Whose Freedom is it Anyway? The Fundamental Rights of Companies in EU Law

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Granting fundamental rights to companies – nature of freedom as a fundamental value in EU law – intrinsic value of protecting freedom of individuals and instrumental value of protecting freedom of companies – Dan Cohen and rationale for protecting rights of organisations – transformation of the right to conduct business in EU law in *Alemo Herron* and subsequent case law – from right to do that which the law allows to right to be free from constraints – whose freedom is at stake when a company's right to conduct business is protected – theories of the firm – company as a nexus of contracts or as a subject of rights on its own behalf – company as a locus of authority and as a jurisdiction – protecting freedom of company to restrict freedom of human beings – ideological underpinnings of extensive protection of freedom of companies – dehumanisation of fundamental rights.

Introduction

Companies enjoy increasingly extensive protection of their fundamental right to conduct business under European Union (EU) law. This article will examine whether this protection is justified by reference to the foundational value of human freedom. In other words, does the way in which EU law protects the fundamental rights of companies to conduct business promote the freedom of individual human beings within the EU?

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The universal value of freedom is claimed to be one of the foundational principles of the EU.[1]. The idea of the EU as an institution which provides individuals with a greater measure of freedom has been a central element of the self-idealisation of the European project,[2] and has played a key role in the justification and legitimacy of the claims of authority which the EU makes over the member state. Munch affirms that 'European law is a major force in advancing individual autonomy by emancipating the individual from traditionally established national constraints'.[3] This statement is not merely presented as a description of the sociological import of the process of European integration, but is given normative force – it is presented as part of the justification and legitimation for the EU project, and for the demands and limitations which this project imposes on national democracies. As Azoulai remarks 'the story often told' about the EU is of a loosening of national ties and of 'making space for greater individual emancipation and self-determination'.[4]

The operating assumption which will provide the point of departure for this paper is that the freedom that 'counts' as an EU fundamental value is the freedom of individual human beings. Nonetheless, the Charter of Fundamental Rights of the EU (the Charter) protects the rights not only of natural persons, but also of legal persons. The right to conduct business under Article 16 of the Charter, in particular, is relied almost exclusively by companies. This article will examine whether protecting the freedom of companies to conduct business promotes the freedom of human beings. It will proceed in three steps. First, it will examine the nature of freedom as a fundamental value in EU law, and how this value is connected to the freedom and autonomy of individual human beings. Second, it will analyse the way the Court of Justice of the EU (the Court) has interpreted Article 16 in its case law, and conclude that this right appears to protect the freedom of companies not to be subject to regulatory constraint in their economic activities. Third, it will assess whose freedom is being protected. It will establish that it is the freedom of the company, and not of individual human beings, which is being protected. The article will then conclude that, by protecting the freedom of companies in this way, the Court does not promote the freedom of human beings and instead risks 'dehumanising' fundamental rights[5] and limiting the political freedom of Europeans.

[1]Art. 2 TEU.

[2]*See* for example, the White Paper on the Future of Europe COM(2017)2025, describing how the European project resulted in '500 million citizens living in freedom' (p. 6).

[3]R. Munch, 'Constructing a European Society by Jurisdiction', 14 *European Law Journal* (2008) p. 519.

[4]L. Azoulai 'The European Individual as Part of Collective Entities', in L. Azoulai et al., *Constructing the Person in EU Law* (Hart Publishing 2016).

[5]The argument that extending human rights protection to corporate persons entails the dehumanisation of human rights is made in T. Isiksel, 'The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights', 38 *Human Rights Quarterly* (2016) p. 294.

Freedom as a foundational value of the EU

Freedom, as a concept and as a normative principle, is both extremely broad and highly contested. As Honneth remarks 'freedom is one of the most controversial notions of modernity'.[6] It is not the purpose of this article to provide any kind of comprehensive exposition of freedom, but there are four key points that will be helpful in framing the discussion of Article 16.

First, freedom, as MacCullum highlighted[7], always concerns a triadic relationship between *x*: an agent – someone who is/would be free; *y*: some 'preventing condition[s]' – obstacles or impediments affecting *x*; and *z*: an action or state of affairs which *x* would be free to do or enjoy, but for *y*. There may be disagreements about what kind of agent 'counts', whether only human beings can be free, or whether we speak of the freedom of collective entities, such as states or peoples. There are, famously, disagreements about what kind of obstacles count. Proponents of 'negative' conceptions of freedom insist that only 'deliberate interference by other human beings'[8] constitutes a restriction on freedom, while others count other factors that limit an agent's sphere of action. There may also be disagreements about what kind of actions or outcomes are the proper object of freedom. Some insist that freedom only concerns actions or outcomes which the agent actually desires or intends, whereas others include what the agent would have desired, but for some limiting factor.[9] But in all different conceptions of freedom, the same triadic relationship between agent *x,* preventing condition *y* and outcome *z* is present. This insight allows us to start from a very capacious understanding of freedom, while still allowing us to distinguish freedom from other social attributes that we consider valuable, such as efficiency or welfare.

Second, as the focus of this article is on freedom as a foundational value underpinning the EU legal order, we can narrow down the range of conceptions of freedom that can be applicable. Freedom is listed in Article 2 of the Treaty on European Union (TEU) as one of the 'values on which the Union is founded'. Still, these are not just EU values, they are expressly claimed to be 'common to the Member States' and are intended to reflect a commitment, on the part of the EU, 'to the postulates of liberal-democratic constitutionalism'.[10] This ties the concept

[6]A. Honneth, *Freedom's Right* (Polity 2014).

[7]G. MacCallum, 'Negative and Positive Freedom', 76 *The Philosophical Review* (1967) p. 312.

[8]I. Berlin, 'Two Concepts of Liberty', in I. Berlin, and H. Hardy (eds.), *Liberty: Incorporating Four Essays on Liberty* (Oxford University Press 2002).

[9]I. Carter, 'Positive and Negative Liberty, in E. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2022 end), at ⟨https://plato.stanford.edu/archives/spr2022/entries/liberty-positive-negative/⟩ visited 3 June 2022.

[10]A. von Bogdandy, 'Founding Principles', in A. von Bogdandy and J. Bast, *Principles of European Constitutional Law*, 2nd edn. (Hart Publishing 2009) p. 22.

of freedom in EU law to what Dan Cohen describes as 'the autonomy paradigm'.[11] According to this paradigm, the normative point of reference is the individual human being 'as an autonomous moral agent, possessed of dignity and deserving of respect'.[12] This understanding of freedom as autonomy is made clearer by the connection between freedom and two other key 'postulates of liberal-democratic constitutionalism' set out in Article 2 TEU: democracy and human rights. Democracy can be described as a means to achieve freedom – as an instrument which secures the freedom of individuals from the torment of heteronomy,[13] or the freedom of individuals not to be subject to authority which cannot be justified to them.[14] The importance of human rights has been said to relate to the 'significance of the freedoms that forms the subject matter of those rights'.[15] Rights are valuable, under this approach, because they secure an area of moral space within which individuals are free to pursue their own plans and projects. According to Habermas, human rights and democracy are co-original, and are essential conditions to secure both the private autonomy of individual citizens and the public autonomy of those citizens as members of a political community.[16] The Preamble to the European Convention on Human Rights expressly states that an effective democracy and respect for human rights are the means by which individual freedoms can be secured.[17] Taken together, all these elements link freedom as an EU value to the ideal of autonomy and self-determination.

Third, freedom and well-being are conceptually distinct normative principles. Well-being, welfare, utility, these terms relate to what Dan Cohen terms 'the utility paradigm'.[18] Under this paradigm, the key legitimising principle of the legal order is not freedom or autonomy, but overall utility. What is valuable or morally correct is that which tends to produce well-being,[19] or to increase aggregate utility. Under this paradigm, the fact that an action, or state of affairs, or institution, will tend to increase autonomy will not, of itself, have any moral weight.[20] Of course, if the overall well-being is increased by promoting autonomy – if most members of the community derive happiness from having greater autonomy, or if they have

[11]M. Dan Cohen, *Rights, Persons and Organisations*, 2nd edn. (Quid Pro Quo Books 2016).

[12]Ibid., p. 51.

[13]H. Kelsen, *The Essence and Value of Democracy*, trans. B. Graf (Rowman and Littlefield 2013).

[14]R. Forst, *The Right to Justification*, trans. J. Flynn (Columbia University Press 2012).

[15]A. Sen, 'Elements of a Theory of Human Rights', 32 *Philosophy and Public Affairs* (2004) p. 315 at p. 319.

[16]J. Habermas, *Between Facts and Norms*, trans. W. Rehg (Polity 1996) p. 121 ff.

[17]ECHR, Recital 4.

[18]Dan Cohen, *supra*, n. 11.

[19]S. Nathanson, 'Act and Rule Utilitarianism', *Internet Encyclopedia of Philosophy*, ⟨https://iep.utm.edu/util-a-r/⟩ visited 3 June 2022.

[20]L. Haworth, 'Autonomy and Utility', 95 *Ethics* (1984) p. 5.

a preference for autonomy, then the maximisation of overall utility will require an increase in individual autonomy. However, under the utility paradigm, the value of increasing autonomy is contingent and instrumental, rather than intrinsic. Conversely, a minimum amount of well-being may well be necessary for individuals to be able to exercise freedom.[21] That still does not reduce freedom to only well-being – freedom has a moral value which is independent of, and distinct from, well-being. Furthermore, as Sen has shown, the ambition of organising society in a way that maximises total welfare is not compatible with upholding liberal freedom.[22] The point of freedom as autonomy is precisely that the individual should be free to pursue her or his own conception of the good, even where this may be considered to undermine the overall collective good.[23]

Fourth, the freedom that 'counts' as an EU fundamental value is the freedom of individual human beings. As the preamble to the Charter points out, the EU 'places the individual at the heart of its activities'. The first foundational value listed in Article 2 TEU is 'human dignity' and Article 1 of the Charter holds that 'Human dignity is invaluable. It must be respected and protected'. The Explanations to the Charter emphasise that human dignity is 'not only a fundamental right in itself but constitutes the real basis of fundamental rights'.[24] It therefore appears logical to assume that, to the extent that EU fundamental rights promote and uphold the value of freedom, it is the freedom of individual human beings that is at stake.

Freedom of corporate entities

The Charter protects the rights not only of natural persons, but also of corporate legal persons. This also reflects the common constitutional traditions of the member states, as well as the approach taken in the European Convention on Human Rights (ECHR).[25] If we understand the normative force of freedom in light of the autonomy paradigm, and in light of the inherent dignity of individual human beings, then we can see that the freedom of corporate entities does not have *intrinsic* normative force. As Dan Cohen observes, organisations 'exist only as means. As such ... they do not deserve or admit of the special kind of respect which gives rise to individual [autonomy rights]'.[26] Therefore, protecting the freedom of a company cannot be justified in the name of the freedom of that company.

[21]A. Sen, 'Well-being, Agency, Freedom', 82 *The Journal of Philosophy* (1985) p. 169 at p. 217.

[22]A. Sen, 'The Impossibility of a Paretian Liberal', 78 *Journal of Political Economy* (1970) p. 152.

[23]Dan Cohen, *supra* n. 11, p. 51.

[24]Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/02.

[25]For an overview of the rights of companies under the ECHR *see* M. Emberland, *The Human Rights of Companies* (Oxford University Press 2006).

[26]Dan Cohen, *supra* n. 11, p. 55.

In some instances, protecting the freedom of a corporate entity can be justified where this is necessary to protect the freedom of individual human beings. Clear examples of this include:

- protecting the freedom of a newspaper to publish a story may be necessary to protect the freedom of speech of the individual journalist or journalists who wrote the story;[27]
- ensuring the freedom of a church to operate may be necessary to protect the freedom of the individual church members to practise their religion;[28]
- protecting the existence of an organisation as a legal entity may be necessary to secure the freedom of association of its members;[29]
- requiring compensation when a company is deprived of its property may be necessary to protect freedom of that company's owners or shareholders to peacefully enjoy their property.[30]

In these cases the rights which would protect the individual human beings are extended to the corporate entities within which those individuals exercise those rights.[31]

Protecting group freedom in order to uphold individual freedom

In some cases, protecting the freedom of individuals may require extending rights to corporate entities even in situations where interference with those entities' rights would not lead to a direct interference in individual freedom. Dan Cohen calls these rights 'derivative autonomy rights'. His illustration[32] may help clarify the matter. The freedom of a university to conduct disciplinary proceedings against its students may be justified by reference to the autonomy right of academic freedom of the faculty staff. Allowing the university autonomy in making decisions concerning students may protect the institution as a space within which academic freedom can be exercised. So even if restricting the freedom of the university to discipline the student does not lead to a direct restriction of the individual professor's academic freedom, it will undermine a structure which is seen as necessary to enable academic freedom to flourish. Similarly, banning the activities of political parties is a restriction on the freedom of citizens to participate in free

[27]ECtHR 20 March 2004, No. 53984/00, *Radio France and Others* v *France*.

[28]ECtHR 31 July 2008, No. 40825/98, *Religionsgemeinschaft der Zeugen Jehovas* v *Austria*.

[29]ECtHR 5 October 2006, No. 72881/01, *Moscow Branch of the Salvation Army* v *Russia*.

[30]ECtHR 20 November 1995, No. 17849/91, *Pressos Compania Naviera S.A.* v *Belgium.*

[31]This can extend as far as requiring the state to respect the ability of the corporate entity to impose its own rules and obligations on its members. *See* in particular J. Levy, *Rationalism, Pluralism and Freedom* (Oxford University Press 2014).

[32]Dan Cohen, *supra* n. 11, p. 67.

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and fair elections, because the freedom to participate in free elections requires there to be a plurality of political parties.[33]

Dan Cohen asserts that 'derivative autonomy rights' are only available to organisations that have as their goal the protection of individual autonomy rights (such as universities, who have as one of their goal the promotion of academic freedom or, in my example, political parties). I suggest however, that at least in some cases corporate entities can enjoy derivative autonomy rights even where those entities do not have as a goal the protection of individual autonomy rights. Previously[34] I have used the *Yukos Oil* case[35] as an example of where protecting the rights of a company which clearly did not have as its goal the protection of individual autonomy rights, may be necessary to protect individual freedom. This occurs where the state exercises its power to regulate the economy by persecuting corporate entities *arbitrarily*, or in a manner designed to stifle political dissent.[36] Such state action against a company may undermine the political freedom of everyone in that state.[37]

To conclude, the EU foundational value of freedom protects the freedom and autonomy of individual human beings. In some circumstances, this may entail protecting the rights of companies, where such protection is necessary to protect the freedom of individual human beings, or to protect structures which support individual freedom. However, the freedom of companies does not have any intrinsic normative value.

Article 16 – the right to conduct business

The right to conduct business is protected under Article 16 of the Charter, which provides that 'the freedom to conduct a business in accordance with Union law and national laws and practices is recognised'. This right protects both natural and

[33]ECtHR 14 February 2006, No. 28793/02, *Christian Democratic Party* v *Moldova*. Of course banning the activities of that party may also directly interfere with the freedom of association and freedom of expression of the party's members.

[34]E. Gill-Pedro, 'Proportionality and the Human Rights of Companies under the ECHR – Whose Interests are at Stake?', 89 *Nordic Journal of International Law* (2020) p. 327.

[35]Judgment (Merits) of 20 September 2011, No. 14902/04 *Yukos Oil* v *Russia* (App.).

[36]Yukos Oil was a company founded by the 'oligarch' Mikhail Khodorkovsky, who became a critic and political opponent of the Russian president Vladimir Putin.

[37]Emberland notes that 'the Convention's democracy concept places considerable emphasis on the ability of the private sphere to keep "critical control of the exercise of public power"': M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press 2006) p. 43. Therefore the ECtHR can intervene where public power is exercised arbitrarily in a manner likely to undermine the ability of private parties to contest or control the exercise of power by the state.

legal persons, but from the case law examined below it is clear that it is mostly the rights of companies that are the subject of litigation.[38] According to the Explanations to the Charter 'this right is based on Court of Justice case-law'. In fact, it can be said that it was the original EU fundamental right: fundamental rights were first recognised by the Court as part of the Union legal order in *Internationale Handelsgesellschaft*.[39]

The approach of the Court to the right to conduct business underwent a transformation when the Charter came into force. In its initial case law, the Court insisted that companies did not have a general right to be free from regulation. In *Nold*[40] the Court expressly states that the right to conduct business, to the extent that it is protected under EU law 'can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity'.[41] This was reaffirmed in subsequent case law,[42] prior to the coming into force of the Charter. As Groussot et al point out, the right to conduct business was considered a 'weak' right, and in reviewing the compatibility of EU regulatory measures with the right to conduct business, the Court limited itself to assessing whether that measure 'contains a manifest error or constitutes a misuse of power or whether the authority in question did not clearly exceed the bounds of its discretion'.[43]

Importantly, this interpretation did not entail a prima facie right to operate in the market free from regulation. Companies had a right to conduct business in the market only 'in accordance with EU law and national law and practice'.

[38]A Eur-Lex search of the ECJ's case law for judgments where the phrase 'freedom to conduct a business/freedom to conduct business' is present in the title or text gives 119 results. Discounting 15 cases which concerned freezing of assets under the Common Foreign and Security Policy (which concern deprivation/control of use of property, rather than interference in freedom to conduct a business), as well as two cases where the pleas were declared inadmissible, leaves 102 cases. Of these, five were brought by private persons and 97 by companies or other corporate entities.

[39]ECJ 17 December 1979, Case 11/70 *Internationale Handelsgesellschaft mbH*, ECLI:EU:C:1970:114.

[40]ECJ 14 May 1974, Case 4/73, *Nold* v *Commission*, ECLI:EU:C:1974:51.

[41]Ibid., para. 12.

[42]For a review of the case law, *see* E. Gill-Pedro 'Freedom to Conduct Business in EU Law: Freedom from Interference or Freedom from Domination?', 9 *European Journal of Legal Studies* (2016) p. 103.

[43]X. Groussot et al., 'Weak Right, Strong Court – The Freedom to Conduct Business and the EU Charter of Fundamental Rights', in S. Douglas-Scott and N. Hatzis (eds.), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2019). Wetherill also states that 'Article 16 of the Charter does not disallow a broad range of interventions by public authorities which limit the exercise of economic activities, provided only that the public interest behind the intervention is adequately demonstrated': S. Wetherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract"', 10 *European Review of Contract Law* (2014) p. 167 at p. 178.

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Companies effectively had the right to do that which the law allows them to do. But if the law did not allow them to conduct business in the way they prefer, then they could not rely on Article 16 to challenge that law. This fits with the understanding of 'derivative autonomy rights' presented above. If public entities can exercise their power over market actors arbitrarily, by preventing them from doing something which the law allows them to do, this may undermine the political freedom of everyone. However, merely requiring companies to abide by the applicable laws will not interfere with anyone's human rights.

The transformation of the right to conduct business

Prior to the coming into force of the Charter, the right to conduct business had been considered by the court exclusively in respect of challenges to EU measures. This changed after the Charter came into force. The first cases where the Court considered the applicability of Article 16 to member states measures were *Scarlet Extended*[44] and *Netlog*.[45] In these cases, the Court considered the lawfulness of national injunctions which required internet service providers to set up filtering systems in order to prevent users of their services from downloading songs and other material in breach of copyright. The applicant for the injunctions in the national court in both cases was SABAM, a Belgium organisation that represents musicians and collects royalties. SABAM claimed that the filtering system was necessary to prevent file-to-file sharing of copyrighted material and thereby protect the right to property of the musicians.

The Court held that

> national authorities and courts must *in particular* strike a fair balance between the protection of the intellectual property right enjoyed by copyright holders and that of *the freedom to conduct a business enjoyed by operators* such as hosting service providers.[46]

By choosing to reformulate the question, and thus place the internet service providers' right to conduct business at the centre of its reasoning, the Court elevates Article 16 to a directly effective subjective right that national courts have a duty to respect – even in proceedings against another private person.[47] On this reading, the use of Article 16 amplifies the obligation of the member state *not* to introduce the measure – not only will introducing the measure contravene the member

[44]ECJ 24 November 2011, Case C-70/10, *Scarlet Extended SA* v *SABAM*, ECLI:EU:C:2011:771.

[45]ECJ 16 February 2012, Case C-360/10, *SABAM* v *Netlog*, ECLI:EU:C:2012:85.

[46]*Scarlet Extended,* para 46, *Netlog*, para. 44 (emphasis added).

[47]M. Everson and R. Gonçalves, 'Art 16 – Freedom to Conduct Business', in S Peers et al. (eds.), *The EU Charter of Fundamental Rights: a Commentary* (Hart Publishing 2014).

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states' obligations to implement the Directive and to achieve the Directive's objectives of ensuring the free movement of information society services, but it will also breach the internet service providers' fundamental right not to be subject to unlawful restriction on their right to conduct business.

However, we need to remember that the Court had already determined that the national injunction is unlawful because it contravenes the prohibition to impose monitoring obligations under Article 15 of the Directive.[48] The internet service providers have the right to conduct business 'in accordance with EU law', so the interference with their economic liberty breaches Article 16 because it is not in accordance with the Directive. So when the Court goes on to balance the fundamental rights at stake, it is able to place on the scales the right of the internet service providers not to be subject to *unlawful* interferences with their economic freedom.

Protecting the freedom of the company?

In *Alemo Herron*[49] the Court again deployed Article 16 in order to set aside national legislation. However, in this case the national law appeared to constitute a *lawful* interference with the economic freedom of a company. The national legislation implemented the Acquired Rights Directive,[50] which protects the rights of employees in the event of a transfer of undertakings. The national legislation did not appear to breach the Directive – it provided employees with more extensive protection than provided for by the Directive, but this was expressly allowed.[51] Nor was the national measure an obstacle to the functioning of the internal market. The employer company (Parkwood Leisure Ltd.) was a British company, operating in the British market, and there was no suggestion in the Court's judgment or Advocate General's Opinion[52] that the national legislation was an obstacle to free movement.[53] Furthermore, the referring court, the UK

[48]The Court stated that 'It follows that that injunction would require the ISP to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31': *Scarlet Extended*, para. 40, and *Netlog* para. 38.

[49]ECJ 18 July 2013, Case C-426/11, *Alemo-Herron and others* v *Parkwood Leisure Ltd*.

[50]Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings [2001] OJ L 82/0016.

[51]The Directive stated expressly that it was without prejudice to the right of member states to apply or introduce laws more favourable to employees.

[52]Opinion of AG Cruz Villalon in ECJ 19 February 2013, Case C-426/11, *Alemo-Herron*, ECLI:EU:C:2013:82.

[53]Indeed, as Bartl and Leone note, whilst this case would appear to entail a notable extension in the Court's power to review national measures, the judgment does not indicate the reasons for such an extension: M. Bartl and C. Leone, 'Minimum Harmonisation after Alemo-Herron: The Janus Face of EU Fundamental Rights Review', 11 *EuConst* (2015) p. 140.

Supreme Court, had declared that the legislation was 'entirely consistent with the [national] common law principle of freedom of contract'.[54]

Nonetheless, the Court found that the national court must set aside the national legislation. This was because, under this legislation, 'the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business'.[55] Such a conclusion implies that Article 16 does not merely entail the freedom to conduct business 'in accordance with the (EU and national) law', but also entails a right to challenge national laws which unduly restrict the freedom of manoeuvre of a market actor.

It appears, therefore, that the Court of Justice required the national court to set aside the national measure for the sake of protecting the freedom of Parkwood Leisure Ltd – the freedom of this company to operate free of constraints imposed by national law.

A trend confirmed?

Alemo Herron appeared to be an aberration – a decision that did not seem to fit the case law of the Court and which was poorly reasoned.[56] However, there are signs that this understanding of Article 16 may be gaining traction in EU judicial discourse. In an essay[57] written for an edited volume titled *The Internal Market and the Future of European Integration*, Nils Wahl, then Advocate General, now Judge at the Court, stated that:

> the freedom to conduct a business forms part of the EU's economic constitution according to which Member States have undertaken to commit to a specific form of political economy and market within the European Union.[58]

The political economy which Wahl goes on to describe entails an understanding of the market where every interference in 'the freedom of undertakings to conduct

[54]*Parkwood Leisure Ltd* v *Alemo-Herron and others* [2011] UKSC 26, para 9 (per Lord Hope).

[55]*Alemo-Herron*, *supra* n. 49, para. 35.

[56]Stephen Wetherill described it as a decision that was 'so downright odd' that it deserved to be consigned to the bottom of the lake: S. Wetherill, 'Use and Abuse of the EU's Charter of Fundamental Rights', 10 *European Review of Contract Law* (2014) p. 167.

[57]N. Wahl, 'The Freedom to Conduct a Business: a Right of Fundamental Importance to the Future of the European Union', in F. Amtenbrink et al. (eds.), *The Internal Market and the Future of European Integration* (Cambridge University Press 2019).

[58]Ibid., p. 276.

business in the way they see fit' is prima facie prohibited,[59] and constitutes 'a serious interference in the open market economy on which the EU is built'.[60]

This view was not restricted to Wahl's extra-judicial writings. As Advocate General, he stated in his Opinion in *AGET Iraklis*[61] that:

> The European Union is based on a free market economy, which implies that undertakings must have the freedom to conduct their business as they see fit.[62]

Whist the Court did not use the language of the Advocate General in its subsequent judgment,[63] it did hold that the national legislation constituted not only a restriction on the free movement of the company but also an interference with that company's fundamental right to conduct a business.

The company is thus considered by the Court to have a right to conduct its business as it sees fit, and in particular freedom of contract in respect of the workers they employ.[64] Any national measure which falls within the scope of EU law must not constrain that company's freedom of contract unless such constraint is justified. As Koen Lenaerts, president of the Court of Justice, who presided over the Grand Chamber in this case put it subsequently, this case shows that 'the scope of Article 16 of the Charter is broader than that of the fundamental freedoms', because it entails a prima facie prohibition on all 'limitations on the exercise of private autonomy' by market actors.[65]

This mode of reasoning was reiterated in *Achbita*.[66] This case concerned a measure introduced by the employer (G4S Secure Solutions NV) which prohibited all employees from wearing visible signs of religious belief. Ms Achbita was a Muslim woman, who considered that her religion required her to wear a headscarf in public. She argued that the decision of the company discriminated against her on grounds of religion. The Court agreed that the measure could be prima facie indirectly discriminatory because, while it may be an apparently neutral obligation, it may nonetheless lead to a person adhering to a particular religion or belief being put at a particular disadvantage.[67] However, in considering whether the measure was justified, the national court was required to consider the employer's freedom

[59]Ibid., p. 287.
[60]Ibid.
[61]Opinion of AG Wahl in ECJ 9 June 2016, Case C-201/15, *AGET Iraklis*.
[62]Ibid., para. 1.
[63]ECJ 21 December 2016, Case C-201/15, *AGET Iraklis*.
[64]Ibid., para. 85.
[65]K. Lenaerts and J. Gutiérrez-Fons, 'The EU Internal Market and the EU Charter: Exploring the "Derogation Situation"', in Amtenbrink et al., *supra* n. 57.
[66]ECJ 14 March 2017, Case C-157/15, *Achbita*.
[67]Ibid., para. 34.

to conduct business.[68] The Court thus held that the freedom to conduct business of G4S includes the freedom to impose a dress code on its employees which reflects G4S's 'policy of neutrality', even where the exercise of such freedom places employees who belong to particular religious groups at a disadvantage. In *IX v Wabe eV* the Court reiterated that 'an employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter'.[69]

These cases did not appear in a vacuum – As Giubboni points out, *Alemo Herron* and *AGET Iraklis* 'finalise the explicitly neoliberal restyling regarding the internal market doctrine initiated by [the *Laval* quartet]'.[70] But these cases are significant because, unlike the *Laval* quartet, the freedom of the company is not presented as a necessary element in the construction of the internal market, but is presented as a fundamental right worthy of protection for its own sake. As Bartl and Leone point out 'unlike in *Laval* and related cases, the limitation of workers' rights is not offered up on the altar of fundamental freedoms but fundamental rights'.[71] The approach of the Court appears to set aside national law, not in the name of the internal market, but in order to promote 'the private autonomy in a liberal sense understood as *freedom from coercion*'.[72]

Whose freedom is protected?

From the facts of the cases discussed, it appears that the freedom that is at stake is that of the companies themselves – in *Alemo Herron,* it was Parkwood Leisure Ltd, rather than any particular director or shareholder who would be free to change the terms of contract with its employees; in *AGET Iraklis* it was again the company that would be free to restructure its workforce and institute the redundancies it wanted; and in *Achbita* it was G4 Secure Solutions NV that would be free to impose its dress code on its employees.

The proposition that the freedom at stake is the company's freedom is somewhat question begging, because it assumes that the company is an entity that is able to exercise freedom. This raises the age-old question of the nature of the

[68]Ibid., para. 38.

[69]ECJ 15 July 2021, Joined Cases C-804/18 and C-341/19, *IX v WABE eV and MH Müller Handels GmbH* v *MJ*, para. 63.

[70]S. Giubboni, 'Freedom to Conduct a Business and EU Labour Law', 14(1) *EuConst* (2018) p. 172 at p. 180.

[71]Bartl and Leone, *supra* n. 53, p. 141.

[72]D. Leczykiewicz, 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?', in U. Bernitz and X. Groussot (eds), *General Principles of EU Law and European Private Law* (Kluwer 2013) (emphasis added).

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corporate legal person. I have engaged with this question previously,[73] but here I will focus on the relationship between the company, as a legal person, and its stakeholders (shareholders, directors, employees) in order to assess whether the freedom at stake may be the freedom of human beings who own or control the company, rather that the freedom of the company itself.

Are companies people – the shareholders

It could be argued that categorising legal subjects as natural or legal persons is to make a distinction without a difference. As the former US presidential candidate Mitt Romney put it, 'Corporations are people'.[74] On this view, companies are purely fictitious entities, and the interests of the company are the interests of the people that own it – its shareholders. This understanding of the company has been advanced initially by economists, who argued that companies are merely 'legal fictions which serve as a nexus for a set of contracting relationships among individuals'[75]. If we approach the question at the heart of this paper with this understanding of the company, then the matter is straightforward – protecting the fundamental rights of the company protects the freedom of the shareholders – when directors make decisions on behalf of the company, they act as agents of the shareholders,[76] who own the company and who therefore have the freedom to steer it in the way that best serves their interest.

There are two serious problems with this understanding. First, as a matter of law, shareholders do not own the company.[77] Shareholders hold a share, a form of contract that gives them certain rights in relation to the company; they do not own the company, nor any part of it,[78] even if, as Borg-Bartlet points out, the 'dominant thesis' prevalent in much economic theory and corporate law writing

[73]*See* in particular Gill-Pedro, *supra* n. 34.

[74]Youtube clip of Presidential candidate speech ⟨www.youtube.com/watch?v=FxUsRedO4UY&t=1s⟩, visited 3 June 2022.

[75]C. Jensen and W. H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure', 3 *Journal of Financial Economics* (1976) p. 305 at p. 310.

[76]The assumption that the shareholders own the firm, and that the directors of the firm are agents for the shareholder principals, is another feature of this understanding of the nature of a company: *see* Jensen and Meckling, *supra* n. 75, p. 312.

[77]The type of companies discussed here are limited liability companies, where the capital fund is owned by the company itself, not partnerships or joint-stock companies, where the capital fund is owned by individuals. It is arguably easier for partnerships or closely-held companies to claim certain kinds of rights which normally attach to individual human beings, such as right to religious belief or right to privacy: R. Ahdar, 'Companies as Religious Liberty Claimants', 5 *Oxford Journal of Law and Religion* (2016) p. 1.

[78]P. Ireland, 'Company Law and the Myth of Shareholder Ownership', 62 *Modern Law Review* (1999) p. 32.

holds that they do.[79] As Ciepley explains in much greater detail than I can here, the mechanisms by which a company comes into being and operates do not support the theory that the shareholders own the company.[80]

Second, even if it is accepted that shareholders *own* the company, there is a further and more serious difficulty in equating the freedom of the company with the freedom of shareholders. Shareholders do not, either in law or in fact, *control* the company. Control over the company, which is represented by control over the capital fund, is placed in the hands of its directors.[81] These directors, when exercising control of the company, have a duty to act in the interests of the company itself.

> Directors' duties are, in all jurisdictions, owed to the company, rather than to its shareholders or any other third parties. [. . .] Shareholders are entitled to vote in order to elect the board of directors, but it is the board of directors who controls the company, not the shareholders.[82]

Whilst some economic theories reduce the interest of the company to the value of its shares, and emphasise the importance of the directors acting solely in order to maximise shareholder value,[83] as a matter of law directors have broad scope to determine what the best interests of the company entail.[84] They cannot, either in law or in fact, be considered agents of the shareholders or to be in some way acting under their direction.[85] Again, economic theory may require the

[79]J. Borg-Barthlet, *The Governing Law of Companies in EU Law* (Hart Publishing 2012) p. 37. Borg-Barthlet remarks that this dominant theory 'is indicative of a slight but significant misunderstanding of the nature of share ownership'.

[80]D. Ciepley, 'Beyond Public and Private: Toward a Political Theory of the Corporation', 107 *American Political Science Review* (2013) p. 139 at p. 150.

[81]As Watson points out, what distinguishes the modern company from previous entities such as joint stock company, is that it has a capital fund is owned and controlled by the company itself, rather than by the stockholders: S. Watson, 'How the Company became an Entity: A New Understanding of Corporate Law', 2 *Journal of Business Law* (2015) p. 120 at p. 132.

[82]C. Jeffwitz, *Redefining Directors' Duties in the EU to Promote Long-termism and Sustainability* (Frank Bold 2018).

[83]Most famously Milton Freedman argued that the duty of corporate executives is 'to conduct the business in accordance with the [shareholders'] desires, which generally will be to make as much money as possible': M. Friedman, 'The Social Responsibility of Business is to Increase its Profits', *The New York Times Magazine*, 13 September 1970.

[84]B. Black, 'The Principal Fiduciary Duties of Boards of Directors', Third Asian Roundtable on Corporate Governance, 4 April 2001, available at ⟨https://www.oecd.org/daf/ca/corporategovernanceprinciples/1872746.pdf⟩, visited 3 June 2022.

[85]As Lord Hershell put it in the seminal case of *Salomon* v *Salomon & Co Ltd* 'the company is not in law the agent of the subscribers or trustee for them': *Salomon* v *Salomon & Co Ltd* [1897] AC 22, per Lord Hershell.

use of the 'principal/agent' analogy to analyse the duties of directors in a situation where maximising shareholder value is seen as normatively desirable, but the principal/agent analogy does not reflect the respective legal positions of shareholders and directors.

Still, it could be argued that these obstacles are irrelevant. Even if shareholders do not own and control the company, protecting the freedom of the company is in the interests of the shareholders because it improves the economic performance of the company and therefore the economic interests of the shareholder. This may or may not be correct, from a perspective of economic theory. But it does not concern freedom. As set out above, freedom involves a triadic relationship between an agent, some preventing condition and a state of affairs. The preventing condition restricts the freedom of the agent to act, to do, to be. In the cases described above, the preventing condition (the national legislation) restricted the freedom of the company. Shareholders were not part of that triadic relationship because they were not agents[86] – they were not exercising, or being prevented from exercising, any freedom to 'act' or to 'do' or to 'be' what or whom they choose.[87]

Are companies people – directors

Given that it is not the shareholders who control the companies, but the directors, there could be an argument that it is their freedom that is at stake when the freedom of companies is at limited. This argument again fails, because the directors are not free. Directors are under a fiduciary duty to act only in the interests of the company,[88] and to do only those things which advance the corporate purpose.[89]

[86]And here the term is 'agent' implies the entity who acts, rather than a party to an agent/principal relationship. As set out above, that relationship is also not applicable either, as the directors of the company are not the agents of the shareholders.

[87]That is not to say that the shareholders do not have rights, even fundamental rights, in connection with their shareholding. If the company is expropriated without compensation, this will effectively deprive the shareholders of their property, as the value of the shares will be reduced. Similarly, if the law is changed so as to deprive shareholders of voting rights over the company or if the company is forcibly dissolved, or has its legal personality withheld, this will likely interfere with the rights of association of the shareholders. But this type of interference with the rights of shareholders is not what is at stake in the cases discussed above.

[88]A guide to the duties of directors in EU countries indicates that, while the specific duties may vary between different jurisdictions, in all of them the directors were bound by a duty to act only in the interests of the company: CMS Legal Services, 'Duties and Responsibilities of Directors in Europe' (2015), at ⟨https://www.cms-lawnow.com/-/media/lawnow/pdfs/cms-publications/sector-specific-publications/corporate/directors-issues/cms_duties_responsibilities_2015.pdf⟩, accessed 3 June 2022.

[89]Directors are not free to determine the corporate purpose, but it is normally set out in the charter of incorporation, or articles of association.

To act in order to achieve the purposes of another, and in fulfilment of a duty to another, is not freedom. As Mill so succinctly put it, 'The only freedom which deserves the name, is that of pursuing our own good in our own way'.[90] Again, a clarification may be helpful. It is accepted that the decision of a human person to become a company director is an exercise of freedom – any law that prohibited an individual from becoming a company director would be an interference with the freedom of that individual. But once that individual is a company director, the actions she takes as director are an exercise of her duties towards the company which she directs, in order to pursue the interests of the company; they are not an exercise of her freedom or individual autonomy.[91]

The same considerations apply in respect of employees of the company, even senior employees of the company. They have a contract with the company, and when they act as employees they do so in accordance with the contract, and in discharge of their duties towards the company.

In conclusion, the freedom of the company cannot be reduced to, or equated with, the freedom of the individual shareholders, directors or employees. Protecting the freedom of the company to conduct business as it sees fit, or to be free from intrusion into its private affairs by others, does not further the freedom either of the shareholders of the company, or of its directors and employees.

The company as a free person

If it is the freedom of the company that appears to be at stake, this raise the question of whether companies are the kind of entities that can be free. We have seen above that freedom always entails a triadic relationship between an agent, preventing conditions and a state of affairs. This means that the concept of freedom is necessarily connected to the notion of an *agent* who would be free.[92] In the sentence '*x* is free', the predicate 'is free' cannot be understood without the subject *x* – a subject that is able to act.[93] The concept of agency is a contested one, but List

[90]J.S. Mill, *On Liberty* (Dover 2002).

[91]This can be contrasted with the situations described above, where organisations are the vehicles by which individuals exercise their individual freedom, such as newspapers as vehicles for free expression of its journalists, or churches as the means by which individuals can exercise their freedom to manifest their religion.

[92]P. Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Oxford University Press 2001).

[93]R. Waller, 'Recent Work on Agency, Freedom, and Responsibility', Templeton Foundation White Paper 2019, available at ⟨https://www.templeton.org/wp-content/uploads/2019/10/Free-Will-White-Paper.pdf⟩, visited 3 June 2022.

and Pettit provide a helpful and minimalistic formulation.[94] An entity is an agent if it meets three criteria:

(1) it has representational states that depict how things are in the environment ('beliefs', 'understandings');
(2) it has motivational states that specify how it requires things to be in the environment ('desires', 'goals');
(3) it has the capacity to process its representational and motivational states, leading it to intervene suitably in the environment.

Do companies meet this criteria? I will use the facts of *AGET Iraklis* to try to answer that question. According to the facts of the case 'AGET Iraklis invited the workers at its plant in Chalkida to meetings with a view to considering alterations to the activities at the plant in the light of a fall in demand for cement'.[95] The implication is that the company had the *belief* that there had been a fall in demand for cement in Greece. Can this belief be ascribed to the company, or is this merely a figure of speech,[96] and the belief is in fact held by the company's managing director, or by the individual members the Board? After all, beliefs and desires are normally conceived as mental states, and mental states require a mind.[97] Companies do not, as such, have minds. Nonetheless, we do know that the company, like all corporations, has internal mechanisms that allow it to adopt corporate attitudes.[98] As Hess notes, corporate beliefs and desires are shaped by the activities of the members (directors, employees, officers) of the corporate body, in ways that can be extremely complex.[99] So in shaping the belief of AGET Iraklis, perhaps the employees in the sales teams provided information about their customers' attitudes, others may have provided information about the general state of the Greek economy, others still provided information about AGET Iraklis' competitors. Nonetheless, once the company, through its internal mechanisms, adopts a particular belief, that belief is the belief of the company, and not a mere reflection of the beliefs of its employees.

[94]It is minimalistic in the sense that it makes no claims as to the moral agency of the entity, nor about whether it should have rights or responsibilities, nor whether it is a person.

[95]*AGET Iraklis*, *supra* n. 63, at para. 13.

[96]Quinton argues that 'these ways of speaking are plainly metaphorical. To ascribe mental predicates to a group is always an indirect way of ascribing such predicates to its members': A. Quinton, 'Social Objects', 76 *Proceedings of the Aristotelian Society* (1975-76) p. 17.

[97]S. Miller and P. Makkela, 'The Collectivist Approach to Collective Moral Responsibility', 36 *Metaphilosophy* (2005) p. 634.

[98]C. List, 'Three Kinds of Collective Attitudes', 79 *Erkem* (2014) p. 1601.

[99]K. Hess, '"If You Tickle Us . . . ": How Corporations can be Moral Agents Without Being Persons?', 47 *Journal of Value Inquiry* (2013) p. 319.

The same applies in respect of motivational states, such as goals and desires. The company desired to carry out a restructuring programme in order to safeguard its own viability. This can be understood as the desire of the company, even if the activity of individual members will be necessary for this motivational state to come about.

This understanding of corporate agency does not require any commitment to an ontology of the corporation that sees it as a 'psychic organism . . . , possessing not a fictitious but a real psychic personality'.[100] As Harari points out 'Any large-scale human cooperation is rooted in common myths that exist only in people's collective imagination'.[101] Such entities – states, money, churches, corporations – are what Harari terms 'imagined realities'. Note, however, that imagined realities are still real: money, Greece, AGET Iraklis – these entities all exist, even if their existence is dependent on inter-subjective, contingent, beliefs. So when the workers met with representatives of the company in 2011, they believed that they were negotiating with AGET Iraklis, their employer. The representatives shared this belief, and considered themselves to be acting on behalf of the company. When the Minister (who saw himself acting on behalf of another imagined reality, the Greek state) received a request for approval of the projected collective redundancies, he believed that this request had been made by AGET Iraklis. And when the judges of the Court of Justice of the EU (the EU being, of course, another imagined reality) received a reference for preliminary ruling from the Greek Council of State, they believed that the case concerned a dispute involving AGET Iraklis, and that the lawyers before it were representing the interests of that company.

It is possible that all these persons were mistaken in their beliefs, or that they were only using figures of speech. But it is not very credible, and it seems to unnecessarily complicate our understanding of the social world.[102] When the Court of Justice, in its judgment, held that AGET Iraklis' freedom to conduct business should be respected, it was the freedom of the company that was thereby protected, not the freedom of any individual human beings.

Corporate freedom and human freedom

It could be argued that it is irrelevant whether the entities protected are natural persons or legal persons: freedom is a fundamental value of the EU, and the

[100]I. Barnes, *Sociology and Political Theory* (1924) 29-3, cited in J. Dewey, 'The Historical Background of Corporate Legal Personality', 25 *Yale Law Journal* (1926) p. 655 at p. 670.

[101]Y.N. Harari, *Sapiens: A Brief History of Humankind* (Vintage 2015).

[102]Copp also notes that it may be normatively undesirable: D. Copp, 'On the Agency of Certain Collective Entities: An Argument from "Normative Autonomy"', 30 *Midwest Studies in Philosophy* (2006) p. 194. I will address the normative implications of recognising the agency of corporate entities in the following section.

maximisation of freedom is valuable regardless of the subjects of freedom. The protection of private autonomy, entrepreneurial freedom and the 'mutual allocation of spheres of liberty' are central pillars of the European economic constitution.[103] Protecting the fundamental rights of companies provides private parties with a 'more concrete and entrenched mechanism of resisting regulatory effects of national and EU law' and therefore promotes '*private autonomy*'.[104]

There is a problem with that argument: the exercise of 'freedom' by a company is not really a *private* matter. As Ciepley points out,[105] companies are governmental in their operation. Companies have a *jurisdiction*, that is to say, 'the right to establish and enforce rules' in order 'to govern the property and the people within their jurisdiction'.[106] Companies can make by-laws, work rules, and other forms of regulation, and those under the companies' jurisdiction (its directors and employees) have a duty to obey.

We can see this type of rule in operation in the case law set out above. *Achbita* provides a good illustration. The company, G4S, introduced a rule in the workplace regulations which prohibited employees from wearing of any visible sign of religious or political belief at work.[107] This rule was binding – when Ms Achbita came to work in violation of this rule, G4S terminated her contract of employment, and the national courts, once they determined that the rule was not unlawful, held that G4S had been entitled to do so.[108]

In addition to such formal, binding rules, companies are able to institutionalise complex social norms which alter and condition the preferences and behaviour of their members. Singer refers to this phenomenon as 'norm-governed productivity'.[109] He shows how theories of the firm that reduce it to a market within which individuals are able to freely bargain in order to maximise their individual preferences 'misses the mechanism that enables people to cooperate within the firm'.[110] Individuals may join the firm for purely preference-maximising reasons. But once they are a member of the firm, they are subject to norms which shape their preferences in subtle ways that the individuals themselves may not even be aware of.

[103]A. Hatje, 'The Economic Constitution within the Internal Market', in von Bogdandy and Bast, *supra* n. 10.

[104]Leczykiewicz, *supra* n. 72, p. 172.

[105]Ciepley, *supra* n. 80, p. 139.

[106]Ibid., p. 141.

[107]*Achbita*, *supra* n. 66, para. 15.

[108]Ibid., paras. 17 and 18.

[109]A. Singer, *The Form of the Firm. A Normative Political Theory of the Corporation* (Oxford University Press 2018).

[110]Ibid., p. 134.

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Achbita again provides an illustration of this. Before the formal rule was introduced in the regulations, there was in G4S 'an unwritten rule that prohibited the wearing of any visible signs of religious or political belief'.[111] While this rule may not have been binding, it is easy to imagine how employees would accept that this was 'the way things were done' at G4S, and that, as good team members, they had a duty to conform with this rule. As March and Olsen point out, individuals in institutional settings follow rules of appropriateness. Such rules not only guide actors behaviour but 'tell actors where to look for precedents, who are the authoritative interpreters of different types of rules, and what the key interpretative traditions are'.[112]

If, with Goldmann, we understand authority as 'the law based capacity to legally or factually limit or otherwise affect other persons' ... use of their freedom',[113] it is clear that companies exercise authority: they are endowed with the power to legislate – to create legal norms binding those in its jurisdiction. In addition, they have the capacity to institutionalise social norms that shape and condition the preferences of those that work within it.[114] This may not be 'public authority' in the sense that it is not authority that is backed by a public.[115] But classification as 'private authority' refers to the claimed source of authority, not to its ontology or its effects.[116] In a legal order that claims to respect human freedom, no exercise of authority by one person over another can be considered a 'private' matter and the question of the extent to which such authority should be limited or regulated will necessary be a political question of concern to all in that legal order.[117]

[111]*Achbita*, *supra* n. 66, para. 11.

[112]J. March and J. Olsen, 'The Logic of Appropriateness', in R. Goodin (ed.), *Oxford Handbook of Political Science* (Oxford University Press 2013).

[113]M. Goldmann, 'A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority' (and Not Law)', 5 *Global Constitutionalism* (2016) p. 48.

[114]I have not mentioned the ability of powerful firms to create rules that bind individuals who may appear *outside* its jurisdiction. The case of Facebook Inc., which institutionalised its own 'Supreme Court' to review its decision to ban the former President of the United States from its platform provides a striking example of how companies have the capacity to create rules binding others.

[115]Goldmann provides a helpful definition of public authority as an act of authority whose actor can reasonably claim to be acting on behalf of a community of which the addressee is a member: Goldmann, *supra* n. 113, p. 77.

[116]Ibid., p. 58. It is important to note that there is no evidence that the employees agreed to be bound by the rules which the company sought to impose on them, and therefore the source of the authority of the rules cannot be the consent of the employees themselves. This distinguishes these cases from situations where individuals agree together to be bound by common rules, where such rules would be an expression of the members' freedom of association: *see* Levy, *supra* n. 31.

[117]Ibid., p. 80.

Conclusion

The Court has interpreted Article 16 as protecting the prima facie freedom of companies to conduct business in the way they see fit. But companies are not people, and protecting the freedom of companies does not necessarily equate with protecting the freedom of human beings. The fact that we refer to companies as legal 'persons' can lead us to treat them as if they were people. However, as Dan Cohen reminds us, the 'person' metaphor 'can divert attention from the distinctive features of organisations and from the normative implications of these features'.[118] The two key 'distinctive features' highlighted in this article are, first, that companies are not autonomous moral agents, possessed of dignity and deserving of respect. Therefore there is no moral requirement to protect the freedom of companies for their own sake, nor is there any moral wrong in treating companies in a purely instrumental manner. Second, protecting the freedom of companies does not necessarily entail protecting the freedom of human beings. On the contrary, because companies exercise authority over human beings in their jurisdiction, protecting the freedom of companies may mean empowering them to restrict the freedom of those human beings.

That does not mean that it will never be appropriate to protect the rights of companies in the interest of protecting human freedom. As set out above, organisations of all kinds, including commercial companies, can be vehicles that allow human beings to enjoy freedom in association with others. Furthermore, allowing the state to *arbitrarily* restrict the economic freedom of particular companies may undermine the freedom of everyone in that political community.

But whether the restriction on the freedom of the company will entail a restriction on the freedom of human beings will depend on the circumstances. It cannot be inferred that, merely because the freedom of a legal person is being restricted, that this entail a restriction on the freedom of a natural person. Article 16 protects the freedom of companies to conduct business 'in accordance with Union and national laws'. It should be interpreted and applied in a way which respects that limitation which the framers included in the text, and not be extended to protect the freedom of companies to do that which Union or national law does not allow.

There is another reading of the case law, of course. It could be argued that the Court is not relying on Article 16 to protect anyone's freedom, but instead it is relying on it instrumentally: to create 'a good regulatory environment and promoting a climate of entrepreneurship' in order to foster economic growth.[119]

[118]Dan Cohen, *supra* n. 11, p. 40.

[119]C. Manolopoulos, 'Foreword' to Fundamental Rights Agency 'Freedom to conduct a business: exploring the dimensions of a fundamental right (EU Commission 2015), available at ⟨https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf⟩, visited 3 June 2022.

In the words of Judge Wahl, it may be that the Court is using Article 16 in order to bring into being the political economy on which he claims the Union is based.[120] This may be desirable because it will generate economic growth or further economic integration.[121]

Such an approach to rights fits within the 'utility paradigm' described by Dan Cohen and set out above, whereby rights are protected, not in the interests of protecting individual autonomy or freedom, but in order to maximise collective well-being. Such an approach would also be in line with the instrumental way in which the Court has approached fundamental rights.[122] As I have argued previously, EU fundamental rights have often been deployed by the Court of Justice instrumentally, in order to protect the primacy, unity and efficacy of EU law and in order to further EU law objectives.[123]

This argument is, however, problematic. It is one thing to rely on fundamental rights instrumentally in order to achieve objectives which the member states have agreed to and which are expressly stated in the Treaties. It is quite another to use them instrumentally in order to favour a particular ideological position on concerning the Union's political economy. It amounts to, in the words of Giubboni, 'the ideological overthrow of the [. . .] assumptions' of the founding Treaties.[124] The Court is thus making a political decision which will bind the political autonomy of the member states. The ability of the peoples of the member states to decide democratically how to regulate the market is being constrained in the name of a political goal which those peoples have not agreed to.[125] As Hesselink points out, the question of what a 'good' regulatory environment is, and to what extent the market should be regulated, is highly

[120]Wahl, *supra* n. 57.

[121]As Usai argued, Art. 16 should be used to 'push the throttle in favour of an even more developed economic union': A. Usai, 'The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order', 14 *German Law Journal* (2013) p. 1867 at p. 1871.

[122]And indeed fundamental freedoms – companies have been granted rights which protect their freedom of movement within the internal market. These rights are instrumental, but in the service of a fundamental objective of the EU – securing free movement within an internal market.

[123]*See* in particular E. Gill-Pedro, *EU Law, Fundamental Rights and National Democracy* (Routledge 2019) ch 6, and E. Gill-Pedro, 'Divisible, Contingent and Parochial? The Instrumentality of EU Fundamental Rights', in S. Rocha-Cunha et al. (eds.), *Os Direitos Humanos por um fio?* (Húmus 2019). For insightful interventions on the relationship between EU fundamental rights and market objectives *see* D. Augenstein, 'Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law', 14 *German Law Journal* (2013) p. 1917 and T. Isiksel, *Europe's Functional Constitution* (Oxford University Press 2016).

[124]Giubboni, *supra* n. 70, p. 175.

[125]As Giubboni elaborates, the goal of creating a 'free market' – in the sense of a market where undertakings have a prima facie right to be free from regulatory interference – is not a goal set out in the Treaties (ibid.).

controversial.[126] Whilst the supporters of the free market may argue that free markets are more efficient, or bring the greatest benefits to consumers[127] and that therefore the EU *should* aim to liberalise national markets, such empirical assertions are highly contested.[128]

Fundamental rights are meant to be fundamental. As the Court of Justice itself put it, respect for fundamental rights is 'a condition of the lawfulness of Union acts'[129] and neither EU nor the member states can lawfully act in way that contravenes fundamental rights. They are fundamental, we are told by the Explanations to the Charter, because they are founded on the universal value of human dignity. To appropriate and instrumentalise fundamental rights in order to pursue a particular ideological vision of the market, or in order to protect the freedom not of human beings, but of companies, risks not only the *dehumanisation* of fundamental rights,[130] but it risks undermining the legitimacy of the EU legal order.

[126]M. Hesselink, 'The Justice Dimensions of the Relationship between Fundamental Rights and Private Law', 24 *European Review of Private Law* (2016) p. 425 at p. 446.

[127]Usai, *supra* n. 121, p. 1870.

[128]For a critique of free market economics, *see* G. Akerlof and R. Shiller, *Phishing for Phools : The Economics of Manipulation and Deception* (Princeton University Press 2015).

[129]ECJ 3 September 2008, Case C-402/05 P and C-415/05 P, *Kadi.*

[130]Isiksel, *supra* n. 5.