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# Fundamental rights as sources of trust and voices of distrust in the European Internal Market

ANTOINE BAILLEUX

## 1. Introduction

In the case law of the European Court of Justice, the relationship between the protection of fundamental rights and the establishment of the Internal Market is characterized by a deep ambivalence.[1] To be sure, many lawyers are now familiar with the ever-growing slew of cases in which fundamental rights are invoked by Member States in order to *escape* the requirements of the free movement principles.[2] In such instances, public authorities rely on the need to protect rights such as the freedom of expression, the freedom of assembly or human dignity in an attempt to justify a measure *prima facie* incompatible with the basic principles of the Common Market. The Court had long paved the way for such a development by recognizing fundamental rights as 'general principles of Community law' in its early case law.[3] It is therefore not surprising that the European judicature proved receptive to this line of argument and readily accepted that the protection of fundamental rights may amount to an 'overriding' or 'mandatory' requirement of general

[1] See A. Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire. Essai sur la figure du juge traducteur* (Brussels: FUSL-Bruylant, 2009).

[2] On this case law, see, e.g., J. Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution', *European Law Journal* 12 (2006) 15–40; A. Alemanno, 'A la recherche d'un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur', *Revue du droit de l'Union européenne* 4 (2004) 709–51.

[3] Case 26/69, *Stauder* [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73, *Nold* [1974] ECR 491.



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interest capable of justifying a deviation from the free movement principles enshrined in the Treaty.[4]

One should be careful, however, not to regard the protection of fundamental rights as a systematic obstacle to the free exercise of the 'four freedoms' and to the establishment of a European Common Market. In numerous cases, fundamental rights come into play to *bolster* the free movement dynamic, whether by supporting the removal of regulatory barriers to free trade[5] or by advancing the cause of the free movement of non-economically active citizens.[6] In a number of occurrences, combined claims relating to breaches of free movement *and* fundamental rights resulted in the Court exercising a particularly extensive or vigorous scrutiny of the impugned measure.[7]

This ambivalent relationship between fundamental rights and free movement (featuring both 'conflicts' and 'alliances') provides the background to this chapter. The aim of the following pages is to unravel further the chemistry of this interaction by analyzing it through the lens of the promising – yet relatively unexplored – notion of 'trust'. In this respect, it will be argued that trust is indeed the centrepiece of the relationship between fundamental rights and free movement. First, the notion of trust sheds a new light on – and, to a certain extent, provides an explanation for – the ambivalence of this relationship. Second, the issue of trust seems to bear a direct influence on the Court's reasoning and final verdict in many cases where fundamental rights and free movement come to meet.

These observations will emerge from a short – and selective – overview of the case law on fundamental rights and free movement. Section 2 of the chapter focuses on cases in which fundamental rights appear as a trust-enhancing factor, either buttressing the trust between Member States or strengthening the citizen's confidence in foreign Member States. Section 3 of the chapter explores the cases where fundamental rights act as channels for the expression of distrust both among Member States and between citizens and foreign Member States.

[4] See, e.g., Case C-353/89, *Commission* v. *Netherlands* [1991] ECR I-4069; Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda* [1991] ECR I-4007; and Case C-368/95, *Familiapress* [1997] ECR I-3689.

[5] See, e.g., Case 222/86, *Heylens* [1987] ECR 4097; and Case C-260/89, *ERT* [1991] ECR I-2925.

[6] See, e.g., Case C-60/00, *Carpenter* [2002] ECR I-6279; and Case C-109/01, *Akrich* [2003] ECR I-9607.

[7] See, e.g., Case C-370/05, *Festersen* [2007] ECR I-1129, paras. 35 and 37.

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## 2. Fundamental rights as sources of trust

In a number of cases brought before the Court, fundamental rights are presented as the touchstone of a common legal heritage. These shared common values, it is argued, are the backbone of the European integration project and the bedrock of trust relationships between the Member States. Such references to human rights aim to strengthen the mutual recognition principle and – whether directly or indirectly – to further the free movement dynamic. An analysis of the case law reveals that, depending on the circumstances of the case, fundamental rights can be used to bolster the trust of the host State, of the home State, or of the European citizen.

### *2.1 Building up the host State's trust*

In *Dynamic Medien*,[8] the Court was called upon to rule on the compatibility, with the free movement of goods, of a German rule prohibiting the sale of image media that had not been examined and classified by the German authority for the purpose of protecting children and the youth. This legislation precluded Avides, a German company, from selling in Germany video media that had only been approved by the British authority responsible for the protection of children. Germany claimed that this restriction to the free movement of goods was justified by the protection of morality, the rights of the child and human dignity.

We will come back later to this argument which sets the stage for a conflict between fundamental rights and free movement. Of more direct relevance here is the reply of Avides to the defence of the German government, to be found in the Opinion of Advocate General Mengozzi:

> Avides points out in this regard that the examination criteria for the protection of young persons used by the competent British and German authorities are equivalent, since both the United Kingdom and Germany have signed and ratified the Convention on the Rights of the Child adopted in New York on 20 November 1989, in the preamble to which the States Parties recognise 'that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity'.[9]

Striking here is the use of fundamental rights as a trust-building factor. The argument goes as follows: from the fact that both Germany and the

[8] Case C-244/06, *Dynamic Medien* [2008] ECR I-505. [9] *Ibid*., para. 73.

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United Kingdom have ratified the Convention on the Rights of the Child, it must be inferred that these two countries share the same standards as regards the protection of the youth. *Ergo*, Germany (the host State) should be confident that the control exercised by the British authorities (the home State) on the contents of image media is sufficient to ensure the protection of German children. By setting a common floor of core values, adherence to fundamental rights is used to support the mutual recognition principle that lies at the heart of the Common Market.

It should be noted that this argument was not taken up by the Court. The Court preferred to follow the line of reasoning developed in the *Omega* judgment that will be discussed below.

### *2.2 Building up the home State's trust*

Trust relationships cannot work one way. In some instances, it is for the *home* Member State to place confidence in the *host* State in the name of a shared commitment towards fundamental rights.

An illustration of this situation is provided by the *United Pan Europe*[10] case, which concerned a Belgian measure requiring cable operators to broadcast in Brussels programmes transmitted by certain broadcasters established in Belgium. Foreign broadcasters, which *de facto* did not benefit from this regime of 'must carry', claimed that the Belgian law was discriminatory and unduly restricted their right to freely provide services. Belgium justified this *prima facie* breach of free movement by the need to maintain pluralism and protect the freedom of expression in Brussels: cable operators had to transmit programmes in Dutch and in French in order to preserve the right of the Dutch- and French-speaking populations of Brussels to receive local information in their own language. Just like the German government in the *Dynamic Medien* case, Belgium used the protection of fundamental rights as a shield against the requirements of the free movement principles.

The call for mutual trust did not come from the claimant this time, but from the Court itself. The Court accepted Belgium's argument and considered that:

> the national legislation at issue in the main proceedings pursues an aim in the general interest, since it seeks to preserve the pluralist nature of the range of television programmes available in the bilingual region of

[10] Case C-250/06, *United Pan-Europe* [2007] ECR I-11135.

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> Brussels-Capital and thus forms part of a cultural policy the aim of which is to safeguard, in the audiovisual sector, the *freedom of expression of the different social, cultural, religious, philosophical or linguistic components* which exist in that region.[11]

The Court did not only recognize the legitimacy of the need to safeguard the freedom of expression of the population of Brussels. Following the reasoning adopted in the *Schmidberger*[12] case, the Court went as far as to grant Belgium a wide margin of appreciation in its efforts to protect pluralism and free speech:

> As regards, thirdly, the question whether the legislation at issue in the main proceedings is necessary in order to attain the aim pursued, it must be noted that, while the maintenance of pluralism, through a cultural policy, is connected with the fundamental right of freedom of expression and, accordingly, that the national authorities *have a wide margin of discretion* in that regard, the requirements imposed under measures designed to implement such a policy must in no case be disproportionate in relation to that aim and the manner in which they are applied must not bring about discrimination against nationals of other Member States.[13]

It is submitted that trust played a pivotal role in the Court's decision to grant Belgium significant leeway and convert its classic proportionality test into a 'non-disproportionality' review. Behind this decision lies the notion that the home State (and all the other Member States) should trust the host State's judgment in its efforts to safeguard common fundamental values. Interestingly, fundamental rights are used by the Court to enlarge the scope of the mutual trust and mutual recognition principles, with the effect of creating an obstacle to the '*laissez faire, laissez passer*' dynamic inherent in the Common Market. It could be argued, however, that, even in this case, the role played by trust indirectly fosters economic integration by setting the ground for the establishment of a genuinely *common market*, premised on shared 'constitutional' standards.

[11] *Ibid*., para. 42 (emphasis added).

[12] Case C-112/00, *Schmidberger* [2003] ECR I-5659. On this case, see, e.g., A. Biondi, 'Free Trade, A Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights', *European Human Rights Law Review* 1 (2004) 51–61; F. Ronkes Agerbeek, 'Freedom of Expression and Free Movement in the Brenner Corridor: The Schmidberger Case', *European Law Review* 29 (2004) 255–66.

[13] Case C-250/06, *United Pan-Europe* [2007] ECR I-11135, para. 44.

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### 2.3 *Building up the European citizen's trust*

Fundamental rights may also be viewed as a necessary condition for European *citizens* to make confident use of their free movement rights. There are good grounds to believe that respect of European standards of fundamental rights by a foreign Member State is likely to strengthen the migrant citizen's trust in that Member State and act as an incentive to move. This reasoning was set out for the first time by Advocate General Jacobs in the *Konstantinidis*[14] case:

> Suppose that a Member State introduces a draconian penal code under which theft is punishable by amputation of the right hand. A national of another Member State goes to that country in exercise of the rights of free movement ... steals a loaf of bread and is sentenced to have his right hand cut off. Such a penalty could undoubtedly constitute inhuman and degrading punishment contrary to Article 3 of the European Convention on Human Rights. But would it also be a breach of the individual's right under Community law, even though it were applied in a non-discriminatory manner? I believe it would ... In my opinion, a Community national who goes to another Member State ... is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights.[15]

This revolutionary stance was never endorsed by the Court, which prompted Advocate General Maduro recently to submit a milder version thereof. In *Centro Europa 7*,[16] Advocate General Maduro suggested that the trust necessary to the European integration project and to the exercise of free movement would be compromised by serious and persistent violations of fundamental rights in a given country. Therefore, such violations had to be regarded as breaches of the free movement principles falling under the Court's jurisdiction:

> My suggestion is not that any violation of fundamental rights within the meaning of Article 6(2) EU constitutes, of itself, an infringement of the rules on free movement. Only serious and persistent violations which highlight a problem of systemic nature in the protection of fundamental rights in the Member State at issue, would, in my view, qualify as violations of the rules on free movement, by virtue of the direct threat they would pose to the transnational dimension of European citizenship and to the integrity of the EU legal order.

[14] Case C-168/91, *Konstantinidis* [1993] ECR I-1191. [15] *Ibid*., paras. 46–7.
[16] Case C-380/05, *Centro Europa 7 Srl* [2008] ECR I-1349.

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To date, the Court does not seem to have endorsed this reasoning. It is submitted, however, that, having recognized – at least implicitly – that the exercise of free movement heavily depends on trust in the host State's regulatory regime, it might not take more than a clear (but low-profile) case for the Court to establish a further link between free movement and the respect of fundamental rights.

## 3. Fundamental rights as voices of distrust

Fundamental rights are not always used as trust-enhancing tools before the Court of Justice. It emerges from the case law that these same rights may carry a divisive force and be used to voice distrust towards the neighbour and shields the Member States' constitutional identities and regulatory diversity from the unifying dynamic of the Internal Market.

### *3.1 Expressing the host State's distrust*

A first spate of cases features fundamental rights as channels of expression of the host State's distrust *vis-à-vis* the home State's regulatory standards. The nature and the extent of this mistrust may, however, differ considerably from one case to another, as it appears from the *Omega Spielhallen*[17] and *Laval*[18] cases.

In *Omega*, the Court was called upon to assess the compatibility with the free movement of goods and services of an order from the police in Bonn prohibiting the operation of a game commercialized in the United Kingdom which involved simulated killing actions. In support of this prohibition, Germany invoked the protection of human dignity and of public policy. It argued that, in view of the specific history of Germany, such games were considered by the population as violating the highest value of the German Constitution, i.e., human dignity. Importantly, through such a measure, Germany did not express blunt distrust towards

[17] Case C-36/02, *Omega* [2004] ECR I-9609. On this case, see, e.g., C. Smith and T. Fetzer, 'The Uncertain Limits of the European Court of Justice's Authority: Economic Freedom Versus Human Dignity', *Columbia Journal of European Law* 10 (2004) 445–90; G. Chu, '"Playing at Killing" Freedom of Movement', *Legal Issues of Economic Integration* 33 (2006) 85–94.

[18] Case C-341/05, *Laval* [2007] ECR I-11767. On this case, see, e.g., B. Bercusson, 'The Trade Union Movement and the European Union: Judgment Day', *European Law Journal* 13 (2007) 279–308; N. Reich, 'Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases before the European Court of Justice', *German Law Journal* 9 (2008) 125–61.

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the British standards, neither did it blame the British authorities for being too lax in the enforcement of such standards. Indeed, Germany did nothing more than stress the specificity of its own 'constitutional public order' and express its concern that this specificity could not be adequately safeguarded by foreign standards.

Both the Court and its Advocate General approved this line of defence. The Court stated that '[i]t is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected'. Accordingly, the Court vested Germany with a significant margin of appreciation to determine (1) the existence of a breach of its constitutional values and (2) the measures needed to remedy that violation.

As a matter of fact, although this case illustrates a situation of conflict between free movement and fundamental rights, it is disputable whether it provides an instance of mistrust between Member States. To be sure, Germany distanced itself from the British standards and made a case for the protection of diversity in the Common Market. Yet, concern for specificity can hardly be equated with distrust. In addition, it should be noted that the Court's reasoning is once more premised on a powerful sense of trust – the trust that Germany will not abuse the latitude that it enjoys by adopting protectionist measures under the umbrella of its Constitution.

This example should be contrasted with the examination of the Swedish 'Lex Britannia' in the *Laval* case. This legislation authorized collective actions only against undertakings which were not bound by collective agreements in Sweden, regardless of whether such undertakings were already bound by collective agreements in any other Member State. In other words, under Swedish labour law, 'collective action is authorised against undertakings bound by a collective agreement subject to the law of another Member State in the same way as such action is authorised against undertakings which are not bound by any collective agreement'.[19]

It is submitted that the Swedish 'Lex Britannia' in *Laval* does not fulfil the same function as the order of the police of Bonn in *Omega*. Whereas the latter genuinely seeks to protect the specificity of the German constitutional order, the former merely encapsulates blunt distrust towards the other Member State's labour regime. This 'Lex Britannia' relies on the (non-rebuttable) assumption that the only trustworthy labour

[19] Case C-341/05, *Laval* [2007] ECR I-11767, para. 113.

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protection instruments are those which are signed on its own territory according to its own laws. This blind defiance – applicable not only to Latvia or Estonia but also to Finland or Denmark – brings us back to the early years of European integration, when States did not know each other very well and had trouble trusting each other's standards.

It is therefore not surprising that the Court dealt with the 'Lex Britannia' as it would have forty years ago. The Court considered that the Swedish law was discriminatory and that this discrimination was contrary to EU law as it could not be justified by the public policy, public morality or public health reasons laid down in the Treaty. Admittedly, this statement is lamentable for two reasons. First, it maintains the aged and ill-suited dividing line between the express derogation grounds contained in the Treaty (capable of justifying discriminatory measures) and the mandatory or overriding requirements of general interest developed by the case law (only able to justify non-discriminatory breaches of free movement). Second, it denies any special status to the 'fundamental rights defence' by failing to recognize that the need to protect fundamental rights (such as the right to collective action) carries a particular significance in the European legal order and should therefore be placed on the same footing as the express derogation grounds enshrined in the Treaty.

However, it could be argued that the content of the 'Lex Britannia' can at least partly explain the Court's conservative position. By expressing blind distrust *vis-à-vis* all the Member States' labour legislation, the 'Lex Britannia' strikes at the heart of the European project. It is therefore only natural that the Court treated Sweden like parents would treat a boisterous child, taking the view that behaviours reminiscent of those in the early days of European integration should be sanctioned in accordance with the standards of that time.

### *3.2 Expressing the European citizen's distrust*

European *citizens* can also use fundamental rights to express distrust towards Member States of which they are not a national. In *Viking*,[20] for instance, collective actions were taken to preclude a Finnish ship-owner from registering one of its vessels under the flag of Estonia. Those actions were taken in accordance with the policy of the International Transport Workers' Federation (ITWF). Under this policy, the ITWF was obliged to take collective actions at the request of the Finnish trade unions, even

[20] Case C-438/05, *Viking* [2007] ECR I-10779.

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though Viking (the Finnish ship-owner) had eventually promised to maintain the same working conditions, and even if (hypothetically) Viking had decided to register its vessel in a State which guarantees workers a higher level of protection than Finland.[21] However legitimate and praiseworthy the goal of these collective actions may be, it is submitted that in the automatic character of such actions lies the spectre of the 'blind distrust' already found in *Laval*.

This was rightly observed by the Court and by Advocate General Maduro. Both considered that breaches of free movement caused by collective actions could be objectively justified if such actions genuinely aimed to protect the 'social identity' of the country or if they sought to improve the working conditions of all the Union workers. By contrast, such collective actions could not be allowed if they boiled down to a blunt expression of distrust *vis-à-vis* the other Member States' standards and workers.

In this respect, Advocate General Maduro's call for trust in the governments of the Member States should also be highlighted. In his Opinion in the *Viking* case, the Advocate General called upon European citizens to trust the European integration project and willingly suffer a few sacrifices in exchange for greater benefits to come:

> The European economic order is firmly anchored in a social contract: workers throughout Europe must accept the recurring negative consequences that are inherent to the common market's creation of increasing prosperity, in exchange for which society must commit itself to the general improvement of their living and working conditions, and to the provision of economic support to those workers who, as a consequence of market forces, come into difficulties.[22]

The Advocate General states further that this trust must, however, not be blind. Fundamental rights come into play here: 'The right to associate and the right to collective action are essential instruments for workers to express their voice and to make governments and employers live up to their part of the social contract'.[23]

[21] 'As Viking argued during the hearing without being contradicted by [the International Transport Workers' Federation] in that regard, the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a higher level of social protection than they would enjoy in the first State.' *Ibid*., para. 89.

[22] *Ibid*., Opinion of Advocate General Maduro, para. 59. [23] *Ibid*., para. 60.

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The *AGM Cos.Met*[24] case provides another illustration of the role that fundamental rights can play in expressing a citizen's distrust. In this case, a Finnish official, Mr Lehtinen, publicly aired his doubts as to the safety of vehicle lifts marketed by AGM, an Italian company. These products benefited from the 'CE' label and were therefore presumed to comply with the safety requirements of secondary legislation. The only way for the Finnish authorities to lawfully restrict the marketing of these products would have been to alert the Commission and follow the procedure laid down in secondary legislation. The warnings expressed by Mr Lehtinen caused the sale in Finland of the vehicle lifts to plummet. Finland accepted that this entailed a restriction on the free movement of goods but claimed that this restriction was dictated, *inter alia*, by the need to secure the freedom of expression of Mr Lehtinen. In a rather clumsy judgment, the Court seemed to consider that Mr Lehtinen had given the impression that he was talking on behalf of the Finnish government and that therefore the restriction on free movement was imputable to Finland itself. The Court considered further that Finland did not enjoy any right to freedom of expression for itself and that, consequently, the disruption of the free flow of trade caused by Mr Lehtinen could not be justified under Union law.

From this case, it appears that the Court is again not very happy with statements or actions that jeopardize the mutual trust underpinning the European integration project. However, it is submitted that the Court went too far here. It is one thing to say that fundamental rights cannot serve as a cloak to disseminate the fear of one's neighbour and to convey mutual defiance. It is yet another to consider that the protection of fundamental rights is less important than compliance with secondary legislation on the free movement of products.

## 4. Conclusion

Three main trends seem to emerge from the overview of the case law on the relation between trust, free movement and fundamental rights.

First, it appears from several cases that, as a set of common values, fundamental rights can bolster trust between the Member States and

[24] Case C-470/03, *AGM Cos.Met* [2007] ECR I-2749. On this case, see, e.g., A. Bailleux, 'Les droits de l'homme face à la libre circulation – un nouveau conflit porté devant la Cour de justice', *Revue trimestrielle des droits de l'homme 72* (2007) 1171–1184; S. de Vries, 'Case C–470/03, AGM-Cos.Met Srl v. Suomen valtio, Tarmo Lehtinen', *Common Market Law Review* 45 (2008) 569–85.

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hence further the dynamic of economic integration. In some instances, reliance on the Member States' adherence to the same fundamental values can make it more difficult for a State to justify obstacles to the free flow of trade. In other situations, while successfully justifying restrictions to the free movement, fundamental rights indirectly foster mutual trust and economic integration by setting the ground for the establishment of a genuinely *common market*, premised on shared 'constitutional' standards.

Second, the Court recognizes that fundamental rights can be invoked in order to secure the protection of a country's identity – whether constitutional, social or otherwise – against the unifying dynamic of the Internal Market. In such situations, the 'burden of trust' weighs on the host Member State, requested not to pursue a protectionist agenda under its constitutional umbrella.

It appears from the above that the Court takes fundamental rights seriously insofar as these rights are aimed at protecting non-market values or at preserving diversity against the imperatives of the Common Market. However – and this is my third observation – the Court has so far never admitted that fundamental rights could serve as a means to express blind defiance towards the other participants in the European integration project. This limit, placed by the Court, sheds new light on the interactions between fundamental rights and free movement. It reveals that there are things more important to the Court than the free flow of trade and the ever-closer integration of Europe – which can be both challenged and countered on fundamental rights grounds. As the touchstone of the European project, the sense of trust between and towards the Member States is carefully preserved by the Court and kept beyond the reach of litigants.

Should it be confirmed in subsequent judgments, this trend in the case law could legitimately raise a few eyebrows. Certainly, one can understand the Court's desire to keep a close eye on the jewel of the Union crown. It is respectfully submitted, however, that the Court can only be regarded as 'taking rights seriously'[25] as long as it takes care not to sacrifice individual liberty on the altar of the mutual trust underpinning the European project.

[25] See J. Coppel and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', *Common Market Law Review* 29 (1992) 227–39; J. Weiler and N. Lockhart, '"Taking Rights Seriously" Seriously: The European Court of Justice and Its Fundamental Rights Jurisprudence', *Common Market Law Review* 32 (1995) 51–92 (Part I) and 579–627 (Part II).

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