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# Limitations of Fundamental Rights in EU Law: Are Human Rights Absolute?

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The importance of fundamental rights has been seen especially during the Covid-19 crisis. Although fundamental rights are usually perceived as abstract by individuals, they concretely and directly influence our everyday lives. With this article I want to confirm the thesis that, despite the fact that rights are generally not absolute, their limitation is possible only in exceptional cases. This article will discuss fundamental rights in the EU. It will present the regulation and possibilities of limiting fundamental rights in EU law, in particular in the EU Charter of Fundamental Rights (the Charter). The article will also present the role of the Court of Justice of the EU (CJEU) in the field of fundamental rights. Moreover, it will depict the jurisprudence of the CJEU regarding health care rights. This is particularly important due to the problems of restricting several fundamental rights during the Covid-19 crisis, where health-related rights were at the forefront and accompanied by the search for a fair balance and assessment of proportionality. The article will also present the CJEU case law on the limitation of fundamental rights in the digital society, in the context of which we are also often faced with the search for a fair balance between several rights, especially concerning the protection of personal data on the one hand and other rights on the other hand (e.g. the freedom to conduct a business).

Human rights are not a privilege conferred by government. They are every human being's entitlement by virtue of his humanity. (Mother Teresa)

## Introduction

Although fundamental rights are usually perceived as abstract by individuals, they concretely and directly influence our everyday lives. Human rights are given to us at birth and therefore are not conferred by the state, as Mother Teresa said. But human/fundamental rights[a] are not absolute. With this article, I want to confirm the thesis

that, despite the fact that rights are generally not absolute, their limitation is possible only in exceptional cases.

This article will discuss fundamental rights in the EU. It will present the legal framework and possibilities of limiting fundamental rights in EU law, particularly in the EU Charter of Fundamental Rights (the Charter).[b] The article will also present the role of the Court of Justice of the EU (CJEU) and its case law in the field of fundamental rights. Moreover, it will depict the jurisprudence of the CJEU regarding health care rights. This is particularly important due to the problems of restricting several fundamental rights during the Covid crisis, where health-related rights were at the forefront and accompanied by the search for a fair balance and assessment of proportionality, since health care was in conflict with other fundamental rights. The article will also present the CJEU case law on the limitation of fundamental rights in the digital society, in the context of which we are also often faced with the search for a fair balance between several rights, especially concerning the protection of personal data on the one hand and other rights on the other hand (e.g. the freedom to conduct a business). Both these fields are important for the further development of fundamental rights in the EU. The Covid crisis opened the question of limitations of fundamental rights for the first time to such a broad extent, while the digital era is prone to a wide spectrum of conflicts between fundamental rights with new technologies. Thus, this discussion is pertinent in the context of future challenges.

## Fundamental Rights in the EU[c]

### *Legal Framework*

Fundamental rights in the EU are governed by the Charter, which entered into force on 1 December 2009 and is part of EU primary law. This is set out in Article 6(1) of the Treaty on EU (TEU).[d] The Charter shall be interpreted by the CJEU and national courts with due regard to the explanations prepared under the authority of the Praesidium of the Convention, which drafted the Charter (Article 52(7) of the Charter).[e]

The Charter can be regarded as the EU constitution on fundamental rights. It covers not only classical human rights but also social and employment rights (e.g. the right to paid annual leave under Article 31 of the Charter) as well as some political rights, mainly related to EU citizenship (e.g. the right to vote in the European Parliament in Article 39 of the Charter).

In principle, fundamental rights are not absolute (with exceptions, e.g. human dignity, the prohibition of inhuman or degrading treatment, the prohibition of slavery and forced labour). They are limited by the rights of others, as also stated by the Charter in the preamble: 'Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community, and future generations'.

This has also been emphasized by the CJEU in various cases. For example, referring to Article 16 of the Charter (the freedom to conduct a business) and Article 17 of the Charter (the right to property), the CJEU (also in relation to health) in the

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case C-544/10, *Deutsches Weintor eG v Land Rheinland-Pfalz*, held that the freedom to pursue an economic activity and the right to property are not absolute, but must be considered in relation to their social function.[f]

The Charter is not the only legal basis for fundamental rights protection in the EU. Article 6(3) TEU provides that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. This is a confirmation of the long-standing case law of the CJEU. Although the EU has not yet acceded to the ECHR, as mandated by Article 6(2) TEU, it still plays an important role in the EU. The CJEU often refers to the case law of the European Court of Human Rights (ECtHR) and vice versa. Article 52(3) of the Charter provides that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. The ECHR represents only the minimum protection of those rights; thus, EU law can grant more extensive protection.

## *Restrictions of Fundamental Rights*

### *Rules on Limitations of Fundamental Rights*

The rights enshrined in the Charter (similarly to constitutional rights in the constitutions of the Member States) are generally not absolute. Possible limitations are provided by the Charter itself. There is a vast literature discussing this issue (Lenaerts 2012, 2019; Möllers 2012; Barak 2016). Additionally, possible limitations are often interpreted in the case law of the CJEU. For example, with regard to the right to the protection of personal data, the CJEU explains that this right is not absolute but must be assessed in accordance with the principle of proportionality in light of its role in society and balanced with other fundamental rights.[g]

The possibility of limiting the rights of the Charter is governed by Article 52(1). Limitations are permissible only under specific conditions. They must be prescribed by law and respect the essential content of these rights and freedoms. Moreover, subject to the principle of proportionality, limitations shall be permitted only if they are necessary and genuinely meet objectives of general interest recognized by the EU or if they are necessary to protect the rights and freedoms of others.

The first condition requiring that limitations would be 'prescribed by law' applies to both EU law and the Member States' national legislations. As the Charter contains the word 'law', the scope of this provision must be interpreted in the light of the meaning found in an individual Member State's legislation or in EU law. However, it should be borne in mind that the EU does not recognize or define *the law* as a legal act, nor do all Member States have a legal system that would derive from the law as the only supreme legal act following the Constitution in the hierarchy of legal acts.

In this regard, the CJEU clarifies the requirement that any limitations on exercising fundamental rights must be prescribed by law. The legal basis for limitations of these rights must determine the scope of the limitations on the exercise

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of these rights and provide a level of protection against potential arbitrary interferences by the authorities.[h] This is similar to requirements governed by the ECHR, which also demands that limitations must be 'prescribed by law'.[i] Concerning the Covid-19 crisis, it should be noted that many countries already had in place specific legal acts addressing the situations of spreading diseases (including, but not limited to, Covid-19), which already contain certain limitations.[j] Additionally, during the Covid-19 crisis, many Member States adopted additional so-called special laws[k] and other legal acts that were not adopted in the form of a law. As a rule, the governments of the Member States aspired to approve these measures adopted in the form of special laws in the parliament.[l] Alternatively, they adopted special legal acts with the force of law intended to be adopted only in exceptional (e.g. emergency) situations based on an existing legal basis, such as a law. Given that the majority of the Member States declared the state of a pandemic due to an outbreak of the Covid-19 virus, these measures have thus been adopted on that basis.[m] In the majority of the Member States, the declaration of the state of the pandemic allowed for the adoption of special legal measures. The exact procedure under which the legal acts were adopted depended on each individual Member State. It is for the constitutional or supreme courts of Member States to assess whether, in certain cases, a measure is indeed 'prescribed by law'. In so doing, the minimum democratic standards need to be observed in granting certain acts the validity of 'law'. Thus, it needs to be appropriate both substantially and procedurally.[n] Nevertheless, even in such cases, it has to be taken into consideration that the law must provide for any limitations on the exercise of rights and freedoms under Article 52(1) of the Charter.

The second condition set out in Article 52(1) of the Charter, namely that the 'essence of those rights and freedoms' must be respected, has to be interpreted on a case-by-case basis. The 'essence' of a fundamental right 'defines a sphere of liberty that must always remain free from interference' (Lenaerts 2012: 792). It is argued (Brkan 2018: 333) that it 'represents the untouchable core or inner circle of a fundamental right that cannot be diminished, restricted or breached upon save for the right to lose its value either for the right holder or for society as a whole'. The concept of the essence of a fundamental right must be examined in light of the constitutional traditions common to the Member States, the ECHR, and the case law of the CJEU (Lenaerts 2012: 781). It must be discerned what essentially is the content of those rights and freedoms, or 'the very substance of a fundamental right',[o] when applied to a concrete factual situation. Thus, for example, in Opinion 1/15 on the envisaged Agreement between Canada and the EU on the transfer of passenger name record (PNR) data to Canada for the purpose of combating terrorism and serious transnational crime, the CJEU explicitly addresses the essential content of Article 7 and Article 8 of the Charter.[p] Concerning the content of Article 7 of the Charter (respect for private and family life), the CJEU argued that even if PNR data may in some cases reveal very accurate information about a person's private life, the nature of this information is limited to certain aspects of that private life which relate in particular to the air travel between Canada and the EU. Concerning the content of

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Article 8 of the Charter (protection of personal data), the envisaged agreement in Article 3 limits the purposes for which PNR data may be processed, and Article 9 sets out rules to ensure, inter alia, security, confidentiality, and integrity of this data and to protect it against unlawful access and processing.[q] The CJEU on this basis outlines that in those circumstances

> the interferences which the envisaged agreement entails are capable of being justified by an objective of general interest of the European Union and are not liable adversely to affect the essence of the fundamental rights enshrined in Articles 7 and 8 of the Charter.[r]

In analysing the first paragraph of Article 52 of the Charter, the CJEU also assesses 'objectives of general interest'. An example of the latter was the above-mentioned assessment of the CJEU in Opinion 1/15 on the agreement with Canada on Articles 7 and 8 of the Charter.[s]

Proportionality as a condition stemming from Article 52(1) of the Charter can be seen as an essential assessment criterion for limiting fundamental rights. With regard to fundamental rights and Article 52(1), the CJEU held that the principle of proportionality, in accordance with its settled case-law, requires that the measures adopted by the EU institutions as well as the Member States

> do not exceed the limits of what is appropriate and necessary to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.[t]

The case law of the CJEU[u] and the theory in this field are very extensive (see for example Lenaerts 2019: 779–793; Trstenjak and Beysen 2012: 282–283; Sauter 2013).

The CJEU, therefore, generally assesses two elements of proportionality. First, appropriateness (Ger. *Geeignetheit*) and, second, necessity (Ger. *Erforderlichkeit*) of the measures in question. Advocate Generals' of the CJEU assessments tend to be even more 'extensive' as they include three elements of assessment (see Trstenjak and Beysen 2013: 314; Trstenjak and Beysen 2012: 282–283). Thus, 'proportionality in a broader sense' includes: appropriateness, necessity, and proportionality in a narrower sense,[v] and/or excessiveness of an intervention. The latter could also be interpreted as whether the measures are reasonable (Ger. *Angemessenheit*).[w] However, it also needs to be assured that such exceptional limitations of fundamental rights as they were adopted, for example, during the Covid-19 crisis, may only apply for a limited period of time. The limitations must be lifted as soon as the rights concerning the protection of public health are no longer under threat.

As aforementioned, all conditions set out by Article 52(1) of the Charter must be fulfilled. This means that the limitations must genuinely meet objectives of general interest recognized by the EU or if they are necessary to protect the rights and freedoms of others. In this regard, the CJEU often discusses legitimate aim. At the end of the day all measures are assessed by courts, national courts and the CJEU.[x]

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*Collision of Several Fundamental Rights*

A fundamental issue that arose during the Covid-19 crisis but also in other areas, e.g. in the context of the digital era, is the question of when and under what conditions it is possible to limit rights and freedoms and what is a fair balance in the event of a collision of several rights.[y]

The Covid-19 crisis has shown that the right to health, together with the right to life and personal dignity, were among the fundamental rights that most often collided with some other fundamental rights. These fundamental rights were inter alia the freedom of movement, right to privacy, protection of personal data, freedom to conduct a business (e.g. due to the closure of shops), equality before the law, etc.

It is paramount to mention Article 52(1) of the Charter, which addresses the cases of 'collision' of several fundamental rights and sets out the conditions on how the principle of proportionality applies. It is up to the competent authorities and, ultimately, the courts to decide on a fair balance, as the CJEU has often pointed out in its case law (see, for example, Fazlioglu 2013: 149; Padova 2019: 15–29).

An example of a case in which the CJEU had to address a multi-rights conflict is the case C–131/12, *Google Spain*, where the CJEU interpreted (old) Directive 95/46[z] on the protection of individuals regarding the processing of personal data. The main question concerned the right to be forgotten and the rights of the companies in charge of search engine management (such as Google).

More specifically, the issue at hand was whether one could request the deletion of a link to a website containing personal data. The CJEU has given priority to the protection of personal data and the right to privacy. Furthermore, the CJEU has issued several other decisions concerning Directive 95/46. Several legal issues were disputed, in particular, the extent of the search engine operator's liability under Directive 95/46. Specifically, within the scope of the search engine operator's responsibilities, the CJEU has comprehensively explained the fundamental rights enshrined in the Charter.

As regards the individual's right to delete links to his personal data, the CJEU has ruled that

> [a]rticle 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged to remove from the list of results displayed following a search made based on a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.[aa]

It is also not necessary that the inclusion of the relevant information in the list of hits would cause harm to that person.

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Subsequently, the CJEU considered a fair balance between several fundamental rights, including both the rights of the person concerned and the rights of the controller, in this case Google. In accordance with the fundamental rights under Articles 7 and 8 of the Charter, the person concerned may request that the information in question be no longer available to the general public through inclusion in a list of search results, as these rights take precedence over the economic interest of the search engine operator (i.e. Article 16 of the Charter), but also over the interest of the public to have access to the said information by searching by the name of that person (Article 11 of the Charter). However, exceptions apply if the information relates to a person in public life, e.g. politics. In this case, for specific reasons, such as the person's role in public life, the interference with his or her fundamental rights is justified by the overriding interest of the general public to have access to the relevant information through this inclusion.[ab] In this case, Article 11 of the Charter prevails in the search for a fair balance. Today a new EU regulation is in force, namely the General Data Protection Regulation (GDPR).[ac]

Deciding which right should be given priority is the crucial and hardest task of a judge. Thus, it is not only important to consider normative assessment in balancing rights and finding the right balance, but also fairness. Adjudication of fundamental rights, when one right is subordinated to another right, is important both for a specific dispute and persons directly concerned and for the development of fundamental rights protection more generally.

## The Impact of the Court of Justice of the EU Case Law on Fundamental Rights

### *General*

In recent years, the CJEU has increasingly referred to the Charter in its decisions. If, in 2011, it referred to the Charter 43 times, in 2018 this number grew to 356.[ad]

Most often, the CJEU refers to the Charter in preliminary ruling proceedings under Article 267 Treaty on the functioning of the EU (TFEU), but we also find references to the Charter in other proceedings, e.g. actions for failure to fulfil obligations under Article 258-260 of the TFEU. An example of the limitations of fundamental rights and the clash of several rights related to health are presented in the following subsections.

### *An Example from the Case Law of the Court of Justice of the EU in the Area of Health*

An interesting example of a case in which the CJEU interpreted a provision on the protection of health (Article 35 of the Charter) in relation to a conflict of several rights is the case C–547/14 *Philip Morris*.[ae] Although this case was decided before the Covid crisis, it had an important impact also on the Covid era. In the search for a fair balance between several fundamental rights, the CJEU decided in favour of health

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care, which also often happened in the Covid cases, especially at the national level.[af] In the case C–547/14*, Philip Morris*, a referring court from the United Kingdom asked in the preliminary reference under Article 267 TFEU, inter alia, whether the first paragraph of Article 13 of Directive 2014/40[ag] in relation to tobacco products should be interpreted as prohibiting the display, on the labelling of unit packets and on the outside packaging, as well as on the tobacco product itself, of any information, even if this is factually accurate, and, if so, whether this provision is invalid due to a breach of primary law, including Article 11 of the Charter (freedom of expression and information) and the principle of proportionality. In its reasoning, the CJEU also mentioned Article 35 of the Charter (health care) regarding the proportionality of the infringement found. It emphasized that the second sentence of Article 35 of the Charter requires a high level of protection of human health in the implementation of all EU policies and activities. However, the CJEU emphasized that a potential prohibition of indications on outer packaging and tobacco products certainly constitutes a breach of the entrepreneur's freedom of expression and information (Article 11 of the Charter). However, limitations on rights are possible pursuant to Article 52(1) of the Charter. As mentioned earlier, any limitation on exercising the rights and freedoms recognized by the Charter must be prescribed by law and respect the essence of those rights and freedoms. Moreover, it has to meet the objectives of general interest recognized by the EU or be necessary to protect the rights and freedoms of others.[ah] As aforementioned, the CJEU also refers to Article 35 (health care) of the Charter and emphasizes the importance of a fair balance in exercising rights. In that regard, it emphasizes that

> the discretion enjoyed by the EU legislature, in determining the balance to be struck, varies for each of the goals justifying limitations on that freedom and depends on the nature of the activities in question. In the present case, the claimants in the main proceedings rely, in essence, under Article 11 of the Charter, on the freedom to disseminate information in pursuit of their commercial interests.

The CJEU, therefore, emphasizes that the protection of human health in an area that is proven to be highly negatively impacted by the use of tobacco products and which also has negative results in addiction levels and the development of serious diseases caused by pharmacologically active, toxic, mutagenic and carcinogenic compounds those products contain, is more important than the interests of the applicants in the main proceedings.[ai]

The CJEU has decided that the conditions for limiting fundamental rights are met in this case and that the disputed provisions of the Directive remain in force as they do not violate the Charter and are justified and in accordance with conditions for limitations found in Article 52(1) of the Charter and other applicable EU primary law. It is a matter of a fair balance between the protection of freedom of expression and information on the one side and the protection of human health on the other. In this case, the balance was tipped in favour of the protection of human health.

As mentioned, the right to health played an important role in the Covid crisis when the CJEU decided on several conflicts of different fundamental rights. In 2022 and later, the Court of Justice and the General Court of the EU (both courts under the CJEU umbrella) have decided several Covid-related cases in which the right to health has been at the forefront. Both EU courts, in principle, interpret regulations and directives and only indirectly refer to the right to health care. These cases often deal with measures restricting certain fundamental rights to protect public health. Thus, the CJEU has to assess whether these measures pursued a legitimate aim (e.g. human health) and whether they were proportionate. In Joined Cases T–710/21, T–722/21 and T–723/21, *Robert Roos*,[aj] the General Court of the EU dealt with an obligation to ensure the health of staff in the service of the EU. The case dealt with a legal challenge seeking interim relief for a decision on the access to the Parliament buildings in Brussels, Luxembourg, and Strasbourg conditional on presenting an EU Digital Covid-19 certificate. This challenge was unsuccessful. An interesting example is also the case C-667/21, *ZQ*, dealing with the processing of personal data concerning an employee's health.[ak] Another relevant case concerning Covid-19 measures is case C-396/21, *FTI*,[al] concerning package travel. In this case, the CJEU confirmed that travellers whose package travel has been affected by measures to fight the Covid-19 pandemic may be entitled to a reduction in the travel price.

### *An Example from the Case Law of the Court of Justice of the EU in the Area of Data Protection*[am]

The recent developments in digital law and artificial intelligence have elevated the importance of the area of data protection. Several CJEU rulings concern the protection of data in the digital age and, specifically, companies such as Facebook and Google. The CJEU has dealt with this issue in a number of cases and, as a rule, these decisions are based on the Charter.

In the following, case C-362/14, *Schrems*[an] (also *Schrems I*) will be presented, which is important because of the transfer of our personal data to the US, specifically the data that Facebook has about us. The essence of this case, in which the CJEU ruled on the preliminary question of the Irish court, was the protection of personal data in the transfer of data from the EU to the US. The dispute arose because, at that time, a law student from Austria (Schrems) objected to Facebook transferring his personal data from the EU to the US. As Facebook is based in the US, all persons residing in the EU who wish to use Facebook must sign an agreement with Facebook Ireland, a subsidiary of Facebook Inc., based in the US. In a complaint to the Irish Personal Data Protection Authority, M. Schrems argued that the current law and practice in the US does not provide sufficient protection of personal data stored in the territory of that country from the control exercised there by state authorities. The legal basis for the transfer of data to the US was the Commission Decision 2000/520 in force at the time on the adequacy of the protection provided by the Safe Harbour privacy principles from 2000 (the so-called Safe Harbour Decision).[ao]

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In the ruling, the CJEU interpreted Directive 95/46, the Commission Safe Harbour Decision, and several fundamental rights from the Charter, which are essential for this issue. In the case, the CJEU specifically highlighted the rights under Article 7 of the Charter (right to respect for private and family life), Article 8 (right to protection of personal data) and Article 47 (the right to effective judicial protection).

It should be noted that in this case, the CJEU did not only interpret the scope of the protection of personal data, but specifically also the third paragraph of Article 8 on the independence of supervisory authorities, and emphasized that the aim of guaranteeing the independence of national supervisory authorities is to

> ensure effective and reliable supervision of compliance with the provisions in the field of the protection of individuals in the processing of personal data, so it must also be interpreted in relation to this objective. This guarantee was established to strengthen the protection of persons and entities to whom the decisions of these bodies refer. The establishment of independent supervisory authorities in the Member States is therefore, as stated in recital 62 of Directive 95/46, an essential element of respect for the protection of persons in the processing of personal data.

The authorities' responsibility is also emphasized, namely that national supervisory authorities are, in accordance with Article 8(3) of the Charter and Article 28 of Directive 95/46, responsible for monitoring compliance with Union regulations regarding the protection of individuals regarding the processing of personal data. Each of these authorities is responsible for verifying whether the transfer of personal data from the Member State to which it belongs to a third country meets the requirements set out in Directive 95/46.[ap] Even when the Commission adopts a decision on the transfer of data to other countries (i.e. a legal basis), the national supervisory authorities to which an individual submits a request for the protection of his or her rights and freedoms regarding the processing of personal data relating to him or her must be able to fully independently examine whether the transfer of this data meets the requirements set out in the said directive. Otherwise, individuals whose personal data have been or could be transferred to the third country in question would be deprived of the right guaranteed in the first and third paragraphs of Article 8 of the Charter to submit a request to the national supervisory authorities in order to protect their fundamental rights.

In the case C-362/14, *Schrems*, the CJEU ruled not only on the interpretation of EU law (Charter and Directive 95/46), but also on the validity of the aforementioned Commission Decision 2000/520 on 'safe harbour'. The essence of the judgment of the CJEU is the finding that this so-called Safe Harbour Decision is invalid. As mentioned, the CJEU took into account Articles 7, 8 and 47 of the Charter. It is worth noting that a new EU legal basis for the transfer of data to the US was subsequently adopted. This is Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 on the adequacy of protection provided by the EU–US Privacy Shield.[aq] In 2020, the CJEU ruled in the case C-311/18, *Schrems*[ar] (also *Schrems II*)

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and decided that the mentioned Commission Implementing Decision 2016/1250 is also invalid.[as]

This decision shows that fundamental rights, as protected in the EU, can also be important for the operations of large foreign companies (such as Google, Apple, Meta, etc.) in the EU. The decision of the CJEU also shows that regardless of other EU acts, i.e. acts of secondary law, the protection of fundamental rights guaranteed by the Charter must be taken into account. In a case of infringement of rights, an individual can turn to the courts to seek justice. In the EU, the CJEU is also involved through the preliminary reference procedure, which ensures legal certainty and trust in the implementation of fundamental rights. It is necessary to be aware of the great dangers to human rights in the digital age. The infringers can be sanctioned with multi-million euro financial sanctions, both at the national level[at] and EU level.[au] We hope that artificial intelligence will never decide on what is fair, what is proportional, etc. Let me emphasize, with Albert Einstein, 'The human spirit must prevail over technology'.[av]

## Conclusion

Fundamental rights in modern society are something that is inscribed to an individual at the moment of birth, as Mother Theresa pointed out. Still, one must be aware that even fundamental rights can be restricted, but only under strictly defined conditions. In the EU, a legislative framework is established for the Member States based on the consideration of the Charter, while the CJEU also plays an important role with its interpretation of the Charter and EU law in general. The CJEU has contributed to better understanding of the fair balance between different fundamental rights. It continuously emphasizes that most of the rights are not absolute, however, it strictly interprets their possible limitations. The CJEU often puts rights linked to human life (e.g. health care) and privacy (e.g. data protection) on a pedestal, but it also stresses the importance of the rights of businesses, especially the right to conduct a business. Human rights, despite their possible limitation, must be perceived as something like air and water for each of us if we paraphrase the wise words of Gustav Radbruch.[aw]

## Notes

**a.** At the EU level, the concept of fundamental rights is used, while in the Council of Europe, which is an independent organization from the EU, and often also in the EU Member States, the term human rights is applied. It is also worth noting that the concept of fundamental rights is more modern, it covers both classical human rights (e.g. the right to life, human dignity), social rights (e.g. the right to paid annual leave), and some political rights (e.g. the right of Union citizens to vote in European elections to the European Parliament).

**b.** The Charter of Fundamental Rights of the European Union, OJ EU C 83, 30 March 2010.

**c.** The issue of fundamental rights is addressed in several of my articles, thus some parts of this text may be similar to my other publications.

**d.** The Treaty on European Union, OJ C 326, 26.10.2012.

**e.** Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35.

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**f.** C-544/10, *Deutsches Weintor*, EU:C:2012:526, para. 54.
**g.** See C-92/09 and C-93/09, *Volker und Markus Schecke in Eifert*, EU:C:2010:662, para. 48.
**h.** See C-419/14, *WebMindLicenses*, EU:C:2015:832, para. 81.
**i.** See the second paragraphs of Articles 9, 10, and 11 ECHR.
**j.** For example. in Austria the *Epidemiegesetz*, BGBl. Nr. 186/1950 with amendments.
**k.** For example, in Austria in the field of education: *Bundesgesetz über hochschulrechtliche und studienförderungsrechtliche Sondervorschriften an Universitäten, Pädagogischen Hochschulen, Einrichtungen zur Durchführung von Fachhochschul-Studiengängen und Fachhochschulen aufgrund von COVID-19* (COVID-19-Hochschulgesetz – C-HG), BGBl. Nr. 23/2020.
**l.** For example, Slovenia adopted the Act Determining the Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy (ZIUZEOP), Official Gazette of the RS, no. 49/2020, 10 April 2020. In Austria: *Bundesgesetz betreffend vorläufige Maßnahmen zur Verhinderung der Verbreitung von COVID-19* (COVID-19-Maßnahmengesetz), BGBl. Nr. 12/2020.
**m.** For example, in Slovenia on the basis of Article 7 of Communicable Diseases Act, Official Gazette of the RS, no. 65/95 with amendments. More concretely see the Order on the declaration of the Covid-19 epidemic in the territory of the Republic of Slovenia, Official Gazette of the RS, no. 19/20, date of application 12 March 2020. See also Ordinance on the temporary prohibition of the gathering of people at public meetings at public events and other events in public places in the Republic of Slovenia and prohibition of movement outside the municipalities, Official Gazette of the RS, no. 38/20 and 51/20).
**n.** See, for example, ECtHR, *Sunday Times v United Kingdom*, App. No. 6538/74, para. 49:

> In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

**o.** See, for example, T-187/11, *Trabelsi and Others v. Council*, EU:T:2013:273, para. 81.
**p.** Opinion 1/15 of 26 July 2017, EU: C:2017:592.
**q.** Ibid, para. 150.
**r.** Ibid, para. 151.
**s.** Ibid.
**t.** See C-283/11, *Sky Österreich*, EU:C:2013:28, para. 50. See also C-343/09, *Afton Chemical*, EU: C:2010:419, para. 45, and joined cases C-581/10 and C-629/10, *Nelson in Others*, EU:C:2012:657, para. 71. Concerning the Member States, see: C-2/10, *Azienda Agro-Zootecnica Franchini in Eolica di Altamura*, EU:C:2011:502, para. 73; C-28/05, *Dokter and Others*, EU:C:2006:408, para. 72, and C-434/02, *Arnold André*, EU:C:2004:800, para. 45.
**u.** See the decision in joined cases C-293/12 and C-594/12, *Digital Rights Ireland in drugi*, EU:C:2014:238; C-419/14, *WebMindLicenses*, EU:C:2015:832; C-650/13, *Delvigne*, EU:C:2015:648; C-92/09 and C-93/09, *Volker und Markus Schecke and Hartmut Eifert*, EU:C:2010:662–; C-237/15 PPU, *Lanigan*, EU: C:2015:474-; C-157/15, *Achbita*, EU:C:2017:203. See also numerous opinions of the Advocates General, e.g. *Cruz Villalón* in the case C-580/13, *Stadtsparkasse Magdeburg*, EU:C:2015:243 and the opinion of the Advocate General *Trstenjak* in the case C-28/09, *Commission/Austria*, EU:C:2010:770.
**v.** Slovene language uses the definition 'sorazmernost v ožjem pomenu', in English 'reasonableness', in German 'Angemessenheit', in French 'le caractère mesuré'. See para. 118 for different linguistic versions in the Opinion of the Advocate General *Trstenjak* in C-28/09, *Commission/Austria*, EU: C:2010:770.
**w.** See also the Opinion of the Advocate General *Cruz Villalon* in case C-580/13, *Stadtsparkasse Magdeburg*, EU:C:2015:243, para. 43. See also the Opinion of the Advocate General *Trstenjak* in case C-28/09, *Commission/Austria*, EU:C:2010:770, paras. 93 and 118-132.

**x.** See, for example, case C-157/15, *Achbita*, EU:C:2017:203, para. 35 et seq. In the case C-268/21, *Norra Stockholm,* EU:C:2023:145, in para. 31 in relation to data protection the CJEU specifically reminds the Member States:

> In accordance with Article 6(3) of the GDPR, read in combination with recital 45 thereof, the basis for the processing referred to in Article 6(1)(e) of that regulation is to be defined by EU law or by Member State law to which the controller is subject. Moreover, the EU or Member State law must meet an objective of public interest and be proportionate to the legitimate aim pursued.

**y.** See also para. 76 of case C-136/17, *CNIL*, EU:C:2019:773.

**z.** Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, pp. 31–50.

**aa.** See C-131/12, *Google Spain*, EU:C:2014:317.

**ab.** The decision of the CJEU is based on the ruling in this case.

**ac.** Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016. See also Gömann (2017).

**ad.** See European Commission 2014 Report on the application of the EU Charter of Fundamental Rights, Overview of the decisions of the Court of Justice of the European Union (Court of Justice, General Court and Civil Service Tribunal) referring to the Charter, available at http://ec.europa.eu/justice/fundamental-rights/files/2014_annual_charter_report_en.pdf (20 May 2020), p. 25. See also Trstenjak (2021).

**ae.** See C-547/14, *Philip Morris*, EU:C:2016:325.

**af.** For example, decision of the German Constitutional Court BVerfG, Order of the First Senate of 10 February 2022 – 1 BvR 2649/21, ECLI:DE:BVerfG:2022:rs20220210.1bvr264921. The Austrian Constitutional Court decided on 14 July 2020 that the so-called 'Covid act', which restricted certain fundamental rights, is compatible with Austrian constitution. See https://www.vfgh.gv.at/medien/Covid_Entschaedigungen_Betretungsverbot.de.php

**ag.** Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, OJ L 127, 29.4.2014, p. 1–38.

**ah.** *Philip Morris*, see fn. 29, pp. 148–150.

**ai.** Ibid. See fn. 29, p. 155 and 156.

**aj.** Joined Cases T-710/21, T-722/21 and T-723/21, *Robert Roos*, EU:T:2022:262.

**ak.** C-667/21, *ZQ,* pending.

**al.** C-396/21, *FTI,* EU:C:2023:10.

**am.** The analysis of this case was also published as my contribution in the edited book *Forth Industrial Revolution* (Trstenjak 2020).

**an.** C-362/14, *Schrems*, ECLI:EU:C:2015:650, paras. 40–47.

**ao.** Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441) (Text with EEA relevance.), OJ L 215, 25.08.2000, pp. 7–47.

**ap.** See C-362/14, *Schrems*, EU:C:2015:650, paras. 40–47.

**aq.** Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176) (Text with EEA relevance) C/2016/4176, OJ L 207, 1.8.2016, pp. 1–112.

**ar.** See C-311/18, *Schrems*, EU:C:2020:559.

**as.** It is important to mention that the EU member state Ireland decided about the sanctions against Meta. Irish regulators slapped Facebook parent Meta with a €265 million fine in November 2022, for breaching strict European Union data privacy rules. See: https://www.euronews.com/next/2022/11/28/meta-hit-with-265-million-fine-by-irish-regulators-for-breaking-europes-data-protection-la

**at.** For example French regulators have fined Google a total of €150 million and Facebook (now Meta) €60 million for non-compliance with French legislation, press release available at https://www.cnil.fr/

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en/cookies-cnil-fines-google-total-150-million-euros-and-facebook-60-million-euros-non-compliance. In Ireland, Meta was fined €1.2 billion for breach of EU data protection regulation. This is 'the largest GDPR fine ever'. See press release available at https://edpb.europa.eu/news/news/2023/12-billion-euro-fine-facebook-result-edpb-binding-decision_en

**au.** For example, the European Commission fined Google €2.42 billion for abusing dominance as a search engine by giving an illegal advantage to its own comparison shopping service. Press release available at https://ec.europa.eu/commission/presscorner/detail/es/MEMO_17_1785. The European Commission has threatened Meta with a penalty payment of €8 million per day for non-compliance with EU antitrust rules.

See Commission Decision (C(2020) 3011 final of 4 May 2020 relating to a proceeding pursuant to Article 18(3) and to Article 24(1)(d) of Regulation (EC) No 1/2003 (Case AT.40628 – Facebook Data-related practices). Meta brought an action for annulment before the General Court of the EU, relying on the right to privacy. The General Court of the EU dismissed the action on 24 May 2023 (T-451/20, *Meta Platforms Ireland v. Commission*, EU:T:2023:276). Meta brought an appeal before the Court of Justice in the case C-497/23 P, *Meta Platforms Ireland v Commission*, which is still pending.

**av.** See https://www.goodreads.com/quotes/44156-the-human-spirit-must-prevail-over-technology

**aw.** Gustav Radbruch: 'A constitutional state is like daily bread, like water to drink and air to breath, and the best thing about democracy is that it is the only system capable of securing the constitutional state'; Gesetzliches Unrecht und übergesetzliches Recht. *Süddeutsche Juristenzeitung*, 1, (1946) No. 5, p. 108.

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