ARTICLES

Freedom of Expression in the European Union

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There has been much discussion about the extent to which the jurisprudence of the EU courts gives adequate protection to human rights and, in particular, reflects the decisions of the European Court of Human Rights. This article aims to add to the discussion by providing a review of the EU courts decisions in respect of one particular human right, freedom of expression, to assess the EU courts' consistency of decision making on this issue and their consistency with the jurisprudence of the European Court of Human Rights. The review will result in a better understanding of the scope of freedom of expression within the European Union, as well as the weight accorded to this right. Further, in focussing in depth on one human right, this article will provide a detailed and nuanced picture of the level of protection awarded to human rights than a general overview might provide.

1. Introduction

The Constitution for Europe proposed that the European Union (EU) seek accession to the European Convention on Human Rights (ECHR). If it comes into force, it could be seen as constituting the latest phase in the relationship between the EU and the ECHR. Although the status of the Constitution is unclear, it is nonetheless timely to consider the current level of protection awarded to human rights within the EU and how it corresponds with the model provided by the ECHR. This issue,

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which has been somewhat contentious,[2] falls into two linked questions: whether the EU should be expected to protect human rights; and, if so, to what degree.

Originally the EC Treaty, a trade treaty, contained no reference to human rights[3] and it was only in the face of rebellion from a number of national courts that the ECJ accepted that human rights did form part of the Community legal order.[4] Since then, the position has been recognized by treaty amendments[5] and the subsequent introduction of the Charter of Fundamental Rights ('the Charter'), albeit non-binding. It would therefore seem that the answer to the first question is in the affirmative. There is, however, a history of concern about the level of protection awarded to human rights within the EU. Insofar as the ECHR seems to be the reference point for the assessment of rights protection within the EU, issues arose as to whether the EU courts were using the rights to justify extending Community competence,[6] or – more neutrally – the fact that discrepancies between the two legal orders might arise.[7]

The question that this article will address is the second question identified above, that is whether the substantive scope of rights within the Union legal order are 'at least equal to the rights conferred by the Convention'[8] as interpreted by the

[2] See famously the discussion between Coppell and O'Neill 'The European Court: Taking Rights Seriously?' 29 *CML Rev* (1992) 669 and Weiler and Lockhart '"Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence' 32 *CML Rev* (1995) 51 and 579

[3] The first reference was in the recitals to the Single European Act.

[4] See e.g. Case 4/73 *Nold* v. *Commission* [1974] ECR 491, at p. 507; note that in early cases two Advocates-General stated that the ECJ is under no obligation to follow the jurisprudence of the ECtHR: see Case 118/75 *Watson* v. *Belmann* [1976] ECR 1201 at p. 1207; Case 374/87 *Orkem* v. *Germany* [1989] ECR 3301, 3337-8.

[5] Articles 6 and 7 TEU, following the wording of the ECJ's jurisprudence as regards the ECHR.

[6] Coppell and O'Neill, *supra*, at p. 669, suggest that the ECJ's jurisprudence is masking an attempt to extend Community competence and its jurisdiction, but contrast views of Weiler and Lockhart, and also Weiler, J.H.H., 'Fundamental Rights and Fundamental Boundaries: On the Standards and Values in the Protection of Human Rights' in Neuwahl and Rosas (eds) *The European Union and Human Rights* (1995).

[7] See e.g. van Dijk, P. 'Judicial Protection of Human Rights in the European Union – Divergence, Coordination, Integration' *Exeter Paper in European Law* No. 1 (1996), at p. 15, Venice Commission Opinion 256/2003 *Opinion on the Implications of a Legally-Binding Charter of Fundamental Rights on Human Rights Protection in Europe* CDL-AD (2003) 92 Or. Eng. 18th December 2003, Lawson, R., 'Confusion and conflict? Diverging Interpretation of the European Convention on Human Rights in Strasbourg and Luxembourg', in Lawson, R., and de Blois, M., (eds) *The Dynamics of the Protection of Human Rights in Europe, Essays in Honour of Henry Schermers*, volume III, (Martinus Nijhof Publishers 1994); Speilmann, D., 'EU Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities' in Alston et al (eds) *The EU and Human Rights* (Oxford University Press 1999).

[8] Venice Commission, *supra*, para. 32. The fact that for most Member States the ECHR constitutes a prior Treaty obligation would also seem to be a factor here: Grabitz, E., 'Implementation of Human

European Court of Human Rights ('ECtHR'),[9] that is, equal in scope and weight. 'Equal' in this context means equivalent or comparable rather than identical,[10] though it has been suggested that the 'result of the protection of the Convention rights should be the same'.[11] This question of the level of protection can be looked at in a general or formal way, or by looking at the jurisprudence of the two court systems in respect of an individual right. It has been noted that the second aspect has been missing.[12] This article reflects the latter point, as it aims to assess the level of protection in a particular substantive field by considering the scope of the freedom of expression, as well as the weight attributed to it in the EU legal order. Focussing on an individual right may provide a more sophisticated view of the EU courts' approach to human rights. Freedom of expression has been selected for a number of reasons. It is a right that can be seen as embodying central democratic and societal concerns; it also contains a commercial element, thus reflecting some of the tensions inherent within the EU system itself. More pragmatically, there is a significant body of case law under both the EU and ECHR systems.

This article has two elements. It will review the case law of the European Court of Justice (ECJ) and the Court of First Instance (CFI) (together the 'EU courts') in relation to the freedom of expression to assess the development of the jurisprudence, in particular whether the EU courts have been consistent in their approach. In itself, such a review may provide valuable information for individuals seeking to assert their rights to freedom of expression at the Community level, in that the scope of their rights will be more clearly delineated.[13] Secondly, this article will compare the approach of the EU courts to freedom of expression with that of the European Court of Human Rights (ECtHR) to the same issue.[14]

Rights in Community Law' in *In Memoriam J.D.B. Mitchell* (London: Sweet & Maxwell, 1983), 194–210.

[9] Sørensen 'Meeting Points between the ECHR and the Law of the European Communities' in *Information on the Court of Justice of the EC*, III (1977) 41 at p. 45. See also the reasoning the ECtHR itself in *Matthews* v. *UK*, ECHR judgment 18 February 1999; *Waite and Kennedy* v. *Germany*, ECHR judgment 18 February 1999. Implicit in its reasoning is the assumption that the EU is still the creature of the member States which remain fundamentally responsible for the Community's actions – and those of the Union. The joint responsibility of the member States for the action of the EU has been raised a number of times since *Matthews*, see most recently *Bosphorus Airways* v. *Ireland*, ECHR judgment 30 June 2005 (GC), which concerns alleged human rights violations resulting from Community secondary legislation which the ECJ had upheld.

[10] *Bosphorus Airways*, *ibid*., para. 155.

[11] *Bosphorus Airways*, *supra*, Concurring Opinion of Judge Ress, para. 3.

[12] *Bosphorus Airways*, *supra*, Concurring Opinion of Judge Ress, para. 2.

[13] Clapham suggests that a 'victim-centred' policy towards human rights is desirable, rather than one which focuses on the actors: 'A Human Rights Policy for the European Community' 10 *YBEL* (1990) 309, at p. 365.

[14] Article 11 of the Charter is the relevant provision guaranteeing freedom of expression and the *Explanations* state that 'Article 11 corresponds to Article 10 of the European Convention of the

Given that the model against which we will be measuring the decisions of the EU courts is Article 10 ECHR, that provision will be our starting point. Despite considerable jurisprudence on Article 10 ECHR, it is not the intention to develop a detailed critical analysis of those decisions. Instead an overview will suffice to provide a yardstick against which the EU courts' decisions may be measured. This article will then review the EU cases considering freedom of expression since 1992, which was, broadly speaking, both the endpoint for the analysis undertaken by Coppell and O'Neill and the date of the Treaty on European Union, with its express reference to the ECHR. Some previous analyses of the jurisprudence have been criticized for being selective in the cases chosen or the way they were presented so as to further the authors' hypothesis.[15] This study does not seek to support any particular hypothesis, nor is it heavily theorized. It instead aims to provide the evidence against which such claims may be assessed. It describes the relevant cases in chronological order, as this would seem to be the most neutral framework.[16] A third section will compare the EU courts' jurisprudence with that of the ECtHR to assess the consistency of the EU courts with the ECHR system. The conclusions, in addition to providing an overall assessment of the position, will suggest a possible direction for future action in this field.

2. Outline of Article 10 ECHR

Freedom of expression guaranteed by Article 10 ECHR is not absolute: states may require the licensing of broadcasting, television or cinema enterprises[17] and Article 10(2) specifies the conditions upon which States may restrict freedom of expression. Article 10 protects a broad range of expression. It includes commercial as well as artistic or political 'speech'.[18] The shocking as well as the acceptable deserves protection.[19] The essential element of freedom of expression, which distinguishes it from other linked rights, such as freedom of association, seems to

European Convention on Human Rights …' and that 'the meaning and scope of this right are the same as those guaranteed by the ECHR'.

[15] Notably the criticism levelled at Coppell and O'Neill by Weiler and Lockhart, *supra*.

[16] To avoid duplication, Case C-353/99P *Hautala* [2001] ECR I-9565, [2002] 1 CMLR 15; and Case C-6/98 *ARD* v. *ProSieben* [1999] ECR I-7599 will be dealt with at the same time as cases with a similar factual basis.

[17] Article 10(1) ECHR, last sentence.

[18] *Markt Intern Verlag GmbH and Klaus Beermann* v. *Germany*, ECHR judgment 20 November 1989, Series A no. 165, pp. 19-20, para 33; *Casado Coca* v. *Spain*, ECHR judgment 24 February 1994, Series A no. 285; *Jacubowski* v. *Germany*, ECHR judgment of 23 June 1994, Series A no. 291-A, p. 14, para 26; and *VgT Verein gegen Tierfabriken* v. *Switzerland*, ECHR judgment 28 June 2001, *Reports of Judgments and Decisions* 2001-VI.

[19] See e.g. *The Observer and Guardian* v. *UK*, ECHR judgment 26 November 1991, Series A No. 216, (1992) 14 EHRR 153 at p. 30.

be the communication of ideas. As such, it covers transmission as well as content, a point important for the mass media.[20] It includes the right to receive information which others wish to impart, for example, a right to access newspapers which are generally available to the public.[21] Article 10 does not provide a right to freedom of information independent of others' rights to communicate, although the Council of Europe recognizes the importance of freedom of information to freedom of expression.[22]

Many of the cases arising before the ECJ concern broadcasting regulation, as commercial sector broadcasters use freedom of expression arguments to challenge national broadcasting regulation. Article 10(1) ECHR recognizes that certain regulation of the mass media is acceptable, for example for 'technical reasons, or in the interests of ensuring diversity and pluralism'.[23] The jurisprudence of the ECtHR has, however, limited states' freedom to regulate.[24] Although the reason justifying the regulatory system need not correspond to any of the aims in Article 10(2),[25] the ECtHR will review the appropriateness and necessity of the national measure.[26] As a result, States have been required to abandon monopoly broadcasting systems[27] and they are under positive obligations to facilitate[28] freedom of expression both in terms of licensing requirements and access to airtime.[29] The extent of these obliga-

[20] *Autronic AG* v. *Switzerland*, ECHR judgment 22 May 1990, Series A, no. 178.

[21] *Sunday Times* v. *UK*, ECHR judgment 26 November 1991, Series A no. 217, (1992) 14 EHRR 229.

[22] See e.g. Council of Ministers' Recommendation No. R (2002) 2 on Access to Official Documents; Parliamentary Assembly's Recommendation 1506 (2001) on Freedom of Expression and Information in the Media in Europe.

[23] *Informationsverein Lentia* v. *Austria*, ECHR judgment 24 November 1993, Series A no. 276, (1994) 16 EHRR 93, *Hins and Hagenholtz* v. *the Netherlands*, application no. 25987/94, decision of 8 March 1996, DR 84-A, p. 146.

[24] *Groppera Radio AG* v. *Switzerland*, ECHR judgment 28 March 1990, Series A, no. 173, para 61, *Autronic AG* v. *Switzerland*, ECHR judgment 22 May 1990, Series A, no. 178., para 52, *Lentia*, *supra*, para 29.

[25] *Demuth* v. *Switzerland*, ECHR,judgment 5 November 2002, para 33. Contrast view of the Commission of the European Union in an early Green Paper: 'Television without Frontiers' Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable, COM (84) 300 final, 14 June 1984.

[26] van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed) (Kluwer Law International, 1998), p. 580; contrast *Groppera Radio*, *supra*, and *United Christian Broadcasting Ltd* v. *UK*, 7 November 2000, in which the State was held not to have exceeded its margin of appreciation.

[27] *Lentia*, *supra*. Contrast earlier *Sacchi* decision.

[28] Positive obligations have also in arisen in other circumstances: note the ruling against the UK for failing to prevent high damages awards: see e.g. *Tolstoy* v. *UK*, ECHR judgment 13 July 1995, Series A no. 323, (1995) 20 EHRR 442.

[29] *Tierfabriken*, *supra*.

tions is unclear. They would not seem to give an individual (or company) the right to demand a particular licence[30] and early decisions of the Commission show that Article 10 does not include the unfettered right to airtime.[31] It is unclear whether the ECtHR generally sees such regulation as not constituting an interference with freedom of expression under Article 10(1), or constituting a justified interference, though the latter is the more likely possibility.

Given the breadth of Article 10(1), much of the jurisprudence has focussed on Article 10(2). Whereas Article 10(1) may be seen as determining the scope of the right, Article 10(2) concerns the weight to be attributed to it when in conflict with other interests. Article 10(2) provides a three stage test against which State action is measured:

1. is there a legitimate aim as stated in Article 10(2), or the last line of Article 10(1);
2. is the restriction necessary in a democratic society; and
3. is the restriction prescribed by law.

The ECtHR usually accepts a State's assessment of the legitimate aim, reserving more detailed scrutiny for other aspects of Article 10(2). The central question is whether the restriction is necessary in a democratic society, that is, whether it answers a 'pressing social need'.[32] Necessity has been linked with proportionality, which occurs in many legal systems including the EU, albeit in slightly different forms. Proportionality has a number of elements: whether the measure is appropriate to achieve its stated aim; and whether no other, less intrusive effective measure is available. Sometimes a third element can be seen: is the measure proportionate to its aim?[33] The ECtHR has not always been consistent in how it sees proportionality[34] and different factual circumstances might mean a different outcome, even with the application of the same test.[35]

Article 10(2) is a mechanism to find a balance between the freedom of expression and the interest the State is seeking to protect.[36] In this assessment the importance of freedom of expression may be considered,[37] as well as the importance of the

[30] *Tele 1 Privatfernsehgesellschaft mbH* v. *Austria*, ECHR, judgment 21 September 2000.

[31] *X and Association of Z* v. *UK*, Application no. 4515/70, Coll. 38 (1972), 86, 88.

[32] *Handyside* v. *UK*, Series A, no. 24, para. 48.

[33] *Lingens* v. *Austria*, ECHR judgment 8 July 1986, Series A No. 103, (1986) 8 EHRR 407, at paragraph 40.

[34] Van Dijk and van Hoof, *supra*, at p. 81.

[35] McBride, J., 'Proportionality and the European Convention on Human Rights' in Ellis, E., (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing: Oxford, 1999).

[36] See e.g. *Brogan*, Series A. no. 145-B p. 27.

[37] E.g. *Sunday Times*, *supra*.

conflicting policy goal.[38] The type and level of intrusion are also relevant. Certainly the ECtHR has noted when the effect of the measure is to eliminate the substance of a person's right entirely, rather than just limit its exercise.[39] The approach adopted to the relative weighting of freedom of expression and the competing interests by the ECtHR on the one hand and the EU courts on the other are likely to prove crucial in any assessment of whether the EU courts are awarding protection 'at least equal' to that of the ECtHR.

The ECtHR reserves to itself the position of final arbiter of a measure's acceptability in a given case. It does allow a certain 'margin of appreciation' regarding the assessment of the need for a restriction or the most appropriate way to achieve that goal, thereby introducing some flexibility into the proportionality assessment.[40] This is understandable: the doctrine of margin of appreciation is a way of managing difference between the various signatory States and also a recognition that the national authorities might be in a better position than the ECtHR to assess the position. The difficulty is that, not only does the use of the doctrine tip the balance in favour of the State seeking to impose the restriction,[41] but the margin of appreciation is a vague concept and in some cases States' choices are subject to a greater level of scrutiny than in others.[42] It seems that a number of factors may affect the scope of the margin of appreciation: the type of speech; the aim protected;[43] the degree of 'common ground' between the states; and the seriousness of the interference. One issue that might arise is whether the doctrine of the margin of appreciation can be transposed to the EU, given the different relationship between the EU courts and the national legal orders.

According to the ECtHR, there is little scope for restrictions on political speech, especially where the criticism relates to a government rather than a private individual or even a politician.[44] Commercial speech receives less attention,[45] even when it may arguably affect the public interest. Indeed, in some circumstances the difference between commercial speech and other speech in the public interest may be

[38] Albeit not in the context of Article 10 ECHR, the weight of competing policy objectives can be seen in the Diane Pretty case, which concerned a blanket ban on assisted suicide: *Pretty* v. *UK*, ECHR judgment 29 April 2002, (2002) 35 EHRR 1, para 74.

[39] See e.g. *Hertel* v. *Switzerland*, ECHR judgment 25 August 1998, (1998) 28 EHRR 534.

[40] Macdonald, R., StJ., 'The Margin of Appreciation' in Macdonald *et al*. (eds) *The European System for the Protection of Human Rights* (Martinus Nijhoff: Dordrecht, 1993).

[41] Van Dijk and van Hoof, *supra*, 585-606; MacBride, *supra*, 29–30.

[42] Contrast *Lentia, supra* n.18 with *United Christian Broadcaster, supra*.

[43] There may be a greater degree of freedom where a State is balancing competing Convention rights: see e.g. Sales, P., and Hooper, B., 'Proportionality and the Form of Law' 119 *LQR* (2003) 426 at 436

[44] *Okcuoglu* v. *Turkey*, ECHR judgment 8 July 1999 at paragraph 46.

[45] *Markt Intern, supra,* but c.f. *Tierfabriken*, *supra* n. 13, *Krone Verlag GmbH & Co KG* v. *Austria*, ECHR judgment 11 December 2003.

difficult to define. This issue may be even more significant in the context of the European Union, given its trade-based origins and the importance of advertising for the creation of the internal market. In *Handyside*,[46] the United Kingdom sought to protect public morals, an area where there are often many differences between the States. Here, the States seem to have a wide margin of appreciation. Similarly, in *Otto Preminger*,[47] the ECtHR recognized that, given the different attitudes towards religion in the various States, the authorities have a wide margin of appreciation in taking action to protect individuals' religious sensibilities, which fall within the scope of Article 10(2) as part of the 'rights of others'. Issues of national security are also perceived as sensitive.[48] It should be noted that the ECtHR itself has not developed complete or consistent analysis of the use of the doctrine of the margin of appreciation and has been subject, in cases such as *Otto Preminger,* to some criticism in this context.[49] Insofar as the doctrine may be transposed, a lack of clarity here might give rise to difficulties in application for the EU courts.

Freedom of expression is awarded to everyone; it is not restricted to citizens. Indeed, it is not restricted to natural persons; despite conceptual difficulties with this position, companies have benefitted from Article 10 in the same way as people have.[50] This is a point that has particular relevance in the broadcasting sphere, as many (if not all) broadcasting licences tend to be held by bodies corporate rather than corporeal.

The ECtHR has accepted that, although public servants have a right to freedom of expression, it is not unlimited. Article 10(2) refers to the duties and responsibilities in exercising freedom of expression. Civil servants, in particular, are under a duty of loyalty to the state as noted in the case of *Vogt*.[51] Nonetheless, civil servants are persons who, in principle, should benefit from Article 10. The competing interests should therefore be balanced.[52] This line of cases has been the subject of some criticism.[53] Certainly when civil servants are dismissed for expressing political opinions, one might question whether the requirement of proportionality has really been satisfied. By contrast, in *Fuentes Bobo*,[54] which did not concern a civil servant, the dismissal of an employee for making televised statements that were critical of

[46] *Handyside*, *supra*.

[47] *Otto Preminger Institute* v. *Austria*, ECHR judgment 20 September 1994, Series A No. 295-A, (1995) 19 EHRR 34.

[48] See e.g. *Zana* v. *Turkey*, ECHR judgment 25 November 1997; cf. *Okcuoglu*, *supra*.

[49] Van Dijk and van Hoof, *supra*, p. 87 *et seq*.

[50] See e.g. *Autronic*, *supra*.

[51] *Vogt* v. *Germany*, ECHR judgment 26 September 1995, Series A No. 323, (1996) 21 EHRR 205

[52] *Ibid*., para. 53.

[53] See e.g. Vickers, L., 'The Protection of Freedom of Political Opinion in Employment' *EHRLR* (2002) 468.

[54] *Fuentes Bobo* v. *Spain*, ECHR judgment 29 February 2000, (2001) 31 EHRR 50.

the employer was found to be disproportionate. Although issues of responsibility apply to all, and in some cases have given rise to comments about the need for compliance with journalistic ethics, in practice it seems that otherwise the duties and responsibilities noted in Article 10(2) do not have much impact on the ECtHR's assessment of the permissibility of government action under Article 10.

Overall, the ECtHR has given a broad scope and a heavy weight to freedom of expression. Under the ECHR jurisprudence, political speech in particular, is hard to outweigh. How have cases within the EU fared?

3. Review of the Jurisprudence of the European Courts

There have been 15 cases[55] during the review period in which freedom of expression arises, including those cases where the issue is discussed only by the Advocate General. The first is *TV10*,[56] which concerned the question of whether broadcasters established in another member State but aiming their programming at the Netherlands should have to comply with Dutch regulation. The referring court questioned whether restrictions on receiving such services were compatible with Articles 10 and 14 ECHR. The ECJ followed earlier decisions in the broadcasting field,[57] accepting that regulation protected pluralism and diversity.[58] Its assessment of the compatibility of the Dutch laws with Article 10 ECHR and Community law was brief and the judgment was finally based on principles relating to the freedom to provide services. The Advocate-General had looked at the matter more closely, noting that the, 'Court of Justice has invariably held back from applying in practice the general legal principles defined in the European Convention'.[59]

He implied that in previous cases the ECJ had thought that no relevant ECHR jurisprudence existed. The Advocate-General referred to *Groppera*,[60] as well as a decision of the Commission of Human Rights concerning the same laws as in issue here, *Cable Music Europe* v. *Netherlands*.[61] *Cable Music Europe* dealt with and dismissed the argument that these rules violated Article 10 or that there had been discrimination in the restrictions imposed on the broadcaster. Given this case law

[55] A further case came before the EFTA court concerning broadcasting and the right to restrict broadcast pornography: Case E-8/97 *TV1000 Sverige AB* v. *Norway*, EFTA Court judgment 12 June 1998. Cases in which a freedom of expression argument has been raised but not addressed by either the Advocate-General or the court are not included.

[56] Case C-23/93 *TV10 SA* v. *Commisaariat voor de Media* [1994] ECR I-14795.

[57] Case C-353/89 *Commission* v. *the Netherlands* (Mediawet) [1991] ECR I-4069.

[58] *TV10*, *supra*, para. 25.

[59] *Ibid*., para. 84.

[60] *Groppera Radio*, *supra*, especially para. 73.

[61] *Cable Music*, Application No. 1803/91, Commission Decision.

on clearly similar facts, the Advocate-General concluded that there was no 'reason to doubt the proposed solution to this case from the point of view of Community law'.[62] This statement constitutes a rare example of the Community legal system, albeit in the form of the Advocate-General, applying ECHR case-law directly. This rarity might be explained by the fact that cases involving exactly the same rules arise infrequently; it does not explain why the ECJ did not take the same approach.[63]

Two cases[64] concern access to information, potentially expanding the scope of protection granted by freedom of expression. In both cases there were passing references in the opinion of the Advocate-General to the fact that freedom of expression encompasses freedom of information. In neither case was the point determinative in the reasoning of the Advocate-General, nor was the issue picked up at all by the ECJ.[65] Article 10 ECHR does not constitute a free-standing right to information, a fact which Advocate-General Leger noted in *Hautala*, the more recent of the two cases.[66] He then continued to argue that although international instruments, including the ECHR, may not provide an unambiguous link between freedom of information and freedom of expression, 'convergence of the constitutional tradition of the Member States may suffice in order to establish the existence of one of [the general] principles'.[67]

This is a link back to early case law which shows that the ECHR, although significant for the EU, is not the only potential source of inspiration for the EU courts in identifying the nature and scope of the rights protected by the Union legal order. Interestingly, the Union does provide for a right of access to public documents in the interests of improving democratic accountability of the institutions.

Familiapress[68] concerned a prohibition on the inclusion of prize competitions in journals. The Austrian government argued that the rule had been introduced to help maintain diversity of the press. The ECJ accepted that such an aim could justify a restriction on the free movement of goods,[69] but that any provision of national law restricting free movement of goods must be proportionate to the objective pursued

[62] *TV10*, *supra*, Opinion para. 89.

[63] One might perhaps suggest that the ECJ did not want to refer to a Commission decision; this is not convincing as the ECJ's judgment contained no reference to Article 10 ECHR at all.

[64] Case C-58/94 *The Netherlands* v. *Council* [1996] ECR I-2169, in which the Advocate-General based the link between freedom of expression and freedom of information on Council of Europe recommendations rather than ECtHR jurisprudence, para. 16; Case C-353/99P *Council* v. *Hautala*, *supra*.

[65] The ECJ in Case C-58/94, *ibid.*, linked the right to access information to general concerns regarding democracy.

[66] *Hautala*, *supra*, para. 61.

[67] *Ibid.*, para. 68.

[68] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH* v. *Heinrich Bauer Verlag* [1997] ECR I-3689.

[69] *Ibid.*, para. 18.

and, 'must not be capable of being achieved by measures which are less restrictive of intra-Community trade'.[70]

Further, limitations on EC Treaty freedoms must be assessed in the light of fundamental rights. The ECJ then considered the issue from the perspective of ECHR jurisprudence, noting that freedom of expression was not unlimited provided the conditions in Article 10(2) were met. The ECJ concluded that the question before it was whether a national measure aimed at ensuring the diversity of the press such as the Austrian measure is proportionate to its aim and, 'whether that objective might not be attained by measures less restrictive both intra-Community trade and freedom of expression'.[71]

The ECJ highlighted that there were less intrusive mechanisms to achieve the same end, for example blacking out the relevant page or stipulating that Austrian readers do not qualify for a prize[72]. It seems the measure was disproportionate, although the EC did not rule on this issue as the final assessment was one for the national courts. Although the ECJ recognized freedom of expression, the value ascribed to that right here is unclear. In particular, should the proportionality test consider the impact of the national measure on inter-State trade, or on trade and freedom of expression? The issue of whether proportionality should be assessed against the public interest objective or against the impact of the national measure on trade recurs through the jurisprudence of the EU courts, and has given rise to some criticism.

Montecatini was an appeal from a decision of the CFI. This case concerned a cartel, the members of which held a number of meetings to set prices. Montecatini argued that the finding of the CFI was that the meetings themselves were *per se* illegal under the terms of Article 81, which ignored freedom of expression and freedom of association. The ECJ's response to this argument was brief. After re-iterating that these rights are protected in the Community legal order, it held

> '…that the meetings of the polypropylene producers were not held to be contrary to Article [81(1)] of the Treaty *per se*, but only inasmuch as their purpose was anti-competitive …. It follows that [this argument] cannot be upheld either.'[73]

Unsurprisingly, the appeal was unsuccessful; the fact that this argument was not the applicants' strongest claim may have been the cause of the ECJ's lack of analysis

[70] *Ibid*., para. 19.

[71] *Familiapress*, *supra*, para. 27, see also para. 34.

[72] This would constitute direct discrimination on grounds of nationality, however, a point the ECJ did not consider.

[73] Case C-235/92P *Montecatini SpA* v. *Commission* [1999] ECR I-4539, paras. 138–139.

on this point,[74] although as we shall see below, the ECJ's reasoning does raise some concerns about its approach to rights protection.

The *Tobacco Advertising case*,[75] which concerned Germany's challenge to the enactment of a directive prohibiting the advertising of tobacco products, was another judicial review action. It was argued that the directive constituted an infringement of freedom of expression. In assessing the proportionality of a restriction, the Advocate-General suggested that a stricter standard be used in relation to fundamental rights than is used in relation to assessing the proportionality of Community acts in other contexts, i.e. that the least impact test should be used rather than reasonable behaviour usually used in judicial review situations.[76] By contrast to some of the other cases involving the proportionality of Community actions, the Advocate-General recognized, as the ECtHR suggested in *Handyside*,[77] that we are not looking for a measure that is reasonable, but a measure we really cannot do without. The ECJ did not address the point at all. Ultimately the Advocate-General and the ECJ came to the same conclusion; that the measure was invalid, although by different routes. This assessment of the law, by the Advocate-General is very close to the Strasbourg position; the ECJ's disregard for the freedom of expression argument much less so.

One of the fullest discussions of freedom of expression came in *Connolly*. Connolly worked for the Commission. Staff regulations required officials to abstain from any public expression which reflected on the official's position.[78] They further specified that officials should not publish any matter dealing with the work of the Communities, save with express prior permission.[79] Connolly published such a book, without permission. The views expressed in the book, which received a significant amount of publicity, contradicted the central policies espoused by the Community. Connolly was dismissed for non-compliance with staff regulations. He appealed against this decision before the CFI challenging the compatibility of the restrictions

[74] The Commission's investigative powers have been challenged on the basis of fundamental rights on numerous occasions. See e.g. Riley, A., 'Saunders and the Power to Obtain Information in the European Community and United kingdom Competition Law' (2000) 25 *ELRev* 264. In Joined Cases T-125/03 and T-253/03R *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd* [2003] nyr, an action for interim measures, freedom of expression was raised in the context of privileged communications between lawyer and client, but not addressed.

[75] Case C-376/98 *Germany* v. *European Parliament and Council of the European Union* (Tobacco Advertising Directive) [2000] ECR 1-8419. The prohibition on advertising has given rise to more challenges but these have been unsuccessful on procedural grounds; see further below.

[76] *Ibid*., para. 159.

[77] In *Handyside*, *supra*, the ECtHR held that 'necessary' 'is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "reasonable" or "desirable"', para. 48.

[78] Article 12 Staff Regulations.

[79] Article 17 Staff Regulations.

on publications with Article 10 ECHR. In rejecting his argument, the CFI, pointed out that although freedom of expression is a fundamental right,

> 'fundamental rights do not constitute an unfettered prerogative but may be subject to restrictions, provided that the restrictions in fact correspond to objectives of general public interest pursued by the Community and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the right protected.'[80]

It noted that the provision was limited in terms of the material affected and that permission could only be refused where the publication would be likely to prejudice the Communities' interests. It also commented that Article 17 was designed as a preventative measure, both to protect the Communities' interests and to make disciplinary actions unnecessary.[81]

Connolly appealed to the ECJ. After emphasizing the significance of freedom of expression and its role as an essential foundation of a democratic society, the ECJ noted that Article 10(2) ECHR permits certain limitations on freedom of expression, although these exceptions must be interpreted restrictively. Following ECHR jurisprudence,[82] the ECJ identified the three-stage test used by the ECtHR in assessing Article 10(2).[83] The ECJ further noted that prior restrictions deserve particular consideration.[84] It then held that, in principle, Community employees retained their freedom of expression[85] but noted that public servants could nonetheless be expected to be under some obligations to preserve the relationship of trust between the institution and employee, though the scope of these obligations would vary depending on an individual's place in the hierarchy. In terms of the exceptions permitted by Article 10(2) ECHR, the ECJ referred to the 'rights of others',[86] and noted that in such cases the relevant national authorities would enjoy a certain margin of appreciation in assessing the proportionality of the impugned measure. The ECJ emphasized the extremity of the views expressed in this case and that Connolly was a high-ranking official who had expressed views contrary to the policy which he was entrusted to carry out. Taking these factors into account, the appeal was dismissed. By contrast to the CFI's judgment, which seems to give little weight to freedom of expression, there are strong similarities to the approach of the ECHR in the civil servants cases to which the ECJ, indeed, referred. *Connolly* has

[80] Case C-274/99P *Connolly* v. *Commission* [2001] ECR I-1611, para. 148 of CFI judgment quoted by ECJ, para. 19.

[81] *Ibid.,* para. 153 CFI judgment.

[82] *Wille* v. *Liechtenstein*, ECHR judgment 28 October 1999, (2000) 30 EHRR 58.

[83] *Connolly*, *supra*, para. 41.

[84] *Connolly*, *supra*, ECJ judgment, paras. 41 and 42.

[85] *Ibid*., para. 43.

[86] *Connolly*, *supra*, para. 46.

been cited in subsequent case law regarding the scope of freedom of expression the employees of Community institutions (see further below).[87]

De Coster concerned a tax imposed on the installation of satellite dishes and, consequently, the right to receive information which was decided on the basis of a restriction to provide services. It can be seen as a thinly reasoned judgment from many perspectives. Notably, the ECJ did not consider freedom of expression at all; the Advocate General touched on the issue, but fleetingly and at the end of his opinion, as a general additional point. It did not seem to add to his conclusions in the matter; indeed the ECHR case law he referred to was not the most relevant to the facts in issue.

Like *Connolly*, *Cwic*[88] concerns the right of a Commission employee to publish, in this case the text of a speech, against the wishes of the relevant Commissioner. The Commission's argument was that the article presented a point of view which did not reflect that of the Commission. Cwic's internal appeals were unsuccessful and he brought an action before the CFI, challenging the Commission's interpretation of Regulation 17 of the staff regulations (detailed in *Connolly*) and in particular what is required by the interests of the Community. The CFI found for Cwic, not accepting the preventative function of Regulation 17. This is in marked contrast to its approach in *Connolly*. In particular, it held that a difference of opinion between the Commission and an official cannot justify restricting freedom of expression; such a difference would not necessarily prejudice the interests of the Community within the terms of Regulation 17.

The Commission appealed, arguing that the interpretation of Regulation 17 was too restrictive (or allowed too much freedom of expression). In rejecting this appeal, the ECJ relied heavily on its judgment in *Connolly*, emphasizing that restrictions on a right so fundamental to a democratic society should be interpreted narrowly and a real threat rather than a hypothetical risk to the interests of the Community must be shown to justify a restriction. Interestingly, in its judgment the ECJ did not refer to ECtHR jurisprudence, but to its own earlier decision. By contrast, the Advocate-General referred to ECHR jurisprudence, albeit not that on public servants. Rather, he focussed on the case law of the ECtHR as to whether abstract risks may justify a limitation on freedom of speech. Assessing the ECtHR's jurisprudence to allow both prior restrictions and hypothetical risks, the Advocate-General concluded that,

> '… the Convention acts as a lowest common denominator as to the substance of fundamental rights and that there is nothing to preclude the European Union,

[87] Case T-82/99 *Cwik* v. *Commission* [2000] ECR-SC-I-A-155, on appeal Case C-340/00P *Commission* v. *Cwic* [2003] ECR I-10269; Case T-76/03 *Meister* v. *OHIM*, CFI judgment 28 October 2004, on appeal to ECJ as Case C-12/05P.

[88] Case T-82/99 *Cwik* v. *Commission* on appeal Case C-340/00P *Commission* v. *Cwic*, *ibid*.

like the parties to the Convention, from providing itself with a higher level of protection'.[89]

Although the jurisprudence of the ECtHR does indeed allow prior restraints, it is usually only with great scrutiny. The jurisprudence referred to on hypothetical risk concerned the functioning of the judicial system, an area which the ECtHR has tended to treat with some sensitivity. Whether such an approach is right or wrong is one question, whether that approach can be generalized to other areas of policy is another. Using this case law as a comparison is therefore problematic, especially when case law involving public servants does exist. In *Vogt*, the question of risk to a democratic society was discussed, the risk being found unproven.[90] For these reasons, the assessment of the Advocate-General may be a trifle harsh.

Cwic is interesting for another reason. The difference between the approach of the ECJ and the CFI in this case is not marked, by stark contrast to the approach in *Connolly*. We can thus see the CFI's jurisprudence in this particular regard developing, though it must be emphasized that the development takes place within the context of Community case law rather than that of the ECHR.

Schmidberger[91] raised the question of how the conflict between EC Treaty free movement rights – here the free movement of goods protected by Article 28 – and freedom of expression can be resolved, an issue that has given rise to some comment already.[92] In previous cases involving public protest affecting the import and export of goods, freedom of expression was not discussed.[93] This case concerned a public protest about the impact of road transport on the environment, which resulted in the closure of the main trans-Alpine routes between Austria and Italy. Schmidberger brought an action against the Austrian state for failure to take action against the protest, which resulted in delays to intra-Community transport.[94] Following the approach of the Advocate-General, the ECJ found that there had been a restriction of inter-State trade, by the Austrian decision not to stop the protest, but that the decision of the Austrian authorities might be justified.[95] It also re-affirmed the point that national derogating measures must be compatible with human rights to comply with Community law. Although national authorities enjoyed a wide margin of

[89] Case C-340/00P *Commission* v. *Cwic*, *supra*. Opinion of the Advocate-General, para. 29.

[90] *Vogt*, *supra*, judgment paras. 59–60.

[91] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge* v. *Austria* [2003] ECR I-5659.

[92] See e.g. Barnard and Hare, 'The Right to Protest and the Right to Export: Police Discretion and the Free Movement of Goods' 60 *M.L.R.* (1997) 394; Butterman, 'European it Union: Free Movement of Goods versus Human Rights Protection' 21 *NQHR* (2003) 527.

[93] Case C-265/95 *Commission* v. *France* (*Angry Farmers)* [1997] ECR I-6959.

[94] Article 28 in conjunction with Article 10 EC requires Member States to take action to remove barriers to intra-Community trade: see Case C-265/95 *Angry Farmers*, *ibid*.

[95] *Schmidberger*, *supra*, para. 74, paras. 84–89.

discretion to assess whether a fair balance has been struck between the competing interests, the ECJ held that it must ensure any restriction;

> 'placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights'.[96]

In such a case, the motives of the protesters were not relevant: it was the motives of the member State that would be under review. Although Schmidberger's challenge to the Austrian decision did not succeed, one might question the value attributed to freedom of expression here. On the one hand proportionality is assessed against public interest objectives; nonetheless here it seems that freedom of expression is protected only indirectly.

Television arose again in the context of television advertising and the Television without Frontiers Directive (TWFD)[97] in *RTL*. Whereas in the previous broadcasting cases, Article 10 was used to justify member States' regulation, here it was used to challenge member States' regulation of advertising and to protect freedom of commercial speech. The questions referred concerned the interpretation on the rules relating to advertising frequency contained in Article 11 TWFD. RTL argued that the rules should be interpreted to allow broadcasters to insert more frequent commercial breaks during films made for television; there were no countervailing artistic rights in the film to set against the broadcaster's rights since the films were structured with advertising breaks in mind. The Advocate-General, in dealing with this argument, made two points. He commented first that he, 'was not convinced that the regulation of television advertising will necessarily and in all cases involve a restriction on the fundamental rights of broadcasters and producers to freedom of expression and artistic freedom', though this point was not developed; secondly, on the basis that such regulation did constitute an interference, it could be justified in the interests of viewers.[98] When considering whether the measure was proportionate, the Advocate-General did not address what the appropriate test of proportionality would be in this context.[99] In coming to the conclusion that the regulation was not disproportionate, the Advocate-General highlighted the margin of appreciation

[96] *Ibid*., para. 82.

[97] Council Directive 89/552/EEC as amended by 97/36/EC.

[98] Case C-245/01 *RTL Television GmbH* v. *Niedersächsische Landesmedienanstalten für privaten Rundfunk*, judgment 23 October 2003, Opinion, para. 38.

[99] *Ibid*., Opinion, paras. 52-3. Consider the relationship between proportionality and the margin of appreciation noted earlier, but contrast the opinion of the Advocate-General in the *Tobacco Advertising* case: *supra*.

allowed to states when regulating commercial speech and advertising in particular[100] by reference ECHR jurisprudence.[101]

Article 11 TWFD had been considered by the Advocate-General in the light of Article 10 ECHR previously, in *ProSieben*, but not in as much depth. In *ProSieben*, the ECJ dealt with the matter by referring to the main purpose of the TWFD; that is, the freedom to provide services, discounting the freedom of expression issues, despite the fact that the recitals do contain a reference to Article 10 ECHR.[102] Given the similarity of the subject matter between *ProSieben* and *RTL*, one might have thought that the ECJ would similarly disregard the freedom of expression issues in *RTL*. In *RTL*, however, the ECJ did refer to Article 10 ECHR, as well as to Article 11(2) of the Charter. In this *RTL* might be thought a progression on *ProSieben,* perhaps as a consequence of the introduction of the Charter. The ECJ concluded that the limitation on advertising 'may amount to a restriction on the freedom of expression' but 'appears, however, to be justified under Article 10(2) of the ECHR'.[103] The ECJ accepted the need to protect consumers and cultural policy objectives as falling within the scope of Article 10(2), presumably as the rights of others, a category of interest which the ECtHR has seen quite broadly. In identifying these aims, the ECJ referred to its own jurisprudence in the broadcasting field, rather than any ECHR cases, and did not appear to recognize that it had previously[104] seen cultural policy objectives as forming part of freedom of expression. The ECJ pointed out that broadcasters remained free to determine content, timing and length of advertising breaks, thus implying that the rules were proportionate; the right to advertise was not entirely extinguished.[105] As had the Advocate-General, the ECJ noted the margin of appreciation accruing in the commercial field to determine that the regulations were justified.[106] Nonetheless, the approach in this case broadly parallels that taken under the ECHR.

Lindqvist concerned the liability of a woman who included personal details of her co-workers on her web-page without their consent. *Linqvist* could be seen as being in a similar category to cases such as *RTL* and to a lesser extent *Karner*, in that it involves human rights arguments in the interpretation of Community secondary measures; here, the Data Protection Directive (DPD). The freedom of expression argument was used to suggest a narrow interpretation of the DPD, allowing greater freedom to make statements about other people and also to provide services. It is,

[100] *RTL*, *supra*, para. 54.

[101] *Casado Coca* v. *Spain,* ECHR judgment of 24 February 1994, Reports Series A No 285.

[102] Not all advertising cases have raised freedom of expression arguments: see e.g. Case C-322/01 *Deutscher Apothekerverband*, judgment 11 December 2003.

[103] *RTL*, *supra*, para. 68–69.

[104] See e.g. Case C-353/92 *Commission* v. *Netherlands* (Mediawet) [1991] ECR I-4069.

[105] Contrast the *Tobacco Advertising* case, *supra*; see also *Hertel supra*.

[106] *RTL*, *supra*, para. 73.

however, a case in which the right to a private life, protected by Article 8 ECHR and which the DPD aims to protect, weighed on the other side of the argument. Although the Advocate-General did not consider it necessary to consider freedom of expression, the ECJ did, constituting a reversal of the more usual position. The ECJ highlighted the level of rights protection in the EU, citing *Connolly*,[107] but then left it to the national court to balance the competing interests, always in the light of the principle of proportionality with its multiple meanings.[108] No further guidance to the referring court was given; there was certainly no detailed analysis of Article 10 or its case-law.

More recently in *Karner*,[109] Austrian rules which prohibited certain advertisements were challenged for their compatibility with the Misleading Advertising Directive,[110] as well as Articles 28 and 49 EC. The ECJ concluded that none of these provisions precluded the Austrian rules. The ECJ then considered freedom of expression. It re-emphasized the fact that the Community legal order protects human rights as recognized by the ECHR; it also noted that, following *Kremzow*,[111] the ECJ must, where the national legislation falls within the field of application of Community law, give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of the national legislation with human rights, something which as we have seen, it has not always done. The ECJ continued by paraphrasing the scope of Article 10 ECHR, citing Community cases,[112] and noted that the level of discretion enjoyed by national authorities varied depending on the circumstances. It held:

> '[w]hen the exercise of the freedom does not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising.'[113]

[107] *Connolly, supra*.

[108] Case C-101/01 *Lindqvist*, judgment 6 November 2003, [2004] 1 CMLR 20, para. 87.

[109] Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH* v. *Troostwijk GesmbH*, judgment 25 March 2004.

[110] Council Directive 84/450/EEC, OJ [1984] L 250/17, as amended by Directive 97/55/EC OJ [1997] L 290/18.

[111] Case C-299/95 *Kremzow* [1997] ECR I-2629.

[112] *Familiapress*, *supra*, Case C-60/00 *Carpenter* [2002] ECR I-6279, and *Schmidberger*, *supra*.

[113] *Karner*, *supra*, judgment para. 51, citing *RTL*, as well as *Markt Intern Verlag* and *Tierfabriken*, *supra*.

In concluding that the restrictions were proportionate, the ECJ seems to have adopted a different approach to the assessment of proportionality than that suggested by Advocate-General Jacobs in the context of judicial review actions.

Congres National du Kurdistan[114] is the first in a series of cases challenging Union (and Community) action,[115] some of which have yet to be decided.[116] As these have on the whole be declared as inadmissible, they should not form part of this review and indeed, no further factual detail will be given. It should be noted that they do raise questions as to the formal, rather than substantive, level of protection awarded to freedom of expression. A similar concern with the general status of rights, as well as their substantive scope can be seen in *Meister*.[117] This is another staff case. In this instance, Meister complained of his re-assignment, arguing that his assignment took place not for the reasons given but because of his objections to the re-organization of OHIM, which he expressed in a letter. The CFI decided the case, broadly in the Commission's favour. On the facts of the case, because an improper motive had not been found, the CFI did not a violation of Article 10. Meister appealed. Amongst other grounds, he has put forward the argument that the CFI made an error in law 'in failing to make a clear statement on the scope of the right to freedom of expression'.[118]

4. Themes and Comparison of Jurisprudence

In the Introduction, it was suggested that there are two ways of considering the equivalence of protection of human rights between the EU and ECHR: that of looking at protection generally considering the interrelationship between the two systems, as well as access to justice; and that focussing on specific substantive issues. Although this survey has focussed on one particular substantive area so as to address the second level of protection, it is impossible to avoid questions relating to more general issues too. In assessing the jurisprudence of the EU courts, then, this article will consider general issues before looking at the substantive scope and weight of freedom of expression within the EU legal order, as well as permitted derogations from freedom of expression. This analysis may allow us to see the

[114] Case T-206/02 *Congres National du Kurdistan* v. *Council of the European Union*, CFI, judgment 15 February 2005.

[115] Case T-310/03 R *Kreuzer Medien GmbH* v. *European Parliament and Council*, CFI judgment, 21 September 2004; Case T-321/02 *Vannieuwenhuyze-Morin* v. *European Parliament*, CFI judgment, 6 May 2003.

[116] Case T-327/03 *Stichting Al-Aqsa* v. *Council and Commission*; Case T-13/04 *Bonde et al*. v. *European Parliament and Council*; Case T-253/04 *Aydar and others* v. *Council*. There is also one preliminary ruling: Case C-479/04 *Laserdisken ApS* v. *Kulturministeriet*.

[117] Case T-76/03 *Meister* v. *OHIM*, *supra*.

[118] Case C-12/05, *supra*.

relationship between different values within the EU, which in turn may return us to general questions about the relationship of the EU to other systems of law, as well as the prior question of whether the EU should be regarded as protecting human rights.

Generally, human rights arguments seem now more common: in *Sacchi*,[119] an early broadcasting case concerning a state monopoly broadcaster, there was no mention of freedom of expression. By contrast, recent cases on broadcasting[120] show Article 10 being referred to regularly and sometimes by both sides to the dispute.[121] The EU courts, and in particular some Advocates-General, appear more comfortable referring to the case-law of the ECtHR as time has progressed. In *TV10*, the first case, although the ECJ's reasoning does not show much development from earlier broadcasting jurisprudence, the opinion of the Advocate-General indicates greater awareness of the scope of Article 10[122] and he specifically refers to the earlier failure to refer to specific ECHR decisions in the ECJ's jurisprudence. *Connolly* and, to some extent, *RTL*, which are both cases post-dating the proclamation of the Charter, contain more detailed analyses of the law. The impact of the Charter is, however, uncertain. *Lindqvist*, handed down less than two weeks after *RTL*, was a disappointing judgment in terms of its analysis of freedom of expression, leaving difficult questions to the national court. In *Cwic*, both courts relied on the judgment in *Connolly*, only the Advocate-General discussing the ECtHR jurisprudence. Any general statements as to changes in the EU courts' approach to protection of human rights must be subject to caveats.

The EU courts do not, however, always refer to the most relevant ECHR jurisprudence on the issue in question[123] and in some instances seem only to be making general statements about the existence and importance of freedom of expression. The early case of *TV10* is a case in point. Even post-Charter, in *de Coster*, the Advocate-General, rather than referring to cases such as *Groppera*, which deals specifically with the right to receive satellite services, quoted the *Sunday Times* case about the importance of the media in a democratic society. The role of the mass media was hardly the central issue in the case. As such, the freedom of expression arguments put forward by the Advocate General were not the most appropriate to

[119] Case 155/73 *Sacchi* [1974] ECR 409. Sacchi subsequently brought an action before the ECtHR unsuccessfully.

[120] The first broadcasting case in which Article 10 ECHR was mentioned was Case 352/85 *Bond van Adverteerders* [1988] ECR 2085 although the ECJ did not address the issue, dealing with the basis of Article 49 EC.

[121] *Familiapress*, *supra*; *Lindqvist*, *supra*.

[122] Contrast the earlier Case C-288/89 *Stichting Collective Antennevoorziehing Gouda* v. *Commisaariat voor de Media* [1991] ECR I-4007 and Case C-260/89 *Elliniki Radiophonia Tileorassi AE* (ERT) v. *Dimotiki Etairia Plirofissis* (DEP) [1991] ECR I-2925, but note that in Case C-159/90 *SPUC* v. *Grogan* [1991] ECR I-4685, the Advocate-General did discuss Article 10 in some detail.

[123] See e.g. Case C-17/00 *de Coster* [2001] ECR I-9445; CFI in *Connolly*; Advocate-General in *Cwic*, *supra*.

the decision, nor were they particularly well elaborated. Such an approach hardly indicates that the rights based arguments are being addressed in a particularly thorough manner. The mere reference by the EU courts to a decision of the ECtHR is not itself sufficient to show a similar level of protection between the two systems. A similar problem can be identified in *Familiapress*: the ECJ referred to one ECHR case, *Lentia*,[124] and it did not review all relevant cases.

One might argue that, as the ECJ is ruling on Community law, it is under no obligation to consider the rulings of a court in an entirely different system. Conversely, the ECHR has inspired the European Union's system of human rights protection and the surest way to avoid discrepancies between the two is to refer to the relevant judgments of the ECtHR. This may partly be the result of the courts' collegiate approach to judicial drafting. Nonetheless, the EU courts may be criticized for failing to give a detailed analysis of the relevant issues where human rights issues arise and for sometimes avoiding dealing with the human rights arguments entirely. These two points raise slightly different concerns.

If the EU courts do address the human rights issues, there are a number of pitfalls. First, the relevant court may accept that a human right is in issue, but not refer specifically to the ECHR and the decisions thereon. Although such a failure does not necessarily mean that the level of protection is lower than under the ECHR, there is certainly a risk of a divergent approach as the ECJ or CFI develops Union standards, designed for and developed by the EU courts in a trade-based context. The development of a Union standard can be seen for example in the CFI's approach in *Connolly* and *RTL*, although it must be noted that *RTL* is unusual for the rigour of its analysis and the fact that it specifically referred to the Charter. If the EU courts refer to inappropriate case law, again the danger of inconsistent ruling arises. Further, once introduced into the Community *acquis*, it could be difficult to eradicate the divergence, especially if EU courts continue to refer, as the ECJ did in *RTL, Karner* and *Cwic*, to 'Union' rulings, rather than Strasbourg cases. Similarly, the analysis of the Advocate-General in *Karner* relies heavily on the Opinion in the *Tobacco Advertising Directive* case, perhaps because it constituted one of the few, thorough considerations of ECtHR decisions and the issue of proportionality in EC case-law. The issue may have repercussions for the relationship between the EU courts and ECtHR. In *Bosphorus Airways*, the ECtHR held that EC law can be considered equivalent to ECHR, unless 'manifestly deficient'.[125] The majority did not discuss what was meant by this term, but Judge Ress suggested that this test would require the EU courts to follow ECtHR established principles and 'be under an obligation to consider whether there was already an interpretation or an application of the Convention which was already the subject of ECHR case law'. This approach suggests that the original ECHR case law itself should be used, as otherwise it might be difficult to identify the precise scope of a right, especially in

[124] *Lentia*, *supra*.

[125] *Bosphorus Airways* para. 156.

circumstances where the ECHR view of a particular right has been developed at the level of principle and as regards practical application.

Secondly, problems may also arise where the human rights aspect is not expressly addressed, addressed only by the Advocate-General, or dismissed summarily. As noted, the lack of express reference to the decisions of the ECtHR does not necessarily mean that the standards are lower. Indeed one might argue that the EU courts are seeking to integrate human rights issues into the substantive Community law, whether as a limitation of a Treaty provision[126] or by defining its scope.[127] On this basis, Union standards would be ECHR standards under a different name.[128] As has been noted, it would be simplistic to suggest that Union law is concerned only with trade issues.[129] Nonetheless, there are problems with this argument.

Although in some cases freedom of expression and Treaty freedoms might point to the same conclusion, for example in the case of cross-order advertising, the analysis is rarely that simple. An approach in which human rights issues are not directly addressed hardly indicates that protection of human rights is as a matter of principle given a high priority. Even where they are addressed, if rights arguments are seen as just one argument out of many, rights protection may not be given the weight it deserves whether this be in terms of the reasoning used or, and as a possible consequence, in terms of outcome. In *Montecatini*, for example, it is somewhat worrying that the ECJ did not consider whether there might have been a *prima facie* interference with the rights in issue, but one that was justified under Articles 10(2) and 11(2). Following the ECJ's reasoning, which seemingly limits the protection awarded by Article 10 ECHR to legal activities, in other contexts could allow authorities to stifle dissent by making the expressions expressed illegal. This sort of reasoning underpinned the CFI's approach in *Connolly*. Further, in a number of the broadcasting cases, such as *ProSieben*, *TV10* and *de Coster*, the decision was framed in terms of Article 49 and the freedom to provide services, even where the Advocate-General had considered the human rights-based argument.[130] Sometimes the public interest (freedom of expression) was outweighed by the

[126] Contrast reasoning in Case C-368/95 *Vereinigte Familiapress*, *supra*, with the earlier cases of Cases 60 and 61/84 *Cinetheque SA* v. *Federation Nationale de Cinemas Francaises* [1985] ECR 2605 regarding competence to review national legislation for compliance with human rights requirements.

[127] See by analogy Case C-379/98 *PreussenElektra AG* v. *Schleswag AG* [2001] ECR I-2099, discussed further below.

[128] Judge Ress in his Concurring Opinion in *Bosphorus Airways*, *supra*, seems to recognise this possibility, para. 2.

[129] Weatherill, S., 'The Internal Market' in Peers, S., and Ward, A., (eds) *The EU Charter of Fundamental Rights: Politics, Law and Policy* (Hart Publishing, Oxford, 2004).

[130] See *de Coster, supra*; see also *Tobacco Advertising Directive* case, *supra*.

economic freedom.[131] Often freedom of expression arguments occur as a limitation on the economic freedom (or on both sides of the argument), making it difficult to suggest that all aspects of freedom of expression are adequately protected by an analysis of the economic freedom. Even if it is likely that the same conclusion would be reached on each approach, it is hard to know that this is a 'rights-friendly' outcome without going into a human rights based analysis.[132] It should be noted, however, that in these cases the Advocate-General and court have not differed in their ultimate conclusions.

The cases so far have concerned a discussion of the merits; a prior problem concerns jurisdiction of the courts. There are two problems. The first is where the substance of the argument is held not to fall within the EU courts' jurisdiction. The classic example of this was *Grogan* in which the ECJ did not discuss freedom of expression because the elements of a service for the purposes of Article 49 EC were not satisfied. This decision was heavily criticized; it seems to have been a limited approach to the determination of a 'service' which has not re-occurred, although it should be noted that will always be limits to the EU courts' competence, as with any court.[133] The other major problem is that of standing and in this we can see a clear difference in the position of individuals under the preliminary rulings procedure (Article 234)[134] and those seeking judicial review of a Community act (Article 230). The most recent collection of judicial review cases, noted in brief, show how difficult it is for non-privileged applications to show *locus standi*; indeed the EU courts have been criticized for taking an overly restrictive approach to this issue.[135] Individuals' substantive arguments of whatever nature are not as a consequence considered, potentially leaving rights ill-protected. It has been suggested that the courts' approach to *locus standi* is part of a general unwillingness to accept challenges to Community actions: the differences between the different types of jurisdiction exercised by the EU courts in relation to the value ascribed to freedom of expression is discussed further below.

[131] Arguably this is the result in *Familiapress, supra*. Certainly this is the case in a number of broadcasting cases not discussed in this review either because they are too old, such as *Mediawet*, *supra*, or because they did not directly refer to freedom of expression although cultural policy issues were engaged: see e.g. Case C-11/95 *Commission* v. *Belgium* [1996] ECR I-4115; Case C-211/91 *Commission* v. *Belgium* [1992] ECR I-6757; see in a different context the same point being made: Case T-266/97 *Vlaamse Televisie Maatschappij NV* v. *Commission* [1999] ECR II-2329.

[132] This is particularly striking in the case of *TV10* in which the Advocate-General identified relevant ECtHR jurisprudence which was not discussed at all by the ECJ.

[133] In respect of the ECtHR see e.g. *Segi and Gestoras Pro-Amnistia* v. *Fifteen Member States*, application 6422/02 and 9916/02, ECHR 2002-V.

[134] On the adequacy of Article 234 EC, note that it is the competent court which makes the references; the matter is not in the control of the parties.

[135] Contrast views of CFI, Advocate-General and ECJ in *Jego Quere & Cie* v. *Commission* [2002] ECR II-2365 (CFI); on appeal Case C-263/02P, [2004] ECR I-3425 (ECJ) and Case C-50/00P *Union de Pequenos Agricultores* v. *Council* [2002] ECR I-6677.

Another general question is whether the differences in approach, as illustrated by the Opinion in *Tobacco Advertising, RTL* and *Karner* on the issue of proportionality, can be categorized by the type of case in which the issues arise. Objective differences in the role of the courts can be seen depending on whether a preliminary ruling, enforcement action or judicial review case in issue. To a certain extent responsibility for the protection of rights in preliminary reference cases must be divided between the national courts and ECJ which might explain some differences. In *Familiapress*, for example, the ECJ seems vague about the scope of Article 10, leaving the national courts to deal with the issue.[136] The same problem seems not to have arisen in other preliminary reference cases, however, irrespective of their age.[137] One might question in such cases where the national court is given vague guidance, whether the ECJ can be said to be protecting the rights rather than devolving responsibility for their protection on the national court. Other difficulties occur irrespective of the type of jurisdiction.

A linked question is whether the EU courts give greater attention to human rights claims when they seek to limit member States' actions or extend Community competence. The EU courts have been reluctant to accept freedom of expression arguments as justifying restriction of Treaty freedoms, *TV10* and *Schmidberger*[138] being the only examples.[139] *TV10* is a case in which the company benefiting from the freedom to provide services was using EC law to evade national regulation and, as such, might be deemed to fall within a different stream of jurisprudence, that relating to anti-avoidance of national law.[140] *Schmidberger* is also unusual, as it does not involve a direct infringement by State action but liability arising from State inaction, and might therefore be seen as involving a weaker type of trade right. In other cases in which member States have tried to use freedom of expression to justify a limitation on a Treaty provision, the ECJ although accepting the principle has been less open to national rules in practice, often directly suggesting that they were disproportionate.

So far, the cases identified have been located in a simple trade versus freedom of expression context. Freedom of expression does not always operate in this way. In *Familiapress*, for example, the impact of the rights based argument was less clear-cut as it was used, in different versions, by both sides to the dispute; that is, it could operate to support the economic right as well as to restrict it. There the ECJ gave little guidance to the national court as to what factors it should take

[136] See also *Lindqvist*, *supra*.

[137] *Mediawet*, although outside the scope of this review; *Karner, supra*.

[138] *Schmidberger*, *supra*.

[139] The advertising cases have tended to involve harmonising measures and may therefore be considered a different category, as discussed further below.

[140] Rehberg, '*Inspire Art* – freedom of establishment for companies in Europe between "abuse" and national regulatory concerns' 1 *EU LF* (2004) 1; Hansen 'The Development of the Circumvention principle in the Area of Broadcasting' 25 *LIEI* (1998/2) 111.

into account in determining the scope of Article 10, although the ECJ did suggest the rule was disproportionate in its impact on the economic freedoms. A similar approach can be seen in *Lindqvist*, in which two fundamental rights, freedom of expression and the right to privacy, were in issue on different sides of the case and in which it was left to the national court, with little help from the ECJ, to determine whether the national rules in issue were proportionate.[141] The lack of direction might also give rise to an increased risk of the resulting decision of the national court being inconsistent with the ECtHR's rulings and would seem to run contrary to the requirement in *Kremzow*, to which the ECJ has expressly alluded in other decisions.[142] At any rate, the responsibility for reconciling tensions would fall to the national court.

RTL is an example of another type of case; that where Community legislation is in issue.[143] Unlike *Lindqvist*, the freedom of expression argument is used to try to limit member States' freedom to take action. Arguably, freedom of expression in such circumstances would be likely to receive such support. The ECJ accepted that the measures were proportionate despite the fact that the measures imposed limitations on the right to provide services, or the free movement of goods, as well as on freedom of expression. Note, however, that irrespective of questions about the type of speech in issue, the regulation introduced by the Member State has already been approved through Community action – the member States in these cases are implementing the Community policy. From this it seems that freedom of expression arguments will be unlikely to be successful when they are used to justify derogating from a Treaty freedom or to undermine a harmonized standard: in both instances Community policy is hard to outweigh on non-trade grounds.[144] The ECJ will be much more cautious, irrespective of whether a Treaty provision or harmonizing measure is in issue, when human rights arguments are put forward by both sides; in the relevant preliminary reference cases it has, indeed, avoided coming to clear conclusions on the matter. One might suggest that in such complex situations, the ECJ will seek to deal with the questions by traditional EC principles,[145] as it did in *Familiapress*, where the clearest direction to the national court is based on a two-prong proportionality test focussing on the impact on trade, or by leaving it to the referring court, as it did in *Lindqvist*.

[141] The ECJ has been equally forthright regarding disproportionality in a number of cases regarding broadcasting regulation, not included either because of their age (*Mediawet*) or because they are dealt with as cultural policy without considering issues of freedom of expression – see cases noted *supra*.

[142] Most recently, *Karner, supra*.

[143] See also *Karner*, *supra*.

[144] Note that the one case where a directive was successfully challenged, the ECJ based its decision on Treaty base rather than freedom of expression: see *Tobacco Advertising Directive* case, *supra*.

[145] In this there might be similarities with the ECJ's attempts to sidestep difficult issues in *Grogan, supra*.

As regards challenges to Community action, although some claims have been upheld, this has not been on human rights grounds.[146] In two of the three cases in which the freedom of expression point has been directly addressed by the EU courts, *Connolly* and *Montecatini*, the challenges were unsuccessful; *Cwic* being the exception. Although there might be a temptation to try to develop these cases into generalizations, suggesting that there is no successful example of a freedom of expression-based challenge to Community action, the problem is that there are so few cases where the ECJ actually addresses the issue directly. It is dangerous to draw firm conclusions based on such little evidence.

Moving on to look at the substance of freedom of expression, there are a number of cases in which the EU courts have considered Article 10 and relevant Strasbourg jurisprudence. In most instances, the EU courts have not expressly considered the scope of freedom of expression; perhaps because the cases fall centrally within its normally accepted scope. Certainly, the ECJ has not expressly excluded categories of expression. On this basis, ignoring *Montecatini* the reasoning of which is unclear, the EU courts' approach to freedom of expression is broad, reflecting the approach of the ECtHR. Indeed, in some of the broadcasting cases and *Familiapress*, the ECJ has suggested that licensing is necessary to create freedom of expression.[147] The reasoning behind this is that broadcasting regulation based solely on the market place of ideas drowns out the weaker groups.[148] On this view, the scope of Article 10 as protected by the ECJ is broader than that as seen by the ECtHR.[149] The ECtHR seems to view broadcasting licences as restrictions on freedom of expression, albeit restrictions that are usually justified. The position is, however, less clear: in some cases cultural policy and issues of broadcasting diversity have been detached from questions relating to freedom of expression. Moreover in *RTL,* the ECJ considered advertising regulations to be justified restrictions.[150] Given the different approaches to the scope of freedom of expression, it is ironic that the ECtHR allows States in practice greater freedom to regulate the broadcast media than the ECJ. It seems that there is a certain margin of appreciation in the

[146] In the *Tobacco Advertising* case, *supra*, for example, the ECJ ruled against the institutions and limited Community competence though not on the basis of freedom of expression.

[147] Contrast earlier views, Commission *Green Paper*, *supra*.

[148] See e.g. Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' *Duke Law Journal* (1984) 1. Another consideration might be that companies do not enjoy 'full' rights to freedom of expression that are based on personal development, but instead enjoy only instrumental rights that should be exercised in the interests of democracy.

[149] Another difference might arise in relation to the question of whether freedom of expression implies the right to information; see e.g. *Hautala*, *supra*.

[150] *RTL*, *supra*; contrast views of Advocate-General.

assessment of licensing regimes[151] not apparent in the services jurisprudence.[152] We might go further: the freedom of information cases may indicate another area in which the EU position is broader than that of the ECtHR and reminds us that the EU is not limited to the rights protected by the ECHR.[153] Indeed the Charter, which the first of these cases pre-dated, also provides such a right and includes many socio-economic rights not incorporated in the ECHR.

A couple of further points relating to the scope of the right might be noted. The EU courts have never analyzed the relationship of freedom of expression to linked rights, such as freedom of association.[154] This might be a lawyers' point, given the similarity of the derogation provisions, rather than an issue impeding individuals' ability to exercise their rights. A lack of analysis can similarly be seen regarding the nature of the beneficiaries of the right; the EU courts have considered freedom of expression in the context of companies as well as individuals. This would indicate a similarity of approach between the Strasbourg and Luxembourg courts in relation to the scope of Article 10(1).

More worrying is the fact that the EU courts do not seem to appreciate the distinction between different types of speech within Article 10 ECHR.[155] In *Schmidberger* the fact that political speech was in issue was an irrelevance, the key factor was the motive of the member State. A similar disregard for the nature of speech can be seen in *Connolly*, especially in the views of the CFI. In some, but not all, recent advertising cases,[156] the ECJ has paid more attention to the commercial nature of the speech. Might we think it worrying that the EU courts have considered types of speech only when it operates to lower levels of protection to the speaker? One might suggest that this approach arises out of the fact that, to fall within Community law in the first place, some sort of commercial element is required and that therefore all Community cases concerned commercial speech. Two comments may be made

[151] See e.g. *United Christian Broadcasters, supra*.

[152] *Mediawet*; this is apparent in the other cases concerning cultural policy and broadcasting regulation, *supra*.

[153] Note that the ECtHR also has recourse to what is common in the signatory states, this is often in terms of determining appropriate restrictions and the margin of appreciation.

[154] See e.g. *Schmidberger*, *supra*.

[155] Interestingly, in the *Tobacco Advertising* case, *supra*, the Advocate-General, as an exception to the general rule, noted:

> 'personal rights are recognised as being fundamental in character, not merely because of their instrumental, social functions, but also because they are necessary for the autonomy, dignity and personal development of individuals. Thus, individuals' freedom to promote commercial activities derives not only from their right to engage in economic activities and the general commitment, in the Community context, to a market economy based upon free competition, but also from their inherent entitlement as human beings freely to express and receive views on *any* topic, including the merits of the goods and the services which they market or purchase.'

[156] Contrast *RTL* and *Karner, supra*.

in response to this argument. The ECtHR has been criticized for not looking into whether so-called commercial speech may in fact be speech on a matter of public interest; nonetheless, that Court has accepted that speech made in a commercial context may still be political speech. Newspapers, for example, are commercial entities. They have, however, been recognized by the ECtHR as being essential to the functioning of democracy and any restrictions on freedom of expression will be subject to close scrutiny. On this basis, one might have political speech within the Community even if, for Community law to apply, it must have some commercial context.[157] Secondly, one case in which the CFI and ECJ discussed the margin of appreciation, *Connolly*, which involved the duties of a civil servant is hardly the most commercial of contexts. The argument is therefore not convincing.

More problems arise at a number of levels. The first is a general problem, relating to the relationship between the two legal orders. This is an issue that has been raised before, but is still significant: what weight does freedom of expression carry in relation to the four freedoms and other economic rights contained in the EC Treaty? One question is whether Treaty freedoms be considered 'rights of others' within the context of Article 10(2), are the restrictions they impose on freedom of expression proportionate? Despite the arguably wide scope of this phrase under the Convention jurisprudence, the EU courts have not addressed this point. More generally, although some recent cases take a human rights-friendly view, in much of the jurisprudence, including the case of *Karner*,[158] the question has been whether fundamental rights affect trade freedoms. A number of points could be made. It means the balancing of competing interests does not take place within a human rights framework, which the '"rights of others" approach' would permit. Further, raising the question this way prioritizes trade freedoms over fundamental rights, which might well affect the final determination of the case, especially where. proportionality has been judged by reference to the measure's impact on trade. Although this has been much criticized, given the EU courts are formed by the EU framework, the choice is hardly surprising.

The EU courts have not adopted a consistent position as to how they view fundamental rights in general.[159] Are they derogations (and implicitly then in the province of the Member States) or more general principles affecting the interpretation of the Treaty and thus forming a real part of the Community legal order? If we discount the suggestion discussed above that the blurring of the boundary between the 'Strasbourg method' and that of the economic freedoms constitutes an attempt to incorporate ECHR standards into substantive Community law, many cases suggest that arguments concerning human rights should be seen as a derogation from Treaty freedoms. Two cases run counter to this trend: *Schmidberger* and *Karner*.

[157] See e.g. *Schmidberge*, *Montecatini*, *supra*.

[158] *Karner*, *supra*, para. 82.

[159] See *Mediawet*, *Familiapress,* and contrast *Schmidberger*, *supra*.

The ECJ's decision in *Schmidberger* is curious. It did not equate the fundamental freedoms with the specific Treaty derogation found in Article 30 or with the mandatory requirements. Can one argue that the ECJ has seen human rights as some form of horizontal, general limitation (albeit one still subject to proportionality test) justifying Member State action, or that human rights operate to affect the definition of the scope of free movement rights at an earlier stage in the analysis, that is the determination of whether there is a restriction in the first place? The ECJ has taken such an interpretive approach in relation to protection of the environment in one case: *PreussenElektra*.[160] There it considered the reasons for the national measure, environmental protection, and concluded in the light of those aims that the national measure did not constitute a restriction on free movement, rather than finding a restriction and then seeking to justify it. In doing so, the ECJ noted the importance of environmental protection both within the EU and in international law. This is significant because such an approach indicates that environmental protection considerations shape trade-freedoms rather than being seen as a limited exception to them. Given the Union is founded on respect for the ECHR, one might have thought that such an approach could also be justified here.

Schmidberger might be open to interpretation on this point, but *Karner* makes an important departure. In *Karner*, freedom of expression was considered as a free-standing issue, and not limited to the context of derogating from a Treaty freedom. The ECJ held that neither Article 28 nor 49 precluded the rules; derogation is not therefore an issue. Nonetheless, the ECJ discussed freedom of expression because the case fell within the scope of Community law. Although this introduces another limitation on Member States' freedom to act when specific provisions of Community law do not preclude the relevant provisions, it is not an extension of Community competence. The *Karner* approach could suggest that human rights might constitute a more general part of the fabric of the Union legal order. As yet, however, it is an isolated case.

Despite this possible improvement in the status of human rights arguments, and freedom of expression in particular, within the Union legal order, other problems remain. There are discrepancies between the interpretation of the three-stage test in Article 10(2) adopted by the EU courts and the ECtHR. Although the EU courts have addressed proportionality, there has been little consideration of lawfulness, though in most cases this requirement is likely to have been satisfied. In a number of instances, notably the judicial review cases but also in *RTL* and, despite the opinion of the Advocate-General, in *Karner*, the EU courts have suggested that a measure which is 'reasonable' is acceptable from the perspective of Article 10(2). This is particularly worrying as *RTL* and *Karner* are recent cases. The ECtHR, however, has specifically stated that the test is not one of reasonableness.[161] Part of the problem is the EU courts' differing approach to questions of proportionality

[160] Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paras. 72-81.

[161] See *Handyside*, *supra*.

even when the cases concern only EC law;[162] the difference in approach seems to have bled into cases concerning human rights. It might be mitigated were the EU courts to refer to ECHR cases, rather than Community cases on proportionality, illustrating again the difficulties arising from blurring of the two systems.

The weak notion of proportionality can be linked to the 'margin of appreciation'. Worryingly, the ECJ seems to feel that States will have a wide margin of appreciation irrespective of the type of speech in issue. We have already noted the weaknesses in the EU courts' approach to different types of speech. Conversely, the ECtHR has distinguished between types of speech and allowed States a broader margin of appreciation where commercial speech is concerned and rather less where political speech is an issue. This would suggest that the case-law of the EU courts and that of the ECtHR diverges, with the EU courts giving lower protection to political speech than the Strasbourg court does. One final point concerning the margin of appreciation is that the ECtHR has justified its use on the basis that the national authorities are often in the best position to assess the appropriate response in a given situation. Although this reasoning can be transferred to preliminary rulings and enforcement actions, it is less appropriate to staff cases and other judicial review actions. This throws further doubt on the acceptability of the wide margin of appreciation claimed in *Connolly*.

5. Conclusions

There are two aspects to freedom of expression: the scope of the right, and the weight attached to the right. Those aspects can be considered from the perspective of the European Union's internal consistency and then the consistency of the rulings of the EU courts with those of the ECtHR. From the foregoing analysis, it would seem that the scope of freedom of expression has given rise to little difficulty, the ECJ in particular has defined the right broadly. In terms of comparison with the ECtHR, the scope of protection is at least as extensive as that granted by that court and is, arguably, broader. The difficulty starts when we consider the weight attached to freedom of expression, especially when that right conflicts with free movement or other economic rights.

On a positive note, the jurisprudence of the ECJ shows increased exposure to freedom of expression arguments, and in some cases, greater sophistication in the analysis of the rights to be weighed against it. Some EU judgments have been criticized for the way they approach human rights in general, seeing the rights as forming part of the derogation from the Treaty freedoms; and, as a corollary, the EU courts' approach to proportionality. The consistency of the ECJ's approach to these issues may be breaking down. Although some cases still view human

[162] Tridimas, T., 'Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny' in Ellis, E., (ed) *supra*, p. 66.

rights as derogating principles, in more recent cases they have also been seen as countervailing rights to be balanced against economic freedoms.

There also seems to be uncertainty as to whether cases involving human rights arguments should be analyzed within the framework of Community *acquis* or by drawing directly on the decisions of the ECtHR. Although such inconsistency leads to some legal uncertainty, it may also reflect a general, albeit uneven, development of the EU courts' jurisprudence in this area, a development which in general terms seems to be moving towards a greater degree of interest in the human rights arguments. This last point should not be overstated: in addition to inconsistencies between the EU courts' own decisions, there are discrepancies between the approach of the EU courts and that of the ECtHR. It has been noted that the courts have not always been clear as to whether they should refer directly to ECHR standards and jurisprudence. Although mere references to decisions do not in themselves guarantee adequate protection, there is a greater likelihood of inadequate protection being awarded to freedom expression when the discussion is framed entirely within the EU context, given its long history as a trade-based organization.

Thus, although the EU courts, and particularly the ECJ, seem to be trying hard to reconcile their judgments with ECHR requirements, one might question the degree to which it is possible for them consistently to provide appropriate protection in a system which was designed originally to ensure free trade between the various signatory states. All this suggests that the member States should think carefully about the judicial protection of human rights within the EU and more particularly about the relationship between the EU courts and the ECtHR. From the European Constitution which introduced the possibility of the European Union's accession to the ECHR, it may be that some solution, such as a reference or appeal system, will be finally introduced. Until that time no doubt controversy will continue about the real level of protection provided by the EU courts. One final point seems clear from this survey: it is not possible to make 'big' statements about the EU courts' approach. Whilst it is not possible to suggest that the EU courts are abusing human rights arguments to further Community competence, neither can it be said that they are consistent either within their own jurisprudence or with that of the ECtHR.