

FREEDOM TO CONDUCT BUSINESS IN EU LAW: FREEDOM FROM INTERFERENCE OR FREEDOM FROM DOMINATION?

Eduardo Gill-Pedro*

What understanding of freedom does the EU freedom to conduct business protect? This article distinguishes between two understandings of freedom – freedom as non-interference and freedom as non-domination, and argues that both the text of Article 16 of the Charter and the pre-Charter case law suggest an understanding of freedom as non-domination. However, in recent case law, the Court appears to have move towards an understanding of freedom as non-interference. This article highlights the implications of such a move for national democracies.

Keywords: Charter of Fundamental Rights of the EU, right to conduct business, freedom, republican theory, *Alemo-Herron*

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* Post Doctoral Researcher, Faculty of Law, Lund University

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I. INTRODUCTION

The freedom of individuals and enterprises to engage in economic activity, to enjoy freedom of contract and to compete freely in the market is protected as an EU fundamental right, under Article 16 of the Charter of Fundamental Rights of the EU, which states that 'the freedom to conduct a business in accordance with Union law and national laws and practices is recognised'.

The inclusion of the freedom to conduct business as a fundamental right guaranteed by the Charter, entails its recognition not only as a legal right, but as a legal right which reflects a moral concern.¹

This article will investigate what that moral concern might be. What morally relevant interest is the EU seeking to protect when recognising the freedom to conduct business as a fundamental legal right? The obvious answer, I suggest, is freedom – the freedom of those who may wish to conduct business. However, freedom is an ambiguous and controversial moral concept. In this article, I will begin in Section II by contrasting two understandings of the concept of freedom: freedom as non-interference and freedom as non-domination. I will then argue in Section III that the text of Article 16, and the caselaw of the CJEU, until recently, can be seen as compatible with an

¹ As Besson puts it 'legal human rights are fundamental and general moral interests recognised by the law as sufficiently important to generate moral duties'. Similarly, Habermas stipulates that 'human rights circumscribe precisely that part (and only that part) of morality which can be translated into the medium of coercive law'. So there is an irreducible connection between human rights as moral concerns and human rights as legal norms. As Forst emphasises, 'human rights have a moral life, expressing urgent human concerns and claims that must not be violated or ignored [...] they also have a legal life' (S. Besson, 'Human rights and democracy in a global context: decoupling and recoupling' (2011) 4 Ethics & Global Politics 19, 25; J. Habermas, 'The concept of human dignity and the realistic Utopia of human rights' (2010) 41 Metaphilosophy 464, 470 and R. Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) Ethics, 711).

understanding of freedom as non-domination. However, in Section IV, I will show how the case of *Aleمو-Herron* and associated developments, appear to indicate an interpretation of the right to conduct business as protecting freedom understood as non-interference.

These developments, while appearing to uphold freedom, if we conceive of freedom as non-interference, may also be seen as diminishing freedom, if we conceive of freedom as non-domination. I will conclude by arguing that these developments can be seen as depriving the national polity of the freedom to regulate their collective life together by democratic means, and of the possibility for the national polity to protect the freedom of its members from being dominated by others.

II. FREEDOM AS NON-INTERFERENCE OR AS NON-DOMINATION?

There is an understanding of freedom, which can be termed 'freedom as non-interference', which has been a very influential in Western political thought. It has been most elegantly articulated by Isaiah Berlin.² For Berlin, social and political freedom entails 'the absence of obstacles to choices and activities' which may be open to a person.³ A person's is free, in regard to any salient area of activity, when she or he has a number of options open to her or him, and that person's freedom is diminished whenever other persons interfere with her or his possibility to choose one of those options. The mere fact that the person does not have the opportunity or capacity to do something does not

² See in particular I. Berlin 'Two Concepts of Liberty' in I. Berlin, and H. Hardy, (eds), *Liberty: Incorporating Four Essays on Liberty* (OUP 2002).

³ *ibid* 32. In the original essay Berlin stated that freedom entails non-interference with an individual's ability to choose according to her or his desires (*ibid* 128). However, Berlin later recognised that this was an error – a person is deprived of freedom not only when she is precluded from choosing something that she actually desires, but also when the number of options open to her are reduced. As Berlin acknowledges, 'if freedom is simply not to be prevented by other persons from doing whatever one wishes, then one way of attaining such freedom is by extinguishing one's wishes' (I. Berlin 'Introduction' in I. Berlin, and H. Hardy (eds), *Liberty: Incorporating Four Essays on Liberty* (OUP 2002), 31).

diminish her or his freedom.⁴ According to Berlin it is only 'if I am prevented by others from doing what I could otherwise do, I am to that degree unfree'.⁵

This is not the only possible understanding of freedom.⁶ Phillip Pettit has criticized it as inadequate on two grounds. First, because it fails to acknowledge that there can be a diminution of freedom even in the absence of interference, and second, because it fails to recognize that not all interferences with an individual's ability to choose entails a diminution of freedom.⁷ I will elaborate this criticism and present Pettit's own understanding of freedom.

1. Loss of Freedom without Interference

Freedom as non-interference is a product of the choices open to an individual. Berlin uses the metaphor of open doors – an individual is free to the extent that there are a number of possible doors that are open to her or him, and to the extent that those doors are free from obstacles. So on this view, if person B is able to choose between option x, y and z in respect of some important aspect of her life,⁸ then B is free to that extent. Her freedom is reduced when someone interferes with her ability to choose one or more of

⁴ It is only 'the part that I believe to be played by other human beings, directly or indirectly, with or without the intention of doing so, in frustrating my wishes' which makes me unfree (*ibid* 176).

⁵ *ibid* 169 (emphasis added).

⁶ In fact, Berlin presents, as the title of the essay suggests, two concepts of 'liberty': negative liberty, which he conceives as non-interference, and 'positive liberty' which he equates with the possibility of self-realisation of the individual's true self. Berlin emphasises that this concept of 'liberty' negates the possibility of individual freedom and is irreconcilable with a notion of freedom as non-interference. So for Berlin, only negative liberty can be called 'freedom'. I do not take issue with Berlin in his claim that 'positive liberty' cannot be equated with freedom. I will however argue that Berlin presents a false dichotomy, because 'negative liberty' can itself be conceived as 'freedom as non-interference' and 'freedom as non-domination'.

⁷ The seminal work is Pettit *Republicanism: A theory of freedom and government* (OUP 1999). See also Pettit 'Republican Freedom: Three axioms, four theorems' in C. Laborde and J. Maynor (eds.) *Republicanism and Political Theory* (Blackwell 2008).

⁸ Freedom is thus a function of my ability to choose in respect of matters that 'are important in my plan of life, given my character and circumstances' (Berlin (n 2), 177)

those options, by preventing, or making more difficult for her to choose that option or options.

Pettit argues that this fails to account for the possibility that freedom can also be reduced in situations where there is no interference with the actual choices which are available to a person. He therefore proposes a different conception of freedom, which builds on the republican tradition of political thought,⁹ and which he terms 'freedom as non-domination'. Under this conception, freedom is diminished not only by actual interference, but also by domination. Domination entails the possibility of one person (or group, or institution) exercising control over the choices of another – when one person has 'alien control'¹⁰ over another. So freedom is not only compromised when person A interferes with the choices open to person B, but also when person A is able to control the choices which B makes, even if no actual interference occurs.¹¹

According to the concept of freedom as non-interference, the existence of such relationships of dominance has no impact on freedom if those who are in a position to exercise 'alien control' refrain from interfering with the choices open to those whom they dominate. So according to Berlin 'liberty is not incompatible with some kinds of autocracy' and 'it is perfectly possible that a liberal minded despot will allow his subjects a large measure of [...] freedom'.¹² By contrast, where freedom is conceived as non-domination, it is

⁹ It should be noted that Pettit himself does not claim that the conception of freedom as non-domination is his own original idea, but is his articulation of 'an ideal which has deep roots in the history of thought' and reflects a tradition that goes back to 'at least to the Roman republican way of thinking about freedom, and survived through the Renaissance and the English republic [...] to become a centerpiece of political thought in the 18th century' (Pettit 'The Instability of Freedom as Noninterference: The Case of Isaiah Berlin' (2011) 121 *Ethics* 693, 708).

¹⁰ According to Pettit, 'alien control' arises where A has desires over how B chooses, A acts on those desires, A's action or presence makes a desired difference to how B chooses. So there is an element of intentionality to alien control, on the part of A – A has to want B to choose in a particular way (Pettit *Republicanism*, 22 ff and Pettit 'Three Axioms', 102 (both n 7)).

¹¹ Pettit suggests that alien control may be exercised through invigilation – A is able to invigilate the choices which B makes (Pettit 'Three Axioms' (n 7)).

¹² Berlin (n 2), 176.

wholly incompatible with subjugation to a despot, because while such a despot 'might allow his subjects free choice', she or he will nonetheless always be in a position to exercise invigilation and control over how those subjects choose. Domination is thus a function of unequal power between such persons or groups.¹³

So, as Pettit argues, a conception of freedom as non-interference is incomplete. It fails to account for those circumstances where the freedom of persons is diminished not by any interference in the choices that they make, but by the existence of relations of domination – relations where one person, or group, is able to exercise oversight and control over the choices made by other persons.¹⁴ In freedom as non-domination, therefore, the focus shifts from the extent to which a person's choices are restricted to the extent to which a person is subject to the control of other persons in the making of choices – in other words, the focus shifts from the freedom of choices and the notion of a free person as one who has free choices, to the freedom of person and the notion of a free choice as one which is made by a free person.¹⁵

2. Interference without Loss of Freedom

The incompleteness of the conception of freedom as non-interference is double-edged. Not only does this conception miss those situations where there is loss of freedom without interference, but it assumes that all interferences with the ability of individuals to choose amount to a restriction of that individual's freedom. However, if we conceive of freedom as non-domination we can see that there can be interferences in the choices of

¹³ C. Laborde 'Republicanism in M. Freeden and M. Stears (eds) *Oxford Handbook of Political Ideologies* (OUP 2013).

¹⁴ Pettit points out that Berlin's conception of freedom would count as free a person (B), who is subject to the control of another (A), in respect of the choice between X and Y, where B is able to ingratiate himself to A so that A will not interfere with B's choice. In this scenario, it appears that the freedom of B to choose between X and Y has not been interfered with, because B was able to persuade A (who could have interfered) not to interfere. But as Pettit points out 'you cannot make yourself free [where freedom is understood as non-domination] by cozying up to the powerful and keeping them sweet' (Pettit (n 9), 705).

¹⁵ Pettit 'Free Persons and Free Choices' (2007) 28 *History of Political Thought* 709.

individuals which do not entail a loss of freedom, because they do not entail a domination of one person by another.

The mechanism which allows for such interference without domination is democratic control. Where a law is enacted in a manner which allows those subject to the law to exercise control over it¹⁶ and where laws 'are forced to track the perceived interests of those on whom they are imposed'¹⁷ then those subject to the law are not subject to domination by any one person or group – they are not subject to arbitrary rule by another.¹⁸

The person subject to that law may find that the choices open to her have been diminished. We can use as an example a law that prohibits driving over 50 km/h in a built-up area, which clearly interferes with the choice of a driver to drive over that speed. But if that law was enacted through a process in which that person had some measure of control, then, under the concept of freedom as non-domination, her freedom was not diminished by that restriction of her choices. The freedom of the driver to *choose* to drive fast is

¹⁶ What kind of control would suffice is a matter which goes beyond the scope of this paper, and thus one in which I will not go to in detail, but, following Pettit, it would need to more than mere causal effect, but it would not need to be intentional direction. (Pettit, 'Three Conceptions of Democratic Control' (2008) 15 *Constellations*, 46).

¹⁷ Pettit, 'Republican Freedom and Contestatory Democratization' in I. Shapiro and C. Hacker-Cardón (eds) (CUP 1999), 170.

¹⁸ Of course, it will never be possible to demonstrate that any particular law is truly non-arbitrary, and adequately tracks the interests of those over whom it claims authority. Pettit emphasises that the most important element of democratic control is the ability of those who are subject to the law to contest that law (Pettit, (fn 17)). This echoes the theory of democracy of Claude Lefort, who argues that democracy 'invites us to replace the notion of a legitimate law with the notion of a debate about what is legitimate and what is illegitimate, a debate which is necessarily without any guarantor and without any end' (C. Lefort 'The Question of Democracy' in *Democracy and Political Theory* (Transl. D. Macey) (Polity 1998), 39). For Lefort therefore 'it is the very fact that every single individual over whom that authority is claimed has the right to reject that claim, and denounce it as hollow and wrong, which gives any claim of authority democratic legitimacy.' (C. Lefort 'Human Rights and the Welfare State' in *Democracy and Political Theory*, (Transl. D. Macey) (Polity 1998), 41).

taken away,¹⁹ and this is not remedied by arguing that she should not have chosen to drive fast. But she is not deprived of freedom, understood as non-domination, because it is not any one person imposing their choices on her, but it is a rule which results from a process over which the driver herself had a measure of control. What prevents the restriction on the driver's freedom of choice from being dominating is not that it was 'correct' but that it was imposed by a process over which the driver had control, so it was not the imposition of an alien will on her.

3. The Value of Civic Freedom

Where we conceive of freedom of as non-domination, we can see that it is possible for law to restrict choices without thereby diminishing freedom. But its effect goes further. The introduction of laws which restrict the freedom of choice of persons can have the effect of protecting others from domination. If freedom is diminished by the presence of relations of domination, where one individual or group has the power to exercise 'alien control' over others, then it is possible for the introduction of a law which restricts the freedom of choice of those who may have such dominance increases the freedom of all those who may otherwise be subject to that domination.

So setting aside such laws in order to allow individuals to choose that which those laws prohibit does not necessarily result in an increase in freedom. First, as set out above, such laws will not be a restriction on the freedom of its

¹⁹ And here it may be helpful to distinguish again 'freedom as non-domination' from Berlin's conception of positive liberty, discussed in footnote 6 above. Under the conception of positive liberty, the argument would be that the driver's liberty had not been diminished because her liberty as a rational individual would not be increased by giving way to irrational desire of driving fast: If A was truly free she would see that she should not desire to drive fast, and so would exercise self-mastery over her desires. As Berlin points out, such an understanding of liberty is incompatible with individual freedom and carries with it totalizing forces ('it is the argument of every dictator, inquisitor and bully'). But that is not what is meant by freedom as non-domination. The freedom of the driver to choose to drive fast is taken away, and this is not remedied by arguing that she *should not* have chosen to drive fast.

addressees, if they are non-dominating.²⁰ And, second, those laws may in themselves be protective of freedom.

If individual members of the community are able to arbitrarily disregard the rules by which that community regulates its life together, and thereby exercise domination over other members of the community, then no member of that community is able to consider her or himself as a free person.²¹ As Pettit puts it:

Freedom involves emancipation from [...] subordination, liberation from [...] dependency. It requires the capacity to stand eye to eye with your fellow citizens, in a shared awareness that none of you has a power of arbitrary interference over another.²²

Under the republican conception of freedom advanced by Pettit, rules which the political community agree on, through a process over which members of that community have some control, do not deprive individuals of freedom, even when they restrict the choices available to them. On the contrary, such rules are necessary to protect freedom, because they can restrict the possibility that some members of that community will dominate others.²³

²⁰ This is not to say that laws promulgated by the state cannot themselves be a source of domination. As Pettit puts it 'The republican state must not only seek to combat the effects of *dominium* in giving rise to domination, it must also guard against the domination that can be associated with the *imperium* of government' (*Pettit Republicanism* (n 7) 173). And the state, by being inescapable, and by being able to exercise violent coercion to ensure compliance with its rules, is itself 'a serious threat to people's enjoyment of [freedom as non-domination]' (Pettit (n 7), 155). So the thesis advanced here is not that state rules are per-se non-dominant. However, republican political theory presupposes that some degree of non-domination is possible through the institution of democratic processes, by which those whose freedom of choice is limited by common rules are able to exercise a measure of control over those rules.

²¹ It is possible that persons who exercise domination over others may consider themselves free. But if there are no institutional protections against domination, then such persons are not necessarily free from domination, because there may be others who will, in other circumstances, have the upper hand and thereby dominate them. If there are no protections against arbitrary power, then what may appear as freedom is wholly contingent, and the dominator may find himself the dominated.

²² *Pettit Republicanism* (n 7) 5.

²³ And this is an indication that understanding freedom as non-domination also entails the protection of basic rights. To be able to live as a free person, in a society where

Further, under this conception of freedom, a person is free to the extent that she or he lives in a community in which she or he is able to exercise control over the rules which coerce her or him, so setting aside those rules will diminish the freedom of all the persons living in that community.

III. THE EU RIGHT TO CONDUCT BUSINESS AS A REPUBLICAN FREEDOM

Article 16 of the Charter states that 'the freedom to conduct a business in accordance with Union law and national laws and practices is recognised'.²⁴ I argue that, by tying the freedom to conduct business to 'Union law and national laws and practices', the EU is recognizing the freedom to conduct business as non-domination, rather than as non-interference. This means that, under Article 16, persons do not have a general right to be free from interference in their choices when conducting their business. They have a right to conduct their business to the extent that the law allows them. This may seem a tautology: 'I am allowed by law to do that which the law allows me to do'. But it is not a tautology, because the fact that the Charter recognizes that I have the freedom to conduct business in accordance with the law means that I have a *legally enforceable* right to do so, and I am therefore

one is not subjected to domination by others, entails the institutionalization of a set of basic rights which will protect the person *both* from *dominium*, that is by being subject to alien control by other persons, *and* from *imperium*, that is, to being subject to arbitrary rule by the state (see Pettit 'The Basic Liberties' in M. Kramer et al (eds) *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy* (OUP, 2008). But such basic liberties, being themselves legal rights, must themselves be the outcome of democratic processes (see J. Waldron 'A Right-Based Critique of Constitutional Rights' (1993) 13 OJLS 18. It should be noted that there are important differences between republican theorists on the extent to which basic rights should be entrenched in a constitution and enforced by courts. For an overview of the debate between different approaches in the republican 'camp' see T. Hickey 'The Republican Virtues of the "New Commonwealth Model of Constitutionalism"' (2016) 14 Icon 494.

²⁴ The Explanations to the Charter indicate that this entails the recognition of the freedom to exercise an economic or commercial activity, freedom of contract and free competition. (Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/02). Article 6(i) TEU states that these explanations are to be given due regard to in interpreting and applying the Charter.

entitled to challenge before a court²⁵ any measure which precludes me from doing that which the law allows me to do.²⁶

This understanding of freedom to conduct business is perfectly consonant with freedom as non-domination. If the political community (the EU or the member states) has regulated a particular area of economic activity, then this will not restrict the freedom of the economic actors engaged in that activity, even if it may interfere with some of the choices that would otherwise be open to them.²⁷

By contrast, if the economic activity is allowed by the relevant laws, then any restriction on that activity will amount to alien control. So if the EU or the member states, or any other body, seeks to prevent a person from conducting their business, where that person's conduct is in accordance with Union law and national laws and practices, then that could amount to alien control over that person.

²⁵ Either the CJEU or in the national courts, depending on the measure that causes the interference.

²⁶ Article 16 thus allows individuals to challenge before a court any arbitrary interference with their freedom to conduct business. Such an arbitrary interference may of course be challengeable on other grounds, such as ultra vires or abuse of power, but Article 16 makes sure that a ground for challenge will exist. As the Court held in *Kadi* 'the Community judicature must [...] ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights' (Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and another v Council* ECLI:EU:C:2008:461, para. 326). It should be noted that this obligation extends to national measures implementing EU law, as set out in Article 51 of the Charter.

²⁷ This presupposes that the law in question is made through a process over which those affected have some control over. I will not address whether in reality this is the case, but if a person considers that a law is made in a way which does not take her or his interest into account, then that itself will be the ground for challenging that law, not the interference with freedom. However, this takes us into questions relating to a theory of democracy which are outside the scope of this article. (for a theory of democratic contestation that would be compatible with freedom as non-domination see J. Hart Ely *Democracy and Distrust* (Harvard U.P.; 1980). For an application in the European context, see E. Gill-Pedro *EU Fundamental Rights and National Democracies: Contradictory or Complementary* (Doctoral Dissertation, Lund, 2016).

1. The CJEU's Case Law

The case law of the CJEU is particularly relevant in the context of this right, because in the Explanations to the Charter relating to Article 16, it is stated that 'this right is based on the case law of the CJEU'.²⁸ The Explanations provide examples of cases where this right was recognised, and in order to understand how this right is conceived within the EU legal order, we need to look at that caselaw. I will seek to show that this case law is, until quite recently, consonant with an understanding of freedom as non-domination.

The first case mentioned in the Explanations is *Nold*.²⁹ This case concerned EU measures which sought to rationalize coal production and distribution, and therefore imposed conditions which meant that the applicant, a company engaged in the selling and distribution of coal, but who did not meet those conditions, could not act as a direct wholesaler of coal. The applicant challenged the EU measures before the CJEU, on the grounds *inter alia* that it breached its fundamental right to the free pursuit of its business activities,³⁰ because the measures 'have the effect, by depriving it of direct supplies, of jeopardising both the profitability of the undertaking and the free development of its business activity, to the point of endangering its very existence'.³¹

The CJEU did not accept the applicant's arguments. Instead it stated:

²⁸ This right is absent from the European Convention on Human Rights (ECHR) and from other Council of Europe instruments, such as the European Social Charter. It is also absent from other major international human rights instruments, such as the Universal Declaration of Human Rights, the UN Covenant on Civil and Political Rights, the UN Covenant on Social, Economic and Cultural Rights.

²⁹ Case 4/73 *J. Nold, Koblenz- und Baustoffgroßhandlung v Commission*, ECLI:EU:C:1974:51, 49I.

³⁰ The only explicit provision cited by the applicant in this context was 'the right of property ownership, the protection of which is ensured in particular by Article 14 of the 'Grundgesetz' of the Federal Republic of Germany and the Constitution of the Land of Hesse'. (*ibid* Submissions and Arguments of the Parties, Section III.B.4.). In addition, the applicant claimed that 'These rights are also recognized by the Constitutions of other Member States of the Community, by international Conventions' (*ibid*, Conclusions of the Parties, Section IV). No citations to such provisions in other Constitutions or Conventions appears to have been provided.

³¹ *ibid* para. 12 of the Grounds.

If rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder.³²

So the CJEU states that, if such a right were to be protected, it would not be absolute but could be limited. However, the CJEU does not then consider whether the measure could be justified as a limitation on the applicant's rights. Instead, in a final twist, it turns at last to the question of whether the measure fell within the scope of fundamental rights. It states:

As regards the guarantees accorded to a particular undertaking, they 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.³³

So in the end the CJEU concludes this measure, in restricting the economic opportunities of undertakings participating in the internal market, do not fall within the scope of a putative 'right to conduct a business', if such a right were to be guaranteed.

This rejection of the claim that that the freedom to conduct business extends to measures that limit the 'commercial interests of opportunities' – measures which interfere with the freedom of choice of economic operators – indicates that the CJEU did not approach the freedom to conduct business as freedom as non-interference. Because under such a conception of freedom, the Commission's decision³⁴ had clearly interfered with the choices open to the applicant.

Nold is presented as a 'founding stone' in the emergence of the right to conduct business as an EU fundamental right. The Explanations state that 'Article 16 is based on CJEU case law which has recognised freedom to

³² *ibid* para. 14 (emphasis is mine).

³³ *ibid* para. 14.

³⁴ The Commission's Decision introduced new terms of business which the Commission knew meant that a number of coal dealers would lose their entitlement to buy directly from the producer – the Decision interfered with the freedom of those dealers to choose to buy directly from the producer.

exercise an economic or commercial activity' and cites *Nold*.³⁵ This case is presented as 'a source for later case law'³⁶ and indeed is cited extensively by the CJEU. Dean Spielmann, former judge of the CJEU and writing as part of an EU Network of Experts, explicitly acknowledges the right to conduct business as founded on the CJEU's case law:

La liberté d'entreprise n'est pas prévue dans les autres conventions internationales. Elle n'est pas reconnue dans la Convention européenne des droits de l'homme [...] [Elle] se fonde sur la jurisprudence de la Cour de justice.³⁷

So when seeking to understand the meaning and scope of the EU fundamental right to conduct business, this case is of central importance. And if we consider *Nold*, and all the case law which followed it, alongside all the cases concerning the right to conduct business decided by the CJEU prior to the Charter coming into force, I identify three characteristics. First, all

³⁵ Together with *SpA Eridiania*. But in that case, again the CJEU does not 'recognise' a right to conduct business, but merely observes that 'an undertaking cannot claim a vested right to the maintenance of an advantage which it obtained from the establishment of the common organization of the market and which it enjoyed at a given time', and that therefore a national decree which altered the applicant's quota allocation (implementing a EU Regulation) did not breach the applicant's fundamental rights. As in *Nold*, the CJEU merely repeats someone else's claim that this right exists, without taking a view on whether it does so: 'That guarantee is said to extend to the rights of undertakings [...]' (Case 230/78 *SpA Eridania-Zuccherifici nazionali and another v Minister of Agriculture and Forestry and another*, ECLI:EU:C:1979:216, paras 22 and 20 respectively, emphasis is mine).

³⁶ J. Cunha Rodrigues, 'Internationale Handelsgesellschaft and Nold' in Maduro M and Azoulai L (eds), *The Past and Future of EU Law* (Hart 2010), 93. Oliver states that CJEU ruled in *Nold* that the right to conduct business was recognised as an EU fundamental right, and subsequent cases confirmed this ruling (Oliver, 'What purpose does Article 16 of the Charter serve?' in U. Bernitz, X. Groussot and F. Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer 2013), 283).

³⁷ D. Spielmann *Liberté d'entreprise* in EU Network of Experts on Fundamental Rights (eds) *Commentary on the Charter of Fundamental Rights of the EU* (EC Commission, June 2016), at: http://ec.europa.eu/justice/fundamentalrights/files/networkcommentaryfinal_en.pdf, accessed at 21 September 2016.

these cases entail challenges brought against EU measures. Persons³⁸ who considered that their freedom of economic action was constrained by EU measures challenged those measures, either directly in the CJEU,³⁹ or indirectly through the national courts and by way of preliminary reference.⁴⁰

Second, in all these cases in which individuals sought to rely on their right to conduct business in order to challenge EU measures, the Court has rejected their challenge.⁴¹

Third, the approach of the Court appears to follow the same pattern in every case – the Court will adopt a very deferential attitude to the EU institution that adopted the measure.⁴² The focus is on the EU measure and on the objectives which that measure is intended to achieve, rather than on the interference with the choices open to the persons claiming that their right

³⁸ Mostly legal persons. In some cases the proceedings were brought by member states though the rights claimed to be infringed were those of persons (e.g. Case C-240/97 *Spain v Commission*, ECLI:EU:C:1999:479 and Joined Cases C-184/02 and C-223/02 *Spain and Finland v European Parliament and Council*, ECLI:EU:C:2004:497), and some cases entail natural persons (e.g. Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz*, ECLI:EU:C:1979:290).

³⁹ As in *Nold* (n 29).

⁴⁰ As in Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114.

⁴¹ This point is made by both Oliver and Usai, who both conduct an overview of the relevant caselaw (Oliver (n 36); A. Usai 'The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order' (2013) 14 German Law Journal, 1867). Weatherill 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. Weatherill 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of "freedom of contract"' (2014) 10 European Review of Contract Law 167, 178).

⁴² In his very critical overview of the caselaw, Carsten Herresthal observes that 'the [Court] grants the EU [...] a very wide range of discretion in choosing measures of intervention' (C. Herresthal 'Constitutionalisation of Freedom of Contract Law' in K. Ziegler, and Huber *Current Problems in the Protection of Human Rights* (Hart 2013), 112).

had been interfered.⁴³ So while the Court stated, in *Spain v Commission*⁴⁴ that 'the freedom [to conduct business]⁴⁵ cannot, therefore, be limited in the absence of Community rules imposing specific restrictions in that regard' whenever the Community rules impose specific restrictions on that choices open to particular economic actors, the Court will not set aside those in order to protect the freedom of choice of those actors. As Groussot et al. put it, the Court:

Confine[s] itself to examining whether [the EU 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 discretion⁴⁶

This is consonant with the text of Article 16 – the right to conduct business, *in accordance with Union law*, is guaranteed. This was expressly affirmed by the Court in *Sky Österreich*, a case that was decided after the Charter had come into force, and where the Court (sitting as a Grand Chamber) reviewed its own case law and stated that:

On the basis of that case-law and in the light of the wording of Article 16 of the Charter, [...] the freedom to conduct a business may be subject to a broad

⁴³ The case of *Hauer* (n 38) is particularly striking in that respect. The applicant was the owner of a plot of land, and she wished to plant vines on that land in order to produce and sell wine. However, an EU Regulation prohibited all new planting of vines for wine producing in her area, so she was absolutely precluded from engaging in the occupation of wine producer. The Court held that this prohibition did not necessarily engage Ms Hauer's right to conduct business - and in any event was justified and necessary ('the restriction on the free pursuit of the occupation of wine grower, *assuming it exists*, is justified').

⁴⁴ *Spain v. Commission* (n 38) para. 99.

⁴⁵ This case concerned the freedom of contract of one of the parties. Freedom of contract is recognized as one aspect of the freedom to conduct business under Article 16 of the Charter, according to the Explanations to the Charter (together with the freedom of economic activity and the right to free competition).

⁴⁶ X. Groussot, G.T. Pétursson and J. Pierce 'Weak Right, Strong Court – The Freedom to Conduct Business and the EU Charter of Fundamental Rights' (2014) Lund University Legal Research Paper 01/2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428181, accessed 21 September 2016, 11.

range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.⁴⁷

I suggest that the case law of the court regarding the right to conduct business can be interpreted as holding that, in situations where the Union rules permit a particular activity, the person has a right to conduct it. But if Union rules do restrict that activity, there is no right to conduct it. It is also consonant with an understanding of freedom as non-domination. The freedom of economic operators means that they have a right to do that which the law allows them, and not to be subject to arbitrary, dominant, impositions on their action. But the freedom of economic operators does not mean that they have a right to do what they choose to do. Their freedom of choice is protected only to the extent that they may choose that which the law allows them to choose.

2. Freedom from National Regulation

As set out above, in the case law prior to the Charter coming into force, the freedom to conduct business had only been invoked in order to challenge (unsuccessfully) EU law measures. Groussot et al. speculate that this 'weak' right might be transformed by a 'strong' court. They note that the inclusion of this right in the Charter imbues this right with a 'constitutional flavour'⁴⁸ emboldening the CJEU to allow this right to be invoked by individuals challenging national measures within the scope of EU law.

In *Scarlet Extended*⁴⁹ the Court did just that. In this case, a management company, representing copyright holders (SABAM), brought proceedings in a national court against an internet service provider (Scarlet Extended) because clients of Scarlet were accessing the internet to download works from SABAM's catalogue without paying. In the national proceedings, SABAN applied for an injunction requiring that Scarlet install filters in its servers in order to monitor and block any users which were unlawfully sharing works in SABAM's catalogue. Directive 2000/31/EC⁵⁰ prohibits national

⁴⁷ Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk*, ECLI:EU:C:2013:28, para. 46.

⁴⁸ Groussot et al (n 46) 4.

⁴⁹ Case C-70/10 *Scarlet Extended SA v SABAM*, ECLI:EU:C:2011:771.

⁵⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic

authorities from imposing a general obligation on an ISP to monitor and record the information it transmits on its network, so the national court submitted a reference asking whether granting that injunction would contravene that prohibition, read in light of Articles 8 (right to respect for private life) and 10 (freedom of expression) ECHR.⁵¹

The Court found that granting the injunction would not be compatible with EU law. But in its reasoning, the Court did not focus on the Directive, nor to the right of free expression and the right to privacy. Instead it rephrased the question, to refer not to 'article 8 and 10 ECHR' but to 'applicable fundamental rights'. It then rephrased the Grand Chamber judgement of *Promusicae*, which had stated that '*the right to respect for private life* on the one hand and the rights to protection of property and to an effective remedy on the other' need to be balanced,⁵² by holding that this meant that 'the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of *other fundamental rights*'.⁵³ It then concluded that it followed from *Promusicae* that, in circumstances such as in the main proceedings, the national court must:

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 ISPs pursuant to Article 16 of the Charter⁵⁴

The application of Article 16 in respect of national measures, and in proceedings between private persons, was a significant extension of the scope of Article 16. As Everson and Gonçalves suggest, this case:

commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/01.

⁵¹ Respectively, the right to respect for private life and the right to free expression.

⁵² Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España*, ECLI:EU:C:2008:54, para. 65 (emphasis added)

⁵³ *ibid* (emphasis added).

⁵⁴ *Scarlet Extended* (n 49) para. 46.

both *de facto* and *de jure* elevates the principle of the freedom to conduct business to a private obligation – or 'quasi-subjective' right – that must be enforced by national law between private individuals.⁵⁵

But when it comes to the substance of Article 16, the Court follows the pre-Charter approach. Article 16 only protects the freedom to conduct business to the extent to which such freedom is allowed by EU and national law. The injunction which SABAM applied for was not allowed by the Directive,⁵⁶ and it would contravene the rights of free expression and of privacy of the internet users.⁵⁷ Which means that the injunction would prohibit Scarlet Extended from doing something which, under the Directive (interpreted in light of the rights of free expression and privacy) Scarlet Extended had a right to do. As I have sought to demonstrate, in the review of the case law set out above, the right to conduct business protects the freedom of individuals to do that which the law allows them to do. Therefore, an injunction which prevented Scarlet Extended from conducting their business in a manner which was allowed by law would constitute an arbitrary interference with the company's 'right to conduct business in accordance with EU law and national law and practice'.⁵⁸

Scarlet Extended, while a significant case⁵⁹ in that it extended the application of Article 16 to national measures, can thus be understood as a continuation

⁵⁵ M. Everson and R. C. Gonçalves, 'Art 16 - Freedom to Conduct Business' in S Peers and others (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart 2014), 451.

⁵⁶ The granting of the injunction would clearly be a 'general obligation' prohibited by the Directive. See Opinion of AG Cruz Villalón in Case C-70/10 *Scarlet Extended SA v SABAM*, ECLI:EU:C:2011:255, para. 66.

⁵⁷ AG Cruz Villalón pointed to the very far reaching consequences of the national proceedings 'The outcome of the main action is undeniably intended to be extended and generalised not only to all ISPs but also and more widely to other important internet participants, not only in the Member State from which the questions have been referred for a preliminary ruling, but also to all Member States, and even beyond.' (para 61). Further, in the earlier case of *Promusicae*, cited by the CJEU in *Scarlet Extended*, the Grand Chamber had already emphasised the importance of the right to respect for private life in the context of internet service providers.

⁵⁸ Article 16 of the Charter of Fundamental Rights of the EU.

⁵⁹ This case was followed shortly after by Case C-360/10 *SABAM v Netlog N.V* ECLI:EU:C:2012:85, with very similar facts, where the court applied the reasoning of

of the pre-Charter approach, where the right to conduct business protects freedom as non-domination, rather than freedom as non-interference.

IV. TRANSFORMING THE RIGHT TO CONDUCT BUSINESS

Shortly before the Charter came into force, Andrea Usai proposed⁶⁰ that Article 16 should be used to 'push the throttle in favour of an even more developed economic union' by allowing the right to conduct business to be used as a 'safeguard against barriers that the member states may want to put up in the internal market'⁶¹ even in purely internal situations.⁶² Usai thus presents the normative value of the right to conduct business as flowing from the way it preserves and promotes the possibility for individuals to be able to be free from constraints – constraints in the way they conduct their business or on the way they structure their contractual relationships.

Under this understanding, freedom from regulation is presented as a value in itself. In other words, the ability of individuals to determine their actions and structure their relationships independently from public intervention,⁶³ and to insulate those persons from regulation or coercion is presented as normatively valuable in itself.⁶⁴

Of course, this freedom is not presented as absolute, and interferences with the economic freedom of individuals by both EU and by the member states are permissible.⁶⁵ But any such interference, either by the EU or by the

⁶⁰ Scarlet almost verbatim (compare *Scarlet Extended*, paras 41 – 49 with *Netlog* paras 39–47).

⁶¹ Usai (n 41), 1871.

⁶² *ibid* 1881.

⁶³ *ibid* 1883.

⁶⁴ D. Leczykiewicz and S. Weatherill 'Introduction' in D. Leczykiewicz and S. Weatherill (eds) *The Involvement of EU Law in Private Law Relationships* (Hart 2013), 3.

⁶⁵ D. Leczykiewicz 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?' in U. Bernitz, X. Groussot and F. Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013), 172.

⁶⁶ Oliver suggests that the role of Article 16 should be reserved for 'extreme cases, its primary function being to act as a counterweight to other fundamental rights' and to

member states when acting in the scope of EU law, must be justified and proportionate, in light of an objective which is recognized as legitimate under EU law. The key point is that private autonomy, presented as the freedom of economic actors to determine their actions without interference from the state,⁶⁶ is something which *should* in principle be preserved, with any regulatory interference on that freedom presented as something that requires justification.

I argue that this understanding of the right to conduct business does not reflect the text of the Article 16 of the Charter and of the Explanations to the Charter. Nor does it reflect the case law of the Court. This understanding of the right to conduct business reflects a conception of freedom as non-interference, rather than freedom as non-domination. It presupposes that individuals are free to the extent that their ability to choose between different options that could be open to them is not interfered with, and they are made less free whenever some choices are closed to them.

In *Alemo-Herron*, it appears that the Court departed from its traditional understanding of the right to conduct business and adopted an approach which seems more in line with the approach set out in the preceding paragraph – an approach which seems to reflect an understanding of freedom as non-interference.

1. *Alemo-Herron*

The claimants in *Alemo-Herron*⁶⁷ were former employees of the leisure department of a local authority (Lewisham Borough Council). The Council's leisure activities were sold to one private company and subsequently to the defendants (Parkwood Leisure, another private company). Under the domestic legislation, the contract of employment between the employees

serve as a reminder to the EU and the member states that they 'must have regard to [to the freedom to conduct business] in all their actions' ((Oliver (n 36) 299).

⁶⁶ Or even from interference by other private actors – Leczykiewicz considers that a restriction of private autonomy can occur in horizontal situations, where private actors interfere with the private autonomy of other private actors (Leczykiewicz (n 64)).

⁶⁷ Case C-426/11 *Mark Alemo-Herron and others v Parkwood Leisure Ltd*, ECLI:EU:C:2013:521.

and the Council had been transferred to the new employers, who assumed the 'rights, powers, duties and liabilities' under that contract. This contract included a provision to the effect that the terms of the employment would be in accordance with terms negotiated by the National Joint Council for Local Government Services (NJC). Parkwood did not participate in the NCJ, and could not do so as it was not a local authority.

After the transfer, the NJC negotiated a new agreement, the terms of which, under domestic law, would become binding on Parkwood. However, Parkwood informed its employees that it would not be abiding by that new agreement. Alemo-Herron and the other employees brought proceedings in the Employment Tribunal.

The domestic legislation⁶⁸ implemented the Acquired Rights Directive.⁶⁹ This Directive stipulates that 'the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement' until the termination of that agreement.⁷⁰ The CJEU had already held⁷¹ that this provision should not be interpreted as *requiring* that the employer be bound not just by the agreements in force at the time of the transfer, but also by agreements concluded after that date (so called 'dynamic' clauses).⁷²

But the Directive stated expressly that it was without prejudice the right of Member States to apply or introduce laws more favourable to employees. This is what the domestic legislation did – it allowed 'dynamic' clauses to be incorporated into contracts of employment, which meant that, on transfer,

⁶⁸ The Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE Regulations).

⁶⁹ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82/0016 (the Acquired Rights Directive).

⁷⁰ Acquired Rights Directive, Article 3(3).

⁷¹ Case C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG*, ECLI:EU:C:2006:168.

⁷² Article 3(1) of the Directive must be interpreted as *not precluding*, [...] that the transferee, who is not party to such an agreement, is not bound by collective agreements subsequent to the one which was in force at the time of the transfer of the business. (*Werhof*, para 37, emphasis is mine).

the new employer would be bound not only by the terms of collective agreements at the time of the transfer, but also to subsequent collective agreements.⁷³ The question which the national court⁷⁴ referred to the CJEU then was whether national courts were free to apply those more favourable provisions of the national implementing legislation.⁷⁵ The national court expressly stated that there was no contention that such national legislation breached the rights of the employer to freedom of association, as protected by Article 11 ECHR.

The CJEU pointed out that the 'dynamic clause', was 'liable to limit considerably the room for manoeuvre necessary for a private transferee' to make adjustments to the conditions of employment to reflect 'the inevitable difference in working conditions that exist between [the public sector and the private sector]'.⁷⁶ It would also require the employer to be bound by a contractual process to which it was not a party, where it could:

neither assert its interests effectively in a contractual process nor negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity.⁷⁷

Therefore, the CJEU concluded that the requiring the employer to be bound by the 'dynamic clause' would be 'liable to adversely affect the very essence of its freedom to conduct a business'.⁷⁸

⁷³ *Alemo-Herron* (n 67), para 8.

⁷⁴ The matter was referred from the Supreme Court of the United Kingdom.

⁷⁵ The CJEU had held in *Hernandez* that the grant of more extensive protection than provided for in a Directive was a matter that fell outside the scope of EU law (Case C-198/13 *Víctor Hernández and Others v Reino de España and Others*, ECLI:EU:C:2014:2055).

⁷⁶ *Alemo-Herron* (n 67), para 28.

⁷⁷ *ibid* para 34.

⁷⁸ *ibid* para 35.

This judgment received extensive criticism, in particular for its treatment of the Acquired Rights Directive⁷⁹ and for its treatment of the CJEU's own case law,⁸⁰ and for the intrusion into the autonomy of labour law.⁸¹

I will not address those aspects specifically, but will instead make two distinct but related arguments. First, in *Alemo-Herron*, the CJEU interpreted the right to conduct business so as to prohibit a member state from doing something which, but for that right, would be lawful under both national law and EU law. Second, the approach of the CJEU to freedom to conduct business entails an understanding of freedom as non-interference.

2. Prohibiting That Which Is Allowed by National Law

The referring court in *Alemo Herron* had itself indicated that the right to freedom of association, as protected by the ECHR, was not in issue.⁸² Further, the referring court, the UK's Supreme Court, had clearly stated that the domestic law was 'entirely consistent with the common law principle of freedom of contract'⁸³ and:

There can be no objection in principle to parties including a term in their contract that the employee's pay is to be determined from time to time by a third party such as the NJC of which the employer is not a member or on which it is not represented.⁸⁴

⁷⁹ J. Prassl 'Freedom of contract as a general principle of EU law? Transfers of undertakings and the protection of employer rights in EU labour law' (2013) 42 *Industrial Law Journal* 434 (esp. 439 – 440).

⁸⁰ Weatherill (n 41); X. Groussot and G. T. Petursson, 'The Emergence of a New Constitutional Framework' in S. de Vries, U. Bernitz and S. Weatherill (eds), *The EU Charter of Fundamental Rights as a binding instrument* (Hart 2015), 142–143.

⁸¹ Prassl (n 79), Syrpis and T. Novitz, 'The EU Internal Market and Domestic Labour Law: Looking Beyond Autonomy' in A. Bogg and others (eds) *The Autonomy of Labour Law* (Hart 2015).

⁸² *Alemo-Herron* (n 67), para 19.

⁸³ *Parkwood Leisure Ltd v Alemo-Herron and others* [2011] UKSC 26, para 9 (*per* Lord Hope).

⁸⁴ *ibid.*

And as the Advocate General pointed out, the parties in the proceedings had indicated to the CJEU that the UK system of collective bargaining is characterised by its flexibility, and UK labour law:

does not appear to preclude Parkwood and the employees of the transferred undertaking sitting down to negotiate and agreeing to dispense with, amend or preserve the clause.

So according to the referring court, the national legislation did not violate national principles of private law, nor was it in any other way invalid as national legislation. Therefore Parkwood Leisure, according to national law, did not have the right not to abide by the collective agreement.

3. Prohibiting That Which Is Allowed by EU Law

As indicated above, the Directive, read in isolation, did not prohibit member states from granting more extensive protection to employee's right following transfer than stipulated in the Directive. Further, in its Preamble the Directive states that its objectives are a) reducing differences between member states in respect of employee protection following transfer and b) ensure that the rights of employees are protected in the event of transfer.

So on the face of it, the national legislation did not contravene the Directive, nor could it be considered to undermine the expressly stated objectives of the Directive. This is in contrast to situations such as *Laval*⁸⁵ In that case, the Swedish law granted the workers more extensive protection than required under the Posted Workers Directive⁸⁶, but in so doing it restricted the freedom to provide services of *Laval*.⁸⁷ This Directive is expressly stated to be a measure intended to further the integration of the single market, and any national measure which restricts one of the fundamental freedoms will inevitably contradict the objectives of the Directive.⁸⁸ *Alemo-Herron* entails an extension of the scope of application of the Charter also in comparison to

⁸⁵ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetarförbundet and others*, ECLI:EU:C:2007:809.

⁸⁶ 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 [1997] OJ L18/1.

⁸⁷ *Laval* (n 85) para. 99.

⁸⁸ Posted Workers Directive (n 86), Recitals 1 and 2.

Scarlet Extended and *Netlog*.⁸⁹ In those cases the national measure contravened an express provision of the Directive, and undermined an express objective of the Directive. They therefore fell clearly within the scope of EU law.

4. The Transformation of the Right to Conduct Business

So why should the CJEU have the power to review national measures implementing a Directive which provide more extensive protection and which do not otherwise obstruct the achievement of the objectives of that Directive? As Bartl and Leone emphasise, whilst this would appear to represent an extension of the scope of the CJEU's power of review member state measures, neither the judgment nor the AG's Opinion indicate the reason for such an extension of the CJEU's power.⁹⁰

But the CJEU does state that the objective of the Directive is not merely to protect the rights of employees, in the event of a transfer, but 'seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other'.⁹¹ The relevant interest of the transferee is the interest in having 'room for manoeuvre in order to make necessary adjustments and changes to the contractual relationship with its employees. In other words, the relevant interest that needs to be balanced against the employees' interests is the freedom of contract of the employer.

I argue that, in presenting Article 16 as protecting the 'room for manoeuvre' of Parkwood, the CJEU interpreted the right to conduct business as

⁸⁹ Discussed above (n 57).

⁹⁰ M. Bartl and C. Leone 'Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review' (2015) 11 European Constitutional Law Review 140.

⁹¹ *Alemo-Herron* (n 67), para. 25. This 'teleological twist' has been criticized on several grounds. Prassl points out that it appears to go against the text of the Directive – according to Prassl the Directive was never designed internally to balance the interests of the employer and employee, but was intended to protect employees in light of structural changes in the employment market - changes brought about in part through the processes of European market integration (Prassl (n 79)). Weatherhill claims that this interpretation misses the 'thematic rationale' of protecting the weaker parties in contractual relationships which is prevalent in much of EU secondary law, in fields such as employment rights and consumer protection (Weatherill (n 41)).

protecting freedom as non-interference, rather than freedom as non-domination. On the later interpretation, Parkwood would have no right *not* to comply with the contractual clause to which it had signed up. Its right to conduct business was limited to the freedom to conduct business 'in accordance with EU law, and with national laws and practices'.

However, by re-interpreting Article 16 as protecting the right of Parkwood to that which national law expressly precluded it from doing, the CJEU transformed the freedom to conduct business. It transformed from the freedom to do that which the law allows, to the right to challenge the law where such law interferes with the freedom of choice of the undertaking.

V. THE IMPLICATIONS OF PROTECTING FREEDOM AS NON-INTERFERENCE

Stephen Weatherill suggested that *Alemo-Herron* was a decision so 'downright odd' that it deserves to be 'consigned to the bottom of an icy lake' and forgotten about. It is, as I have argued above, and as Weatherill so lucidly demonstrates, a decision that is clearly out of line with the previous jurisprudence of the Court. It has also not been followed in subsequent rulings.⁹² It may therefore appear wiser, for those troubled by its implications, to leave it to fall into obscurity at the bottom of that lake.

However, the aim of this article is not solely a critique of the specific decision in *Alemo-Herron*. Rather, this article seeks to problematize the particular conception of freedom which is presupposed by *Alemo-Herron*, and which has been advanced not just in that decision, but also in discussions concerning the meaning of Article 16. In particular, the Fundamental Rights Agency of the EU has produced a report on the freedom to conduct business that ties Article 16 to the need to 'reshape Europe's approach to free enterprise' 'by creating a business-friendly environment at the national level' and by

⁹² At the time of writing, the judgment had not been cited by the CJEU in connection with the interpretation of Article 16 (in Case C-328/13 *Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich*, ECLI:EU:C:2014:2197) the CJEU cited the case in connection with the Transfer of Undertakings Directive, and in Case C-456/13 *T & L Sugars Ltd and Sidul Açúcares Unipessoal Lda v European Commission*, ECLI:EU:C:2015:284, in connection with the interpretation of Article 47 of the Charter).

'spurring the economy by simplifying for entrepreneurship and business to operate'.⁹³ On a similar vein, Usai proposes that a greater recognition of the right to conduct business would lead to more economic freedom and therefore to greater welfare – it would push the throttle in favour of an even more developed economic union, and Leczykiewicz suggests that the right to conduct business 'offers private parties more concrete and entrenched mechanisms of resisting regulatory effects of national and EU law'. Advocate General Trsternjak, in her Opinion in the *Fra.Bo* even implied that a private entity could rely on Article 16 to challenge (otherwise lawful) measures aimed at ensuring free movement.⁹⁴

Additionally, the language of the CJEU in *obiter dicta* in recent cases seems to echo an understanding of the freedom to conduct business as freedom from interference. In *UPC Telekabel Wien* the CJEU stated that '[t]he freedom to conduct a business includes, inter alia, the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it'.⁹⁵ This idea of the right to conduct business as entailing a freedom from regulatory burdens, as freedom from interference, seems therefore to have some traction in the discussions concerning Article 16. It appears both logical and appealing – who can object to the right of individuals to make their own choices in life.

But if we recall the republican critique of freedom as non-interference outlined above, we realise that freedom does not consist of not having one's choices interfered with, it consists of not being in a position where others have control over us when we make choices. So if we take the case of *Alemo-*

⁹³ FRA 'Freedom to Conduct Business – Exploring the dimensions of a Fundamental Right (EU Commission, Report, 2015), at <http://fra.europa.eu/en/publication/2015/freedom-conduct-business-exploring-dimensions-fundamental-right> accessed 21 September 2016.

⁹⁴ Opinion of AG Trsternjak in Case C-171/11 *Fra.Bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches*, ECLI:EU:C:2012:176, para 56.

⁹⁵ Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and another*, ECLI:EU:C:2014:192, para 49. But the CJEU held that any right of the company to conduct its business was not affected by the injunction at issue. This phrasing was repeated recently in Case C-134/15 *Lidl GmbH & Co. KG v Freistaat Sachsen*, ECLI:EU:C:2016:498, para 27, but the CJEU held that the EU measure did not breach the applicant's freedom to conduct business.

Herron, we can see that what is at stake is not just the freedom of the employer and of the employees to choose the terms of their contract of employment, but the fact that in a scenario where employers and employees have such freedom of choice, the employer might well be in a dominant position, and so be able to exercise alien control over the employees.⁹⁶ In other words, those employees will only be seen as free if we conceive of freedom as non-interference. If we conceive of freedom as non-domination, then where the employer is in a dominant position, the freedom of choice for the employees may be seen as no freedom at all. Indeed, as Weatherill and other commentators point out,⁹⁷ a range of EU legislation, not only in labour law, but also in consumer law and anti-discrimination law, can be understood as an attempt to protect the weaker party in situations where untrammelled freedom of choice would leave that weaker party vulnerable. The Acquired Rights Directive itself appeared (before its reinterpretation by the Court in *Alemo-Herron*) to be a measure intended to protect employees who found themselves in a particularly vulnerable situation following the take-over of their employer by another company.

But my argument does not stop there. As set out above, the republican critique of freedom as non-interference is double edged. Not only does it fail to account for loss of freedom in situations of non-interference, but also fails to account for interference which does not entail loss of freedom. Considering again *Alemo-Herron*, it may appear that the domestic legislation restricts the employer's freedom, by interfering with their freedom to choose the terms of their contract with their employees. But that legislation, assuming that it was the outcome of a reasonably democratic process over which both employees and employers had some measure of control,⁹⁸ did not restrict the employer's freedom as it was not a result of alien control.

⁹⁶ For an exploration of the freedom of association of trade unions from a perspective of republican political theory, see A. Bogg and C Estlund 'Freedom of Association and the Right to Contest' in A. Bogg *et al* (eds.) *The Autonomy of Labour Law* (Oxford: Hart, 2015).

⁹⁷ Weatherill (n 41), 174; Bartl and Leone (n 90), 144, Prassl (n 79), 439.

⁹⁸ Although the TUPE Regulations are a Statutory Instrument, rather than an Act of Parliament, they are made by the Secretary of State under powers delegated by an Act of Parliament, and subject to parliamentary scrutiny (as well as judicial review on, *inter alia*, *ultra vires* grounds). Further, as the Explanatory Memorandum to the

However, in requiring the national court to set aside the domestic legislation in order to extend the freedom of choice of the employers, the Court effectively diminished the public autonomy of the UK, and in so doing, diminished the freedom of persons in the UK. As I set out above, if individual members of the community are able to arbitrarily disregard the rules by which that community regulate their life together, and thereby exercise domination over other members of the community, then no member of that community is able to consider her or himself as a free person.

The objection might be made that the rules were not set aside arbitrarily. EU law claims primacy over national law, and requiring the UK to set aside its laws where they conflict with EU law is merely an expression of that. But, under a republican conception of freedom, we can see the obligations which member states take under the Treaties, such as the obligation to allow free movement in the internal market, as being obligations that are undertaken by the political community as a whole, and over which that community has some control. Similarly, the demand that member states implement the obligations imposed by EU Secondary Law are not arbitrary if we assume⁹⁹ that the legislative processes of the EU are ones over which those affected are able to exercise some measure of control.¹⁰⁰

By contrast, the Court in *Alemo-Herron* determined that the national legislation should be set aside because it was wrong – because it was 'liable to adversely affect the very essence of [the employer's] freedom to conduct a business'.¹⁰¹ This assumes that there is an objective 'essence' to economic

Regulations state, these Regulations were years in the making, in a process in which a broad range of both employer and employee organizations were consulted (Explanatory Memorandum to TUPE Regulations 2006 (2006/246), paragraph 7.1, available at <http://www.legislation.gov.uk/uksi/2006/246/memorandum/contents>, accessed 21 September 2016).

⁹⁹ As Pettit points out, the republican ideal of freedom as non-domination assumes that those subject to the law have some measure of control over that law, even if this is only to a limited extent (Pettit (n 7), 139).

¹⁰⁰ This of course is a matter in respect of which there is significant disagreement. But I suggest that the wide margin of discretion which the Court affords the EU legislature stems (at least in part) from the recognition of the greater democratic legitimacy of the EU legislature vis à vis the Court.

¹⁰¹ *Alemo-Herron* (n 67), para 35.

freedom, and that it is possible for the Court to identify it. But what the 'essence' of any right to conduct business might be, if such an essence exists at all, is a question of considerable disagreement. This disagreement is reflected both in the litigation that took place at national level,¹⁰² and in proposals for legislative reform,¹⁰³ which preceded the Court of Justice's judgment.¹⁰⁴ By constitutionalizing the right of participants in the market to be free of regulatory interference, except to the extent that this can be justified,¹⁰⁵ the CJEU is making a particular determination of the relationship between the market and the state, and the role of the state in regulating the market.¹⁰⁶ By making that determination in a way which fails to acknowledge the disagreements that surround it, and the resulting need for political

¹⁰² For an overview of that litigation, see, e.g. C. Wynn-Evans, 'TUPE, Collective Agreements and the Static–Dynamic Debate: *Alemo-Herron and Others v Parkwood Leisure Ltd* [2010] IRLR 298, CA (2010) 39 Industrial Law Journal 275

¹⁰³ The 2006 Regulations were introduced by the Labour government, and were criticized by the conservative opposition. When the Coalition government came to power they proposed reform of the 2006 Regulations (see iCroner 'Amendments to the TUPE Regulations 2006' 31 January 2014, at: <https://app.croner.co.uk/feature-articles/reform-tupe-regulations?product=29#WKID-201401071444350299-25691899>, accessed on 21 September 2016).

¹⁰⁴ Not to mention the barrage of criticism that the judgment received after it was handed down. And it should be remembered that the Advocate General, in his interpretation of the right to conduct business, did not consider that the UK legislation breached the essence of that right (Opinion of AG Cruz Villalon in Case C-426/11 *Mark Alemo-Herron and others v Parkwood Leisure Ltd* ECLI:EU:C:2013:82).

¹⁰⁵ For a criticism of EU political choices which favour distributive justice and collective welfare over personal freedom and market economy, see Herresthal (n 42), 114. This leads Herresthal to call for stronger EU mechanisms against the undue restriction of the latter (102) and specifically to propose that the CJEU 'make an effort to provide for substantiation of freedom of contract' and to refer less to the ECtHR caselaw and more to the Charter (116).

¹⁰⁶ Poiares Maduro highlights the choice entailed in different concepts of the European economic constitution, by reference to the Treaty provisions on free movement of goods. One concept sees this freedom as aimed at preventing protectionism and barriers to trade *between* member states, and the other concept sees this freedom as an 'economic due process' clause that would allow the CJEU to review any kind of intervention in the market (M. Poiares Maduro *We the Court: the European Court of Justice and the European economic constitution* (Hart, 1998), 60).

mechanisms to resolve them, the Court risks becoming itself a source of domination.¹⁰⁷

VI. CONCLUSION

I have argued that 'freedom' need not only be conceived as non-interference, but can also be conceived as non-domination. I suggested that there are very good reasons why a right to conduct business should be understood - as the text of Article 16, and the pre-Charter case law of the Court, would suggest – as freedom from domination. What the right to conduct business protects is the freedom to conduct business in accordance with EU law and national laws and practices, and not the freedom not be interfered with in the conduct business.

But in *Alemo-Herron* the Court appears to have departed from this understanding of Article 16. By protecting the right of Parkwood Ltd not to be interfered with by the (otherwise valid) national Regulation the Court reinterpreted Article 16 as protecting freedom *from* national law and practices.

I argued that there are grave implications in such a reinterpretation. If we understand freedom as non-domination, such reinterpretation will result in the loss of freedom of those who become subject to domination by others, and the loss of freedom of the political community to determine its common life together.

¹⁰⁷ Richard Bellamy argues that any attempt to delineate matters which are to be insulated from politics, and a failure to acknowledge disagreement in respect of those matters can itself be a source of domination and arbitrary rule (R. Bellamy *Political Constitutionalism* (CUP 2007), 147 ff.).