Balancing Conflicting Fundamental Rights: The Sky Österreich Paradigm

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Balancing Conflicting Fundamental Rights: The Sky Österreich Paradigm

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Abstract

Is the Audiovisual Media Services Directive compatible with the Charter of Fundamental Rights of the European Union? The Charter guarantees the right to property and the freedom to conduct a business, insofar as it limits the compensation for broadcasting short news events of high interest to the public to the additional costs incurred in providing access to the signal only. This was the essence of the question referred in Sky Österreich, which gave the Court of Justice the opportunity to explain the circumstances in which legislative provisions intended to safeguard the right to receive information and the pluralism of the media may impose restrictions on other fundamental freedoms protected by the Charter. The ruling suggests that when several fundamental rights guaranteed by EU law are at stake, the EU legislature is given considerable leeway to reconcile their requirements in order to strike a fair balance between them. At the same time, it implies that the balancing of fundamental rights under the Charter will be assessed in accordance with the requirements of EU law without reference to either national constitutional standards of protection or their interpretation by national constitutional courts. The judgment also indicates the role that the Court reserves for itself as regards the determination of the level of fundamental rights protection applicable in the European Union.

Introduction

Conflicts between different fundamental rights constitute a rather common occurrence at national level.1 In resolving these conflicts, national courts are called upon to apply constitutional standards of protection that are not necessarily the same in all jurisdictions. Inevitably, the resolution of a given conflict may vary from one legal order to another. However, this is not problematic in practice since there is no overlap between the national systems of fundamental rights protection. On the contrary, collisions of rights are particularly contentious when they arise in the context of the EU legal order.2 In these circumstances, the competent authorities are confronted with both the national and the EU standard of fundamental rights as a result of their respective obligations under the national constitution and the provisions of EU law. There

1 Legal Adviser and Teaching Associate respectively. All views expressed are personal. The author is particularly grateful to Professor Niamh Nic Shuibhne and to the anonymous reader of the European Law Review for their invaluable comments.

2 For a very interesting analysis of the issues arising in this respect, see E. Brems (ed.), Conflicts Between Fundamental Rights (Antwerp: Intersentia, 2008), especially the contributions in Chapter 4 at pp.273–380.

are many instances where these standards may not actually coincide. 3 The question, then, is which standard must be applied in order to determine the priority that one fundamental right should (appropriately) take over the other. The matter is very politically sensitive, since it can easily turn into a conflict across jurisdictions between EU law and national constitutional law. This is particularly the case in Member States where this dimension of judicial review is exercised by a constitutional court. Constitutional courts accept the principle of the supremacy of EU law, but they contest its emanation from the autonomous nature of the EU legal order. 4 They rather consider that it stems from a constitutional authorisation, which also sets the limits of its operation. Certain constitutional courts claim, in this respect, the capacity to review whether these limits are respected by the competent EU institutions. 5

One of the principal objectives of this review is to guarantee that EU law actually complies with national constitutional standards of fundamental rights protection. But reliance on national conceptualisations of fundamental rights runs counter to the supremacy case law of the Court of Justice, which rules out any possibility of reviewing EU law for conformity with national constitutional provisions. 6 However, it is well known that constitutional courts refrain in practice from the exercise of substantive fundamental rights review on the assumption that the EU standard of protection of these rights is equally effective. This approach is based on the eminent Solange case law of the German Federal Constitutional Court, which pronounced that it would not examine secondary EU law against the standard of fundamental rights protection provided for by the national constitution so long as the European Union ensures the protection of these rights to an essentially equivalent extent. 7 However, it needs to be recalled that this Solange principle was only introduced following the active engagement of the Court of Justice in the protection of fundamental rights at EU level. 8 Even today, constitutional courts continue to warn that they may still exercise their reserve power in individual cases. 9 Consequently, any interpretation of fundamental rights by the Court of Justice that fails to meet national standards of protection may potentially trigger the reaction of the constitutional courts—including cases of conflicts of rights that arise in the implementation and application of EU law by national authorities.

The situation becomes even more complicated when the source of the collision is a secondary EU act containing legislative rules comparable to national provisions already considered by a constitutional court as being in violation of the constitutional standard of fundamental rights protection. When reviewing the

5 See particularly in this respect the judgments of the German Constitutional Court in Brunner v European Union Treaty (Maastricht) BVerfG, 2 BvR 2134/92 and 2159/92 [1994] 1 C.M.L.R. 57 and Gauweiler Die Linke v Act of Approval of the Lisbon Treaty (Lisbon) BVerfG, 2 BvE 2/08; judgment SK 45/09 of the Polish Constitutional Tribunal; Decision Pl. ÚS 19/08 of the Czech Constitutional Court (Lisbon); judgment of the Lithuanian Constitutional Court in Joined Cases 17/02-24/02-06/03-22/04.
7 Re Wünsche Handelsgesellschaft (Solange II) BVerfG, 2 BvR 197/83 [1987] 3 C.M.L.R. 225. This constitutional court considers inadmissible claims against EU acts that do not substantiate that the protection of fundamental rights required unconditionally by the national constitution is not generally assured in the respective case. See Banana Market Regulation (Banana Market) BVerfG, 2 BvL 1/97.
validity of such an act at EU level, the Court of Justice is thus faced with the constitutional resolution of the conflict at national level. If it concludes that the act is valid, this may well be interpreted as a strike at the authority of the national constitutional court and as a lowering of the constitutional standard of fundamental rights protection guaranteed by national case law. The Court of Justice’s ruling may also be seen as vitiated by judicial politics and by the wish to reserve for itself the final say in the area of fundamental rights protection.

The issues arising in this respect are very acutely illustrated by the recent Sky Österreich ruling. The question at issue was whether the limitation imposed by the Audiovisual Media Services Directive on the compensation that holders of exclusive broadcasting rights may seek from other television channels for short news events of high interest to the public is compatible with the right to property and the freedom to conduct a business, as protected by the Charter of Fundamental Rights of the European Union. The ruling suggests that the EU legislature enjoys a wide margin of appreciation in the balancing of conflicting fundamental rights, implying that it will be a very challenging task to contest the legality of secondary EU law on the basis of an alleged erroneous reconciliation of relevant rights. Very interestingly, the Court makes no attempt to reconcile its ruling with the earlier conclusions of two constitutional courts that considered it to be unconstitutional to grant a right to make short news reports available free of charge. Certainly, this could be because of the particular features of the contested legislative act, which confined within precise limits the extent of its interference with the fundamental rights involved in the proceedings. Alternatively, the ruling may provide additional evidence that national constitutional standards of fundamental rights may not compromise the level of protection of parallel rights under the Charter and may not, in turn, impinge on the judicial interpretation of its provisions by the Court.

This article suggests that, in examining whether an EU act reconciles correctly the various fundamental rights at stake, the Court will probably apply a manifestly inappropriate balance test similar to that which it employs when proportionality is invoked as a ground of review for EU legislation. It further argues that, in ascertaining the existence of such a manifest error of assessment in the balancing of fundamental rights, the Court will rely exclusively on the EU standard of rights protection, taking into account also the requirements and the objectives of the internal market. It concludes that the ruling constitutes further confirmation that the Court reserves for itself the final word as concerns the level of fundamental rights protection under the Charter, at the expense of national constitutional courts and their relevant constitutional case law.

**Factual and legal background**

Aiming at ensuring wide public access to the television coverage of events that are considered to be of particular interest and importance, the Audiovisual Media Services Directive (AVMSD) contains provisions that impose restrictions on the acquisition and exercise of exclusive broadcasting rights. It authorises Member States to take measures in accordance with EU law to ensure that broadcasters under their jurisdiction do not broadcast on an exclusive basis events which are regarded as being of major importance for their society, in such a way as to deprive a substantial proportion of the public of the possibility of following such events on free television. It also imposes on Member States the obligation to ensure that for the purpose of short news reports, any broadcaster established in the European Union is granted access on a fair and reasonable basis to events of high interest to the public that are transmitted on an exclusive basis by a broadcaster under their jurisdiction. Short extracts may be chosen freely from the signal of the

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11 Directive 2010/13 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1.
13 AVMSD art.14.
holder of the exclusive broadcasting rights, which may request compensation corresponding only to the additional costs directly incurred in providing access to the signal. According to the Directive’s preamble, these provisions aim at the protection of media pluralism and of the right to information. These objectives constitute particular aspects of freedom of expression, which is one of the fundamental rights expressly recognised within EU law. It is nevertheless apparent that their protection imposes restrictions on the provision of television services and may adversely affect other fundamental rights and freedoms guaranteed by EU law.

Austrian law used to provide that, in the absence of an amicable agreement between the broadcasters concerned, the federal communications senate was to decide whether and under what conditions the right to make short news reports would be granted to a television broadcasting organisation. Following the introduction of EU rules in this area, national law was amended; it now provides that the broadcaster that acquires the exclusive broadcasting rights to an event of general interest is required to grant the right to make short news events from its signal and is entitled only to the reimbursement of any additional costs directly incurred in providing access to the signal. The applicant in the main proceedings acquired the exclusive rights to broadcast by satellite the Europa League football matches in the Austrian territory. It then entered into an agreement with a national public broadcaster, granting it the right to produce short news reports of these events in return for considerable remuneration. However, the implementation period of the AVMSD had not yet elapsed and its provisions were not yet transposed into national law. Following the reform of the applicable national regime, the Austrian communications regulator concluded that the reimbursement that the applicant could seek for the production of short news reports of the Europa League matches could no longer exceed the technical costs incurred in providing access to the satellite signal. That decision was appealed before the federal communications senate.

Considering that the right to produce short news reports constitutes an interference with the right to property, the federal communications senate expressed serious reservations as to whether the provisions of the AVMSD were compatible with the principle of proportionality. It stressed that these provisions prevented the national authorities from taking into account the subject-matter of the exclusive broadcasting rights and the amount paid for their acquisition, in order to calculate appropriate compensation for the making of short news reports. It referred in this respect to the case law of the German and the Austrian constitutional courts, which considered that the granting of the right to make short news reports free of charge violated the principle of proportionality and infringed professional freedom and the right to property. In those circumstances, the federal communications senate decided to make a preliminary reference on the matter. It asked whether the limitation of the compensation imposed by the Directive was compatible with the right to property and the freedom to conduct a business as protected by the Charter.

The judgment of the Court of Justice

As concerns the right to property, the ruling accepts that exclusive broadcasting rights must not be regarded as constituting mere commercial interests and opportunities, since they preclude other broadcasters from transmitting certain events in any way. Accordingly, they constitute rights with an asset value. However, the applicant in the main proceedings could not rely on an acquired legal position enabling it to exercise

14 AVMSD art.15.
15 AVMSD Preamble, Recitals 48 and 49.
16 Charter art.11.

its exclusive broadcasting rights autonomously. This is because its rights were acquired at a time when EU law already provided for the right to make short news reports, limiting the amount of compensation to the additional costs incurred in providing access to the signal. It was irrelevant in this respect that these provisions were not yet implemented into national law at the time of the acquisition of the exclusive broadcasting rights at issue, since implementation could take place at any time since the entry into force of the Directive.\footnote{Sky Österreich GmbH (C-283/11) [2013] 2 C.M.L.R. 25 at [31]–[40].}

Regarding the freedom to conduct a business, the judgment accepts that the AVMSD indeed interferes with the protection provided for by the Charter. This is because the holder of exclusive broadcasting rights cannot choose freely with which broadcasters it may wish to enter into an agreement regarding the granting of the right to make short news reports. It is not also allowed to set freely the price to be charged for providing access to the signal and to impose on other broadcasters the obligation to contribute to the costs of acquiring its exclusive broadcasting rights.\footnote{Sky Österreich GmbH (C-283/11) at [41]–[44].}

However, the Court concluded that this interference was justified in the case at hand, emphasising that the freedom to conduct a business is not absolute but must be viewed in relation to its social function. As a result, it may be subject to a broad range of interventions on the part of public authorities, which may limit the exercise of economic activity in the general interest.\footnote{Sky Österreich GmbH (C-283/11) at [45]–[48].} That circumstance is also reflected in the provisions of the Charter, which requires that any limitation on the exercise of the rights and freedoms recognised by it must be provided for by law and respect the essence of those rights and freedoms in compliance with the principle of proportionality.\footnote{Charter art.52(1).} The Court noted that the limitation of compensation imposed by the AVMSD leaves intact the core content of the freedom to conduct a business in the sense that the holder of the exclusive broadcasting rights is not prevented from carrying out a business activity. It is also not prevented from broadcasting the event in question itself or from granting that right to another economic operator on a contractual basis for consideration.\footnote{Sky Österreich GmbH (C-283/11) at [49].}

The ruling then proceeds to a meticulous assessment of the proportionality principle. It starts by pointing out that the marketing on an exclusive basis of events that are considered to be of great interest to the public is liable to restrict considerably the access of the general public to information relating to those events. The legislative restrictions imposed in this area pursue, consequently, an objective in the general interest, since they seek to protect the fundamental freedom to receive information and to promote pluralism of the media in the production and programming of information in the European Union.\footnote{Sky Österreich GmbH (C-283/11) at [50]–[52].} Assessing the suitability of the limitation of compensation imposed by the AVMSD, the ruling concludes that this puts any broadcaster in a position to be able to make short news reports and to inform the general public of events of great interest to it that are marketed on an exclusive basis. The Court turns then to the necessity of this legislation. It recognises that a less restrictive alternative could be to make broadcasters of short news reports contribute to the cost of acquiring the exclusive rights at issue. However, such legislation could prevent certain broadcasters from requesting access to the signal and thus considerably restrict the access of the general public to information. In these circumstances, the EU legislature could legitimately consider that this alternative solution would not achieve the general interest objectives pursued as effectively as the limitation of compensation solely to the technical costs of the holder of the exclusive rights.\footnote{Sky Österreich GmbH (C-283/11) at [53]–[57].}

The ruling stresses that the EU legislature was required in these circumstances to strike a balance between the freedom to conduct a business and the right of citizens to receive information, taking into account also the freedom and pluralism of the media. It recalls that when several fundamental rights and
freedoms are at stake, the legality assessment within EU law must be carried out with a view to reconciling
the requirements of the protection of those rights and of achieving a fair balance between them. Applying
these principles to the contested provision at issue, the Court concluded that the EU legislature ensured
that the extent of the interference with the freedom to conduct a business and the possible economic
benefits which broadcasters might acquire from making a short news report are confined within precise
limits. Short news reports can be produced only for general news programmes and cannot be used in
programmes serving entertainment purposes, which generate a much greater economic impact. Member
States are also obliged to set the modalities and conditions regarding the provision of extracts from the
signal used, so as to ensure that these news reports are not more than 90 seconds long and that they identify
clearly their original source. Moreover, holders of exclusive rights are not prevented from charging for
the use of these rights and may always take account of any reduction in their commercial value in the
contractual negations relating to their acquisition.

In view of the above, and also taking into account the restrictive effect that the acquisition of exclusive
broadcasting rights may produce as concerns the access of the general public to information, the ruling
concludes that the contested legislation must be considered as proportionate. Given the importance of the
fundamental rights and freedoms involved, the EU legislature was lawfully entitled to adopt the contested
provision and to give priority, in the necessary balancing of the rights and freedoms at issue, to public
access to information over contractual freedom. As a result, the limitation of the compensation that holders
of exclusive broadcasting rights can seek for the making of short news reports was compatible with the
freedom to conduct a business guaranteed by the Charter.

Mission impossible? Alleging an erroneous balancing of conflicting fundamental
rights

The provisions of the Charter are often relied upon to contest the validity of secondary EU law. Until
now, this endeavour was largely unsuccessful, however, since there are only two occasions in which it
was concluded that the contested act contravened the rights and principles set out in the Charter. In all
other instances, the Court ruled on the compatibility of the EU law provisions concerned. From a
methodological point of view, the ruling in Sky Österreich is illustrative of the way in which the Court
turns an alleged conflict between secondary EU law and a fundamental right into a collision of rights
protected by the Charter. It examines in this respect whether the contested measure seeks to give effect
to another fundamental right recognised by EU law. Provided that this is the case, the conflict is no longer
between a secondary act and the provisions of the Charter. It is, rather, between several fundamental rights
that must be balanced against each other by the EU legislature. It is interesting to note at this point that a
similar approach is followed by the Court when it is called upon to rule on conflicts between fundamental

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25 Sky Österreich GmbH (C-283/11) at [58]–[60].
26 Sky Österreich GmbH (C-283/11) at [61]–[64].
27 Sky Österreich GmbH (C-283/11) at [65]–[68].
28 For example, see the two recent preliminary references made by the Irish Supreme Court and the Austrian
Constitutional Court on the compatibility with the Charter of the Data Retention Directive (Directive 2006/24 on the
retention of data generated or processed in connection with the provision of publicly available electronic
L105/54) in Digital Rights Ireland Ltd v Minister for Communications Marine and Natural (C-293/12) [2012] OJ
C258/11, and Kärntner Landesregierung (C-594/12) [2013] OJ C79/7 respectively.
All E.R. (EC) 127 at [43]–[92] (see further, the case comment by M. Bobek in (2011) 48 C.M.L. Rev. 2005); and
rights and secondary legislation enacted in order to give effect to the free movement provisions of the Treaty. These conflicts are restated at the primary law level and are treated, accordingly, as collisions between fundamental freedoms and fundamental rights.\textsuperscript{30}

In terms of substance, the ruling suggests that even when the contested act amounts to interference with a fundamental right, it is still likely that it will be considered to be valid so long as it seeks to safeguard another fundamental right protected by the Charter. There are two reasons why this is so. The first is that in assessing whether the EU legislature managed to reconcile the requirements of the protection of the various fundamental rights at stake, the Court will probably apply a manifestly erroneous balance test, similar to the one that it employs when proportionality is invoked as a ground of review of EU measures. The second is that this legality assessment will take place in accordance with the EU standard of fundamental rights protection as interpreted by the Court, without reference to the respective case law of national constitutional courts.

**Reconciling the requirements of conflicting fundamental rights—towards a manifestly inappropriate balance test?**

*Sky Österreich* constitutes the third preliminary ruling in less than six months in which it was concluded that the EU legislature exercised its rule-making powers in a way that struck a fair balance between the various fundamental rights involved in the proceedings. In all three rulings, it was confirmed that the need to protect the public interest objectives guaranteed by the Charter may justify the imposition of reasonable legislative restrictions on the fundamental rights of professional operators.

In *Deutsches Weintor*, one of the questions referred to the Court of Justice was whether it was compatible with the freedom to choose an occupation and the freedom to conduct a business for a producer of wine to be completely prohibited from making advertising claims that referred to its wine as being easily digestible. The Court stressed that the contested Regulation should also be assessed in the light of the protection of health, which was among its principal aims.\textsuperscript{31} The EU legislature was fully entitled in this respect to consider that claims such as that at issue in the main proceedings were likely to encourage the consumption of wine, increasing the risks inherent in the immoderate consumption of any alcoholic beverage. Consequently, the total prohibition of the advertising claim concerned was necessary to ensure compliance with the requirements stemming from the provisions of the Charter. Even though it amounted to the imposition of certain restrictions on the professional activity of the economic operators involved, the actual substance of the freedom to choose an occupation and to conduct a business was not affected. Far from prohibiting the production and marketing of wine, the legislation at issue merely controlled its associated labelling and advertising.\textsuperscript{32}

The same line of reasoning can also be seen in *Ryanair*. The question there was whether it violates the right to property and the freedom to conduct a business to impose on air carriers the obligation to provide care to passengers, without any temporal and monetary limitation, in the event of cancellation of a flight due to extraordinary circumstances arising from the temporary closure of air space as a result of a volcanic eruption. The Court recalled the importance of consumer protection, which may justify even substantial negative economic consequences for certain professional operators.\textsuperscript{33} Based on that premise, it concluded

\textsuperscript{30}See in this respect, V. Trstenjak and E. Beysen, “The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU” (2013) 38 E.L. Rev. 293, with references to relevant case law.


\textsuperscript{32}Deutsches Weintor eG v Land Rheinland-Pfalz (C-544/10) September 6, 2012 at [42]–[60].

\textsuperscript{33}McDonagh v Ryanair Ltd (C-12/11) (C-12/11) [2013] 2 C.M.L.R. 32 at [48]–[49] with reference to Emeka Nelson v Deutsche Lufthansa AG (C-581/10) and TUI Travel Plc v Civil Aviation Authority (C-629/10) October 23, 2012 at [81]. Article 38 of the Charter expressly provides that Union policies must ensure a high level of consumer protection.
that the contested Regulation complied with the requirement intended to reconcile the various rights and freedoms involved and to strike a fair balance between them.\footnote{The case involved Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L46/1.} It stressed in this respect that the obligations imposed on air carriers were proportionate to the aim of ensuring a high level of consumer protection for passengers. Air carriers were expected to foresee costs linked to the execution of their obligations to provide care to passengers, and could transfer them to airline ticket prices.\footnote{McDonagh v Ryanair Ltd (C-12/11) [2013] 2 C.M.L.R. 32 at [45]–[50] and [59]–[65].}

The ruling in \textit{Sky Österreich} confirms that when an EU measure imposes restrictions on a fundamental right in order to serve other fundamental rights and freedoms protected by the Charter, an assessment of its validity requires a proportionality review of the interference found to exist. The Court clarified that this assessment will take the form of a tripartite test, which will also include an explicit value-balancing between the adverse impact of the contested measure over the affected fundamental rights and its benefits as concerns the protection of other important rights and principles guaranteed by the Charter. This is actually one of the rare occasions in which the Court proceeds expressly to a costs versus benefits balancing exercise, going beyond the necessity requirement of its standard proportionality review.\footnote{On this matter, see T. Tridimas, \textit{The General Principles of EU Law} (Oxford: Oxford University Press, 2006), pp.139–140.}

The ruling is particularly meticulous in this respect, as the Court thoroughly examines the structure and content of the contested provision in order to conclude whether it confines within reasonable limits the restrictions that it imposes on the freedom to conduct a business in the interests of media pluralism and the right to information.

However, the ruling also suggests that it is only in exceptional circumstances that EU law will be considered to be invalid on grounds of an erroneous balancing of relevant fundamental rights. It must be recalled in this respect that when proportionality is invoked as a ground of review of EU measures, the Court applies the so-called manifestly inappropriate test, which aims to respect the policy choices made by the EU legislature in the exercise of its rule-making powers.\footnote{See in this respect, W. Sauter, “Proportionality in EU Law: A Balancing Act?”, TILEC Discussion Paper No.2013-003, SSRN, \url{http://ssrn.com/abstract=2208467} [Accessed December 19, 2013]. See also T.-I. Harbo, “The Function of the Proportionality Principle in EU Law” (2010) 16 E.L.J. 158.}

Under this test, a violation of proportionality only exists if the contested measure is evidently inappropriate with regard to the objectives that it seeks to pursue. That leaves a great margin of appreciation to the EU legislature, taking into account that it is often called upon to undertake complex assessments in an area that necessarily entails various political and economic choices.\footnote{Germany v European Parliament and Council of the European EU (C-380/03) [2006] E.C.R. I-11573; [2007] 2 C.M.L.R. 1 at [144]–[159]. See also in this respect, the preliminary ruling in Afton Chemical Ltd v Secretary of State for Transport (C-343/09) [2010] E.C.R. I-7027; [2011] 1 C.M.L.R. 16 at [28].}

In \textit{Sky Österreich}, the Advocate General had proposed the application of a similar test, suggesting that the proportionality of the restrictions imposed by the contested provision were to be verified in the light of the wide margin of appreciation conferred on the EU legislature.\footnote{Opinion of A.G. Bot in Sky Österreich GmbH (C-283/11) [2013] 2 C.M.L.R. 25 at [57] and [66]–[68].} Apparently, the judgment of the Court is more equivocal in this respect. It makes no express reference to a manifest imbalance requirement, but only recognises that a less restrictive alternative could not guarantee the effective attainment of the objectives pursued by the legislature. It then looks at the contested measure and examines whether this provides evidence that the legislature took methods of limiting its adverse impact on the rights of the affected professional operators into consideration. It concludes that, in these circumstances, the legislature was lawfully entitled to take into account the importance of the objectives that it purported to attain and to give priority to public access to information over contractual freedom.\footnote{Sky Österreich GmbH (C-283/11) [2013] 2 C.M.L.R. 25 at [48]–[50]. Could this be another way of
saying that there was no indication that the contested act balanced the rights and freedoms at stake in a manifestly erroneous manner?

Such an interpretation is certainly possible, especially in the light of the recent judicial pronouncements in *Schaible*. This case involved a conflict between the freedom of animal keepers to conduct a business and other general interest objectives pursued by EU law, which required the individual electronic identification of sheep and goats. Referring explicitly to *Sky Österreich*, the ruling went on to ascertain the proportionality of the restrictions imposed by the contested EU measure. The Court recalled in this respect that the EU legislature enjoys a wide margin of appreciation in the exercise of its powers and that its assessment is only open to criticism if it appears to be manifestly erroneous. Consequently, the proportionality review of the provisions at issue was to be carried out within that framework. Examining then whether the contested act balanced correctly the various legitimate interests at issue, the ruling noted that the legislature had taken measures to limit the negative financial effects of the measure on animal keepers. Furthermore, its potential impact on animal welfare was taken into account in the studies that were conducted prior to the adoption of its provisions. In those circumstances, the EU legislature was not wrong in considering that the advantages resulting from the introduction of the new identification system outweighed its negative effects on the freedom of animal keepers to conduct a business.

**Ascertaining the existence of a manifest error of assessment in the balancing of fundamental rights**

However, this is not to say that there will not be instances where the contested legislative measure will be captured by the manifestly erroneous balance test. This will be the case in particular when the EU legislature blatantly fails to consider the possibility of a more restrained interference and to explain convincingly the precise reasons for its intervention. Very interesting in this respect is the preliminary ruling in *Schecke*. This case illustrates by analogy that any legislative interference with fundamental rights must be clear as to its underlying objectives and must also provide evidence that the competent institutions balanced all the available options before arriving at the conclusion that the adoption of the specific act in question was indeed necessary.

*Schecke* concerned a conflict between the general principle of transparency and the right to privacy and protection of personal data. The contested measures were two Regulations which established a wide publication scheme for natural and legal persons receiving money from EU agricultural funds. The Court concluded that this obligation was invalid as far as natural persons were concerned, because it violated the necessity requirements of proportionality review. In particular, there was no indication that, when adopting these Regulations, the EU legislature took into account methods of publishing information which would be consistent with the objective pursued by the contested scheme while, at the same time, causing less interference with the right to privacy of the beneficiaries of agricultural funds. Furthermore, it seems

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41 *Schaible v Land Baden-Württemberg* (C-101/12) October 17, 2013.
42 The contested measure was Regulation 21/2004 establishing a system for the identification and registration of ovine and caprine animals [2004] OJ L5/8.
43 *Schaible* (C-101/12) October 17, 2013 at [28]–[29].
44 *Schaible* (C-101/12) at [47]–[51].
45 *Schaible* (C-101/12) at [60]–[75].
47 Charter arts 7 and 8.
48 The contested measures were Regulation 1290/2005 on the financing of the common agricultural policy [2005] OJ L209/5, and Regulation 259/2008 laying down detailed rules for the application of Regulation 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) [2008] OJ L76/28.
that there was some uncertainty as to the precise aims of the publication scheme at issue. As stressed in
the Opinion of the Advocate General, the institutions involved in the adoption of the Regulations gave
contradictory explanations as to objectives that they wished to attain. According to the Advocate General,
the Court could not rubber-stamp legislation that revealed a level of confusion and inter-institutional
inconsistency which prevented it from assessing the proportionality of the contested publication regime
by reference to a clearly identifiable objective. This reasoning suggests that when the EU legislature is
not itself clear about the precise reasons for its interference with a fundamental right, it cannot validly
argue that it managed to strike an appropriate balance between the various interests at stake.

It appears, accordingly, that the odds of successfully contesting the validity of secondary EU law on
the basis of an erroneous reconciliation of the fundamental rights at stake are rather slim, so long as the
measure is explicit as to the public interest objectives that it pursues and provides some evidence that the
legislature took into account methods of confining its interference within reasonable limits. In these
circumstances, the Court will normally recognise a wide margin of appreciation for the EU legislature to
balance the importance of safeguarding the rights and freedoms concerned and to make the political and
legal assessments that are necessary in order to set its regulatory priorities.

From collision of rights to conflict across jurisdictions—disregarding the relevant constitutional case law?

A very interesting question arising in this respect is whether this validity assessment can nevertheless be
affected by the existence of relevant constitutional case law, involving similar conflicts of rights, at national
level. In this case, the overlap between the European Union and the national standard of rights may turn
the issue into a conflict across jurisdictions between judicial institutions fighting over their own established
prerogatives and their authority to shape autonomously the level of fundamental rights protection that
national courts will be called upon to apply.

Once again, Sky Österreich is very illustrative in this respect. It will be recalled that the Austrian federal
communications senate referred specifically to the case law of two national constitutional courts, where
it was considered to be unconstitutional to grant the right to make short news reports without the payment
of appropriate compensation. However, the Court of Justice concluded that the imposition of the obligation
to contribute to the cost of acquiring the exclusive broadcasting rights would not effectively pursue the
public interest objectives of the contested legislation. It made no particular attempt to reconcile this
conclusion with the respective case law of these constitutional courts, although it referred to it when
explaining the circumstances that give rise to the preliminary ruling request.

On the contrary, the Advocate General considered that there were two principal reasons why the case
law referred to by the Austrian federal communications senate could not affect the legality of the contested
legislation. The first related to the fact that the assessment of these constitutional courts concerned national
legislative measures and not the EU law provisions involved in the main proceedings. The AVMSD
imposed precise conditions and limits on the exercise of the right to produce short news reports, confining
its scope in accordance with the principle of proportionality. Consequently, the conclusions of the national
constitutional courts were not automatically transposable to the provisions of this measure. Furthermore,
the Advocate General recalled that fundamental rights within the European Union must be protected in
the context of its structure and objectives. He concluded that in examining whether the EU legislature

at [104]–[128].
51 See also in this respect, the case comment by Bobek in (2011) 48 C.M.L.R. Rev. 2005.
had managed to strike a fair balance between the right to receive information and the economic interests of the holders of exclusive broadcasting rights, account had to be taken of the requirements relating to the completion of the internal market and to the emergence of a single information area. Hence, the limiting of compensation for providing a right to short extracts did not arise in the same terms and did not necessarily call for the same response when considered in the context of the European Union rather than at a purely national level.\footnote{Opinion of A.G. Bot in Sky Österreich GmbH (C-283/11) [2013] 2 C.M.L.R. 25 at [52] and [80].}

The first of the above explanations is also reflected in the Court’s ruling, insofar as this concludes that the contested measure ensures that the extent of the interference with the freedom to conduct a business, and with the possible economic benefits that broadcasters acquire from the production of short news reports, are confined within precise limits. However, the Court makes no attempt to explain why the national measures examined by the constitutional courts referred to were not actually comparable to the legislation involved in the proceedings before it. This is certainly regrettable, especially from a political point of view. It is well known that the institutional relationships between the Court of Justice and national constitutional courts are particularly sensitive, and that they can be adversely affected every time a preliminary ruling appears to question the correctness of judicial solutions already adopted at national constitutional level.\footnote{In fact, constitutional courts are often encouraged to react to preliminary rulings that raise suspicions of unconstitutionality. Consider, for example, the criticism against the preliminary ruling in Mangold v Helm (C-144/04) [2005] E.C.R. I-9981; [2006] 1 C.M.L.R. 43. It was accepted in that case that there exists a general principle of equal treatment on grounds of age, although this is unknown in most national constitutions and is not covered by any international instrument. See particularly in this respect, R. Herzog and L. Gerken, “Stop the European Court of Justice”, EU Observer, September 10, 2008.} Suffice it only to recall that it was in similar circumstances that the Czech Constitutional Court proceeded recently to the implementation of ultra vires review, pronouncing as unconstitutional an interpretation of EU law made by the Court of Justice in the context of the preliminary reference mechanism.\footnote{Pl. ÚS 5/12 (Slovak Pensions) of the Czech Constitutional Court, January 31, 2012. For more on this case, see R. Zbíral, “A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires” (2012) 49 C.M.L.R. Rev. 1475; J. Komárek, “Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires” (2012) 8 European Constitutional Law Review 323; G. Anagnostaras, “Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court” (2013) 14 German Law Journal 959. The pronouncement of unconstitutionality concerned the preliminary ruling in Marie Landtová v Česká správa socialního zabezpečení (C-399/09) [2011] E.C.R. I-5573.} Accordingly, it would be politically unwise to ignore the existence of relevant national constitutional case law to the extent that this could be reconciled with the specific features of the contested legislation. In the present context, this would risk an unnecessary rivalry with two constitutional courts, in an area where the recognition of the authority of the Court to review the legality of EU law is ultimately conditional on the existence of evidence that its standard of fundamental rights protection continues to live up to their constitutional levels of protection.

The second argument put forward by the Advocate General calls for closer examination. He seems to imply that the protection of fundamental rights must be interpreted in the light of the requirements and the objectives of the internal market. In the case of conflict between several fundamental rights, the particularities of the internal market may be relied upon in order to justify the adoption of legislative measures that could be considered as unconstitutional at national level. This analysis suggests that there exists a close interaction between the provisions of the Charter and internal market requirements. All legislative rules enacted in the internal market area must necessarily comply with the rights and freedoms protected by the Charter. Conversely, the objectives of the internal market come into play any time the EU legislature is called upon to reconcile the legal values and principles set out in the Charter in the exercise of its regulatory powers.\footnote{Opinion of A.G. Bot in Sky Österreich GmbH (C-283/11) [2013] 2 C.M.L.R. 25 at [60] and [80].} Apparently, this interpretation makes it even more testing to prove that...
a legislative measure amounts to an erroneous balance of the rights and freedoms at stake. This is because it allows reliance on vague and imprecise legal standards linked to assumed internal market requirements when it comes to the examination of the proportionality principle.

More generally, the Advocate General seems to suggest that in order to assess correctly whether a proper balance is struck between the various rights at stake, it is important to take into account the specific interests of the European Union and the particularities of its legal order. However, one can only wonder whether there can ever be an objective balancing assessment of fundamental rights that is blurred by contemplations completely alien to the nature and the operation of these rights. This would be tantamount to accepting that the provisions of the Charter must be interpreted in the light of the objectives pursued by the EU legislature and that all conflicts between them must be resolved in such a way as to facilitate the attainment of these aims. This would not only compromise the legal status of the Charter and the legal value of its provisions. It would also call again into question the aptitude of the Court to resolve conflicts of fundamental rights in a truly impartial manner.

Indeed, a common criticism voiced against the Court in the past was that it used the language of fundamental rights in order to serve the objectives of market integration and that it was not really committed to the protection of values that constitute the essence of these rights at national constitutional level. The argument raised by the Advocate General implies a similar inclination to facilitate the creation of the common production and distribution market pursued by the AVMSD. On this interpretation, freedom to conduct a business was not balanced only against the right to receive information and the pluralism of the media. It was also balanced against the emergence of a single information area and the completion of the internal market in the audiovisual media services sector.

National constitutional standards of protection and the balancing of fundamental rights under the Charter

It is not clear whether the Court was influenced by this argument of its Advocate General, since its legality assessment of the contested legislation was based exclusively on the provisions of the Charter without any reference to the specificities of EU law. However, it is interesting to note that, in a more recent preliminary ruling, the completion in the sector concerned of the agricultural internal market was explicitly considered as a public interest objective that could introduce exceptions to the freedom to conduct a business. This is a remarkable pronouncement that recognises a central role for internal market requirements when it comes to ascertaining whether an EU measure violates the standard of protection of fundamental rights. Needless to say that this amplifies concerns that the judicial interpretation of these rights may often be subordinated to the attainment of the objectives pursued by the EU legal order.

It could be assumed that once it is concluded that a legislative act strikes a fair balance between the fundamental rights and freedoms recognised by EU law, this conclusion can no longer be invalidated by reference to the constitutional standards of protection applicable at national level. Arguably, this is the implication of the recent preliminary ruling in Melloni. One of the questions asked in that case was whether

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58 The same Advocate General put forward a similar argument in his Opinion in Melloni v Ministerio Fiscal (C-399/11) [2013] 2 C.M.L.R. 43 at [111]–[119]. He argued that the level of protection to be afforded to fundamental rights reflects the choices of a society as regards the proper balance to be achieved between the interests of individuals and those of the community to which they belong. He concluded that, as concerns the legality of the Framework Decision for the European Arrest Warrant, the level of rights protection must be adapted to the requirements connected with the construction of an area of freedom security and justice.


60 AVMSD Preamble, Recitals 2 and 10–11.

61 Schaible (C-101/12) October 17, 2013 at [35].
Member States may rely on their own constitutional provisions insofar as these guarantee a superior level of protection of fundamental rights, in order to contest the validity of secondary EU law that is in compliance with the legal standards of the Charter. The Court concluded that this interpretation would violate the principle of supremacy, undermining the effectiveness and the unity of EU law. Certainly, the Charter confirmed that its provisions were not to be interpreted as restricting fundamental rights and freedoms as recognised in their respective fields of application by the constitutions of the Member States. However, this was not to say that the competent national authorities were given a general authorisation to apply their own constitutional standards of protection of fundamental rights, in violation of the supremacy requirements of EU law, and to give them priority over the application of lawful secondary EU law.

Seen in this perspective, Sky Österreich constitutes the logical corollary of the preliminary ruling in Melloni. If the compatibility of EU law with the concept of fundamental rights can be ascertained on the basis of national constitutional standards only to the extent that the level of protection provided for by the Charter is not compromised, this also implies that a balancing of conflicting rights that complies with the EU standard of fundamental rights cannot be called into question by relying on national constitutional arrangements and/or the case law of national constitutional courts. This also means that when collisions of rights occur within the scope of EU law, it is only the Court of Justice that can resolve them authoritatively by assessing the level of protection that the Charter intends to confer on the rights in question.

Under this interpretation, the ruling in Sky Österreich confirms the autonomous nature of the EU standard of fundamental rights, i.e. the scope of protection of these rights in the context of EU law will not always coincide with their constitutional protection at national level. Consequently, a balancing assessment may also vary. Additionally, the resolution of their conflict under national constitutional law is not necessarily conclusive when the same matter arises in the EU legal order. Member States are obliged, then, to give effect to legislative measures that violate the national constitutional understanding of proportionality, so long as their restrictive effects on the provisions of the Charter are considered to be reasonably balanced against other general interest objectives pursued by EU law. In other words, national authorities are called upon in these circumstances to apply potentially unconstitutional legislation to the extent that this reconciles the various rights at stake in accordance with the requirements of EU law.

This approach effectively negates the authority of national constitutional courts when the application of EU law gives rise to conflicts of fundamental rights under the Charter. These courts apply constitutional standards of protection, which cannot affect the validity of EU law that is in accordance with EU fundamental rights standards as interpreted by the Court. Even when there exists relevant national constitutional case law, this is not irrefutable when national courts are confronted with a collision of rights occurring within the scope of EU law. If the competent national court is uncertain about the appropriateness of the balancing undertaken by the EU legislature, it is obliged to make a preliminary reference in order to give the Court the opportunity to rule on the matter. Hence, once again the Court emerges as the ultimate authority in the area of fundamental rights protection. Although the ruling in Sky Österreich is certainly

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62 Charter art.53.
63 Melloni (C-399/11) [2013] 2 C.M.L.R. 43 at [55]–[64]. For more on this ruling, see the case comment by N. de Boer in (2013) 48 C.M.L. Rev. 1083. See also N. Lavranos, “The ECJ Judgments in Melloni and Åkerberg-Fransson: Une Ménage à Trois difficulté” (2013) 4 European Law Reporter 133.
64 Consider also in this respect the recent preliminary ruling in Åklagaren v Hans Åkerberg Fransson (C-617/10) [2013] 2 C.M.L.R. 46. This amounted to a significant expansion of the scope of the Charter, to the extent that the Court interpreted its provisions as being binding on the Member States any time they are acting within the scope of EU law. See in this respect, B. van Bockel and P. Wattel, “New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åklagaren v Hans Åkerberg Fransson” (2013) 38 E.L. Rev. 866. See also E. Hancox, “The Meaning of ‘Implementing’ EU Law under Article 51(1) of the Charter” (2013) 50 C.M.L. Rev. 1411.
less explicit than that in *Melloni*, it could be nevertheless construed in the same way. It may well testify, therefore, to the unconditional supremacy of the EU standard of fundamental rights protection over national constitutional instruments. It may also attest to the institutional primacy of the Court over national constitutional courts and the former’s intention to safeguard its judicial prerogatives, even in circumstances where this is likely to give rise to serious constitutional reactions at national level.

**Conclusion**

The ruling in *Sky Österreich* is interesting from multiple perspectives. In the first instance, it is indicative of the way in which an alleged conflict between secondary EU law and a fundamental right may be elevated to a collision of rights protected by the Charter. By positioning the conflict at the level of primary law, the Court turns the validity issue into a balancing exercise that aims at ascertaining whether the restrictive effects of the contested measure on the affected fundamental rights are outweighed by the benefits that it entails as concerns the protection of other general interest objectives guaranteed by the Charter. This assessment is based on an examination of the proportionality principle, in the form of a tripartite test that goes beyond suitability and necessity requirements to ascertain the reasonableness of the legislative restrictions imposed.

What are the chances, then, of EU law being pronounced invalid on the basis of an erroneous balancing of fundamental rights? There are good reasons to believe that such pronouncements will be a rather uncommon occurrence. This is partly because the Court seems to apply a manifestly inappropriate balance test in this respect, in order to take into account the complex policy choices made by the legislature in the exercise of its rule-making powers. It is also because the ruling suggests that this balancing assessment will be based on the EU standard of rights protection, which is completely autonomous in nature and cannot therefore be affected by the existence of relevant national constitutional case law. Seen in this perspective, the ruling is also important in terms of inter institutional relationships. It seems to confirm that the Court reserves for itself the final word as concerns the level of rights protection under the Charter, at the expense of national constitutional courts and their understanding of the relevant national standards of fundamental rights protection. It thus provides further evidence that the Charter is the main legal arena in which the battle over judicial supremacy is currently taking place, as the interpretation of its provisions tests the reflexes and the tolerance of national constitutional courts still further.

This interpretation of the scope of the Charter was also confirmed in *Texdata Software GmbH* (C-418/11) September 26, 2013 at [72]–[73].