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Whose freedom is it anyway? The fundamental rights of companies in EU law

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Abstract

Fundamental rights of companies – freedom as fundamental value of the EU – interpretation of the freedom to conduct business in EU law – companies as nexus of contracts or as real entities – duties of directors – the myth of the shareholder value theory – corporate freedom and private autonomy - dehumanisation of fundamental rights

Introduction

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

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

¹ Article 2 of the Treaty on European Union
² See for example, the White Paper on the Future of Europe COM(2017)2025, describing how the European project resulted in “500 million citizens living in freedom” (p. 6).
EU is of a loosening of national ties and of “making space for greater individual emancipation and self-determination”.  

The meaning and scope of freedom is not clearly defined in the treaties, and the concept of freedom is of course a contested one. In this article I will follow von Bogdandy’s lead in regarding the principle of freedom in EU law in light the Declaration of the Rights of Man, under which liberty consists of ‘being able to do anything that does not harm others’. This is what Berlin termed the ‘negative’ understanding of freedom ‘the absence of obstacles to choices and activities’ which may be open to a person.

The operating assumption which will provide the point of departure for this paper is that the freedom that ‘counts’ as an EU fundamental value is the freedom of individual human beings. As the preamble to the Charter points out, the EU ‘places the individual at the heart of its activities’. The first foundational value listed in Article 2 TEU is ‘human dignity’ and Article 1 of the Charter holds that ‘Human dignity is invaluable. It must be respected and protected’. The Explanations to the Charter emphasise that human dignity is “not only a fundamental right in itself but constitutes the real basis of fundamental rights”. It therefore appears logical to assume that, to the extent that EU fundamental rights promote and uphold the value of freedom, it is the freedom of human beings that is at stake.

Nonetheless, the Charter protects the rights not only of natural persons, but also of legal persons. The right to conduct business under Article 16 of the Charter, in particular, is relied almost exclusively by companies. This article will examine the way the Court of Justice has interpreted Article 16 in its recent caselaw, and conclude that this right appears to protect the freedom of companies not to be subject to regulatory constraint in their economic activities. It will then assess whether the protection of such freedom is conducive to promoting the freedom of individual human beings. This article will conclude that, by protection of the freedom of companies in this way, the Court does not promote the freedom of human beings and instead ‘dehumanises’ fundamental rights.

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4 L. Azoulai ‘The European Individual as Part of Collective Entities’ in Azoulai, Barbou des Places and Pataut Constructure the Person in EU Law (Hart, 2016)
Article 16 - The right to conduct business

The right to conduct business is protected under Article 16 of the Charter of Fundamental Rights of the EU, which provides that “the freedom to conduct a business in accordance with Union law and national laws and practices is recognised”. This right protects both natural and legal persons, but from the caselaw examined below it is clear that it is mostly the rights of companies that are the subject of litigation. According to the Explanations to the Charter “this right is based on Court of Justice caselaw”. In fact, it can be said that it was the original EU fundamental right: fundamental rights were first recognised by the Court as part of the Union legal order in *Internationale Handelsgesellschaft*. The applicant before the national court, a trading company, claimed that an EU regulation infringed its fundamental rights under Germany’s Basic Laws, in particular “principles of freedom of action and disposition [and] of economic liberty” – effectively the freedom to conduct business, as well the protection of property. The Court, by holding that fundamental rights formed part of the EU legal order, implicitly acknowledged that such rights included the freedom to conduct business.

However, it is important to remember that Article 16 protects the right to conduct business “in accordance with EU law and national laws and practices”. There was nothing in *Internationale* that suggests that companies had a general right to be free from regulation. This was reaffirmed in subsequent caselaw, prior to the coming into force of the Charter. In *Nold* the Court expressly states that the right to conduct business, to the extent that it is protected under EU law “can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity”, and in *Spa Eridania* it reaffirmed that:

> an undertaking cannot claim a vested right to the maintenance of an advantage which it obtained from the establishment of the common organization of the market and which it enjoyed at a given time

As Grousset et al point out, the right to conduct business was considered a ‘weak’ right, and in reviewing the compatibility of EU regulatory measures with the right to conduct business, the Court limited itself to assessing whether that measure “contains

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8 ECJ 17 December 1979, Case 11/70 *Internationale Handelsgesellschaft mbH*, EU:C:1970:114  
9 Although it is notable how little attention the Court devotes, in its judgment, to the substance of the rights claimed.  
12 Ibid., para. 12.
a manifest error or constitutes a misuse of power or whether the authority in question
did not clearly exceed the bounds of its discretion.”13 Importantly, this interpretation
did not entail a prima facie right to operate in the market free from regulation.
Companies had a right to conduct business in the market only ‘in accordance with EU
law and national law and practice’. Companies effectively had the right to do that
which the law allows them to do. But if the law did not allow them to conduct business
in the way they prefer, then they could rely on Article 16 to challenge that law.

The right in the Charter

Prior to the coming into force of the Charter, the right to conduct business had been
considered by the court exclusively in respect of challenges to EU measures. This
changed after the Charter came into force. The first cases where the Court considered
the applicability of Article 16 to member states measures were Scarlet Extended14 and
Netlog.15 In these cases, the Court considered the lawfulness of national injunctions
which required internet service providers to set up filtering systems in order to prevent
users of its services from downloading songs and other material in breach of copyright.
The applicant for the injunctions in the national court in both cases was SABAM, a
Belgium organisation that represents musicians and collects royalties. SABAM
claimed that the filtering system was necessary to prevent file-to-file sharing of
copyrighted material and thereby protect the right to property of the musicians.

The Court noted that Article 15(1) of the Directive prohibited member states from
imposing a “general obligation on [ISPs] … to monitor the information which they
transmit”. The filtering system amounted to an obligation to monitor and so it was
prohibited by the Directive.16 The Court then affirmed that “account must also be taken
of the requirements that stem from the protection of the applicable fundamental
rights”.17 This is because the file-to-file sharing may result in the infringement of the
fundamental right to property of the copyright holders. This right to property is not
absolute, but must be balanced against other fundamental rights. Scarlet Extended and

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14 ECJ 24 November 2011, Case C-70/10 Scarlet Extended SA v SABAM, ECLI:EU:C:2011:771
15 ECJ 16 February 2012, Case C-360/10 SABAM v Netlog, ECLI:EU:C:2012:85.
16 Scarlet Extended, para 40, Netlog, para. 38.
17 Scarlet Extended, para 41, Netlog. para. 39 [my emphasis]
Netlog (the ISPs who were the subject of the injunction) both contended that such a monitoring obligation would breach the right to receive and impart information and of protection of personal data of the users of their internet services.18 The Court also referred to its earlier case of Promusicae,19 where it had held that national courts must “reconcile the requirements of … the right to respect for private life [of the internet service users] on the one hand and the rights to protection of property [of the copyright holders] on the other”.

It would have been open to the Court to reiterate its previous ruling in Promusicae. However, the Court chose to introduce a new element to the balance – the injunction would interfere with the ISPs right to conduct business. Indeed, according to the Court national authorities and courts must in particular strike a fair balance between the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by operators such as hosting service providers.20

By choosing to reformulate the question, and thus place the right to conduct business of the ISPs at the centre of its reasoning, the Court elevates Article 16 to a directly effective subjective right that national courts have a duty to respect – even in proceedings against another private person.21 On this reading, the use of Article 16 amplifies the obligation of the Member State not to introduce the measure – not only will introducing the measure contravene the Member States obligations to implement the Directive and to achieve the Directive’s objectives of ensuring the free movement of information society services, but will breach the ISPs’ fundamental right not to be subject to unlawful restriction on its right to conduct business.

However, it should be remember that the Court had already determined that the national injunction is unlawful because it contravenes the prohibition to impose monitoring obligations under Article 15 of the Directive.22 The ISPs have the right to conduct business ‘in accordance with EU law’, so the interference with their economic liberty breaches Article 16 because it is not in accordance with the Directive. So when the Court goes on to balance the fundamental rights at stake, it is able to place on the

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18 C-275/06, Promusicae v. Telefónica de España SAU ECLI:EU:C:2008:54
19 Scarlet Extended, para 46, Netlog, para. 44 (emphasis is mine).
20 Scarlet Extended, para 46, Netlog, para. 44 (emphasis is mine).
22 The Court stated that “It follows that that injunction would require the ISP to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31” (Scarlet Extended, para. 40, and Netlog para. 38).
scales the right of the ISPs not to be subject to *unlawful* interferences with their economic freedom.

*An instrument for economic freedom?*

With *Scarlet Extended* and *Netlog*, the role of the right to conduct business evolved – rather than merely being used in the defensive mode, to ensure that national fundamental rights protection did not undermine the primacy, unity and effectiveness of EU law, the Court deployed Article 16 to strengthen the obligation of the member states to comply with EU law. It did so in order to achieve the objective of the Directive, namely the removal of potential obstacles to free movement which would be created by the injunction and the monitoring obligation it imposed. Article 16 was thus used instrumentally in order to promote the functioning of the *internal* market.

In *Alemo Herron* the Court again deploys Article 16 in ‘offensive’ mode. The national legislation implemented the Acquired Rights Directive which protects the rights of employees in the event of a transfer of undertakings The salient point is that the national legislation did not breach it the Directive – it provided employees with more extensive protection that provided for by the Directive, but this was expressly allowed. Nor was the national measure an obstacle to the functioning of the internal market. The employer company (Parkwood Leisure Ltd.) was a British company, operating in the British market, and there was no suggestion in the Court’s judgment or Advocate General’s opinion that the national legislation was an obstacle to free movement. Furthermore, the referring court, the UK’s Supreme Court, had declared that the legislation was ‘entirely consistent with the [national] common law principle of freedom of contract’.

Nonetheless, the Court found that the national court must set aside the national legislation. This was because, under this legislation, “the transferee’s contractual freedom is seriously reduced to the point that such a limitation is liable to adversely

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23 ECJ 18 July 2013, Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd* ECLI:EU:C:2013:521
25 For a more detailed analysis of this case see Gill-Pedro *supra*, note 8.
26 The Directive stated expressly that it was without prejudice the right of Member States to apply or introduce laws more favourable to employees.
27 Opinion of AG Cruz Villalon in ECJ 19 February 2013, Case C-426/11 *Alemo-Herron* ECLI:EU:C:2013:82
28 Indeed, as Bartl and Leone note, whilst this case would appear to entail a notable extension in the Court’s power to review national measures, the Judgment does not indicate the reasons for such an extension (M. Bartl and C. Leone, ‘Minimum Harmonisation after Alemo-Herron: The Janus Face of EU Fundamental Rights Review’, 11 *EUConst* (2015) p. 140).
29 Parkwood Leisure Ltd v Alemo-Herron and others [2011] UKSC 26, para 9 (per Lord Hope).
affect the very essence of its freedom to conduct a business”. Such a conclusion implies that Article 16 does not merely entail the freedom to conduct business ‘in accordance with the (EU and national) law’, but also entails a right to challenge national laws which unduly restrict the freedom of manoeuvre of a market actor.

It appears therefore, that the Court of Justice required the national court to set aside the national measure, not because this was necessary to protect the ‘unity, primacy and effectiveness of EU law’ nor to ensure the achievement of an EU objective. Rather, it appears that the Court required the national court to set aside the national measure for the sake of protecting the freedom of Parkwood Leisure Ltd – the freedom of this company to operate free of constraints imposed by national law.

A trend confirmed?

_Alemo Herron_ appeared to be an aberration – a decision that did not seem to fit the caselaw of the Court and which was poorly reasoned. However, there are signs that this understanding of Article 16 may be gaining traction in EU judicial discourse. In an essay written for an edited volume titled _The Internal Market and the Future of European Integration_, Nils Wahl, then Advocate General, now Judge at the Court, stated that

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

The political economy which Wahl goes on to describe entails an understanding of the market where every interference in “the freedom of undertakings to conduct business in the way they see fit” is prima facie prohibited, and constitutes “a serious interference in the open market economy on which the EU is built”.

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30 _Alemo-Herron_, supra n. 27, para. 35.
31 As I put it previously, in _Alemo Herron_ the Court protected the company’s freedom from interference, and not merely its freedom from domination (Gill-Pedro, supra, n. 5).
32 Stephen Wetherill described it as a decision that was “so downright odd” that it deserved to be consigned to the bottom of the lake. (S. Wetherill ‘Use and Abuse of the EU’s Charter of Fundamental Rights’, 10 _European Review of Contract Law_ (2014) p. 167).
34 Ibid., p. 276.
35 Ibid., p. 287.
36 Ibid.
This view was not restricted to Wahl’s extra-judicial writings. As Advocate General, he stated in his Opinion in *AGET Iraklis*\(^{37}\) that:

> The European Union is based on a free market economy, which implies that undertakings must have the freedom to conduct their business as they see fit.\(^{38}\)

The case concerned a company (AGET Iraklis) which intended to institute a number of redundancies among its workforce. National legislation required employers to enter into consultations with the workers’ representatives if they intended to institute redundancies. If the employers and the workers failed to reach an agreement concerning the redundancies, the employer could only institute the redundancies with the authorisation of the national authorities. AGET Iraklis failed to reach agreement with the workers representative, and the Minster for Labour refused to authorise the redundancies. Both the AG and the Court considered that the national legislation constituted a restriction of freedom of establishment and free movement of capital.\(^{39}\) Such a restriction can of course be justified by the member state, by reference to Treaty exceptions, or to imperative requirements in the public interest. Here the Court accepted that the aim of the national legislation was, inter alia “protecting workers and combating unemployment”, which are legitimate interests which could in principle justify a restriction on the freedom of movement of the company.\(^{40}\) However, when considering the proportionality of the national measures, both the AG and the Court considered that the national legislation constituted not only a restriction on the free movement of the company, but also an interference with that company’s fundamental right to conduct a business.

The company is thus considered by the Court to have a right to conduct its business as it sees fit, and in particular the freedom of contract in respect of the workers they employ.\(^{41}\) Any national measure which falls within the scope of EU law must not constrain that company’s freedom of contract unless such constraint is justified. As Koen Lenaerts, president of the Court of Justice, who presided over the Grand Chamber in this case put it subsequently, this case shows that “the scope of Article 16 of the Charter is broader than that of the fundamental freedoms”, because it entails a

\(^{37}\) Opinion of AG Wahl in ECJ 9 June 2016, Case C-201/15 *AGET Iraklis* EU:C:2016:429.

\(^{38}\) Ibid., para. 1.

\(^{39}\) Ibid., paras 47 and 48 and ECJ 21 December 2016, Case C-201/15 *AGET Iraklis* EU:C:2016:972, para 57.

\(^{40}\) ECJ Judgement, para. 70.

\(^{41}\) Ibid., para 85.
prima facie prohibition on all “limitations on the exercise of private autonomy” by market actors.42

This mode of reasoning was reiterated in Achbita.43 This case concerned a measure introduced by the employer (G4S Secure Solutions NV) which prohibited all employees from wearing visible signs of religious belief. Ms Achbita was a Muslim woman, who considered that her religion required her to wear a headscarf in public. She argued that the decision of the company discriminated against her on grounds of religion. The Court agreed that the measure could be prima facie indirectly discriminatory because, while it may be an apparently neutral obligation, it may nonetheless lead to a person adhering to a particular religion or belief being put at a particular disadvantage.44 However, in considering whether the measure was justified, the national court was required to consider the employer’s freedom to conduct business.45 The Court thus held that the freedom to conduct business of G4S includes the freedom to impose a dress code on its employees which reflects G4S’s ‘policy of neutrality’, even where the exercise of such freedom places employees who belong to particular religious groups at a disadvantage. In IX v Wabe eV the Court reiterated that “an employer’s wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter”.46

Conclusion

These cases did not appear in a vacuum – As Giubboni points out, Alemo Herron and AGET Iraklis “finalise the explicitly neoliberal restyling regarding the internal market doctrine initiated by [the Laval quartet ]”.47 But these cases are significant because, unlike the Laval quartet, the freedom of the company is not presented as a necessary element in the construction of the internal market, but is presented as a fundamental right worthy of protection for its own sake. It appears to promote ‘the private autonomy in a liberal sense understood as freedom from coercion’.48

44 Ibid., para. 34.
48 D. Leczykiewicz ‘Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?’ in U Bernitz and X Groussot (eds), General Principles of EU Law and European Private Law (Kluwer 2013
Whose freedom is protected?

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

The proposition that the freedom at stake is the company’s freedom is somewhat question begging, because it assumes that the company is an entity that is able to exercise freedom. This raises the age-old question of the nature of the corporate legal person. I have engaged with this question previously, but here I will focus on the relationship between the company, as a legal person, and its stakeholders (shareholders, directors, employees) in order to assess whether the freedom at stake may be the freedom of human beings who own or control the company, rather that the freedom of the company itself.

Are corporations people - the shareholders

It could be argued that categorising legal subjects as natural or legal persons is to make a distinction without a difference. As the former US presidential candidate Mitt Romney put it ‘Corporations are people’. On this view, corporations are purely fictitious entities, and the interests of the company are the interests of the people that own it – its shareholders. This understanding of the firm has been advanced initially by economists, who argued that companies are merely “legal fictions which serve as a nexus for a set of contracting relationships among individuals”. If we approach the question at the heart of this paper with this understanding of the company, then the matter is straightforward – protecting the fundamental rights of the company protects the freedom of the shareholders – when directors made decisions on behalf of the

50 Youtube clip of Presidential candidate speech https://www.youtube.com/watch?v=KIPQkd_AA6c
company, they act as agents of the shareholders, who own the company and who therefore have the freedom to steer it in the way that best serves their interest.

There are two serious problems of this understanding. First, as a matter of law, shareholders do not own the company. Shareholders hold a share, a form of contract that gives them certain rights in relation to the company, they do not own the company, nor any part of it, even if, as Borg-Bartlet points out, the ‘dominant thesis’ prevalent in much economic theory and corporate law writing holds that they do. As Ciepley explains in much greater detail that I can do here, the mechanisms by which a corporation comes into being and operates do not support the theory that the shareholders own the corporation.

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

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

Whilst some economic theories reduce the interest of the company to the value of its shares, and emphasise the importance of the directors acting solely in order to

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52 The assumption that the shareholders own the firm, and that the directors of the firma are agents for the shareholder principals, is another feature of this understanding of the nature of a company (see Jensen and Meckling, Supra at n. 60, p. 312).

53 The type of companies discussed here are limited liability companies, where the capital fund is owned by the company itself, not partnerships or joint-stock companies, where the capital fund is owned by individuals.


55 J. Borg-Barthlet The Governing Law of Companies in EU Law (Hart, 2012), p. 37. Borg-Barthlet remarks that this dominant theory “is indicative of a slight but significant misunderstanding of the nature of share ownership”.


57 As Watson points out, what distinguishes the modern corporation from previous entities such as joint stock company, is that it has a capital fund owned and controlled by the company itself, rather than by the stockholders (S. Watson ‘How the company became an entity: a new understanding of corporate law’ (2015) 2 Journal of Business Law, 120 – 141 at 132).

58 C. Jeffwitz C (2018). Redefining directors’ duties in the EU to promote long-termism and sustainability.
maximise shareholder value,\textsuperscript{59} as a matter of law directors have broad scope to determine what the best interests of the company entail.\textsuperscript{60} They cannot, either in law or in fact, be considered agents of the shareholders or to be in some way acting under their direction.\textsuperscript{61} Again, economic theory may require the use of the ‘principal/agent’ metaphor to analyse the duties of directors in a situation where maximising shareholder value is seen as normatively desirable, but the principal/agent analogy does not reflect the respective legal positions of shareholders and directors.

Still, it could be argued that these obstacles are irrelevant. Even if shareholders do not own and control the company, protecting the freedom of the company is in the interests of the shareholders because it improves the economic performance of the company and therefore the economic interests of the shareholder. The freedom of the company protects the freedom of the shareholders to become richer, which is presumed to be their intention in the first place.\textsuperscript{62} This approach still fails because it is not compatible with any plausible understanding of freedom as fundamental value shared by the member states. As already hinted above, freedom as a fundamental value which constitutes the foundation of European legal orders is ineluctably connected to the notion of the self determination of every individual human being. As Honneth points out, an indispensable element in modernity’s moral self understanding of freedom is the “the demand that all individuals be entitled to act in accordance with their own preferences”.\textsuperscript{63} This concept of ‘negative’ liberty concerns the question “what am I free to do or to be”.\textsuperscript{64} Shareholders, as the passive recipients of the profits of the company, are not exercising any freedom to ‘act’ or to ‘do’ or to

\textsuperscript{59} Most famously Milton Freedman argued that the duty of corporate executives is “to conduct the business in accordance with the [shareholders’] desires, which generally will be to make as much money as possible” M. Friedman ‘The Social Responsibility of Business is to Increase its Profits’ The New York Times Magazine, September 13, 1970.


\textsuperscript{61} As Lord Hershell put it in the seminal case of \textit{Saloman v Saloman & Co Ltd} “the company is not in law the agent of the subscribers or trustee for them.” (\textit{Salomon v. Salomon & Co Ltd} [1897] AC 22, per Lord Hershell).

\textsuperscript{62} For a classic example of this logic, see speech by ‘Larry the Liquidator’ in \textit{Other Peoples’ Money} (Warner Bros. 1991) https://www.youtube.com/watch?v=62kxPyNZF3Q. c.f. Linn Stout, who describes the presumption that shareholders care only about the profit they make from their shareholding as a ‘fiction’ (L. Stout \textit{The Shareholder Value Myth} (Berrett-Koehler, 2012).

\textsuperscript{63} A. Honneth \textit{Freedom’s Right} (Polity, 2014).

\textsuperscript{64} I. Berlin ‘Two Concepts of Liberty’ in I. Berlin, and H. Hardy (eds), \textit{Liberty: Incorporating Four Essays on Liberty} (Oxford University Press 2002)
‘be’ what or whom they choose. There is no choice being made other than allowing the directors and managers of the company to control the company.65

**Are corporations people – directors**

Given that it is not the shareholders who control the companies, but the directors, there could be an argument that it is their freedom that is at stake when the freedom of companies is at limited. This argument again fails, because the directors are not free. Directors are under a fiduciary duty to act only in the interests of the company,66 and to do only those things which advance the corporate purpose.67 To act in order to achieve the purposes of another, and in fulfilment of a duty to another, is not freedom. As Mill so succinctly put it “The only freedom which deserves the name, is that of pursuing our own good in our own way”. 68 Again, a clarification may be helpful. It is accepted that the decision of a human person to become a company director is an exercise of freedom – any law that prohibited an individual from becoming a company director would be an interference with the freedom of that individual. But once that individual is a company director, the actions she takes as director are an exercise of her duties towards the company which she directs, in order to pursue the interests of the company, they are not an exercise of her freedom or individual autonomy.

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

In conclusion, the freedom of the company cannot be reduced to, or equated with, the freedom of the individual shareholders, directors or employees. Protecting the freedom of the company to conduct business as it sees fit, or to be free from intrusion

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65 That is not to say that the shareholders have not rights, even fundamental rights, in connection with their shareholding. If the company is expropriated without compensation, this will effectively deprive the shareholders of their property, as the value of the shares will be reduced to zero. Similarly, if the law is changed so as to deprive shareholders of voting rights over the company. But this interference with the rights of shareholders is not what is at stake in the cases discussed above.

66 A guide to the duties of shareholders in EU countries indicates that, while the specific duties may vary between different jurisdictions, but in all of them the directors were bound by a duty to act only in the interests of the company. (CMS Legal Services ‘Duties and Responsibilities of Directors in Europe’ (2005), at https://www.cms-lawnow.com/-/media/files/lawnow/publications/directorsduties.pdf.

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

68 J. S. Mill *On Liberty*
into its private affairs by others, does not further the freedom either of the shareholders of the company, or of its directors and employees.

**The company as a free person**

If it is the freedom of the company that appears to be at stake, this raise the question of whether companies are the kind of entities that can be free. The concept of freedom, in whatever guise we encounter it, is connected to the notion of an agent who would be free.\(^{69}\) In the sentence ‘x is free’, the predicate ‘is free’ cannot be understood without the subject x – a subject that is able to act.\(^{70}\) The concept of agency is a contested one, but List and Pettit provide a helpful and minimalistic formulation.\(^{71}\) An entity is an agent if it meets three criteria:

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

Do companies meet this criteria? I will use the facts of *AGET Iraklis* to try to answer that question. According to the facts of the case “*AGET Iraklis* invited the workers at its plant in Chalkida to meetings with a view to considering alterations to the activities at the plant in the light of a fall in demand for cement”.\(^{72}\) The implication is that the company had the belief that there had been a fall in demand for cement in Greece. Can this belief be ascribed to the company, or is this merely a figure of speech,\(^{73}\) and the belief is in fact held by the company’s managing director, or by the individual members the Board? After all, beliefs and desires are normally conceived as mental states, and mental states require a mind.\(^{74}\) Companies do not, as such, have minds.

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\(^{69}\) P. Pettit  *A Theory of Freedom: From the Psychology to the Politics of Agency.* (Oxford University Press; 2001)


\(^{71}\) It is minimalistic in the sense that it makes no claims as to the moral agency of the entity, nor about whether it should have rights or responsibilities, nor whether it is a person.

\(^{72}\) C-201/15 *AGET Iraklis*, supra n. 37, at p. 13.

\(^{73}\) Quinton argues that “these ways of speaking are plainly metaphorical. To ascribe mental predicates to a group is always an indirect way of ascribing such predicates to its members” (A. Quinton ‘Social Objects’ (1975-76) 76 Proceedings of the Aristotelian Society, at p17).

Nonetheless, we do know that the company, like all corporations, has internal mechanisms that allow it to adopt corporate attitudes.\textsuperscript{75} As Hess notes, corporate beliefs and desires are shaped by the activities of the members (directors, employees, officers) of the corporate body, in ways that can be extremely complex.\textsuperscript{76} So in shaping the belief of AGET Iraklis, perhaps the employees in the sales teams provided information about their customers attitudes, others may have provided information about the general state of the Greek economy, others still provided information about AGET Iraklis competitors. Nonetheless, once the company, through its internal mechanisms adopts a particular belief, that belief is the belief of the company, and not a mere reflection of the beliefs of those employees.

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

This understanding of corporate agency does not require any commitment to an ontology of the corporation that sees it as a “psychic organism…, possessing not a fictitious but a real psychic personality”.\textsuperscript{77} As Harari points out “Any large-scale human cooperation is rooted in common myths that exist only in people’s collective imagination”.\textsuperscript{78} Such entities – states, money, churches, corporations - are what Harari terms ‘imagined realities’. Note however that imagined realities are still real – money, Greece, AGET Iraklis - these entities all exist, even if their existence is dependent on inter-subjective, contingent, beliefs. So when the workers met with representatives of the company in 2011, they believed that they were negotiating with AGET Iraklis, their employer. The representatives shared this belief, and considered themselves to be acting on behalf of the company. When the Minister (who saw himself acting on behalf of another imagined reality, the Greek state) received a request for approval of the projected collective redundancies, he believed that this request had been made by AGET Iraklis. And when the judges of the Court of Justice of the EU (the EU being, of course, another imagined reality) received a reference for preliminary ruling from the Greek Council of State, they believed that the case concerned a dispute involving AGET Iraklis, and that the lawyers before it were representing the interests of that company.

\textsuperscript{76} K. Hess “‘If you tickle us…’: How Corporations can be Moral Agents Without Being Persons?”
\textsuperscript{78} Y. N. Harari \textit{Sapiens: A brief history of humankind} (Vintage, 2015).
It is possible that all these persons were mistaken in their beliefs, or that they were only using figures of speech. But it is not very credible, and it seems to unnecessarily complicate our understanding of the social world.\(^7\) When the Court of Justice, in its judgment, held that AGET Iraklis’ freedom to conduct business should be respected, it was the freedom of the company that was thereby protected, not the freedom of any individual human beings.

**Corporate Freedom and Human Freedom**

It could be argued that it is irrelevant whether the entities protected are natural persons or legal persons - freedom is a fundamental value of the EU, and the maximisation of freedom is valuable regardless of the subjects of freedom. The protection of private autonomy, entrepreneurial freedom and the “mutual allocation of spheres of liberty” are central pillars of the European economic constitution.\(^8\)

Protecting the fundamental rights of companies provides private parties with a “more concrete and entrenched mechanism of resisting regulatory effects of national and EU law” and therefore promotes ‘private autonomy’.\(^9\)

There is a problem with that argument: the exercise of ‘freedom’ by a company is not really a private matter. As Ciepley points out,\(^1\) corporations are ‘governmental’ both in their provenance and in their operation. On the first point, Ciepley conducts a survey that shows that, historically, corporations were chartered by the state to perform activities in the public good. They were conceived not as private entities but as ‘bodies politic’.\(^2\) And this connection with the state remains today – companies come into being as a result of an act by the state – unlike truly private entities, such as a family, or a voluntary association, a group of private individuals cannot, between themselves, create a company – only the state can do that – the state, by its act, incorporates the company, thereby constituting it as a legal person.

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\(^7\) Copp also notes that it may be normatively undesirable. D. Copp. ‘On the Agency of Certain Collective Entities: An Argument from “Normative Autonomy”’ (2006) 30 Midwest Studies in Philosophy 194. I will address the normative implications of recognising the agency of corporate entities in the following section.

\(^8\) A. Hatje ‘The Economic Constitution within the Internal Market’ in von Bogdandy and Bast Principles of European Constitutional Law (2.\textsuperscript{nd} Edn. Hart, 2009), Finid reference to Leczykiewicz horizontal effect.


\(^1\) Ciepley, supra n. 79, p. 139.

\(^2\) Ibid. Of course, this argument is in no way original, even if many appear to have forgotten it. Already in 1916 Laski could affirm that “English lawyers .. have no doubt [that] the corporation is the creature of the state” (H. Laski The Personality of Associations (1916) 29 Harvard Law Review 404, at 406.).
On the second point, and of greater relevance to this article, companies are governmental in their operation. Companies have a *jurisdiction*, that is to say, “the right to establish and enforce rules” in order “to govern the property and the people within their jurisdiction”.\(^{84}\) Companies can make by-laws, work rules, and other forms of regulation, and those under the companies jurisdiction (its directors and employees) have a duty to obey.

We can see this type of rule in operation in the caselaw set out above. *Achbita* provides a good illustration. The company, G4S, introduce a rule in the workplace regulations which prohibited employees from wearing of any visible sign of religious or political belief at work.\(^{85}\) This rule was binding – when Ms Achbita came to work in violation of this rule, G4S terminated her contract of employment, and the national courts, once they determined that the rule, was not unlawful, held that G4S had been entitled to do so.\(^{86}\)

In addition to such formal, binding rules, companies are able to institutionalise complex social norms which alter and condition the preferences and behaviour of its members. Singer refers to this phenomenon as ‘norm-governed productivity’.\(^{87}\) He shows how theories of the firm that reduce it to a market within which individuals are able to freely bargain in order to maximise their individual preferences “misses the mechanism that enables people to cooperate within the firm”.\(^{88}\) Individuals may join the firm for purely preference-maximising reasons. But once they are a member of the firm, they are subject to norms which shape their preferences in subtle ways that the individuals themselves may not even be aware of.

*Achbita* again provides an illustration of this. Before the formal rule was introduced in the regulations, there was in G4S “an unwritten rule that prohibited the wearing of any visible signs of religious or political belief”.\(^{89}\) While this rule may not have been binding, it is easy to imagine how employees would accept that this was “the way things were” done at G4S, and that, as good team members, they had a duty to conform with this rule. As March and Olsen point out, individuals in institutional settings follow rules of appropriateness. Such rules not only guide actors behaviour, but “tell

\(^{84}\) Ciepley, supra n. 79, p. 141
\(^{85}\) *Achbita*, para. 15.
\(^{86}\) *Ibid*, paras. 17 and 18.
\(^{87}\) A. Singer *The form of the firm. A normative political theory of the corporation* (OUP, 2018).
\(^{89}\) *Achbita*, para. 11.
actors where to look for precedents, who are the authoritative interpreters of different types of rules, and what the key interpretative traditions are.”  

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

**Conclusion**

The Court has interpreted Article 16 as protecting the prima facie freedom of companies to conduct business in the way they see fit. What I have sought to show in this article is, first, that this is not merely a figure of speech – it is the company’s own freedom that is protected by the Court, not the freedom of any individual human beings behind the company. Second, protecting the freedom of companies does not increase ‘private autonomy’, because companies themselves exercise authority over human beings in very profound ways.

The Court has been criticised as imparting a “distinctly libertarian flavour” to its interpretation of Article 16. Critics assert that it endorses a “liberal line of reasoning”

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91 M. Goldmann ‘A matter of perspective: Global Governance and the distinction between public and private authority’ (and not law) (2016) 5 Global Constitutionalism 48
92 I have not mentioned the ability of powerful firms to create rules that bind individuals who may appear outside its jurisdiction. The case of Facebook Inc. which institutionalised its own ‘Supreme Court’ to review its decision to ban the former President of the United States from its platform provides a striking example of how corporations have the capacity to create rules binding others.
93 Goldmann provides a helpful definition of public authority as an act of authority whose actor can reasonably claim to be acting on behalf of a community of which the addressee is a member (*Ibid*, p. 77).
96 Hesselink, *supra* p. 53.
which favours private autonomy over the protection of collective interests. However, this critique may miss the mark. Because even if from the perspective of the libertarian position that the liberty and self-ownership of the individual is the only possible foundation of the social order, and with the liberal concern for protecting individual liberty as negative liberty, that is, as the absence of forcible interference from other agents, we still find no justification for protecting the freedom of companies. Companies exercise authority over human beings, and forcible interfere with their freedom in order to achieve the goals of the company.

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

This argument is problematic because, as Hesselink points out, the question of what a ‘good’ regulatory environment is, and to what extent the market should be regulated is highly controversial. For the Court to use of Article 16 in order to favour a particular ideological position on this matter will exceed the remit of a court. It amounts to, in the words of Giubboni, “the ideological overthrow of the […] assumptions” of the founding Treaties. The Court is thus making a political decision which will bind the political autonomy of the member states. The ability of the peoples of the member states to decide democratically how to regulate the market is being constrained in the name of a political goal which those peoples have not agreed to. Whilst the supporters of the free market may argue that free markets are more efficient, or bring the greatest benefits to consumers and that therefore the EU should aim to liberalise national markets, such empirical assertions are highly contested.

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97 Giubboni, supra n. 44, p. 184.
99 Berlin, Supra n. 6.
101 Giubboni
102 AS Giubboni elaborates, the goal of creating a ‘free market’ in the sense of a market where undertakings have a prima facie right to be free from regulatory interference, is not a goal set out in the Treaties.
103 Usai, supra n. 54, p. 1870.
104 For a critique of free market economics, see G. Akerlof. and R. Shiller, Phishing for Phools: The Economics of Manipulation and Deception (Princeton University Press 2015).
Fundamental rights are meant to be fundamental. As the Court of Justice itself put it respect for fundamental rights is “a condition of the lawfulness of Union acts”\textsuperscript{105} and neither EU nor the member states can lawfully act in way that contravenes fundamental rights. They are fundamental, we are told by the Explanations to the Charter, because they are founded on the universal value of human dignity. To appropriate and instrumentalise fundamental rights in order to pursue a particular ideological vision of the market, or in order to protect the freedom not of human beings, but of companies, risks not only the \textit{dehumanisation} of fundamental rights,\textsuperscript{106} but it undermines the legitimacy of the EU legal order.

\textsuperscript{105} ECJ 3 September 2008 C-402/05 P and C-415/05 P \textit{Kadi} EU:C:2008:461
\textsuperscript{106} T. Isiksel The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights