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**DOI**

[10.18352/ulr.219](https://doi.org/10.18352/ulr.219)

**Publication date**

2013

**Document Version**

Final published version

**Published in**

Utrecht Law Review

[Link to publication](#)

**Citation for published version (APA):**

de Boer, N. J. (2013). Fundamental rights and the EU internal market: just how fundamental are the EU treaty freedoms? A normative enquiry based on John Rawls' political philosophy. *Utrecht Law Review*, 9(1), 148-168. <https://doi.org/10.18352/ulr.219>

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This article is published in a peer-reviewed section of the Utrecht Law Review

## Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms? A Normative Enquiry Based on John Rawls' Political Philosophy

Nik J. de Boer\*

### 1. Introduction

Should the EU Treaty freedoms – the free movement of goods, persons, services and capital – be seen as fundamental rights? And should we thus see them as hierarchically equal to other fundamental rights? The answer of the European Court of Justice (CJEU) to these two questions seems to be in the affirmative, as its judgments on conflicts between the Treaty freedoms and fundamental rights attest – most notably the cases of *Schmidberger*,<sup>1</sup> *Omega*,<sup>2</sup> *Viking*<sup>3</sup> and *Laval*.<sup>4</sup> For example, in *Schmidberger*, which concerned a conflict between the free movement of goods and freedom of speech, the CJEU held that ‘the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.’<sup>5</sup> Thus the CJEU considered the Treaty freedoms to be on a par with fundamental rights.<sup>6</sup> The Charter of Fundamental Rights of the European Union appears to confirm this, in so far as it qualifies the free movement of workers, services and establishment as part of Article 15 on the freedom to choose an occupation and the right to engage in work.<sup>7</sup> However, the idea that we should see the Treaty freedoms as fundamental rights and thus as hierarchically equal to other fundamental rights, cannot be assumed as obvious.

My starting point is the idea of the political philosopher John Rawls that ‘[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.’<sup>8</sup> It is for this reason that we protect persons’ fundamental rights: we consider persons to have certain basic

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1 Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, [2003] ECR I-5659.

2 Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-09609.

3 Case C-438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779.

4 Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, [2007] ECR I-11767.

5 Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, [2003] ECR I-5659, Para. 81.

6 AG Stix-Hackl explicitly affirmed this in Opinion AG Stix-Hackl, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-09609, Para. 50; it was also affirmed by AG Trstenjak in Case C-271/08, *European Commission v Federal Republic of Germany*, [2010] ECR I-07091, Para. 81.

7 See the explanatory memorandum from the Convention, CONVENT 49 of 11 October 2000, <<http://www.europarl.europa.eu/charter/>> (last accessed 17 January 2013).

8 J. Rawls, *A Theory of Justice, Revised Edition*, 1999, p. 3.

interests that are fundamental and therefore deserve special protection. This form of protection is often offered in the form of fundamental *legal* rights that have a special weight when balanced against other considerations. It means that they cannot be easily overridden on the basis of the general interest, such as maximizing economic efficiency.<sup>9</sup>

Seeing the Treaty freedoms as fundamental rights seems to deny this special feature of fundamental rights, namely as specially protected interests of the person that carry independent weight vis-à-vis other considerations. The Treaty freedoms are commonly justified with direct reference to the general interest. They are instrumental towards achieving an internal market in the EU and so to maximise economic welfare. They make possible the free movement of all factors of production, i.e. work, services, goods and capital, within the EU. The aim of this is to lead to an optimal allocation of resources which, in turn, serves to maximise wealth creation in the EU as a whole.<sup>10</sup> But in order to see the Treaty freedoms as fundamental rights we must establish that they serve a purpose beyond this general interest of wealth maximisation.<sup>11</sup>

This is an important issue. Whether the Treaty freedoms are to be seen as fundamental rights and as hierarchically equal should affect the way in which we think they are to be balanced in case of conflict, in particular should it have an influence on the application of the proportionality principle.<sup>12</sup> It is also likely to affect the burden of proof in such cases.<sup>13</sup> Moreover, the issue is relatively underexplored in the current legal literature.<sup>14</sup> In this article I argue that the Treaty freedoms should be seen as fundamental rights where they protect equality of opportunity, but not where they protect ‘market access’ in a broader sense. The CJEU should distinguish carefully between cases where equality of opportunity is at stake and cases in which it is market access in a broader sense that is restricted. In cases where the Treaty freedoms can be seen as protecting equality of opportunity, and where they conflict with other fundamental rights, the Court is justified in construing the conflict as a right-right conflict in which a fair balance has to be sought. Where the Treaty freedoms protect market access in a broader sense, the CJEU should regard the protection of fundamental rights as more important, and be very careful in allowing restrictions on fundamental rights for the purpose of protecting this market access.

This article uses the political philosophy of John Rawls and his philosophical arguments on the justification of rights as a normative frame of reference.<sup>15</sup> Rawls’ theory, whilst not flawless, is probably the most influential contemporary theory about justice and his insights remain of continued importance. Rawls was one of the first to offer a systematic and convincing alternative to the philosophy of utilitarianism. He modernised traditional social contract theories and provided a political theory with direct relevance for real political issues.<sup>16</sup> It therefore provides a valuable point of reference. In this paper I give a constructive interpretation of Rawls’ theory and justification of rights with the help of secondary

9 The idea that theories that take as their normative ideal the maximization of total welfare (the theory commonly known as utilitarianism) or maximizing economic efficiency can provide a normative basis for legal rights is troublesome. See D. Lyons, ‘Utility and Rights’, in J. Waldron (ed.), *Theories of Rights*, 1984, pp. 110-136, pp. 110-136; see also R. Martin, *Rawls and Rights*, 1985, pp. 1-20.

10 See for example: P. Craig & G. de Búrca, *EU Law, Text, Cases, and Materials*, 2008, p. 605; C. Barnard, *The Substantive Law of the EU*, 2010, pp. 3-8. The creation of an internal market has been characterised by Weiler as ‘a philosophy, at least one version of which – the predominant version – seeks to remove the barriers to the free movement of the factors of production, and to remove distortions as a means to maximize utility.’ J. Weiler, ‘The Transformation of Europe’, 1990-1991 *Yale Law Journal*, p. 2477.

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

12 For a view on how they should be balanced in case of an equal rank see S. de Vries, ‘The protection of fundamental rights within Europe’s internal market after Lisbon – An endeavour for more harmony’, in S. de Vries et al., *Balancing Fundamental Rights with the EU Treaty Freedoms: the European Court of Justice as “tightrope” walker*, 2012, pp. 9-42.

13 Namely in the sense that the burden of proof falls on those willing to exercise their fundamental rights, as they need to justify it as a restriction on free movement. See C. Brown, ‘Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria. Judgment of 12 June 2003, Full Court.’ 2003 *Common Market Law Review*, pp. 1507-1508. See more generally on this issue, J. Gerards ‘The structure of fundamental rights and the European Court of Human Rights’, 2009 *International Journal of Constitutional Law*, pp. 641-644.

14 See for a short overview of the debate, C. Krenn, ‘A Missing Piece in the Horizontal Effect “Jigsaw”: Horizontal Direct Effect and the Free Movement of Goods’, 2012 *Common Market Law Review*, pp. 186-189.

15 One may call this approach one of ‘normative constitutional theory’ as Stephen Griffin calls it. He regards that as involving ‘an examination of our constitutional practices from the perspective of political philosophy in an effort to gain a critical perspective on those practices and hopefully to change those that are unjustified.’ See S. Griffin, ‘Reconstructing Rawls’s Theory of Justice: Developing a Public Values Philosophy of the Constitution’, 1987 *New York University Law Review*, p. 778.

16 J. Christman, *Social and Political Philosophy, A contemporary introduction*, 2002, p. 5; W. Kymlicka, *Contemporary Political Philosophy, An Introduction*, 2002, p. 53.

literature on his work. My goal is to bring forward Rawls' theory as a powerful justification of why we should protect certain rights as fundamental rights and to understand which rights these are. A final important point to note here is that the use of Rawls' theory in this article rests on the assumption that his principles of justice are an appropriate normative benchmark to assess the EU and its Member States as a whole.

In the following I set out the normative framework based on Rawls' theory required to answer the central question of this paper (Section 3). On the basis of his theory I enquire why we should attach priority to certain fundamental rights and which rights these should be. I argue that this gives us reason to recognise two main types of fundamental rights, namely the basic rights and liberties associated with the first principle of justice and the rights associated with the second principle of justice necessary to achieve equality of opportunity. In the section thereafter (Section 4) I use this framework to evaluate whether the Treaty freedoms can be seen as fundamental rights, and whether they are to be treated as hierarchically equal to other fundamental rights. I achieve this by analysing the interpretation that the CJEU gives to the Treaty freedoms and by arguing that the Treaty freedoms in many cases can be seen as fundamental rights embodying the value of equality of opportunity. Nonetheless, the CJEU increasingly seems to rely on a broader market access approach rather than an equal treatment approach in interpreting the Treaty freedoms. Where equal treatment is not at stake the Treaty freedoms should not be seen as fundamental rights. In Section 5 I offer some concluding thoughts. Before all this, however, I give a minimum conceptual clarification of the notion of rights used in this article (Section 2).

## **2. Rights: moral, legal, fundamental**

The notion of rights may be understood as referring to legal rights but also to moral rights. In the introduction I have indicated a certain relation between these two types of rights, moral and legal, without being very clear about how I conceive this relationship. In order to provide a minimum of such clarity, I explain what I understand here by moral rights, legal rights and fundamental rights.<sup>17</sup>

For my purposes I find that Henry Shue provides a suitable account of moral rights.<sup>18</sup> He holds that a moral right 'provides (1) the rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats.'<sup>19</sup> The first criterion entails that the demand for the social guarantee of the enjoyment of a certain substance is supported by good reasons. What counts precisely as a rational basis for a justified demand is subject to philosophical debate. In this article I take Rawls' arguments from the original position and reflective equilibrium, explained below, as providing the requisite justification. As the definition here indicates, moral rights provide the rational basis for their actual enjoyment. Essential to this conception of a moral right is that it places a demand upon others and that 'arrangements have been made for people with the right to enjoy it.'<sup>20</sup> However, this right standard can only provide a guarantee that is reasonable, not absolute. This is why Shue introduces the notion of a standard threat. One way to understand this is that rights must provide protection not against all possible threats, but against 'predictable remediable threats.'<sup>21</sup>

Often, the social arrangement appropriate to provide the social guarantee for a moral right is the institution of the law. In those cases, moral rights establish a moral ground for the protection of specific legal rights. Yet the social guarantee of moral rights does not necessarily have to come in the form of legal rights, 'in other cases well-entrenched customs, backed by taboos, might serve better than laws.'<sup>22</sup> In other words, 'there is no necessary inference from a rights-based position in political philosophy to a

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17 However, in doing so I do not necessarily wish to take a position in the philosophical discussion concerning the formal definition of rights (see e.g. L. Zucca, *Constitutional Dilemmas, Conflicts of Fundamental Legal Rights in Europe and the USA*, 2007, pp. 27-48). My main goal in this paper is, after all, to enquire why certain rights merit having a particular status from a moral point of view, not to engage in a formal discussion concerning the concept of rights.

18 H. Shue, *Basic Rights, Subsistence, Affluence, and U.S. Foreign Policy*, 1980, pp. 13-18.

19 *Ibid.*, p. 13.

20 *Ibid.*, p. 16.

21 *Ibid.*, p. 33.

22 *Ibid.*, p. 16.

commitment to a Bill of Rights as a political institution.<sup>23</sup> In this paper I understand a legal right, as a specific type of institutional arrangement, which entails that there exists a legal rule or principle that entitles a person to the substance of that right and usually to bring suit for it in a court of law.<sup>24</sup> Fundamental rights are understood as legal rights of a specific nature. They belong to the realm of constitutional law and limit the power of the state to make law.<sup>25</sup> They subject the highest political authority to legal constraints in the form of specific legal rights.<sup>26</sup> This often entails that these rights are in some way entrenched; in order for them to be changed something more is required than the ordinary procedure of changing laws.<sup>27</sup> This may be coupled with the institution of judicial review, where reliance is placed on the judiciary in order to effectuate matters of constitutional law against legislative majorities.<sup>28</sup>

In Rawls' view not every matter of justice has to be settled at the level of constitutional law. Rawls restricts this to the class of so-called constitutional essentials. These constitutional essentials are thus matters of justice that are to be settled at the level of constitutional law, i.e. as higher law. The point of this is to ensure that they prevail over contrary action by legislative majorities, so that the exercise of political power is legitimate.<sup>29</sup> The choice of constitutional essentials is motivated by a concern for transparency. Citizens must be able to check whether the political regime to which they are subject complies with minimum standards of justice, but these standards must not be too numerous if they are to be able to do so.<sup>30</sup> A second consideration that informs the idea of constitutional essentials is that of judicial review. Rawls does not hold that judicial review is always a requirement of justice, but the restriction of certain aspects of justice to constitutional essentials seems to be informed by the idea that a judge should not rule over all matters of justice.<sup>31</sup> For Rawls then, the basic liberties and formal equality of opportunity – explained below – are to be regulated as a matter of constitutional law.<sup>32</sup>

### 3. Rawls' conception of justice and rights

#### 3.1. General features of Rawls' conception of justice

For Rawls the question of justice concerns the way in which the benefits of cooperation in society are to be distributed.<sup>33</sup> The primary subject of justice is therefore what he calls the basic structure of society, which is 'the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.'<sup>34</sup> By these major social institutions Rawls means 'the political constitution and the principal economic and social arrangements.'<sup>35</sup> A main starting point in Rawls' theory, closely connected to his justification of rights, is that the requirements of justice must not be dependent on a particular conception of the good life. Rawls' goal is to develop a conception of justice that is in some way neutral towards different ideas about what would be a worthwhile and valuable life. The requirements of justice cannot be made dependent on such a conception of the good, because a pervasive feature of modern democratic societies is the existence of a plurality of incommensurable and irreconcilable conceptions of the good. In modern democratic societies citizens simply do not agree on what constitutes the best way to live one's life. A consequence is 'that a continuing shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the

23 J. Waldron, A Rights-based Critique of Constitutional Rights, 1993 *Oxford Journal of Legal Studies*, p. 19.

24 Here I rely on Waldron 1993, supra note 23, pp. 24-25.

25 Zucca, supra note 17, p. 34.

26 F.I. Michelman, 'Rawls on Constitutionalism and Constitutional Law', in S. Freeman (ed.), *The Cambridge Companion to Rawls*, 2006, p. 394.

27 See W. Waluchow, 'Constitutionalism', *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), Edward N. Zalta (ed.), forthcoming, <<http://plato.stanford.edu/archives/win2012/entries/constitutionalism/>> (last visited 17 January 2013).

28 Michelman, supra note 26, p. 403.

29 J. Rawls, *Political Liberalism*, 2005, pp. 227-230; Michelman, supra note 26, p. 402.

30 Michelman, supra note 26, pp. 404-406.

31 Rawls 2005, supra note 29, pp. 229-230, p. 237; Michelman, supra note 26, pp. 403-404.

32 Michelman, supra note 26, p. 401.

33 Rawls 1999, supra note 8, p. 4.

34 *Ibid.*, p. 6.

35 *Ibid.*, p. 6.

oppressive use of state power.<sup>36</sup> Rawls, therefore, aims to develop a conception of justice that is neutral regarding these different conceptions of the good.<sup>37</sup>

Rawls reasons that a particular conception of justice, *justice as fairness*, should regulate the basic structure of society and he argues for it on the basis of two related arguments. First, he holds that a particular conception of justice is justified if it matches our considered convictions of justice or extends them in an acceptable way.<sup>38</sup> The method here is to start from uncontroversial judgments about justice that we have intuitively and to try to justify these as a coherent conception of justice on the basis of more general principles. The process is one of continuously moving back and forth between concrete judgments and principles until we have found a coherent set of principles that matches our considered convictions on justice. This is called 'a state of reflective equilibrium.'<sup>39</sup>

Secondly, Rawls places himself in the tradition of the social contract theories and tries to carry these theories to some higher form of abstraction. The principles of justice that should regulate the basic structure of our society are the ones that we would accept in a position of freedom and equality. His well-known thought experiment of 'the original position' models this situation. It is a hypothetical situation in which human beings are represented as free and equal, and in which they decide on the principles of justice that are to regulate the basic structure of society. The idea is that they choose on the basis of rational self-interest for a set of principles of justice, but at the same time are restricted in the knowledge they have about themselves. Rawls thus models the parties in the original position as deciding from behind a so-called veil of ignorance. This veil ensures that certain morally arbitrary factors are not taken into account when the parties decide upon the principles of justice and so ensures that they decide in a position of freedom and equality. The veil of ignorance essentially makes that the persons in the original position lack all particular knowledge about themselves, such as knowledge about their particular social position in society, their natural talents and intelligence, and their individual conceptions of the good. However, the persons do have some knowledge of what is worthwhile in life so that they are able to make a decision on matters of justice. They have a general knowledge about society and themselves, know that they have a particular conception of the good and that they want certain primary goods whatever their particular conception of the good turns out to be. Roughly these primary goods are rights, liberties and opportunities, and income and wealth.<sup>40</sup> On the basis of this knowledge the parties decide for a set of principles of justice on the basis of rationality and self-interest.<sup>41</sup> The idea is that the principles of justice that result from this decision are the result of a fair agreement, hence the name of 'justice as fairness.'<sup>42</sup>

Rawls argues that the parties in the original position will choose for two principles of justice. The first is that: 'Each person has an equal right to a fully adequate scheme of equal basic liberties compatible with a similar system of liberties for all.'<sup>43</sup> Rawls' list of basic liberties includes the right to vote and hold public office, freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person and 'the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.'<sup>44</sup> The basic liberties are roughly what jurists would normally call civil and political rights.

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36 Rawls 2005, supra note 29, p. 37.

37 Ibid., pp. 35-40 and pp. 302-304.

38 Rawls 1999, supra note 8, p. 17

39 Rawls 1999, supra note 8, pp. 17-18 and pp. 40-46.

40 Rawls 1999, supra note 8, pp. 54-55. Here I have not mentioned the primary good of self-respect, to which Rawls often refers as the most important primary good. Self-respect has two aspects. It means first that persons have a sense of that living their life according to their conception of the good is worth carrying out and secondly that we are able to carry out this life-plan. See Rawls 1999, supra note 8, pp. 386-387. In the following I do not refer to the primary good of self-respect, because I do not believe a discussion of this primary good is really necessary for our purposes here.

41 Rawls 1999, supra note 8, p. 18.

42 Rawls 1999, supra note 8, pp. 10-13, p. 118, p. 123 and pp. 79-80.

43 Rawls 2005, supra note 29, p. 291; Rawls' statement of the first principle in a 'Theory of Justice' is slightly different. In *Political Liberalism* he amended it following a criticism by H.L.A. Hart, 'Rawls on Liberty and its Priority', in N. Daniels (ed.), *Reading Rawls*, 1978, pp. 230-252.

44 Rawls 1999, supra note 8, p. 53.

The second principle is the following:

- ‘Social and economic inequalities are to be arranged so that they are both:  
 (a) To the greatest benefit of the least advantaged, consistent with the just savings principle, and  
 (b) Attached to offices and positions open to all under conditions of fair equality of opportunity.’<sup>45</sup>

The second principle has more of an economic focus and as we will see the rights to be protected under it can be seen as similar to the Treaty freedoms. This principle applies to ‘the distribution of income and wealth and to the design of organizations that make use of differences in authority and responsibility.’<sup>46</sup> The first principle affirming basic liberties has so-called ‘lexical’ priority over the second principle and needs to be satisfied first. In short this entails that the basic liberties can only be restricted for the sake of other basic liberties and that the basic liberties cannot be limited solely for the purpose of achieving greater social and economic welfare.<sup>47</sup> The second principle in itself also contains a lexical priority, in the sense that fair equality of opportunity is lexically prior to the principle that social and economic inequalities are to be arranged to the greatest benefit of the least advantaged. In the latter part of the second principle ((a) in the above) Rawls names the difference principle. It limits considerations of wealth maximization and efficiency, by indicating that such considerations are to be limited by considerations of equality. More precisely, wealth maximization and efficiency has to be to the benefit of the least well-off in society.<sup>48</sup>

### 3.2. Basic rights and liberties

The first principle of justice makes that certain basic liberties are to be given priority, rather than a general principle of greatest equal liberty. The defence of such a general principle would be highly problematic for two main reasons. Firstly, it is extremely difficult to come up with an adequate definition of freedom that this principle requires. Secondly, it is impossible to measure the quantity of someone’s freedom, because we lack a scale for making such quantitative assessments.<sup>49</sup>

In order to avoid such difficulties Rawls argues that there are certain basic liberties that are more important, because they protect the fundamental aims and interests of the persons in society.<sup>50</sup> Citizens, therefore, do not wish to exchange a lesser liberty for attaining higher economic advantage. To explain this priority he links the basic liberties to the conception of the person that forms a basis of his overall theory of justice. He holds that the basic liberties form the necessary conditions for ‘the adequate development and full exercise of the two powers of moral personality over a complete life’, the development in which citizens take a higher-order interest.<sup>51</sup> These two powers are ‘the capacity for a sense of right and justice’ and ‘the capacity for a conception of the good.’<sup>52</sup> The capacity for a sense of justice is the ‘capacity to understand, to apply, and normally to be moved by an effective desire to act from (and not merely in accordance with) the principles of justice as the fair terms of social cooperation.’<sup>53</sup> This capacity for a sense of justice thus makes possible that citizens accept reciprocal obligations in society. The capacity for a conception of the good Rawls describes as ‘the capacity to form, to revise, and rationally to pursue such a conception, that is, a conception of what we regard for us as a worthwhile human life.’<sup>54</sup>

By ascribing these two moral powers to persons in society, Rawls does not intend to make controversial anthropological assumptions about what constitutes the essence of man. Rather, the two moral powers are closely connected to Rawls’ image of society as ‘a fair system of cooperation over time.’<sup>55</sup> This means

45 Rawls 1999, supra note 8, p. 266. I do not discuss here the just savings principle.

46 Rawls 1999, supra note 8, p. 53.

47 Rawls 2005, supra note 29, p. 295.

48 See Rawls 1999, supra note 8, pp. 131-132 and pp. 266-267.

49 N. Simmonds, *Central Issues in Jurisprudence, Justice, Law and Rights*, 2002, p. 66; Hart, supra note 43, 1978, pp. 233-239; Kymlicka 2002, supra note 16, pp. 143-144.

50 See for an important critique: Hart 1978, supra note 43, pp. 247-255.

51 Rawls 2005, supra note 29, p. 293; see also Rawls 1999, supra note 8, pp.441-449.

52 Rawls 2005, supra note 29, p. 302.

53 Ibid., p. 302.

54 Ibid., p. 302.

55 Ibid., p. 15. See also T. Scanlon, ‘Adjusting Rights and Balancing Values’, 2003-2004 *Fordham Law Review*, p. 1482.

that participants in society cooperate under a public system of rules in which they accept these rules on the condition that others accept them as well. The idea of a fair system of cooperation thus involves the idea of reciprocity. At the same time, within this scheme of cooperation participants try to achieve their own conception of the good. In depicting society in this manner Rawls hopes to take society as we find it in our ordinary human life as the basis of his theory, which he sees as a middle ground between ‘a society of saints’ and ‘a society of the self-centered.’<sup>56</sup> Because people can be participants in such a society of fair cooperation, Rawls ascribes to them the two powers of moral personality that make such fair cooperation possible.<sup>57</sup> Since citizens need the two powers of moral personality in order to be able to be a ‘normal and fully cooperating member of society over a complete life,’ they take a higher-order interest in being able to develop and exercise these two powers.<sup>58</sup> As we saw before, Rawls also assumes that the citizens represented by the parties in the original position have a determinate conception of the good and that they take special interest in realising it.<sup>59</sup> The basic liberties are necessary for persons to be able to fully exercise and develop their two moral powers as well as realising their determinate conception of the good. Therefore, the parties in the original position would choose them.<sup>60</sup> The parties opt for a principle of justice that offers strong protection to liberty of conscience, as this ensures that they will be free from oppression by others who disapprove of their conception of the good. Moreover, Rawls holds that the development and exercise of our moral capacity for a conception of the good is a means to a person’s good and in itself is part of a person’s good. This means that we do not only wish to lead our life on the basis of a determinate conception of the good, but also that we may wish to revise this conception and strive for a better understanding of why we should live our life in accordance therewith. Liberty of conscience protects our exercise and development of this capacity and therefore the parties in the original position would choose to give it strong protection.<sup>61</sup> They would also choose for strong protection of freedom of association because ‘unless we are at liberty to associate with other like-minded citizens, the exercise of liberty of conscience is denied.’<sup>62</sup>

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

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

In this way Rawls gives us strong reasons to attach great importance to these basic rights and liberties, as the set of basic liberties is necessary to pursue a conception of the good at all and to maintain fair terms of cooperation in society. However, his account needs to be supplemented by a set of basic social and economic rights. The idea that citizens would choose for the priority of civil and political rights when they do not have the assurance that their basic material wants are fulfilled, such as access to

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56 Rawls 2005, *supra* note 29, p. 54.

57 *Ibid.*, pp. 15-19 and pp. 300-304.

58 *Ibid.*, pp. 73-74.

59 *Ibid.*, p. 74.

60 *Ibid.*, pp. 304-305.

61 *Ibid.*, pp. 310-314.

62 *Ibid.*, pp. 313.

63 *Ibid.*, p. 335.

64 *Ibid.*, p. 335.

65 *Ibid.*, p. 335; Rawls 1999, *supra* note 8, p. 53.

66 Rawls 1999, *supra* note 8, p. 53.



food, clothing, minimal education and medical care, ignores the indispensability of such basic material wants in human life. It would mean that poor people in society, unable to afford food, would prefer their rights of political participation over and above being well nourished.<sup>67</sup> The parties in the original position are therefore more likely to include in the first principle of justice the requirement that basic social and economic needs are to be met. Without having these basic needs met, citizens are also unlikely to be able to develop and fully exercise their two powers of moral personality.<sup>68</sup>

Nonetheless, the justification of the basic liberties, including these basic social and economic rights, does not yet give us much reason to see the Treaty freedoms as fundamental rights. Although Rawls mentions freedom of movement and freedom of occupation as supporting rights, these should be interpreted narrowly and in relation to the other basic liberties, since they are supporting rights. The second principle of justice has a more economic focus that allows a better link with the Treaty freedoms, which under the first principle is absent. Freedom of movement should primarily be understood as ancillary to the other basic liberties, for example by requiring the movement necessary to exercise religious liberty or political liberty. Similarly, in my view the right to freedom of occupation as protected under the first principle of justice must be given a narrow reading, namely primarily as a prohibition on forced labour. This makes sense, since Rawls names free choice of occupation in conjunction with a prohibition on 'slavery and serfdom'. Moreover, in this way it is better to distinguish it from equality of opportunity, protected under the second principle of justice to which I now turn.<sup>69</sup>

### 3.3. *The principle of fair equality of opportunity and the difference principle*

In addition to the rights that require protection on the basis of the first principle, the second principle of justice also gives us good reason to protect a number of rights. Rawls maintains that the parties in the original position choose the second principle because they make a conservative choice. Since the parties in the original position do not know their particular position in society but do know that they value primary goods and that they have a particular conception of the good, Rawls argues that they would choose according to the 'maximin rule'. The maximin rule 'tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcome of which is superior to the worst outcomes of others.'<sup>70</sup> This leads to the adoption of the 'difference principle' because it is the most favourable principle for the least advantaged in society when it comes to the distribution of income and wealth. Whether this principle justifies the protection of specific rights is a matter of disagreement. One may argue that it can be best achieved by income taxation and does not demand any specific fundamental legal rights, in line with Rawls' view on constitutional essentials.<sup>71</sup> Another view is that the difference principle requires a right to a minimum income.<sup>72</sup> However, for the purpose of this paper it is not necessary to settle this issue here. More important is the principle of fair equality of opportunity.

The principle of fair equality of opportunity requires that different social positions remain available to all in society. Since the second principle of justice mainly concerns the distribution of income and wealth, an important dimension of the principle of fair equality of opportunity considers economic opportunities. An important way to understand the different social positions to which equality of opportunity applies is thus as 'economic offices or vocations that generate income and wealth.'<sup>73</sup> This

67 T. Pogge, *Realizing Rawls*, 1989, pp. 133-134; see also, although in a somewhat different vein, F. Michelman, 'Constitutional Welfare Rights and A Theory of Justice', in N. Daniels (ed.), *Reading Rawls, Critical Studies of A Theory of Justice*, 1975, pp. 319-347.

68 Pogge 1989, supra note 67, pp. 143-144. In general, these basic needs will include 'food and drink, clothing and shelter, as well as some interaction including education and care', Pogge 1989, p. 144. What these basic needs are will depend to some extent on the particular society in which the citizens live. A further argument in favour of including in the first principle the requirement that basic needs are to be met is that only when people have their basic needs fulfilled can they meaningfully exercise their civil and political rights. It is this argument that Rawls himself appears to adopt. See Pogge 1989, p. 145 and Rawls 2005, supra note 29, p. 7 and pp. 324-334.

69 Here I draw on Martin, supra note 9, pp. 67-70. See also G. A. Cohen, *Rescuing Justice and Equality*, 2008, pp. 196-197 who expresses reservations as to whether free choice of occupation really should be included as part of the first principle of justice. It is admitted, though, that these sections in Rawls' work are not unambiguous.

70 Rawls 1999, supra note 8, p. 133.

71 Pogge names the choice of income tax rates as a choice 'paradigmatically governed by the difference principle', Pogge 1989, supra note 67, p. 200; see for a discussion on whether the difference principle gives rise to certain welfare rights, Michelman 1975, supra note 67, pp. 319-343.

72 See Martin, supra note 9, pp. 120-125.

73 Here I follow Martin, supra note 9, p. 67.

economic focus of the principle of equality of opportunity, and the second principle more in general, allows us to link it to the EU Treaty freedoms.

Rawls distinguishes fair equality of opportunity from formal equality of opportunity. Formal equality of opportunity is the situation where all persons have only the same legal rights to access different social positions. He takes this to be insufficient because it leaves the distribution of income and wealth too much influenced by social contingencies, such as the fact that some people may not have been able to develop their talents because of insufficient means to acquire a good education. In order to remedy such contingencies that are arbitrary from a moral point of view, one needs to ensure that all also have a fair chance to attain the higher social positions.<sup>74</sup> According to Rawls this means that ‘those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system.’<sup>75</sup> The basic structure of society, therefore, has to be arranged in such a manner that this fair equality of opportunity is ensured and goes beyond the protection of only formal equality of opportunity. Formal equality of opportunity is thus part of a wider principle of fair equality of opportunity.

There are three fundamental rights closely connected to formal equality of opportunity: free choice of occupation, freedom of movement and freedom of information about jobs and prices.<sup>76</sup> Together they are necessary to achieve at least formal equality of opportunity. Citizens must have a legal right to freely choose their occupation in order to have access to different social positions. Moreover, they need the freedom of movement necessary to take up such a position, perform it or engage in training and education required for it.<sup>77</sup> Also they would need to have information about the different opportunities offered and thus require freedom of information about jobs. Next to this, a right to advertise the prices of services and products offered in those occupations is crucial to effectively exercise them. These rights would need to be coupled to institutions that remedy uneven starting points. A possible candidate for a right in this respect is a basic right to education.<sup>78</sup> However, considering Rawls’ idea of constitutional essentials, he does not seem favourable towards the recognition of such a right as a fundamental legal right.

### **3.4. The principle of fair equality of opportunity and the Treaty freedoms**

The rights to freedom of occupation and freedom of movement in turn can be seen as closely related to the Treaty freedoms. The reason to associate the Treaty freedoms with equality of opportunity would be that they protect the equal opportunity of all market participants to compete and have access to the market of another Member State regardless of their nationality. However, in order to demonstrate that the Treaty freedoms can be fitted in this mould of equality of opportunity two things need to be shown. First, Rawls’ principle of equality of opportunity requires that different social positions are open to all *individuals* of equal talent and ability, whereas the Treaty freedoms apply not merely to *individuals* but also to *legal persons*, most notably companies. In order to treat the Treaty freedoms as equal opportunity rights, we must accept that the discrimination of companies on grounds of nationality limits the equal opportunity of *individuals*. The argument that supports this is that in essence legal persons are no more than a conglomeration of individuals: legal persons represent real persons and companies employ real people. For this reason, it seems highly likely that discrimination on grounds of the nationality of legal persons will have a negative effect on the opportunities of real people.<sup>79</sup>

Secondly, we still need to establish that the Treaty freedoms are in fact interpreted so that their underlying rationale can be seen as promoting equality of opportunity. This is discussed below, where

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74 Rawls 1999, *supra* note 8, pp. 62-63.

75 Rawls 1999, *supra* note 8, p. 63.

76 Martin, *supra* note 9, pp. 67-70.

77 See Martin, *supra* note 9, p. 67.

78 Rawls 1999, *supra* note 8, p. 63. Martin, *supra* note 9, pp. 82-85. What the principle of fair equality of opportunity requires exactly in terms of institutions that supplement mere formal equality of opportunity is a difficult matter. See for a critical interpretation Pogge 1989, *supra* note 67, pp. 172-196.

79 This position is supported by the recent decision of the CJEU in *DEB*, where the Court held that the fundamental right to have effective access to justice could be relied on by legal persons as well. Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, [2010] ECR I-13849.

I wish to show that the CJEU's interpretation does not always fit the equality of opportunity mould. In fact, I hope to show that where the CJEU applies a so-called broad test of market access that catches non-discriminatory measures it seems to move beyond protecting equality of opportunity by means of the Treaty freedoms. This market access test is justified on the basis of the wealth-maximisation considerations often said to form the basis of the internal market project. However, in the next subsection I first wish to show that another ground for seeing the Treaty freedoms as fundamental rights is to be rejected. That is the idea that they form part of an extensive right to private property, on the basis of which any interference with trade would have to be justified.

### 3.5. *Markets and property rights*

Rawls does not include an absolute right to property in his list of basic liberties, in the sense that one would have a basic right to freely dispose of one's property without any legal constraints. He explicitly excludes two conceptions of the right to property, namely 'the right to include certain rights of acquisition and bequest, as well as the right to own means of production and natural resources'.<sup>80</sup> The view is thus rejected that one is entitled, as a matter of justice, to the fruits of one's labour and that any violation of a right to property is also a violation of the precepts of justice.

Recognising such an absolute property right would make the second principle of justice obsolete, as any redistribution of acquired wealth would conflict with such a right, for example redistribution through income taxes. Moreover, it would be inconsistent with one of the overall premises underlying Rawls' theory, principally that one is not as a matter of justice entitled to have material advantage from natural talents that are not deserved within themselves. This means that interference in the workings of a free market system is not unjust *per se*. It is rather the rules of the overall just system that create an entitlement as a matter of legitimate expectation to the product of one's labour.<sup>81</sup> A right to property is necessary for us to have a degree of independence and privacy and is therefore required by the first principle of justice. This is not to say, however, that any redistribution of income acquired through market exchanges is unjust.<sup>82</sup>

Rawls, however, is not very clear on what his basic right to property includes. John Christman argues that a distinction needs to be made between two sets of rights that we ordinarily understand as part of the right to private property. On the one hand, property is taken to include the right to control the good under one's possession, i.e. to use it for one's own purposes. This aspect of property is highly important in our self-determination and in retaining our independence, and therefore in realising our conception of the good. For example, in order to have a degree of privacy, it is important to have a physical area closed off to other persons. However, it is the control of the physical space that is important. On the other hand, property rights are ordinarily understood to have an income aspect, namely 'the right to increased *benefit* from (relinquishing) the ownership'.<sup>83</sup> Unlike the control aspect of property, the income function is not closely related to the agent's autonomy owning the good. The structure of the income aspect of the right to property is closely connected to 'the overall distribution of goods in the economy'.<sup>84</sup> It is this aspect of the right to property that can therefore be determined by distributional policies.<sup>85</sup> In Rawls' theory, income rights would be determined by the distributive policies dictated by the second principle of justice. It is the control aspect of the right to property that receives protection under the first principle, because of its importance in realising our conception of the good.<sup>86</sup>

Consistent with this approach, Rawls holds that the right to private property does not extend to the means of production. Therefore, he argues that justice as fairness can be realised both in a private property economy, i.e. an economy in which the means of production are mostly privately owned, and

80 Rawls 2005, supra note 29, p. 298.

81 T. Nagel, 'Rawls and Liberalism', in S. Freeman (ed.), *The Cambridge Companion to Rawls*, 2003, pp. 67-68. See also Rawls 2005, supra note 29, p. 298; Rawls 1999, supra note 9, pp. 273-277.

82 See also Kymlicka 2002, supra note 16, p. 152.

83 J. Christman, *The Myth of Property*, 1994, p. 130.

84 *Ibid.*, p. 133.

85 *Ibid.*, pp. 125-184.

86 Robert Nozick does defend such pre-institutional property rights. See R. Nozick, *Anarchy, State and Utopia*, 1984. It is a line of thought that I believe to be subject to very powerful criticism; see a.o. Kymlicka 2002, supra note 16, pp. 102-159.

in what he calls a socialist economy, i.e. an economy in which the means of production are mostly publicly owned. He also holds that both types of economy are compatible with a system of markets, that is, a system in which the prices of consumption goods are freely determined by supply and demand. Economic arrangements that rely on a system of markets have the advantage of efficiency. But Rawls sees a market system as having a more important advantage:

‘A further and more significant advantage of a market system is that, given the requisite background institutions, it is consistent with equal liberties and fair equality of opportunity. Citizens have a free choice of careers and occupations.’<sup>87</sup>

In my view Rawls points here to the idea that if the basic structure is arranged so that it complies with the principles of justice, market systems are consistent with such a system in two ways. Firstly, using markets as a system in which the prices of consumption goods are freely determined by supply and demand is compatible with the idea that the requirements of justice cannot depend on a particular conception of the good. A just system must allow individual citizens to spend their fair share according to what they think consists of a worthwhile life. I believe it is in this sense that a system of markets is consistent with the requirements of (liberal) justice.<sup>88</sup> Secondly, the use of markets is consistent with formal equality of opportunity, because it allows citizens to freely choose their occupation. Given the background institutions that correct for differences in natural endowment, it is also compatible with fair equality of opportunity.

What is important, however, is that Rawls’ theory implies the ruling out of the idea that the Treaty freedoms are part of an extensive right to property, on the basis of which any limitations on trade would have to be justified as an infringement of that right. The main ground for seeing the Treaty freedoms as fundamental rights would be that they embody equality of opportunity. In the next section I consider whether the interpretation of the Treaty freedoms given by the CJEU is consistent with this idea.

#### **4. The Treaty freedoms and their interpretation by the European Court of Justice**

##### **4.1. Legal framework and general characteristics of the Treaty freedoms**

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

Article 3 of the Treaty on European Union (TEU) names the establishment of an internal market as one of the primary objectives of EU integration:

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

Article 3 of the TEU thus links the establishment of an internal market by the EU to other goals to be pursued by the EU. On this basis it seems reasonable to say that the establishment of the internal market is not so much positioned as an end in itself, but serves rather to attain other (social) goals such as a high level of employment and sustainable economic growth. Important in this respect is that the Treaty of Lisbon introduced the wording of ‘a highly competitive *social* market economy’ to Article 3 TEU and has

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<sup>87</sup> Rawls 1999, *supra* note 8, pp. 240-241.

<sup>88</sup> Bruce Ackermann formulates it as follows ‘They [markets] are a key tool by which people with radically different ideals may coordinate their activities to mutual advantage.’ See note 5 in B. Ackerman, ‘Why Dialogue’, 1989 *The Journal of Philosophy*, p. 12.

the possible result that the Treaty freedoms now have to be interpreted in a more ‘social’ manner.<sup>89</sup> This was signalled by Advocate General Cruz Villalón in the case of *Santos Palhota and Others*. There he holds that since the entry into force of the Lisbon Treaty ‘it has been necessary to take into account a number of provisions of primary social law which affect the framework of the fundamental freedoms.’<sup>90</sup> However, the effect of this bears not so much on the interpretation of the Treaty freedoms themselves, but rather on their possible restrictions. As Cruz Villalón holds:

‘As a result of the entry into force of the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case-law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law’s regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, which is founded on the new provisions of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality.’<sup>91</sup>

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

#### 4.2. Non-discrimination

One of the key principles underlying the four freedoms is the principle of non-discrimination on grounds of nationality, enshrined as a general principle of EU law in Article 18 TFEU. It requires that goods, persons, capital and services originating from another Member State are treated the same as those originating from the Member State itself. This also means that Member States retain regulatory freedom as long as they treat the domestic factors of production the same as those coming from other Member States.<sup>92</sup> The Treaty freedoms therefore prohibit measures that directly discriminate on grounds of nationality, so-called distinctly applicable rules. Roughly, these are measures that subject goods and persons from another Member State to a different burden in law as well as in fact.<sup>93</sup>

However, the Treaty freedoms do not merely prohibit such directly discriminatory rules. This would allow indirectly discriminatory barriers to free movement to remain in existence because goods and persons from different Member States could, in fact, be subject to different burdens although treated as legally equal. In allowing individual Member States to lay down their own rules regulating goods and persons they may subject those originating from another Member State to an extra regulatory burden. The CJEU has therefore moved beyond interpreting the Treaty freedoms as merely prohibiting direct discrimination.<sup>94</sup>

This is shown by the development of the CJEU’s case law on the free movement of goods. In the renowned case of *Dassonville* it held that Article 34 TEU in principle prohibited ‘[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.’<sup>95</sup> The CJEU thus interpreted free movement of goods broadly, making potentially the

89 Barnard 2010, supra note 10, p. 30.

90 Opinion AG Cruz Villalón, Case C-515/08, *Criminal proceedings against Vítor Manuel dos Santos Palhota and Others*, [2010] ECR I-09133, Para. 51.

91 Ibid., Para. 53.

92 Barnard 2010, supra note 10, p. 18; see also N. Bernard, ‘Discrimination and Free Movement in EC Law’, 1996 *International & Comparative Law Quarterly*, pp. 82-108.

93 Barnard 2010, supra note 10, p. 85.

94 Ibid., pp. 18-19.

95 Case 8-74, *Procureur du Roi v Benoît and Gustave Dassonville*, [1974] ECR 837, Para 5.

‘entire spectrum of the national legal order’ subject to review under the Treaty freedoms.<sup>96</sup> The formula requires no discrimination between imported and domestic goods. This was explicitly affirmed in *Cassis de Dijon*, where the Court struck down a German provision laying down that liqueurs had to have an alcohol content of 25 per cent.<sup>97</sup> In *Cassis de Dijon* the CJEU also introduced the principle of mutual recognition stating that goods lawfully produced in one Member State should be allowed on the market of another Member State, unless such restrictions could be objectively justified.<sup>98</sup>

The difficulty with the CJEU approach in *Cassis de Dijon* and *Dassonville* was its broad scope; it potentially brought all measures that affected trade in some way under the scope of the free movement of goods. The interpretation of free movement of goods in *Dassonville* and *Cassis de Dijon* therefore appeared to go far beyond what would be required by a discrimination test.<sup>99</sup> However, a difference can be made between so-called ‘dual-burden rules’ and ‘equal-burden rules’. Dual-burden rules are those that have the effect of subjecting imported goods to an extra regulatory burden. Rules that regulate the content of goods, such as the rule in *Cassis de Dijon*, have such an effect. They make that imported goods have to comply with two regulatory burdens, those of the Member State of origin as well as the Member State into which they are imported. Therefore, they put imported goods at a disadvantage vis-à-vis domestic goods. This is different for equal-burden rules: such rules do not subject imported goods to an extra regulatory burden, but affect both imported and domestic goods equally, although they do have an effect on the total volume of inter-state trade.<sup>100</sup> The idea that the Treaty freedoms also prohibit such dual burden rules, unless objectively justified, can be seen as a more refined discrimination test.<sup>101</sup>

The distinction between equal-burden rules and dual-burden rules had an influence on the case law of the CJEU, in particular the case of *Keck*.<sup>102</sup> In *Keck* the CJEU made a distinction between rules regulating the characteristics of goods and provisions concerning selling arrangements. It ruled that Article 34 TFEU did not prohibit provisions of the latter type in so far as they ‘affect in the same manner, in law and fact, the marketing of domestic products and of those from other Member States’.<sup>103</sup> Nonetheless, the distinction made in *Keck* between selling arrangements and the rules regulating the characteristics of goods is not without its problems. This is evident if one looks at the cases of *Familiapress*, *De Agostini* and *Gourmet International*, in which the CJEU refined its ruling in *Keck* in two important ways.<sup>104</sup> In *Familiapress* the CJEU held that Austrian legislation that prohibited publishers from including prize competitions in their newspapers and magazines restricted the free movement of goods. The reason was that the Court held that ‘even though the national legislation is directed against a method of sales promotion, in this case it bears on the actual content of the products, in so far as the competitions in question form an integral part of the magazine in which they appear’.<sup>105</sup> The CJEU thus held that certain selling arrangements affect the product itself and therefore fall within the scope of Article 34 TFEU.

In *De Agostini* and *Gourmet International* the CJEU applied the ruling in *Keck* that rules concerning selling arrangements may also restrict the free movement of goods if they have ‘a differential impact, in law or in fact, for domestic traders and importers’.<sup>106</sup> In *De Agostini* the CJEU considered that a Swedish prohibition on television advertising directed at children under the age of 12 could have such a differential impact, as such advertising could be the only way to penetrate the market for foreign companies.<sup>107</sup>

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96 M.P. Maduro, *We The Court, The European Court of Justice and the European Economic Constitution, A Critical Reading of Article 30 of the EC Treaty*, 1998, p. 27.

97 Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649; see also Bernard 1996, supra note 92, p. 91.

98 Craig & De Búrca 2008, supra note 10, p. 679.

99 Bernard 1996, supra note 92, pp. 90-92.

100 Craig & De Búrca 2008, supra note 10, p. 681; see also C. Barnard, ‘Fitting the Remaining Pieces into the Goods and Persons Jigsaw’, 2001 *European Law Review*, p. 36; see also Bernard 1996, supra note 92, pp. 92-93.

101 E. Spaventa, ‘From *Gebhard* to *Carpenter*: Towards a (non)-Economic European Constitution’, 2004 *Common Market Law Review*, p. 744-747.

102 Case C-267/91 & C-286/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, [1993] ECR I-6097.

103 *Ibid.*, Para. 16.

104 Joined cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95)*, [1997] ECR I-03843; C-405/98, *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*, [2001] ECR I-01795.

105 Case C-368/95, *Vereiniged Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, [1997] ECR I-03689, Para 11.

106 Craig & De Búrca 2008, supra note 10, p. 688.

107 Joined cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95)*, [1997] ECR I-03843, Paras. 42-44.

In *Gourmet International* the CJEU held that a Swedish law restricting the advertisement of alcoholic beverages fell within the scope of Article 34 TFEU. This was because the law was 'liable to impede access to the market by products from other Member States more than it impedes access by domestic products'.<sup>108</sup>

In the area of services the distinction between equal-burden and dual-burden rules is also important. A service provider may be subject to such a double burden because he provides services in a state other than where he is established. He may therefore have to satisfy a dual regulatory burden.<sup>109</sup> In the area of the free movement of workers and the freedom of establishment the distinction between rules that impose a dual burden and rules that impose a single burden plays a role too, for example in the case of qualification requirements. However, when it comes to the establishment and free movement of workers the distinction is less central, because only the regulation of the host state applies and measures that do not impose a dual burden can be indirectly discriminatory.<sup>110</sup> A good example of such measures are language requirements; they do not impose a dual burden on migrants but nonetheless have a particular detrimental effect on them. For this reason the CJEU gave a broad definition of indirectly discriminatory measures in *O'Flynn*. It ruled that indirectly discriminatory are those measures that 'affect essentially migrant workers' or those measures that 'can be more easily satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of migrant workers'.<sup>111</sup> Furthermore, it is not necessary to show that such measures actually have a detrimental effect on migrants; it suffices that the measures are liable to have such an effect.<sup>112</sup>

Regardless of the differences between the discrimination test with respect to the different Treaty freedoms, interpreting the Treaty freedoms on the basis of a broad discrimination test, including seeing double-burden rules as restrictions, is consistent with the idea that the Treaty freedoms protect the right of market actors to have an equal opportunity to participate on the market of any other Member State. Equal opportunity is not only impaired by measures that directly discriminate on grounds of nationality, but also by those rules that subject out-of-state market participants to an extra regulatory burden. The extra regulatory burden means that they are in an unequal position vis-à-vis domestic market participants. This is because, insofar as it can be shown, the rules of a Member State have a differential impact on out-of-state market participants and domestic market participants. The fact that the EU is characterised by great legal diversity between its Member States means that even an interpretation of the Treaty freedoms based on discrimination grants a broad scope to these freedoms. The crucial point is that on the basis of this model the freedoms can still be seen as protecting equality of opportunity.<sup>113</sup>

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

Another problem is that the Treaty freedoms do not apply to wholly internal situations, and for this reason do not prohibit so-called reverse discrimination. The Treaty freedoms do not prohibit measures that favour foreign goods, capital, persons or services over national ones. Allowing such a reverse discrimination is incompatible with an underlying rationale of equality of opportunity, as it allows non-national market participants to have a competitive advantage over domestic market participants. This is mitigated by the fact that it may be seen as a rule of jurisdiction: only where there is an inter-state element does EU law apply, in other cases domestic law applies.<sup>114</sup> The rule has also been eroded to some extent.<sup>115</sup>

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108 Ibid., Para. 21.

109 See also Bernard 1996, supra note 92, pp. 96-97.

110 See also Spaventa 2004, supra note 101, p. 746 and p. 748.

111 Case C-237/94, *John O'Flynn v Adjudication Officer*, [1996] ECR I-02617, Paras. 18-19. See also the discussion in Barnard 2010, supra note 10, pp. 239-241; and Barnard 2001, supra note 100, p. 38.

112 Barnard 2001, supra note 100, pp. 37-38.

113 A difficult issue is the possible exit of capital which may undermine national social models, see V. Bader, 'The Ethics of Immigration', 2005 *Constellations*, pp. 331-361, pp. 337-338. I do not believe that this can be said to fall under the protection of equality of opportunity.

114 Barnard 2010, supra note 10, pp. 230-231.

115 Barnard 2010, supra note 10, pp. 232-233.

### 4.3. From double burden to market access

The test laid down by the CJEU in *Keck* was soon criticized for focusing too much on factual and legal equality at the expense of asking whether rules concerning selling arrangements prevented market access.<sup>116</sup> In *Leclerc-Siplec* Advocate General Jacobs criticized the CJEU's ruling and proposed a different test. The case concerned a French fuel distributor that challenged a provision in French law that prohibited the distribution sector from advertising on television. Jacobs held that by applying the *Keck* test, the measure in question could be qualified as a selling arrangement not restricting Article 34 TFEU. Nonetheless, Jacobs argued that the CJEU's reasoning in *Keck* was unsatisfactory. According to him, 'the exclusion from the scope of Article 30 [now Article 34 TFEU] of measures which "affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States" amounts to introducing, in relation to restrictions on selling arrangements, a test of discrimination.'<sup>117</sup> Crucially, Jacobs held that if 'an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade'.<sup>118</sup> Moreover, Jacobs held that restricting the application of Article 34 TFEU along the lines of such a test would be incompatible with the aim of establishing an internal market. The guiding principle for the interpretation of the free movement of goods had to be 'that all undertakings which engage in a legitimate economic activity in a Member State should have unfettered access to the whole of the Community market, unless there is a valid reason for denying them full access to a part of that market'.<sup>119</sup> The decisive criterion had to be whether the national measures substantially restricted market access.<sup>120</sup>

This proposed market-access test by Advocate General Jacobs is considerably different from an approach that focuses on factual and legal equality. Its underlying rationale goes beyond a prevention of discrimination and therefore to ensure equal treatment for market participants. The interpretation of the Treaty freedoms based on equality of opportunity leaves open the possibility that markets remain fragmented along national lines and hinder the 'realisation of greater economies of scale and wider consumer choice in an integrating market'.<sup>121</sup> Such fragmentation of national markets is problematic in light of the aim of establishing an internal market that serves to maximise overall total efficiency, but preventing such fragmentation is not required by equality of opportunity for market participants. For example, very strict regulation of the use of particular goods in a Member State has an equal effect on the opportunities of foreign and domestic market participants. However, such a regulation does have a significant effect on inter-state trade and impedes the market access of out-of-state distributors of such goods.<sup>122</sup> In addition, the test focused on market access proposed by Jacobs does not require a differential impact on foreign goods, persons or capital.<sup>123</sup>

Nonetheless, the market-access test increasingly serves as the predominant approach to the Treaty freedoms, although there is disagreement as to the precise meaning of the notion of market access. In *Leclerc-Siplec* the Court simply applied the *Keck* test and did not adopt Advocate General Jacobs' reasoning; however, it appeared to do so in other cases. In *Alpine Investments*, a case concerning the free movement of services, the CJEU did apply a market-access test.<sup>124</sup> There the CJEU held that a Dutch rule prohibiting companies from contacting individuals by telephone without their consent to offer them financial services was contrary to the freedom to provide services. Even though the rule had no differential impact on domestic and foreign service providers, it was nevertheless held to be a restriction on the free movement of services. The CJEU reasoned that it deprived the service providers from 'a rapid and direct technique for marketing and for contracting potential clients in other Member States'<sup>125</sup>

116 S. Weatherill, 'After *Keck*: Some Thoughts on how to Clarify the Clarification', 1996 *Common Market Law Review*, pp. 885-906.

117 Opinion AG Jacobs, Case C-412/93, *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA*, [1995] ECR I-00179, Para. 39.

118 *Ibid.*, Para. 40.

119 *Ibid.*, Para. 41.

120 *Ibid.*, Para. 42.

121 Weatherill 1996, *supra* note 116, p. 895 and p. 894; see also Opinion AG Jacobs, Case C-412/93, *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA*, [1995] ECR I-00179, Para. 40; see also Barnard 2010, *supra* note 10, p. 21.

122 Barnard 2001, *supra* note 100, p. 46.

123 Barnard 2001, *supra* note 100, p. 49.

124 Weatherill 1996, *supra* note 116, p. 892; Case C-384/93, *Alpine Investments BV v Minister van Financiën*, [1995] ECR I-01141.

125 Case C-384/93, *Alpine Investments BV v Minister van Financiën*, [1995] ECR I-01141, Para 28.



and 'directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services'.<sup>126</sup> In *Bosman*, which concerned the free movement of workers, the Court similarly focused on market access and required no differential impact on domestic and out-of-state workers in order to find the measure contrary to Article 45 TFEU.<sup>127</sup>

In the interpretation of the free movement of services, workers and the freedom of establishment, the market-access test is now well established although there is disagreement as to how the notion should be interpreted.<sup>128</sup> This focus on market access can be traced back to *Säger*.<sup>129</sup> The Court there held that the freedom to provide services (Article 56 TFEU) required:

[N]ot only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.<sup>130</sup>

In *Säger* the CJEU thus formulated a broad test on the basis of which all national measures that potentially restrict free movement are caught by the free movement provisions, although the *Säger* formula leaves open a number of different interpretations. The market-access test is now also used in the area of the free movement of capital, where the CJEU has accepted the *Säger* formula as the norm.<sup>131</sup>

The crucial question in applying this market-access test is whether national measures *substantially* hinder market access, in which case the national measures will be seen as a restriction on free movement. An example of a case in which this was not held to be so was the case of *Graf*. In this case a German national who worked in Austria, Mr Graf, challenged a rule of Austrian law which entitled employees to compensation in case their employment relationship was terminated without their consent after a period of three years or more. Mr Graf had voluntarily terminated his employment contract to take up employment in Germany, but argued that the Austrian rule restricted the free movement of workers. In his view it made moving to another state less attractive because by moving to Germany he lost the opportunity of being dismissed in Austria and, consequently, the opportunity to claim compensation. The CJEU rejected this view, because the entitlement to compensation was 'dependent on a future hypothetical event, namely the subsequent termination of his contract without such termination being at his own initiative or attributable to him'.<sup>132</sup> Moreover, this was considered to be 'too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers'.<sup>133</sup> In summary, the Austrian rule did not form a restriction on the free movement of workers, because it did not substantially impede market access. Commentators have argued that the case of *Keck* should be understood on the basis of this principle, namely that the selling arrangement which was under scrutiny in *Keck* did not substantially hinder market access.<sup>134</sup>

With the rulings in *Commission v Italy (Trailers)* and *Mickelsson and Roos* the CJEU finally appears to have opted for this approach. In these cases, the CJEU chose to apply the market-access approach also in the area of the free movement of goods.<sup>135</sup> In *Trailers* the CJEU ruled on an Italian law that trailers could not be pulled by motorcycles. A number of Member States argued that the rule laid down in *Keck* should be applied by analogy and that the Italian restriction on the use of trailers should be

126 CJEU 10 May 1995, Case C-384/93, ECR 1995 I-01141 (*Alpine Investments*), Para. 38.

127 Weatherill 1996, supra note 116, p. 893; and Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, [1995] ECR I-04921.

128 See Section 4.4., infra.

129 Case C-76/90, *Manfred Säger v Dennemeyer & Co. Ltd.*, [1991] ECR I-4221; see also Barnard 2010, supra note 10, p. 253.

130 Case C-76/90, *Manfred Säger v Dennemeyer & Co. Ltd.*, [1991] ECR I-4221, Para. 12.

131 Barnard 2010, supra note 10, pp. 571-574.

132 Case C-190/98, *Volker Graf v Filzmoser Maschinenbau GmbH*, [2000] ECR I-513, Para. 24.

133 Ibid., Para. 25.

134 Barnard 2001, supra note 100, pp. 13-16; Weatherill 1996, supra note 116, pp. 896-901.

135 E. Spaventa, 'Leaving Keck behind? The free movement of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos*', 2009 *European Law Review*, pp. 919-923; Barnard 2010, supra note 10, pp. 103-108.

presumed legal. The Court however decided that the Italian prohibition constituted a restriction on the free movement of goods. In essence, this was because the Italian prohibition prevented a demand for trailers pulled by motorcycles from arising.<sup>136</sup> The Court distinguished three types of measures that could constitute a measure of equivalent effect. Firstly, these are ‘measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably’.<sup>137</sup> Secondly, measures for ‘goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (...) even if those rules apply to all products alike’.<sup>138</sup> But also ‘[a]ny other measure which hinders access of products originating in other Member States to the market of a Member State’.<sup>139</sup> It was this latter test that the Court applied in *Trailers*. The Italian rule prohibiting the use of trailers towed by motorcycles did not fall within the first two categories, as it subjected Italian trailers to a similar burden as trailers coming from outside Italy by regulating their use. But, by preventing a demand for such trailers from arising, it did hinder the market access of such products on the Italian market.<sup>140</sup>

The judgment in *Trailers* was confirmed by the CJEU’s decision in *Mickelsson and Roos*.<sup>141</sup> In *Mickelsson and Roos* the main question was whether Swedish legislation restricting the use of water jet skis to specially designated waterways and generally navigable waterways was compatible with the free movement of goods. Again, the Court held that the severe restrictions on the use of jet skis in Sweden were likely to affect the consumer demand for these products and therefore constituted a restriction on market access.<sup>142</sup> The Court did maintain, however, that the Swedish measures for the most part could be justified by the aim of protecting the environment.<sup>143</sup>

#### 4.4. The meaning of market access

A difficult issue is to determine what the notion of market access means precisely and what the rationale of interpreting the Treaty freedoms on the basis of a market-access test is. Spaventa distinguishes between three possible meanings of the notion of market access. Firstly, the meaning of market access can be understood in economic terms. In a narrower view, market access then means ‘the ability for an economic actor to gain access to a market on an *equal footing* with other economic operators’.<sup>144</sup> In a broader view ‘any regulation can be seen as a potential barrier to access, since *any* regulation imposes compliance costs’.<sup>145</sup> Taking this latter approach as the norm, the crucial question becomes whether or not such regulation is arbitrary, and if it is, the restriction of market access is unjustified. As Spaventa correctly notes and as we have seen in the two previous subsections, the tension between these two economic interpretations is reflected in the case law of the CJEU.<sup>146</sup>

The second possible meaning Spaventa distinguishes is what she calls the meaning based on an intuitive approach. This intuitive approach is a middle way between the two different economic interpretations of the notion of market access. It goes beyond a test based on discrimination, but tries to provide a distinction for rules ‘which should be subjected to judicial scrutiny, and rules considered neutral as regards intra-Community trade which should fall altogether outside the scope of the Treaty free movement provisions’.<sup>147</sup> The problem with this intuitive approach is that it suffers from ‘definitional deficiency’<sup>148</sup> because it has no coherent normative underpinning. The intuitive approach therefore fails

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136 Case C-110/05, *Commission of the European Communities v Italian Republic*, [2009] ECR I-519, Para. 57.

137 *Ibid.*, Para. 37.

138 *Ibid.*, Para. 35.

139 *Ibid.*, Para. 37.

140 See also the discussion in Barnard 2010, *supra* note 10, pp. 104-108.

141 Case C-142/05, *Åklagaren v Percy Mickelsson and Joakim Roos*, [2009] ECR I-04273.

142 *Ibid.*, Paras. 26-27.

143 *Ibid.*, Paras. 34-44.

144 Spaventa 2004, *supra* note 101, p. 757.

145 *Ibid.*, p. 757.

146 *Ibid.*, pp. 757-758.

147 *Ibid.*, p. 758.

148 *Ibid.*, p. 759.

as a means to distinguish clearly between rules falling within the scope of the free movement rules and those that do not.<sup>149</sup>

The third possible meaning of market access is that based on the formal restrictions approach of Advocate General Fennelly. On the basis of this approach, non-discriminatory measures that form a necessary precondition for taking up a particular activity in another Member State, such as exercising a specific profession or trading in certain goods, are contrary to the free movement provisions unless objectively justified.<sup>150</sup> As with the intuitive approach, this approach based on formal restrictions has no clear and coherent normative underpinning: there is no good reason why these formal restrictions are caught under the free movement rules, whereas others are not.<sup>151</sup>

It is doubtful whether there is currently a coherent normative underpinning of the notion of market access. Spaventa argues that the interpretation of the Treaty freedoms based on a market-access test in essence means that the CJEU is protecting a right of the individual not to be subjected to unjustified regulation in exercising an economic activity. In effect, this means that the Court now requires a justification for all restrictions on economic freedom.<sup>152</sup> The real issue, according to Spaventa, is not one of market access 'but whether the measure in place regulating use, or any other rule for that matter, is such as to discourage the importer from attempting to penetrate the market either because it reduces the consumer base or it increases costs.'<sup>153</sup> The rationale for this interpretation, according to Spaventa, can be found in 'the broader aim of ensuring the competitiveness of the internal market as a whole, i.e. the competitiveness of the sum of 27 national markets, and the need to dispose such rules which, either because of the way they are drafted or because of economic and technological developments, are sub-optimal or altogether unnecessary.'<sup>154</sup> Snell comes to a similar conclusion and holds that the notion of market access serves to conceal a choice between an interpretation of the free movement rules on the basis of discrimination and anti-protectionism, or an interpretation based on economic freedom.<sup>155</sup> He holds that if the latter option is the rationale for the Treaty freedoms, it means that 'it would as a matter of logic have to ban all rules limiting the commercial freedom of traders.'<sup>156</sup>

Thus, the most coherent justification of the notion of market access seems the broad economic view identified in the above: any regulation is a potential barrier to market access, because it increases costs or reduces the width of the market. It is such an approach that the CJEU seems to apply in cases such as *Trailers* and *Mickelsson and Roos*. In its application, however, the CJEU adopts a more intuitive approach. It does not necessarily engage in an economic analysis of the rules under scrutiny but applies the concept of market access intuitively.<sup>157</sup> Therefore, equality of opportunity does not seem to be the underlying consideration in the interpretation of the Treaty freedoms.

#### 4.5. Evaluation

To what extent should we then consider the Treaty freedoms as fundamental rights and see them as hierarchically equal to other fundamental rights? On the basis of the foregoing analysis, we must make a distinction between the situations in which the Treaty freedoms protect equality of opportunity and the situation where they protect market access in a broader sense.

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

If we accept Rawls' lexical hierarchy between his two principles of justice, we would have to accept that there should be a hierarchical relation between those fundamental rights that we associate with the first principle of justice and the Treaty freedoms. Only if we reject Rawls' lexical ordering between the

149 Ibid., pp. 758-759.

150 Ibid., pp. 759-760 drawing on the test proposed by the AG in Case C-190/98, *Volker Graf v Filzmoser Maschinenbau GmbH*, [2000] ECR I-513.

151 Spaventa 2004, supra note 101, pp. 759-764.

152 Ibid., pp. 764-766; see also Spaventa 2009, supra note 135, pp. 924-925.

153 Spaventa 2009, supra note 135, p. 924.

154 Ibid., p. 925.

155 J. Snell, 'The Notion of Market Access: A Concept or Slogan?', 2010 *Common Market Law Review*, pp. 470-472.

156 Ibid., p. 468.

157 Spaventa 2009, supra note 135, p. 923.

first principle of justice and the principle of fair equality of opportunity are we able to accept that in many cases the Treaty freedoms are to be treated as being hierarchically equal to other fundamental rights. At the end of this article I will briefly consider whether this is a viable option.

Secondly, where the Treaty freedoms prohibit national measures that are not in this way discriminatory but merely limit market access in the broad sense discussed in the two previous subsections, they should not be seen as fundamental rights. In this interpretation the function of the Treaty freedoms is to ensure the competitiveness of the markets of the Member States, which does not constitute an interest that justifies these rights being awarded the status of fundamental rights. However, it has to be noted that there is disagreement as to whether this broad market-access test is really what the Court relies upon in its case law. As has been said, the notion of market access leaves open a variety of interpretations among which is a test focused more on equal treatment.<sup>158</sup> In fact, the case law of the CJEU in this respect lacks coherence.<sup>159</sup> Moreover, although some have argued that 'the *Keck* distinction based on the type of rules is no longer relevant',<sup>160</sup> it has not yet been abandoned by the Court. The point I wish to make, however, is that where the Court relies on a broad market-access test outlined in the previous two subsections, it should not claim for the Treaty freedoms a status hierarchically equal to that of fundamental rights. Therefore, in cases where there is a conflict between a fundamental right and a Treaty freedom the CJEU should carefully distinguish between these two different interpretations of the Treaty freedoms.

## 5. Concluding thoughts

This article addressed the question of whether the Treaty freedoms should be seen as fundamental rights and whether we should see both types of rights as hierarchically equal. The short answer to that question argued for here is that at least a distinction needs to be made between different values or interests which the Treaty freedoms can be seen to protect, i.e. equal opportunity and wealth maximization, and that the CJEU currently fails to do so adequately. Only in the case where the Treaty freedoms protect equal opportunity should they be seen as fundamental rights. This distinction should be reflected in the case law of the CJEU.

That view is based ultimately on the idea that we protect persons' fundamental rights, because we accept that persons have certain basic interests that are fundamental and which therefore deserve special protection. If we wish to establish that certain rights are equally fundamental or hierarchically equal, they must equally protect such basic interests. To enquire what these basic interests are, what fundamental rights they justify and whether this includes the Treaty freedoms, the political philosophy of John Rawls was used as a normative framework.

On the basis of Rawls' theory and justification for fundamental rights, it was concluded that as a matter of justice we have reason to accord special protection to two classes of rights. Firstly, everyone is entitled to a set of basic rights and liberties roughly comparable to traditional civil and political liberties and rights, as well as basic rights to food, clothing, education and medical care. These rights are associated with Rawls' first principle of justice. On a strict interpretation of his theory, a basic right can only be limited when necessary for the protection of another one of these basic rights. The second class of rights is the class of rights associated with the principle of fair equality of opportunity. This principle gives us strong reasons to recognise at least a right to freedom of occupation and a related right to freedom of movement as fundamental rights.

On this basis it was argued that the EU Treaty freedoms can be seen as fundamental rights where they protect the value of equality of opportunity. This is where they prohibit the – direct or indirect – discrimination of market participants from other Member States on grounds of nationality, or where they prohibit these market participants from being subjected to double regulatory burdens. In these

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158 An alternative understanding of the case law has been proposed by AG Maduro in *Alfa Vita*, where he argues that the Treaty freedoms should be seen as prohibiting discrimination against the exercise of freedom of movement. This means that Member States must take 'into account the effect of the measures they adopt on the position of all European Union citizens wishing to assert their rights to freedom of movement'. See Paras. 40 and 46 of Opinion AG Maduro, Joined cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulos AE (C-158/04) and Carrefour Marinopoulos AE (C-159/04) v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon*, [2006] ECR I-8135.

159 Snell 2010, supra note 155, p. 467.

160 Spaventa 2004, supra note 101, p. 10.

situations the Treaty freedoms can be said to protect the right of out-of-state market participants to compete equally with domestic market participants and therefore their equality of opportunity. However, in certain cases the CJEU seems to adopt a broader market-access test. There the question seems not so much whether national measures impinge on the equal opportunity of all market actors, but rather whether the national regulation increases costs or reduces the width of the market for those market actors without sufficient justification. On this interpretation the function of the Treaty freedoms is said to be that of ensuring the competitiveness of the markets of the Member States. Important as that may be, it cannot justify giving the Treaty freedoms the status of fundamental rights if we base ourselves on Rawls' political philosophy. The Treaty freedoms therefore should not be seen as fundamental rights where they protect market access in this broad sense and the CJEU should carefully distinguish between these different interpretations.

If we follow the normative framework of Rawls' theory of justice strictly, we would have to conclude that in all cases the protection of fundamental rights that fall under Rawls' first principle of justice should be given priority over the protection of the Treaty freedoms, because of the lexical priority of the first principle. This entails that in any case of a conflict between a fundamental right that falls under the first principle and a Treaty freedom, priority has to be given to the protection of the fundamental right. However, Rawls' strict hierarchical ordering between the different rights and principles of justice perhaps has to be nuanced. Applying Rawls' method of reflective equilibrium we may argue that his construction of the priority of liberty is too strict, because it does not accord with our considered convictions about justice that we find in legal practice, and that we thus should not categorically rule out restrictions on basic liberties also on grounds other than that of protecting basic liberties. The philosopher James Griffin appears to take such an approach. He does not rule out that fundamental rights may be restricted in order to secure other interests such as greater general welfare, but he similarly holds that rights are resistant to such trade-offs because the values which the rights protect are of particular importance.<sup>161</sup> Possibly such an approach also fits better with the way in which fundamental rights in the European Convention on Human Rights and the fundamental rights enshrined in the national constitutions of the Member States often allow for a wide range of possible restrictions. The crucial point, however, is that fundamental rights protect values that are of particular importance and therefore *are resistant* to trade-offs against other interests.

Furthermore, we may also wish to reject Rawls' hierarchy between the basic rights and liberties and equality of opportunity. The justification for a hierarchy between both types of rights lies mainly in the idea that equality of opportunity deals mostly with the economic opportunities of individuals and their eventual economic position in society, whereas the basic rights and liberties associated with the first principle of justice protect more fundamental interests of individuals. However, a choice of occupation may be judged so central for persons in realising their conception of the good that it merits to be included among the basic rights and liberties. If individuals are denied a job because of features not having to do with their talent and ability, this is likely to be a severe impediment to the realisation of their conception of the good and not just an impediment to gain a greater amount of income. If so, the position of the CJEU that there is no hierarchy between the Treaty freedoms and fundamental rights is justified, but only to the extent that the Treaty freedoms can be seen to protect equality of opportunity. In any case the Court should distinguish clearly between cases where equality of opportunity is at stake and cases in which it is merely market access in the broad sense that is restricted. In cases where it is merely this market access that is at stake, the CJEU should regard the protection of fundamental rights as more important, and be very careful in allowing a restriction of fundamental rights in order to protect the exercise of the Treaty freedom. Consistent with this it should take the protection of fundamental rights as a starting point and ask whether the exercise of the Treaty freedom can justify a restriction, thus placing the burden of proof on those willing to exercise the Treaty freedoms. On the other hand, in cases where the Treaty freedoms can be seen as protecting equality of opportunity and where they conflict with other fundamental rights, the Court would be justified in construing the conflict as a right-right conflict in which a fair balance has to be sought.

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161 J. Griffin, *On Human Rights*, 2008, pp. 79-80.

Finally, I wish to point to two difficult issues that arise if we take the Treaty freedoms as fundamental rights where they protect equality of opportunity. First, can it be justified that third-country nationals generally do not enjoy the same free movement rights? Must we not accept that third-country nationals should similarly be able to rely on the Treaty freedoms? Or would difficulties in accepting that position prompt us to reconsider the normative argument for seeing Treaty freedoms as fundamental rights? These issues require further consideration.

Secondly, as we have seen, Rawls holds that formal equality of opportunity is part of a wider principle of fair equality of opportunity, which in turn is part of a wider theory of justice that gives strong normative grounds for redistributive policies. In the EU social and redistributive policies are still primarily organised at the level of the Member States. Even though we may see the Treaty freedoms as fundamental rights because they protect formal equality of opportunity, it seems increasingly problematic that these rights are not coupled with wider social and redistributive policies, as they may be seen to undermine the reciprocity that lies at the basis of the Member States' welfare systems.<sup>162</sup> To quote Scharpf:

‘In the name of transnational solidarity, the Court has weakened or eliminated the nation-state’s control over the balance of contributions and benefits and the boundaries of state generosity. This does, indeed, create incentives for transnational mobility, and it may contribute to the interweaving of European societies. At the same time, however, the extension of personal mobility rights for individuals creates special burdens for national welfare states with high levels of collectively financed services and transfers, and, thus, it also creates incentives favouring convergence towards the liberal minimum of social protection.’<sup>163</sup>

This leads to two questions that deserve further exploration. Because formal equality of opportunity is part of a wider principle of fair equality of opportunity, care should be taken that the protection of formal equality of opportunity does not obstruct the maintenance of institutions that are to ensure this wider fair equality of opportunity. This should be taken into account in the CJEU’s interpretation of the Treaty freedoms. Furthermore, Scharpf’s analysis should also prompt us to further explore the contextual preconditions as well as the consequences of projecting Rawls’ influential and important theory of justice on the EU.

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162 F.W. Scharpf, ‘The asymmetry of European integration, or why the EU cannot be a “social market economy”’, 2010 *Socio-Economic Review*, pp. 222-223.

163 *Ibid.*, p. 238.