Fundamental Rights in Internal Market Legislation
(Draft Presentation Outline for panelists – please do not quote without permission)

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I. Harmonising fundamental rights protection through the internal market?

Academic debates examining the relationship between fundamental rights and economic freedoms in the Internal Market have mainly focused on the tension between the two interests as arising in the negative market integration process, whereas their relationship in the positive integration process has so far been neglected.

However, once it is recognised that the Union legislator has not only (under certain circumstances) a competence to pursue fundamental rights protection through the internal market, but arguably also a duty to do so, as well as an opportunity not only to respond to but also to pre-empt clashes between the two interests arising in the negative integration process, an examination of the existing internal market harmonisation practice impacting on fundamental rights becomes a necessary task.

II. The harmonisation practice

A review of internal market legislation through the lens of four rights (data protection, freedom of expression, fundamental labour rights and the right to health) leads to the following finding:

1. Existent but to a great extent not explicit/visible

For the most part, existing internal market legislation is typically not termed as being expressly concerned with providing fundamental rights protection. One remarkable exception is Data Protection. However that regime is soon to be replaced by new legislation that will be based on a new and explicit legal basis for data protection introduced by the Lisbon Treaty and placing the regulation of this fundamental right at the EU level outside the internal market.

This is not a novel phenomenon; a comparison can be made with social policy, which was also initially pursued through the Internal Market (e.g. the Collective Redundancies Directive and the Acquired Rights Directive) before it had gained

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2 Such duty can be based on the mainstreaming obligation contained in the Charter of Fundamental Rights: Art. 51 (1) CFR provides the Union institutions “shall promote the application” of the rights contained in the Charter “in accordance with their respective powers”.
3 Art. 16 TFEU.
4 OJ 1975, L 48/29
a distinct place in the Treaties with the entry into force of the Maastricht Treaty. Another example of an instrument being expressly concerned with a value linked to the fundamental right of freedom of expression would have been the (failed) Media Ownership Directive.6 Within the area of discussed rights, a further (failed) instrument expressly concerned with a fundamental right can be listed here that arose as a direct response to the controversial Viking/Laval case law - the draft Monti II Regulation.7 However, the instrument did not find its legal basis in the Internal Market but, arguably erroneously, on Art. 352 TFEU.

Another point to note is that, unsurprisingly, in areas where the fundamental right at stake coincides with a market freedom, the latter will be emphasised.8 A good example is the Audiovisual Media Services Directive where the freedom to provide and receive services coincides with the freedom to provide and receive information.9

2. Determinants

Whether or not fundamental rights protection will be pursued through the internal market and whether it will be done so explicitly depends on a series factors, which can be divided in four categories:

a) The interests of the institutions and the political context they operate in at a given time
E.g. The political controversy surrounding the Media Ownership Directive with opposition between, within and outside the law-making institutions facilitated the instrumentalisation of the competence argument against adoption of the Directive.

b) The constitutional context (limited competence, the question of the hierarchical relationship between market freedoms and fundamental rights)
   - Pursuing fundamental rights protection will always be contingent on satisfying the requirements for having recourse to the Internal Market legal basis.
   - Once the legal basis requirements are satisfied, harmonisation will involve the difficult task of reconciling two values that appear to enjoy the same hierarchical rank in the Treaties

5 OJ 1977, L 61/26
7 Commission Proposal for a ‘Council Regulation on the right to take collective action within the context of the freedom of establishment and the freedom to provide services’, COM(2012) 130 final.
c) The incentives provided by the Court
   - Rulings calling for a codification and/or clarification exercise, e.g. the patient mobility directive\textsuperscript{10}
   - Legislator taking the lead in integration because of no/insufficient results through negative market integration, e.g. data protection
   - Rulings, which the legislator may want to pre-empt, e.g. draft Monti II

d) The institutional apparatus (mainstreaming fundamental rights through impact assessments and ex ante fundamental rights compatibility assessments of legislation)

The first instance where legislation can be conceptualised and tested as to its implications for fundamental rights protection is the impact assessment and compatibility assessment stage. The Commission put in place such mechanisms for systematic fundamental rights scrutiny of EU legislation since 2001,\textsuperscript{11} although up until today, these have not been functioning well. One point that is important for the broad absence of fundamental rights language in internal market legislation concerns the institutional actors (the relevant DG and Committee at the Commission and EP respectively) involved, who, so far, have been lacking what the Commission has termed a ‘the fundamental rights reflex’.

e) The type of right affected

3. Consequences of adopting a fundamental rights approach

a) On the substantive content of legislation

aa. Absence of a fundamental rights conceptualisation does not necessarily lead to a violation of fundamental rights standards in legislation
   E.g Commercial speech in consumer legislation

a.b. Presence of a fundamental rights conceptualisation may be likely to correlate with a higher standard of fundamental rights protection in the legislation
   E.g. First Commission proposal of the Posted Workers Directive \textsuperscript{12} and EP amendments at first reading

a.c. Presence of a fundamental rights conceptualisation may however not always provide added value.
   E.g. One added value of fundamental rights language in the sphere of socio-economic rights is that it facilitates mobilisation of civil society leading to upstream change and influencing policy and legislative processes. When taking

\textsuperscript{12} Commission legislative proposal, COM(91) 230 final.
the field for EU tobacco advertising regulation however, it emerges that it was the scientific argument rather than the fundamental rights argument driving the initiation of the policy process.

b) On judicial review of legislation?

In the case of economic legislation the legislator enjoys wide discretion, so that judicial review will not be strict. However, if economic legislation is also conceptualised as fundamental rights legislation, or as legislation impacting on fundamental rights, that may impact on the level of scrutiny employed by the Court.13 Arguably, the degree to which the scope of protection of the EU FR is defined at EU level (e.g. through harmonisation) will play an important role in this regard.

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13 See Case C-92/09 and C-93/09 Schecke.