Oliver Gerstenberg

Fundamental Rights and Democratic Sovereignty in the EU: The Role of the Charter of Fundamental Rights of the EU (CFREU) in Regulating the European Social Market Economy

If the EU succeeds, it will be because the attachment of Europeans to common interests and values is strong enough to contain the conflicts of interest that will inevitably remain …

Thomas Nagel, The Limits of International Law, in: Philosophy and the Religious Temperament (OUP: 2010), 94.

I. "Judicial activism" and democratic sovereignty in the EU

The EU, in its present configuration, has often been accused of a persistent and deep structural bias in favor of economic integration to the detriment of the democratic and social values of its Member States.[1] Can, in response to that accusation, the CFREU come to the rescue and be mobilized, ultimately before a judicially-activist CJEU, as a vehicle of social justice, in an effort to correct bias and to counter-balance the expansive economic liberties of the European single market?

Exploring this question is a timely topic given a clearly discernable new constitutional turn in the jurisprudence of the CJEU's Grand Chamber, especially now under the current presidency of Koen Lenaerts (since 2015). The "Lenaerts-Court," as this article will argue, has embarked on a new EU fundamental-rights jurisprudence, visibly aimed at strengthening the dignitarian-social dimension of EU integration and at adding flesh to the bones of the commitment to a European social market economy in Art. 3(3) TEU.

Yet proposals in support of greater reliance on the substantive, but open-textured, provisions of the CFREU, in the pursuit of a "fair balance" between the EU's economic and dignitarian-social dimensions, invariably run into democratic-minded objections. The provisions of the CFREU, being formulated at a very high level of abstraction, do not generate uncontroversial answers to where the balance should lie. Accordingly, the democratic-minded concern is about sovereignty passing from the Member States to the courts, and ultimately to the Grand Chamber itself. The persistent worry is that democratic sovereignty over constitutionally-sensitive—but morally and politically divisive—choices is being turned into a "sovereignty of law"[2]—in ways that not only risk foreclosure of democratic debate over yet unsettled key societal matters but also will lead to some form of "elite constitutionalism" in the EU at variance with the diverse—to use Bruce Ackerman's term—"legitimation-paradigms"[3] ultimately rooted in the political life and popular politics of the culturally, institutionally, economically diverse Member States themselves.

This concern needs to be taken seriously. A clear and influential articulation of democratic anxiety is Dieter Grimm's stark warning that those who claim that the EU does have a constitution, thereby "give up a central element of modern constitutionalism, namely democratic legitimation, and content themselves with a

[1] For a recent summary and discussion of, and response to, those concerns, cf. Philippe Pochet, À la recherche de l'Europe sociale (PUF: 2019).
[2] Francis Jacobs, The Sovereignty of Law. The European Way. Hamlyn Lectures (Cambridge UP: 2007), (interpreting this, however, as an overall benign process).
[3] On this terminology, see Bruce Ackerman, Revolutionary Constitutions. Charismatic Leadership and the Rule of Law (Harvard UP: 2019), at 22f.

watered-down notion or bridge the gap with fictions."[4] The main reason is that, according to Grimm, the EU treaties remain only "contractual in nature"[5] and are not based on "an act of self-determination of a European society" as a whole, meaning that "[t]he citizens of the Union have no share in [the EU]." Grimm criticises the CJEU's jurisprudence simultaneously on both fronts in a kind of pincer-move: that is, *both* for its alleged structural economic bias and, *at the same time*, for trying to overcome its alleged economic bias. According to Grimm, where the CJEU interprets the Treaties in a constitutional mode"—unmoored from "the will of of the Member States and instead oriented at an objectivised purpose and unconcerned about their sovereignty"—the "chain of legitimation" running from the peoples of the Member States to the EU eventually breaks: "over-constitutionalisation" means that "[d]ecisions of high political moment" are being made "in a non-political way … by … judicial institutions … largely divorced … from the democratic processes of both the Member States and of the EU itself."[6] Wide-spread alienation of citizens from the EU integration project is the predicted consequence of an over-constitutionalizing jurisprudence: a dictatorial CJEU will undermine the capacity of citizens to choose for themselves, in accordance with their own judgments and national constitutional priorities, the kind of constitutional settlements—for example whether capital or labor should be better protected—that best reflect their process of democratic discourse and compromise; a process which is thought to exist at the national level but not at the EU level.[7]

In an effort to address—and eventually disarm—this democratic-minded concern, this article argues that judicial emphasis on the CFREU's dignitarian-social values need not *per se* lead to the consequence of over-constitutionalisation. Rather, this article proposes to look at the Grand Chamber's new fundamental-rights jurisprudence as creating a framework for plural and inclusive deliberation on key societal choices and values. This proposal draws on views according to which courts can enhance democratic deliberation by requiring attention to relevant reasons and by ensuring stakeholder-participation.

To demonstrate the deliberation-enhancing role of the CJEU, in a first step (II.A.), this article introduces—by way of a contrast with the familiar ordoliberal understanding of the EU integration process—what this article will call the dignitarian conception of the CFREU. This dignitarian conception can explain the increasing relevance of the substantive provisions of the CFREU not only as negative defensive rights but also in the economic sphere. In the EU, as an entity defined by establishing an Internal Market which is based on a social market economy (Art. 3(3) TEU), constitutional legitimacy increasingly comes to depend on the efficacy of fundamental rights also within that sphere, often requiring balancing, for example, between the colliding rights of vulnerable employees, on the one hand, and the freedom to conduct a business of economic operators in Art. 16 CFREU, on the other. This requirement, however, raises the concern about over-constitutionalisation. In a second step (II.B.), this article argues that this concern is today particularly strong in two lines of the Grand Chamber's new fundamental-rights jurisprudence, but can also be rebutted by showing that judicial intervention in each of these cases serves to enhance democratic deliberation. Representative of the first line is *AGET Iraklis*,[8] where Greece relied on the CFREU—the workers' right to protection against unfair dismissal in Art. 30 CFREU—in order to justify domestic measures that conflicted with fundamental economic freedoms (Art. 49 TFEU and Art. 16 CFREU). Representative of the second line of cases are the Grand Chamber's rulings on the horizontal direct effect of fundamental rights, as illustrated by its rulings in

[4] Dieter Grimm, "Constitutionalisation without Constitution: A Democracy Problem." *The Rise and Fall of the European Constitution*. Ed. NW Barber, Maria Cahill and Richard Ekins. Oxford,: Hart Publishing, 2019. 23–40, at 25 and 27.

[5] Ibid., at 24.

[6] Dieter Grimm, op. cit.; Scharpf, The asymmetry of European integration, or why the EU cannot be a 'social market economy', Socio-Economic Review (2010) 8, 211–250.

[7] For these lines of critique, cf. Eleanor Spaventa, Should We 'Harmonize' Fundamental Rights in the EU? Some Reflections About Minimum Standards And Fundamental Rights Protection in the EU Composite Constitutional System, in: *Common Market Law Review* 55: 997–1024, 2018; Elise Muir, The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from Mangold to Bauer. In: Review of European Administrative Law 2019-2, 185—215.

[8] CJEU (Grand Chamber) Case C-201/15 Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis, Judgment of 21 December 2016.

Egenberger,[9] *Broßonn*,[10] *Max Planck*,[11] and *Cresco*,[12] among others. In these cases—in order to compensate for the lack of horizontal effect of *directives*—the Grand Chamber "constitutionalised" directives by combining them with substantive CFREU provisions in order to produce the horizontal direct effect of the respective CFREU rights in question. This jurisprudence—which is in continuity with the CJEU's earlier, much-debated rulings in *Mangold*[13] (pre-CFREU) and *Kücükdeveci*[14]—has given rise to severe concerns about over-constitutionalisation, notably among various Advocates General themselves; the concern being that through its constitutionalisation of directives the CJEU is "inventing" EU law in ways that exceed EU competences and fatefully undermine democratic prerogatives of the Member States affected. Yet, in all these rulings the Grand Chamber either endorsed or effectively raised the level of social protection for often vulnerable employees, thereby forcing Member States to reconsider their choices in the light of the CFREU.

In a third step (III.), this article reformulates more systematically the core idea of deliberation-enhancing judicial intervention. As indicated, courts generally can enhance democratic deliberation by requiring attention to relevant reasons and by ensuring inclusion of stakeholders. This section argues that this general idea extends also to the CJEU. First, in each of the cases under review, the Grand Chamber imposes a baseline-answer which does not foreclose or preempt democratic deliberation but touches-off, re-orients and channels a process of deliberative reconsideration of domestic solutions in the light an emergent shared understanding of the respective CFREU-value at stake. Second, over the sequence of cases, this CFREU-interpretive baseline-answer remains subject to critical re-examination, learning and re-interpretation. Yet this process is not court-centric but remains part of a practice of meaningful engagement between various stakeholders—which include not only litigants and national courts but also the Advocates General, the Member States, civil society and the wider EU public. The practice of CFREU-interpretation can itself be seen as an exercise of democratic sovereignty. Rejecting the objection that the account offered in this article is overly optimistic about the prospects of deliberation in the EU, this section concludes that there are today good reasons for turning the CFREU into a critical instrument for the defense of the dignitarian-social values—values which are derived from the underlying social and democratic commitments of the Member States themselves—and for resisting calls for a "de-constitutionalisation" of the CFREU.

II. Constitutionalizing the CFREU

A. The dignitarian conception of the CFREU

Among the concerns raised by Dieter Grimm is that since the vast majority of requests for a preliminary ruling which reach the CJEU have their origin in actions by economic actors who see their interests threatened by national legislation, the inevitable result at the level of EU law is "a structural bias in favour of liberalisation."[15] Indeed, the aim of the Treaty of Rome was to achieve economic integration, albeit from the outset with wider political and social aspirations. The familiar *ordoliberal* reading of the Treaty of Rome focused on rules and institutions designed to insulate markets from ordinary politics and to discourage citizens and states from intervening into economic affairs. In imposing negative constitutional constraints on democratic sovereignty retained by the Member States, (what is now) EU law was seen to work in tandem with—but also to go much further than—the European Convention on human rights. As a leading exponent of ordoliberal tradition at its

[9] CJEU, C-414/16, EU:C:2018:257.
[10] Joined cases of Stadt Wuppertal v Bauer and Willmeroth v Martina Broßonn (C-569/16 and C-570/16).
[11] CJEU Max-Planck-Gesellschaft, C-684/16, ECLI:EU:C:2018:874.
[12] CJEU, Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* EU:C:2019:43.
[13] CJEU Case C-144/04, *Werner Mangold v. Rüdiger Helm*, Judgment of the Court (Grand Chamber) of 22 November 2005, ECLI:EU:C:2005:709.
[14] CJEU Case C-555/07, *Seda Kücükdeveci v. Swedex GmbH & Co. KG*, Judgment of the Court (Grand Chamber) of 19 January 2010, [2010] ECR I-00365
[15] Dieter Grimm, op. cit., at 35.

dawn wrote, with the ECJ's rulings on direct effect and primacy in place, "[t]he chain that bound sovereignty and law together was broken,"[16] welcoming this effect. In its role as primarily economic law, (what is now) EU law was thought to serve "the implementation of an economic order based upon open markets and undistorted competition …. while the Member States retain legislative and executive powers that are compatible with open markets."[17] Grimm's concern can, accordingly, be understood as a normative inversion of ordoliberalism: since, in his view, the ECJ contributes to the establishment of the single market mainly negatively through removal of trade barriers, the resulting structural economic bias fatefully and destructively "affects social policy"[18] both at the EU- and, crucially, at the domestic level.

Contrast the ordoliberal conception of EU law with a contemporary dignitarian conception of the CFREU. The concept of human dignity not only figures prominently in Art. 2 TEU,[19] but is, of course, also central to the entire framework of the CFREU. While it remains the case that the EU's very existence, at the foundational level, derives from an international agreement, with the Member States' consent to be bound by the Treaties being dependent on ratification "in accordance with their respective constitutional requirements,"[20] the Preamble to the CFREU reaffirms that the EU itself, "conscious of its spiritual and moral heritage, … is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law." The Preamble directs the EU to place "the individual at the heart of its activities." The Preamble not only requires the EU to contribute to the "preservation" of those "common values," but also to their "development." CFREU rights—as they result "from the constitutional traditions and international obligations common to the Member States"—must always be protected "in the light of changes in society," in particular through "the case-law" of the CJEU and of the ECtHR. Art. 1 CFREU subsequently provides that human dignity "is inviolable" and "must be respected and protected." As the official *Explanations* go on to elaborate, human dignity "constitutes the real basis of fundamental rights" in the CFREU, adding that "none of the rights laid down in the Charter may be used to harm the dignity of another person" and that "the dignity of the human person … must therefore be respected, even where a right is restricted."[21]

These various formulations in the Preamble point toward the idea of the CFREU as a "living" instrument. The interpretation of CFREU rights must always adapt to "changes in society." The apparent dilemma for the Grand Chamber is this. On the one hand, Grimm's democratic-minded worry about over-constitutionalisation addresses the risk of elevating the Grand Chamber into an "Archimedean position"[22] of deciding matters of high moral and political import whose examination and resolution perhaps more justly or more fittingly belong to domestic democratic venues of political life and compromise. However, on the other hand, the open-textured guarantee of human dignity arguably serves both as a "seismograph"[23] for changing social values in society and as a portal for the incorporation of dignitarian values into EU law. The CFREU's terms must provide citizens and officials with a shared normative framework for critique, justification and ongoing reform through processes of public reasoning and its underlying principles must articulate the EU's self-understanding as a *sui-generis* polity beyond the state. The following section analyses how the Grand Chamber navigates this tension between responsiveness and over-constitutionalisation.

[16] E-J Mestmäcker, On the Legitimacy of European Law 58 RabelsZ, 615—35, at 626 (1994).
[17] Ibid., at 643.
[18] Dieter Grimm, op. cit., at 35.
[19] The EU is "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights." See Art. 2 Consolidated Version of the Treaty on European Union [2016] OJ C202/13.
[20] Art. 54 TEU, Art. 357 TFEU). The same applies also to treaty amendments: Art. 48 par. 4 TEU.
[21] Explanations relating to the Charter of Fundamental Rights, OJ (2007/C 303/02).
[22] Cf. AG Geelhoed, in his Opinion in C-13/05 - Chacón Navas *Chacón Navas*, rec. 54.
[23] On that metaphor, cf. J. Habermas, The Concept of Human Dignity and the Realistic Utopia of Human Rights, in: METAPHILOSOPHY, Vol. 41, No. 4, July 2010, 464—80, at 469 (arguing that human dignity "forms the 'portal' through which the egalitarian and universalistic substance of morality is imported into law.")

B. The CFREU: part of the problem or part of the solution to the problem?

1. Economic freedoms and fundamental rights: the so-called "derogation-situation"

This section explores, against the background of the CJEU's Grand Chamber ruling in *AGET Iraklis*,[24] what Lenaerts and Gutiérres-Fons have called "the derogation-situation."[25] The derogation-situation arises as follows. The EU fundamental economic freedoms—such as, in *Iraklis*, freedom of establishment under Art. 49 TFEU—operate as a "constitutional limit" on the regulatory powers retained by Member States.[26] The question, accordingly arises whether in order for a national measure that conflicts with a fundamental economic freedom to be justified, such a measure must not only pursue a legitimate interest recognised by EU law but must also be in compliance with CFREU rights. In *Iraklis*, the pertinent CFREU rights were the workers' right to protection against unfair dismissal (Art. 30 CFREU), on the one hand, and the economic operator's freedom to conduct a business (Art. 16 CFREU), on the other. However, in order for the CFREU to apply, the challenge is whether, in this derogation-situation, the Member State is actually "implementing" EU law as required by Art. 51(1) CFREU. The normative concern underlying this challenge is about an CFREU-driven competence-creep of the EU and the CJEU and, concomitantly, about upsetting the allocation of powers between the EU and the Member States to the detriment, ultimately, of the remaining democratic prerogatives retained by the latter.

Iraklis concerned the question of whether the powers of the Greek Minister for Labour, once properly notified, to refuse planned collective redundancies in order to protect workers and employment are compatible with EU Law. In particular, at issue was the interpretation of Directive 98/59 on collective redundancies which is designed to strengthen the protection of workers while harmonising the costs which worker-protective rules entail for undertakings by requiring national legislatures to set up objective procedures.[27] The impugned Greek legislative required employers to notify the competent public authority of any plans for collective redundancies. If no agreement was forthcoming between the employer and the workers' representatives on projected collective redundancies, the competent Greek authority could, within a period prescribed by that legislation, adopt a decision opposing or limiting such redundancies.

In his Opinion in *Iraklis*, AG Wahl argued that Art. 30 CFREU—the right to protection against unjustified dismissal—did not lay down obligations that were sufficiently "specific," rendering this provision in the end therefore "irrelevant for the purposes of the balancing test which the Court must perform"[28] and non-justiciable. He took the view that the idea of a balancing exercise was "in fact a fallacy" because, "[h]istorically speaking, the idea of artificially maintaining employment relationships, in spite of unsound general economic foundations, has been tested and has utterly failed in certain political systems of yesteryear."[29]

The Grand Chamber did not follow the AG's view. By contrast to the AG's Opinion, it insisted that the underlying value-conflict was, indeed, between, on the one hand, the protection against unfair dismissal in Art. 30 CFREU, and, on the other hand, freedom of establishment under Art. 49 TFEU and freedom to conduct a business under Art. 16 CFREU which entails freedom of contract. As regards freedom of establishment, the Grand Chamber held that the Greek framework regime for collective redundancies rendered access to the Greek market less attractive to economic operators[30] and constituted a "significant interference"[31] with Art. 49 TFEU, because the decision to effect collective redundancies "is … a fundamental decision in the life of an

[24] CJEU (Grand Chamber) Case C-201/15 Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis, Judgment of 21 December 2016.
[25] K. Lenaerts and José Gutiérres-Fons, The EU Internal Market and the EU Charter. Exploring the 'Derogation Situation'. In: F. Amtenbrink, G. Davies, D. Kochenov, & J. Lindeboom (Eds.), The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley (Cambridge: 2019), 49—64, at 63
[26] Ibid., at 50.
[27] CJEU (Grand Chamber) Case C-201/15 AGET Iraklis, rec. 41.
[28] AG Wahl, Opinion in Iraklis, rec. 58 and 59.
[29] AG Wahl, Opinion in Iraklis, rec. 73.
[30] CJEU, Iraklis, par. 56.
[31] CJEU, Iraklis, par. 55.

undertaking."[32] As regards overriding reasons in the public interest capable of justifying the obstruction of freedom of establishment, the Grand Chamber held that the fundamental rights of the CFREU were, indeed, applicable in such a situation. For the use by a Member State of exceptions provided for by EU law in order to justify an obstruction of one or more fundamental freedoms must count as "'implementing Union law' within the meaning of Article 51(1) CFREU."[33] Accordingly, the Greek framework regime was capable of justification in the public interest, but "only if it complies with fundamental rights"[34] enshrined in the CFREU and, in particular, with both Art. 30 CFREU and with the freedom to conduct a business according to Art. 16 CFREU of economic operators, requiring a fair balance. As the Grand Chamber reiterated, referring to *Alemo-Herron*, freedom to conduct a business in Art. 16 CFREU—which also covers freedom of contract[35]—means that "an undertaking must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity."[36]

To establish a fair balance, in a first step, the Grand Chamber held that the Greek framework regime did constitute an interference with freedom of contract. However, the Grand Chamber, arguably in response to *Lochner*-style concerns, also ruled that freedom of contract may, indeed, "be subject to a broad range of interventions on the part of public authorities that may limit the exercise of economic activity in the public interest."[37] This is the case, in particular, because the "European Union is not only to establish an internal market but is also … to promote … proper social protection" and "is based … on a highly competitive *social* market economy."[38] The Greek regulatory framework regime on collective redundancies was not such as, at least in principle, to "affect the essence of the freedom to conduct a business enshrined in Article 16 of the Charter," because that framework did not entirely exclude—but only regulated—the ability of undertakings to effect collective redundancies.[39] However, those regulatory interventions also had to be proportionate according to Art. 52(1) CFREU. To be proportionate, the domestic regulatory framework must, as the CJEU stressed in a second step, "strike a fair balance" between the interests in protection against unjustified dismissal, flowing from Art. 30 CFREU, on the one hand, and the countervailing interests of economic operators protected under Art. 49 TFEU and Art. 16 CFREU.[40] Here the Greek regulatory framework regime failed to meet that standard, but only because the criteria authorizing intervention by a public authority were formulated "in very general and imprecise terms … without any indication of the specific objective circumstances in which those powers are to be exercised" and in ways that may have the "effect … of excluding that freedom [to conduct a business and to contract] altogether."[41] In other words, the framework was untransparent for economic operators.

As leading commentators on *AGET Iraklis* wrote, "the judgment is certainly to be celebrated," because the balancing exercise which the CJEU performed on this occasion was "more sensitive to the fact that collective redundancies do not solely affect the rights and interest of undertakings, but also those of workers and, no less importantly, of society at large," meaning that "it is now up to Greece's creditors … to support the Greek government in its efforts towards ensuring the development of a 'social market economy' along the lines elaborated by the CJEU."[42] And as Lenaerts and Gutiérres-Fons have clarified, "the ruling of the ECJ in AGET

[32] CJEU, Iraklis, par. 54.
[33] CJEU, Iraklis, 62—64.
[34] CJEU, Iraklis, par. 65.
[35] CJEU, Iraklis, par. 67, with reference to *Sky Österreich* ,C-283/11, EU:C:2013:28, par. 42.
[36] CJEU (Grand Chamber) Case C-201/15 AGET Iraklis, rec. 68.
[37] CJEU (Grand Chamber) Case C-201/15 AGET Iraklis, rec. 86.
[38] CJEU (Grand Chamber) Case C-201/15 AGET Iraklis, rec. 76f. (my emphasis).
[39] CJEU (Grand Chamber) Case C-201/15 AGET Iraklis, rec. 84 and 88.
[40] CJEU (Grand Chamber) Case C-201/15 AGET Iraklis, rec. 90.
[41] CJEU (Grand Chamber) Case C-201/15 AGET Iraklis, rec. 99.
[42] Nicola Countouris and Aristea Koukiadaki, Greek Glass Half-Full: The CJEU And Europe's 'Highly Competitive Social Market' Economy, 13th February 2017, at https://www.socialeurope.eu/glass-half-full-cjeu-europes-highly-competitive-social-market-economy. See also Nicola Countouris, The Narrowing Constitution: European Constitutionalisms, the Social Market Economy, and the Principle of Accommodation, in: Alan Bogg, Jacob Rowbottom, Alison L Young (eds.), The Constitution of Social Democracy. Essays in Honour of Keith Ewing (Oxford: Hart 2020), at 357—73, at 369 ff.

Iraklis suggests that neither the application of the freedom of establishment nor that of the Charter rule out national diversity, in particular when it comes to protecting social objectives."[43] In other words, the ruling is significant because it illustrates that the Grand Chamber can insist on an important dignitarian-social value—here Art. 30 CFREU—without an over-constitutionalisation that imposes choices which the Member State is unwilling to make. The ruling helps set-up a regime for the necessary balancing by the stakeholders themselves: the interest of the Greek legislature and domestic authorities in responding to an acute economic crisis; the interest of workers' representatives in a high level of social protection; the interest of economic operators and employers in transparency and legal certainty.

Consider now, as a variant of the "derogation-situation," the important post-*Iraklis* Grand Chamber ruling in *Commission v Hungary*.[44] The European Commission brought an action against Hungary for failure to fulfil Treaty obligations under Art. 258 TFEU, arguing that Hungary's new "Transparency Law" had introduced discriminatory, unjustified and unnecessary restrictions on foreign donations to civil society organisations, in breach of its obligations under Article 63 TFEU (free movement of capital) and Art. 7 (right to privacy), 8 (right to protection of personal data) and 12 (freedom of association) CFREU.

As AG Sánchez-Bordona pointed out in his Opinion, the thorny issue here lay in the fact that the CJEU was required to rule on an alleged infringement of the CFREU independently of, and separately from, an alleged infringement, by Hungary, of the freedom of movement of capital under Art. 63 TFEU.[45] He argued for an "integrated approach" to the effect that in the interpretation of EU law, including Art. 63 TFEU, the effects of the CFREU had to be fully taken account: the "*traditional* freedoms protected by the Treaties"—here Art. 63 TFEU—"can no longer be interpreted independently of the Charter, and the rights laid down therein must be treated as an integral part of the substance of those freedoms."[46] The need for an integrated approach arises because, according to the AG, "EU law as a whole, including both primary and secondary law, has been imbued with the content of the fundamental rights enshrined in the CFREU … in a radical manner as befits a Union based on the values of respect for human dignity, freedom and human rights (Article 2 TEU) which places the individual at the heart of its activities (preamble to the CFREU)."[47] Arguing that the CFREU's entry into force "constituted the final transition from the previous legislative system to another which revolves around the figure of the citizen, that is to say an actor who holds rights which afford him a legal framework in which he can live autonomously and … pursue the attainment of his own goals,"[48] he suggested that CFREU rights can come into play even "directly and primarily by way of Art. 63 TFEU."[49]

Taking a more cautious approach, the Grand Chamber held, first, that the provisions of the Hungarian "Transparency Law" were such as "to create a climate of distrust with regard to [civil society associations and foundations], apt to deter natural or legal persons from other Member States or third countries from providing them with financial support."[50] Those provisions, given their stigmatising effect, constituted a restriction of free movement of capital that could be justified neither by an overriding reason in the public interest linked to increasing the transparency of the financing of associations nor by the derogations of public policy and public security mentioned in Art. 65(1)(b) TFEU.[51]

Only in a second step did the Grand Chamber examine the question of whether the provisions of the Transparency Law complied with Articles 7, 8 and 12 CFREU. Where a Member State which is the author of an

[43] K. Lenaerts and José Gutiérres-Fons, The EU Internal Market and the EU Charter. Exploring the 'Derogation Situation'. In: F. Amtenbrink, G. Davies, D. Kochenov, & J. Lindeboom (Eds.), The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley (Cambridge: 2019), 49—64, at 63.
[44] CJEU, C-78/18 European Commission v Hungary (Transparency) ECLI:EU:C:2020:1.
[45] Cf. AG Sánchez-Bordona, Opinion in C-78/18 European Commission v Hungary (Transparency) ECLI:EU:C:2020:1, par. 76 f.
[46] CJEU, Commission v Hungary, par. 85 and 88.
[47] CJEU, Commission v Hungary, par. 86.
[48] CJEU, Commission v Hungary, par. 87.
[49] CJEU, Commission v Hungary, par. 89.
[50] CJEU, Commission v Hungary, par. 58.
[51] CJEU, Commission v Hungary, par. 96.

impugned fundamental-freedom restricting measure intends to justify the restriction by an overriding reason in the public interest recognised by EU law, "such a measure *must be regarded as implementing Union law* within the meaning of Article 51(1) of the Charter, such that it must comply with the fundamental rights enshrined in the Charter.[52]

As regards freedom of association, enshrined in Art. 12(1) CFREU, AG Sánchez-Bordona identified the normative core of that provision by emphasising that, "[i]n addition to its strictly personal dimension," freedom of association also has "an objective dimension which makes it one of the pillars of pluralist societies, for its exercise enables the creation of entities that are essential in a democratic system" and that "assist with the shaping and expression of the cultural, religious, social and economic pluralism of society."[53] Drawing on the jurisprudence of the ECtHR, the Grand Chamber, too, emphasized the role of freedom of association as "one of the essential bases of a democratic and pluralist society" which allows "citizens … to contribute to the proper functioning of public life … without unjustified interference by the State."[54] By creating a "dissuasive" or "deterrent effect,"[55] the Transparency Law limited Art. 12(1) CFREU. Moreover, it also limited the right to respect for private and family life enshrined in Art. 7 CFREU in conjunction with the right to protection of personal data, enshrined in Art. 8(1) CFREU of natural persons whose name, place of residence or financial resources had to be disclosed.[56] Yet none of the provisions of the Transparency Law could be justified by any of the objectives of general interest recognised by the Union on which Hungary relied.[57]

The Grand Chamber's intervention can be characterized as strong-form in response to illiberal backsliding, aimed at creating a domestic regime capable of safeguarding vital democratic rights of a plural civil society. For sure, there is a "charterification" of fundamental economic freedoms and the matter was decided, essentially, on the basis of the CFREU. Yet the ruling does not appear to amount to over-constitutionalisation but, rather, is democracy-reinforcing.

2. Case-law on horizontal direct effect of CFREU-rights

A second domain where concerns about separation of powers and democratic sovereignty arise is the case-law on whether—and under what conditions—the substantive provisions of the CFREU can produce horizontal direct effect between private actors. That question, of course, arises because, as the CJEU continues to insist, directives, being addressed to *states*, not individuals (Art. 288 TFEU), cannot have horizontal effect; and in constellations where an incompatibility of national law with a directive can't be neutralised through harmonious interpretation. The often-reiterated democratic-minded concern here is that combining the substance of legislation with the effects of a constitutional right undermines, in AG Trstenjak's words, the "amount of flexibility … required by the [domestic] legislature when giving specific expression to such a general principle," in particular, "as society's view of what is to be considered 'social' or 'socially just' can change over the course of time and is often based on compromise."[58] The concern is about over-constitutionalisation of directives. The crucial strategic choice for the Grand Chamber was whether to allow CFREU rights to produce horizontal direct effect between private individuals or whether, instead, to resort to state liability only as a remedy, thus avoiding horizontal effect. In a crucial line of cases, the Grand Chamber opted for horizontal direct effect. Yet, as this section argues, the Grand Chamber's strategic choice of horizontal direct effect does not imply over-constitutionalisation but, instead, can be seen as ultimately democracy-enhancing by requiring Member States to reconsider their extant legal regimes in the light of, ultimately, their own deep constitutional choices.

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[52] CJEU, Commission v Hungary, par. 101 [my emphasis].
[53] AG Sánchez-Bordona, Opinion, par. 118.
[54] CJEU, Commission v Hungary, par. 112 f.
[55] CJEU, Commission v Hungary, par. 114—18.
[56] CJEU, Commission v Hungary, par. 120—33.
[57] CJEU, Commission v Hungary, par. 140.
[58] Cf. AG Trstenjak, Opinion in Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre C-282/10, rec. 158.

a. The constitutionalisation of directives

To set the stage, recall the two notorious judgments *Mangold*[59] (pre-CFREU) and *Kücükdeveci,*[60] where the CJEU held that parties were indeed able to directly rely on the right to non-discrimination because of age, enshrined in Art. 21 CFREU, in order to force the disapplication of opposing provisions of national law. Directive 2000/78, as the Court held, "merely gives expression to," but does not in itself "lay down," the principle of equal treatment in employment and occupation. By contrast, in its decision in *Association de Médiation Sociale (AMS),*[61] the CJEU stopped short of giving direct horizontal effect to the workers' fundamental right to information and consultation within the undertaking in Art. 27 CFREU, since this provision "by itself" did not suffice to confer on individuals a right which they may invoke "as such."[62] At the time, these cases—in particular *Mangold*—raised severe concerns, including among some of the Advocates General themselves,[63] in part, because of the sheer indeterminacy of the abstract principle in question, in part, because of the concomitant risk of a judicial usurpation of prerogatives that—given the severity of policy conflict at stake—were thought to properly belong to the sphere of national law, politics, and compromise.[64]

In his effort to vindicate this line of case law, Koen Lenaerts argued that it is the *mandatory nature* and *normative self-sufficiency* of a principle that must be seen as the necessary and sufficient conditions for a principle to produce *horizontal direct effect* between private parties:

> a combined reading of the judgments in *Mangold*, *Kücükdeveci* and *AMS* suggests that the possibility of relying on the horizontal direct effect is, in the first place, based on its mandatory nature. … In the second place, the normative self-sufficiency of that principle played a decisive role in the reasoning of the Court of Justice. That self-sufficiency makes it possible to distinguish between applicable rules at the constitutional level and those which need legislative action in order to apply. […] Since that principle is sufficient in itself to confer on individuals an individual right which they may invoke as such, it does not encroach on the prerogatives of the EU or national legislatures.[65]

Lenaert's restatement invites the question: when does a CFREU right belong to the same "*cadre* of rights"[66] as the prohibition on discrimination on the basis of age by being mandatory and self-sufficient? In *Egenberger,*[67] which involved a reference from the German *Bundesarbeitsgericht* ["BAG"; Federal Labour Court], the CJEU's Grand Chamber held that both Art. 21 CFREU (prohibition of discrimination) and Art. 47

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[59] CJEU Case C-144/04, *Werner Mangold v. Rüdiger Helm*, Judgment of the Court (Grand Chamber) of 22 November 2005, ECLI:EU:C:2005:709.
[60] CJEU Case C-555/07, *Seda Kücükdeveci v. Swedex GmbH & Co. KG*, Judgment of the Court (Grand Chamber) of 19 January 2010, [2010] ECR I-00365
[61] CJEU Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, Judgment of the Court (Grand Chamber) of 15 January 2014.
[62] CJEU AMS, par. 48 f.
[63] E.g. Opinion AG Mazak in Case C-411/05, Félix Palacios de la Villa v Cortefiel Servicios SA, delivered on 15 February 2007, ECLI:EU:C:2007:106; AG Geelhoed in C-13/95 (Chacon Navas), rec 50.
[64] See in particular, Roman Herzog and Lüder Gerken, An Article on the EU Constitution, in "Welt am Sonntag" dated 14 January 2007, English version at http://swpat.ffii.org/07/01/herzog_eu/herzog_eu_orig0701.en.pdf.
[65] Lenaerts, K., 'L'invocabilité du principe de non-discrimination entre particuliers', *Le droit du travail au XXI^e siècle, Liber Amicorum Claude Wantiez*, Larcier, Brussels, 2015, pp. 89 to 105, at 104 f. (English translation by AG Bot, Opinion Joined cases of Stadt Wuppertal v Bauer and Willmeroth v Martina Broßonn (C-569/16 and C-570/16), at footnote 81.
[66] Cf. the formulation by AG Tanchev in Egenberger, at par. 45.
[67] CJEU, C-414/16, EU:C:2018:257. On this *Egenberger*: Eleni Frantziou, Mangold Recast? The ECJ's Flirtation with Drittwirkung in Egenberger, https://europeanlawblog.eu/2018/04/24/mangold-recast-the-ecjs-flirtation-with-drittwirkung-in-egenberger/; see also E. Frantziou, The Horizontal Effect of Fundamental Rights in the European Union. A Constitutional Analysis (OUP: 2019); and Ronan McCrea, Salvation outside the church? The ECJ rules on religious discrimination in employment, http://eulawanalysis.blogspot.com/2018/04/salvation-outside-church-ecj-rules-on.html.

CFREU (right to effective judicial protection) crossed the threshold and were thus capable of conferring rights on which individuals could rely directly against another individual.

The *BAG's* reference concerned the meaning of the term "genuine, legitimate and justified occupational requirement" in Article 4(2) of Directive 2000/78 in a constellation where the ecclesiastical privilege of self-determination of churches or other ethos-based organisations, on the one hand, collided with the right of workers to non-discrimination on grounds of religion or belief, on the other. The claimant, Ms Egenberger, sought compensation from the *Evangelisches Werk*, a charitable organization of the German Protestant Church, contending that she suffered discrimination on grounds of religion during a recruitment procedure. As was undisputed between the parties, Ms Egenberger had been the subject of a difference of treatment since her job application was dismissed because she was of no denomination. However, the Evangelisches Werk argued that the difference of treatment was justified by the churches' right to self-determination under the German constitution. The legal framework which had been developed by the case law of the German *Federal Constitutional Court (FCC)* prioritized the church's ecclesiastical right to self-determination by allowing the *church itself* to unilaterally determine the meaning of justified occupational requirements in employment relations.[68] According to the German *FCC*, this ecclesiastical right could only be subject to a light-touch plausibility-review by domestic courts; review which merely required the church to plausibly submit that the appointment requirement of a particular religion is the expression of the church's self-conception as defined by its belief. Domestic courts were barred from scrutinizing whether the church's description of an employment activity was "close to" or "remote from" the proclamation of the church's message.[69] Accordingly, the referring *BAG* wanted to know, whether Article 4(2) of Directive 2000/78 could be interpreted as meaning that a church or other organization whose ethos is based on religion or belief may determine *authoritatively*, with only minimal judicial scrutiny, the occupational activities for which religion constitutes a "genuine, legitimate, and justified occupational requirement," with regard to the ethos of the church or organization.

In response, the Grand Chamber, in a first step, held that what must count as a "genuine, legitimate and justified occupational requirement" cannot be determined unilaterally by the church but must be established in the light of the CFREU through proportionality analysis—a contextual balancing between the competing interests embedded in Article 4(2) of Directive 2000/78. The objective of Article 4(2) of that directive is to ensure a "fair balance" between the right of autonomy of churches or other ethos-based organisations, on the one hand, and the right of workers in not being discriminated against on grounds of religion or belief also in the context of recruitment, on the other.[70] In insisting on proportionality analysis, the Grand Chamber required contextualizing attention by domestic courts to the circumstances of the individual case: the occupational requirement must be "necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out"[71] and cannot be based on considerations which have no connection with that ethos. This requirement had not been met by by the regime established by the German *Bundesverfassungsgericht* which therefore had the balance wrong.

In a second step, the issue of horizontal direct effect of Art. 21 and 47 CFREU arose. In his Opinion, AG Tanchev took the view that the prohibition on discrimination based on religion or belief in Art. 21 CFREU was not a subjective right capable of producing horizontal application between private parties. In support of that

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[68] Judgment of the Bundesverfassungsgericht (Federal Constitutional Court) of 22 October 2014, 2 BvR 661/12, par. 124—26. As AG Tanchev pointed out (at par. 63), the German Government's representative in the hearings disagreed with the analysis of German law by the referring *BAG*. (The relevant passage in the German FCC's ruling reads: "Dem Selbstverständnis der Kirche ist dabei ein besonderes Gewicht beizumessen, … ohne dass die Interessen der Kirche die Belange des Arbeitnehmers dabei prinzipiell überwögen. … eine Verabsolutierung von Rechtspositionen ist der staatlichen Rechtsordnung jenseits des Art. 1 Abs. 1 GG fremd.", par. 125.: ["The self-understanding of the church has special weight but there is no priority in principle of the church's interests over those of employees. An absolutization of legal positions is alien to the German legal order except in the context of human dignity in Art. 1 of the Basic Law" (my translation)].

[69] CJEU Egenberger, par. 31-2.

[70] CJEU, Egenberger, rec. 51.

[71] At 69.

conclusion, he argued that pursuant to Art. 17(1) and (2) TFEU—which expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities—regulating church-State relations was a matter that entirely remains vested with the democratic choice of Member States themselves, using their own broad margin of appreciation as to where the balance should lie.[72] It is "the exclusive province of the Member States to establish the model of their choosing for church-State relations."[73] He pointed out that there was "no sufficient consensus between national constitutional traditions on the circumstances in which differences in treatment on religious grounds may be genuine, legitimate and justified."[74] Hence, there could only be an action in state liability against Germany by Ms Egenberger as an appropriate remedy, but no direct claim of hers against the *Evangelisches Werk*.

The Grand Chamber did not follow the AG's proposal and, as before in *Mangold* and *Kücükdeveci*, performed a constitutional turn from secondary law to the CFREU: Directive 2000/78 "does not in itself establish the principle of equal treatment"[75] but "is [...] a specific expression, in the field covered by it, of the general prohibition of discrimination laid down in Article 21 of the Charter"[76] and "has the sole purpose of laying down… a general framework for combatting discrimination."[77] The role of Art. 17 TFEU could not be to exempt religious organisations from the requirement of compliance with the criteria set out in Article 4(2) of Directive 2000/78 and from effective judicial review.[78] The Grand Chamber held that Art. 21 CFREU was "sufficient in itself"[79] and "mandatory" and "no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals"[80] and, therefore, capable of producing horizontal direct effect between individuals.[81]

So far, there is no response yet by the German *FCC* to *Egenberger*. Yet, again, the Grand Chamber's ruling does not appear to amount to an over-constitutionalisation. Arguably, the Grand Chamber's position and the one taken by the German FCC are even in continuity with one another.[82] Notice that the First Senate of the German *FCC*, in a constellation where EU fundamental rights guaranteed under the CFREU took precedence over German fundamental rights, in a 2019 ruling announced that it would directly review, on the basis of the CFREU itself, the application of EU law by German authorities, as a consequence of "the German Basic Law's openness to EU law" and in order to close a protection-gap left by the preliminary reference procedure which does not afford individuals' direct access to the CJEU equivalent to a constitutional complaint procedure under German law.[83] Arguably, then, there is a reciprocating search for normative continuity also from the side of the German FCC's First Senate.

Consider, next, the CJEU's ruling in the joined cases *Bauer* and *Broßonn*.[84] These were—rather anodyne—employment law cases, distinguished from each other merely by the fact that the former (*Bauer*) concerned a *public-law* employment relationship, whereas the latter (*Broßonn*) a private-law one with a private employer. In both these cases, the respective employer, relying on domestic German law, refused to pay the widows of

[72] AG Tanchev, Opinion in Egenberger, rec. 119—23.
[73] AG Tanchev, Egenberger, rec. 121.
[74] AG Tanchec, Egenberger, rec. 123.
[75] CJEU, Egenberger, par. 75.
[76] CJEU Egenberger, at par. 47.
[77] CJEU, Egenberger, par. 75.
[78] CJEU, Egenberger, rec. 58.
[79] CJEU, Egenberger, at 76 (for Art. 21 CFREU) and 78 (for Art. 47 CFREU).
[80] CJEU, Egenberger, rec. 77. As to the self-sufficiency of Art. 47 CFREU, see rec. 78.
[81] In its subsequent ruling in *IR v JQ*, Case C-68/17, ECLI:EU:C:2018:696, the Grand Chamber, drawing on *Egenberger*, confirmed that an occupational requirement—in a case where a church or ethos-based organisation managed a hospital in the form of a private limited company—must again meet the principle of proportionality.
[82] Cf. AG Tanchev's observation, in *Egenberger*, that the case law of the German FCC "is frozen in time of the adoption of the Directive 2000/78," at rec. 82.
[83] BVG, Order of 6 November 2019 - 1 BvR 276/17 - Right to be forgotten II.
[84] Joined cases of Stadt Wuppertal v Bauer and Willmeroth v Martina Broßonn (C-569/16 and C-570/16).

deceased workers an allowance in lieu of the paid annual leave not taken by their spouses before their deaths. The provisions of German law had the effect of extinguishing the deceased's entitlement to annual leave rather than it forming part of the estate. Article 7 (2) of the Working Time Directive 2003/88 stipulates that "(t)he minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated." The referring German *Bundesarbeitsgericht* wanted to know whether Article 7 (2) of the Working Time Directive—when read in conjunction with Article 31(2) CFREU[85]—which guarantees every worker a fundamental right to an annual period of paid leave—requires a private employer to pay *to the worker's heirs* an allowance in lieu of paid annual leave not taken by the deceased.

Referring to Lenaerts' writings, AG Bot "invit[ed] the Court to strengthen the enforceability of the fundamental social rights which possess the qualities that allow them to be relied on directly in disputes between individuals."[86] He argued that relying directly on provisions of the CFREU in horizontal disputes is not contrary to Art. 51 CFREU which does not expressly exclude any effect of the CFREU in horizontal relations between individuals.[87] Art. 31(2) CFREU is not merely of "weak normative value"[88] but is "a particularly important principle of European Union social law,"[89] as the "succession of cases brought before the Court"[90] has demonstrated. Art. 31(2) CFREU, he argued, therefore meets the requirements of being mandatory and sufficient in itself. In support of that conclusion, AG referred to the *Explanations* which explain that Art. 31(2) CFREU "is based on Directive 93/104" which was subsequently codified by Directive 2003/88. Art. 31(2) CFREU thus "enshrines and consolidates what appears most essential in that directive,"[91] namely its underlying and animating principle itself.

In its response to the *BAG*, the Grand Chamber followed the Opinion by AG Bot, observing, first, that Art. 51(1) CFREU "does not … address the question whether those individuals may … be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility."[92] Second, the Grand Chamber ruled that the right to paid annual leave in Art. 31(2) CFREU—because it expresses "a particularly important principle of European Union social law from which there can be no derogations"[93]—"entails, by its very nature, a *corresponding obligation on the employer* … to grant such periods of paid leave."[94] Hence, the domestic German courts were required to disapply contrary national law and ensure that the legal heir received payment from the employer of an allowance in lieu of paid annual leave.

In *Max Planck*,[95] the referring *Bundesarbeitsgericht* wanted to know whether Article 7 of the Working Time Directive 2003/88 in combination with Article 31(2) CFREU had the effect of precluding domestic German legislation that provided for the automatic loss of an allowance in lieu of untaken paid annual leave at the end of the employment relationship, where the worker had not sought to exercise his right to paid annual leave during the reference period and regardless of whether the employer had actually given the worker the opportunity to do so in the first place. In an earlier 2017 decision in *King*, the Grand Chamber had ruled that the right to paid annual leave could not be lost at the end of the leave year or carry-over period when the worker had been unable to take his leave.[96] In the hearings, Germany did acknowledge the principle that an employer owes a duty of care to his employees and is generally obliged to ensure the welfare of his workers

[85] "Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."
[86] AG Bot, rec. 57.
[87] AG Bot, rec. 77 f.
[88] AG Bot, rec. 92.
[89] AG Bot, rec. 89, with reference to CJEU *King* C-214/16, EU:C:2017:914.
[90] AG Bot, rec. 89.
[91] AG Bot, rec. 88.
[92] CJEU, ibid., rec. 87.
[93] CJEU Joined cases of Stadt Wuppertal v Bauer and Willmeroth v Martina Broßonn (C-569/16 and C-570/16), rec. 38 and 51 and 58 and 83.
[94] CJEU, [Grand Chamber], rec. 90.
[95] CJEU Max-Planck-Gesellschaft, C-684/16, ECLI:EU:C:2018:874.
[96] AG Bot in Max Planck, rec. 29, with reference to King (C-214/16, EU:C:2017:914, paragraph 56.

and that that duty of care also encompasses the need to put the worker in a position to exercise his rights.[97] Importantly, in his Opinion, AG Bot emphasized that regard must be had to "the reality of employment relationships which is reflected in an imbalance between employer and worker, who may be encouraged, in various ways, to work more, especially where he hopes that his contract will be renewed"[98] by imposing on the employer the obligation to take the appropriate measures to enable the worker actually to use his right to paid annual leave.

In its response to the referring *BAG*, the Grand Chamber reiterated that the Working Time directive does not in principle preclude national legislation which lays down conditions for the exercise of the right to paid annual leave, including even the loss of that right at the end of a leave year or of a carry-over period, "provided, however, that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the directive."[99] So, contrary to domestic German legislation, the loss can never be an automatic one and must always be subject to "prior verification that the worker was in fact given the opportunity to exercise that right"[100] by the employer, in particular because, as the Grand Chamber emphasised, "the worker must be regarded as the weaker party in the employment relationship"[101] and as vulnerable to being manipulated or deterred or dissuaded from exercising her right. The need for prior verification is a consequence of the "mandatory nature of the entitlement to paid annual leave,"[102] and the burden of proof lies entirely with the employer.[103] The Grand Chamber reiterated that Art. 31(2) CFREU produces horizontal direct effect between private actors.[104] In support of that conclusion, the Grand Chamber insisted that the right is affirmed for "every worker" (and does not depend on specific further conditionalities to be established by EU law or national law) and that the right reflects an "essential principle of EU law," derogations from which must comply with the conditions set out in Art. 52(1) CFREU. The right, being "mandatory and unconditional in nature,"[105] "entails, by its very nature a corresponding obligation on the employer."[106]

In a similar vein, the CJEU's Grand Chamber reiterated in *Cresco*,[107] a case involving a religious (paid) holiday, in response to a reference from the Austrian Supreme Court, that the principle of equal treatment in Art. 21(1) CFREU is not only "mandatory as a general principle of EU law" but also "sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law" and hence capable of producing horizontal direct effect. Under impugned Austrian law, Good Friday was a paid public holiday for members of four churches only. If those members nevertheless chose to work on that day, they would be entitled to double pay. The applicant—who did not belong to any of these four churches—did not receive a paid holiday nor double pay. This, as the Grand Chamber held, in a first step, amounted to an impermissible direct discrimination on grounds of religion.

Importantly, as regards horizontal direct effect, the Grand Chamber, in a second step, refused to follow the Opinion by AG Bobek who expressed his "difficulty" in seeing that Art. 21(1) CFREU met the requirements of mandatoriness and self-sufficiency[108] and proposed, instead of horizontal direct effect, state liability as a remedy. The argument of the employee's structural weakness in an employment relationship, as AG Bobek argued, "hides a deeply ideological choice on risks and costs allocation,"[109] for not all employers are

[97] AG Bot in Max Planck, rec. 40.
[98] AG Bot, rec. 56.
[99] CJEU, Max Planck, par. 35.
[100] CJEU, Max Planck, par. 40.
[101] CJEU, Max Planck, par. 41.
[102] CJEU, Max Planck, par. 45.
[103] CJEU, Max Planck, par. 46—48.
[104] Cf. the summary of *Max Planck* by Koen Lenaerts in: Limits on Limitations: The Essence of Fundamental Rights in the EU, German Law Journal (2019), 20, pp. 779–793, at 791. Notice that the Grand Chamber itself does not use the terminology of horizontal direct effect.
[105] CJEU, Max Planck, par. 72—74.
[106] CJEU, Max Planck, par. 78 f. (referring to *Egenberger*).
[107] CJEU, Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* EU:C:2019:43.
[108] AG Bobek, Cresco, rec. 132.
[109] AG Bobek, Cresco, rec. 183.

"proverbial faceless multinational corporations" but often only small businesses—and "why should they bear the cost of applying faulty national legislation?"[110] Hence, to judicially impose such a choice—given the abstractness and vagueness of the CFREU's bill of rights[111]—would amount to "extreme forms of judicial creativity" in conflict not only with "the need for predictability [and] legal certainty" but also with the requirements of "separation of powers."[112] Hence, the route of action for damages against the state should be preferred.[113]

The Grand Chamber did not follow AG Bobek's Opinion in this latter respect. It held, instead, that Art 21(1) CFREU, "[a]s regards its mandatory effect, … is no different … from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals."[114] Accordingly, where it is not possible for national courts to interpret the national provision in conformity with Directive 2000/78, the national courts must directly rely on Art. 21(1) CFREU to ensure its full effect: the "observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category."[115] The Grand Chamber insisted that the national court not only must set aside any opposing discriminatory provision of national law, but also "must apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category."[116] Accordingly, until it is the case that the national legislature amends domestic law and adopts measures reinstating equal treatment between employees, "it is for employers to ensure that employees who are not members of one of those churches [i.e. are part of the "disadvantaged category"] enjoy the same treatment as that enjoyed only by employees who are members of one of those churches [i.e. are part of the "favoured category"] …"[117] The CJEU in this way requires the domestic courts to be activist in the service of the CFREU's principle of equal treatment as interpreted by the CJEU.[118]

b. The transformative role of the CFREU

In this way, the Grand Chamber constitutionalises directives. The dignitarian-social provisions of the CFREU transform and shape the private-law relations between market actors in the context of employment. For sure, critics of this jurisprudence—such as AG Bobek—have argued that the Grand Chamber's "persistence in formally denying horizontal direct effect to directives while moving heaven and earth to ensure that that restriction has no practical consequences whatsoever, such as importing the content of a directive into a

[110] Ibid.

[111] AG Bobek, Cresco, rec. 141.

[112] AG Bobek, Cresco, rec. 141. Bobek's reference here is to Kelsen, H., Wesen und Entwicklung der Staatsgerichtsbarkeit. Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Heft 5, Berlin und Leipzig, de Gruyter & Co., 1929, pp. 69 to 70. Notice, though, that Kelsen's argument, in that famous text, was directed against *any* form of substantive judicial review of legislation based on fundamental rights.

[113] AG Bobek, Cresco, rec. 186 ff. Notice that in his Opinion in *Kücükdeveci* AG Bot had addressed the principal inconvenient of that remedy for individuals:

> "… the principal disadvantage of an answer which directed Ms Kücükdeveci towards a civil liability action against the Federal Republic of Germany is that it would cause her to lose her case, with the financial consequences that would flow from that, even though the existence of age discrimination contrary to Directive 2000/78 is established, and require her to initiate fresh judicial proceedings. In my view, such a solution would run counter to the effective right of action …" Opinion AG Bot in *Kücükdeveci* C-555/07 rec. 69.

[114] Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* EU:C:2019:43, at par. 77.

[115] CJEU, Cresco, at 79.

[116] CJEU, Cresco, at 80.

[117] CJEU, Cresco, at 83.

[118] On this suggestion, cf. K. Lenaerts and José Gutiérres-Fons, The EU Internal Market and the EU Charter. Exploring the 'Derogation Situation'. In: F. Amtenbrink, G. Davies, D. Kochenov, & J. Lindeboom (Eds.), The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley (Cambridge: 2019), 49—64, at 49 f.

Charter provision, appears increasingly questionable" in terms of separation of powers and democracy.[119] Undeniably, the Grand Chamber, in each of these cases, is making a distinct, far-reaching strategic choice in favour of horizontal direct effect of the CFREU fundamental social rights in question. Yet, in each of the above cases, this choice is motivated by a value judgment on the importance and normative salience of the principle in question itself. This is not just a matter of (uncritically) importing the content of a directive into the CFREU to achieve the legal effects of a fundamental right. Undeniably, there is a risk—as clearly identified by AG Trstenjak and AG Bobek—that the Grand Chamber ends up absorbing into itself the entire job of balancing, thereby transforming itself into quite an aggressive instrument of social and economic change—as predicted by the over-constitutionalisation critique. Yet in each of the cases, the Grand Chamber still leaves an important leeway for national legislatures to develop and specify national law in the light of an emergent shared understanding of a mandatory CFREU right at issue. The Grand Chamber indicates a mandatory threshold but does not compromise, or pre-empt, deliberation on crucial issues. In this way, as the following section argues, the Grand Chamber requires Member States to reconsider their own discretionary legislative choices in the light of an emergent and shared understanding of CFREU principles. These principles are not developed out of thin air, but are continuous with, and reflect, the Member States' own fundamental constitutional and social commitments.

III. Dialogic constitutionalism, democratic sovereignty, and conceptions of judicial role

The Grand Chamber's constitutional turn—its emphasis on the CFREU's dignitarian-social values in the interpretation of primary and secondary EU law in response to concerns about economic bias—has led to persistent concerns about "over-constitutionalisation" that threatens democratic legitimacy at the national level and even at the EU level. Do constitutional legitimacy and democratic sovereignty necessarily conflict in the EU? Recall Dieter Grimm's concern about a form of constitutionalism that "functions no longer as a framework … but as a blueprint for politics,"[120] with the CJEU dictatorially cementing EU-wide answers where there (still) is ongoing dispute and deep disagreement in a fragmented EU of 27 politically and constitutionally diverse Member States and where moral dissensus percolates internally within the Member States themselves.

Contemporary constitutional theory posits the fact of social disagreement. We can no longer assume that, when moral values and neutral principles are applied in court, judges can escape the political conflicts of pluralistic and morally divided societies. Instead, social disagreement translates all-the-way-up into constitutional-interpretive disagreement itself which—as Frank Michelman has influentially argued—we must assume to be "not only intractable and sharp but also honest and reasonable on all sides"[121] and which proliferates "not just at the level of constitutional-legal application but at the level of a constitution's underlying conception of justice"[122] as well. The fact of reasonable disagreement poses a "Goldilocks dilemma"[123] for constitutional interpretation as a general matter. The terms of a constitution must never be "too thick," nor "too thin." On the one hand, where "matters of grave moral moment" arise, and where "agreement does not yet exist throughout the population of reasonable citizens,"[124] those terms—as they are being judicially developed—must never pre-empt and foreclose democratic deliberation but must leave those questions for "future continuing examination in the democratic venues of political life."[125] We risk weakening the binding force of a constitution by over-extending it, for constitutional over-extension would risk re-inscribing disagreement into the constitutional framework itself. On the other hand, however, the very

[119] AG Bobek, Opinion in Cresco, rec. 145.
[120] Dieter Grimm, op. cit., at 29.
[121] Frank I Michelman, 'Is the Constitution a Contract for Legitimacy' (2003) 8 Rev Const Stud 101, at 103.
[122] Frank I Michelman, Political-liberal legitimacy and the Question of Judicial Restraint, in: (2019) 1 Jus Cogens 59—75, at 67.
[123] Ibid.
[124] Frank I Michelman, Political-liberal legitimacy and the Question of Judicial Restraint, in: (2019) 1 Jus Cogens 59—75, at 67.
[125] Political-Liberal Legitimacy and the Question of Judicial Restraint, at 65.

premise of a "living" constitution is that its terms must "perpetually be open to modifications, concretizations, extensions, and retractions of bill-of-rights coverage as times and conditions change and understandings accordingly evolve or shift,"[126] in the continued shared pursuit of a shared political-moral foundation. A crucial Rawlsian insight, on which Michelman draws, is that despite persistent moral disagreements including about justice citizens, to secure the goods of social cooperation, should give their respect, cooperation and loyalty to a governmental regime if it "operates under a constitution … [that] all citizens may reasonably be expected to endorse in the light of principles and ideals" that should be acceptable to them "as reasonable and rational." Yet these terms must be acceptable on an ongoing basis and responsive to social change. A morally divided citizenry would otherwise no longer be able to attribute this kind of "legitimacy-sustaining function"[127] to the constitution and the great good of social cooperation would no longer be secure.

Has the Grand Chamber in its new fundamental-rights jurisprudence trapped itself in this Goldilocks dilemma? The specific "EU version" of this dilemma is that the CJEU is vulnerable either to being accused of outright economic bias, to the detriment of the vulnerable in society and the constitutional legitimacy of the EU integration project as a whole, or to being accused of over-constitutionalisation to the detriment of democratic legitimacy—*tertium non datur* (if the critics are right).

However, the cases discussed above suggest that we can look at the CJEU's fundamental rights jurisprudence differently—that is, as creating a framework for plural deliberation on key societal choices at the European level. The CJEU can be seen as exerting an important EU-wide *forum-creative* and *agenda-setting role not only* in the process of requiring reconsideration of domestic legal and political solutions in the light of an emergent understanding of CFREU principles *but also* in the process of an ongoing reinterpretation and critical re-examination of our understanding CFREU's principles themselves. In a far-flung and divided EU, the CFREU can become the focal point of meaningful engagement between multiple stakeholders, broadly defined, among whom Member States no longer hold a privileged position as "masters of the treaties," and which includes litigants, national courts, Advocates-General, civil society organisations and the wider European public. On this reading, the CFREU-interpretive process itself amounts to a form of democratic sovereignty.

By requiring deliberative re-evaluation of domestic legal and political choices in the light of the CFREU, the Grand Chamber may enhance the legitimacy of domestic law and politics. The CFREU exerts a deliberation-enhancing transformative role. Its role lies not only in (Burkean) preservation but its values are open to ongoing development. The CJEU can instigate and channel this transformative process. Recall the various illustrations: Greece is, under EU law, allowed to pursue its worker-protective social objectives, given the EU's commitment to a social market economy,—but must do so in ways that also ensure transparency of its domestic regulatory regime for economic actors (*Iraklis*). Only in the Hungarian case of illiberal backsliding was judicial intervention fully strong-form, with the Grand Chamber, in a principled statement, insisting on the importance of freedom of association as essential for "a democratic and pluralist society" (*Commission v Hungary*). Germany must more fully than it did before subject the ecclesial right to self-determination to proportionality analysis in order to adequately take account of a countervailing right to non-discrimination (*Egenberger*). Germany must also more strongly take into account the fact that often workers are "the weaker party in [a private] employment relationship" who must therefore be afforded the fair opportunity by the employer to exercise their right to paid annual leave instead of an automatic loss of that right (*Max Planck*). Indeed, the right to paid leave, as "an essential principle of European Union [social] law" (*Bauer* and *Broßonn*), is a baseline-principle that sets a threshold beneath discretionary legislative choices must not fall. The same reasoning, as to the principle of equal treatment, applies in *Cresco*. These rulings do not appear to jeopardize democracy in the Member States; instead, they invite—and instigate—a deliberative re-evaluation of domestic policy and practice at the behest of the vulnerable against the backdrop of an emergent EU-wide understanding of the CFREU that draws on the Member States' own deep social and democratic commitments.

[126] Michelman, F. (2018). Human Rights and Constitutional Rights: A Proceduralizing Function for Substantive Constitutional Law? In S. Voeneky & G. Neuman (Eds.), Human Rights, Democracy, and Legitimacy in a World of Disorder (pp. 73-96). Cambridge: Cambridge University Press, at 91.

[127] F. Michelman, *Legitimacy, The Social Turn and Constitutional Review: What Political Liberalism* Suggests, in: *KritV | CritQ | Rcrit, Jahrgang 98 (2015), Heft 3,* pp. 183—205, at 187.

At the same time, the CFREU's baseline-principles themselves are subject to ongoing reinterpretation and critical re-examination. However, this process of continuous re-interpretation is never entirely court-centric, but permits EU citizens themselves to understand themselves as implicated in this process as its co-authors. It is sometimes asserted by critics that a "constitutional narrative" removes fundamental rights from the realm of political processes and limits possibilities to challenge them.[128] However, constitutional meaning, having emerged from deliberation, always remains under discussion and can change if further deliberation recognizes meanings that hitherto have not been recognized or favored or even explicitly discarded. The polysemy of a constitution's abstract words and concepts invites and encourages democratic citizenship and participation in the process of constitutional interpretation.

The underlying deliberative conception of democracy interprets democracy not just formally as an aggregative process but in terms of public reasoning, through participatory discussions and public decision-making.[129] Courts can induce, institutionalize and channel deliberation, requiring participants to rethink their initial commitments, internalizing elements of their opponents' antagonistic views and thereby transforming their own. Courts can require attention to relevant reasons and ensure inclusiveness by giving voice to hitherto marginalized and vulnerable groups. Even in the context of the CJEU, its rulings often are—and remain—exposed to ongoing public debate and scrutiny in a vigilant EU-wide public sphere capable of talking back to the CJEU. Its rulings are never as remote and judicially-supremacist as critics claim they are but in one way or other actively engage with, and are responsive to, a participatory deliberative process in the wider public.

To illustrate this latter point about responsiveness, recall the criticism and outright rejection provoked by the past CJEU rulings forming the Court's so-called "*Laval* quartet"[130] as undermining fundamental social rights.[131] The various Grand Chamber rulings discussed above can arguably be seen as a response to those criticisms about structural economic bias. For sure, the stakes in some of these rulings may appear small. Yet, these rulings still suggest that, procedurally, the CJEU's fundamental-rights jurisprudence is open to—and even can become a catalyst of—change, reform, learning and self-revision through dialogue and (self-) exposure to criticism in the nascent EU public sphere. Substantively, the Grand Chamber's fundamental-rights jurisprudence suggests that the application of the EU's market-making rules is increasingly being qualified by the CFREU's dignitarian principles and basic political values.[132] Despite the EU's multiple—institutional, economic, ideological and cultural—pluralisms which translate into debate about the contested applied meaning of fundamental rights, the CFREU may nevertheless foster a sense of shared democratic EU citizenship and belonging by enabling, as Giuliano Amato has written, the "gradual formation of a platform of mutual solidarity among Europeans."[133] Constitutional loyalty in the EU attaches not only to statements of

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[128] For a representative statement, cf. Elise Muir, The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from Mangold to Bauer. In: Review of European Administrative Law 2019-2, 185—215, at 215.

[129] As Rawls wrote, "[t]he definite idea for deliberative democracy is the idea of deliberation itself." In: 64 (3) U. Chi. L. Rev., 765—807, at 772.

[130] Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet (C-341/05) EU:C:2007:809; [2007] E.C.R. I-11767 (Grand Chamber); International Transport Workers' Federation v Viking Line ABP (C-438/05) EU:C:2007:772; [2007] E.C.R. I-10779 (Grand Chamber); Ruffert v Land Niedersachsen (C-346/06) EU:C:2008:189; [2008] E.C.R. I-1989; [2008] (2nd Chamber)); Commission of the European Communities v Luxembourg (C-319/06) EU:C:2008:350; [2008] E.C.R. I-4323; [2008] (1st Chamber).

[131] For a review of this debate, see Dagmar Schiek, Towards more resilience for a social EU - the constitutionally conditioned internal market, E.C.L. Review 2017, 13(4), 611-640. Cf. also, at the time, for an expression of strong dissent, the interview with Fritz Scharpf, "Der einzige Weg ist, dem EuGH nicht zu folgen" ["The only way is not to follow the ECJ"], Magazin Mitbestimmung (Hans Böckler Stiftung), 07+08/2008, at https://www.boeckler.de/de/magazin-mitbestimmung-2744-aposder-einzige-weg-ist-dem-eugh-nicht-zu-folgenapos-11173.htm.

[132] Perhaps there even is, as Dagmar Schiek has observed in her analysis of "social Europe," a gradual "constitutional conditioning" of the internal market which provides economic liberties with a "civilizing frame," based on the "priority of human dignity" which translates into "a slight priority to social rights." Cf. Dagmar Schiek, Towards more resilience for a social EU - the constitutionally conditioned internal market, E.C.L. Review 2017, 13(4), 611-640, esp. at 624-6.

[133] Amato, Giuliano. "From the Years of the Convention to the Years of Brexit. Where Do We Go

principle but to this process of contestation of the applied meaning of CFREU values itself. Yet, if fundamental rights were to be repatriated to the Member States, we would have succumbed to defeatism and abandoned the commitment to democratic co-authorship of the EU project.

Is, however, this model of dialogic adjudicative constitutionalism over-optimistic about the prospects of meaningful deliberation in the EU and therefore deluded? Notice that, while raising this concern, Daniela Caruso does acknowledge the fact that, especially under the preliminary reference procedure, "dissonant voices are able to produce justifications for their arguments" by bringing "a variety of understandings of fairness"[134] to the bench, allowing meaningful engagement. However, Caruso also voices her misgivings about what she calls "the perils of deliberation:" not only systematic bias and lack of inclusiveness but also the risk of further polarization and paralysis and the suspicion, among participants, of an ideological, apologetic, or hypocritical use of the very idea of deliberation itself in order to paper-over persistent disagreements and to provide a cloak of legitimacy for what are only partisan and biased interpretations.[135] The perils of deliberation include the possibility of ideological gulfs in the EU becoming so wide and unbridgeable that partisan descent into mutual perceptions of the illegitimacy of just any common constitutional framework, including the CFREU, ensues, in part, as a result of the allegedly elites-driven and technocratic nature of the EU project, in part, as a result of illiberal backsliding, rendering any talk about a solidary EU "polity" simply meaningless.

Caruso's concern about the perils of deliberation raises the difficult question of whether the CFREU can produce the kind of loyalty and commitment among EU citizens on which its success depends. In their illuminating discussion of democratic-experimentalism's response to facts of pervasive uncertainty and moral dissensus, Charles Sabel and William Simon have likened the concepts of solidarity and sociability that animate democratic experimentalism to a life-boat situation which associates solidarity not with a pre-existing shared background or culture but, instead, "with the possibility and experience of effective collaboration" itself.[136] In a life-boat, people collaborate because their welfare—indeed their very fate and survival—depends on it. As Sabel and Simon explain, collaborators come to realize that "[d]iverse values and perspectives need not be disabling obstacles; [instead,] they are often beneficial because they give the group access to a wider range of knowledge." Drawing on this analogy, one may—with some caution—also compare *solidarity* in the EU under changing geopolitical circumstances to this life-boat conception ("caution," with the fate of those not admitted into the lifeboat in mind).[137]

What one can perhaps conclude is this. The Grand Chamber's role in instantiating the CFREU's dignitarian values is not simply to deductively announce the meaning of "*the* law" through a debate-foreclosing *judicial fiat* but instead to require stakeholders themselves to resume deliberation, under continuing judicial observation. The Grand Chamber's fundamental-rights jurisprudence perpetuates, as Tridimas and Gentile have put it, "the post-war liberal compact that define[s] European constitutionalism founded on dignity and the absence of arbitrariness."[138] Human dignity is becoming the bedrock value underwriting the unity of EU law: no spheres governed by EU law can be tolerated where the CFREU's dignitarian values are absent, including those regulated by (notionally) private law. Gradually, through its

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from Here?." *The Rise and Fall of the European Constitution*. Ed. NW Barber, Maria Cahill and Richard Ekins. Oxford,: Hart Publishing, 2019. 11–22, at 17.

[134] Daniela Caruso, Fairness at a Time of Perplexity: The Civil Law Principle of Fairness in the Court of Justice of the European Union, in: St. Vogenauer & St. Weatherill (eds.), General Principles of Law. European and Comparative Perspectives (Oxford;Hart, 2017), 329—353, at 352. Notice, however, that emphasis on deliberation neither implies "value pluralism" nor an organicist theory of law, nor a downplaying of hard rules or of legislative prerogatives. My point simply was that the application of rules is often qualified by principles. Those principles permit public criticism whenever the judicial agenda becomes unduly narrow or biased.

[135] Duncan Kennedy, "The Hermeneutic of Suspicion in Contemporary American Legal Thought", (2014) 25 Law & Critique, 91-139; idem, A Political Economy of Contemporary Legality (ms. 2019, on file with author).

[136] Charles F Sabel and William H. Simon, Democratic Experimentalism, op. cit.

[137] A rather gruesome connotation of the lifeboat-metaphor—of *couper les mains* of those pushed away from the lifeboat for it not to sink—is invoked in André Gide's novel *Les Faux Monnayeurs*. However, I do not think that this necessarily invalidates the metaphor and its idea of control of shared fate.

[138] Takis Tridimas and Giulia Gentile, The Essence of Rights: An Unreliable Boundary? In: German Law Journal (2019), 20, pp. 794–816, at 816.

jurisprudence, the Grand Chamber is turning political decisions—expressed in directives—into principles, by insight into their importance. In a changing geopolitical context, these principles, which have their origin in the political experience of the diverse European nation states—in the struggle for recognition between diverse social groups and the effort to mutually reconcile liberal and social-democratic values over continuous political time—today perhaps can only be effectively defended and kept alive and vibrant at the European level. As elsewhere, success isn't guaranteed. Yet, what has been said about political liberalism generally is also true of the EU project in particular: that it is a fighting faith. In any case, today's frequent calls for return to the nation state and for "less Europe" and "de-constitutionalisation" come with their own perils, too: of abandoning the distinctly EU concept of deliberative proceduralism in the practice of principle—and thereby perhaps of fatefully blinding ourselves to the present-day challenges to social Europe that needs outspoken, courageous defence.

IV. Conclusion

An influential strand in the literature today argues that fundamental rights should be repatriated from the EU level to the Member States themselves. This is seen as a requirement of both constitutionalism and advanced democracy. Contrary to the widespread belief that true constitutionalism implies the nation-state, this article has argued that the CFREU should better be seen as a European project of a defence of domestic constitutional values under fast-changing conditions in the present geopolitical context. While the CFREU, on the one hand, summarizes and generalizes historically-saturated and democratically-vindicated domestic constitutional values, the CFREU also, on the other hand, at the same time, and in response to concerns about democracy and social disagreement, provides Member States and citizens and stakeholders with an experimentalist forum *beyond the state* where these values—and how we should best understand them—can be re-examined in the light of new challenges, in this way ensuring their ongoing vitality and perpetual renewal. Put differently, it is the *practice* of an *ongoing mobilization* and *interpretive contextualization* of CFREU rights itself which might provide a sufficiently robust response to the critics' democratic-minded concerns which—routinely, even though also understandably—arise. We should see and value this practice of mobilization as an expression, among many others, of course, of democratic sovereignty.