a conflict between a Treaty freedom and the right to collective action. However, whereas *Viking* concerned the freedom of establishment, *Laval* concerned a conflict between the right to collective action and the freedom to provide services. The legal issues in *Laval* appeared to be more complex, in particular as the Court held that the Posted Workers Directive was incorrectly transposed in Swedish law.[209] Another difference with *Viking* was that in *Laval* the Court itself ruled on the question of whether the principle of proportionality had been complied with. Strikingly, the Court held that this condition was not fulfilled, thereby ruling in favour of the Treaty freedom over the fundamental right to collective action.

Laval was a Latvian construction company which had commenced work on building sites in Sweden through its Swedish subsidiary and posted workers from Latvia to do the job. In response to this the Swedish trade union in the relevant sector started negotiations with Laval with the purpose of making Laval sign the building sector's collective agreement. Those negotiations, however, broke down and eventually led the trade union with support of the electricians' trade union to commence collective actions against Laval. These actions included a blockade of Laval's working sites in Sweden. Ultimately, the whole series of events had the result that Laval's subsidiary in Sweden was declared bankrupt. In the meantime, Laval had commenced proceedings against the Swedish trade union claiming, among other things, that the collective action amounted to a violation of Article 56 TFEU. The preliminary questions posed to the ECJ mainly concerned the question of whether the collective actions constituted an unlawful restriction to the freedom to provide services as enshrined in Article 56 TFEU.

The first important point to note is that the ECJ interpreted Article 56 TFEU in light of Posted Workers Directive. The Posted Workers Directive requires that Member States lay down certain minimum requirements regarding working conditions to guarantee that posted workers receive a minimum level of protection equal to that of domestic workers, and so to ensure fair competition between domestic undertakings and out-of-State undertakings providing services operating on the same market. The Directive provided for two main ways of implementation, either by 'law, regulation or administrative provision' or by 'collective agreements or arbitration awards which have been declared universally applicable'.[210] Lest a Member State has no mechanism to declare collective agreements universally applicable the Directive provides for two other means of implementation. Sweden had implemented the Directive by legislation, except for the provisions on pay. In the building sector, pay was left to individual negotiation on a case-by-case basis. Although the Court held that Member States were at liberty to implement the Directive by a means different from those summed up in the Directive, it held that the Swedish implementation of the provisions on pay was not in accordance with the Directive.[211] As noted by Davies '[t]his process was presented as too onerous and uncertain for firms.'[212] Furthermore, the conditions of the collective agreement that the Swedish trade union wanted Laval to sign went beyond what was laid down in

[209] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, *OJ* 1997 L 18, p. 1.
[210] Article 3 (1) Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, *OJ* 1997 L 18, p. 1.

[211] ECJ 18 December 2007, no. C-341/05, *ECR* 2007, p. I- 11767, 2007 (*Laval un Partneri*), see para. 69-71.

[212] Davies 2008, p. 129.

Swedish legislation and required Laval to pay certain insurance premiums. The ECJ held that this was incompatible with the Posted Workers' Directive.[213]

Subsequently, the Court considered the relation between Article 56 TFEU and the right to collective action. As in the case of *Viking*, it held that the right to collective action is a fundamental right and that the protection of fundamental rights is a legitimate interest that can justify restrictions on the freedom to provide services.[214] Thus the Court had to consider whether such a restriction existed, and if so whether that restriction could be justified. Firstly, the Court held that Article 56 TFEU did apply to trade unions as well, as the rules of the collective agreements were 'designed to regulate, collectively, the provision of services.'[215] Secondly, the collective action was held to be 'liable to make it less attractive, or more difficult' for foreign undertakings to carry out construction work in Sweden, because 'in order to ascertain the minimum wage rates those undertakings may be forced, by way of collective action, into negotiations with the trade unions of unspecified duration at the place which the services are to be provided.'[216] It was, therefore, the incorrect implementation of the Posted Workers' Directive that was essential for the Court's finding that a restriction on the freedom to provide services existed.

The Court accepted that the fundamental right to collective action with the purpose of protecting workers was a legitimate interest that could justify a restriction on free movement, but that it had to be exercised in compliance with the principle of proportionality. It also accepted that the blockading actions fell within the scope of the protection of workers.[217] However, the Court held that that objective could not justify the specific obligations which the trade union sought to impose on undertakings established in other Member States, because they went beyond the minimum level of protection laid down pursuant to the Posted Workers Directive.[218] Moreover, the Court held that the system of settling conditions of pay through individual negotiations made it excessively difficult for employers to determine their obligations.[219] The Court therefore concluded that the trade union's collective actions amounted to an unlawful restriction on the freedom to provide services. This shows that in *Laval* the Court's main concern was that the Posted Workers' Directive had not been implemented correctly in the Swedish legal order. The use of collective action resulting from this was therefore considered to be incompatible with Union law.[220]

Again, the justification for the Court's solving of the conflict between the fundamental right and the Treaty Freedom was limited. Advocate-General Mengozzi did offer some reflections on the hierarchy between the Treaty Freedoms and fundamental rights. In response to the argument that the Treaty Freedoms should not apply to the protection of fundamental rights he held:

> 'To reject in all cases the applicability of the freedoms of movement provided for in the Treaty with the aim of guaranteeing the protection of fundamental rights would in reality amount to upholding a hierarchy between the rules or principles of primary law

[213] ECJ 18 December 2007, no. C-341/05, *ECR* 2007, p. I- 11767, 2007 (*Laval un Partneri*), para. 80-81.
[214] *Viking*, paras. 90-95.
[215] ECJ 18 December 2007, no. C-341/05, *ECR* 2007, p. I- 11767, 2007 (*Laval un Partneri*), para. 98.
[216] ECJ 18 December 2007, no. C-341/05, *ECR* 2007, p. I- 11767, 2007 (*Laval un Partneri*), para. 99.
[217] ECJ 18 December 2007, no. C-341/05, *ECR* 2007, p. I- 11767, 2007 (*Laval un Partneri*), para. 107.
[218] ECJ 18 December 2007, no. C-341/05, *ECR* 2007, p. I- 11767, 2007 (*Laval un Partneri*), para. 108.
[219] ECJ 18 December 2007, no. C-341/05, *ECR* 2007, p. I- 11767, 2007 (*Laval un Partneri*), para. 110.
[220] Davies 2008, p. 137.

> which, if not necessarily entirely inappropriate, is not allowed as Community law stands at present.'[221]

Perhaps Mengozzi is right in holding that declaring inapplicable the free movement rights whenever the protection of fundamental rights is at stake, is not allowed under Union law. Nonetheless, the *de facto* establishment of a hierarchy between fundamental rights and the Treaty freedoms is clearly reconcilable with it. The Treaty Freedoms have always allowed for a wide range of restrictions and holding that restrictions are legitimate and proportionate when restrictions result from the lawful exercise of fundamental rights, is possible under Union law. Applying the stricter test of proportionality, as the ECJ did, is not necessitated by the Treaties.

V.V Commission v. Federal Republic of Germany

Another case in which there was a conflict between the fundamental rights to collective bargaining was the case of *Commission v. Federal Republic of Germany* (C-271/08).[222] German local authorities and local undertakings had awarded service contracts for occupational pension schemes to specific pension schemes providers without following the procedures for the awarding of public service contracts under Directives 92/50/EEC and 2004/18/EC. As the specific providers were identified in a collective agreement, the case also concerned the fundamental right to collective bargaining and to autonomy in collective bargaining. Advocate-General Trstenjak held that the case concerned a conflict between this fundamental right and the freedom to provide services and the freedom of establishment, as both Directives 92/50/EEC and 2004/18/EC were intended to give effect to these freedoms.[223] For this reason the Advocate-General dwelled on the relation between the Treaty Freedoms and fundamental rights. She held that both types of rights had equal status:

> 'In the case of a conflict between a fundamental right and a fundamental freedom, both legal positions must be presumed to have equal status. That general equality in status implies, first, that, in the interests of fundamental rights, fundamental freedoms may be restricted. However, second, it implies also that the exercise of fundamental freedoms may justify a restriction on fundamental rights.'[224]

AG Trsetenjak also proved to be critical of the Court's approach in *Viking* and *Laval* stating that the ruling in those two cases was at odds with the idea that both types had to be ranked equally:

> '183. The approach adopted in Viking Line and Laval un Partneri , according to which Community fundamental social rights as such may not justify – having due regard to the principle of proportionality – a restriction on a fundamental freedom but that a written or unwritten ground of justification incorporated within that fundamental right must, in addition, always be found, sits uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms.

[221] Opinion AG Mengozzi 23 May 2007, no. C-341/05, *ECR* 2007, p. I- 11767, 2007 (*Laval un Partneri*), para. 84.
[222] Opinion AG Trsetenjak 14 April 2010, no. C-271/08, not yet published (*Commission v. Federal Republic of Germany*).

[223] Opinion AG Trsetenjak 14 April 2010, no. C-271/08, not yet published (*Commission v. Federal Republic of Germany*), para. 176-177.
[224] Opinion AG Trsetenjak 14 April 2010, no. C-271/08, not yet published (*Commission v. Federal Republic of Germany*), para. 81.

> 184. Such an analytical approach suggests, in fact, the existence of a hierarchical relationship between fundamental freedoms and fundamental rights in which fundamental rights are subordinated to fundamental freedoms and, consequently, may restrict fundamental freedoms only with the assistance of a written or unwritten ground of justification.'

The reason why Trsetenjak held the Treaty Freedoms and fundamental rights to be of equal rank was that it is possible 'to formulate the substantive guarantee inherent in fundamental freedoms in terms of fundamental rights, in particular, using fundamental rights which protect economic activity.'[225] Here the Advocate-General relies on an article produced by Prechal en De Vries who state that the Treaty Freedoms can quite easily be seen as fundamental rights. Firstly, because they can be seen economic fundamental rights protecting the right pursue a trade or business. Secondly, because the Treaty Freedoms protect citizens' non-economic interest such as the right to reside and travel freely between Member States, and prohibit discrimination on grounds of nationality.[226]

According to Trsetenjak this means in practice that a two way test has to be applied on the basis of which it has to be determined that a restriction on a Treaty Freedom does not go beyond what is appropriate, necessary and reasonable, nor that a restriction on the fundamental right goes beyond what is appropriate, necessary and reasonable.[227] This test is to ensure that a fair balance is struck between the rights at stake and so to create 'the optimum effectiveness of fundamental rights and fundamental freedoms.'[228]

V.VI Evaluation

The reasoning of the Court in the cases discussed is broadly similar. The protection of fundamental rights in all these cases was considered to be a restriction on free movement to be justified under the mandatory requirements. Whereas in the cases of *Schmidberger* and *Omega* the Court held that a proper balance between the different interests had to be struck, in *Viking* and *Laval* the Court opted for a test more in favour of the Treaty Freedoms. What is problematic is that the Court offers so little justification for its position that the Treaty Freedoms are at least hierarchically equal as fundamental rights. In most cases, it simply establishes that the achievement of an internal market is fundamental aim of the European Union and that its requirements therefore have to be reconciled with that of fundamental rights. Such reasoning is insufficient. The establishment of an internal market for reasons of wealth maximization is no reason for upgrading the Treaty Freedoms to the status of fundamental rights.

Positive exceptions are the opinion of Advocate General Stix-Hackl in *Omega* and that of Advocate General Trsetenjak in *Commission v. Federal Republic of Germany*, where both deal more extensively with the hierarchy between the free movement rights and fundamental rights. In *Omega*, Stix-Hackl holds that where the Treaty Freedoms prohibit discrimination they can be treated as fundamental rights, but offers no reasons as to why they would have to be treated as such where the application of the Treaty Freedoms goes beyond a prohibition on

[225] Opinion AG Trsetenjak 14 April 2010, no. C-271/08, not yet published (*Commission v. Federal Republic of Germany*), para. 187.
[226] Prechal en De Vries 2008, p. 434-435; See also Prechal , p. 60-61.
[227] Opinion AG Trsetenjak 14 April 2010, no. C-271/08, not yet published (*Commission v. Federal Republic of Germany*), para. 190.
[228] Opinion AG Trsetenjak 14 April 2010, no. C-271/08, not yet published (*Commission v. Federal Republic of Germany*), para. 191.

discrimination. Moreover as I have argued in this paper, the prohibition of discrimination on grounds of nationality when exercising an economic activity is a right associated with the principle of equality of opportunity and not a fundamental right associated with the first principle of justice. Rawls does not explicitly state that among the basic rights and liberties is a general right to equal treatment or a right to formal equality before the law. The reason is that equality is a value that plays a foundational role in the whole of his theory and that Rawls wants to show that when we start from a position of full equality – the original position – we would come to accept that unequal treatment is sometimes justified. So affirmation of a general principle of equality before the law is possible under Rawls' framework, but it allows for exceptions. One case where this can be so, is in allowing inequalities in wealth and income on the basis of the difference principle. But inequalities in wealth and income may also be justified if they are necessary to protect equality of opportunity. And where protection of the basic rights and liberties conflicts with equality of opportunity, it is the protection of the former that should prevail. It is in this manner that the value of equality plays a complex role in Rawls' conception of justice as a whole, and it is why Rawls does not count a general right to equal treatment among the basic rights and liberties. So if we wish to establish that the Treaty Freedoms are hierarchically equal to other fundamental rights, we need to argue that there should be no lexical ordering between the principle of fair equality of opportunity and the first principle of justice.

The idea brought forward in the opinion of Advocate General Trsetenjak in *Commission v. Federal Republic of Germany* and also by de Vries and Prechal, that the Treaty Freedoms can be seen as seen fundamental economic rights protecting the right pursue a trade or business is correct in so far as they mean that it protects equality of opportunity. However, as I have argued in the previous chapter, careful distinctions need to be made between various interpretations of the Treaty Freedoms in order to ascertain whether it can be seen to protect equality of opportunity.

However, a similar critique possibly applies to the treatment I have given so far of what constitute fundamental rights. In the foregoing I have treated a range of different fundamental rights as being of higher rank than the Treaty Freedoms. But it may be doubted whether all fundamental rights should be associated with Rawls' first principle of justice. The right to collective action for example is of a somewhat peculiar nature. On the one hand it is a concomitant of the fundamental right to freedom of assembly, on the other hand it seems to have its main purpose in ensuring a fair distribution of wealth between employers and employees. In this sense we may associate it more with Rawls' second principle of justice. Moreover, collective action is also instrumental in achieving efficiency.[229] For these reasons we may argue that the right to collective action is a fundamental right not as important as the basic rights and liberties we affirm as a first requirement of justice.

VI. Conclusion

In this paper the question was addressed whether the position of the ECJ that that there is no hierarchical relation between the Treaty Freedoms and fundamental rights is justified as a matter of justice, more specifically from the viewpoint of Rawls' political theory. The short answer to that question is that the ECJ's position is at least a simplification and fails to

[229] See Bercusson 2007, p. 290 and 305.

distinguish between different values or interests the Treaty Freedoms can be seen to protect, i.e. physical free movement, equal treatment and wealth maximization.

In Chapter II it was first explained that the use of political philosophy was appropriate and necessary in answering the central question of this paper, because the special importance we give to the protection of fundamental rights cannot merely be explained by referring to their legal status. Rather their special importance is to be understood as a requirement of justice. This paper is based on the idea that we protect persons' fundamental rights, because we take persons to have certain basic interests that are fundamental and which therefore deserve special protection. If we wish to establish that certain rights are equally fundamental or hierarchically equal, they must equally protect such basic interests. To enquire what these basic interests are, what rights they justify and whether this includes the Treaty Freedoms, the political theory of John Rawls was used as a normative framework.

The discussion of Rawls' theory and justification of fundamental rights was then the subject of Chapter III. There it was concluded that as a matter of justice we have reason to accord special protection to two classes of rights. Firstly, everyone is entitled to a set of basic rights and liberties roughly comparable to traditional civil and political liberties and rights, and basic rights to food, clothing, education and medical care. These rights are associated with Rawls' first principle of justice. On a strict interpretation of his theory a basic right can only be limited when necessary for the protection of another one of these basic rights. The second class of rights is the class of rights associated with the principle of fair equality of opportunity. It includes the right to formal equality of opportunity, the right to minimally adequate employment opportunities and the right of access to a roughly equivalent education, although it can be doubted whether the latter two rights are to be enshrined in a constitution.

In Chapter IV it was then assessed whether the Treaty Freedoms should be seen as fundamental rights hierarchically equal to other fundamental rights generally so recognised. There it was argued that the Treaty Freedoms can be seen as fundamental rights in two respects. Where they prohibit restrictions on physical free movement of individuals in the Union, they can be seen as fundamental rights covered by the first principle of justice. More often, however, they can be seen as a species of the right to formal equality of opportunity. This is where they prohibit the – direct or indirect - discrimination of market participants from other Member States on grounds of nationality, or where they prohibit that these market participants are subject to double regulatory burdens. In these situations the Treaty Freedoms can be said to protect the right of out-of-state market participants to compete equally with domestic market participants and therefore their equality of opportunity. However, in certain cases the ECJ seems to adopt a broader market access test. There the question seems not so much whether national measures impinge on the equal opportunity of all market actors, but rather whether the national regulation increases costs or reduces the width of the market for those market actors without sufficient justification. On this interpretation the function of the Treaty Freedoms is said to be that of ensuring the competitiveness of the markets of the Member States. Important as that may be, it cannot justify giving the Treaty Freedoms an equal rank as fundamental rights if we base ourselves on Rawls' political theory. The Treaty Freedoms therefore should not be seen as fundamental rights where they protect market access in this broad sense and the ECJ should carefully distinguish between these different interpretations. However, it is not fully clear to what extent the ECJ actually adopts this broad market-access approach in the case-law as the notion of market access leaves open a variety of interpretations.

In Chapter V it was discussed in more detail how the ECJ has so far approached conflicts between fundamental rights and the Treaty Freedoms, and how it has justified its position that the Treaty Freedoms rank equally with fundamental rights. There we saw that the reasoning of the ECJ is, in most cases, very limited and that it fails to distinguish adequately between the type of restriction the national protection of a fundamental right constitutes. This is to be regretted and should be improved.

If we follow the normative framework of Rawls' theory of justice strictly, we would have to conclude that in almost all cases, the protection of fundamental rights should be given priority over the protection of the Treaty Freedoms. In principle, the protection of the Treaty Freedoms does not form a sufficient reason to justify the restriction of fundamental rights, except in those limited cases where the Treaty Freedoms protect physical free movement of individuals. However, in section *III.5* the strict hierarchical ordering between the different rights and principles of justice was nuanced. We may find that interpreting the priority of the first principle should not be so strict. Furthermore, we may wish to reject the hierarchy between the basic rights and liberties and equality of opportunity altogether. Rawls' justification for a hierarchy between both types of rights is that equality of opportunity has to do with the economic opportunities of individuals and their eventual economic position in society, whereas the basic rights and liberties associated with the first principle of justice protect more fundamental interests of individuals. However, a choice of occupation is often so central for persons in realising their conception of the good that it merits to be counted among the basic rights and liberties. If individuals are denied a job because of features not having to do with their talent and ability this is likely to be a severe impediment to their realisation of their conception of the good and not just an impediment to gain a greater amount of income. If so, the position of the ECJ that there is no hierarchy between the Treaty Freedoms and fundamental rights is justified to the extent that the Treaty Freedoms can be seen to protect equality of opportunity. However, the Court should distinguish more clearly between cases where equality of opportunity is at stake and cases in which it is merely market access in the broad sense that is restricted. In the latter case, the ECJ should at least regard the protection of fundamental rights as more important. In cases where the Treaty Freedoms can be seen as protecting equality of opportunity and where they conflict with other fundamental rights, the Court is justified in construing the conflict as a right-right conflict in which a fair balance has to be sought.

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