**A Tale of Two Europes: Fundamental Rights in the Constitutional Order of the European Union**

**Thesis Submitted for the Degree of Doctor of Philosophy**

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# Abbreviations

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
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| |  |  | | --- | --- | | ACTA | Anti-Counterfeiting Trade Agreement | | AGS | Annual Growth Survey | | CRPD | Convention on Rights of Persons with Disabilities | | CSR | County-specific Recommendation | | DDPPC | Directive on Data Protection in Police and Crime | | DG | Directorate General | | DPD | Data Protection Directive | | DRD | Data Retention Directive | | ECJ | European Court of Justice | | ECSR | European Committee of Social Rights | | EDP | Excessive Deficit Procedure | | EDRi | European Digital Rights | | EFSF | European Financial Stability Facility | | ERDF | European Regional Development Funds | | ESC | European Social Charter | | ESF | European Social Fund | | ESFM | European Financial Stability Mechanism | | ESM | European Stability Mechanism | | EU | European Union | | GDPR | General Data Protection Regulation | | LI | Liberal Intergovernmentalism | | LIBE | Civil Liberties, Justice, and Home Affairs | | MIP | Macroeconomic Imbalance Procedure | | NGO | Non-Governmental Organisation | | OMC | Open Method of Coordination | | QMV | Qualified Majority Voting | | TEC | Treaty on the European Community | | TEU | Treaty on the European Union | | TFEU | Treaty on the Functioning of the European Union | | UK | United Kingdom | | UN | United Nations | |  |

# Abstract

With the entry into force of the Treaty of Lisbon at the end of 2009, fundamental rights have taken on a more prominent constitutional role in the European Union (EU), marking the culmination of decades of rights-based developments. Most notably, the Charter of Fundamental Rights, a charter which contains both civil and social rights side-by-side, was ostensibly granted legal value equal to that of the treaties. Yet historically EU integration has been premised on an economic constitution based around liberal economic principles. Furthermore, across Europe there is a variety of different approaches to rights issues. The question must be asked, then, what role do fundamental rights actually play in the EU today? This analysis is informed by a critical constructivist framework which emphasises that it is the way in which fundamental rights have been constructed that affects the role of rights and how this process of construction is influenced by the institutional framework and presence of dominant economic paradigms in the EU. It is argued that fundamental rights are primarily understood as civil rights of equal value to liberal economic principles and applicable only where the ECJ has jurisdiction. Social rights have been afforded a secondary status and the scope of rights has not extended to the political institutions of the EU when acting outside of the jurisdiction of the ECJ, namely in the context of the governance of the Eurozone. This has constrained the ability of rights developments to contribute towards a European constitutional order that adequately balances competing civil, social, and economic concerns. The argument is developed in two stages. First, the historical development of rights up until the watershed moment of the Charter of Fundamental Rights gaining legal value is analysed. Second, three case studies analysing the political application of civil, social, and equality rights are examined to draw out the implications of how rights are understood.

# Introduction

In December 2009 the Treaty of Lisbon entered into force and brought with it the Charter of Fundamental Rights. The adoption of a legally binding charter of rights marks the culmination of about 40 years of *ad hoc* rights developments in the European Union (EU). The Charter of Fundamental Rights had actually been drafted about 10 years prior. It was solemnly proclaimed by the European Commission, the Council of the European Union, and the European Parliament in Nice in 2000. It was solemnly proclaimed a second time in 2007 after having been amended slightly. To mark the occasion of the Charter achieving legal value, the European Commission swore an oath pledging to respect the Charter of Fundamental Rights in front of the European Court of Justice in 2010. One of the reasons for this saga of solemn declarations and oath swearing was that the Charter was actually meant to be integrated into the Constitutional Treaty, but had to be reconsidered after the rejection of that treaty by French and Dutch voters in 2005. The very name of the Constitutional Treaty indicates the ambitions many had for it: to create a state-like constitutional foundation for the EU. Indeed, fundamental rights are commonly found in national constitutions and tend to be associated with statehood. As it happened, the rejection of the Constitutional Treaty was a minor obstacle. Its provisions, the Charter of Fundamental Rights included, were more or less implemented anyway by the Treaty of Lisbon, albeit in a less grandiose manner. Some of the more overt references to constitutionalism may have been dropped, but the intention remained. The Charter of Fundamental Rights, along with a few other provisions of the Treaty of Lisbon, must be viewed in the context of attempts to achieve a turning point in European integration: to secure a European-style constitutional order that adequately balances civil, social, and economic values. The Charter itself contains both social and civil rights and the Treaty of Lisbon contains a new provision committing the EU to a social market economy. It is the first catalogue of fundamental rights unique to the EU and is targeted at the institutions of the EU and member states when implementing EU law. The Commission has subsequently launched a strategy to ensure the EU is exemplary in the field of rights by implementing the Charter in all of its political activities.

These recent fundamental rights developments therefore raise the question: what role do rights actually play in the EU today? In particular, there are two aspects of the role of rights in the EU that require attention: the relationship between rights and economic principles in the EU and how rights are understood in the EU. These aspects represent two different faces of Europe. On the one hand, there is the predominately economic nature of European integration in the EU and, on the other, the development of rights-based constitutional orders that proliferated in the aftermath of World War II.

How are rights to be understood in relation to other principles that have underpinned European integration? The history of the EU has been dominated by economic integration in the single market and Economic and Monetary Union (EMU). This is a particularly important question as the EU has often been described as having an economic constitution in recognition that integration has predominately progressed along economic lines. From the outset, market integration has been particularly prominent and has given rise to the four fundamental freedoms of the single market. Already a significant amount of scholarship has sought to determine the legal relationship between fundamental economic freedoms and fundamental rights, as this is an area that has been subject to numerous cases before the European Court of Justice (ECJ). More recently, integration under EMU has taken centre stage. The economic principles underpinning EMU have themselves been described as constitutional, owing to the degree to which they have become embedded in the legal framework of the EU. Furthermore, the recent Eurozone crisis has seen the development of entirely new and novel forms of integration that are premised on executive decision-making. The prominence of economic principles as part of European integration has resulted in a unique problem for the EU. As the treaties have attained a legal status superior to that of national laws and constitutions, economic principles have in effect become constitutionalised -- or at the very least elevated to a legal status not commonly seen in any domestic constitutional order. How these economic principles are understood, especially when it comes to their relationship with fundamental rights, raises a number of issues. This situation does not necessarily mean that economic principles are prioritised over other values, such as fundamental rights, though the tensions arising out of this legal arrangement have been common in the history of the EU. Historically, the limitations of the competence of the EU have meant that the scope for conflict between rights and economic principles has been small. Today, this is no longer the case. In both the single market and EMU, the past ten years or so have seen significant clashes between fundamental rights and economic principles. The Treaty of Lisbon would appear to put fundamental rights on the same footing as these economic principles that have underpinned integration for so many decades. As the Charter of Fundamental Rights does contain social rights, it is possible that recent fundamental rights developments could contribute to a more state-like, constitutionally balanced European order wherein economic and social values are afforded equal weight.

How are rights actually understood in the context of the broader approach to rights in Europe? Look across Europe today and it is evident that there are numerous different ways in which rights are understood. Not only are there different rights institutions under the Council of Europe, every EU member state has its own constitutional arrangement regarding fundamental rights. Historically, rights are associated with political upheavals, from the *Magna Carta* and the Charter of the Forest in medieval England to the Declaration of the Rights of Man and of the Citizen in revolutionary France to the Universal Declaration of Human Rights in the aftermath of the Second World War. The history of each European state has affected how rights feature in their political arrangements. For example, the French revolution and subsequent declaration of rights play a more prominent role in France, whilst the German and Italian experiences with fascism shaped their post-war constitutional orders. The absence of a bourgeois revolution or experience with fascism has impacted on the UK, where there is no written constitution and was no clear domestic source of rights until the Human Rights Act in 1998. In addition to a spatial variation in how rights are understood across different states, rights have also developed over time. The case-law of courts has continuously developed how rights are protected in different states. For example, even if the UK were to repeal the Human Rights Act, many of its rights would remain in common law and therefore remain applicable in domestic law. The state of rights in the legal order of the UK is different today than when the Human Rights Act was first implemented. Furthermore, changes in circumstances, such as societal attitudes and technological advancements, have led to the development of new rights and new mechanisms to promote and defend rights. The Charter of Fundamental Rights contains a new right to the protection of personal data, something felt to be necessary in an era of ubiquitous information flows over the internet. The last 20 years have the seen the development of statutory bodies tasked with various powers to ensure rights are respected, including through monitoring, research, and education. It is clear that the concept of fundamental rights can be understood in different ways, which is often not evident at the surface level in documents such as the Charter of Fundamental Rights. Rather, it is necessary to look more critically at how EU actors engage with fundamental rights to ascertain how they are understood and what role they play.

Of course, there are also many aspects of fundamental rights that are shared across Europe. It is widely accepted that rights form core constitutional principles that underpin the modern state, part of the social contract between citizen and sovereign. Common aspects of fundamental rights are also supported by European-wide rights institutions, which themselves are be considered a regional application of a global norm of rights represented at the United Nations. The European Convention of Human Rights (ECHR) has sought to ensure that all Europeans have recourse to the same court of last resort, thereby removing complete control of rights issues out of national control and to the supranational level. The European Social Charter (ESC) has also sought to ensure that all Europeans can draw on the same set of standards for social rights, though it is widely considered to be less entrenched that the ECHR.

Rights developments within the EU must be understood in terms of both the economic principles that have underpinned European integration and the broader context of rights in Europe when addressing the question of what role rights play. As rights were not present in the founding moments of the EU and were instead introduced *post hoc*, it must be asked whether rights developments culminating in the Charter of Fundamental Rights have ensured a state-like and balanced constitutional foundation. In essence, despite its economic history, does the EU adequately balance economic, social, and civil concerns in its political activities? In order to answer this question, the role of rights in the EU must be critically engaged with.

Critically analysing fundamental rights in the EU requires a theoretical framework capable of identifying and offering insights into the key concepts involved. This means not only theorising about the nature of fundamental rights, but also considering the nature of the institutional arrangements of the EU and the other principles embedded in it. To do this, theoretical insights from both social constructivism and critical theory have been drawn upon. Constructivism highlights how the concepts central to politics are constructed and upheld by human agency, exhibiting properties associated with a dialectical relationship between structure and agency. These political concepts include fundamental rights, economic doctrines, and institutions such as the EU. For example, as highlighted above there is no single fixed meaning of the concept of fundamental rights. Rights have been developed by human agency and can be changed by human agency. The same can be said about economic doctrines, as ideas about how the state and economy should be organised develop and change over time. Different sets of economic ideas include Keynesianism in the UK, *dirigisme* in France, and the social market economy in Germany, though today it is more common to speak of neoliberalism and the pressure it has brought to bear on all European states. The economic ideas that have become embedded within the EU are particularly important when considering how fundamental rights have developed. In addition to this, constructivism recognises that even the institutions through which politics is conducted are socially constructed. If not for the collective action of humans, there would be no state and no EU. Again, ideas about what political institutions such as the EU should do change over time as new opportunities develop and circumstances change. Whilst constructivism highlights the ontological nature of key concepts in politics, critical theory provides insights into the power dynamics underpinning the prevailing political order at a given time. Critical theory, particularly from a neo-Gramscian perspective, has sought to understand how certain ideas supported by specific actors have become dominant in contemporary society. Its focus is on critically engaging with how a given prevailing order has come about: how it has been created, by whom, and for what purpose. This provides a means to conceptualise how contemporary dominant ideas such as neoliberalism have become embedded in the institutional framework of the EU and the implications this has for fundamental rights.

Taking into account theoretical insights from constructivism and critical theory, fundamental rights are analysed as a socially constructed concept and situated in relation to economic ideas embedded within the EU. Fundamental rights have been introduced and developed in the EU in a *post hoc* and *ad hoc* fashion as a secondary project focused on legitimising the EU. I argue that the institutional framework of the EU and the constitutionalisation of neoliberal economic principles that have underpinned much of integration have shaped the way in which fundamental rights have been constructed and how they are understood, moulding fundamental rights to fit the prevailing EU order and neutralising potential challenges they could pose for economic-based integration. The dominant understanding of fundamental rights is that they are legally enforceable civil rights of equal value to core neoliberal economic principles embedded in the treaties and restricted in application to areas where the ECJ has jurisdiction. Social rights have been afforded a secondary status wherein their justiciability has been left uncertain unclear and, in the occasions where they come into conflict, are restricted in favour of protecting neoliberal economic principles in the single market and in EMU. This specific understanding of rights was developed primarily by the ECJ, but has become broadly accepted by the other EU institutions and embodied within the Charter of Fundamental Rights. Although the changes introduced by the Treaty of Lisbon in 2009 indicated a possible enhancement of the position of rights in the EU legal order, rights developments since then have done little to alter the dominant way in which fundamental rights in the EU are understood.

Acknowledging that rights are understood in this fashion is particularly important for two reasons. First, this understanding of rights runs contrary to the way rights are presented in the Charter of Fundamental Rights, which contains both civil and social rights side-by-side and commits all of the institutions of the EU to respect rights without specifically highlighting any restriction to the jurisdiction of the ECJ. The surface text of the Charter masks a deeper understanding of rights. Yet the historical relegation of social rights to a secondary status is also evident to some extent in the Charter, wherein a provision (Article 52[5]) was added stipulating a distinction between rights that are directly enforceable and others that are principles to be implemented by legislation. Whilst this provision does not specify which rights are either directly justiciable or to be implemented by legislation, viewed in the context of the history of rights in the EU and the negotiations of the Charter it is clear that social rights were intended to be afforded a different status than judicially enforceable civil rights. The second reason that identifying this dominant understanding of fundamental rights is important is that it raises serious questions about the constitutional balance of competing values. Whilst civil rights have generally been adequately protected, particularly due to the ease at which they can be protected judicially, the same cannot be said about social rights. No national constitution in Europe affords economic freedoms the same value as fundamental rights. Through the prioritisation of neoliberal economic principles at the EU level, European social settlements that have sought to realise social rights embedded in most national constitutions have come under strain. This has occurred through both the direct judicial prioritisation of market freedoms over select social rights by the ECJ and, more extensively, through the formation of an EU economic governance architecture premised on executive enforcement without recourse to any fundamental rights procedures or protections. Whilst it is certainly the case that many European states do not have directly enforceable social rights in their constitutions (though some of those that do have still seen those rights undermined by EU activities), the various ways in which social rights have been given practical meaning – whether through collective agreement or legislation or a combination thereof – are now being undermined despite the presence of supposed EU guarantees and protections for fundamental rights.

My argument about the way in which fundamental rights have come to be understood in the EU and the implications this has for contemporary EU politics is built up in two stages of research. First, the development of the general concept of fundamental rights from their original introduction to the European Communities in 1969 up until the Charter was granted legal value by the Treaty of Lisbon in 2009 is analysed in order to determine how fundamental rights have been constructed within the EU, looking specifically at how the ECJ has developed the concept of rights in its case-law and how the other institutions of the EU have sought to shape and legitimise fundamental rights developments. Whilst it is mainly the ECJ that has taken the lead in developing this dominant understanding of fundamental rights (though other institutions were particularly influential in ensuring social rights received at least some recognition), the specific way in which it has developed rights has become broadly accepted by the other institutions of the EU. Rights developments are traced up until 2009 as this was the point at which the Treaty of Lisbon entered into force and brought with it a number of changes designed to enhance the role of rights in the EU, most notably the legal value granted to the Charter.

The second stage of this research analyses the application of specific fundamental rights to their respective policy areas before and after the Treaty of Lisbon gained legal value at the end of 2009 and in the context of relevant international rights standards. The time period analysed after the Treaty of Lisbon entered into force is from the end of 2009 till the end of 2014. There are three purposes to this stage: to consider the implications that this dominant understanding of rights has for the practice of politics; to determine if the concept of fundamental rights has developed in any way through the utilisation of rights in political activities; and to situate the EU’s engagement with rights in the context of relevant European or international rights standards. These political activities include recent judicial cases before the ECJ, legislative developments, and non-legislative activities such as political strategies and action plans. This allows for the role of fundamental rights in the political activities of the EU to be considered beyond the scope of judicial review, which recognises that there are barriers to accessing judicial avenues. Three case studies are used to provide broad and balanced coverage of different issues associated with rights, including further examination of the level of judicial protection of rights, the way rights are implemented or protected via legislation, and the possibility of positive duties arising out of rights obligations. In the area of traditional civil rights, the right to privacy and the right to protection of personal data are looked to. For social rights, the rights of workers to collective bargaining, fair and just working conditions, and fair pay are addressed. And in the area of non-discrimination and equality, which cross-cuts both civil and social rights, rights of persons with disabilities are examined.

The findings of these case studies demonstrate that the dominant understanding of fundamental rights developed by the ECJ, as determined in the first stage of the research, has undergone little change when rights have been utilised in contemporary political activities. There have been some minor further developments, but they have not altered the dominant understanding of rights. Civil rights have continued to enjoy high levels of protection and their role in the EU has been enhanced since the Treaty of Lisbon. The rights to privacy and protection of personal data have been at the forefront of developments in the ECJ’s case-law in advancing the role of judicial review, have seen legislative developments designed to enhance their protection and consistency across the single market, and have contributed to the downfall of an international treaty that seriously risked breaching civil rights. Whilst civil rights have little scope to clash with the economic principles embedded at the core of the EU, the developments since the Treaty of Lisbon do indicate that these civil rights have taken on a stronger and more authoritative role in the EU.

However, the same cannot be said about social rights. Whilst social rights were already relegated to a secondary status, developments since 2009 have seen this situation deteriorate due to a combination of the prioritisation of liberal economic principles and the restriction of the scope of application of the Charter. Though there has been little change regarding the legal balancing of market freedoms and social rights, the emergence of a new hybrid governance structure in the Eurozone, largely in response to the Eurozone crisis, has directly undermined social rights as executive actors have been empowered to make wide-ranging decisions on policies without any oversight from the ECJ or any other body tasked with protecting rights. The governance of the Eurozone has seen a neoliberal strategy to reduce public debt through the use of austerity and achieve macroeconomic competitiveness through the removal of workers’ protections prioritised at the expense of social rights. The perception of fundamental rights as judicial constructs and the underdevelopment of social rights in relation to economic principles have allowed social rights to be completely ignored by EU actors in their response to the Eurozone crisis, despite the key roles played by the Commission and the Council. Recent developments in the Eurozone in Southern European states in particular directly threaten the social settlement that has characterised many European states in the post-World War II period.

Finally, equality and non-discrimination for people with disabilities has seen some tentative developments regarding a positive duty on the EU. Disability rights have been bolstered by the recent establishment of the United Nations Convention on the Rights of Persons with Disabilities, which fully endorses the need for public authorities to actively ensure that full social and civil rights are being respected. This responsibility is represented in the EU’s disability strategy, though it has not been fully incorporated into broader political activities or legislation. Once again, however, these trends were present before the Treaty of Lisbon changes at the end of 2009, with recent developments tentatively pushing the EU in the direction of a stronger positive duty on disability rights, but constituting more continuity than change.

## Contribution to Contemporary Debates

The primary contribution of my research is premised on engaging with fundamental rights as a socially constructed concept and therefore dependent on how actors engage with them. It is how rights are understood by relevant actors that shapes the role they play in the political process. This allows for an account of the development of rights that considers the impact of how rights have been constructed in the EU and affected by both its institutional framework and the presence of dominant economic ideas that have underpinned integration. In the context of the EU, it is primarily the ECJ that has driven rights developments, as widely identified in the literature, yet other institutions have also shaped how rights are understood. Acknowledging the role of the other institutions of the EU – namely the Commission, Parliament, and Council – is particularly important when it comes to analysing how rights have been utilised in contemporary areas of political activity, while recognising that the engagement of the different institutional actors with rights is affected by the institutional framework of the EU. Furthermore, treating rights as socially constructed allows their relationship to other principles, such as neoliberal economic ideas, and the implications that this has for contemporary politics to be analysed. As many scholars tend to engage with the concept of fundamental rights as a fixed concept without really considering the unique way in which rights are understood in the EU, the full implication of rights as predominately judicially enforceable civil rights of equal value to liberal economic principles has not been adequately theorised. To be clear, these are issues that have not been completely absent from EU rights scholarship, but have largely not been developed in a comprehensive manner.

The academic field of fundamental rights in the EU is one that is dominated by legal scholars, and for good reason. Fundamental rights in the EU have been dependent on judicial authority for their development more than in any European state. Yet rights developments in the EU today have started to break out of these judicial confines as political actors have become more directly involved. This is not to suggest that legal scholarship on the EU has not sought to theorise about rights developments beyond the case-law of the ECJ. As noted below, there are several notable areas of rights scholarship that touch upon the issues highlighted above, but still leave plenty of room for further development.

Of all those who have theorised about fundamental rights in the EU, those who have come closest to the critical constructivist approach highlighted above are Andrew Williams and Stijn Smismans. Both have argued that fundamental rights have been written into the EU order as a ‘founding myth’, despite not actually being present at the foundation of the European integration process (Smismans, 2010; Williams, 2004). Williams (2004) focuses on the incoherence between the EU’s internal and external rights policies, which he argues is based on the absence of the clear constitutional basis for rights and the post-hoc addition of rights as a foundational myth that has been written into the history of the EU and is premised on the need to secure legitimacy for the new European constitutional order. Smismans (2010) draws out some of the issues associated with treating the EU’s fundamental rights narrative as a myth, noting that despite this myth containing factual errors it is still acted upon by political actors as if it represents the reality of EU integration. However, similar to Williams, Smismans (2010: 63) also emphasises the potential negative outcomes associated with the ambiguities inherent to the post-hoc construction of rights as a myth. Both of these contributions mark important additions to scholarship on rights in the EU. They add to a field of institutionalist examinations of rights in the EU that have generally highlighted the piecemeal nature of these developments, but not engaged critically with how this has affected how rights are understood and utilised (see Alston and Weiler, 1998; de Witte, 2005; de Schutter, 2010). Although Williams and Smismans do not explicitly draw on constructivism or critical theory,[[1]](#footnote-2) both contributions highlight how rights have been actively constructed by different institutional actors in the EU and how this has influenced the role of rights in the European constitutional order. However, neither of the contributions seriously considers the tensions between fundamental rights and the economic principles that were present at the foundational moments of European integration (or, indeed, those economic principles that have come later with EMU) and how the interplay between these concepts has shaped the development of rights. As highlighted throughout this thesis, the relationship between fundamental rights and neoliberal economic principles is vital to understanding the role that rights play in the EU today. It is only possible to fully understand this relationship by looking to the process of the construction of rights in the EU.

Of course, the tension between fundamental rights and the fundamental freedoms of the internal market is an area that has received ample academic attention, though this has been largely confined to analyses of the case-law of the ECJ (see Augenstein, 2013; Christodoulidis, 2013; de Vries, 2013a; Semmelmann, 2010; Barnard and Deakin, 2011; De Búrca, 2006; Maduro, 2000, 1999; Hervey, 1995). It is broadly recognised that the ECJ has established that both fundamental rights and fundamental market freedoms enjoy the same level of constitutional protection and must be balanced against one another when they come into conflict. One of the key debates within this literature concerns the problems that such a balancing act entails and how social rights are treated. It has been noted that the ECJ tends to treat market freedoms as at the core of the constitutional order, meaning that when they conflict with rights it is the interference with the market freedoms caused by the rights that must be justified. This is a reversal of the rule/exception logic found in national constitutional traditions, wherein market freedoms are not afforded constitutional level protections (Augenstein, 2013: 1935; see also Scharpf, 1999: 57). Though it is widely accepted that civil rights have been adequately protected by the ECJ when they conflict with market freedoms, there is more of a debate when it comes to social rights. Some scholars have highlighted that the ECJ has declared in its case-law that (certain) social rights are of equal value to market freedoms and therefore consider the issue to be relatively uncontroversial (see de Vries, 2013; Semmelmann, 2010), whilst others, particularly labour market lawyers, focus on the practical effect of the ECJ’s case-law that has resulted in social rights being restricted in favour of market freedoms (Christodoulidis, 2013: 2005; Lo Faro, 2011; Barnard and Deakin, 2011; Davies, 2008). It is in this literature in particular that the tensions arising out of conflicts between economic and civil and social values have been considered in detail. When the broader implications of these tensions are considered, it tends to be in terms of the impact that fundamental market freedoms are having on national welfare states across Europe. Whilst this is a hugely important implication of the way in which market freedoms have been constitutionalised at the EU level, the impact of the prominence of market freedoms on how rights are understood has strong implications for political activities beyond the scope of ECJ case-law that has not been adequately considered. This is particularly evident when it comes to the governance of the Eurozone, which has taken the form of a hybrid between soft and hard law that exists largely outside the jurisdiction of the ECJ (see Armstrong, 2013). So whilst the tension between the freedoms of the internal market and fundamental rights in the case-law of the ECJ have been considered in detail, the tensions between the economic values underpinning the Eurozone and fundamental rights have gone under theorised. The political implications of how rights are understood in the EU have been given insufficient attention beyond the case-law of the ECJ and the link between these two aspects tends not to be considered in detail. By analysing the construction of fundamental rights and paying particular attention to the way in which the ECJ has engaged with this concept and influenced broader political developments, I provide a more comprehensive account of fundamental rights that addresses this shortcoming.

Some fundamental rights scholars have sought to engage with the less legalistic soft law and hybrid governance arrangements that have characterised EMU. From quite early on the scope for conflict between the neoliberal principles underpinning the European Employment Strategy and later the Lisbon Strategy, on the one hand, and fundamental social and labour rights, on the other, was identified as scholars called for greater integration of rights into these soft-law processes (see Smismans, 2005; Ashiagbor, 2005; 2001; Sciarra, 2005; Deakin and Reed, 2000). Now in the context of the Eurozone crisis this scope for conflict has come to a tipping point, wherein the economic principles underpinning EMU and a neoliberal perception of the causes of and solutions to the crisis have been prioritised over protecting social rights (Fischer-Lescano, 2014a; Oberndorfer, 2014; Poulou, 2014). Scholarship analysing social rights in the context of EMU have made significant contributions to analysing the tensions in this area, largely through reference to international rights standards external to the EU. Yet little connection is made, let alone theorised, between what is going on under the governance of the Eurozone and the way in which fundamental rights have developed under the case-law of the ECJ, despite the similar tensions in both areas. The literature has offered no adequate explanation as to why it is that the EU has been able to champion policies in the Eurozone so hostile to social rights despite all of the recent developments supposedly enshrining a respect for fundamental rights in the EU.

Essentially, the literature that has considered how rights have been constructed has not taken into account their relationship to economic principles, whilst those studies that do include economic principles have taken a narrower focus on either the case-law of the ECJ or the governance of the Eurozone. This has left a gap wherein the consequences of the unique development of fundamental rights in the EU have not been fully considered, particularly when it comes to the role of rights (and particularly their relationship to the economic principles that have underpinned integration) in contemporary political activities. This gap is addressed in my research by analysing the way in which rights have been socially constructed in the EU and how this understanding of rights has been deployed in a range of contemporary policies.

## Structure of the Thesis

As highlighted above, the primary research has taken place in two stages. First, the historical development of rights is analysed to determine how rights have been constructed over time in the EU. Second, three policy areas were analysed to see how the dominant understanding of fundamental rights has functioned in practice. Yet for this primary research to be fully understood, it is necessary to understand the theoretical framework underpinning it and the broader political context in the EU that rights have developed in. There are six chapters in total, followed by a conclusion.

Following this introduction, the first chapter outlines the critical constructivist theoretical framework that underpins this research and sets out the methodology appropriate for this framework. It entails a critique of the rationalist orientation of mainstream integration theories on the EU in order to set out the rationale behind taking a more critical approach. Following this, insights from constructivism are combined with those from neo-Gramscian critical theory to set out my theoretical framework. This chapter emphasises the importance of treating political concepts and institutions as socially constructed, while also being mindful of how certain ideas can become dominant and the influence of institutional frameworks on the construction of ideas.

Chapter two outlines the European context within which fundamental rights developments have taken place. There are three parts to this. First, it provides information on the state of rights in Europe in both national constitutions and under the Council of Europe’s ECHR and ESC, demonstrating that rights are understood in a variety of different fashions within Europe. Second, an account of EU integration and its economic constitution is provided, highlighting the prominent role of economic-based integration and dominance of neoliberal ideas in this process. Third, the historical and theoretical relationship between economic liberalism, civil rights, and social rights is outlined. The purpose of this chapter is to draw attention to the relevant factors necessary to understand the context that rights developments have taken place in.

Chapter three constitutes the first stage of my primary research. It traces the development of fundamental rights in the EU from their introduction in 1969 up until the Treaty of Lisbon in 2009. By analysing the ways in which different institutional actors have engaged with fundamental rights from a critical constructivist perspective, this chapter provides an account of the unique way in which rights are broadly understood and how this has been shaped by the way in which rights have developed in the EU, as shaped by the institutional framework of the EU and the presence of a dominant neoliberal economic paradigm. It highlights how efforts by the Parliament and Commission to develop fundamental rights have been largely thwarted by the reluctance of national governments in the Council, leaving rights to be developed in an *ad-hoc* manner by the ECJ and subject to the constraints faced by the court. This has resulted in fundamental rights being understood as primarily civil rights, of equal value to core EU economic principles, and applicable only where the ECJ has jurisdiction. As political developments, particularly in the form of the Charter of Fundamental Rights, occurred rather late, the dominant understanding of rights developed by the ECJ had already become embedded within the EU. This chapter sets out the basis of the primary contribution of this thesis, that the judicial process of the construction of rights in the EU has brought about this specific dominant understanding of fundamental rights that has become embedded in the other EU institutions.

Chapters four, five, and six present three case studies on specific fundamental rights in their relevant policy areas. These case studies are designed to ensure that different aspects of fundamental rights are adequately covered in a balanced fashion. Their purpose is to examine the practical application of select rights in their relevant political activities from a critical constructivist perspective in order to analyse the factors that affect the realisation of rights in practice, to determine if the advancements introduced by the Treaty of Lisbon have changed the way in which rights are understood, and to situate the EU’s engagement with rights in the context of relevant international standards. These case studies add further weight to the argument about the construction of rights developed in chapter three as they find the dominant understanding of fundamental rights has remained consistent in these different policy areas and that developments since the Treaty of Lisbon entered into force has continued along these lines. By looking to international standards on rights, the implications of this understanding of rights are drawn out.

Chapter four covers civil rights by examining the rights to privacy and protection of personal data. In this area there have been developments since 2009 in the ECJ’s case-law, an attempt to negotiate an international treaty, and the adoption of new secondary legislation. Furthermore, there was also considerable activity around privacy and data protection before the rights developments in the Treaty of Lisbon. This chapter adds further weight to the argument developed in chapter three that civil rights enjoy strong protection as it highlights several developments that suggest the protection of these rights has been enhanced. The institutional framework of the EU and the compatibility between civil rights and the economic principles that underpin EU integration have contributed towards stronger rights protection in this area. The convergence of the desire to protect personal data and uphold the single market has led to the political institutions of the EU adopting successive pieces of legislation creating a specialised legal framework, contributing to the conceptualisation of civil rights as requiring proactive, legislative steps to ensure their realisation. The enhanced role of the European Parliament in the EU institutional framework introduced by the Treaty of Lisbon has further contributed to the protection of civil rights, not least through the oversight by the Parliament of the ratification of international treaties. The compatibility between civil rights and the ECJ has seen further development of the concept of judicial review of EU secondary legislation to the benefit of privacy and data protection rights. In this area, the EU has surpassed privacy rights developments under the Council of Europe and established itself as a leader in the protection of privacy and data protection rights. These developments suggest, in line with chapter three, that civil rights are taken seriously by the EU.

Chapter five covers social rights by examining workers’ rights to collective bargaining, fair and just working conditions, and fair pay. The secondary status afforded to social rights and the limitations of the scope of rights protection to the jurisdiction of the ECJ have both contributed to a clear deterioration of respect for social rights. The institutional barriers and conflicts with neoliberal principles have continued to reduce the scope for EU action on social rights. Before the Treaty of Lisbon entered into force, EU engagement with labour market regulation was patchy and generally focused on upholding minimum standards, largely owing to the reluctance of national governments to delegate responsibilities in this area. Despite the Charter of Fundamental Rights gaining legal value in 2009, the EU has demonstrated a clear neglect of rights-standards in this area that have been established under the Council of Europe’s ESC. This has taken place in the context of the governance of the Eurozone and the response to the crisis afflicting the Eurozone area, wherein a neoliberal strategy of austerity and macroeconomic restructuring has been prioritised over all else. The treatment of social rights as secondary rights and the constraints on the scope of application of rights have allowed the Commission and the Council to actively undermine workers’ rights in their response to the Eurozone crisis without any EU-level checks or balances, despite the guarantees contained within the Charter of Fundamental Rights.

Chapter six covers the right to equality and non-discrimination by examining EU policy on disability. Equality is an issue that cross-cuts the divide between civil and social rights, particularly due to the growing recognition of the need to actively intervene in society to ensure that disadvantaged groups are treated equally. Nowhere is this clearer than with the issue of disability, wherein disability campaigners have been successful in establishing widespread acceptance of the social model of disability that emphasises that it is dominant norms in society that have a disabling effect on people with impairments. This understanding of equality for people with disabilities is represented in the UN Convention on the Rights of Persons with Disabilities (CRPD), which was ratified by the EU in 2011. Disability equality is an area that the EU has historically been active in, having established numerous political strategies and having adopted legislation prohibiting discrimination and providing for some limited positive duties. Yet despite this high profile development, rights developments have largely stalled in face of institutional barriers and a reluctance to mainstream disability equality in broader policy areas. There are some tentative indications that the EU is embracing a stronger positive duty involving a greater array of social rights in the area of disability, as required by the CRPD, yet barriers to these developments remain.

The conclusion draws the above findings together, discusses their implications for the European project, and highlights scope for further research.

# 1. Critical Constructivism and the Study of the European Union

The topic that this research is concerned with is the development of fundamental rights in the European Union and how this development may affect political activities. More specifically, the question that has motivated this research is: have fundamental rights developments ensured that the EU adequately balances economic, social, and civil values despite the fact that European integration has predominately been via economic means? The study of fundamental rights in the EU requires a theoretical framework capable of accounting for the nature of the key concepts involved. This means engaging critically with the concept of fundamental rights themselves, the nature of the institutional framework of the EU, and identifying other principles and values that interact with and may affect rights.

This research is premised on a constructivist perspective and incorporates insights from critical approaches. It takes into consideration Robert Cox’s distinction between problem solving and critical theory. According to Cox (1981: 128-129), problem solving theory takes the world as it is and seeks to address problems within the current prevailing institutional arrangement and power relations. In doing so, it helps to uphold the status quo. Critical theory, by contrast, calls into question how institutions and their power relations have come about and how they may be in the process of changing. It seeks to make a normative intervention and identify possible alternatives to the current prevailing order (Cox, 1981: 129-130). From a constructivist perspective, this framework sets out a means to engage with fundamental rights and the EU as concepts that are socially constructed by actors, but also exhibit structural features due to the multitude of actors involved in their production and reproduction. This guides the research towards analysing how both rights and the EU, including other principles and values embedded in the EU, have been constructed and what power dynamics underpin developments in these areas. Furthermore, in order to provide a firmer basis on which to conceptualise power dynamics within contemporary society and to address some of the shortcomings of other constructivist research, this framework incorporates insights from critical political economy. By combining insights from critical theory and critical political economy with constructivism, the theoretical framework set out here is one of critical constructivism. It sets out a means to analyse fundamental rights as a socially constructed concept while understanding the institutional dynamics within the EU that have contributed to their construction and the influence of other sets of ideas that are embedded within the EU.

The critical constructivist framework outlined here is also premised on a critique of the rationalism that has underpinned the traditional theories of integration, namely neofunctionalism and liberal intergovernmentalism. In order to provide a full explanation of why critical constructivism is a relevant and appropriate framework, it is necessary to highlight some of the shortcomings of the rationalist theoretical basis of these theories. Yet in critiquing these theories, it should be noted that the ideas that they have developed about how integration takes place and empirical insights that they are based on are still important. This means that whilst some of the assumptions in traditional integration theories may be flawed and restrict the degree to which they can engage with the focus of this research, there are still valid insights into the behaviour of different actors that are useful and, with some qualifications, compatible with the framework developed here.

This chapter proceeds in three broad steps. First, a critique of the mainstream integration theories neofunctionalism and liberal intergovernmentalism is developed and used to set out the basis for adopting a critical constructivist theoretical framework. Second, the critical constructivist theoretical framework used in this research is set out. This second step is sub-divided into three sections. After introducing the basic tenets of the critical constructivist approach, there are sections on the nature of institutions, dominant paradigms, and power dynamics in contemporary capitalist society. Each of these sections addresses a key issue that has to be taken into account when studying fundamental rights in the EU and care has been taken to relate each of these issues to the focus of this research. Finally, the third step highlights the methodological implications of this theoretical framework and sets out how it has been applied to the research.

## 1.1. Neofunctionalism and Liberal Intergovernmentalism

A lot of the history of research on the EU has been dominated by debates about European integration and the nature of the EU, sometimes referred to as the ontological question. Two mainstream theories, broadly speaking, have dominated this debate: liberal intergovernmentalism (LI) and neofunctionalism. These theories are still present in contemporary debates about European integration. The response to the recent Eurozone crisis, for example, has been analysed from both perspectives (see Schimmelfennig, 2014; 2015; Niemann and Ioannou, 2015). Both mainstream theories have developed some key insights into the integration process that are worth highlighting, though, for reasons outlined below, they do not themselves provide a suitable theoretical framework for the study of fundamental rights in the context of the EU. This section introduces some of the key insights from these mainstream integration theories and then goes on to critique their rationalist underpinning by focusing on how they engage with political economy and fundamental rights.

LI is generally considered the more dominant theory. Developed by Andrew Moravcsik in the 1990s and building on earlier intergovernmentalist work by Stanley Hoffman, LI takes nation states as the primary actors and drivers of integration. It suggests that states’ preferences are based on their own rational self-interest, often derived from geopolitical interests, the need to respond to externalities (such as the global economy), and issue-specific powerful domestic interests engaged in lobbying. Institution-building as part of European integration occurs as a means to secure credible commitments of bargaining outcomes between member states, in which those states have attempted to maximise their own self-interest within an environment of power asymmetry (Moravcsik and Schimmelfennig, 2009: 69-70). The institutions of the EU are the result of strategic bargaining by rational member states. Under LI, power remains predominately in the hands of member states. It is member states that represent domestic interests at the European level, whilst supranational bodies such as the Commission only really act as agents on behalf of member states. Liberal intergovernmentalists have sought to explain the Common Agricultural Policy, enlargement, the single market, and EMU by looking at the domestic preferences of key member states (often France, Germany, and the UK) and the inter-state bargaining process (Moravcsik, 1998; Moravcsik and Schimmelfennig, 2009).

Neofunctionalism is generally considered to be the primary challenger to LI. However, it has been noted, even by proponents of the theory itself, that neofunctionalism is hard to pin down due to the way in which it has been redefined over the years (Niemann and Schmitter, 2009: 46). The theory has evolved over time in response to critiques and the changing nature of the EU. For the purpose of my research, there are two key insights from neofunctionalism that need to be accounted for: the role of supranational actors and spillover. Unlike LI, where member states are the primary actors and domestic interests and economic pressures are represented by their respective member state, neofunctionalism emphasises the agency of supranational EU actors. This includes bodies such as the Commission, the ECJ, and the ECB. These actors have their own interest in pursuing integration and are able to promote integration at times when even member states are resistant (Stone Sweet and Sandholtz, 1997: 308). The key factor driving forward integration, which supranational actors are able to exploit, is spillover.

Spillover comes in three inter-related types: functional, political, and cultivated (Niemann and Schmitter, 2009: 48-50). Functional spillover is the most important type. It suggests that integration in one area will lead to pressures to integrate in related areas due to the interdependence of the economy. For example, the integration of coal and steel markets would create pressures for broader internal market integration. Functional spillover also entails a step by step process, whereby new obstacles to integration become apparent and dismantled over time. For example, trade tariffs may be the first obvious policy to dismantle to secure internal market integration, but their removal would then increase the salience of non-tariff barriers to trade that would have to be addressed to secure a proper internal market (Stone Sweet and Sandholtz, 1997: 309). Barriers to integration can also lead to functional dissonance, in which tensions arising from incomplete integration may increase to the point of crisis, the response to which may overcome the initial barrier to integration (see Niemann and Ioannou, 2015). Functional spillover pressure is driven forward by non-governmental actors, particularly business. Transnational transactions by domestic actors, particularly business and capital, generate demand for EU level rules (see Stone Sweet and Sandholtz, 1997). Recognising that functional spillover may not occur automatically as pressure builds, neofunctionalists have also highlighted a process of cultivated spillover. This is when supranational actors actively emphasise spillover pressures and facilitate agreement on integrative outcomes by fostering ties with national elites to promote European level solutions (Niemann and Schmitter, 2009: 50). Furthermore, the process whereby actors shift their political attention and lobbying efforts to the European level is called political spillover (Niemann and Schmitter, 2009: 50), though whether this leads to actors shifting their loyalty to the European level is subject to debate and critique (Stone Sweet and Sandholtz, 1997: 301). The concept of spillover essentially conceptualises European integration as a path dependent process in which integration, once embarked upon, creates self-reinforcing pressures.

There has been a healthy debate between LI and neofunctionalism, though it should be recognised that neofunctionalism has been the more heavily criticised of the two and was even declared obsolete at one point by Ernst Haas, one of its original founders (Niemann and Schmitter, 2009: 51). One of the key critiques of neofunctionalism has been that it is economically determinist due to assumptions of the automaticity of functional spillover, though later versions of the theory have moved away from this position (Niemann and Schmitter, 2009: 51). LI has been critiqued for underplaying the influence of institutional structures and path dependent processes by treating each instance of intergovernmental bargaining in isolation (Stone Sweet and Sandholtz, 1997: 302; Pierson, 1996). Both sides have accused the other of neglecting either supranational actors or the intergovernmental bargaining of member states. These debates have introduced some nuance into these theories. One of the later incarnations of neofunctionalism has gone out of its way to incorporate intergovernmental insights, though the founders do stress that their theory is incompatible with LI (Stone Sweet and Sandholtz, 1997: 314). Frank Schimmelfennig, who has utilised both theories at times, suggests that ‘LI is best embedded as a theory of intergovernmental negotiations and decisions in a supranationalist theory of long-term, path-dependent development of integration’ (Schimmelfennig, 2015: 16).

These mainstream integration theories are important when analysing fundamental rights in the EU. As demonstrated in this thesis (particularly in chapter three), rights developments have been driven and shaped primarily by the ECJ, which has itself acted in response to domestic and transnational pressure. Insights from spillover effects, as per neofunctionalism, help to account for what has driven this process. Yet national governments have certainly not been absent from this process. For the most part, they have constituted resistance to the further transfer of authority to the supranational level. The absence of a clear self-interest or pressure from domestic interest groups on national governments, which underpins LI’s account of integration, does have some explanatory value.

However, these theories can only do so much when it comes to analysing fundamental rights in the EU. They are constrained by a rationalist ontology. LI and neofunctionalism both assume actor preference to be an objective representation of their self-interest, usually derived from a material structure (Risse, 2009: 146-147). It should be noted that neofunctionalism is less committed to a rationalist ontology than LI, particularly in that it recognises that actors can learn from their experiences and that it is perceptions of processes such as functional spillover that really matter (Niemann and Ioannou, 2015). Niemann and Schmitter (2009: 55) also highlight that neofunctionalism has more recently moved away from its soft rationalist origins towards ‘soft constructivism’. Despite these qualifications, neofunctionalism is still premised on a rationalist ontology and the critiques outlined below are felt to be appropriate. The assumption that the objective interest of actors is to maximise their own gain is what underpins theoretical frameworks designed to account for things like intergovernmental bargaining and functional spillover. There is no account of worldviews, ideology, or any type of ideational structure that may influence how an actor thinks or behaves and there is little room for actors having an interest that goes beyond maximising their self-gain. This means that the interest of actors is not treated critically, but rather taken as a given. Such an approach has allowed LI and neofunctionalism to provide explanations for integration, particularly when the nature of the EU itself has been limited to the question of if it is predominately intergovernmental or supranational, but starts to break down when it comes to engaging with more complex and normative concepts in politics and how they interact with actors. The limitations of rationalism become apparent when two issues of central importance to this research are considered: the nature of the political economy and fundamental rights. More specifically, how both of these concepts are understood by actors.

Both neofunctionalism and LI have been deployed in the context of the recent Eurozone crisis and have sought to explain the integrative outcomes of the response to the crisis. From a neofunctionalist perspective, Niemann and Ioannou (2015) explain how the salience of the original objective of EMU and how the functional dissonances emerging out of EMU being incomplete (e.g. the mismatch between supranational monetary policy and more national and intergovernmental budgetary, fiscal, and structural policy) have created a self-interest for various actors in favour of further integration. From a liberal intergovernmentalist perspective, Schimmelfennig (2015) argued that whilst all member states had an interest in remaining in EMU (as the cost of breakdown and dismantling outweighed the benefits) and pursuing reforms to ensure credible commitments, a powerful group of member states led by Germany had a self-interest in imposing the burden of adjustment on the heavily indebted peripheral states.

Both mainstream theories set out to explain further integration based on the rational self-interest of the actors involved, yet by not critically engaging with how actors’ interests are formed and how they interpret the Eurozone crisis many important aspects of this phenomenon are missed. There is no convincing explanation of the focus on austerity and neoliberal restructuring that has become embedded within the institutional structure of the EU via measures such as the Six Pack, Two Pack, the ESM treaty, and the Fiscal Compact (see Ryner, 2015; Oberndorfer, 2014; Hall, 2012). This appears to be somewhat of a missed opportunity, albeit a missed opportunity necessitated by their rationalist basis, as both theories do at times draw attention to relevant actors that have shaped the neoliberal response: LI focuses on the role of the German government (Schimmelfennig, 2015: 3-7), whilst neofunctionalism incorporates the role played by transnational business and financial capital (Niemann and Ioannou, 2015: 205-209). These actors have been central in shaping the focus on austerity and economic restructuring that has characterised integration since the Eurozone crisis (Ryner, 2015; Matthijs, 2016). As political economists and ideational scholars have highlighted, the preferences of actors cannot be presumed to be in pursuit of an objectively identified self-interest. Rather, economic ideas play a key role in shaping how actors perceive of their own interest and the problems they are faced with (Schmidt and Thatcher, 2013; Drahokoupil, van Apeldoorn, and Horn, 2009; Matthijs, 2016). In the case of the response to the Eurozone crisis, dominant neoliberal and ordoliberal economic doctrines underpinned by the power of financial capital have shaped how key actors have understood the crisis and formed their solutions towards it (Ryner, 2015; Hall, 2012; Matthijs, 2016). This critique is not to suggest that rationalist insights hold no value or that actors themselves do not think they are acting rationally. LI certainly appears accurate to suggest that the German government has a rational interest in imposing the cost of adjustment on other states. Yet to understand why austerity and economic restructuring are chosen as the instrument of adjustment it is necessary to understand the role of ordoliberal doctrine in the German political economy (Ryner, 2015; Hall, 2012; Matthijs, 2016). The conclusion to draw from this critique is that it is necessary to understand how the ‘rationality’ of actors is formed in relation to broader ideas about the world.

The mainstream integration theories also struggle when it comes to fundamental rights in the EU, as they encounter difficulties when engaging with concepts that are ideational and cannot be reduced to rationalist accounts of self-interest. This is not to suggest that self-interest is absent when it comes to fundamental rights. Neofunctionalism would draw attention to the desire of supranational institutions to pursue integration through any means possible and the legitimacy enhancing role that rights are commonly associated with. Liberal intergovernmentalism helps to account for the reluctance of member states, given the absence of a clear self-interest or domestic pressure to delegate rights powers to the EU level. However, fundamental rights are an entirely socially constructed concept. What rights are covered, their position vis-à-vis other principles, and how they are to be protected are elements of the concept of fundamental rights that vary across different national polities, international regimes, and over time (see chapter two). LI and neofunctionalism can provide some insights as to which actors may be expected to support or oppose rights developments, but not on the role that fundamental rights actually play in the institutional structure of the EU.

There are several ways in which the concept of rights has evolved over time that rationalist theories cannot account for. The distinction between civil rights and social rights that has long manifested itself in the political realm (e.g. the separation between the ECHR and ESC in Europe) has come under sustained criticism from academics (see Fabre, 2005; Tushnet, 2004; Kenner, 2003; Fredman, 2004). Traditionally, civil rights were viewed as judicially enforceable, whilst social rights were consigned to mere aspirations to be decided upon by legislation. Whilst this understanding of fundamental rights certainly continues to exist today in the EU, clear elements of change have also emerged. The EU’s Charter of Fundamental Rights (2000) contains both civil and social rights side by side, though this development is tempered by the inclusion of a (somewhat unclear) distinction regarding enforcement of different types of rights. The notion of positive duty applicable to all rights has also started to gain traction, which stands in contrast to the traditional liberal conception of civil rights as only restrictions on the state (Fredman, 2004). The ECJ has affirmed the principle of positive duty in the EU (Alston and Weiler, 1998: 680). Finally, the idea of using independent, technocratic agencies to contribute to rights protections has also emerged recently. This idea has been driven forward by academics and experts, particularly in UN bodies, (Toggenburg, 2008: 386; Pegram, 2010) and has taken place within a broader trend towards ‘new governance’ (de Búrca, 2005a). In 2007, the EU incorporated this idea into its institutional framework by creating the Fundamental Rights Agency. All of these developments are underpinned by developments in the way in which rights are understood that cannot be reduced to rational choice or self-interest.

The limitations of mainstream integration theories when it comes to issues of political economy and fundamental rights are important. As socially constructed concepts, fundamental rights must be situated alongside other ideas that shape how actors engage with politics. One of the most central issues in politics is the political economy, particularly in the EU as European integration has progressed predominantly as economic integration. It is therefore vital to situate fundamental rights alongside the ideas that dominate the political economy. To do this, a theoretical framework must be able to account for the interplay between ideas and actors and engage critically with how interests are formed. As the next section demonstrates, a critical constructivist framework provides the means to do this.

## 1.2. Critical Constructivism and the EU

Constructivism forms a broad school of thought in political studies, often being described as more of a theoretical approach than a distinct theory. To ensure clarity on the theoretical approach being used here, it is necessary to highlight what branches of constructivism are being drawn upon. The framework outlined here mainly draws upon that constructivism that has developed out of the new institutionalist debate and which is often referred to as constructivist (Hay, 2008) or discursive institutionalism (Schmidt, 2008). In addition to this, insights from constructivist scholarship on the EU are also drawn upon (see Saurugger, 2013; Börzel and Risse, 2012; Jabko, 2006; Checkel, 1999). The approach used here also sets out to address one of the shortcomings of constructivism: its partial account of power dynamics underpinning ideas. Although recent ideational research has sought to address this shortcoming (see Carstensen and Schmidt, 2016), power has been conceptualised in a fashion that has exaggerated agency over structure. For this reason, I have turned instead to critical research primarily from a neo-Gramscian perspective that has sought to understand European integration in the context of developments in global capitalism (Ryner, 2015; Cafruny and Ryner, 2007; van Apeldoorn, Overbeek, and Ryner, 2003). This section proceeds by introducing the core tenets of constructivism and highlighting the role of agency and structure. It then goes on to outline institutional ideas, paradigms, and power dynamics. However, it should be noted that these sections cannot be neatly delineated from one another: institutions, paradigms, and power dynamics are all intrinsically interlinked, and so these sections do overlap to some degree.

At the heart of this constructivist framework is the notion that actors’ perceptions play a key role in how they interpret the world and their institutional environment and form their own interests and preferences. This feeds into the traditional philosophical question of what is reality or, more specifically, if there is an objective, material reality. The position within constructivism varies, with some scholars arguing that there is no independent, material reality and that reality is entirely socially constructed and others arguing that there may be an independent reality, but that everything an actor can know of reality is socially constructed (see Hay, 2002: 199). Other scholars claim that to ask if there is an independent reality is the wrong question (Schmidt, 2008: 318). In both of the aforementioned positions what matters and what is being analysed is socially constructed ideas (see also Bevir, 2011: 188). To be clear, the position taken here is that all knowledge held by actors – whether it is to do with their own identity and interests or their perception of institutional environments – is socially constructed. Many of the concepts that are the focus of political research – e.g. fundamental rights, economic doctrines, the state, and the EU – do not have intrinsic and objective features; rather, they are socially constructed by actors and reproduced as actors engage with them. The features of these concepts have been defined by human agency and can be changed by human agency. Furthermore, even actors’ own perceptions of their identity and their interests are premised on socially constructed ideas. An actor’s identity (and subsequent interests) as a liberal, conservative, or socialist; a human rights defender or activist; a court, technocratic regulatory body, or a legislative chamber are all premised on concepts constructed by human agency and shared across society. Everything actors know, including through reasoning and sensory experience, is interpreted by them through the ideas they hold; essentially, knowledge does not exist in a vacuum. Ideas play a key role in how actors interpret the outside world by providing cognitive scripts -- causal ideas about how things work and relate to each other -- and normative ideas – ideas about what is desirable (Schmidt, 2008: 306; Börzel and Risse, 2009). The importance of recognising that all knowledge is socially constructed is important, as one of the critiques raised by constructivist scholars (Gofas and Hay, 2010; Bevir and Rhodes, 2010) has been on the ontological inconsistency of positing socially constructed ideational factors as simply another variable among a range of materialist factors. Critics point to (non-constructivist) studies by Goldstein and Keohane (1993), Hall and Soskice (2001), Wendt (1999) or even some of Schmidt’s earlier collaborations (Schmidt and Radaelli, 2004) for using ideas as just another variable without giving due regard to their compatibility with more materialist or positivist assumptions in these studies (see Gofas and Hay, 2010).

One of the key contributions of constructivism is to conceptualise agency and structure as mutually constitutive. Yet far from being dependent on structure, actors retain the ability to think critically and act strategically in pursuit of their interests. Ideational structures such as dominant paradigms and institutional environments, as outlined below, may influence actors’ interests and even perception of their own identity, but the ability to be self-reflexive and critical of these structures is fundamental to the concept of agency (Hay, 2008: 8; see also Schmidt, 2008; Jabko, 2006). This also means that actors play a key role in formulating and spreading new ideas, which can develop as actors encounter new experiences or learn from both successful and unsuccessful past policies and political actions (Carstensen, 2011; Checkel, 2003; Hall, 1993). Recognising that actors can learn from unsuccessful action also draws into focus another point highlighted by constructivists, that actors’ ideas about their institutional environment or anticipated outcomes are often based on partial information and can be wrong (Hay, 2008: 8). Scholars have highlighted how actors’ behaviour may vary depending on their knowledge of their institutional environment and perception of their own interest and identity. This includes actors engaging in strategic bargaining based on a narrow conception of their self-interest, acting according to a norm whilst not necessarily internalising it, or fully adopting a new norm as part of their own identity (see Börzel and Risse, 2012; Zürn and Checkel, 2005). Approaching from a constructivist perspective, actors must be engaged with in a critical manner. Concepts such as fundamental rights and the EU cannot be taken as a given, they must be treated as ideational and contingent on the actors that uphold them.

However, all of this focus on socially constructed ideas should not be taken to exaggerate the role of individual agency. Actors do not function in isolation from one another. As they interact they form structures that govern political life. As Saurugger (2013: 888) highlights, scholars have come up with many terms when engaging with shared ideational structures, including worldviews, collective understandings, norms, and cognitive schemes. Scholars studying ideational change have theorised about various levels of ideas, from policies to programmes to paradigms (Schmidt, 2008: 306; Campbell, 2001 Hall, 1993). It is easy to get bogged down in such typologies of ideas, attempting to identify different levels and types of ideas and the different impacts they may have on political outcomes. Attempting to set out a rigid framework is potentially rather unhelpful as it risks reifying concepts that may not accurately represent the complexity and ubiquity of the ideational sphere. As research has shown, the sets of ideas that actors hold are fluid, malleable, and even contradictory (see Carstensen, 2011; Schmidt and Thatcher, 2013) – which, given the mutual constitution of agents and structures, should not come as a particular surprise. Furthermore, research has also highlighted the range of different types of ideas found in different contexts. For example, scholars have analysed ideas associated with the left-right political spectrum (Bevir and Rhodes, 2003), working practices in journalism (Hudson and Martin, 2010), local or national traditions (Kjær and Pedersen, 2001), and international regimes (Ruggie, 1982). Many of these insights into ideas go beyond the remit of the research in this thesis on fundamental rights in the EU. To attempt to capture all types of ideas held by various actors would be potentially rather unhelpful and beyond the remit of my research. Instead, the below sections focus on highlighting two theoretical insights from ideational research that are relevant to the study at hand: first, the nature of institutions as ideational and socially constructed; and second, the nature of shared sets of ideas about the organisation of politics and the economy, known as paradigms. In highlighting these two ideational structures, it is important to bear in mind that actors retain the ability to think critically outside of these structures and may be influenced by other ideas. The aspects of this framework highlighted below do not seek to deliver an exhaustive account of all the ideas that may be held by actors.

Furthermore, unlike some of the constructivist accounts highlighted here (see Schmidt, 2008; Hay, 2008; 2002) structure should be conceptualised on two levels (Bulmer and Joseph, 2015). First, there are the aforementioned meso-level structures that make up the institutional framework of the EU and dominant ideas in society. These structures are more malleable and open to change through a process of reproduction as actors engage with them, as highlighted below. In addition to this, there is a second level of macro-structural features (see Bulmer and Joseph, 2015: 9). It is the meso-level structures that are of particular concern to my research on fundamental rights in the EU and are outlined in more detail below. Yet it is important to acknowledge those phenomena that exist at a more macro-structural level. This includes phenomena such of the nation state as the primary mode of political organisation and the implications this has for EU integration. This also includes the nature of the economy in capitalist society and the power dynamics engendered by this structure. It is this macro-structural level that is necessary for understanding how certain institutional arrangements and sets of ideas at the meso-level become dominant in a given context at a given time. Yet it should be emphasised that whilst macro-structural features are still the product of human agency, the sheer magnitude of the number of actors involve in a process as complex as the capitalist economy necessitates that it be treated as a more stable structural process – at least for the purpose of my research and its focus on fundamental rights in the EU.

### 1.2.1. Institutions and the EU

The study of institutions has been a key area of political analysis, leading to a rather large body of literature known as new institutionalism. The breadth of this body of literature has also caused it to be subdivided into different branches, though there is not always agreement as to how this should be done. In his book on new institutionalisms, Guy Peters identifies at least six different branches, though by the third edition of his book that number appears to have grown (Peters, 2012: 19). Whilst each branch has its own questions and conception of institutions, there has been a significant amount of cross-fertilisation and intellectual borrowing. In fact, historical institutionalism has been described by some as an amalgamation of earlier rational choice and sociological branches (Hall and Taylor, 1996; see also response and critique by Hay and Wincott, 1998) and the most recent branch, constructivist institutionalism, can be viewed more as extension of (some interpretations of) historical institutionalism (Hay, 2008: 6). Given the constructivist orientation of the theoretical framework being developed here, it is the specific constructivist institutionalist branch and its incorporation of historical institutionalist work that is most relevant.

Historical institutionalism conceptualises institutions as occupying the ‘meso-level’ of analysis, situating them between the micro-level focus associated with rational choice models and macro-level focus associated with sociological accounts (see Thelen and Steinmo, 1992). This meso-level identifies institutions as the structures that make up decision making procedures in a system: ‘institutionalists are interested in the whole range of state and societal institutions that shape how political actors define their interests and that structure their relations of power to other groups’ (Thelen and Steinmo, 1992: 2). Immergut (2005: 287) describes interest in institutions as an interest in their ‘distorting effect of the political process’. This includes formal rules and informal norms and can result in unintended consequences that were not envisaged by those who set up the original institutional design (see Pierson, 2004). Whilst a lot of earlier institutionalist research in the 1990s and 2000s was premised along the lines of ‘bridge building’ between rationalism and constructivism, constructivist institutionalism as developed by Hay (2008) has emphasised instead how the entire institutional structure (including both formal rules and norms) is socially constructed by actors and sustained as those actors engage with them over time (see also Schmidt, 2008). All of the components of an institution – decision-making procedures, areas of competence, the institutional actors, etc. – represent ideas shared by actors and embodied in both formal rules (such as the EU treaties) and informal norms. Some rules may be codified formally, particularly in the treaties and in secondary legislation, whilst others exist more as norms. Whilst not departing from the insights of historical institutionalists, this constructivist turn helps to place the ontological nature of institutions and their relationship with actors on sounder footing (see Gofas and Hay, 2010; Hay and Wincott, 1998) and, as highlighted below, conceptualise change in a better fashion.

Another area in which constructivism has built on historical institutionalism is on the nature of institutional change over time. One the main contributions of historical institutionalists have been on the concepts of critical junctures and path dependency. Essentially, this posits that there is a critical foundational moment of institutional formation that, once formed, continues to constrain future developments along the same path through both intended and unintended consequences (Thelen, 1999: 387). On the issue of critical junctures, constructivists have been critical of research that takes a narrow focus on institutions and treats path disrupting events as exogenous shocks. Rather, it is the perception and interpretation of external events that affects their impact, rather than an assumption that such an external event logically entails certain responses (Schmidt and Radaelli, 2004: 194; Blyth, 2002). A classic example here is globalisation, which is often portrayed as a global force external to the state and applying pressure on the national economy, thereby justifying the apparent necessity of certain economic reforms through the perception that there is no alternative (Schmidt and Radaelli, 2004; Hay, 2002: 202-204). Constructivists have challenged this narrative, arguing that it is how actors interpret and construct processes such as globalisation that affects their policy responses and that such ideas may not necessarily be true (Hay, 2002: 202). Such a response by actors may be due to their tacit acceptance of dominant ideas or, in some cases, the deliberate misrepresentation of processes such a globalisation to justify policies (Beresford and Holden, 2000). The way in which actors interpret external events is central to the issue of dominant paradigms and it should be noted that this is an area in which constructivism has fallen short due to not fully accounting for power dynamics in contemporary capitalist society. These issues are discussed in more detail below, as they are also relevant to the concept of dominant paradigms.

Historical institutionalists have highlighted several factors that result in path dependency, which help to account for the stability of institutions over time. Ikenberry (1994: 20) highlights how ‘sunk costs’ and ‘vested interests’ create path dependency. Essentially, actors adapt their strategies and expectations based on an institutional arrangement and reinforce the logic of that arrangement as they act in it (‘sunk costs’) or an institutional arrangement reinforces pre-existing power asymmetries that ensures continued support for the institution as those actors that benefit from it become more powerful (see also Thelen, 1999: 392-394; Pierson, 1996). This account of power dynamics within institutions also includes the creation of partially autonomous institutional actors, such as the European Commission or the ECJ, who can use their agency to attempt to increase their own autonomy and power and reinforce the overall institutional arrangement in doing so (Pierson, 1996: 132). These accounts of path dependency have helped to account for why institutional designs have persisted over time, particularly when they become apparently inefficient yet continue to stick around.

However, some scholars have been critical of these accounts of institutions for being too deterministic, basically for subordinating agency to institutional structure (Immergut, 2005; Thelen, 1999). Thelen (1999: 397-398) addresses this shortcoming from a historical institutionalist perspective in a fashion that is similar to later constructivist work, emphasising how institutions are produced and reproduced as actors engage with them (see also Hay, 2008: 9; Schmidt, 2008: 314). By taking a more agency-focused approach, a constructivist understanding of institutions perceives institutions as less stable than in earlier new institutionalist scholarship as they are dependent on the agency of actors to continuously uphold them. Such an account opens up possibilities for change by accounting for how actors form their interests outside of institutional environments, whilst acknowledging the path dependent pressures of institutional inertia that other historical institutionalists have highlighted. Furthermore, the constructivist approach to institutions as ideational constructs also builds on older research on the path dependency of ideas and policy legacies in politics (Hall, 1993; Weir, 1992). Institutions embody ideas about governance and decision-making that different actors agreed on at least at one point in time and so tend to remain relatively stable until such a time that they no longer serve their function, though there is often a high threshold for their shortcomings due to the uncertainty inherent in adopting an alternative approach. Therefore, institutions tend to change incrementally over time as actors reproduce them through their engagement, but that change is often along a path dependent process. For example, the centrality of market integration at the beginning of European integration has meant that certain markets rules, particularly the four fundamental freedoms of the internal market, have continuously played an important role and have been progressively elevated to a higher status over time, thereby allowing integration via the market to expand to a greater array of areas (see Hay and Wincott, 2012: 141-143; Scharpf, 1999; 58). The prominent position allocated to market freedoms in the original treaties provided the grounds for the ECJ to elevate their status in its case law in the 1960s and 1970s, whilst other actors such as national governments remained committed to the idea that the market provided the best means towards integration.

To be clear, institutional ideas refer to things such as organisation structure, decision-making procedures, roles of different actors, and competences. These are important sets of ideas collectively shared by actors, but are not the only sets of ideas embodied in the EU. As highlighted below, ideas about the normative goals of political action and how these should be achieved in paradigms are also embedded in the EU. Yet before considering paradigms, it is necessary to consider the implications of constructivism with regards to conceptualising the EU. By acknowledging that the institutional framework of the EU is produced and reproduced as actors engage with it, it is possible to account for how new concepts such as fundamental rights become incorporated and how they can influence later developments. To do this, it is necessary to consider the actors involved and the institutional constraints these actors have to contend with. Empirical insights from the vast body of literature on the EU provide an account of these factors, even if not from a constructivist perspective.

In terms of actors, national governments, particularly those of larger member states, have been widely regarded to be central players. Liberal intergovernmentalists have provided some insights into the preference formation of national governments and the bargaining process that leads to institutional outcomes (see Moravcsik and Schimmelfennig, 2009), but, as highlighted above, the interests of these actors need to be treated more critically. The perceived self-interest of national governments has exerted a strong influence on how integration can proceed. For example, the commitment of national governments to sovereignty in policy areas that hold high domestic legitimacy has affected how integration can proceed. It has been broadly recognised that market regulation has been far easier to gain an EU level consensus on than policy areas such as welfare or labour market regulation (Leibfried, 2010; Majone, 2005; Scharpf, 1999). The high level of consensus required among governments to actively construct a European level polity is made particularly difficult by the heterogeneity of nationally embedded ideas as to how different policy areas should be organised (Scharpf, 1997: 26). Even when treaty competences are interpreted broadly to allow the EU legislators to act, the ability to achieve agreement in the Council of the EU where national governments are represented often stalls developments. Even where Qualified Majority Voting (QMV) rules are in effect, there is an informal norm in the Council to seek unanimity (Novak, 2013) – though it should be noted that fundamental rights developments tend to require unanimous agreement anyway, as highlighted in chapter three. In institutionalist terms, the centrality of the Council in EU procedures and the need for consensus among national governments is an example of a veto point (Lewis, 2003; Pierson, 1996). As highlighted throughout this thesis, the strong institutional role of the Council representing national governments is important to take into consideration as it has primarily acted to block developments concerning fundamental rights. This has contributed to the path dependency of the institutional arrangement of the EU, as those actors with the strongest capability to alter it are often paralysed by the need for unanimity (see Scharpf, 1999; Pierson, 1996).

Whilst the Council has often acted as a veto point stalling developments, the ECJ has contributed greatly to integration via the internal market (Hay and Wincott, 2012: 142-144; Niemann and Schmitter, 2009; Scharpf, 1999: 50-51). In doing so, the ECJ has established itself at the top of the legal hierarchy as a kind of constitutional court of Europe (see Weiler, 1991: 2415-2418). Yet in contributing to integration, the ECJ is constrained by institutional dynamics, as well as the presence of a strongly embedded neoliberal paradigm (as introduced below and developed in chapter two). The ECJ has an institutional role to ensure that EU law is interpreted consistently across the EU and the other EU institutions abide by this same law. The key reference point of the ECJ is the EU treaties, so although it has taken on a role as a kind of constitutional court of Europe it is constrained not by a constitutional text setting out legitimate democratic statehood (as national constitutional courts are), but instead by treaties historically focused on market-based integration. The Court is also constrained by the legitimate expectations of courts in Europe. That is, it must follow a legal logic when deciding upon cases and apply its rules consistently over time (de Sousa, 2011: 165-166; Scharf, 2010: 240). This contributes to a path dependent effect as earlier case law locks in rules, which can result in a far larger impact than the original case may have implied (de Sousa, 2011: 166). Furthermore, the Court is also constrained by what is acceptable to national governments and has faced backlash against its more innovative and expansive interpretations of EU law (Alter, 2000). By conceptualising the institutional framework of the EU as socially constructed, it is possible to understand how the ECJ as a judicial actor is able to reinterpret key aspects of the EU and expand the scope for integration without the necessity of cumbersome treaty amendments. The central role of the ECJ in introducing and developing the concept of fundamental rights (as highlighted in chapter three) means that these institutional dynamics are of key importance to the way in which rights can be constructed.

The Commission and the Parliament have also contributed towards furthering integration (Niemann and Schmitter, 2009), but have generally been less influential when it comes to fundamental rights developments. With regards to the Parliament, its institutional role has generally restricted the degree to which it can contribute to rights developments. Until the Treaty of Lisbon entered into force at the end of 2009, the institutional framework of the EU afforded the Parliament a weaker role than its co-legislator, the Council. As an the only directly elected institution and as the representative of the European people, the Parliament also considered itself as the most legitimate actor to draft a catalogue of fundamental rights – a view shared by the German constitutional court (see chapter three). The Commission, on the other hand, is more of a technocratic body and has attempted to derive its legitimacy from achieving Pareto-efficient outcomes (Majone, 2005). It often acts as a ‘purposeful opportunist’ by supporting those policies and strategies it thinks will successfully achieve integration (Cram, 1997; see also Jabko, 2006). Diez and Wiener (2009: 14) have even described neofunctionalism as a kind of ‘quasi-official ideology’ of the Commission. Utilising its control over information flows and its role as instigator of the EU legislative process, the Commission has been able to overcome reluctance from national governments and successfully pursue integration (Pierson, 1996: 132).

As the institutional ideas that constitute the EU are continuously reproduced as actors engage with it, new ideas can be introduced and incorporated into the broader institutional structure. The clearest examples of these ideas can be found in the EU treaties, which are amended at select intervals as national governments agree on new sets of ideas in response to changes in circumstances. Yet change does not only happen via treaty amendment and not all the ideas that constitute the EU are codified in the treaties. This is evident when it comes to fundamental rights. As elaborated on in chapter 4, the original treaties contained no mention of fundamental rights and these rights were not originally introduced by national governments amending the treaties. Rather, the ECJ introduced the concept of fundamental rights via its case law. A rather significant set of ideas about what protections an individual should enjoy and how courts should ensure those protections were introduced wholly by the ECJ and with no written basis in the treaties. The ECJ essentially reinterpreted what principles constitute the institutional framework of the EU and even its own role in upholding those principles. Crucially, these developments were acceptable to national governments, who were mostly subject to similar constraints domestically, and were largely considered to be compatible with the pre-existing institutional nature of the EU. As demonstrated throughout this thesis, the institutional framework of the EU has been open to incremental change led by institutional actors such as the ECJ. Yet when actors conceptualise fundamental rights and the role they should play in an institutional framework like the EU, they do so in relation to other dominant political ideas about the nature of public authority and its relation to society and the economy. To situate ideas such as fundamental rights in an appropriate political context, the nature of paradigms must be taken into account.

### 1.2.2. Paradigms and Neoliberalism

Ideational research from a political economy perspective in particular has developed the concept of paradigms. This concept of a paradigm is based on the work of Peter Hall in which he outlines an ideational approach to policy making based on sets of ideas (a paradigm) that identify the normative goals of policy, the instruments appropriate to achieve them, and the nature of the problems that should be addressed (Hall, 1993: 279). Essentially, paradigms provide guidance to actors on how to interpret complex signals in the political economy, including normative ideas about how the state should be organised in relation to the economy and society and cognitive ideas as to how these goals can be achieved (Schmidt, 2008: 206). According to Hall, paradigms should be situated at the top of a three-order hierarchy, with instruments/programmes and specific policies encompassed under paradigms. Social learning processes contribute to changes to programmes and policies, but the overarching paradigm goals tend to remain relatively stable over time (Hall, 1993: 275-276). The concept of paradigms in the work of Hall provides a useful starting point, though later research has developed this concept through critical engagement. For example, Hall’s account of paradigm change is premised on a notion of ‘punctuated equilibrium’ during a crisis, wherein there is an accumulation of external anomalies (in Hall’s case in the functioning of the UK economy) that the paradigm can no longer account for (Carstensen, 2011: 598). Work by Hay (2001) has suggested that it is instead the perception of crisis or anomalies and the perceived failure of a paradigm, rather than these factors being an objective fact and derived from exogenous factors, that effects paradigm change (see also Blyth, 2002). Highly politicised and value-laden debates about the desirability of competing visions of the state and society rather than technocratic learning processes are more important to the development of paradigms (see Hay, 2001: 200), though, as highlighted below, power dynamics in society are also key to understanding ideational change and resilience. Scholars have also turned to study the malleability, internal contradictions, and incremental change in paradigms (Schmidt and Thatcher, 2013; Cartsensen, 2011; Hudson and Martin, 2010; Jabko, 2006).

Since the 1980s the paradigm of neoliberalism has come to dominate European politics. Post-World War II social settlements that generally entailed some degree of state intervention and permitted high welfare and labour standards, such as Keynesianism in the UK and *dirigisme* in France (see Hall, 1993; Clift, 2003), have all been influenced and adapted to some degree by neoliberal ideas, though there has been significant national variation (Schnyder and Jackson, 2013; Gualmini and Schmidt, 2013; Brenner, Peck, and Theodore, 2009; Kjær and Pedersen, 2001). Though there is some disagreement as to what exactly neoliberalism is, there are several core tenets that have been identified that are vital to understanding contemporary developments in the EU. The primary focus of neoliberalism is on the centrality of the market to distribute resources in society, which is understood as involving minimal constraints on capital such as business and financial actors. This involves price stability in the form of low inflation to secure a sound investment environment for financial capital, fiscal balance of public finances and low public spending to ensure levels of taxation are low, and the expansion of market competition as the primary means to distribute resources in society (Schmidt and Thatcher, 2013: 5). These normative ideas, neoliberalism suggests, are the best way to manage the economy and the state in the context of global capital flows, though they have important implications. In order to achieve these normative goals, neoliberalism entails a number of proposals. Keynesian counter-cyclical spending is rejected in favour of austerity to achieve fiscal balance, which often has repercussions for areas of higher state spending such as social security and healthcare. Deregulation is proposed to ensure that private market actors face as few constraints as possible and seeks to expose workers to cost competitiveness pressures. This includes a commitment to flexible labour markets by freeing employers from restrictive employment protection standards, concerted state action to lower the bargaining power of labour, and the reorganisation of welfare support designed to incentivise uptake of work. It also suggests that public services are better provided through market mechanisms and has sought to expand markets through the use of liberalisation and privatisation to this end (Schmidt and Thatcher, 2013: 4-5).

To anyone familiar with the history of economic liberalism, many of these neoliberal principles would appear to be part of classical liberalism and the prioritisation of the *free* market. What is specifically ‘neo’ about neoliberal is more to do with the implementation and long-term securement of these ideas through attempts at depoliticisation and the removal of direct democratic control, which entail a specific role for the state that stands in contrast to prescriptions about the free market that are associated with classical liberalism.[[2]](#footnote-3) Neoliberalism promotes the delegation of monetary policy to an independent central bank with a remit to maintain low levels of inflation and, particularly more recently, the enshrinement of balanced budget rules in constitutional law and international treaties (Gill and Cutler, 2015; Oberndorfer, 2014; Gill, 1998). State power is used to create new avenues for market competition, including in areas such as healthcare and welfare provisions that have historically been sheltered from such pressures in Europe (Heyes, Lewis, and Clarke, 2012; Brenner, Peck, and Theodore, 2009). A key component of neoliberalism is the idea that liberal economic values are to be prioritised over other concerns and secured at the highest level of law, which has led neoliberal reforms to be described as a form of ‘new constitutionalism’ (Brenner, Peck, and Theodore, 2009: 213; Gill, 1998: 30-37). In the context of the EU and in response to the Eurozone crisis, even labour market and social policies have become encompassed under technocratic modes of governance and subordinated to neoliberal ideas of macroeconomic competition (de la Porte and Heins, 2015; Oberndorfer, 2014; see chapter five). So whilst classical liberalism was more focused on the spontaneous and natural emergence of a free market order and restrictions on the role of the state, neoliberalism recognises (though not always explicitly) the need to use state power to create and secure market freedoms and space for competition (Parker, 2008: 397). However, it is important to note that there is some disagreement about this particular aspect of neoliberalism (see Brenner, Peck, and Theodore, 2009 on academic uses of neoliberalism; see W. Davies, 2016 on journalistic and political uses of the term) and that some scholars associated this role of the state more with German ordoliberalism (as addressed below; see also Cerny, 2016). It has been suggested that neoliberalism is rhetorically committed to the idea of the restricted role of the state, but in practice relies on the use of state power to secure the freedom for capital to expand by restricting actions that may infringe on the ‘free’ market (see Schmidt and Thatcher, 2013: 26-32). Yet this debate is moving more into the realm of political economy theory. The implications of neoliberal ideas about the role of the state vis-à-vis the economy that have been observed in practice and theorised on by the scholars highlighted above have serious implications for fundamental rights, as explored in chapter five in particular.

Whilst neoliberalism emerged on a global scale in the 1980s with the US and UK leading the way, there is a specific strand of neoliberal thought in Germany with a longer history and that has influenced EU developments. It is commonly referred to as ordoliberalism, though also as German neoliberalism (see Bonefeld, 2012; Sally, 1996). Ordoliberalism became established in Germany in the immediate post-World War II period, at the time when Britain and France were more focused on state interventionist approaches, and was heavily influenced by the German experience with Nazism (Foucault, 2008: 110-111). It shares many key tenets with contemporary neoliberalism, such a commitment to price stability, balanced budgets, and the role of the free market, though it has developed around the export-focused economy of Germany rather than the context of global financial flows that neoliberalism is more associated with. The exact differences between ordoliberalism and neoliberalism are difficult to delineate, as both paradigms share key thinkers (for example, Friedrich Hayek) and, more recently, neoliberal ideas have spread into Germany and influenced policy design (Berghahn and Young, 2013: 773; see also Cerny, 2016). However, it is worth highlighting Germany’s post-war history of ordoliberalism as these ideas have been influential when it comes to European integration. It has been suggested that the German strand of ordoliberalism is more comfortable with the need for some level of state intervention to provide welfare provisions, particularly when focused on enhancing market competition by ensuring that all individuals can participate (Sally, 1996: 248-249). Along these lines, Germany has become associated with a ‘social market economy’ that uses social policy to secure the foundations of a highly competitive free market (Bonefeld, 2012). Yet as Foucault (2008: 143-144) argues, many elements of German social policy formed in the post-war period were influenced by state interventionist ideas rather than ordoliberal orthodoxy. The German social market economy developed at the height of embedded liberalism (see below), at a time when state interventionist policies were the norm across Europe (Ruggie, 1982). The German history with ordoliberalism is important to take into account for its influence on early EU developments at a time when other European states had adopted state interventionist approaches.

Of course, neoliberalism (and the ordoliberal variant) is not the only set of ideas about how politics and the economy should be managed. As mentioned above, the UK has a history of Keynesianism and France has a history of *dirigisme*. Though there is a fair amount of national variation across Europe, as evidenced by the scholarship on types of welfare states (Esping-Anderson, 1990) and varieties of capitalism (Hay and Wincott, 2012; Hall and Soskice, 2001), prior to the onset of global neoliberalism European states were all characterised by paradigms that accepted some degree of state intervention under a global system of ‘embedded liberalism’ (Ruggie, 1982; see also Brenner, Peck, and Theodore, 2009: 192-194). Ruggie takes the concept of embedded liberalism from the work of Karl Polanyi and uses it to refer to what is considered the legitimate social purpose of state power in relation to the economy (Ruggie, 1982: 386). Embedded liberalism recognises the need for the state to actively interfere and regulate market forces in order to stabilise the economy and protect its citizens from the excesses of market liberalism, whilst still broadly accepting a liberal basis for capitalist society (Ruggie, 1982: 388). Neoliberalism, by contrast, can be conceptualised as a form of disembedded market order, wherein the market forces are prioritised over that of state intervention (though see van Apeldoorn, 2009 on ‘embedded neoliberalism’). So whilst different European states went about organising their national economies and welfare states in different fashions in the immediate post-World War II era, they were generally premised on some degree of state intervention to regulate the economy to secure full employment and redistribute wealth to protect citizens from poverty. To achieve these goals, states generally engaged in policies to ensure mass consumption such as counter-cyclical public spending during economic downturns, targeted public investment, creation of a robust welfare state, and employment protection. It should be noted, as highlighted above, that Germany is a bit of an exception to this trend due to its adoption of ordoliberal ideas in the immediate post-war period.

Despite the current dominance of neoliberal ideas in Europe today, it is important to take into account those paradigms associated with the embedded liberal period. Neoliberalism has emerged as a globally dominant paradigm, but has been most strongly implemented in the UK and the US where there has been a cleaner break from their past paradigms. Other European countries have generally implemented neoliberal ideas to a lesser extent and maintained some degree of state intervention in their economies, particularly when it comes to employment protection and social protection (Schnyder and Jackson, 2013; Gualmini and Schmidt, 2013; Brenner, Peck, and Theodore, 2009). The legacies of older paradigms in European states continue to hold a lot of sway, particularly among those attempting to oppose neoliberalism. For example, Bulmer and Joseph (2015: 17) highlight other projects at the EU level informed by older paradigms that are attempting to compete against the current dominance of neoliberalism, which include promoting the organisation of social and welfare policies at both the national level and European levels. However, it should be noted that such attempts, particularly to promote social policy at the European level, have also been strongly influenced by neoliberal ideas. This is evident in the way in which the EU’s ‘social dimension’ in the Lisbon strategy and now in Europe 2020 has shifted towards championing flexible labour markets and activation-based welfare policies in order to secure macroeconomic competitiveness (Copeland and James, 2014; Bulmer, 2012; Daly, 2012; Smismans, 2005). Finally, it is necessary to take into account the post-war economic orders because it was under these conditions that many fundamental rights developments took place. The national constitutions of many European states were founded or updated in the post-war period and many include both civil and social rights (Fabre, 2005). The ECHR was signed in 1950 and the ESC in 1961. The rights-basis found in national constitutions and in international treaties represents an attempt to constitutionally embed the post-war settlement. When examining rights developments in the context of the EU, therefore, it is necessary to take into account the relationship between rights and the paradigms that were dominant when many rights developments originally took place in Europe. This issue is looked at in greater detail in Chapter two.

### 1.2.3. Dominant and Hegemonic Ideas

Paradigms as outlined here are important ideational factors that must be taken into account when looking to understand why political actors do what they do. Yet these ideas do not float freely and are not all afforded the same resonance and salience across society. It is not simply a case that some ideas about the state and the economy are right whilst others are wrong. As highlighted above, the structure of institutions such as the EU affords different actors different capabilities. For example, the ECJ is more constrained to re-interpreting the treaties, whereas national governments tend to be regarded as the masters of the treaties and are able to work both inside and outside of the framework of the EU. Yet there is more to power in Europe than the institutional structures of the EU or the ability of national governments to do as they please, provided they can reach an agreement. Scholars approaching from a constructivist perspective have given some attention to power dynamics underpinning how certain sets of ideas become dominant in society, often by focusing on elite agency. The roles of elite actors such as politicians, courts, the media, think tanks, and epistemic communities of policy experts have all been highlighted as contributing to the development of dominant ideas in society (see Carstensen, 2011; Hudson and Martin, 2010; Jabko, 2006; Ferree, 2003; Schmidt, 2002; Hall, 1993; Haas, 1992). These accounts chime with the framework highlighted above due to the way in which actors produce and reproduced ideas. Furthermore, some scholars have been critical of the emphasis on elite agency in ideational research. Seabrooke (2010) has drawn attention to the role of the general public and how their everyday politics is crucial to the legitimacy that elites rely upon. This concept of legitimacy is important as it accounts for how non-elites can shape social norms and create the impetus for institutional change. Legitimacy is important in the context of the EU integration, as the ‘permissive consensus’ that was said to have underpinned earlier integration broke down by the 1990s into a ‘constraining dissensus’ (Hooghe and Marks, 2009: 5). As demonstrated in chapter 3, fundamental rights have been used at times as a tool by EU elites in an attempt to enhance the legitimacy of the EU. However, it has been recognised that whilst these actors play a key role regarding the power behind ideas, ideational research has not delivered a strong account of power and ideas (Carstensen and Schmidt, 2016).

Most recently, Carstensen and Schmidt (2016) have put forward a framework analysing power and ideas that suggests three ways in which ideational power can be conceptualised. This accounts for the capacity of actors to persuade others to accept and adopt their ideas (power through ideas), to impose sets of ideas in a policy-making arena (power over ideas), and to control what ideas are even considered (power in ideas) (see Carstensen and Schmidt, 2016). The final point on ideational power, power in ideas, actually draws on the Gramscian notion of hegemony and serves as a useful link between the constructivist literature highlighted here and the more critical neo-Gramscian literature below. The concept of hegemony embodied in Carstensen and Schmidt’s notion of power in ideas refers to the depoliticisation of sets of ideas among the general population as these sets of ideas become ‘common sense’: background knowledge in the public psyche that becomes unchallenged and uncritically accepted (Carstensen and Schmidt, 2016: 329-332). Yet by only really focusing on elite level agency, it is not clear in this constructivist literature how particular actors are in a position to wield such ideational power. So whilst constructivist research has certainly made valuable contributions to the understanding of how ideas become established, the power dynamics underpinning elite agency require more elaboration.

There are macro-structural processes in contemporary society that affect the power dynamics that privilege certain actors and their ideas. These are processes that are products of human agency and are still socially constructed, but due to their enduring nature and the multitude of actors involved must be treated as structural in nature. The functioning of the economy in capitalist society is a macro-structural process that is particularly relevant to European integration. As highlighted at the beginning of this section, it should be emphasised that material factors – i.e. the production of goods or monetary wealth – should not be considered ontologically distinct from socially constructed ideas. A person may be able to physically hold in their hand a banknote, but the value of that banknote and its meaning to the person and society as a whole is socially constructed. The intrinsic properties of money are not fixed, they are liable to change as the perception of its worth change: a phenomenon that can be observed in inflation or in the fluctuations of the capital markets. Research from a neo-Gramscian perspective in particular has sought to situate the dominance of certain sets of ideas in the context of material and structural features in capitalist society, namely through the development of the concept of hegemony.

The concept of hegemony was developed by Gramsci as a means to explain the enduring nature of capitalism despite the circumstances of his time indicating society in Western Europe was ripe for a socialist revolution. Similar to some of the constructivist accounts highlighted above, Gramsci highlighted the role of institutions in civil society in addition to the state (which could encompass the media, academics, think tanks, the church, etc.) in spreading dominant ideas (Morton, 2007: 92). It is through such institutions that the ideational hegemony of capitalism is established by the ruling class, whilst the coercive force of the state lingers in the background ever present but without predominating over consent (Burawoy, 2003: 314). Yet the ability to be hegemonic is not only premised in the state and civil society (called superstructure in Marxist terms), it exists in a dialectical relationship between superstructure and the relations of productions in capitalism that afforded a privileged position to the capitalist class as the owners of production (Morton, 2007: 95; Cox, 1981: 134). This approach highlights how the production of goods and services which creates the wealth of a society underpins the power of different actors and of the state (Cox, 1981: 135). By looking to economic processes and the relations of production under capitalism, neo-Gramscians have sought to account for the basis upon which actors can establish dominant -- and, indeed, hegemonic -- ideas in contemporary society.

Of particular relevance to European integration, is the nature of (global) capitalism. Research from a neo-Gramscian perspective in particular has devoted attention to the interplay between structural processes in capitalist society and the hegemony achieved by particular sets of ideas, most recently neoliberalism (see Drahokoupil, Apeldoorn, and Horn 2009; Cafruny and Ryner, 2007; van Apeldoorn, Overbeek, and Ryner, 2003). In the context of the above discussion about neoliberalism in the EU, Cafruny and Ryner (2007: 22-24) identify the importance of the reconfiguration of the global political economy in the 1980s at the hands of the US and the economic pressures this has brought to bear on Europe. Changes in the global economy, such as the deregulation of capital flows, the transnationalisation of production, and the global free trade have exerted significant pressures on the state and enhanced the agency of specific capitalist actors, namely financial actors but also production based companies, at the expense of labour (see Ryner, 2015; Bieling and Jäger, 2009; Cafruny and Ryner, 2007; Holman and van der Pijl, 2003; Gill, 2003 for more on the EU within US-dominated global economy). According to van Apeldoorn, Overbeek, and Ryner (2003: 28) the ‘economic dependence of the state on the tax revenue and future investment decisions of capitalist firms tend to make the political system treat the special interest of firms as the “general interest”’. Structural changes in the global economy have privileged the paradigm of neoliberalism, which has become widely perceived among elite actors as the best means to manage the political economy in light of these changes whilst simultaneously promoting policies that perpetuate the organisation of the global economy along these lines. An example of his can be found in the words of Leon Brittan, the European Commission Vice President in 1989, touting EU reforms to deregulate capital flows:

We are constructing a financial system which will be less constrained and less regulated than either the USA or Japan. And it will be open to the world. It will be open not simply as a self-indulgent gesture but because that openness helps to make us more competitive, more efficient and more successful. We do not merely tolerate external investment in our banking and financial sectors: we positively welcome it. (European Commission, 1989a)

The neoliberal commitment to a lightly regulated financial system as the best means to organise this area is clear. The special interests of financial capital are presented as the general interest of the European Union, contributing to the hypermobility of financial capital that has necessitated the perceived need for deregulation of financial capital in the first place.

Whether intentional or not, the EU has contributed to this process by granting constitutional-like protection to the free movement of goods, labour, services, and capital (Höpner and Schäfer, 2010; Scharpf, 2010; Bieling and Schulten, 2003; see chapter two). It has been argued that European integration has been inherently more predisposed towards market liberalism due to the relative ease of deregulatory outcomes compared to the consensus necessary for supranational institution building (Hay and Wincott, 2012: 136-140; Scharpf, 2010). This has further increased the power of business actors by, for example, enhancing their ability to move their headquarters to where tax is lowest and production centres to where labour is cheapest (Bieling and Schulten, 2003: 235). As the relative power of business actors has increased at the expense of organised labour, neoliberal ideas that are better suited to the perceived short-term interest of those business actors have become more dominant. Whether it is through the threat of losing foreign investment or a home-grown business moving production abroad, political elites have increasingly adopted neoliberal ideas as the perceived best means to organise the state and its relation to the economy and society. In recent times, many of these neoliberal ideas have come under sustained attack and are considered to be flawed, particularly in light of the global financial crisis in 2007-2008 and the on-going Eurozone crisis (Krugman, 2015; Stiglitz, 2014; Streeck, 2014; Schmidt and Thatcher, 2013). Yet these ideas have largely endured as they continue to serve the interest of powerful business actors and are perceived as necessary in light of global capitalist developments (Ryner, 2015).

Whilst it is primarily scholars in the neo-Gramscian tradition who have situated the dominance of neoliberalism in its appropriate context of developments within global capitalism, scholars in a range of disciplines have drawn attention to the role of neoliberal ideas across numerous policy areas in the EU: see, for example, mainstream political economy (Toporowski, 2015; Mügge, 2013; Thatcher, 2013; Schmidt and Thatcher, 2013; Heyes, Lewis, and Clark, 2012), public policy and governance (Dukelow, 2015; Sacchi, 2015; de Ville and Orbie, 2014; Morin and Carta, 2014; Rosamond, 2014; Parker 2013) and legal studies (Oberndorfer, 2014; Menendez, 2013; Dale and El-Enany, 2013; O’Brien, 2013; Smismans, 2005; Ashiagbor, 2005; Hervey, 1995). Neoliberal ideas raise a number of serious implications for the respect of fundamental rights, particularly social rights. When analysing the development of fundamental rights, it is necessary to take into account areas of convergence and tensions with other ideas embedded in the EU and how this has affected their role.

Gramsci developed an account of hegemonic ideas in society premised on the capabilities bestowed by the forces and relations of production of that society, resulting in a number of common sense presumptions upholding the status quo that permeates all of civil society. Neo-Gramscians have taken this concept and applied it to developments within capitalism, analysing the shift from embedded liberalism to neoliberalism. They have sought to account for the dominance of neoliberalism whilst recognising that it has not quite achieved a status of full hegemony, as the common sense presumptions that neoliberalism preaches have been continuously challenged by subaltern groups. Cafruny and Ryner (2007: 8) describe neoliberalism as a form of ‘minimal hegemony’ that is more reliant on coercive power than consent. Brenner, Peck, and Theodore (2009: 192) describe neoliberalism as not being globally hegemonic in the technical sense as it has not fully co-opted oppositional forces, but should be considered dominant as a form of control. Van Apeldoorn (2009) focuses on how actors have sought to embed neoliberalism in the EU through some (mainly rhetorical) concessions to upholding social protection, but notes that this project has largely started to break down as the EU faces multiple legitimacy crises. Neoliberalism is conceptualised in this thesis as being dominant, but not hegemonic in the sense that its prescriptions have become common sense presumptions and go unchallenged. Its dominance may be largely down to the absence of a clear alternative to neoliberalism that fits with the institutional framework of the EU, particularly given the difficulty in achieving the positive integration required for an active state role in managing the economy and upholding high social standards (see Scharpf, 2010). In the words of Antonio Gramsci, ‘the old is dying and the new cannot be born’ (Gramsci, 1999: 556). In the context of my research, this means that many neoliberal ideas are dominant in the sense that they are widely held by political elites and have been shown to have underpinned both a wide range of policies and the institutional organisation of the EU, particularly in the form of single market and EMU. Yet neoliberal ideas are not so hegemonic that they are uncritically accepted or have completely overcome older sets of ideas about political organisation and constitutional order. The kind of constitutional arrangements and international rights institutions that characterised European states in the more immediate post-World War II era have remained salient among a number of political actors and actors are always able to think critically and challenge dominant ideas. When analysing the development of rights in the EU, therefore, it is important to take into account their relationship to other ideas embedded in the EU, particularly those of neoliberalism.

## 1.3. Methodological Reflections

This critical constructivist theoretical framework highlights several factors that must be taken into account when analysing the development of fundamental rights in the EU. Fundamental rights are themselves socially constructed by actors and so must be approached in a critical manner, looking to the processes through which they have been constructed and taking into account the structural dynamics of these processes. There are two key structural dynamics at play. First, there are institutional dynamics within the EU that affect the way in which the different institutional actors of the EU (that is, the Commission, the Council, the Parliament, and the ECJ) are able to engage with fundamental rights and contribute to their construction. These institutional dynamics are shaped by the official role granted to the different institutional actors and the broader social expectation of how these actors should behave, for example the ECJ is constrained by its role as interpreter of the treaties and the legitimate expectations of how a higher court should act in Europe. Second, there are paradigmatic dynamics. That is, the relationship between different sets of ideas relating to fundamental rights and other (in this case, economic) principles embedded in the EU. This aspect is drawn out in the next chapter, which sets out the broader European context of fundamental rights and the development of neoliberal economic principles in the EU. Within Europe the premier rights institutions are the European Convention on Human Rights (1950) and the European Social Charter (1961) encompassed under the Council of Europe, whilst all European states have their own rights protections embodied within their constitutional arrangements. Whilst there are many similarities between these different approaches to rights, there are also many differences relating to, for example, what rights are protected, how they are enforced, and the relationship between the protection of rights and other political objectives. Within the EU, neoliberal economic principles have become embedded within the treaties, affecting the way in which fundamental rights have been developed. When analysing fundamental rights in the context of the EU, which largely developed after the other European rights institutions and alongside the development of neoliberal economic principles within the EU, it is vital to engage with what actors actually understand fundamental rights to be.

Furthermore, as highlighted above, it is not only rights that are socially constructed: the institutional structure of the EU and the other paradigms embedded in it are also the products of human agency. By treating the EU in this way, it is possible to conceptualise how new ideas such as fundamental rights can become incorporated into its institutional arrangement. Actors can introduce new concepts, such as fundamental rights, into the EU through various means, including by reinterpreting pre-existing treaty provisions. Of course, there are various dynamics that must be taken into account when looking to how such change happens, as many studies on the EU have demonstrated. For example, the ECJ is constrained by path dependent pressures due to its institutionally ascribed role to interpret the treaties and the expectations of it by other actors such as national governments. Furthermore, the EU is not a blank slate on to which fundamental rights can be introduced. Given the economic nature of most integration, there are pre-existing ideas embodied in dominant paradigms that must be taken into account. Of particular importance is the turn towards neoliberalism over the last several decades, which has raised significant concerns about the compatibility between neoliberal ideas and fundamental rights (see chapter six in particular). When engaging with a clash of ideas, the power dynamics underpinning different ideas must be taken into account. Fundamental rights may be considered to be powerful ideas by many, but they do not make money and they do not contribute to the wealth that underpins much power in capitalist society. Due to the focus on fundamental rights in this research, these power dynamics may be more of a background factor, but must be considered when seeking to understand the nature of the EU today.

The purpose of this research, it should be recalled, is to analyse the development of fundamental rights in the EU and explore the ways in which rights developments actually affect different policy areas. The question that this research seeks to answer is whether or not fundamental rights developments have led to a more balanced constitutional arrangement in the EU, which is premised on the recognition that European integration has proceeded primarily via economic means and that the introduction of a legally binding Charter of Fundamental Rights at the end of 2009 was in the context of creating a more state-like constitutional order. The theoretical framework outlined above draws into focus the importance of critically engaging with key actors involved with rights developments and situating them within the relevant structural environment. It recognises that fundamental rights are a political concept that has been constructed by actors in relation to the institutional framework of the EU and other dominant ideas embedded in it. In order to determine if fundamental rights developments have led to a more balanced polity, this research approaches the issue in two stages. First, the historical development of fundamental rights is analysed. Second, three case studies spanning the application of different rights to their respective policy areas are analysed.

First, the historical development of rights since their introduction to the EU in 1969 up until the Charter gained legal value in 2009 is analysed. The unit of analysis in this stage is the concept of fundamental rights, which is treated as socially constructed in a broader political context that includes other socially constructed ideas about constitutional order. This entails taking a process tracing approach to the development of rights, identifying the critical events and key actors involved and seeking to determine how they have constructed the concept of fundamental rights. The purpose of this step is to determine what the dominant understanding of fundamental rights is in the EU, including what specific rights are covered, the role of rights in the institutional framework of the EU, and their relationship to other principles or values. In relation to the overarching question addressed in this thesis, the critical constructivist framework highlights the importance of situating the concept of fundamental rights in relation to the liberal economic principles that have underpinned economic integration, first in the single market and now in EMU. By conceptualising institutions as ideational and as incorporating paradigms, this theoretical framework provides insights into how a concept such as fundamental rights can become incorporated into the EU by different actors as they reproduce its institutional structure via their own agency. It is widely known that it is the ECJ that has been the most proactive actor involved in rights developments historically, though the Commission, Parliament, and national governments in the Council have also been influential in their own ways. Each of these actors has their own specific ideas about what the concept of fundamental rights involves, particularly in relation to their own identity and roles, and is able to enact institutional and paradigmatic change in different ways. By tracing the process of the development of rights in the EU over time, it is possible to ascertain how the current dominant understanding of rights has been constructed and how it fits into the broader structural context of the EU.

The approach taken to analysing the historical development of fundamental rights in the EU was through process tracing. The key events in the history of rights developments were identified and analysed in detail, establishing the pressures that contributed to developments, which actors were involved, and, crucially, how the way in which rights are understood was shaped. Particular attention was paid to the nature of the different actors involved and how they are constrained by the institutional structure of the EU. The position of different actors at key formative events was also treated critically, noting that their presentation of rights may differ from the way in which they actually perceive the role of rights in relation to their position. This is less the case with the ECJ, where the presentation of rights in its case-law also establishes a legal basis for the role of rights in the EU, and more an issue for the political institutions. For example, for all the rhetorical commitments to rights from national governments in the Council, the repeated failure to establish the consensus necessary for any hard law developments at various points in the 1970s and 1980s in particular demonstrates that this commitment has proven difficult to translate into action beyond rhetoric. It is also necessary to highlight the different strands through which different aspects of fundamental rights developed. Most of the developments around civil rights occurred through the case-law of the ECJ and were subject to declarations of endorsement by the political institutions, which means that the judicial nature of the Court must be taken into consideration. Social rights, on the other hand, faced a far tougher path via political developments and obstruction in the Council. Both types of right may have been included in the Charter of Fundamental Rights, but it is only through tracing their different developmental processes that it is possible to fully understand the nature of rights today.

The second step entails examining developments in specific policy areas before and after the Charter gained legal value in 2009. The post-Treaty of Lisbon time period analysed is between the end of 2009 and the end of 2014. This step analyses different policy areas to see how fundamental rights have been utilised in practice in order to determine the implications that the way in which rights are understood has for politics in the EU and if the dominant understanding of rights has changed since 2009. Three different policy areas were selected in order to analyse different aspects of fundamental rights: data protection and privacy rights representing traditional civil rights; collective bargaining, employment protection, and fair pay representing social rights; and disability policy representing equality rights. In order to establish a standard from which the EU’s engagement with rights in these areas can be gauged, each of these case studies includes an account of specific regional or international rights institutions. This allows for the thesis to not only examine how EU actors have constructed the concept of fundamental rights, but to critically appraise this understanding of rights in relation to international developments from more authoritative rights institutions.

Each of these case studies uses process tracing to examine how these policy areas were engaged with before and after the Charter became legally binding. Unlike the first stage of the research, which traced the development of rights, the focus in the case studies is on tracing how these different policy areas have developed before and after the Treaty of Lisbon enhanced the position of fundamental rights. The units of analysis are therefore the different political activities associated with these policy areas. This is important as it recognises that policies relating to rights issues are not always addressed in terms of their relevant fundamental rights, particularly when it comes to social policy and, though to a lesser extent, disability equality. Of course, the absence of a rights-based approach should not be taken to suggest that rights are being undermined, as this has commonly been the case with social policy. In each case study relevant, political activities were identified and analysed in order to determine the considerations and values that have shaped them, using relevant international rights standards to provide appropriate benchmarks to understand the role of rights. These political activities included ECJ cases, the legislative process, the conclusion of an international treaty, the unique governance process of the Eurozone, and non-legislative political strategies. Academic literature was relied upon to provide insights into how these different policy areas have been treated historically, whilst primary documents provided insights into developments in the post-Lisbon period.

The three case studies in the second stage of the research were selected to provide a balanced account of the different types of fundamental rights in the EU. There are many different factors related to both the concept of fundamental rights and the EU that must be considered when seeking to understand the role that rights play in the EU today. These includes the traditional distinction drawn between civil and social rights, judicial enforcement, new governance rights mechanisms and new forms of integration, positive duties, programmatic rights, the application of rights to legislative activities, the relation between rights and economic principles, and the presence of further international developments. The case studies were designed to provide a representative account of these different aspects of fundamental rights in the EU. Chapter four looks at EU activities in the area of the rights to privacy and data protection, allowing the case study to analyse developments concerning traditional civil rights, judicial enforcement, and the role of rights during the legislative process and the signing of international treaties. Chapter five looks at rights to collective bargaining, employment protection, and fair pay. This chapter mainly draws out the relationship between programmatic social rights and economic principles and how rights have (or rather, have not) been utilised in the new forms of integration and governance that have emerged under EMU. Chapter six looks at the right to non-discrimination and equality for people with disabilities. The issue of equality actually cuts across the distinction that is traditionally drawn between civil and social rights depending on the way in which equality is conceptualised. This is a particularly relevant issue for disability, where there is a greater recognition of the need to adopt a positive duty to adequately ensure equality. Furthermore, these ideas are recognised in the UN Convention on the Rights of Persons with Disabilities, which is the only international rights treaty that the EU has actually signed. Therefore, these three chapters provide insights into a broad number of factors relating to how fundamental rights are understood.

The primary research methods deployed in this research are document analysis and elite interviews. As stated above, the primary purpose of the research was to examine how fundamental rights are constructed and understood in the EU, particularly in relation to the institutional structure and other dominant ideas embedded in the EU. Official documents from different institutional actors were analysed to determine how these actors understood the concept of fundamental rights and sought to implement rights in law. As actors are not always so open about their true intentions or beliefs, different types of documents were treated differently. For example, a non-binding resolution or communication may represent a different set of beliefs to what is considered acceptable when hard law is drafted. For the most part, actors were actually found to be fairly consistent. The key documents analysed included: case law of the ECJ, Commission communications and strategies, Parliamentary resolutions and reports, Council recommendations, minutes of Council meetings, progress reports on legislative negotiations, reports from EU agencies, and hard legislation in the form of directives and regulations. In total, over 400 documents were analysed.

Interviews with officials working in the European Commission and European Parliament have also been conducted and were focused on augmenting the document analysis, namely by filling gaps in places the documents were not so clear. These interviews provide insights into the level of importance attributed to rights-issues in the everyday political activities of those working in the EU and into how officials working within the EU conceptualise fundamental rights. The interviews followed a semi-structured format, designed to allow the interviewee the freedom to discuss the issues they felt most appropriate to the role of rights in their work whilst also maintaining a focus on the issues relevant to the research. Ethical approval was secured prior to the interviews taking place to ensure that all necessary safeguards were in place when engaging with potentially sensitive issues such as fundamental rights and the inner workings of the EU institutions. In total, 12 interviews were conducted.

This overall approach to studying the development and impact of fundamental rights has both strengths and weaknesses. It allows for a detailed and in-depth analysis of how rights have developed over time and how they are utilised in contemporary policies, meaning that the position of rights in the EU constitutional order and the relationship between rights and economic principles can be critically engaged with. In the case studies, the focus on a range of political activities allows for a greater understanding of the role of rights in politics beyond judicial cases at the ECJ, which has characterised a lot of academic research into rights, and for instances where rights have not been given their due regard to be considered. However, there are two drawbacks of this approach that should be taken into account. First, the focus on fundamental rights and political activities associated with rights makes it difficult to fully account for the power dynamics underpinning economic principles that have resulted in tensions between these competing constitutional values. Economic principles are only analysed in the context of their interaction with fundamental rights and the political activities associated with rights rather than on their own accord, given the units of analysis of this research highlighted above. This is an inherent limitation of research that is focused primarily on the concept of fundamental rights. To address this issue, it is notable that critical political economy scholarship has focused specifically on economic ideas, how they have become dominant (or hegemonic), and the power dynamics underpinning them, as highlighted above. This literature has been drawn upon where appropriate to provide the relevant context to conceptualising the tensions arising out of the interaction between fundamental rights and economic principles. Second, the focus of the case studies on specific rights to provide insights into how the broader concept of fundamental rights has developed in contemporary policy areas limits the generalisability of these findings. For example, the rights to privacy and protection of personal data may have led to several interesting developments, but whether or not other civil rights more broadly would be treated the same way is not firmly established. This means that the case studies must be treated with some caution. The developments highlighted in them are indicative of the direction in which fundamental rights are going, but further research would be required to establish the broader implications of the way in which those select rights have been interpreted.

In summary, the theoretical framework of critical constructivism outlined here has identified the key factors that must be taken into account when analysing fundamental rights in the EU. It has highlighted these factors in the context of structure and agency, noting the key role played by agents in the construction of political concepts such as fundamental rights and has situated agency in the context of appropriate structures, in this case the institutional arrangement of the EU, dominant paradigms, and macro-structural processes within capitalism. Based on these considerations, an appropriate methodology has been developed that is designed to analyse the development of rights in the EU by tracing the process of their development and application to key policy areas.

# 2. Fundamental Rights and Economic Constitutionalism in Europe

When fundamental rights were first introduced to the European Communities in 1969 they faced a broader political environment already awash with constitutional principles. Rights themselves were already enshrined in the national constitutions of the member states and in European-wide institutions under the auspice of the Council of Europe. European integration, meanwhile, had been built on economic foundations originally premised around the four freedoms of the internal market and later expanded to EMU. Before any analysis of how fundamental rights have developed in the EU can take place, it is first necessary to understand the context in which that development has taken place. These contextual factors are particularly important when treating political concepts as socially constructed ideas influenced by power dynamics embedded in contemporary capitalist society. Concepts such as fundamental rights and economic principles are ideas held by actors about how the state should be organised and how competing values should be balanced within a given polity. Prior to any rights developments in the EU, rights and economic principles were already constitutionally embedded in various means across Europe. Rights in the EU were not introduced to a blank slate. The purpose of this chapter is to provide an account of the role of fundamental rights within European states and under the Council of Europe and an account of the economic constitution of the EU, thereby providing the context necessary to understand the development of rights in the EU. Whilst this chapter is primarily descriptive, the conclusion draws the account of fundamental rights and economic principles under the concept of dominant ideas in the critical constructivist framework highlighted in the previous chapter.

This chapter proceeds in three sections. First, the protection of fundamental rights in different European states is accounted for. This section highlights domestic rights protections, particularly those in national constitutions, and the European Convention on Human Rights, and the European Social Charter, noting some of the differences between these approaches to fundamental rights. It draws attention to both the similarities and differences in the way in which fundamental rights are understood in Europe, noting that there is no single clearly defined European approach to rights. Furthermore, rights developments have been constantly developing over time and continue to advance to this day. Acknowledging the variety within European approaches to fundamental rights is vital to understanding the context within which rights have developed in the EU. The second section outlines the economic constitution that has underpinned European integration, noting how liberal economic principles have become intertwined with integration. It highlights both the single market and EMU and the way in which both of these areas of integration have expanded to include a greater array of national policies, including those not fully delegated to the European level. Following this, the conclusion draws this account of constitutional principles in Europe together in the context of the critical constructivist framework developed in chapter one. The third section draws attention to the history of fundamental rights and their relationship to economic liberalism, thereby linking together some of the themes of the first two sections and highlighting the issues rights face in the EU.

## 2.1. Fundamental Rights in Europe

The form that the protection of fundamental rights within member states of the European Union takes is varied, with differences in reliance on judicial and legislative protection, the relationship between national and international law, and the balance between social and civil rights. To provide the necessary context for looking at developments during European integration, other European regimes on fundamental rights and domestic rights arrangements must be accounted for, particularly as many of these developments predates the introduction of rights to the EU. This section does not seek to provide a comprehensive overview of how rights are protected within different European states as such an account is far beyond the remit of this chapter. For example, Alec Stone Sweet and Helen Keller’s edited volume on the ECHR in national legal systems runs around 900 pages. Rather, the purpose of this section is to highlight the position that fundamental rights hold in Europe to provide some idea of the both the commonalities and differences as to how rights have come to be understood across different states. This section begins by outlining the ECHR and then accounts for some of the domestic systems of protection of civil rights, noting how interconnected these two features are. Following this, the development of social rights and the ESC is discussed.

The ECHR was signed in 1950 and entered into force in 1953. It is predominately based around civil rights, such as the rights to liberty and security, fair trial, privacy, expression, and non-discrimination, and is widely regarded to be one of the strongest international rights regimes (Moravscik, 2000: 218). It was designed to afford international protection to rights that were already largely recognised in domestic constitutional orders (Drzemczewski, 1983: 6-7), though it has since become a ‘constitutional document of European public order’ (Moravscik, 2000: 218, quoting the ECtHR) and a key feature of the common European approach to fundamental rights (Leben, 1999: 87). Furthermore, within European states there is said to have been a ‘significant structural change’ brought about by the integration of the ECHR into national legal systems that has helped to expand the concept of judicial review of statute (Keller and Stone Sweet, 2008: 677). The ECHR has also taken on a special role in the EU’s legal system, being the source of rights most regularly referred to by the ECJ – at least until the EU’s own charter of rights became binding in 2009 (de Búrca, 2013). Essentially, the ECHR established itself at the constitutional core of (democratic) Europe, with a court of last resort sitting atop the legal hierarchy and tasked only with the protection of fundamental rights.

However, originally the ECHR was rather different than it is today. The principles of the direct jurisdiction of the European Court of Human Rights (ECtHR) (Article 46) and individual petition (Article 25), two principles that have made the ECHR the strongest international rights regime, were actually optional at first. This was a compromise given to the UK, which had staunchly opposed such developments (though several other states were also sceptical, see Moravcsik, 2000: 231). Furthermore, individual petitions were made to the European Commission of Human Rights, which then made a decision to forward the petition to the Court of Human Rights. This arrangement continued until the agreement of Protocol 11 in 1998, which abolished the European Commission of Human Rights to allow direct access to the ECtHR and made the jurisdiction of this court compulsory. However, prior to this, many states had accepted individual petitions and jurisdiction of the court (these two articles generally came as a package). The UK overcame its opposition and opted in in 1966 and by 1986 all European Community member states bar Greece[[3]](#footnote-4) had accepted these optional articles (Drzemczewski, 1983: 4; see Lester, 1998 on the UK opting in).

The ECHR is often lauded as the premier example of regional cooperation on human rights due to its strong enforcement mechanisms. Yet there are two limitations that should be taken into account. First, the ECHR represents a narrow band of civil and political rights, narrower than, for example, the Universal Declaration of Human Rights. Various protocols have added additional rights over the decades, yet the ECHR remains almost exclusively focused on civil and political rights.[[4]](#footnote-5) Therefore, conflating the ECHR with full protection for fundamental rights runs the risk of neglecting other rights problems, including social and economic inequalities (Drzemczewski, 1983: 12). Second, there is no legal obligation to incorporate the ECHR into domestic law (Drzemczewski, 1983: 2). This means access to the rights listed in the convention can vary significantly by member state and how their legal systems operate. In some states, international treaties with self-executing provisions (such as civil rights) are automatically incorporated into domestic law, which is the case in states such as Belgium and the Netherlands. Other states, such as the UK, Ireland, and Denmark, must pass a separate domestic legislative act to give practical effect to international treaties, allowing them to choose when to transpose the ECHR into their legal systems. For many states, Ireland and Denmark included, the ECHR largely replicated domestic constitutional rights protections and the issue of domestic transposition was a more minor issues. The UK, however, lacked a clear domestic system for protecting rights until the Human Rights Act (1998) transposed rights in the ECHR into the legal system of the UK in 2000, as discussed below. Even today, the ECHR holds a controversial position within the UK, with one major political party committed to reducing its domestic influence.

The founding members of the European Economic Community all had their own domestic protection of fundamental rights and most had signed and ratified the ECHR during these early years. The constitutions of Belgium, the Netherlands, Italy, Germany, and Luxembourg all list civil rights that are to be protected, though some variation on the extent to which these rights are protected exists. Belgium and the Netherlands signed and ratified the ECHR by 1955 and by 1960 both had accepted individual petitions (Article 25) and jurisdiction of the ECtHR (Article 46). Both states felt there would be few problems with implementation of the ECHR as these rights already existed in their constitutions and the ECHR was soon implemented domestically, following their constitutional provisions on implementation of treaties (see Drzemczewski , 1983; Marcus-Helmons and Marcus-Helmons, 2001 on Belgium; Zwaak, 2001 on the Netherlands). However, at this time in both Belgium and the Netherlands the courts were not able to exercise judicial review over statutes passed by parliament for compatibility with rights in the constitution. By ratifying the ECHR, the courts were able to review statutes passed by parliament for conformity with this international treaty, thus creating a form of judicial review to uphold fundamental civil rights (Drzemczewski, 1983: 68-69, 88-89).

Italy’s constitution already contained a catalogue of both civil and social rights and its constitutional court is able to review law for compatibility with the constitution on referral from a lower court (Gentile, 2008). This meant that although the ECHR became part of domestic law upon ratification by Italy in 1955, the judiciary tended to use the ECHR as only a supplementary aid and favoured reference to the constitution (Drzemczewski, 1983: 148). It also took Italy until 1973 to opt into the optional provisions on individual petitions and compulsory jurisdiction of the ECtHR, though given the constitutional protection of rights these provisions did not take on as important a role as in other European states.

Germany is generally considered to have one of the strongest systems of judicial protection of rights, with the German Federal Constitutional Court capable of striking down domestic legislation it finds incompatible with the German constitution, which lists civil rights and allows direct individual petition to the constitutional court (Drzemczewski, 1983: 111). Germany was a strong supporter of the stronger enforcement measures in the ECHR and quickly ratified and opted into the optional articles on individual petition and jurisdiction of the ECtHR (Moravcsik, 2000). As highlighted in more detail in chapter three, it is the German constitutional court that brought direct challenges to the EU legal order in the 1960s on the basis that it could not override German fundamental rights without equivalent protection at the European level. It was also in a preliminary ruling request by a German administrative court that prompted the ECJ to reverse its earlier neglect of fundamental rights and discover that respect for rights was actually enshrined in Community law as inspired by the constitutional traditions of member states (see case of *Internationale Handelsgesellschaft* in chapter three). However, when this case went to the German Constitutional Court in 1974 (in which it is known as *Solange I[[5]](#footnote-6)*), it ruled that though fundamental rights were not violated in this case, it would be prepared to rule Community law unconstitutional if it violated the rights in the German constitution, thus challenging the supremacy of Community law (Grabenwarter, 2005: 98; Quinn, 2001). In particular, the German Constitutional Court highlighted the lack of a written catalogue of rights of decided on by a directly elected European Parliament. This tension between the German Constitutional Court and the ECJ remained until the *Solange II[[6]](#footnote-7)* decision in 1987, at which point these issues had been addressed to the satisfaction of the German court.

France represents a slightly different approach from the other founding members of the European communities. Under the 5th Republic, France did not initially contain a catalogue of rights within its 1958 constitution and it took until 1974 to ratify the ECHR (and until 1981 to accept individual petitions). Nor did the constitution allow for judicial review of legislative acts, though it did for executive and administrative acts (de Witte, 1999: 865). However, in its preamble, the 1958 constitution referred to the preamble to the 1946 constitution and to the *Declaration of the Rights of Man and of the Citizen* (1789), providing it with a list of both civil and social rights. Drawing on this preamble, in 1971 the French Constitutional Council held that it could exert a judicial preview (a review of legislation before it enters into force) of legislative acts for violations of fundamental rights and expanded the sources of fundamental rights beyond the 1789 Declaration to the fundamental principles recognised by the laws of the Republic (de Witte, 1999: 865). De Witte (1999: 865) argues that this ruling by the Constitutional Council has incorporated a wide variety of possible sources for fundamental rights by referring generally to the ‘laws of the Republic’. Furthermore, following France’s ratification of the ECHR in 1974, the Court of Cassation (Court of last resort for civil and criminal matters) has drawn on its provisions, though the Constitutional Council tends to draw on other (French) sources for rights (Dupré, 2001: 315). Following ratification the ECHR was also transposed into domestic law, in line with constitutional provisions on international law.

In 1973, the EU enlarged to include the UK, Denmark, and Ireland among its member states. The constitutions of Denmark and Ireland both contain provisions for civil rights. Both Denmark and Ireland ratified the ECHR, including the optional articles, in 1953. However, following their dualist constitutional provisions on internal application of international treaties, Denmark did not implement the ECHR domestically until 1992 and Ireland in 2003. The UK, however, represents a fairly different case and requires further comment. Despite an interesting history with written constitutions and forms of judicial review for polities that were not the British parliament, such as municipalities, corporations, and colonies (see Cappelletti, 1970: 1028-1031), the norm of parliamentary sovereignty in the UK means there is very limited scope for judicial review of primary legislation. Judicial review of primary legislation can be conducted only by the ECtHR or the UK Supreme Court can issue a non-binding declaration of incompatibility with the Human Rights Act (1998), though both procedures then require the UK parliament to choose to amend the legislation in question. UK courts can review administrative acts and secondary legislation based on the Human Rights Act (1998) though. There exists no written constitution and a domestic catalogue of rights has only existed since the end of the 20th Century, though this domestic catalogue is premised strongly on an international regime for the protection of rights (the ECHR). It should be noted that, domestically, certain rights are protected to some extent under common law, though this provides only fragmented and unclear protection and cannot be used to challenge primary legislation. Although the UK had ratified the ECHR in 1951, there was no domestic effect at this time as it was not transposed into national law and the optional articles were not signed. In 1966 the UK opted into the optional articles and so from this point individuals could gain access to the ECtHR, however the cost (in both money and time) of accessing this court meant it was less than ideal as a means to uphold civil rights. Despite this, during this time a number of important cases at the ECtHR have had an impact on the realisation of fundamental rights in the UK (see Drzemczewski, 1983: 186-187; Blackburn, 2001). This state of affairs continued until the year 2000, when the Human Rights Act (1998) entered into force and transposed most of the ECHR into domestic law, thereby creating a domestic catalogue of rights. A weak form of judicial review was also created by the Human Rights Act (1998) whereby the higher courts can issue a non-binding declaration of incompatibility between primary legislation and fundamental rights. However, this has been described as an internationalised rather than constitutional system of protection of rights (Dickson, 2013), leaving it easier to amend or even unravel than most other European constitutional approaches to rights as the procedure for repealing the Human Rights Act (1998) technically only requires a simple majority in Parliament (though political may be more difficult, particularly due to devolution settlements in Scotland and Northern Ireland).

During the Southern enlargement in the 1980s, Greece, Spain, and Portugal joined the European Community. These states all have similar protection of fundamental rights, both civil and social rights. All three of these states introduced democratic constitutions in the 1970s that listed fundamental rights and ratified the ECHR and opted into the optional articles soon after (Greece was the last to accept Article 25 in 1985). However, it should also be noted that Greece had originally ratified the ECHR in 1953, but later withdrew and denounced the convention, and then ratified again in 1974. They also all have provisions for judicial review based on either their constitutions or on the ECHR, which, as international law, overrides national legislation (see Drzemczewski, 1983: 143, 156, 160).

In the 1990s the EU enlarged to include Finland, Austria, and Sweden and in the 21st century expanded to include 11 post-communist states plus Malta and Cyprus. By this point, and of particularly relevance to the post-communist states, the ECHR and general concept of fundamental rights had become well established in Europe (Stivachtis and Habegger, 2011) and was making inroads into the EU. As discussed in chapter 2, the prospect of enlargement into post-communist states has been a significant motivator for rights developments within the EU (Williams, 2004: 60). All of these states have constitutions that list civil rights and, except for Austria,[[7]](#footnote-8) have some provisions on social rights (Fabre, 2005: 18). Furthermore, by 1998 Protocol 11 of the ECHR had come into force making individual petition and jurisdiction of the ECtHR an integral part of the ECHR, though the vast majority of these states had even signed the optional provisions prior signing Protocol 11. However, it should also be noted that constitution building in many post-communist states took place in the international context of the ‘Washington Consensus’ on capital fluidity, liberalisation, and the free market. According to Tushnet (2004: 1914), this has placed constraints on the drafters of national constitutions to include seemingly strong social rights, but with only weak enforcement mechanisms (see also Hirschl, 2004). The widespread acceptance of civil rights and the enhancements made to the ECHR clearly demonstrated the degree to which civil rights had become constitutionally embedded.

So far it should be clear that civil rights and the ECHR have become strongly enshrined in European states. The same level of support, however, cannot be said of fundamental social rights, though acceptance of these rights has increased significantly over the last 60 years. Generally social rights are associated with questions of distribution of resources, which tend to be felt to be inappropriate for judicial bodies. This has led to the view that social rights may be better formulated as programmatic principles to be achieved via legislation, whilst civil rights should be justiciable. This view is held particularly strongly in the more liberal Anglosphere countries; that is, in the EU, the UK and Ireland (see Nolan, 2014 on Ireland; Goldsmith, 2004 on the UK). Yet this dichotomous view of different types of rights has been challenged by academics and does not appear quite so clear-cut in practice (see Fabre, 2005; Fredman, 2004; Kenner, 2003; Deakin and Browne, 2003). Many aspects of civil rights require positive state action to uphold, not least the creation and maintenance of a functioning legal system, and many aspects of social rights do not directly require large-scale resource allocation that has caused so much anxiety among liberals, such as the protection of labour rights. Civil and social rights even overlap to the extent that civil rights have been used as a legal basis to address issues commonly thought of as social, such as the access to pensions (Psychogiopoulou, 2014: 9-10) or to protect collective action by trade unions (Dorssemont, 2011), or provision of adequate social welfare (Winkler and Mahler, 2013). Nonetheless, social rights have followed a rather different developmental path in Europe.

Among the founding members, Italy was the only state to list social rights in its constitution. France arguably enshrines social rights as well, given the variety of sources its Constitutional Council can draw upon. However, this was not established until 1971 and, more recently, the Constitutional Council has interpreted social rights in the EU Charter of Fundamental Rights as principles rather than enforceable rights (de Witte, 2005: 160). The Netherlands and Belgium added social rights to their constitutions in 1983 and 1994 respectively. Germany’s constitution does not contain social rights and these have never been added to it. Germany, the UK, and Austria are the only states today in the EU that do not have any constitutional provisions for social rights (Fabre, 2005). Though in Germany, it should be noted, the German Federal Constitutional Court has derived social obligations from the right to dignity, including adequate social assistance benefits and support for asylum seekers (Winkler and Mahler, 2013).

The EU member states that established democratic constitutions after the 1960s all included some form of provision for social and economic issues, though these did not all adopt rights language or allow for judicial enforcement. The constitutions of Malta and Ireland, for example, list principles for social policies without utilising rights discourse, whilst Spain uses rights discourse but places social and economic rights in a separate chapter titled ‘Principles governing Economic and Social Policy’ (see Fabre, 2005: 22). Although the Dutch constitution now lists social rights (added in 1983) these are not judicially enforceable as the constitutional arrangement of the Netherlands does not permit judicial review based on the constitution, though it does permit judicial review based on self-executing international treaties such as the ECHR (Gardbaum, 2011). Social rights were added to the constitution of Belgium in 1994 under Article 23 on the right to lead a life with dignity, which includes in its third paragraph a number of specific social rights. These rights in the Belgian constitution are directed at legislators, though the Belgian constitutional court has given some legal force to specific rights. For example, the right to social assistance has been interpreted as implying legislators may not significantly reduce the level of protection already offered by legislation when social rights were added to the constitution in 1994 (Bossuyt, 2009: 2). The point is that the inclusion of social rights in these constitutions has been aimed at providing guidelines for the legislature rather than judicially enforceable rights, though even non-justiciable social rights can be utilised by courts to indirectly militate against other factors (Tushnet, 2004: 1898-1902). The language of rights concerning social rights in constitutions does not necessarily mean that they are judicially enforceable.

Despite these above examples, according to Fabre (2005: 22), the majority of states in Europe allow for some level of justiciability of constitutional social rights, though with some variation. The justiciability of social rights has also developed internationally at the UN Committee on Economic, Social, and Cultural Rights and with the additional protocols on collective complaints and revision of the European Social Charter (Brillat, 2005: 32-37), though this does not match the level of judicial protection enjoyed by civil rights (Alston, 2005: 60). The judicial enforcement of social rights varies significantly among European states and remains a debated issue to this day (see Bercusson, 2005a: 170-175; de Witte, 2005: 160). This variation as to how social rights are utilised domestically has become increasingly evident in the context of the Eurozone crisis where constitutional challenges have met with varying degrees of success in different states --namely those states worse hit states, Greece, Portugal, and Ireland. As highlighted above, the Southern states such as Greece and Portugal have stronger constitutional protection of social rights, whilst economically liberal states such as Ireland have weak protection. According to Nolan (2014: 30-39), legal challenges to austerity in Ireland have been weak and unsuccessful, which should come as little surprise. Yet even in Greece and Portugal legal responses have varied. In Greece, constitutional challenges to massive reductions in social welfare have mainly focused on pensions and have been pursued by pensioners associations. According to Psychogiopoulou (2014: 17), civil society in Greece is not particularly well-developed which has hindered the ability of many vulnerable groups to pursue legal strategies. The domestic Greek courts have not upheld challenges to pension cuts based on constitutional social rights, though international bodies have been particularly critical of violations of social rights in these areas (Psychogiopoulou, 2014: 9-16). Portugal has seen the most active engagement by its constitutional court, which has struck down several austerity measures in a series of judgements, though many of these have focused on principles of equality and legitimate expectations rather than social rights (de Brito, 2014: 73).

It has been suggested that weak judicial review may be more appropriate for supporting social and economic rights (Gardbaum, 2011: 401). Several commentators on social rights have noted that such a debate over the role of the courts in enforcing social rights (or even the idea of social rights) should be expected given the redistributive ideas associated with social rights and how this may be at odds with ideas of liberal capitalism (de Búrca, 2005b: 4; see also Deakin and Browne, 2003 on how social rights can support the market economy). Such a debate is perhaps most prominent in the UK, as highlighted throughout this chapter. More generally, member states have historically approached social rights issues in a variety of fashions. In his seminal text on welfare capitalism, Esping-Anderson (1990) identified liberal, conservative, and social democratic approaches to social and welfare policy, though later work has highlighted Southern and Eastern European models as well (see Hay and Wincott, 2012). Generally social democratic states have given the strongest recognition to social rights and liberal states the least. However, even among social democratic states constitutional recognition of social rights may be slim as their constitution may pre-date the development of social rights discourse. For example, Denmark has fairly limited provisions in its constitutions on social rights, yet has one of the stronger welfare states in Europe.

A trend can be observed whereby social and economic rights, uncommon in the 1950s, have become increasingly integrated into the legal systems of member states, though the debate continues on whether these issues should be addressed as enforceable rights or as programmatic principles for legislation. These are sometimes referred to as the second generation of human rights, as they developed after the first generation of civil and political rights. A key stage in this development in Europe was the agreement on the European Social Charter under the auspices of the Council of Europe. It should be recalled that the UN Declaration of Human Rights addressed both civil and political and social and economic rights. One of the purposes of the ECHR was to implement these civil rights in Europe. The counterpart to the ECHR aimed at bringing about social rights is the European Social Charter, drafted in 1961. However, perhaps not surprisingly given what has been said above, the ESC has been noticeably less visible and influential than the ECHR (de Búrca, 2005b: 5; de Schutter, 2005a: 12). As shown in chapter two, the development of fundamental rights in the EU has clearly privileged the ECHR over the ESC. The enforcement mechanism in the ESC is also weaker than the more judicial enforcement of ECHR rights, though reforms have improved its functioning.

The original ESC (1961) lists 19 social rights, spanning issues associated with employment to rights specific to children and families to social welfare assistance. In 1996, the revised ESC entered into force containing 12 further rights designed to reflect changes in society and fill gaps in the original ESC. The revised ESC was meant to replace the original 1961 version, though many European states have not ratified it, including Germany, Spain, and the UK. All EU member states have signed and ratified either the original or revised ESC.

Social rights in the ESC, in contrast to the ECHR rights, are generally not taken to be justiciable by national courts (Gori, 2005: 70-71). Whilst the ESC does contain legal obligations for states, its provisions on implementation are based on a reporting mechanism and mention nothing of judicial enforcement (see Part IV of the ESC, 1961). The enforcement mechanism of the ESC originally relied on state parties submitting regular reports, which were then examined by a Committee of Independent Experts and a Governmental Committee, consisting of representatives of each state party. Actual recommendations based on these reports would then be made by the Committee of Ministers of the entire Council of Europe, including those not party to the ESC. This reliance on political enforcement meant that no recommendations were issued until 1993 (Betton and Grief, 1998: 48). Reforms in the 1990s addressed these shortcomings and have enhanced the ability of the ESC’s supervisory mechanisms to deliver opinions on social rights in European states. The Committee of Independent Experts was renamed the European Committee on Social Rights (ECSR) and the rules were clarified to specify that the ECSR is the body that determines the legal conformity of states with the ESC (Brillat, 2005: 32), though Alston (2005: 60) has found that there remain some lingering problems with the reporting mechanism that diminish its effectiveness. In particular, the conclusions of the ECSR are still soft law and enforcement mechanisms remain weak, though Brillat (2005: 32) highlights that the majority of recommendations are accepted by states and do lead to changes in policy. As it stands, the reporting procedure of the ECSR sees it publish individual reports (which it calls conclusions) on member states every year.[[8]](#footnote-9)

The most significant reform concerning the justiciability of social rights across Europe came in 1995. An additional protocol to the ESC was adopted providing for a new collective complaints mechanism to run alongside the pre-existing reporting procedure, whereby social partners and NGOs can lodge complaints of violations in a quasi-judicial fashion (Brillat, 2005: 34-36). Through both the collective complaints mechanism and the reporting procedure, the ECSR has amassed a considerable body of what has been described as case law (see ECSR, 2008). It should be noted, however, that there is some debate over the use of terms such as case law and whether or not the ECSR should be described as quasi-judicial. Brillat (2005: 37) accepts that the term case law may not have been appropriate for many years, but is now justified. Alston (2005: 58-59) takes a more nuanced approach, describing the collective complaints mechanism as quasi-judicial whilst setting out that the reporting procedure should not be described in such a way. The ECSR’s self-described ‘case law digest’ does not make a distinction between standards for rights that have arisen out of its reporting and collective complaints mechanisms. Furthermore, the trend towards (quasi) judicialisation has been tempered to some degree by the reluctance of European states towards the collective complaints mechanism. As of 2016, only 12 EU member states have ratified the additional protocol on this mechanism.

Nonetheless, the ESC contains an extensive list of social and economic rights and commits member states to their implementation. The ECSR has developed a considerable body of standards on social rights, its own digest of which runs to some 378 pages (ECSR, 2008). These standards, which are highlighted in more detail in chapter five, have addressed many of the problems encountered by social rights, particularly concerning the need to expend resources to meet many social rights and their conflict with economic principles. The ECSR has generally addressed social rights in terms of the principles of minimum standards and progressive realisation. Minimum standards, as the term suggests, are the baseline to ensure conformity with rights. Where a quantitative measure can be adopted, the standard tends to be fairly clear. For example, any wage that falls below 50% of a state’s national average wage is considered a violation of Article 4(1) on the right to fair remuneration (ECSR, 2008: 43). Other measures for minimum standards have been adopted progressively as the ECSR has built up its case law. For example, the minimum standards for notice periods for termination of employment (in which the notice period should rise in line with length of employment) have been established in the reports spanning five different countries over multiple years (ECSR, 2008: 47). Progressive realisation means that states should be working progressively towards raising the standards of social rights, though this is interpreted less strictly and permits for economic circumstances (such as a recession or other kind of economic crisis) to justify states abrogating their responsibility to raise rights standards at times (see Tooze, 2003: 172-173). As part of this approach, the ECSR has utilised the idea of non-retrogression whereby any interference with standards already achieved are required to be proportionate and in pursuit of a legitimate aim (Jimena-Quesada, 2014: 9).

So far this section has focused on constitutional and international aspects of fundamental rights. Nearing the end of the 20th Century, the idea of mainstreaming fundamental rights has become more widely accepted across Europe (de Beco, 2009: 141). Many recent developments have actually taken in the EU itself, which are analysed in chapter 3 (see also de Schutter, 2010; 2014; Toner, 2006; de Búrca, 2006). Mainstreaming rights includes various different new governance based approaches, broadly concerned with increasing transparency and openness in government. Impact assessments of legislation are increasingly used to ensure that rights have been given adequate regard in the drafting of legislation, which tend to involve some degree of public or stakeholder consultation and expert advice (de Beco, 2008; Toner, 2006). National Human Rights Institutions (NHRIs) -- bodies tasked with monitoring and advising state authorities and increasing awareness of rights (see de Beco, 2008: 861) – have become widespread across Europe (Pegram, 2010). Although early examples of NHRIs can be traced back to the time of the UN Declaration on Human Rights in the 1940s (particularly ombudsman-style bodies tasked with ensuring good governance), the use of national institutions tasked specifically with fundamental rights issues proliferated greatly in the 1990s and 2000s (Pegram, 2010: 738). The Paris Principles on National Institutions for the Promotion and Protection of Human Rights were adopted by UN in 1993, thus establishing international standards on NHRIs. These standards aim to ensure that NHRIs have a broad mandate, autonomy from government, adequate resources, and adequate powers of investigation. Every EU member state has some form of NHRI, though as of 2014 only 12 were fully accredited under the Paris Principles[[9]](#footnote-10) and a further 6 were partially compliant with the Paris Principles[[10]](#footnote-11) (International Coordinating Committee of National Institutes for the Promotion and Protection of Human Rights, 2014). This means that 9 EU member states have some form of rights monitoring body that is not complaint with the Paris Principles. These institutions have also formed European-wide networks and coordinate their work through both the Council of Europe and the EU’s Fundamental Rights Agency (de Beco, 2008: 871-874).

To summarise this section, some observations on fundamental rights in Europe can be made. Earlier on in the process of European integration (in the 1950s and into the 1960s), civil and political fundamental rights became well established and generally accepted as constitutional by European states. Over the following decades, these civil and political rights became further enshrined in Europe as more states became democratic and established civil rights in their constitutions and the enforcement mechanism of the ECHR was strengthened. The judicially enforceable nature of these rights has been well established in their functioning. Social and economic rights, on the other hand, have experienced a more turbulent development. Recognised only in a minority of constitutions in the 1950s and 1960s, acceptance of these rights and their addition to constitutions began to expand after the agreement of the ESC in 1961. Social rights had become accepted by the 1970s as all newly democratised states included some provisions on them. However, the ESC originally listed social rights as programmatic and to be enacted by legislation or industrial agreements, rather than as judicially enforceable. This approach has been challenged over the decades by both the case law of the ESC’s European Committee on Social Rights and by the inclusion of social rights in the constitutions of certain member states, yet a debate over the nature of social rights continues to this day. The main conclusion to be drawn from this section is therefore that there is a high level of consensus on civil and political rights, including their judicially enforceable nature. Though social rights are now generally accepted, whether these exist as judicially enforceable rights or as principles guiding legislation remain a debated issue.

## 2.2. The EU and the Economic Constitution

### 2.2.1. The Single Market

The 1950s was a hotbed of activity around European integration. The European Coal and Steel Community was created in 1951 to ensure shared ownership of the materials necessary to make war, which was soon followed by more ambitious attempts at integration. Treaties were drafted to create a European Political Community, a European Defence Community, and a European Economic Community. The political community was actually meant to integrate the ECHR into the legal order of what would later become the EU and set out a strong role for fundamental rights (see de Búrca, 2011: 472). As it happened, national governments were reluctant to relinquish too much sovereignty over key areas so the political and defence treaties were never ratified. However, the Treaty on the European Economic Community, commonly known as the Treaty of Rome (1957), was successful and formed the backbone of subsequent European integration. This placed the economic principles of the internal market at the core of the emergent new legal order, though the consequences of this initial arrangement would only become apparent over the subsequent decades.

The early period of the ECJ’s case law up until the 1980s has been characterised as a period of constitution-building (Weiler, 1991: 2410; Shaw, 2005). This period saw the ECJ establish the principles of direct effect and supremacy of Community law, which later led to the introduction of fundamental rights to the Community legal order and elevated the four freedoms of the internal market (freedom of movement of workers, goods, services, and capital) to a kind of constitutional status. The nature of the European Communities was fundamentally changed by the legal developments of the ECJ. The Court itself changed from being an arbitrator of disputes over the Treaties to something akin to a constitutional court of Europe.

Two key cases at the ECJ in this early period of judicial developments radically changed the EU legal system. The cases of *Van Gend en Loos[[11]](#footnote-12)* in 1963 and *Costa v ENEL[[12]](#footnote-13)* in 1964 established the principles of direct effect and supremacy of Community law, respectively. Together these cases meant that treaty provisions could be used by individuals to challenge their governments in national courts and that these treaty provisions would take supremacy over national law. In particular, it was those treaty provisions worded in a manner that imply an individually enforceable right, such as the fundamental freedoms of the internal market, that become available to domestic litigants. This marked the first steps by the ECJ to constitutionalise the legal system of the Community as a new European legal order (Weiler, 1991), something not directly accounted for in the original Treaties. Though the ECJ is considered to have acted in a somewhat entrepreneurial and innovative fashion and possibly have even overstepped its boundaries, crucially these developments were considered acceptable by the governments of member states, though some limitations have since been created to prevent the legal transfer of powers to the Court (Alter, 2000: 490). However, this development of the new European legal order in the aforementioned cases in the 1960s was not immediately acceptable to certain national constitutional courts. The German constitutional court (later joined by its Italian counter-part) ruled in 1967 that Community law could not deprive Germans of their fundamental rights enshrined in the German constitution, and so the German constitutional court would continue examine Community law for its compatibility with these rights (Bojkov, 2004: 334). In 1974, this became known as the *solange* principle, as the German constitutional Court ruled that domestic constitutional fundamental rights guarantees would remain within its powers so long as there was no comparable catalogue of fundamental rights decided upon by an elected parliament for Community law. This challenge to the supremacy and legitimacy of Community law triggered the ECJ to discover that fundamental rights were actually part of the general principles of Community law in the case of *Stauder[[13]](#footnote-14)* in 1969, despite having previously rejected rights-based arguments from litigants (Williams, 2004: 146). By 1970, a new legal order was taking shape in Europe.

After having established the supremacy and direct effect of EU law, the ECJ then went on to develop the provisions of the Treaties and their position in the new European legal system, particularly the provisions on internal market freedoms. Two key cases are commonly identified by scholars looking at the point at which economic freedoms became embedded constitutionally in the Community legal order. These two cases are *Dassonville[[14]](#footnote-15)* in 1974 and *Cassis de Dijon[[15]](#footnote-16)* in 1978, in which the principle of non-discrimination applied to the fundamental freedoms of the internal market was replaced by the principle of non-restriction, even if any such regulation was discrimination-free (Höpner and Schäfer, 2010: 17; see also Barnard and Deakin, 2011: 256 on the *Sager* principle further embedding this approach). According to Höpner and Schäfer (2010: 17), the principle of non-restriction meant that ‘every national regulation that restricts the transnational exercise of one of the four “economic freedoms” is in potential violation of European law, even if the regulation is discrimination-free, i.e., imposed equally on nationals and non-nationals alike’. As argued by Scharpf (1999: 54-60), the case of *Cassis* *de Dijon* established constitutional protection for market freedoms as the ECJ had determined that it could assess the reasonableness of any regulation that interferes with the internal market. Further Court decisions since the 1970s and 1980s have strengthened liberal market freedoms, in which these economic freedoms have been regularly referred to as ‘fundamental’, and paved the way for legislative developments expanding the single market (Hay and Wincott, 2012: 142-144; Maduro, 1999: 452-453), though a balance between these freedoms and national-level social rights was respected until the 2000s (see chapter three). The scope of this protection of internal market freedoms is very broad. De Sousa (2011) sets out how expansive this is in an article aptly titled ‘the market freedoms’ ever-expanding outer limits’, whilst Weatherill (2013: 14) states that ‘very few activities truly escape the scope of application of EU economic law’. Furthermore, in the case of *Defrenne[[16]](#footnote-17)* in 1976 the ECJ expanded the principle of direct effect to include a horizontal component. That is, treaty provisions could be relied upon between private parties, in addition to between private parties and the state as in the original version of direct effect (Hay and Wincott, 2012: 142). The treaty provision in question in *Defrenne* was actually the provisions on equal pay for men and women and formed part of the ECJ’s case-law on developing social principles (see chapter three). However, the principle of direct effect has allowed business actors an effective tool to use legal methods to challenge anything that interferes with their market interests (Augenstein, 2013: 1936; see also Hay and Wincott, 2012: 142-144; Höpner and Schäfer, 2010: 17-21). The broad scope of the ECJ’s jurisdiction on market freedoms also expands beyond the legislative competences of the EU, meaning that any deregulatory effect of the Court’s case law on policy areas such as social security or organised labour would face serious difficulties to be re-regulated at the European level (Weatherill, 2013: 17).

The prominence of economic matters in the treaties and the fundamental value afforded to the four freedoms of the internal market are what has given rise to the term ‘economic constitution’. Yet even among those in academia who have written about the EU’s economic constitution, there is a debate over whether or not this is neoliberal. Francesco de Cecco, for example, uses the concept of economic constitution to refer to legal nature of the internal market and its relationship with political economy choices, but dismisses the idea that it contains a specific ideological design (de Cecco, 2013: 18). In defence of this position, de Cecco draws on the work of Miguel Poiares Maduro. Maduro (1998: 150) argues that the case-law of the ECJ has not privileged any one model of political economy, noting that the Court has allowed member states to retain different national institutional arrangements for their political economies and that market re-regulation at the European level is available to complement negative integration. Maduro has, however, also recognised that the case-law of the ECJ has resulted in deregulatory outcomes at the national level, but argues that this is ‘the functional result of the need to promote integration (requiring negative integration in the form of judicial review of divergent state regulations restricting trade)’, rather than a commitment to a neoliberal paradigm (Maduro, 1999: 451). Whilst there has been a ‘spill-over of market integration rules into virtually all areas of national law’, the ECJ has generally upheld social regulations that are shared by a majority of member states (Maduro, 1999: 451).

Maduro may be right in what he has written, but there are two points about what he says that need to be taken into consideration. First, the social regulations shared by a majority of member states have changed significantly since the admittance of eleven post-communist states that have transitioned to market economies under the dominance of neoliberalism (Orenstein, 2013; Supiot, 2011; Vliegenthart and Overbeek, 2009). This geographical expansion of the EU has meant that the majoritarian standard of social regulation was lowered and direct pressure on the social standards of older member states was introduced (see *Laval*-quartet of ECJ cases, highlighted in chapter three). The situation today is rather different from when Maduro was writing back in 1999. Second, scholars such as Maduro and de Cecco appear to limit the concept of neoliberalism to conscious and deliberate acts and account for the deregulatory effects of case-law as simply a functional outcome of the ECJ’s role in integration. This position is shared even by those who have taken a stronger and more critical stance of the way in which the ECJ has constitutionalised market freedoms (see Scharpf, 2010; 1999). Limiting neoliberalism to only conscious acts underestimates the role of dominant ideas in society, particularly in how they relate to the perception of what is the proper political and/or constitutional role of institutions such as courts within a given polity. Rather, the very idea that market freedoms should be at the core of a constitutional order and protected by the highest court is inherently neoliberal, regardless of how it came about (Dale and El-Enany, 2013: 617; Menendez, 2013: 476). This is a legal order that secures the interests of markets at the same level as the protection of basic rights, affording both the status of ‘fundamental’. Market freedoms are depoliticised as they are secured at a level out of reach of ordinary political decision-making, which, as Scharpf (1999: 57) highlights, is a situation not found in any national constitution. It is this elevation of market freedoms to the highest level of legal protection that is specifically ‘neo’ about neoliberalism. State authority is used to back liberal market values.

In treating neoliberalism as being dominant in the EU order, it is necessary to clarify what exactly this means. Specifically, it should be noted, neoliberal ideas are not the only sets of economic ideas present in the treaties, but, crucially, they have become dominant. The Common Agricultural Policy, for example, was designed along more interventionist French *dirigiste* lines, whilst the treaty provisions on equal pay between men and women also recognised the necessity of state intervention for social aims. The court-led progression of integration along the lines of the internal market, rather than other areas such as agriculture, helped to ensure that neoliberalism would come to characterise the EU (see Dale and El-Enany, 2013: 620-622). Key legal principles such as the supremacy of EU law, direct effect, horizontal application, and the expansion of the ECJ’s jurisdiction to cover any interference with the internal market freedoms were all developed through case-law. Furthermore, whilst neoliberalism is taken here to refer to the constitutional embeddedness of liberal economic principles, this does not automatically mean that such economic principles are necessarily prioritised above all else. Indeed, the German economic order has been characterised as a form of neoliberalism, but is also balanced against a constitutionally embedded ‘social market economy’ (Joerges, 2014: 990). Recently, the Treaty of Lisbon in 2009 introduced the concept of ‘social market economy’ to the EU order, though the practical implications of this are not yet known and it is not clear if the drafters of Lisbon Treaty even intended this phrase to mean a German-style socio-economic order (Semmelmann, 2010: 522). In the EU, the ECJ has also introduced the concept of fundamental rights to its constitutional legal order. Rights have been situated on the same level as market freedoms – both are regularly referred to as ‘fundamental’ (see Maduro, 1999; 2003; de Witte, 1999; de Vries, 2013). Neoliberalism provides a means to conceptualise the economic principles that characterised the EU and the way in which they are embedded in the EU legal order.

Looking at the Treaty of Rome and recalling the failure of the treaty on the political community in the 1950s, it is possible to see how market freedoms have attained this status. The Treaty of Rome outlines the foundations of the Community as including the free movement of goods (Title I) and the free movement of persons, capital, and services (Title III). As Weiler (1991: 2419) highlights, ‘the Higher law of the Community is, of course, the Treaty itself’. As highlighted above, the Treaty of Rome was not originally neoliberal (and there is no indication it was intended to be). The prominence of economic freedoms as creating a rules-based framework for the internal market without necessarily prioritising these economic principles above all else is generally considered to be premised on German ordoliberal ideas, which were highlighted in chapter one (Maes, 2002: 27). Yet the prominence of the economic freedoms in the Treaty of Rome has contributed to their elevation to a constitutional status as a functional outcome of the ECJ’s case law, resulting in a neoliberal order emerging over time. As highlighted above, it was ECJ case law in the 1970s that started to change the nature of these economic freedoms of the single market and therefore created the basis for a neoliberal order. As addressed in chapter three, it was not until the 1990s and 2000s that the full implications of these developments emerged and neoliberalism became dominant – particularly when economic market freedoms began to be prioritised over other, social values. While market freedoms may be restricted for various reasons, namely public interest or for the protection of fundamental rights, it is generally the market freedom that is treated as the core value with which interference must be justified. As Augenstein (2013: 1935) highlights, this is a reversal of the ‘rule/exception logic’ found in most national constitutional traditions, wherein fundamental rights are at the core and any interference with the rights is must what must be justified (see also Scharpf, 1999: 57). Any interference with market freedoms is presumed unlawful, unless justified as proportionate and in pursuit of a legitimate aim, including the protection of fundamental rights (Barnard, 2013: 38). The Court has increasingly dealt with cases in involving national legislation in areas such as public provision of services, social security, and labour relations on the basis that they interfere with internal market freedoms, exposing these policy areas to a degree of judicial scrutiny previously unknown within member states. A situation has emerged in which the prioritisation of market freedoms at the European level is now chipping away at national social settlements, as highlighted in chapter three (see Barnard, 2013; Höpner and Schäfer, 2010; Bernard, 2003). Even when the EU has sought to legislate to permit member states to uphold higher labour standards, the ECJ has imposed limitations that have undermined national labour standards to protect market freedoms, as has happened with the Posted Workers Directive (Kilpatrick, 2009: 848-849).

### 2.2.2. Economic and Monetary Union

In 1992 the Treaty of Maastricht set out provisions for integration into an Economic and Monetary Union, eventually leading to the adoption of the Euro as the currency for 19 European states. To be clear, although EMU technically encompassed all EU states -- non-Eurozone states are legally referred to as ‘member states with a derogation’ (Article 139 TFEU) – the governance structures of EMU referred to here are in the context of Eurozone states, as they face far stricter and more intrusive procedures over various policy areas. Since its establishment, EMU has constituted one of the core components of the EU alongside the single market. Although the governance structures of EMU are distinct from the single market, a similar process in which core economic principles have become constitutionalised has taken place. Neoliberal ideas about the prioritisation of low inflation, technocratic control of monetary policy, and low public debt and deficit have been enshrined in the Treaties and can now be found in Title VIII of the TFEU. Since the Eurozone crisis, EMU governance has expanded to incorporate a greater array of policy areas and a neoliberal conception of macroeconomic competitiveness premised on labour market flexibility and wage moderation. EMU has been described variously as a form of ‘new constitutionalism’ enshrining ‘disciplinary neoliberalism’ (Gill, 1998: 5) and, since the Eurozone crisis, as ‘authoritarian constitutionalism’ (Oberndorfer, 2015: 186) and ‘authoritarian liberalism’ (Wilkinson, 2013: 547). What these scholars argue is that EMU has enshrined neoliberal economic principles as constitutional and out of reach of popular democratic will, thereby containing the ability of national governments to pursue social democratic policies. However, it should be noted that it is only really since the Eurozone crisis that the full implications of the neoliberal design of EMU have become apparent.

EMU was only made possible after French president Mitterrand’s famous U-turn in 1983 in which he abandoned France’s traditional *dirigiste* economic strategy in favour of a more German-style orthodoxy (Clift, 2003; 176-177; Maes, 2002: 30). This alignment of French and German preferences (along the lines of the latter) meant that a consensus had formed on key neoliberal principles: the necessity of an independent central bank and a commitment to low inflation and low public debt. The collapse of the post-war Bretton Woods system of international monetary cooperation and the shift towards free capital flows, international financial markets, and floating exchange rates put acute pressure on those states, such as France, exercising interventionist economic policies prioritising economic growth over low inflation (Maes, 2002: 29-31). Powerful social forces, particularly transnational financial capital, were becoming more powerful and favoured a more neoliberal approach to the economy (Streeck, 2012; van Apeldoorn, 2000; Gill, 1998). Of course, there were other political factors at play that contributed to EMU. Cognisant of the strength of the German economy and the power the German central bank could exert over monetary cooperation, France preferred to have power delegated to a European central bank where it felt it had the possibility of exerting more influence. Germany, meanwhile, was keen to secure French support for reunification and was willing to ease their reluctance to form a monetary union without full delegation of economic powers (Maes, 2002: 28-33). Furthermore, many other pro-integration actors were keen to pursue a monetary union for the salience associated with a common European currency and the benefit they felt it would bring to the integration project as a whole without really considering the economic issues associated with a monetary union over a non-optimal currency area – a position also found within academia (Ryner, 2012). Essentially, integration in EMU has taken place under German leadership within an international context of global financial flows and constraints exerted by financial markets. This process has privileged neoliberal ideas on monetary policy and fiscal sustainability that have a longer history in Germany, but have increasingly become dominant over the rest of Europe.

However, barriers associated with positive integration (see Scharpf, 1999) have remained and have led to uneven integration in EMU. Commitments to low inflation and low levels of debt and deficit have been constitutionalised in the treaties (Gill, 1998), but with different levels of depoliticisation and technocratic control. The commitment to low inflation has become most firmly entrenched constitutionally, as monetary policy has been delegated to the European level and placed in the hands of the independent European Central Bank. The removal of monetary policy from national political control constrained member states’ domestic policies and had implications for their growth strategies. Monetary devaluation could no longer be used to achieve competiveness for national export sectors, pushing states to put downward pressure on labour (e.g. through reductions in wages, insurance contributions, or employment protection) or tolerate competitiveness loss by relying on cheap debt to fuel investment (Stockhammer, 2012). As Bieling and Schulten (2003: 242-243) highlight, nearly all EU member states in the 1990s formed corporatist social pacts stipulating wage moderation and labour flexibility, though their success in achieving these goals varied considerably. One of the reasons for the variation in national approaches to the economy was that political control over economic policy remained primarily at the national level, subject in the late 1990s and 2000s to only intergovernmental soft-law coordination at the European level. This room to manoeuvre at the national level led some scholars to critique Gill’s notion of ‘new constitutionalism’ on the basis that some states continued to pursue interventionist and redistributive policies that ran counter to neoliberal discipline (see Parker, 2008: 401-406). In addition to labour policy, prior to the Eurozone all major areas of public spending remained firmly in the hands of national governments. Commitments to low levels of public debt and deficit were enshrined legally in the treaties, but were not subject to the same loss of national power as with monetary policy. Economic and Monetary Union titled more to the economic than the monetary side.

The experience of the Eurozone crisis has dramatically altered EMU and the governance of the Eurozone in particular. Whilst these changes are addressed in more detail in chapter five due to their significance for the realisation of many social rights, the implications for the economic constitution are highlighted here. The imbalance in EMU wherein monetary policy was delegated to the European level whilst economic policies (including labour, social, and welfare) remained at the national level and subject to only soft intergovernmental coordination has been partially redressed. Despite public debt not actually contributing to the crisis of the Euro itself, the subsequent sovereign debt crisis sparked by the huge costs of bailing out failing banks and the downturn in investment and growth in certain European states has led to a host of governance reforms. These include enhancements to the Excessive Deficit Procedure, a new Macroeconomic Imbalance Procedure with a focus on competitiveness, increased surveillance measures in the European Semester, the use of informal procedures such as the ECB’s bond purchasing scheme to impose policy conditionality, and conditionality attached to bail-out mechanisms (de la Porte and Heins, 2015: 13-19; Sacchi, 2015; Dukelow, 2015; Scharpf, 2011). For Eurozone states, this combines the threat of financial sanctions under the enforcement mechanisms with conditionality attached to vital credit lines via the ECB and bail-out mechanisms. Yet these reforms have not led to the complete delegation of economic powers to the EU level or the kind of integration seen in the single market. Instead, there has been a kind of ‘hybrid’ governance incorporating elements of rules- and coordination-based governance that is reliant on political discretion and information flows (Armstrong, 2013). These reforms have been argued to have empowered executive actors, particularly economic and finance actors in the Commission and Council, under the leadership of Germany (Cafruny, 2015; Ryner, 2015; Copeland and James, 2014; Scharpf, 2011), leading to a resurgence of Gill’s (1998) concept of new constitutionalism (see Oberndorfer, 2015; Bonefeld, 2015; Menendez, 2013; Wilkinson, 2013). Of crucial importance for the role of fundamental rights in this constitutional order, it should be noted that there is very little role for the ECJ in EMU. The hybrid governance structure of EMU affords the Court no institutional role and it has so far not established jurisdiction for itself when asked for preliminary rulings (Barnard, 2013: 250).

The development of EMU and the reforms introduced by the Eurozone have further embedded neoliberal principles in the constitutional order of the EU, albeit in a rather different manner than in the single market. In addition to the commitment to low inflation present at the outset of EMU, reforms since the Eurozone crisis mean that neoliberal ideas of fiscal balance and macroeconomic competitiveness have been pursued through executive decision-making and backed by the threat of sanctions and use of conditionality attached to access to funds. Although the impact of this new governance structure varies across the Eurozone, those states that have been worse hit by the Eurozone crisis have seen direct pressure to prioritise neoliberal economic values over social and even democratic concerns (Streeck, 2014; Menendez, 2013; Bonefeld, 2012). Social security and healthcare has been targeted for fiscal retrenchment and labour markets for flexibility restructuring (Pavolini et al. 2015; Theodoropoulou, 2015). EMU has expanded the economic constitution of the EU to incorporate more neoliberal principles and subsume an even greater array of domestic policy areas.

## 2.3. Fundamental Rights and Economic Liberalism

The above sections have highlighted the history of fundamental rights in European constitutions and international treaties overseen by the Council of Europe and the development of neoliberalism in the EU. This is the context in which rights have developed in the EU. As emphasised in chapter one, these are political concepts that are socially constructed. It is what the actors involved make of fundamental rights and neoliberalism that really matters and gives these concepts meaning. Yet actors are not completely free to define these concepts as they please. Both of these concepts are underpinned by political theory and have their own intellectual figureheads associated with them. EU actors enjoy some degree of agency to reshape these concepts as they engage with them, but also face constraints arising from the history of intellectual thought and theory. It is beyond the scope of this chapter to outline a genealogy of neoliberalism and fundamental rights. Given the constructivist ontology underpinning the theoretical framework, such a genealogy would be of limited value. However, it is still necessary to draw attention to the tensions and compatibilities of the theoretical and intellectual underpinnings of these concepts. As neoliberalism was addressed in chapter one, this section will focus towards the ideas underpinning fundamental rights and their compatibility with economic ideas.

Chapter one already highlighted some of the history and the malleability of ideas behind neoliberalism. To recap, briefly: neoliberalism’s prescription for the relationship between the economy, the state, and society is centred on the role of market competition and the freedom of capital and business. Market competition is viewed as the best means to allocate resources and should be expanded to as many areas of life as possible. Public spending is to be kept low to order to ensure a low tax burden (and therefore maximum freedom) for business and, along with low and stable inflation, to ensure public borrowing costs from international creditor markets are low. State regulations, particularly in the labour market, are to be kept to a minimum to prevent any distortion of the market. The role of the state is to secure these principles through depoliticisation, for example by creating an independent central bank to control monetary policy and by embedding policy decisions in technocratic modes of government (including constitutionalism) (Gill and Cutler, 2015). As Schmidt and Thatcher (2013: 19-21) highlight, neoliberal ideas can be rather malleable (see also Brenner, Peck, and Theodore, 2015). In particular, there is sometimes a rhetorical commitment to restricting the role of the state, whilst in practice state power is used to expand market competition and restrict the power of labour to interfere with capital. Essentially, neoliberalism is primarily concerned with ensuring market competition is at the core of a given polity. The role of the state is restricted to supporting market competition, including by embedding neoliberal principles at the constitutional level to protect them against democratic majoritarian decision making.

The history of civil rights is tied up with liberal intellectual thought and the ascendency of classical liberalism as capitalism became the dominant mode of production (Campbell, 2006; Marshall, 1950). Civil rights began to play a more prominent role in the 18th and 19th centuries as citizens sought to restrict the degree to which the state, then still characterised by feudal and aristocratic practices, could infringe on their liberty. As Marshall (1950: 12) highlights, in feudal society status was the hallmark of class and determined one’s place in the world. The early development of civil rights sought to dispense with the notion that status should afford individuals with different legal rights by ensuring equality of all before the law. Regulations and customs restricting certain occupations to particular social classes were broken down and replaced by the idea that the individual pursuit of liberty backed by protection of private property should underpin economic life (Marshall, 1950: 15-16). According to Marshall (1950: 33), ‘civil rights were indispensable to the competitive market economy’. Yet civil rights are not restricted to only individual engagement with work and the economy, they also entail restrictions on the state interfering with the general pursuit of whatever it is an individual has reason to value. As well as the freedom to pursue work and protection of property, civil rights are also strongly associated with free speech and expression (also incorporating the media), privacy, assembly, and religious freedoms (Campbell, 2006: 68-70). In light of the struggles that characterised the 18th and 19th centuries (and earlier) – that is, struggles against monarchies, the aristocracy, and the power of the church – it is understandable that new emergent capitalist class would want to enshrine a set of liberties into constitutional law.

Civil rights emerged in the earlier period of classical economic liberalism strongly associated with exploitation, poverty, and destitution. Older forms of welfare associated with more rural community membership had been torn down by the economic change of industrialisation and, for many decades, replaced with little else (Marshall, 1950: 13; see also Polanyi, 2001). As Marshall (1950: 33) states, civil rights ‘did not conflict with the inequalities of capitalist society; they were, on the contrary, necessary to the maintenance of that particular form of inequality’. The way in which these rights were necessary to inequality was that they treated individuals as formally equal before the law and therefore endowed with the same capacity to earn a living free from the interference of the state. Yet in practice, civil rights largely ignored the structural disadvantages in society arising out of massive wealth and power disparities that acted to create the inequality that characterised capitalism in the 18th and 19th centuries (Marshall, 1950: 35). From this perspective, it is possible to see the compatibility between civil rights and neoliberalism as an economic order. Both are concerned predominately with the role of the state in relation to the economy and society. While civil rights are concerned primarily with the liberty of individuals, neoliberalism is focused on the liberty of business and capital to function with minimal restriction. Those civil rights not related to the economy – such as privacy, freedom of expression, and freedom of assembly – can largely be addressed without infringing on neoliberalism’s prescriptions for the role of the state as they do not entail significant public spending or interfere significantly with the capitalist mode of production. Whilst this compatibility between civil rights and neoliberalism may be put under pressure as notions of substantive equality and positive duties on states has developed (see Fredman, 2004; this issue is explored in chapter six), civil rights broadly remain understood in terms of restrictions on certain actions rather than as a basis for state intervention (de Witte, 2005: 155). Though there are times when civil rights do clash with neoliberal principles (as explored in chapter three), they can generally be resolved in a manner that does not fatally undermine either side.[[17]](#footnote-18)

Social rights became accepted across Europe in the latter half of the 20th Century, though trade union rights have a slightly longer history (Marshall, 1950: 43-45). Social rights arose out of the recognition that the formal equality associated with civil rights allowed dangerous levels of inequality and instability to emerge. The liberal logic behind early civil rights developments presumed that once individuals were freed from the shackles of the state, prosperity and the capability to live life as one pleases would be enjoyed by all. While this logic represented the experience of the bourgeoisie or the middle class – essentially, those of sufficient wealth to not be concerned with the immediate prospect of poverty – it did not represent the reality faced by many workers (Campbell, 2006: 73; Marshall, 1950: 35-38). The capability to invest money in a business venture or further education to enhance one’s economic prospects or to afford healthcare or a lawyer to uphold basic civil rights is far more difficult for an individual living in poverty than it is for someone with money to spare. While this critique of the individualism and assumptions of capabilities underpinning civil rights is common to both mainstream scholars such as T.H. Marshall and more radical scholars such as Karl Marx (see Campbell, 2006: 72-75), it is within mainstream social democratic developments that modern social rights have primarily developed. Social rights in Europe developed within the period of embedded liberalism, wherein steps were taken to redress the inequality and poverty that characterised the dominant economic liberal approach prior to World War II (Ruggie, 1982). Social rights are therefore premised on the recognition that the state must intervene in society and regulate the market in such a way as to ensure that all citizens can enjoy a basic standard of living with access to key services.

However, the notion of the state intervening in society and the market sits in tension with the liberal ideas underpinning capitalism. Even amongst those liberal scholars who do perceive a role for economic redistribution, such as John Rawls, civil liberties securing the basis for participation in the capitalist market are viewed as the core principles to which redistribution should not undermine (Campbell, 2006: 66-67). According to Marshall (1950: 47), social rights essentially create a right to a real income that is not proportionate to the market value of the claimant. It should be noted that Marshall uses the term real income to encompass the provision of various services (medical, housing, education, unemployment benefit etc.) rather than a set monetary income. Ensuring that individuals have access to services disproportionate to their ability to access such services on the free market therefore entails redistribution of wealth within society, resulting in tensions with the liberty and property rights of those wealthier members of society. During the period of embedded liberalism, a high degree of redistribution was achieved and social rights generally considered to be well respected, yet tensions between social rights and economic liberalism never went away (Ruggie, 1982; Marshall, 1950). As embedded liberalism has declined and neoliberalism has become the dominant economic paradigm, these tensions have resurfaced. Neoliberalism’s prioritisation of market competition and freedom for business actors and restrictive role for state spending are significant barriers to the role of the state required to realise many social rights (this issue is explored in detail in chapter five).

The relationship between liberalism and fundamental rights has been present from the origin of these sets of ideas. Civil rights accompanied the development of economic liberalism and have remained, for the most part, compatible with these ideas (whether the classical liberalism of the 18th and 19th centuries, embedded liberalism in the 20th century, or the neoliberalism of today). Social rights, on the other hand, emerged as a reaction to the social displacement of unfettered economic liberalism and have continuously existed in a state of tension that has gone unresolved in capitalist society. As highlighted above, EU integration has coincided with a shift towards neoliberalism from the 1980s onwards. How the relationship between fundamental rights as they have developed in the EU and the neoliberal paradigm that has become embedded in the EU is of key importance.

## 2.3. Conclusion

The sections above have highlighted the differences between the constitutional foundations of European states and the EU. European states have based their constitutional orders around fundamental rights and have further embedded these rights in supranational regional institutions, premising the legitimate use of state power on respect for the lives of their citizens. Both civil and social rights have become widely established in constitutional orders, often intertwined with European level institutions. Yet some variations remain. Civil rights have become more firmly established, particularly with regards to their enforcement via judicial means. All EU member states have at least recourse to the ECtHR for civil rights matter, though there remains some variation over approaches to domestic judicial review. Social rights are also widely found in European constitutions and are embedded at the European level in the ESC, but are more varied when it comes to enforcement. Some constitutions specify that social rights are programmatic principles to be implemented via legislation or other political acts, whilst others provide for some level of justiciability. There has been a discernible trend towards judicial enforcement that has culminated in the collective complaints mechanism under the ESC, yet this has not attained the same status as its civil rights counterpart under the ECHR. More recently, developments around ideas of new governance have pushed both civil and social rights into the realm of protection through legislation and other political acts, promoting ideas of mainstreaming and positive duties to ensure the realisation of rights.

The EU has based its constitutional order on economic principles in the hope that legitimacy can be derived from economic benefit, though the constitutionality of the economic principles has developed partially as an unintended consequence of the ECJ’s development of EU law. The premier areas of EU integration are economic: the single market and EMU. Both have embedded neoliberal economic values at their core: the four freedoms of the internal market and the commitment to low inflation, low debt and balanced budgets, and macroeconomic competitiveness premised on labour market flexibility in EMU. These economic values have been enshrined in the EU treaties, which have attained a constitutional status in Europe.

The previous chapter introduced the theoretical framework of critical constructivism, highlighting the way in which political concepts are socially constructed and the necessity of approaching political orders in a critical manner in order to ascertain the principles and power dynamics that underpin them. Whilst this theoretical framework is applied primarily to the development of fundamental rights in the EU, as demonstrated in chapters’ three to six, the account of rights in Europe and economic principles in the EU provides the necessary background information. In particular, it highlights the dominant nature of different sets of ideas and the different ways in which these ideas have become entrenched. Fundamental rights in European constitutions and regional supranational institutions have attained a dominant status, evidenced from the way in which they are embedded constitutionally as the core principles of modern European democracy. Yet neoliberal economic principles in the EU have also achieved a dominant status, having been established as core principles of the EU order and embedded in the EU treaties. These two different sides to Europe raise questions about the development of fundamental rights in the EU, wherein the balance between these competing dominant ideas is determined through the agency of key actors involved in their development and political practice. As shown in the following chapter, fundamental rights have developed in the EU in a *post hoc* and *ad hoc* manner. The constitutional position of fundamental rights and the legitimacy they embody at the national level has provided the impetus for these EU-level developments, yet in the EU rights compete with other constitutionalised principles in the form of economic values. This means that whilst rights have enjoyed a largely unchallenged constitutional status at the domestic level, they face potential competition with economic values at the level of the EU. There is a clash of two different dominant sets of ideas about European constitutional order. This is of particular importance to the role of social rights, which, as demonstrated above, are part of the canon of fundamental rights and hold the potential for significant tensions with liberal economic principles. Civil rights, it should be noted, hold less potential for such a conflict as both civil rights and the economic principles embodied in the EU are underpinned by ideas of liberalism, namely restrictions on the state to protect individual liberty.

# 3. The Development of Fundamental Rights in the European Union

The purpose of this chapter is to analyse the development of fundamental rights in the EU from a critical constructivist perspective. From this critical constructivist perspective, fundamental rights are treated as a concept that has been socially constructed by actors within the EU and influenced by structural constraints relating to the institutional framework of the EU and the sets of ideas embedded within the EU. The institutional framework of the EU shapes the agency of different institutional actors, affording different capabilities to the ECJ, the Parliament, the Commission, and the Council when it comes to the development of rights and their integration into the EU order. Ideas about fundamental rights already established throughout Europe and paradigmatic ideas about the economic principles that have underpinned European integration are also examined to analyse how they have influenced the way in which EU actors understanding fundamental rights and their role in the EU order. The emphasis is therefore on how actors’ understandings of what fundamental rights are have shaped their development and inclusion into the legal order of the EU. These broader European ideas about rights and the neoliberal economic constitution of the EU were highlighted in the previous chapter. This chapter looks specifically at the development of fundamental rights in the EU by analysing how the different institutional actors have constructed rights, given the context of institutional constraints, the history of rights in Europe, and the neoliberal economic principles embedded in the EU constitutional order.

The focus on institutional actors in the EU is based on the recognition that the development of fundamental rights has been largely an elite driven project. Originally introduced by the ECJ and developed within its case law, the concept of fundamental rights in the EU has been primarily shaped through judicial processes. The absence of a consensus among national governments has largely prevented any substantive political interventions on how fundamental rights are understood and what role they play in the EU. It has taken until the year 2000 for an EU Charter of Fundamental Rights to be drafted and until 2009 for the slightly amended 2007 version of the Charter to be granted legal value. Yet despite this delay, the political institutions of the EU have historically played a key role legitimising the judicial construction of rights and, in the case of the Parliament, have sought to shape the way in which the EU engages with rights through non-binding activities.

This chapter proceeds by presenting the history of fundamental rights developments in the EU based on an analysis of EU documents. The roles of the EU institutions are accounted for along with their understanding of what fundamental rights are and what role they should play in the EU. Process tracing has also been used to identify how key developments unfolded, drawing attention to the roles played by various actors. This chapter is structured around key political developments and the processes that led up to them. The argument is built around identifying how actors have interpreted fundamental rights and is illustrated with excerpts from key documents. As the ECJ has established the foundation for these developments, already subject to intensive study by scholars, this case law is outlined first based on the literature in this area. Following this, the main analysis of this chapter begins by looking at the developments leading up to the Joint Declaration on Fundamental Rights in 1977, looking specifically at how the Parliament and Commission understood rights and endorsed the court-driven approach of the ECJ. Following this, developments around social rights are examined by looking at the development of the Community Charter in 1989. Next, the first introduction of fundamental rights in the Treaties in the 1990s is analysed. Following this, the activities around the development and drafting of the Charter of Fundamental Rights are looked at. Finally, the new governance developments and the establishment of the Fundamental Rights Agency after 2000 are addressed. This chapter concludes with a discussion of these findings and seeks to situate them in the context of the critical constructivist framework.

The main argument, as presented below, is that the ECJ has played a central role in constructing the concept of fundamental rights in the EU, whilst political developments, including the Charter of Fundamental Rights, have largely been limited to endorsing the ECJ’s understanding of rights. Specifically, fundamental rights are understood as predominantly legally enforceable civil rights, as restricted to where the ECJ has jurisdiction, and as of equal value to neoliberal market freedoms. Social rights have historically been afforded a lesser value to both civil rights and liberal market freedoms, which both enjoy judicial protection by the ECJ. Efforts to introduce social rights to the EU have seen these rights first moulded to ensure compatibility with the single market in the Community Charter (2007) and then granted a special status as principles to be implemented via legislation in the Charter of Fundamental Rights (2007). It is argued that the institutional framework of the EU and the way in which neoliberal ideas have become constitutionally embedded at the core of the EU have shaped this way in which fundamental rights are understood.

## 3.1. ECJ and the Protection of Fundamental Rights

The ECJ has historically been the most important institutional actor in the EU when it comes to fundamental rights. As highlighted in the previous chapter, the ECJ has played a central role in the construction of the new constitutional order of the EU single market centred on the economic principles embedded in the treaties. Yet alongside the construction of this economic constitution, fundamental rights have been introduced and advanced primarily by the Court. In fact, up until 2009 the only significant hard law developments concerning rights were at the hands of the ECJ. As demonstrated throughout this chapter, it is the way in which fundamental rights have been constructed and understood by the ECJ -- which has drawn on ideas associated with rights across Europe and sought to integrate rights alongside economic principles in the treaties -- that has become established as the dominant understanding of rights.

Given the central role played by the Court, it is important to bear in mind its role in the EU. Whilst the ECJ is in a fairly unique position to reinterpret and even expand the parameters of European law without treaty revision, it is also constrained in many ways. The development of its case law is influenced by private litigants and national judges and is mediated through the Court’s judicial process (Alter, 2000). Given the economic focus of the EU treaties, a lot of the ECJ’s case law has been shaped by market actors (Maduro, 1999: 458) and German ordoliberal lawyers (Scharpf, 1999: 54). Access to the Court has generally been considered to be rather poor, particularly for more vulnerable groups more in need of rights protection (Dawson, Muir, and Claws, 2012: 287; de Witte, 1999: 877; de Búrca, 1995: 51-51). The Court’s judgements must be based, though with some lee-way, on the provisions of the treaties, other accepted sources of law (including national constitutions and international treaties), and conform to the norms of behaviour widely expected of a judicial body (de Sousa, 2011: 164-166). Courts are generally reluctant to make new law and to engage with questions concerning the distribution of resources in a society, preferring to leave such issues to institutions that enjoy more democratic legitimacy. This has meant that the ECJ is more predisposed towards negative integration and deregulatory outcomes (Scharpf, 1999). Such an approach is compatible with the liberal ideas that underpin the freedoms of the internal market and civil rights, but do not sit comfortably with the concept of social rights.

There is already a healthy body of literature on fundamental rights before the ECJ, some of it deeply critical, but most of it more nuanced. On the critical side, Coppel and O’Neill (1992) stand out for making the claim that the ECJ does not take rights seriously and has instead subverted the language of rights to expand its own jurisdiction and influence. This specific critique has been subject to a direct response by Weiler and Lockhart (1995a; 1995b), who provide a more nuanced account of the ECJ that accepts some shortcomings whilst maintaining that the overall level of protection is adequate. Such a position appears common throughout the literature (see de Búrca, 2013; de Vries, 2013; Barnard, 2013; de Witte, 2005; 1999; von Bogdandy, 2000; Maduro, 2000; 1999). As highlighted below, this literature identifies that the ECJ has constructed many of the key principles relating to fundamental rights in the EU. These include what rights are protected, the application of a proportionality test, the relationship between rights and other legal principles (particularly the freedoms of the internal market), and the scope of application of rights in EU law. Many of these aspects of rights are now enshrined in the Charter of Fundamental Rights, whilst other aspects are not so formally codified yet still form part of how rights are understood.

### 3.1.1. The Introduction of Rights to the EU

The founding treaties of what would later become the European Union contained no mention of fundamental rights. It has been suggested that this omission was intentional, given the association of rights with the idea of supranational state power that had been rejected in the European Political Community in the 1950s (de Búrca, 2011). Furthermore, the founding treaties also contained very few provisions on social policy; a decision associated with the Ohlin Report’s (1956) suggestion that different levels of social protection would not result in downward pressure on those states with higher levels of protection, which is now widely considered to no longer be the case (de Schutter, 2005a). As would perhaps be expected, the ECJ did initially refuse to adjudicate on fundamental rights issues. In the case of *Stork[[18]](#footnote-19)* in 1959, the ECJ ruled that it was not empowered to decide if a Community measure infringed on fundamental rights protections in German constitutional law. It is notable that there was an absence of any corresponding fundamental rights that could have been drawn upon at the European level. Other cases are commonly cited to show the ECJ disregarding fundamental rights, such as *Ruhrkohlen[[19]](#footnote-20)* in 1960 and *Sgarlata[[20]](#footnote-21)* in 1965. Although these cases do not reference fundamental rights directly, in each case it is alleged that the ECJ has failed to uphold these rights (Williams, 2004: 146). These cases show that the ECJ initially held the position that fundamental rights were part of national laws rather than Community law and that its role as court of the European Communities was to uphold Community law based on the treaties. The position of the ECJ became particularly important due to the well-known cases of *Van Gend en Loos[[21]](#footnote-22)* (1963) and *Costa v ENEL[[22]](#footnote-23)* (1964), which established the principles of direct effect of Treaty provisions and the supremacy of Community law over national law as highlighted in chapter two. Member states were left in a position where domestic fundamental rights protections, including their obligations under the ECHR, appeared subservient to a supranational Community law with no corresponding protections. This situation proved to be quite unacceptable to the German and Italian constitutional courts, both of which threatened to undermine the fledgling European legal order by insisting on the primacy of their constitutional rights (Grabenwarter, 2005: 98-99).

Despite the ECJ having previously neglected to include fundamental rights as part of its jurisprudence in the cases outlined above, in 1969 the Court declared in the case of *Stauder*[[23]](#footnote-24) that fundamental rights are ‘enshrined in the general principles of Community law and protected by the Court’. The Court specified two sources of this fundamental rights protection. First, in written law Articles 7 and Articles 40(3) (EEC) prohibit discrimination based on nationality and discrimination between producers and consumers of agricultural markets, but neither of these applied to the case at hand. The second source is unwritten community law derived from general principles of law common to member states, which is what was applied in this case. Several points are worth noting from this case. The written law, despite its economic nature, has been interpreted to provide some fundamental rights protection, albeit on extremely limited grounds. Unwritten general principles appear to provide far broader protection, but are left undefined. Some further definition of unwritten sources was provided a year later in 1970 in the case of *Internationale Handelsgesellschaft,[[24]](#footnote-25)* in which the Court stated that fundamental rights form an integral part of the general principles of law and are inspired by the constitutional traditions common to member states. In 1974, in the case of *Nold*[[25]](#footnote-26)the ECJ added a further unwritten source: ‘international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories’. The international treaty that has become established as the unrivalled paramount source of rights is the ECHR, though the Court did not specify this source until the case of *Rutili* in 1975, as discussed below.

The cases of *Stauder, Nold* and *Internationale Handelsgesellschaft* identify the key sources of fundamental rights in the EU that have largely remained unchanged up until the Charter of Fundamental Rights was added as a source in the 2000s. To reiterate, these sources are written treaty law (which at the time was very limited) and unwritten Community law derived from general principles of law, including common constitutional traditions and international treaties to which member states are signatories. The link between these sources and the broader European field of fundamental rights highlighted in chapter two is clear, as the ECJ has relied on rights sources outside of the EU to legitimise its integration of rights into Community law. The EU has even been criticised for constructing an unnecessarily European perception of fundamental rights by referring almost exclusively to European sources (Smismans, 2010; Williams, 2004). There are three further points worth highlighting concerning the influence of German and French constitutional law. First, the unwritten nature of sources of rights means that the ECJ has created a potentially extremely expansive array of fundamental rights in the EU, which de Witte (1999: 865-866) argues was inspired by developments in the French constitutional court, as noted in chapter two. Second, according to Kumm (2009), the aforementioned *Internationale Handelsgesellschaft* and *Nold* cases both involved economic rights to pursue economic liberty that, at the time, were only really present in Germany, and even then were not uncontroversial. The threshold for common constitutional traditions does not appear too high from these cases and it has also been noted that the ECJ has never appeared to have tried to determine in a systematic fashion what exactly the common constitutional traditions are (Smismans, 2010; Kumm, 2009). De Witte (1999: 878) suggests that the ECJ tends to take national constitutional practices selectively and may not really be interested in determining any common traditions. Third, the German constitutional court remained rather unimpressed with these ECJ developments and maintained its ability to exert oversight. After the preliminary ruling by the ECJ, the case of *Internationale Handelsgesellschaft* went to the German constitutional court in 1974. In this case, which is known as *Solange I*,[[26]](#footnote-27) the German constitutional court ruled that it would be prepared to rule Community law unconstitutional if it felt it violated German fundamental rights (which had not occurred in this specific case). Furthermore, the German constitutional court stated that it would retain this power so long as there was no written catalogue of rights of a comparable nature to the rights in the German constitution decided on by a directly elected European Parliament. Despite the Charter of Fundamental Rights entering into force at the end of 2009, the German constitutional court has largely retained this power, though it has rarely come into conflict with the ECJ (see Sarmiento, 2016).

### 3.1.2. The Proportionality Test

The ECJ’s approach to fundamental rights issues has been to apply a proportionality test. This is premised on the idea that interference with fundamental rights is permissible as long as the interference is proportionate and in pursuit of a legitimate purpose (von Bogdandy, 2000; Kumm, 2009). According to Kumm (2009), this proportionality test is intertwined with the way in which rights were originally introduced. The issues at hand in cases such as *Internationale Handelsgesellschaft* and *Nold* were not really of a fundamental nature of the type usually associated with constitutional protection, as both involved rather minor restrictions on business practices. Yet to see off challenges to the supremacy of Community law, the ECJ had to shoehorn in references to rights by making them applicable to seemingly mundane issues (Kumm, 2009). Whilst Kumm (2009) points out that this reasoning was present in the ECJ’s first cases involving fundamental rights, it was not until the 1979 case of *Hauer[[27]](#footnote-28)* that this became explicit. In this case, the ECJ stated that the rights in question ‘far from constituting an unfettered prerogative, must be viewed in the light of the social function of the activities protected’ and that it ‘is necessary that those restrictions in fact correspond to objectives of general interest pursued by the Community and that, with regard to the aim pursued, they should not constitute a disproportionate and intolerable interference’. The phrase ‘objectives of general interest’ has caused some concern among legal scholars, as de Búrca notes that international treaties and national constitutions tend to set out more restrictive conditions for interfering with fundamental rights (de Búrca, 2013).

The proportionality test has become a crucial tool of the ECJ to address conflicts between rights and other principles, particularly the freedoms of the internal market. It essentially seeks to determine if interference with a right is in pursuit of a legitimate aim and is suitable, necessary, and reasonable for the achievement of that aim. The proportionality test has actually been applied generally across EU law and is not limited to issues of fundamental rights, as demonstrated below. The proportionality test has been applied to market freedoms, against which fundamental rights and general public interest have been used to justify interference.

### 3.1.3. Scope of Application

The jurisdictional scope within which fundamental rights are protected has also been defined by the ECJ. The earliest rights cases concerned the institutions of the EU themselves, which would appear fairly straightforward when it comes to the question of the scope of rights protections. However, von Bogdandy (2000: 1325-1326) has suggested that the ECJ has granted the EU legislators more room to manoeuvre than some of the more forceful constitutional judicial review procedures within member states. This leeway granted to the EU legislatures has led some to suggest that the ECJ is not too concerned with rights and only uses them as a means to expand EU influence (see Coppel and O’Neill, 1992), though others have noted that the level of oversight is sufficient given the absence of any challenge from national constitutional courts (Maduro, 2003: 284), particularly given the German constitutional court’s keen eye. Furthermore, recent judicial developments since the Charter of Fundamental Rights became binding in 2009 have seen the ECJ exert full judicial review of an EU directive and strike it down for violating fundamental rights, as discussed in chapter four (see case of *Digital Rights Ireland[[28]](#footnote-29)* in 2014).

The situation gets a bit trickier when it comes to the scope of rights protections beyond the EU institutions. First, the horizontal direct effect of fundamental rights still remains underdeveloped. In the *Defrenne[[29]](#footnote-30)* case the horizontal application of treaty provisions was established, which in that specific case was a provision on equal pay between men and women. This case meant that EU law on equal pay can be relied upon in disputes between private parties, such as between an employee and an employer. According to Groussot, Pech, and Petursson (2013: 106-112), the ECJ has developed this principle of horizontal effect mainly in areas where there are treaty provisions and directives, such as Directive 2000/78/EC prohibiting discrimination in employment. As noted above, equal pay between men and women is written into the EU treaties. Yet the unwritten source for fundamental rights means that there are no direct written treaty provisions for most rights, which has resulted in a gap wherein many rights are not afforded horizontal application between private parties. It is not clear if the Lisbon Treaty has changed this situation by too much, as the Charter was given legal value supposedly of equal value to the treaties but the provisions of the Charter (i.e. the rights themselves) were not actually incorporated into the treaty text so it is not clear if they have horizontal direct effect (see Groussot, Pech, and Petursson, 2013: 112). However, the Lisbon Treaty also added provisions on some specific core issues, including data protection (Article 16 TFEU) and a number of social goals (Article 9 TFEU), which is expected to bolster the scope of horizontal application on at least rights-related issues.

Second, the ECJ has expanded its oversight of fundamental rights to the activities of member states in two situations: when implementing EU law and when derogating from EU law (see Groussot, Pech, and Petursson, 2013: 113 on case law in these areas). Both of these situations arose out of developments in the Court’s case law around the end of the 1980s. In 1989 the ECJ delivered its opinion in the case of *Wachauf,* [[30]](#footnote-31)in which Regulation 857/84 on rules for levies in milk production had inadvertently deprived a man of the fruits of his labour. The Court decided the deprivation of the right had arisen out of the implementation of the regulation, rather than the regulation itself, and so it was the member states who were obliged to respect fundamental rights when implementing EU law. In 1991, in the case of *ERT[[31]](#footnote-32)* Greece had sought to grant a TV broadcast monopoly to a single firm, but this was challenged on the basis that it interfered with treaty provisions on the free movement of goods and services and competition rules. The ECJ decided that any derogation from these treaty provisions must also be compatible with fundamental rights, in this case the fundamental right to freedom of expression that the Court considered to be at risk in the event of the Greek authorities granting a monopoly to a single broadcaster. As noted in chapter two, the ECJ’s interpretation of treaty provisions on market freedoms is particularly expansive and has been described as ‘ever expanding’ (de Sousa, 2011), so the principle established in *ERT* is significant. Furthermore, the *ERT* line of reasoning has also led to an area of conflict. Whilst in this specific case the protection of fundamental rights happened to coincide with upholding treaty provisions on market freedoms, there are also situations wherein a state derogates from a market freedom in order to uphold a fundamental right, thus leading to a direct conflict between constitutional principles. This has occurred in cases such as *Schmidberger* and *Laval,* which are discussed below as they involve the balancing of rights and economic principles.

### 3.1.4. Civil rights, Social rights, and Economic Principles

The term ‘fundamental rights’ has so far been used throughout this section without a precise definition of what rights are being referred to, an issue compounded by the absence of an EU catalogue of rights (at least until the year 2000). It should be recalled that this was an issue emphasised in the previous chapter. Despite the expansive scope afforded to the ECJ by the unwritten sources of rights established in its earlier case law on the matter, the Court has generally restricted its understanding of fundamental rights to only civil rights without any positive obligations – a position that has been criticised as ‘rather rudimentary’ (de Witte, 2005: 155). This approach conceives of civil rights providing a ‘shield function’, a restriction on EU and member state action rather than as providing objectives for that would require concerted action (de Schutter, 2010: 12). In the case of *Rutili[[32]](#footnote-33)* in 1975 the ECJ specified the ECHR as a source of rights, a source which contains only civil rights. As Rack and Lausegger (1999: 805) highlight, France had ratified the ECHR a year earlier, meaning that all EU member states had ratified the ECHR by 1975. The ECHR has since established a special significance as a source of rights and has been referred to far more often than other sources of rights, though there have been fewer references to the ECHR since the Charter became binding (de Búrca, 2013). It is widely accepted that civil rights have become firmly established in EU law and are adequately protected.

When civil rights have come into conflict with market freedoms, they have generally been resolved in a manner that has upheld their essence. As highlighted in chapter two, the ECJ has established the freedoms of the internal market as ‘fundamental’ and has frequently acted to safeguard them against possible infringement by state and private action. The proportionality test, outlined above, is used to determine if interference with market freedoms is justified. However, it has also been highlighted that there is still some inconsistency in the way in which the ECJ has sought to balance civil rights and market freedoms. In *Schmidberger[[33]](#footnote-34)* the Court allowed interference with the freedom of movement of goods in order to protect the civil rights to freedom of expression and assembly, but implied that the state authorities were only entitled to interfere to the minimum necessary for the protection of those rights (de Schutter, 2010: 22-23). Meanwhile, in the case of *Omega*,[[34]](#footnote-35) the ECJ noted that the German understanding of the right to dignity is higher than in other member states (and therefore beyond the minimum necessary) and still permitted the authorities to interfere with the freedom to provide services to uphold this right (de Schutter, 2010: 22-23; see also de Vries, 2013: 189-191). As de Schutter (2010) and de Vries (2013) highlight, this inconsistency has been presented in a number of cases. Nonetheless, it is clear that civil rights are at least adequately upheld by the ECJ. This should perhaps not be surprising. As noted in chapter two, civil rights are widely accepted as constitutional principles across Europe and courts tend to be comfortable with the idea of judicial enforcement of these rights.

If civil rights can be said to be adequately protected, even when they clash with the freedoms of the internal market, it is not clear if the same can be said of social rights. In contrast to civil rights, it has been quite rare for the ECJ to explicitly recognise fundamental social rights and the ESC has never attained the significance that has been afforded to the ECHR in the eyes of the Luxembourg court (de Witte, 2005). Historically, the ECJ has engaged with social issues without referring directly to social rights. There are two key ways in which this has happened.

First, the ECJ has drawn on the principle of national solidarity to justify exempting certain undertakings that serve a social function from internal market rules, thus protecting social rights without resorting to rights discourse. However, it has also been noted that these exemptions tend not to be comprehensive or absolute. Aspects of social security systems have been increasingly exposed to market rules, though this has tended to coincide with member states already adopting market-based reforms in these areas (Bernard, 2003: 249-252; Hervey, 2000: 34-43). Generally, however, the ECJ’s balancing of social values through the concept of solidarity has been considered adequate (Armstrong, 2010: 196-208).

Second, ECJ has opened up access to national welfare services through internal market freedoms, but for social purposes. These cases have involved allowing access of citizens of one EU member state to services of another on the same grounds as nationals of the host state, including access to welfare schemes, education, and healthcare (Caporaso and Tarrow, 2009: 607-611). It has been argued that the ECJ has gradually changed the meaning of free movement of persons from being understood in a purely economic fashion to a more humane and citizenship focused understanding (Menendez, 2009; see also Everson, 1995 and Hervey, 1995 on the economic understanding of free movement of persons). However, this move has come with a social cost, as it has been argued that using free movement provisions to open up national welfare states potentially undermines national solidarity by delinking financial contributions from welfare provision (Höpner and Schäfer, 2010: 24-25; Menendez, 2009). Thus, EU law has been described as ‘more human but less social’ (Menendez, 2009: 27). It should also be noted that these social policy areas where the ECJ has applied the market freedoms are not fully within the competence of the EU. This means that there is little scope for the EU to actually legislate to address any issues arising out of the Court’s engagement (Weatherill, 2013: 17). Yet despite the ECJ chipping away at the exemptions social welfare systems have historically enjoyed from market rules, its approach was considered to have struck a balance between EU level market rules and national level social aims (Barnard and Deakin, 2011: 251). This compromise whereby national level regimes were protected was disrupted in 2007, as highlighted below.

It is only relatively recently that social rights have actually been explicitly recognised as fundamental by the ECJ, and the series of cases in which they were have done little to ease the anxiety felt by more socially orientated actors about the dominance of liberal market values. In 2007, the cases of *Viking[[35]](#footnote-36)* and *Laval[[36]](#footnote-37)* recognised the right to collective action as a fundamental right, drawing on sources including the EU Charter of Fundamental Rights, the ESC, and the ILO. However, these cases have been described as amounting to ‘one step forward, two steps back’ (Davies, 2008: 126). Whilst the recognition of the right to collective action as a fundamental right has been received positively, the practical effect of these cases was to curtail this fundamental right and to reinterpret the EU Posted Workers Directive (PWD) in order to uphold the internal market freedom to provide services. The right to collective action was curtailed because the Court felt that it interfered disproportionately with the freedom to provide services, a decision for which it has been heavily critiqued (Christodoulidis, 2013; Barnard 2013; Kilpatrick, 2012; Lo Faro 2011; Höpner and Schäfer, 2010). In particular, Barnard (2013: 49-51) highlights how the proportionality test is not an appropriate tool to balance economic and social concerns, particularly when it comes to strike action which is more likely to be successful precisely when it is less proportionate. The reinterpretation of the PWD also raises social issues, which have been further developed in the case of *Rüffert*.[[37]](#footnote-38) The PWD was designed to ensure that host member states provide a minimum set of labour standards for workers posted from another member state (often post-communist states with lower labour standards), whilst allowing member states to choose to provide higher standards. This actually embodied the ECJ’s older approach to the issue in *Rush Portuguesa[[38]](#footnote-39)* in 1990(Kilpatrick, 2012: 232). Yet in the *Laval*-line of cases the ECJ changed its approach and reinterpreted the PWD so that the minimum standards became more of a ceiling in order to ensure minimal interference with the freedom to provide services, thus limiting the scope for member states to provide higher standards on both domestic and posted workers (Kilpatrick, 2012: 223). The ECJ upheld the protection of market freedoms even against the wishes of the EU legislators to protect workers’ rights, a situation that had been described as ‘unimaginable’ prior to 2007 (Moreau, 2011: 11-12).

It is clear that social rights have long occupied a secondary status when it comes to fundamental rights. For decades the ECJ had sought other means to address social issues and since incorporating social rights into its case law has acted to restrict their application. As highlighted in chapter two, European courts have generally been less comfortable engaging judicially with social rights, despite the degree to which they are to be found in national constitutions. The ECJ is no exception. This has left social rights poorly developed in the case law of the Court and, by extension, poorly developed as fundamental rights in the EU.

### 3.1.5. The ECJ’s Construction of Fundamental Rights

Viewed through the lens of critical constructivism, there are several aspects of the ECJ’s engagement with rights to draw out. In constructivist terms, the Court has played a central role in constructing the concept of fundamental rights in the EU. It has defined key parts of the parameters of the concept, including the jurisdictional reach of rights, which rights are protected, and how they are balanced against other core principles. Yet in using its agency to construct fundamental rights in the EU, various institutional factors have constrained and shaped the actions of the Court here. The Court has acted to develop a concept of rights specific to the EU in a broader European environment with pre-existing entrenched ideas about rights. This is evident in the way in which the ECJ has drawn on constitutional traditions and the ECHR. Yet the Court is also constrained by its institutional role as interpreter of the treaties and the socially expected norms of behaviour of a court. Thus, the broader array of ideas about rights in Europe have not simply been transposed to the EU, they have been mediated through the Court’s ability to legitimately draw on ‘unwritten principles’ of law and balanced against the written Treaty provisions on market freedoms. The ECJ has managed to change the way in which the Treaties and the EU legal order are understood without physically altering the written content of the treaties. From a more critical perspective, it is clear that neoliberal market values are treated as dominant ideas by the ECJ, given the way they are situated at the core of the EU legal order against which any interference, including for reasons of fundamental rights protection, is presumed to be unlawful and must be justified. Fundamental rights, understood as predominately civil rights, have also attained a dominant status; yet they compete legally with liberal market freedoms in a fashion unseen in national constitutional orders. Rights have been moulded to fit with market freedoms, rather than vice-versa. For the most part, introducing civil rights to the EU order in this fashion has not been particularly controversial, as chapter two highlighted the compatibility between these principles. It is in the development of social rights that tensions have arisen and neoliberal economic principles have prevailed.

The purpose of this section has been to look at how rights have been constructed in the case law of the ECJ. There are three core aspects of rights that need to be emphasised: fundamental rights are conceived of as primarily civil rights, rights are of equal value to the economic values underpinning the EU, and the scope of rights protection is limited to where the ECJ has jurisdiction. There are some indications of recent change, which are addressed throughout the rest of this thesis. For example, social rights have started to be introduced to the case law on fundamental rights, yet remain underdeveloped. As demonstrated in the rest of this chapter, this specific understanding of rights has come to dominate in the EU. Shortcomings associated with a purely judicial construction of rights have come to characterise the political construction of rights.

## 3.2. Political Developments

The ECJ may have been the most prominent actor in the construction of fundamental rights in the EU, yet the political institutions of the EU have not been absent. Throughout this section, the engagement of the other institutions of the EU is analysed to see how fundamental rights have come to be understood more broadly in the EU. Whilst it is evident that the dominant understanding of rights constructed by the ECJ has become widely accepted across the EU, the political institutions have played a key role legitimising this understanding of rights and have, at times, managed to contribute towards further developments. Yet the engagement of these EU institutional actors has been shaped strongly by their role in the overall institutional framework and, with the exception of the European Parliament, a reluctance to challenge or undermine the dominant economic ideas underpinning integration. This section traces the political development of fundamental rights in the EU, analysing key formative events in detail in order to determine how they have shaped the understanding of rights and contributed to further developments, if at all.

### 3.2.1. Fundamental Rights on the Agenda and the 1977 Joint Declaration

The first non-judicial, political development on rights in the European Community occurred in 1977 in the form of a joint declaration, following pressure to act from the German constitutional court in its *Solange* decision, as highlighted above. Prior to this joint declaration, the Parliament and Commission had both begun to take rights issues on board, whilst the Council remained largely uninvolved. This is indicative of the reluctance of member states and the difficulty in reaching a consensus on this issue that left rights to be an elite driven project by the more supranational institutions. Looking at how the Parliament and Commission have addressed the issue of fundamental rights from the outset identified some of the dominant themes that have continued to characterise fundamental rights in the EU.

The European Parliament, despite its somewhat limited powers, demonstrated from the outset that fundamental rights are an issue it is willing to drive forward, even before the German Constitutional Court’s famous *Solange* decision declaring that it would exert oversight until the EU contained a catalogue of rights decided upon by an elected parliament (Conte, 2012: 9-11). The early 1970s saw the Parliament begin to place pressure on the Commission to act, primarily through the use of parliamentary questions and Committee reports (Conte, 2012). By 1973 the first resolution on fundamental rights was passed, calling on the Commission to explain how it would ensure rights are respected in the drafting and development of a possible future European Union[[39]](#footnote-40) and drawing attention to the need to improve access to the ECJ (European Parliament, 1973: 8). In addition to this, the Parliament called for the ratification of the European Social Charter by the Community institutions (European Parliament, 1974: 145) and a specific European migrant Workers’ Charter in order to ‘give migrant workers and their families civil, political, social, and human rights equal to those enjoyed by the citizens of [host member states]’ (European Parliament, 1975a: 61). By 1975 in its Resolution on European Union, it called for a charter of rights of all the peoples of the European Community (European Parliament, 1975b: 30), though no indication as to the content of this charter was given, beyond a sense of common destiny. However, by 1976 the Parliament decided that the level of protection by the ECJ was adequate and at least as high as if a charter of rights had been adopted, though such a charter would remain desirable within the context of a future European Union (European Parliament, 1976a). It should also be noted that several months earlier the Parliament had passed a resolution criticising the German Federal Constitutional Court’s *Solange* decision that challenged the primacy of Community law on the basis that it felt the ECJ’s protection of rights to be sufficient (European Parliament, 1976b). What this indicates is that the Parliament was willing to push rights issues forward and keep them on the agenda and even acknowledged some of the shortcomings of the judicial approach. However, the Parliament also considered the ECJ’s method of protection to be adequate and was not willing to entertain any challenges to the primacy of EU law on a fundamental rights basis. Furthermore, although the Parliament had been more active in calling for the protection of the rights of migrant workers, in which it recognised both civil and social rights, it also called for a broader charter for all people in the Communities.

The European Commission’s approach to fundamental rights has been far more pragmatic. Its first consideration of rights was in its 1975 report on European Union, after the German constitutional court’s challenge. Though it accepted that the Court’s protection was adequate, it stated that a future European Union should contain stronger provisions and outlined three options: an EU catalogue, a formal endorsement of the ECJ’s jurisprudence, or a reference to the ECHR (European Commission, 1975: 26). Some consideration was also given to social rights, which were explicitly viewed as particularly relevant given the economic nature of European integration, and it was acknowledged that only one of the proposed options (an EU catalogue) could really adequately address the rights concerns that had been raised (European Commission, 1975: 26). A far more comprehensive report on the Protection of Fundamental Rights in the European Community was published in 1976. Of the three options considered in 1975, it was decided that a political endorsement of the ECJ’s jurisprudence would be satisfactory, though a catalogue remained a desirable future development for the move towards a full European Union (European Commission, 1976: 16-17). Two points are worth noting in how the Commission considered its own contribution to fundamental rights in this report: its ‘development of the freedoms laid down in the Treaties’ and its ‘contribution to the case law of the Court of Justice’ (European Commission, 1976: 11). The treaty freedoms and their relation to fundamental rights included the freedom of movement of goods, as ‘the levying of unauthorised taxes or the granting of aids which are incompatible with the Treaty, can also limit the citizen’s freedom to engage in trade or professional activity’ (European Commission, 1976: 11). In its contribution to the case law of the ECJ in *Stauder*, the Commission also drew on economic provisions to constitute a basis for rights protection (non-discrimination provisions in Article 7 (nationality) and Article 40 (agricultural markets)). This is a particularly interesting approach to rights, in that it both derives rights from what are clearly provisions for the internal market and concerns a right that may not really be a *common* constitutional tradition, as some of these rights were more unique to Germany (see above and Kumm, 2009). The Commission also made it clear that it considered the ECHR to be of special significance to fundamental rights in the EU (European Commission, 1976: 14). These documents indicate that the Commission is more pragmatic in its approach to rights, unwilling to play the role of the driving force, yet still concerned about the legitimacy of European integration and any future European Union. The Commission appears quite willing to derive fundamental rights from economic provisions, indicating that they hold similar value, and has privileged the ECHR as an external source of rights. Social rights, although recognised, are relegated to the side-lines and clearly viewed as of lesser importance.

The culmination of the ECJ’s case law, and the debates this stimulated in the Commission and the Parliament, was the Joint Declaration on Fundamental Rights. The primary purpose of this document was to make a political declaration committing the EU institutions to fundamental rights and to endorse the ECJ’s method of protection. It outlines ‘[The] paramount importance of the protection of fundamental rights as defined, *inter alia*, in the Constitutions of the Member States and in the European Convention for the Protection of Human Rights and Fundamental Freedoms [emphasis in text]’ and emphasised that these rights provisions apply only to Community law and member states when implementing Community law (European Parliament, Council of the EU, and European Commission, 1977: 1). This directly endorses the ECJ’s approach, mirroring the language it has adopted on common constitutional traditions, the ECHR, and the jurisdictional scope of rights provisions on Community acts and member states only when implementing Community acts. Once again civil rights are privileged in the conception of fundamental rights. The common constitutional traditions had so far been interpreted by the ECJ to only involve civil rights, including some of a more market nature and of questionable commonality (see Kumm, 2009), and the ECHR as a source contains only civil rights. Yet it is also stated in the Joint Declaration that the Commission would ‘devote particular attention to the evolution of *fundamental economic and social rights* [emphasis in text]’ (European Parliament, Council of the EU, and European Commission, 1977: 2), though there is little mention of social rights in the Commission’s legislative activities or action plans until the late 1980s.

Analysing the Joint Declaration in the context of the other output of the Commission and Parliament and the approach of the ECJ, several themes become clear. Fundamental rights had been forced on the agenda by national courts and the response to this pressure was to do the minimum necessary to protect the legitimacy of supranational Community law: joint declaration with no binding legal value. This was underpinned by the acknowledgment that other approaches – a catalogue of rights or accession to the ECHR – would be politically difficult, as the consensus necessary among member states was not present at the time. In particular, the UK, Denmark, and Ireland had not domestically incorporated the ECHR and were concerned that EU level activities would introduce this by stealth (Betton and Mac Devitt 1996: 7-8). It should be noted that the Commission did attempt to put ECHR accession on the agenda in 1979, but this did not make it through the member states in the Council. The Commission also highlighted the lack of agreement among member states on social and economic rights as a barrier to the development of an EU catalogue (European Commission, 1979). Despite the earlier recognition by the Commission that a simple endorsement of the ECJ’s protection would not be sufficient for the development of social rights, this approach was later deemed adequate when the Joint Declaration was decided upon. Furthermore, the ECJ’s view that fundamental rights and internal market freedoms in the Treaties are of equal value appears to be shared by the Commission, as the latter has derived a fundamental rights basis from these very Treaty provisions and argued that rights could be used to help secure market freedoms, including free movement of goods.

Though their views on the future of fundamental rights have differed, the Council, the Parliament, and the Commission have all explicitly endorsed the ECJ’s approach. The Commission and Parliament had both made this clear even before the 1977 Joint Declaration. Generally the Council has been the most reluctant actor in this area due to the lack of consensus among member states. As the ECJ’s protection was deemed adequate, the pressure for positive action by member states was reduced. The endorsement of the ECJ’s approach meant that its proportionality test, definition of the jurisdictional scope of rights protections, bias towards negative civil rights, and its balancing of these rights against internal market freedoms became accepted early on by the other institutions of the EU. This legal position of fundamental rights in the institutional structure of the Communities would remain relatively unchanged until 2000. As for the position of fundamental rights in a future European Union, both the Parliament and Commission were supportive of a binding catalogue of rights, though the Parliament had demonstrated that it is more willing to drive this issue forward.

### 3.2.2. Foray into Social Rights and the Community Charter of 1989

The clearest evidence of market logic pervading fundamental rights discourse began in the developments around fundamental social rights in the late 1980s. The primary event here is the 1989 Community Charter on the Fundamental Social Rights of Workers. This was pushed forward primarily by the Commission, with the Parliament excluded from discussions around it (much to the Parliament’s displeasure). The developments in the run up to the Community Charter occurred quite quickly. The process began in 1985 following a series of tripartite meetings at the Château of Val-Duchesse in Belgium organised by the Commission, though it was not until 1988 that solid plans towards a charter were put in place (European Commission, 1988a; 1988b). The European Council agreed on the need for a social dimension to the single market in Hanover in 1988 and instructed the Commission to act. The Commission presented a draft Community Charter of Social Rights in May 1989 and, following further deliberations, the charter was declared by 11 of the 12 member states at the European Council at Strasbourg in December 1989, with the UK abstaining. The debates over the role of social rights continued in the treaty developments of the 1980s and 1990s.

However, looking at the content of the developments and the discourse around social issues at this time shows that social rights still have some way to go. According to the Commission, it was ‘essential to implement an active social policy in view of its fundamental role both in achieving the internal market and in achieving economic and social cohesion’ (European Commission, 1988a: 2; 1989b). To complete the single market, three key aims were outlined by the Commission for the social dimension to achieve: a single labour market to help secure freedom of movement of persons and freedom of establishment, the need to cushion the impact of the single market and prevent excessive costs on certain groups, and to ensure economic measures do not affect social standards already achieved in member states (European Commission, 1988a: 2-3). The first aim was clearly in the context of securing internal market freedoms, whilst the latter two were more about preventing adverse effects of the single market and ensure support for the whole project. The context for social policy developments was strictly limited to the internal market. Whilst this may not be surprising, given the competence limitations constraining EU level activities, its impact on social rights developments should not be underestimated, as explored below.

The Community Charter itself continued this market logic. It was clearly geared towards workers in the single market rather than fundamental social rights for all peoples or citizens in the European Communities, though this focus appears to have been incorporated to placate certain member states in the Council. Several key changes are clear from comparing an earlier Commission draft of the Community Charter to the final draft accepted by the Council (see also Kenner, 2003). In particular, the original name, ‘Community Charter of Fundamental Social Rights’, had the words ‘of Workers’ added to its title and provisions within it also saw a discursive shift from ‘citizens’ to ‘workers’ (see European Commission, 1989b; European Commission, 1989c; Community Charter, 1989). There was also a change in the provisions on implementation between the earlier draft and the final version, with the final version placing more emphasis on these rights being the responsibility of member states to implement through legislative measures or collective agreements rather than the responsibility of the EU-level institutions. This represented the reluctance of member states to delegate powers over social policy to the European level and the compromises the Commission had to make. However, even before these changes the Community Charter focused overwhelmingly only on the rights of workers, with even the section on children and adolescents focusing on access to employment (see Articles 20-23 Community Charter, 1989).

The provisions of the 1989 Community Charter are more restrictive than the Council of Europe’s ESC of 1961, particularly for the scope of application of social protection rights. Whilst these workers’ rights are still fundamental social rights, the selective inclusion of these rights and not broader citizens’ social rights and the discursive focus on workers over citizens are indicative of the market focus of this charter. However, even with these limitations it was not possible to reach the unanimous consensus necessary to give social rights legally binding value. Instead, the principles enshrined in the Community Charter were meant to be implemented by legislation, for which the process was set out in an Agreement on Social Policy attached to the Treaty of Maastricht in 1992. The UK remained resolutely opposed to both the Community Charter and the Agreement of Social Policy and secured an opt-out from both, ensuring that any agreement would have to be annexed to the Treaty of Maastricht rather contained within it.

In its reports on social policy and implementation of the charter in the 1990s, the Commission made it clear that the principles social policy is based on were the ‘principle of subsidiarity’, ‘the principle of respect for the diversity of national systems’, and the ‘preservation of business/undertakings competitiveness’ (European Commission, 1991: 5). The discourse on social issues is quite clear. Member states are primarily responsible for social policies, whilst the implementation of the social dimension at the Community level must support the internal market. These reports also shifted away from the use of fundamental rights discourse, instead adopting legislative and programmatic language on policies to be adopted to meet these social aims (European Commission 1991; 1992; 1995; see also Alston and Weiler, 1998: 687). Even in a public facing document titled ‘The European Community and Human Rights’ in 1993, the Commission made scarce mention of fundamental social rights, instead focusing overwhelmingly on civil rights, the ECHR, and rights derived from the treaties on freedom of movement and employment (European Commission, 1993).

It is clear that the concept of fundamental social rights has still not been secured in the European Community and there has even been some back-tracking on the use of fundamental rights discourse for social issues as the Commission has reverted back to legislative language. This is an adoption of social rights discourse that is not primarily about securing these fundamental rights, but rather about completing the single market project and providing assurances to workers that their current national standards should be protected (see also Maduro, 2003). As the Commission has continued to believe that the ECJ’s protection of rights is adequate, the Community Charter was originally meant to be geared towards setting a foundation for social policy developments through legislative and other administrative methods primarily at the member state level. The pragmatic utilisation of social rights was aimed primarily at pursuing integration and completing the single market rather than envisaging a constitutional role for social rights in the upcoming European Union.

This episode provides crucial insights into the approaches of the Commission and the Council to fundamental rights that broadly remain consistent with their earlier activity. The Commission was more explicit about the normative position of social rights as subservient to the single market, a position that was only implied in the 1970s. It considered the role of social rights as a tool to drive forward integration in the single market and to help secure its legitimacy. This again conceives of social rights as different from and lesser to civil rights and internal market freedoms. In addition to this, the Council again demonstrated the lack of consensus that has prevented positive rights developments. Though it was the UK that was principally opposed, to the point that it was the sole member state to not sign the Community Charter, other member states were not keen on delegating too much power over social issues, which ensured that the document focused primarily on employment related issues (Leibfried, 2010)

### 3.2.3. The Introduction of Rights into the Treaties

From the 1980s onwards the Parliament has maintained strong pressure on the need to incorporate fundamental rights into the Treaties. Some limited gains were made in subsequent Treaty developments in the Single European Act, the Treaty of Maastricht, and the Treaty of Amsterdam. These gains primarily included limited mention of the need to respect fundamental rights and some provisions on sanctioning member states for serious breaches. However, this period of integration was overshadowed by the drive to complete the single market and the development of Economic and Monetary Union. The Commission again attempted to put accession to the ECHR on the agenda in 1990, though this was short lived as the necessary consensus was still not present in the Council. Most of the Commission’s activities at this time were directed towards the completion of the single market project, as shown above, though it did also convene three *Comites des Sages* on the issue of fundamental rights in the late 1990s. However, only one of these even reported before the Treaty of Amsterdam, so these are primarily addressed in the following section. This section instead focuses primarily on the activities of the Parliament, contrasted against the limited developments in the Treaties in the 1980s and 1990s.

As early as 1984 the Parliament passed a Draft Treaty on European Union, which included a provision on the need to respect fundamental civil and social rights based on common constitutional provisions, the ECHR, and the ESC and competence to accede to the UN Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights (European Parliament, 1984). In 1989, following its exclusion from the Community Charter negotiations, it passed its own Declaration of Fundamental Rights in 1989 (European Parliament, 1989b). This declaration lists both civil and social rights under the same title, indicating no hierarchical relationship between these categories of rights and does not contain any of the market discourse found in the Commission’s Community Charter. It also emphasises the need for a binding catalogue of rights. In 1994 the Parliament passed the Resolution on the Constitution of the European Union, of which Title VIII is a list of civil and social fundamental rights in a similar manner to its 1989 Declaration (European Parliament, 1994). The Parliament has also passed numerous resolutions prior to the Intergovernmental Conferences repeatedly calling for the inclusion of fundamental rights, including social rights, into the treaties based largely on its aforementioned declaration on fundamental rights (see European Parliament, 1989b; 1990a; 1990b; 1990c; 1992; 1995; 1997a). These resolutions have also been quite critical of the intergovernmental conferences for not adequately incorporating fundamental rights (European Parliament, 1992a; 1997a).

Since 1993 the Parliament has published annual reports on the fundamental rights situation within the EU. Though conducted by the Civil Liberties and Internal Affairs Committee, these reports have included social rights issues and explicitly stated that ‘economic, social, and cultural rights recognised at the international level as fundamental rights should enjoy the same level of protection as civil and political rights’ (European Parliament, 1993: 7). These reports contain a large number of detailed proposals addressing a variety of civil and social rights issues in the European Union, including proactive measures at the EU level to ensure the realisation of rights (for example, see European Parliament, 1993; 1996; 1997b). However, these reports have generally focused on member state activity rather than the EU itself, with criticisms of the EU mainly focusing on the absence of activities to combat various rights issues. There has been some limited acknowledgement of the restrictive provisions on access to the ECJ in the reports for 1995 and 1996 (European Parliament, 1996b; 1997b) and on the need for a clear hierarchy of legal rules to ensure effective justiciability of rights (European Parliament, 2000a: 18).

The Parliament has been quite clear in its position regarding fundamental rights and their role in the EU, which it has pursued quite rigorously given the number of resolutions passed on this issue and the establishment of a new annual reporting procedure on rights. Consistent with its earlier approach, it has been an enthusiastic proponent of rights developments. Whilst in the 1970s the Parliament made some calls for a catalogue of rights, its approach from the mid-1980s onwards has been to promote and actively pursue a constitutional and state-like model of European integration, with a clear constitutional basis including a catalogue of fundamental rights. This stands in contrast with the Commission’s approach, as outlined above, which has been to continue a functionalist approach to integration that has prioritised the completion of the single market and focused on the development of EMU. The Parliament has also been quite clear in its promotion of both civil and social rights and has dedicated specific attention to social rights issues in many of its reports on member states. However, it has also generally shied away from criticising the ECJ’s method of rights protection. A few issues with this judicial approach have been raised in its reports on fundamental rights, but have been few and far between and have not featured consistently.

Despite clear examples of the Parliament attempting to influence the Intergovernmental Conferences, the rights developments in the Treaties were extremely limited. The first mention of fundamental rights occurred in the preamble to the Single European Act (1986), though this treaty went no further than this, instead focusing overwhelmingly on completing the single market. It is important to note that this preamble mentioned three sources: the constitutions and laws of member states, the ECHR, and the ESC. However, if this represented a tentative step towards a consensus on the inclusion of social rights, particularly given the UK’s later reluctance on social rights in the Community Charter, this was short lived. The Maastricht Treaty in 1992 was the first time fundamental rights received direct mention in the body of a treaty, yet any mention of the ESC, the Community Charter, or social rights more generally was dropped. Instead, Article F of the Treaty on European Union referred only to fundamental rights guaranteed by constitutional traditions common to member states and the ECHR, which were to be respected by the EU. However, even Article F was of limited value, as Article L ensured that these provisions on fundamental rights were technically outside of the jurisdiction of the ECJ (Treaty on European Union, 1992). Furthermore, staunch opposition by the UK ensured that any progress on social policy would take place outside of the body of the treaty. This resulted in a Social Protocol, its purpose being to implement the provisions of the Community Charter, having to be annexed to the Treaty for the eleven other member states to pursue.

However, even this Social Protocol is quite limited in its scope. Though it states the eleven member states’ desire to implement the 1989 Community Charter, its provisions are limited. Qualified Majority Voting, widely seen as a necessity to overcome gridlock in the Council, is extended to only a limited number of labour market related areas, with unanimity retained for issues such as social security and protection. The rights to association, to strike, and to impose lock-outs are explicitly excluded. Furthermore, whilst any rights discourse from the Community Charter is jettisoned in favour of more programmatic language, a market discourse is maintained. The provisions in the Social Agreement are explicitly put in the context of ‘the need to maintain the competitiveness of the Community economy’ and to ‘avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings’ (Article 2 (1) and (2), Agreement on Social Policy annexed to the TEU, 1992).

Some progress was made in the Treaty of Amsterdam in 1997. The unusual situation whereby the provision on a general commitment to fundamental rights (Now Article 6 TEU, formerly Article F) was outside of ECJ control was remedied, yet this provision still only referred to the ECHR and common constitutional provisions. Provisions ensuring that new member states respect fundamental rights and a mechanism to allow the Council to sanction member states in serious violation of rights (Article 7, TEU) were also introduced by the Treaty of Amsterdam. The Social Protocol was incorporated into the body of the Treaties, which meant that the European Social Charter and the EU’s Community Charter were now mentioned in the Treaties (Articles 136 and 137, TEC). However, the language on competitiveness and avoiding harm on business, the explicit rejection of powers on the right to association, to strike, and to impose lock-outs, and the use of unanimity for all areas except a select number of labour market related issues remained. The relegation of any mention of fundamental social rights to these limited provisions on social policy rather than the provisions committing the EU to respect fundamental rights is indicative of the lower value these rights hold in the European Union. No catalogue of fundamental rights had yet to be included. Furthermore, there was no provision allowing for the EU to accede to the ECHR, which, although not perceived to be an issue by the Commission in 1979 or 1990, has now been ruled as a requirement by the ECJ in *Opinion 2/94* (see Weiler and Fries, 1999).

By the end of the 20th Century the EU had not moved significantly beyond the fundamental rights situation established in the early 1970s, despite the efforts of the European Parliament. The introduction of fundamental rights to the actual treaties has only taken the form of an explicit statement that the EU is founded on rights, without any further elaboration. It is still left to the ECJ to define all issues surrounding fundamental rights. The primary problem remains one of a lack of consensus among member states, a necessity for any positive developments. This has left fundamental rights to be developed in a more negative fashion by the ECJ and to be tacked on to the internal market, subsumed by assurances that they will not harm competitiveness or place any burden on small and medium size business. Only one treaty development indicates some attempt to create a more central and foundational role for rights in the EU: the new Article 7 TEU introduced by the Treaty of Amsterdam that allows member states to be sanctioned for serious violations. However, this procedure has never actually been used.

### 3.2.4. Charter of Fundamental Rights

The first major step towards advancing fundamental rights in the EU occurred with the establishment of the Charter of Fundamental Rights in the year 2000. Originally a soft law Charter, it has been given legal value in December 2009 with the entry into force of the Treaty of Lisbon. However, despite its early years as a non-binding document, this Charter was still influential in stimulating other governance-based developments in the EU. This section focuses on the debates around the Charter during its drafting and its incorporation into the Treaties.

Some idea of the timeline and context of the time is necessary to understand the development of the Charter. Following decades of pressure from the Parliament to adopt a catalogue, the Commission convened three *Comites des Sages* on the issue of fundamental rights in the latter half of the 1990s. Among the many recommendations to come out of these committees was the establishment of an EU charter of rights (Quinn, 2001: 867-868). Pressure on member states was also ramped up by the impending enlargement of the EU to include many former communist states. These accession states had to meet fundamental rights criteria prior to joining, yet faced a far more lax regime after joining, which raised concerns about the inconsistency of the EU’s application of rights (Williams, 2004). The Treaty of Amsterdam also set the foundation for integration into an area of freedom, security, and justice, involving a range of policy areas on home affairs, criminal justice, policing, and border control, which had the potential for greater impact on fundamental rights (de Schutter, 2007). The result was a proposal to draft a Charter of Fundamental Rights by the German government at the European Council in Cologne in June 1999.

In October 1999, the Tampere European Council established a drafting body for the Charter and from December 1999 till October 2000 the Charter was drafted. The composition of the drafting body is crucial to understanding some of the advances made in the Charter. It was decided that the drafting body should consist of 15 representatives of heads of State and Government, 30 from national parliaments, 16 from the European Parliament, and 1 from the Commission (European Council, 1999). This was a unique development, as inter-governmental conferences that draft the treaties have only ever consisted of representatives from national governments. As highlighted above, it was the difficulties in achieving agreement among member states that has often held back developments around social rights and issues. The composition of the drafting body, being focused towards representatives from parliaments (both national and European), helped to overcome the barriers imposed by disagreement among governments, particularly the opposition of the UK to any extension of EU powers and to justiciable social rights (see Goldsmith, 2004). However, this unique composition of the drafting body was at the expense of it not having the power to amend treaties or the legal competences of the EU. This meant the question of the legal value of the Charter was to be settled elsewhere and in the usual method of an intergovernmental conference. Nonetheless, this method for drafting the Charter still shifted the balance of power towards parliamentarians, allowing them to present the European Council with the simple choice of taking or leaving what they drafted.

Whilst the drafting body was left to come up with its own catalogue of rights, the parameters were set by the European Council in Cologne. The European Council specified that the Charter should ‘contain the fundamental rights and freedoms as well as basic procedural rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and derived from the constitutional traditions common to the Member States’ and ‘account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter […], insofar as they do not merely establish objectives for action by the Union’ (European Council, 1999: 43). This statement on rights is important for two reasons. First, by grouping common constitutional traditions with the ECHR it reaffirms the belief that these traditions refer primarily to civil rights. Second, it specifically sets out to include social rights beyond establishing objectives for policies, indicating some acceptance of social rights beyond the social objectives recently added to the treaties. This second point provided much needed support to those in favour of the inclusion of social rights, as the records of the drafting body indicate continued disagreement over their nature. However, the European Council also reaffirmed that the ECJ had ‘confirmed and defined fundamental rights’ in its jurisprudence, meaning that the purpose of the Charter would be to make the ‘overriding importance and relevance [of rights] more visible to the Union’s citizens’ (European Council, 1999: 43). It is clear that the European Council, in setting the parameters for the drafting of the Charter, felt that the situation regarding rights in the EU was already legally adequate, but required further visibility. It should be recalled that by the end of the 1990s, the ECJ had already established most of the key principles associated with rights in the EU. That is, scope of application of rights within the confines of EU law, the proportionality test, and the sources of rights. Whilst the ECJ had predominately adjudicated on civil rights issues, there had been some mention of social rights and the ESC and national welfare systems had been protected through reference to public interest.

The Commission’s attitude towards the drafting of the Charter reflected the parameters set by the European Council. Whilst supportive of the inclusion of social rights and the idea of the Charter being binding, though with noting that the final decision on its legal status should be taken by the Council, the Commission felt that nothing should really be changed regarding the institutional position of fundamental rights. The Commission emphasised that the European Council’s wishes were that the Charter should be ‘a task of revelation rather than creation, compilation rather than innovation’ and that ‘the Charter will have no impact on forms of court action or the court structure put in place by the Treaties’ (European Commission, 2000a: 3-5; 2000b: 4). The emphasis for the Commission, as for the European Council, was to be on the need to increase the visibility of rights, to demonstrate to citizens that the EU protects their fundamental rights. Again, the Commission demonstrates its pragmatic approach to rights developments. It is willing to apply some pressure, particularly with the establishment of the *Comite* *des Sages* on rights issues, but is primarily concerned about drafting a document that is acceptable to member states in the Council. In the pursuit of the overriding objective of integration, rights developments are secondary, particularly as it believes the ECJ’s level of protection to be adequate. The Commission’s position on not altering the judicial system of the EU is particularly noteworthy (this position re-emerges in its approach to the Fundamental Rights Agency, see European Commission, 2004; de Schutter, 2005b; see below), given the issues identified by scholars and occasionally by the Parliament in this area.

The Parliament was also consistent with its previous resolutions on the need for a binding catalogue that includes social rights. In a number of resolutions it made clear that the Charter must be legally binding, that it must also contain social rights, and that the Parliament must play a central role in its drafting (European Parliament, 1999a; 1999b; 2000b; 2000c). A report specifically on fundamental social rights in member states was also immediately commissioned by the Parliament, in the context of contributing to the debates over the Charter, again demonstrating its commitment to this issue (European Parliament, 1999c). In its report on the drafting the Charter, it stated that ‘*the Charter should fully reflect the importance of the social dimension of the activities of the Union,* including the centrality of socialcohesion to its economic policy orientations [emphasis in text]’ and that ‘the single market has implications for social policythat are not yet legislated for at the EU level’ (European Parliament, 2000c: 16). The Parliament even went as far as to emphasise certain specific social rights (right to trade union association and right to strike) that the Charter should contain (European Parliament, 2000b: 4). In addition to this, it also called for supplements to existing mechanisms of judicial review to ensure protection for all persons protected under charter (European Parliament, 2000c: 9). Furthermore, the Parliament also used the drafting of the Charter as an opportunity to criticise the EU for not having formally acceded to the ECHR (European Parliament, 2000c: 10). It is clear that the need for a legally binding Charter that contains social rights is of central importance to the Parliament. Though not critical of the ECJ’s protection of rights, this position does demonstrate some acknowledgement of the shortcomings of this reliance on judicial protection. Once again the Parliament demonstrated a more constitutional conception of rights and its willingness to drive this issue forward.

One of the central issues to be addressed by the drafting convention was the nature of fundamental social rights, which were strongly supported by the European Parliament’s delegation (Conte, 2012: 32). From the outset these rights were listed as ‘economic and social rights/objectives’ (Charter Drafting Body, 2000a: 6), though the Charter Drafting Body also emphasised that disagreement over their exact nature should not be taken to conceal opposition (Charter Drafting Body, 2000b). By its third meeting, it had decided that some social rights would have to be added as obligations rather than rights (Charter Drafting Body, 2000c: 3). Though it was stated that this would only apply to some rights, the question of ‘right or political objective’ appeared to apply to the majority of social rights, including the rights to work, health and safety at work, fair remuneration and minimum wage, to weekly rest periods, to a pension, to access to free placement services, vocational guidance and training, to health, social security, and to social and medical assistance (Charter Drafting Body, 2000d). The social rights whose nature did not appear to be questioned were those that overlap more directly with civil rights, such as trade union rights (due to the right to association) or the right to choose an occupation. A provision outlining a distinction between enforceable rights and principles to be implemented via other means was considered too, which stated that the institutions of the EU and the member states ‘shall observe the social rights *and implement the social principles* set out in this Charter [emphasis added]’ (Charter Drafting Body, 2000e: 2). However, this provision was rejected and did not originally make it into the final draft of the Charter. The eventual compromise was that many social rights would be included in the final Charter under the title of ‘Solidarity’ rather than ‘Social Rights’ (Charter Drafting Body, 2000f: 26). In addition to this, an explanatory document drafted by the President of the Drafting Convention was also attached that to clarify the status of certain rights. Yet whilst the exact status of many social rights was questioned throughout the drafting negotiations, the explanatory document only clarifies that the provisions on social security and assistance, healthcare, integration of the disabled, and environmental protection are principles (Charter Drafting Body, 2000f). However, the value and legitimacy of the explanatory document itself has also been questioned, as it has been claimed that the Presidency of the Charter Drafting Body was acting alone in drafting it (Bercusson, 2005b: 202). To further complicate matters, no provision highlighting a distinction between rights and principles was originally included and the articles the explanatory document refers to as principles are worded in both rights and non-rights terms. For example, Article 35 states that ‘everyone has the right of access to preventative health care’, despite being identified as a principle in the explanatory document, whilst Article 34 outlined social security and assistance as an ‘entitlement’ (Charter of Fundamental Rights, 2000).

The treatment of social rights and their eventual ambiguity in the compromise of the drafting Convention demonstrates the continued impact of disagreement over social rights. Though some level of agreement had been reached on the necessity of including social rights, their exact nature as enforceable right or political objectives saw cleavage lines emerge between Southern European states with more extensive social rights protection and the more liberal Northern states that preferred social dialogue to address these issues (Conte, 2012: 35), with the UK staunchly opposed to the idea of justiciable social rights (Goldsmith, 2004). When the issue of the legal status of the Charter was debated by Working Group II of the Convention on the Future of Europe (the convention charged with drafting a constitutional treaty) both the Commission representative and the Director-General of the Council’s Legal Service indicated that such a distinction between rights and principles existed in the Charter, but without actually specifying which provisions were which exactly (Working Group II, 2002a; 2002b). The preamble to the Charter and the Article 51(1) both mention rights and principles and a small number of provisions do not directly use rights discourse, though it should be recalled that a provision explicitly making a distinction between rights and principles was rejected by the original Charter Drafting Body. Nonetheless, the Convention on the Future of Europe reintroduced a provision specifying a distinction between rights and principles (Article 52(5)), though without specifying which provisions were rights and which were principles (Working Group II, 2002d; see also Bercusson, 2005a for a critical account of these developments). Instead, the task of identifying principles in the Charter was envisaged as being in the hands of the ECJ (Working Group II, 2002d: 5). Though these developments around rights versus principles have been criticised as a direct attack on labour and social rights (Bercusson, 2005a), it has been argued that these social principles still have some form of justiciability, though they require an implementing act (Ashiagbor, 2004; Alston, 2005). Furthermore, labour rights such as the right to strike and collective bargaining do appear to be considered by the ECJ to be justiciable, as they featured in the case of *Laval*, though many scholars consider these rights to have not been properly upheld, as in section one. This still represents some developments in favour of social rights, though there still seems some way to go.

The final 2007 version of the Charter is a text that largely reflects the protection of fundamental rights already established by the ECJ. The scope of application is limited to EU institutions and member states when implementing EU law, as reflected in Article 51, along with a specific guarantee that the Charter does not extend the field of application of EU law or establish any new powers. The proportionality test is reflected in Article 52. The only part of the Charter that contains a possible advancement on the pre-existing protection of rights in the case law of the ECJ is the inclusion of social rights under the chapter on solidarity, yet as highlighted above the practical effect of these rights is open to question. Despite their inclusion in the Charter, the justiciability of social rights remains uncertain and dependent on interpretation by the ECJ – essentially the same situation as before the Charter. Even the granting of legal value to the Charter by the Treaty of Lisbon, which entered into force in December 2009, is of uncertain impact. The original intention had been to fully incorporate the text of the Charter into the text of the Constitutional Treaty, clearly embedding fundamental rights at the core of the EU constitutional order. The rejection of the Constitutional Treaty and move towards a new treaty saw the provisions of the Charter removed from the body of the treaties and replaced by a provision referring to the Charter as a separate document. It is stated in Article 6 of the Treaty on European Union that the Charter has legal value equal to that of the treaties, but the Charter itself is annexed to the treaties as a separate document. Furthermore, a protocol was also attached to the Treaty of Lisbon clarifying its application to the UK and Poland. In this protocol it is reiterated that the Charter only makes rights more visible and does not make any substantive changes to the protection of rights in the EU and it is further emphasised that the social rights contained in the Charter are not justiciable in the UK and Poland. This protocol has actually been widely (mis)interpreted as an opt-out from the Charter, though its provisions are entirely consistent with Articles 51 and 52 of the Charter. The final version of the Charter conforms to the European Council’s and the Commission’s original vision of creating more visibility for fundamental rights without enacting any substantive changes to rights in the EU.

Basically, this codifies the ECJ’s case law by endorsing its proportionality approach, its restriction of the application of rights to EU law, and its history of ruling on civil rights. As stated above, the Commission and European Council were of the opinion that the purpose of the Charter was to publicise rights protection that was already in existence in the EU. However, other scholars have pointed out that the Charter does change the situation (Dawson, Muir, and Claes, 2012; de Búrca, 2011; Davis, 2005). By making rights more visible to citizens they can be better utilised in litigation, potentially leading to better protection of rights and placing them at the core of the EU’s legal system (Dawson, Muir, and Claes, 2012; de Búrca, 2011). Furthermore, certain rights not previously acknowledged in the ECJ’s case law may now be recognised. As mentioned above, this includes the right to strike, which was recognised in the case of *Laval* after the Charter was drafted, though before it was granted legal value.

The debates around the drafting of the Charter of Fundamental Rights and its incorporation into the treaties demonstrate the political disagreements over rights that have characterised the history of rights in the EU. Some headway was made in addressing the historic absence of any serious legal developments around social rights, yet the eventual compromise indicates that this issue is not settled. The intention of the European Council and the Commission from the outset was to have the Charter codify the existing approach to fundamental rights constructed by the ECJ, which has been achieved. The proportionality approach in which fundamental rights can be interfered with in order to achieve objectives of general interest is written into the Charter. As demonstrated earlier in this chapter, these objectives include the internal market freedoms that have been central to the integration process. A distinction continues to be made between civil and social rights, with the former still enjoying a higher degree of consensus than the latter. As social rights are to be realised through implementing acts, the provisions on social policy must be borne in mind. These provisions remain underdeveloped, focused primarily towards employment law, and are coated in market discourse on competitiveness and avoiding harm to business. Fundamental rights continue to play a more prohibitive and ‘shield’ function (de Schutter, 2010) in that they are to ensure the EU does not violate these rights in its law-making rather than the EU having competence to legislate in rights areas.

### 3.2.5. Fundamental Rights and New Governance Mechanisms

A number of smaller-scale developments in the 2000s have contributed to the transformation the role of fundamental rights in the EU beyond the approach to rights constructed by the ECJ and endorsed by the Charter. Following the establishment of the Charter and coinciding with the drive towards new methods of governance, the Commission has adopted compliance checks and impact assessments on fundamental rights in its legislative proposals (de Schutter, 2014). In addition to this, the Fundamental Rights Agency (FRA) was established in 2007. These developments indicate a more central role for fundamental rights in the activities of the EU. There have been fewer developments at the Parliament and the Council. The Parliament has actually amended its rules of procedure to place more emphasis on ensuring rights are respected, though, as one official emphasised, ensuring legislation is compatible with rights was already one of the functions of MEPs when scrutinising proposals.[[40]](#footnote-41) As highlighted above, the Parliament has been particularly active on rights issues without the need for any specific mechanisms designed to ensure rights are given due regard. The Council, on the other hand, has continued to lag behind the other institutions on rights developments and only adopted guidelines in 2011 on checks for rights compatibility in its Permanent Representatives Committee (Council of the EU, 2011a; see also de Schutter, 2014). This section primarily focuses on the new governance developments at the Commission and with the establishment of FRA.

Following its White Paper on Governance in 2001, the Commission has engaged with new methods of governance in an attempt to improve the legitimacy of EU law making. Though the White Paper on Governance itself did not discuss fundamental rights, developments since then have addressed the role of fundamental rights in this process. The two main mechanisms through which the Commission is to ensure respect for fundamental rights are compliance checks and impact assessments. Compliance checks were originally launched in 2001 and primarily involve the Commission’s Legal Service, though it was not until 2005 that a methodology for ‘systematic and rigorous monitoring’ was introduced (European Commission, 2001a; 2005a). The Commission also expanded the use of impact assessments to include fundamental rights in 2005, which includes the involvement of DG Justice and its Directorate on Fundamental Rights (European Commission, 2005a). More extensive efforts to involve fundamental rights were launched in 2010 in the Commission’s ‘strategy for effective implementation of the Charter’ (European Commission, 2010a). This strategy calls for the development of a ‘fundamental rights culture’ and the process of mainstreaming, including the publication of annual reports on the Charter (European Commission, 2010a). To support the process of mainstreaming, the Commission also published operation guidance on fundamental rights in the policy process for its staff (European Commission, 2011a). There was also indication of a more central role for fundamental rights in the Commission’s ‘Communication on respect for and promotion of the values on which the Union is based’ in 2003. Pressure from enlargement and more recent areas of integration were outlined, though this document was primarily based around the operationalisation of the new Article 7 on preventing and sanctioning severe violations of fundamental rights (European Commission, 2003).

Clearly there have been numerous changes in how fundamental rights are utilised at the Commission. Though they clearly occupy a more central role, how fundamental rights are actually conceptualised does not appear to have significantly changed. In its ‘fundamental rights check list’, the Commission sets out to identify if any limitation of rights is ‘necessary to achieve an objective of general interest’ and is ‘proportionate to the desired aim’ (European Commission, 2010a: 5). This retains the proportionality approach to rights, allowing rights to continue to be balanced against other principles that are deemed to be of general interest, though it is also acknowledged that there are a limited number of absolute rights (i.e. the prohibition of torture). The mechanisms on ensuring rights are complied with are also limited to actual policy proposals, continuing the negative and prohibitive approach to rights that views them as restrictions on EU actions (de Schutter, 2010; 2005b). This stands in contrast to a positive approach, which would entail setting out means to proactively identify areas in which EU action is required to ensure the effective realisation of fundamental rights. Furthermore, the use of mainstreaming in legislative proposals has also been premised on the need to avoid judicial backlash, as one official in the Commission highlighted the embarrassment of cases such as *Digital Rights Ireland* wherein the ECJ struck down an EU directive.[[41]](#footnote-42) The issue of ensuring judicial compliance is particularly relevant to the realisation of social rights, as they tend to require active measures to ensure their realisation (particularly when conceptualised as programmatic principles) rather than judicial enforcement. Furthermore, whilst impact assessments are capable of identifying impacts on a variety of rights, actual compliance with the Charter to ensure the legality of legislation is conducted by the Commission’s Legal Service. How this is reconciled with the ‘social principles’ and their programmatic nature in the Charter is not clear and is not directly addressed in the Commission’s guidance (see European Commission, 2009a; 2011). According to two officials in the Commission, there is a greater focus towards hard rights that can be judicially enforced than to social rights, as it is not clear how social rights can be mainstreamed and there are few examples from the ECJ’s case law to look to.[[42]](#footnote-43)

In addition to changes in how the policy making process functions, a specific agency for fundamental rights has been established. Looking at its development, a now familiar story emerges. The initial pressure to act appears to have come from the introduction of Article 7 TEU, on sanctioning member states for serious violations of fundamental rights, and from integration in the area of freedom, security, and justice (de Schutter, 2009; 2010). However, initially neither the Commission nor the European Council appeared particularly keen on creating an agency (Nowak, 2005: 97). The European Council in Cologne in 1999, which had kick started the Charter drafting process, had considered the issue of an agency, but then failed to act on it for several years. The Commission, meanwhile, felt that it did ‘not lack for sources of advice and information’ as it could draw on expertise from various international sources, and therefore opposed the creation of an agency (European Commission, 2001b: 20). Realising that the other institutions were reluctant to act, the Parliament requested a more informal network of experts be formed (European Parliament, 2001), resulting in the creation of the EU Network of Experts on Fundamental Rights. However, pressure remained for a more permanent and robust form of monitoring and expertise. The European Council decided in 2003 that an agency for fundamental rights should be created. There were extensive debates around the shape this new agency should take (see de Schutter, 2009 for a full account). The Parliament was in favour of a stronger role for the agency, helping to secure additional powers for the agency on dialogue with civil society, liaising with member states, and issuing opinions on legislative proposals (European Parliament, 2006; see also Lord, 2011). The Commission was worried about threats to its own role regarding its powers to bring judicial cases and opposed any powers for the agency to launch legal proceedings or have any kind of quasi-judicial complaints mechanism (see Nowak, 2005: 101). The end result saw the establishment of a Fundamental Rights Agency based around monitoring, the provision of expertise, and the engagement of civil society actors, though with limited freedom as its focus is determined by the Commission and Council at five year intervals (de Schutter, 2009). This agency was modelled on the EU Monitoring Centre on Racism and Xenophobia, which it replaced, and has now taken over the work of the Network of Independent Experts.

There is some indication that the Commission intends to move towards a more proactive approach to rights, by identifying areas of potential rights violations that may be due to a lack of EU action and engaging in programmes to promote fundamental rights. However, this is undermined by the absence of a general competence on fundamental rights in the Treaties and such a proactive approach is not yet considered to be fully developed (see de Schutter, 2010). There are some examples of such a proactive approach, such as the directives on tobacco sales and personal data that proactively addressed issues associated with the right to health and right to privacy and with the activities of FRA. However, the primary role of fundamental rights is still to act as a restriction on what legislation can do. This prohibitive approach still favours a civil rights conception of fundamental rights. A lot of the more recent institutional focus on rights issues has been in the context of integration in the area of freedom, security, and justice, which deals with primarily civil rights issues (see de Schutter, 2010). This is also apparent with the bodies that address fundamental rights issues. In the Council of the EU it is the Justice and Home Affairs Council that is involved with the setting of the five year multi-annual framework for FRA, in the Commission it is the Directorate-General on Justice that has primary responsibility for fundamental rights and the Legal Service that checks for compatibility with the Charter, and in the Parliament it is the Civil Liberties, Justice, and Home Affairs committee that has taken a lead role on rights issues. All of these bodies are more predisposed to a judicial conception of fundamental rights that favours civil rights in the current EU order. Given the distinction made between directly enforceable rights and principles to be secured through implementing measures in the Charter, this institutional arrangement may not be ideal for the realisation of social rights. Even the Network of Independent Experts has been criticised for only really being experts on civil rights (Alston, 2005: 187-188). This is not to suggest that these bodies are unable to deal with social rights issues effectively. Certainly the Civil Liberties, Justice, and Home Affairs committee of the Parliament has demonstrated its commitment to social issues in its annual reports, as highlighted above. However, there remains an inherent bias towards civil rights.

The development of new governance mechanisms associated with fundamental rights has shown some limited potential to change how fundamental rights are perceived. This change has mainly been in the dominant way in which rights have been viewed as restrictive limitations on EU law, which may now be changing to include the need for proactive measures to actively seek out and address areas in which rights are being violated. However, rights appear to still be viewed predominantly as restrictions on EU law, though these restrictions are now being addressed from the beginning of the legislative process rather than waiting for a post-hoc solution from the ECJ. The way in which fundamental rights have been viewed in a rationalist paradigm to be balanced against other (mainly economic) objectives of interest to the EU has continued and the privileged status civil rights enjoy over social rights has also continued.

## 3.3. Discussion and Conclusion

The purpose of this chapter was to analyse the way in which fundamental rights have been constructed in the EU. Acknowledging that the ECJ has played a key role in this regard, the above sections focused first on the judicial construction of fundamental rights and then on the way in which the political institutions of the EU have engaged with rights. To fully draw out the implications and meanings of these developments, it is necessary to recall the critical constructivist framework from chapter one and the broader political context from chapter two.

Critical constructivism emphasises the socially constructed nature of political concepts, acknowledging that concepts such as fundamental rights are constructed by the agency of individual actors but also subject to structural constraints including the expectations of actors across society, institutional arrangements, and competing sets of ideas. From the more critical side, it highlights the importance of analysing where the current prevailing EU order on fundamental rights has come from, essentially how and by whom it was constructed. Politics is a not a neutral arena in which all actors have equal access to contribute towards the construction of ideas. Rather, power dynamics in political society afford certain actors a greater ability to produce and reproduce dominant ideas to their preference. From a critical constructivist perspective, there are two key power dynamics that have affected the development of rights: the structural framework of the EU and the agency it affords different institutional actors, and the power of the neoliberal economic ideas embedded in the EU. It is evident from the findings presented above that rights have been developed in a *post hoc* and *ad hoc* fashion, built up piece by piece largely in response to pressures from other actors, particularly lower courts referring cases to the ECJ. Fundamental rights have been developed as a secondary project closely related with the need to grant legitimacy and authenticity to the EU: the early case law before the ECJ was necessitated by the need to respond to challenges to the supremacy of EU law by the German and Italian constitutional courts and the political developments, particularly the Charter, was premised on granting more visibility and legitimacy to the pre-existing approach to rights established by the ECJ. In constructing the concept of fundamental rights, the ECJ has been constrained by the provisions written into the treaties (and that it has developed itself, including the prominence of neoliberal market values), its institutionally-ascribed role as interpreter of the treaties, and the political expectations of the role of judicial bodies in European society. The political engagement with rights by the other institutions has largely been through references to the phrase ‘fundamental rights’ without shaping how the concept is understood in the EU legal order other than to secure the legitimacy of rights developments. Even when drafting a charter of rights, in which more substantive engagement with rights could be expected, the outcome has been to endorsed an understanding of rights already constructed by the ECJ while offering slight advancements (namely in the area of social rights) with an uncertain capacity to bring about any substantive change.

Within the institutional arrangement of the EU, the institutional actors have different abilities to reshape the ideas that underpin the institutional structure of the EU order. For example, the ECJ can reinterpret the founding treaties themselves, but only within what can be reasonably expected of a judicial authority (de Sousa, 2011). The ECJ has established for itself a role as a kind of constitutional court of Europe, but has also faced some backlash from member states aimed at constraining further potential judicial activism (Alter, 2000: 513). The national governments of the member states are perhaps in the strongest position to reinvent the ideational underpinnings of the EU as they can rewrite the treaties themselves, yet also face constraints over their ability to achieve the consensus necessary for such change. The absence of a consensus on the role of fundamental rights in the EU has prevented national governments in the Council from contributing in any significant way to the development of rights for most of their history in the EU, leaving rights to be constructed by the ECJ and simply endorsed by the Council. The Commission and the Parliament are limited in the degree to which they can directly alter the ideas embedded in the Treaties, yet in the Parliament’s case have sought to influence how rights are understood through soft-law developments and lobbying efforts during periods of treaty reform. The construction of rights in the EU must also be contextualised vis-à-vis the dominant ideas associated with rights in Europe and the liberal economic ideas embedded in the EU, as highlighted in chapter two. These are two sets of ideas that contain many points of tension.

Having outlined the history of the development of rights, it can be seen how the different institutional actors of the EU have sought to shape the construction of rights, which actors have been central to this process, and how these actors have been constrained by structural factors. It is particularly important to note the absence of any significant activity from the Council or from national governments in other forums, such as intergovernmental conferences for treaty amendments, for most of the history of rights developments. This means that those actors that have the agency to fully embed fundamental rights in the EU legal order by amending the treaties have largely shied away from any substantive debate about rights themselves, preferring instead to refer generally to the concept of fundamental rights and leave the actual definition of what this concept means to be defined elsewhere. This has also left the competences of the EU regarding fundamental rights underdeveloped, as the ECJ is institutionally restricted from expanding the formal competences of the EU, and left the economic ethos of integration largely unchallenged. To this day the EU still has no general competence to act in the area of fundamental rights. This position from the Council and national governments more generally should not come as a surprise, as research has generally highlighted the reluctance of governments to delegate power to the European level, particularly on issues as fundamental as fundamental rights, and the difficulties in achieving the necessary consensus for such a delegation of power (see Leibfried, 2010). At times when accession to the ECHR has been put to the Council, in both 1979 and 1990, the necessary consensus to take the issue forward was lacking. By the time a decision was made by the European Council to draft the Charter, national governments felt safe in the knowledge that fundamental rights were already defined in the case law of the ECJ and the task at hand was simply to be one of visibility and appearance.

The Commission has historically taken a rather cautious approach to the issue of fundamental rights. It has been theorised that the Commission is a ‘purposeful opportunist’ (Cram, 1997: 173), its overriding objective the pursuit of further integration through whatever means available to it (Niemann and Schmitter, 2009; Jabko, 2006; Stone Sweet and Sandholtz, 1997). When pursuing the development of fundamental rights has coincided with the need to ensure the legitimacy of the entire EU order (as in the 1970s) or the opportunity to attempt to drive forward an EU social dimension (as in the 1980s), the Commission has been keen to act. Yet when it is clear that there is an impasse in the Council and rights developments are unlikely to contribute to further integration, there is often little enthusiasm to push the issue. The Parliament, by contrast, has persistently championed fundamental rights since the 1970s, having passed numerous resolutions and having even drafted its own catalogue of rights, though it has generally lacked the powers to put its words into any hard action. The extent of the actions of the Parliament in this regard have even been criticised for lacking nuance and consideration of the EU’s ability to act in this area and for having led to tensions in light of the reluctance of the Commission and Council in this area (Alston and Weiler, 1998: 700). It is clear that the Parliament has long sought a stronger role for fundamental rights, including social rights, at the constitutional core of the EU. The outcome of the activities of the Parliament also stands in contrast to that of the ECJ. Both institutions have sought to develop the concept of fundamental rights in the EU, but have very different capabilities to do.

Most political developments in the history of fundamental rights in the EU have been premised on securing legitimacy of the new European order through discursive references to the general concept of fundamental rights (see also Smismans, 2011; Williams, 2004). Given the absence of any substantive political engagement with fundamental rights up until the year 2000, it fell to the ECJ to take the lead in constructing a concept of rights for the EU legal order. The development of rights has therefore been shaped by the institutional role of the Court and the way in which it has sought to balance rights against the economic basis of integration. Due to the lack of a treaty basis for rights, the ECJ looked to sources outside of the EU. Yet the European constitutional traditions and other European-wide treaties on rights that were drawn upon were not simply transposed into EU law; instead, they had to contend with legal principles that already enjoy a stronger treaty basis. As shown above, the ECJ has defined key aspects of the concept of fundamental rights in the EU: the proportionality test, scope of application of rights, the predominance of civil rights, and the way in which rights are balanced against neoliberal market freedoms.

The full importance of this judicial construction of rights can only really be appreciated when understood in the context of the political developments that have neglected to substantially address any of its shortcomings. At face value, the Charter of Fundamental Rights appears to put any concerns about rights in the EU to rest by embedding a catalogue of rights and procedures for their protection at the heart of the EU. Yet diving deeper into the understanding of fundamental rights, it is clear that the Charter only really endorses the conception of fundamental rights already constructed by the ECJ. Indeed, the European Council’s purpose for the Charter was only to make the pre-existing protection of rights in the EU more visible. The proportionality test and the jurisdictional scope of rights protections were left untouched. The debates over social rights and eventual inclusion of a provision designed (albeit rather unclearly) to strip social rights of any direct justiciability have ensured that this area of potential progress has been severely hampered. The added value of social rights reconceptualised as principles to be implemented via legislation appears small, particularly as EU continues to lack the competence to legislate effectively on social issues. Crucially, the reliance on a judicial construction of fundamental rights has left the arrangement of the EU wherein market freedoms share the constitutional core with fundamental civil rights remains unchanged. This has left the dominance of neoliberal principles intact and done little to address the tension between these values that has emerged in cases such as *Laval* and *Viking*, which is explored in further detail in the case study on labour rights in chapter five. The tentative and post-hoc construction of rights in the EU stands in stark contrast to the centrality of neoliberal economic ideas that have historically been at the core of European integration, as highlighted in chapter two.

The dominant conception of fundamental rights in the EU is as a set of predominately legally enforceable civil rights limited to the jurisdiction of the ECJ and of equal value to the liberal market principles embedded in the treaties, which is explored in further detail in chapter four. Social rights are afforded a lesser status as programmatic principles with uncertainties still present about their justiciability, as examined in more detail chapter five. It has been argued that this understanding of fundamental rights has been shaped by the process of their social construction and influenced by both institutional and paradigmatic dynamics. It should be recalled that chapter two outlined the history of the development of rights in Europe (out with the EU) and drew attention to the economic nature of EU integration. Chapter two also gave some consideration to the relationship between fundamental rights and the economic liberal ideas that have underpinned the development of capitalism. What is particularly interesting about the construction of fundamental rights in the EU analysed in this current chapter is how aspects of this rights-liberal economics relationship have reoccurred. The historic compatibility between civil rights and economic liberalism (which has been fairly consistent during classical liberal, embedded liberal, and now neoliberal periods of capitalism) has meant that civil rights could be developed by the ECJ in a fashion that not only does not challenge any of the underlying premises of EU economic integration, but actually helps to secure this new post-national order by establishing constitutional style rights guarantees. Meanwhile, the historic tension between social rights and economic liberalism has remained. While political developments led to the realisation of social rights at the domestic level (as well as international treaties), the judicial nature of the construction of rights in the EU largely ignored directly engaging with social rights by permitting a balance wherein EU level economic freedoms would not infringe on national level social settlements. This balance has now started to break down and the historic tensions between social rights and economic liberalism have re-merged as embedded liberalism has declined and been replaced by a more hostile neoliberal paradigm.

Yet it should be noted that this understanding of rights was established prior to the Charter of Fundamental Rights gaining legal value. Whilst the Charter of Fundamental Rights primarily endorsed this understanding of rights, there are several aspects of it that have the potential to advance the role of rights in the EU. First, it introduced social rights on a firmer legal basis than they had previously enjoyed. Whilst it is not yet clear if this will rebalance social rights in relation to neoliberal market principles, there is some scope for this to happen. However, the distinction written into the Charter between judicially enforceable rights and principles to be implemented by legislation casts some doubt on the utility of the Charter in this regard. Second, by virtue of attaining legal value, the Charter could also provide a basis to detach liberal market principles from the constitutional core of the EU and instead establish fundamental rights at the top of the legal hierarchy. As highlighted above, there are some indications that fundamental rights are taking on a more proactive and political role, as the various new governance reforms have sought to mainstream rights. The implications of this understanding of fundamental rights and the scope for further developments since the changes made by the Treaty of Lisbon in 2009 are drawn out in the subsequent three chapters.

# 4. Privacy and Data Protection Rights in the European Union

The focus of this chapter is on the activities at the EU level regarding the civil rights to privacy and data protection. The salience of privacy and data protection has increased dramatically over the past two decades as technological advancements in information technology and the internet have resulted in a significant increase in the ubiquity of personal information in the everyday life of many Europeans. As public authorities have grappled with how to balance different fundamental rights and public interests in light of technological advancements, the EU has emerged at the forefront of legislative developments. As a policy area that has seen significant activity over the past two decades, the rights to privacy and data protection provide for an ideal case study into how civil rights are protected in the EU.

Privacy and data protection rights are both outlined in the Charter of Fundamental Rights, in Article 7 (respect for private and family life) and Article 8 (protection of personal data). The Treaty of Lisbon also introduced a new treaty competence for the EU to legislate on data protection in Article 16 TFEU using qualified majority rules. These rights have become particularly salient in modern life. Technological developments have given rise to new types of privacy concerns. The growth of computers and the internet have changed the way in which data are stored, making it more easily accessible and sharable by a greater number of actors. The development of the internet has greatly increased the amount of personal data that can be amassed about individuals. More and more of peoples’ everyday lives now involve the internet, whether it be socialising and sharing experiences on social media, communicating through email (both personal and professional), managing personal finances, shopping, reading the news, or simply searching for information. Many of these activities involve handing over personal information and it is often not clear what the consequences of this are. It is not just the state and its security services that are interested in knowing as much as possible about individuals; the commodification of personal data has resulted in a market worth billions. Internet based companies such as Facebook and Google are among the highest valued companies in the world and are both premised on processing data, whether it is uploaded information or observations about searching habits.

To put this chapter into context, the conceptual framework of this thesis should be recalled. Approaching from a critical constructivist perspective, it is argued here that the way in which fundamental rights as a concept is understood is of key importance. Fundamental rights identify both normative goals to which human society should be striving and identify some means through which goals can be achieved. As a socially constructed concept, rights are also constantly evolving as new rights and methods of realising rights are developed. This evolution happens through a variety of means, including the practical application of rights to new situations and technologies. As such, the development of fundamental rights does not occur in a vacuum; rather, they are shaped by the institutional framework within which they are constructed and their interaction with other ideas about political, economic, and social organisation. As chapter three highlighted, fundamental rights have developed in the EU primarily as a secondary project to ensure the legitimacy of European integration, whilst not fundamentally challenging the process of integration in any significant manner. Fundamental rights have been shaped by the institutional dynamics of their development and the interaction between rights and neoliberal economic principles. However, since the Lisbon Treaty entered into force at the end of 2009, rights have gained a stronger legal basis and there are signs that the EU is moving away from this economic premise and towards a more balanced constitutional settlement. These developments have been matched by rhetorical commitments by EU institutions to be exemplary in protecting fundamental rights. In order to examine how these recent changes have shaped the protection of rights, contemporary political developments must be taken into account.

It is necessary to recap some of the primary findings on how fundamental rights have been broadly understood in their development in the EU. The dominant understanding of fundamental rights is as legally enforceable civil rights, of equal value to core neoliberal economic principles, and limited to the jurisdiction of the ECJ. This understanding of fundamental rights has moulded them into a concept that is more compatible with and, crucially, unchallenging to, the economic fashion in which integration has primarily been pursued. This dominant understanding of rights indicates that civil rights are strongly protected in the EU. The factors that have caused difficulties for other rights, namely social rights as highlighted in chapters five and six, bear less significance for civil rights. Civil rights enjoy a strong consensus on the role of the judiciary in their protection and are generally less likely to clash with the neoliberal economic principles that have underpinned EU integration. When there have been clashes between civil rights and economic freedoms before the ECJ, they tend to be resolved in a manner that most legal scholars have found satisfactory from a rights perspective (see chapter three; de Vries, 2013; de Witte, 1999). In essence, the protection of the rights to privacy and data protection (as with civil rights more generally) fits with the regulatory style of the EU.

This chapter examines contemporary civil rights in the EU by looking at the rights to privacy and data protection. Its aim is to examine how well privacy and data rights are protected and if contemporary developments have altered the way in which these rights are generally understood. The main findings of this chapter concern how civil rights are protected. The compatibility of civil rights with the institutional framework of the EU and their limited scope for conflict with neoliberal economic principles has seen the rights to privacy and data protection enhanced considerably. The conception of rights as to be protected through judicial enforcement has gone through some significant advancements though. Of particular interest, there is also a clear recognition that the rights to privacy and data protection require a specialised legal framework and technocratic bodies to provide oversight and expertise and the ECJ has strongly exerted its power of judicial review over the EU legislators to an extent not previously seen with regards to fundamental rights. This has helped to push the conception of rights protection away from a reactive and *post hoc* fashion and towards a proactive duty that requires active involvement of non-judicial bodies, though there is no indication of any positive obligation or duty to legislate. Rather, the motivation to legislate remains based on the desire to enhance the protection of these rights and expand EU integration. These developments promote a conception of civil rights as both legal principles to be protected by a court and programmatic principles to be legislated upon. Previously, the idea of rights as programmatic principles had been associated with only social rights, as highlighted in chapter three. A strong and robust framework for the protection of privacy and data rights has been created at the EU level.

This chapter proceeds in three parts. First, in order to get an idea about appropriate standards on privacy and data protection in Europe, the Council of Europe’s rights protection regime is highlighted. This includes a convention on data protection standards, a recommendation on data processing by the police, and relevant case law of the ECtHR. Second, the state of EU engagement with privacy and data protection before the Lisbon Treaty is examined in order to provide the necessary context to analyse contemporary developments. Finally, this chapter analyses contemporary developments around privacy and data protection, covering the headline ECJ case *Digital Rights Ireland* that struck down the Data Retention Directive (DRD), the rejection of the Anti-Trade in Counterfeiting Agreement (ACTA), and the proposed reform of data protection laws.

## 4.1. Data Protection Rights Standards at the Council of Europe

Prior to any legislative developments taking place at the EU level, the Council of Europe adopted Convention 108 on the ‘Protection of Individuals with regard to Automatic Processing of Personal Data’ (referred to as Convention 108) in 1981. This convention provided more specific guidance on how to protect personal data, which, in the context of the Council of Europe, had previously been protected by the ECtHR based on Article 8 (right to private and family life). Although not ratified by every EU member state by the time the Data Protection Directive was adopted in 1995 (Maxeiner, 1995: 432), the standards developed by the Council of Europe have strongly influenced developments in the EU (Hijmans and Scirocco, 2009: 1518). The key points of Convention 108 are outlined below.

The approach taken by Convention 108 is to set out a series of obligations on actors processing data and a set of individual rights that can be enforced against those actors, thus ensuring that there is a means to uphold the standards of the convention. Its primary focus is to ensure that there is a strong regulatory framework at the national level in which individuals are able to exert some control over what happens to their personal data when it is processed by other actors. It does this by setting out the conditions in which it is legitimate for actors to process data and through creating several enforcement rights for individuals whose data is being processed, for example to find out the identity of who is processing their data, the purpose of data processing, and to obtain rectification or erasure of data that has been illegally processed. Additional safeguards are also set out for sensitive data (e.g. that pertaining to ethnicity or health), to ensure the security of data processing, and to restrict transfers of data to third countries without adequate data protection standards (see Council of Europe, 1981). Although a bit dated, given some significant advances in computing and communications technology since 1981, Convention 108 remains an important instrument. It is the only international instrument on data protection (FRA, 2014: 16) and has established a general framework that remains influential today. As demonstrated below, it has clearly influenced developments in the EU.

However, it should be noted that Convention 108 allows for exemptions for law enforcement. In 1987, the Council of Europe issued Recommendation R(87) 15 ‘Regulating the use of Personal Data in the Police Sector’. This non-binding recommendation basically sets out to apply the data protection standards mentioned above to the police sector, whilst noting that there are various reasons relating to law enforcement that require separate rules. For example, it sets out that data subjects should be informed of any personal data collected on them when such disclosure would no longer inhibit an investigation. The recommendation also provides that personal data collection should be limited to what is necessary for the prevention of specific criminal offences, indicating that mass indiscriminate data collection is disallowed (see FRA, 2014: 252).

In addition to the Council of Europe’s convention and recommendation, the European Court of Human Rights has developed a substantial body of case law relating to data protection. This case law has been developed based on the right to private and family life as there is not a separate right to data protection in the ECHR itself. Whilst this case law is too large to go into any great detail on, some important standards on privacy and data protection have been developed. As far as data protection standards go, the ECtHR has developed a similar approach to that outlined in Convention 108, which is to ensure that any interference with the right to privacy is in pursuit of a legitimate aim and proportionate to that aim (Kranenborg, 2014: 235-236). Through its case law, the ECtHR has clarified some examples of what it considers to be legitimate and proportionate which are worth highlighting. Of particular importance is the way in which the ECtHR has engaged with law enforcement and freedom of expression in the media.

The ECtHR has recognised that police surveillance of those suspected to have engaged in criminal activities and the maintenance of certain databases of those convicted of criminal offences are necessary and legitimate activities, but has sought to ensure that interference with the right to privacy is provided for by law and proportionate to the legitimate aim of crime prevention (see FRA, 2014: 64, 145). In the case of *Weber and Saravia v Germany*[[43]](#footnote-44) the ECtHR set out that surveillance of suspects must be provided for by law, the law must ensure safeguards against abuse, and the law must be accessible enough that individuals are aware of the circumstances in which public authorities are enabled to monitor them. In the case of *B.B v* France, [[44]](#footnote-45) it was established that personal information held in databases by law enforcement bodies must also be subject to certain privacy controls, such as procedures to rectify incorrect information and to erasure information when it is no longer relevant. In *Marper v UK*,[[45]](#footnote-46) it was held that safeguards must also apply to biometric data of individuals arrested by the police but not formally charged and that blanket indefinite retention of such data violated the right to privacy. Essentially, the ECtHR has clearly established that individuals’ rights are still applicable even when it comes to law enforcement.

With regards to the balance between freedom of expression in the media and privacy, the ECtHR has generally applied a test of public interest. This includes the idea that public figures should expect a greater degree of tolerance regarding the publication of information about them, but should still be able to enjoy some protection of their private life (Kranenborg, 2014: 231). The ECtHR has also included checks on whether information could be considered reliable based on how it was obtained (case of *Springer v Germany*)[[46]](#footnote-47) and has applied stronger protection to sensitive information such as medical data, particularly if that data has been attained by a newspaper through questionable means (case of *Biriuk v Lithuania*).[[47]](#footnote-48) The ECtHR has also been careful not to allow the expansion of censorship. In the case of *Mosley v UK[[48]](#footnote-49)* it was established that newspapers are not required under the right to privacy to pre-notify individuals about personal information they intend to publish, even if such information does not appear to be in the public interest (see also FRA, 2014: 24-26). Essentially, in balancing freedom of expression and privacy, the ECtHR has tended to prioritise expression.

## 4.2. History of Data Protection in the EU

At the EU level, the rights to privacy and to data protection are not just addressed in a *post hoc* fashion by a judicial body; a regulatory framework has been put in place by legislation to give practical meaning to these rights and ensure they are respected. To understand contemporary developments concerning these rights, it is necessary to first look at the regulatory framework put in place by legislation and the way in which this has been interpreted by the ECJ. There are quite a number of pieces of legislation on data protection. The Data Protection Directive (DPD) established the general principles of the regulatory framework in 1995 for the single market. This framework was augmented and updated by the Privacy Directive in 1997, the E-Privacy Directive in 2002, and the EU Cookie Directive in 2009. The Data Retention Directive (DRD) was passed in 2005 and had a significant impact on privacy, though this directive was eventually annulled by the ECJ in 2014 (see subsequent section). These directives were all premised on treaty provisions permitting legislation to ensure the functioning of the internal market (now Article 114 TFEU) and were applicable to what used to be the first pillar of the EU. A Framework Decision on data protection in police and judicial cooperation was adopted in 2008 under the now defunct third pillar.

Due to the rather complex and technical nature of computers and the internet, a significant amount of time and space could be spent explaining what these data protection rules do and why they are deemed necessary for the protection of privacy online. However, the actual technical details of these rules are not the focus of this research. Such a detailed account can be found elsewhere (see in particular FRA, 2014; Costa and Poullet, 2012; Wong, 2011; Robinson et al. 2009; Debussere, 2005). Rather, it is the fact that there are detailed rules that is the point, as the creation of such a framework to adequately protect privacy and personal data represents a key development in how fundamental rights are understood. The EU legislators decided that it was not sufficient for privacy and personal data to be protected *post hoc* by a judicial body, as civil rights have traditionally been conceptualised. Instead, a robust and specialised legal framework, including the creation of technocratic bodies, was required. This section focuses on providing an overview of that framework.

### 4.2.1. General EU Data Protection Standards

As mentioned above, the DPD established the main principles of the data protection regulatory framework in 1995. Following this, the institutions of the EU have engaged in a struggle to keep up with the pace of technological advancements. Two years later the Privacy Directive (1997) was established to apply the standards of the DPD to the telecommunications sector. However, within five years the Privacy Directive was repealed and replaced by the E-Privacy Directive (2002), designed to apply the standards of the DPD to electronic communications. Seven years later the E-Privacy Directive was amended by the EU Cookie Directive (2009) in an attempt to improve the application of the standards of the DPD to the internet. These data protection rules have been updated by a new reform package that entered into law in early 2016, as outlined in the next section. As it is the DPD that established the key aspects of the data protection framework, it is outlined in the most detail below.

There were two incentives that drove the EU legislators to adopt the DPD in the 1990s: the need to ensure common data protection standards for the single market to function efficiently and the need to protect fundamental rights (Shaffer, 2000). The prominence of data protection as a rights issue had been growing steadily since the 1970s as several European states began to adopt laws in this area. As the single market was nearing completion, the issue of data transfers between European states with different levels of data protection became a problem. Member states with higher levels of protection, namely Germany and France, threatened to ban data transfers to other member states without similar standards, potentially undermining business in the single market (Shaffer, 2000: 11). The need to protect privacy of communications and personal data became intertwined with the functioning of the single market. It was in this context that the DPD was negotiated. Crucially, it was the more powerful member states of France and Germany that had already developed high domestic standards and were unwilling to water these down, resulting in the EU directive ensuring a stronger level of rights protection across all member states (Shaffer, 2000: 13). The twin aims of protecting fundamental rights and ensuring the functioning of the internal market are set out in Article 1 of the DPD. As highlighted above, European states had already negotiated a Council of Europe convention on data protection. This convention was used to help establish the standards which the EU should seek to enact (Hijmans and Scirocco, 2009: 1518; Maxeiner, 1995: 96-97).

The DPD creates the framework for protecting privacy and personal data by defining key terms and actors and setting out rights and responsibilities. Personal data is defined as any information relating to an identifiable person and processing is defined as any set of operations performed on personal data (Article 2, **Directive 95/46/EC**). Key actors such as data controller (the body that determines the purpose and means of data processing) and data processor (the body that actually conducts the data processing) are defined (Article 2, **Directive 95/46/EC**), though there are exceptions concerning public and state security, defence, and criminal law and individuals involved in a purely household activity (Articles 3, **Directive 95/46/EC**). Furthermore, as the directive was based on provisions for the internal market, its provisions do not apply to police and judicial cooperation in criminal matters or common foreign and security policy. However, despite being based on internal market provisions, the ECJ has given the scope of the DPD a broad interpretation by determining that it is applicable to domestic data processing with no immediate link to the principle of free movement (Kranenborg, 2014: 227, 242). Although its scope is limited to actors within the EU, the DPD also prohibits the transferring of personal data to third countries unless the standards of those countries have been approved by the Commission (Article 25, **Directive 95/46/EC**). The ECJ has exercised significant oversight of this role for the Commission. A Commission decision approving the adequacy of data protection in the United States in order to facilitate passenger name records for airlines was struck down by the ECJ in 2006 on the basis that was outside the scope of the DPD.[[49]](#footnote-50) More recently, the ECJ has struck down an agreement known as Safe Harbour allowing the transfer of personal data from the EU to the US.[[50]](#footnote-51)

The DPD takes a very similar approach to Council of Europe Convention 108 on data protection. It creates a number of responsibilities for data controllers and a set of rights for individuals to be enforced against the data controller. Under the DPD, personal data must be: processed fairly and lawfully; collected for a specific, explicit, and legitimate purpose and only processed for those purposes; relevant and appropriate for the purpose it is collected; accurate and up to date; and kept in a form that permits identification of the data subjects for no longer than is necessary (Article 6, **Directive 95/46/EC**). There are specific conditions on the processing of sensitive data such as information on race, ethnic origin, political opinions, or trade union membership (Article 8, **Directive 95/46/EC**). The data controller also has to ensure appropriate technical measures to ensure that all data processing is conducted securely (Article 17, **Directive 95/46/EC**). These provisions are all based directly on Convention 108.

However, the DPD also contains additional obligations for data controllers that go beyond Convention 108. In order to ensure fair processing, individuals must be informed of who the data controller is, the purpose of data processing, and any third parties the data is passed to, including in instances where personal information has not been collected directly from the data subject (Articles 10 & 11, **Directive 95/46/EC**). The DPD also sets out when personal data may be processed. This is primarily based on the consent of the data subject, though there are exceptions for when data processing is necessary for the performance of a contract of which the data subject is party to, for compliance with a legal obligation, to protect the vital interest of the data subject, to perform a task in the exercise of official authority, or for the purpose of a legitimate interest of the data holder or third party to whom the data are disclosed unless overridden by the interests for fundamental rights and freedoms (Article 7, **Directive 95/46/EC**). It is the responsibility of the data controller processing the personal data to ensure that these provisions are met.

The DPD also contains a number of rights for individuals, which also go beyond the standards set by Convention 108. Individuals have a right to access to the data held by controllers, which allows individuals to find out what information is being held about them and to request rectification, erasure, or blocking of any incomplete or inaccurate data held about them (Article 12, **Directive 95/46/EC**). Individuals are also granted a right to object to the processing of their data, if they have compelling legitimate grounds to do so, and to object if personal data are to be processed for marketing purposes (Article 14, **Directive 95/46/EC**). This right to object to the processing of personal data for marketing purposes also requires data controllers to notify individuals if their data is to be passed to a third party for marketing purposes and provide the opportunity to object. Finally, individuals have the right to not be subjected to decisions which produce legal effects on them which is based solely on automatic processing of data, such as automatic credit checks (Article 15, **Directive 95/46/EC**).

To ensure that these rights are actually enforceable, the DPD also sets out that member states must ensure judicial remedies along with appropriate rules for compensation are in place (Articles 22 & 23, **Directive 95/46/EC**). Member states are compelled to create an independent supervisory body with a range of powers. These powers include the ability to hear claims of breaches of data protection, investigate breaches of data protection, engage in administrative enforcement actions, and intervene in legal proceedings (Article 28, **Directive 95/46/EC**). Furthermore, an EU body made up of representatives of each national supervisory body is established to provide expertise at the European level. With its legal basis in Article 29 **Directive 95/46/EC**, this body is known as the Article 29 Working Party. Once again, these provisions go beyond the standards set by Convention 108.

In recognition of the fact that the rights to privacy and data protection can have a significant impact on freedom of expression, Article 9 **Directive 95/46/EC** sets out that the processing of personal data for journalistic, artistic, or literary purposes is exempt from data protection rules. These exemptions are to be the responsibility of member states when implementing the directive. The ECJ has generally referred questions about the exact balance between these rights back to national authorities when the question has arisen, but has also clarified that the scope of journalistic purposes is somewhat broad as it includes ‘the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them’ (case of *Satamedia*, Kranenborg, 2014: 262). This implies that a broad range of activities can be considered to be journalistic and therefore exempt from data processing rules. However, whilst the concept of journalistic activities may be broad, the issue of who exactly is considered to be a journalist appears to have been interpreted more restrictively. Erdos (2015) highlights that national authorities have generally not applied these journalistic exemptions to more recent media, such as online amateur blogs or social media. The recent case of *Google Spain*, which is analysed in greater detail below, saw the ECJ rule that online search engines do not enjoy journalistic exemptions from data processing rules.

As a directive, the DPD is directed at national governments and does not actually apply to the institutions of the EU. To rectify this situation, Regulation (EC) 45/2001 was passed in 2000. Essentially, it repeats the same provisions outlined in the DPD in order to apply them to the institutions of the EU. Crucially, Regulation (EC) 45/2001 also created an independent supervisory authority for data protection at the EU level: the European Data Protection Supervisor. Along with the Article 29 Working Party created by the DPD, this makes two independent bodies at the EU level able to provide expertise on data protection issues. As highlighted at various points below, these bodies have provided valuable insights into the compatibility of various EU activities with fundamental rights to privacy and data protection.

Several directives were passed after the DPD in order to apply its principles to more contemporary forms of communication. Most key changes were introduced by the E-Privacy Directive in 2002: the Privacy Directive in 1997 was outdated almost as soon as it was implemented and the EU Cookie Directive[[51]](#footnote-52) in 2009 simply made several minor amendments to existing provisions. The main focus of the E-Privacy Directive is on applying the standards of the DPD to the provision of electronic communications. This included several specific changes such as setting out that users must be informed of security breaches which may have compromised their personal data and rules regarding opting in to market communications. On the more technical side, the E-Privacy Directive set out how tracking cookies on internet websites should be used (see Debussere, 2005). The E-Privacy Directive also specified that the confidentiality of communications must be ensured and monitoring of communications prohibited, except where a user has given their consent. This prohibition of monitoring is particularly important, as the issue of monitoring was a key point of contention for the Anti-Trade in Counterfeiting Agreement that is examined below. Also of key importance to the privacy and data protection framework were the rules on traffic data.

Traffic data is basically the information held by providers of electronic communications, i.e. phone or internet providers, which is required to provide the actual communications and process billing (Article 2(b), **Directive 2002/58/EC**). Essentially, it is a record of network usage metadata: data about data. This includes information on time, origins, and destinations, but not content, of communications such as phone calls, text messages, e-mail, and internet browsing. This information is generally collected by providers of electronic communications networks as part of their provision of their service. Certain responsibilities are set out in the E-Privacy Directive for the providers of electronic communication networks, including that traffic data must either be erased or made anonymous when it is no longer needed for the transmission of communications and that data used for billing can only be processed until the end of the period in which the bill may be lawfully challenged or payment pursued (Article 6(1 & 2), **Directive 2002/58/EC**). This means that data held by the providers of electronic communication networks must be for the specific purposes of transmitting communications or billing and must be deleted (or, at least, anonymised) once that purpose is fulfilled.

These rules on traffic data are particularly important as they were perceived to impede counter-terrorism efforts, leading to the adoption of the Data Retention Directive in 2006. The DRD was negotiated in light of the terrorist attacks that occurred in London in 2005 and Madrid in 2004. The political climate following these terrorist attacks and the perception of high levels of risk resulted in this directive being rushed through the legislative process at the behest of certain member states, in particular the UK (DeSimone, 2010). Data retention was actually originally to be addressed through provisions on the third pillar, which would have required unanimity in the Council. However, the UK successfully switched this to the legislative procedure on the single market under the first pillar (then Article 95 TEC, now Article 114 TFEU) in order to overcome a potential German veto (DeSimone, 2009: 301). The fact that QMV rather than unanimity rules were used is particularly important, as several member states were opposed to the new rules on data retention due to their interference with fundamental rights. Ireland, who had voted against the DRD, attempted to get it annulled before the ECJ by arguing that the directive was premised on the wrong treaty basis, though this challenge failed. Sweden, Austria, and Belgium failed to transpose the directive into domestic law within its set timeframe, despite relying on provisions in the directive allowing them to postpone domestic implementation (Granger and Irion, 2014: 839). Domestic implementation of the DRD was struck down by constitutional courts in Romania and Germany for violating constitutional law (DeSimone, 2010). Eventually, the ECJ itself struck down the DRD in 2014 for violating fundamental rights; a ruling, which is looked at in greater detail below.

The DRD basically reversed the situation where the EU was perceived to be a strong defender of data protection and privacy rights, at least temporarily. Whilst the E-Privacy Directive set out that traffic data is to be retained only for as long as it was necessary to transmit communications and bill customers, the DRD stipulated that this data should instead be retained for a period of 6 to 24 months. The DRD set out that providers of electronic communication services and public communications networks, i.e. internet and phone companies, were to retain metadata of communications including phone calls (both successful and unsuccessful), emails, internet calls, and social network communications (Article 5, Directive 2006/24/EC). This metadata had to include information able to identify the originator and recipient of the communication, the equipment used, time duration, date, and the geographical locations of mobile communications. The actual content of communications would not be recorded (see DeSimone, 2010: 300). These data had to be held by providers of electronic communications on all of their users to allow access for law enforcement agencies investigating serious crime.

Concerns with the impact of the DRD on the rights to privacy and data protection were present from the outset. During its legislative passage, privacy concerns were raised by the European Parliament and by expert bodies such as the Article 29 Working Group and the EDPS (See Article 29 Working Party, 2005; EDPS, 2005). Lobbying from these actors did lead to compromises, for example the original proposals had contained a longer retention period for the data to be held and allowed for access for reasons beyond serious crime (DeSimone, 2010: 301-302). Although concessions were enough to win the support of the European Parliament (which was also under intense pressure due to the perceived threat of terrorism), concerns over excessive interference with fundamental rights remained (Feiler, 2010). As mentioned above, several member states did not implement the DRD and in two cases national constitutional courts struck down domestic implementation. As highlighted below, the ECJ eventually annulled the DRD in 2014. This means that the provisions of the E-Privacy Directive on processing traffic data are back in effect, though it should be noted that some member states, in particular UK, have passed domestic legislation re-enacting data retention in a manner that they feel is compatible with the ECJ’s ruling (see Kühling and Heitzer, 2015).

### 4.2.2. Data Protection Standards in the Third Pillar

There have been attempts to regulate personal data in the area of the former third pillar, on justice and home affairs. In 2008, the EU adopted Council Framework Decision 2008/977/JHA on the protection of personal data in the framework of police and judicial cooperation in criminal matters. However, unlike the aforementioned directives, the framework decision is quite limited in scope, does not have general applicability across police and judicial matters, and until recently has not been subject to full oversight by the ECJ.[[52]](#footnote-53) As of 2015, this framework decision remains in force, but is due to be replaced by a directive. Member states, particularly the UK, have been reluctant to delegate powers over justice and home affairs to the EU level, which is largely the reason for the inadequacy of EU level rules in this area. Whilst this means that the standards developed by the ECtHR around the right to privacy in law enforcement are not established in the EU, individual member states are still free to ensure that those standards are met.

In a similar fashion to the DPD, the Framework Decision sets out obligations on actors processing personal data, stricter obligations on sensitive data, rights for individuals, and oversight by an independent body. However, the scope of application of the Framework Decision is severely limited. It is only applicable to data processing when data is being transferred between member states, though it is questionable how an actor would know about future data transfers and therefore whether or not to apply the standards of the Framework Decision when processing data (Hijmans and Scirocco, 2009: 1494). If data is to be subject to these conditions only when actually being transferred between member states, the scope of application is extremely narrow. Furthermore, most European level bodies involved with crime and justice, such as Europol and Eurojust, are actually subject to their own data protection rules, which are given precedence over the framework decision. Whilst the specific rules for these actors are considered to be to a reasonable standard (see FRA, 2014: 153-154), this means that there is a patchwork of different standards across justice and home affairs (Hijmans and Scirocco, 2009: 1496). Concerns were also raised by the EDPS when the framework decision was proposed about the standard of protection being lower than that of the DPD, both the Council of Europe’s Convention 108 and Recommendation R(87) 15 on data processing by the police, and the case law of the ECtHR (EDPS, 2007). The Parliament had also attempted to improve data protection standards when it was consulted including through references to Convention 108, though many of its changes were later dropped by the Council (EDRi, 2009). The primacy of the Council over the Parliament under the former third pillar rules limited the prospect of the Parliament enhancing rights standards. The EDPS has been particularly critical of provisions allowing data to be processed for purposes other than that for which it was collected and the absence of certain safeguards on the quality of data, both of which run counter to the standards of Convention 108 and Recommendation R(87) 15 (EDPS: 2007: 5-6). With a very limited scope of application, several inadequate provisions on rights, and no recourse to the ECJ, the Framework Decision falls short of the higher standard found in the DPD and under the Council of Europe.

### 4.2.3. The State of Data Protection and Privacy Rights Prior to the Lisbon Treaty

It is evident from these pieces of legislation that there have been some significant developments on data protection and privacy at the EU level. Before looking at these rights in the contemporary period, after the granting of legal status to the Charter of Fundamental Rights and the other enhanced provisions of the Lisbon Treaty, it is necessary to take stock of these developments in light of fundamental rights standards. There is a mixed picture. On the one hand, the EU has emerged as a leader in protecting data protection and privacy rights with the DPD, albeit with some lingering issues highlighted below. On the other hand, the DRD has been criticised for its excessive interference with data protection and privacy rights and the data protection under the former third pillar has generally been considered to provide inadequate rights safeguards. This section will put the aforementioned legislative developments in context of relevant rights standards and relevant aspects of the dominant understanding of fundamental rights as a whole outlined in chapter three, namely that rights have developed in a fashion that is congruent with the economic ethos of the EU and a positive obligation on rights is emerging.

In terms of legislative developments around data protection and privacy, the DPD is of a high standard. As highlighted above, it surpasses the standards set by the Council of Europe Convention 108 in several areas, for example by providing a requirement for the data controller to actively inform individuals that their data is being processed and setting out additional requirements for data processing to be considered legitimate. The case law developed by the ECJ on data protection, which is partially based on the DPD, is also considered to be to a high standard of rights protection (P. Oliver, 2009). The E-Privacy Directive should also be lauded for its attempt to apply data protection principles to electronic communications and in particular for its engagement with the more technical issue of internet cookies and the hazards they pose for privacy (Debussere, 2005: 96).

However, there are several issues with this framework for data protection. As a directive, the DPD relies on member states to transpose its provisions into domestic law. It is now widely regarded that the DPD has not led to the level of harmonisation of data protection standards across the EU that had originally been hoped for (Costa and Poullet, 2012; de Hert and Papakonstantinou, 2012). This means that rights standards vary across different member states. Such national fragmentation of data protection rules also exacerbates another issue, the application of these rules to contemporary developments. As highlighted above, new directives and amendments have sought to apply data protection principles to new technologies. However, the pace of technological change is difficult to keep up with. In particular, recent developments around internet-based services raise some tricky questions for data protection. Erdos (2015) highlights complications emerging from new developments such as amateur blogs, social media, and street mapping and the application of journalistic exemptions. As journalistic exemptions are left to national authorities to decide upon, a variation among how different member states address internet based services has emerged. According to Erdos (2015), the trend among data protection authorities at the national level has been towards an expansive application of data protection rules and restrictive use of journalistic exemptions. This approach appears to diverge from the way in which the ECtHR has engaged with these issues and it is feared that this does not get the balance between data protection and privacy right (Erdos, 2015: 557). Bessant (2015) highlights some uncertainties around the household exemption for personal data processing and its application to social media, noting differences between the UK’s domestic application of the DPD and the ECJ’s interpretation at the EU level. In addition to problems associated with balancing rights, there are also technical complications. In particular, Jones and Tahri (2011) and Debussere (2005) have highlighted difficulties that websites face in attempting to apply EU rules on internet cookies. Whilst these issues should not be ignored, they mainly relate to the specific application of the EU’s framework for data protection and do not detract too much from what is a fairly robust framework.

One of the key shortcomings in the protection of privacy and personal data at the EU level is the scope of legislative developments. As the DPD and E-Privacy Directive are premised on single market provisions, they apply mainly in the area of economic activity and not to law enforcement. As noted when discussing the ECtHR’s standards, above, law enforcement is an area somewhat prone to privacy issues. The framework decision on data protection in the third pillar constituted a limited attempt to establish some regulations here, but its scope is very limited and has done little to address the patchwork of other agreements that govern EU level law enforcement bodies (Hijmans and Scirocco, 2009). The EU does not provide for comparable standards to the ECtHR’s case law in this area, given the latter’s clear establishment of the application of a proportionality test to interference with privacy by law enforcement bodies. However, this is not necessarily due to an absence of will on the part of EU actors; rather it is an issue of competency. Justice and home affairs are a key area of sovereignty and national governments, in particular the UK, have been keen to avoid delegation of these powers to the EU level. With the introduction of a specific treaty provision on data protection and the abolition of the pillar structure by the Lisbon treaty, this situation may be changing, as explored below.

The primary shortcoming of data protection at the EU level was the DRD. Though it is no longer in effect, it is worth mentioning here for two reasons. First, it demonstrates that the commitment to privacy and data protection of the EU legislators can be overridden by security concerns. Given the terrorist attacks in Europe in 2004 and 2005, this may have been an exceptional circumstance. The DRD actually went through the EU legislative process in record time – about two and a half months. It overrode the norm of seeking consensus in the Council and ignored the advice of privacy groups and even the EU’s own data protection bodies. The second reason the DRD is worth mentioning, however, is that it was struck down by the ECJ in 2014, thus showing that the EU as a whole is capable of protecting fundamental rights, albeit with some time lag. This case, *Digital Rights Ireland*, is examined in more detail below as it occurred after the entry into force of the Lisbon Treaty. With some caveats, then, it can be said that the rights to data protection and to privacy of communications are protected to a high standard in the EU.

The regulatory framework on data protection outlined above also demonstrates a clear willingness to intervene in and regulate the market actors in order to uphold the EU single market. Obligations are imposed on private actors and the ability to which actors can make profit from a market in personal data is constrained, particularly when contrasted to the more liberal approach taken to personal data in the US (Shaffer, 2000). This raises some issues regarding the neoliberal principles on which the EU is premised. Interference with the market to impose obligations involving financial costs on business actors in order to protect specific civil rights does challenge neoliberalism to some extent, as there is often a rhetorical commitment to deregulation and restrictions on the capability of the state to interfere with the market. It should be recalled that in chapter one, one of the key aspects of neoliberalism – part of what constitutes the ‘neo’ of neoliberalism – is the use of state power to construct and expand the market, a process that has historically converged with civil rights developments, as noted in chapter two.[[53]](#footnote-54) The convergence of setting EU level rights standards with upholding the single market and securing the fundamental economic freedoms it is premised upon supports this central aspect of neoliberalism. The dynamics of creating an EU wide market have seen this process of construction coincide with protecting certain rights (a situation also present in EU equality law, see chapter six) due to the need to create a uniform set of standards across all member states. This dual purpose of data protection laws further backs the idea that civil rights and neoliberal economic principles are afforded the equal status at the core of the EU order.

Finally, the examples of the DPD and E-Privacy Directive are among the clearest examples of the need to proactively adopt regulation in order to adequately protect fundamental rights. The success the EU has had in legislating in this area has even led to a more prominent place for data protection in the Treaties, as Article 16 TFEU now provides a clear legal basis for the EU to legislate in this area without recourse to treaty provisions on the functioning of the single market. Of course, it is possible that similar standards of protection could be developed through a judicial process via the case law of the ECJ. This has happened to a certain extent under the ECtHR, though its case law has taken decades to develop and is not always so precise in how rules are to be applied. It has been recognised in the EU that is would not be sufficient to wait for data protection rules to be constructed through a judicial process and that instead legislation would need to be passed. Interestingly, the perceived need to legislate to provide an appropriate framework for data protection incorporates the idea of fundamental rights as programmatic principles, which some scholars had viewed as applicable only to social rights and as a means to reduce the effectiveness of social rights (see Bercusson, 2005a). It would appear that some civil rights, at least, are both immediately legally enforceable and also require further legislation to ensure their effective realisation.

## 4.3. Data Protection in Contemporary EU Politics

At the end of 2009, the Lisbon Treaty introduced two significant changes to the right to data protection in the EU: the Charter of Fundamental Rights was given legal value and a new provision giving the EU competence on data protection was introduced (Article 16, TFEU). It is evident from section two that these changes have been introduced to a field already brimming with activity. This policy area remains one of significant activity that provides plenty of scope for an analysis of how data protection rights, and civil rights more broadly, are understood and how policy is influenced. Three instances in particular are relevant. First, the ECJ has been rather active in this area. Whilst there have been several high profile cases, *Digital Rights Ireland* in particular stands out as a landmark ruling. In this case, the ECJ exerted the primacy of fundamental rights over the other institutions of the EU by striking down the Data Retention Directive. Second, the European Parliament, buoyed by protests within member states, refused to give consent to the ratification of ACTA, thus ensuring that the treaty would not enter into force. This decision by the Parliament was largely on fundamental rights grounds, though some other issues were also present. Third, the EU legislators are currently revising the existing legislation on data protection with a view to ensure data protection harmonisation across the EU and adapt it to modern technological advancements. Together, these three instances provide valuable insights into how the rights to privacy and data protection are understood and protected in the EU.

### 4.3.1. Digital Rights Ireland

The development of legislation setting out a framework on data protection has been accompanied by a growing body of case law from the ECJ. Even before the Charter of Fundamental Rights gained legal value at the end of 2009, the level of protection afforded to data protection rights was generally considered to be to a high standard (P. Oliver, 2009). Since 2010, there have been numerous high profile cases that have reaffirmed this high standard of protection for data protection. This section focuses on one particularly important case, *Digital Rights Ireland*.[[54]](#footnote-55) In the past, the ECJ had exerted some level of judicial review based on respect for fundamental rights to non-legislative activities of the Commission, such as administrative and regulatory decisions, but appeared reluctant to review legislative acts in such a way (Granger and Irion, 2014: 844).[[55]](#footnote-56) In *Digital Rights Ireland* this situation changed; the ECJ struck down the Data Retention Directive due to excessive interference with the rights to privacy and data protection and appeared to set out a strict test for the EU legislators to follow when creating legislation in this area.

In 2014, the ECJ delivered its opinion on the case of *Digital Rights Ireland* in which it struck down the Data Retention Directive. As highlighted in section 2, the DRD mandated that providers of electronic communications must retain metadata on all users for a period of 6 to 24 months in order to allow law enforcement access should they require it. Rights concerns were already well known, as scholars, civil society organisations, and the EDPS and Article 29 Working Party had all been critical of the DRD on this basis (EDPS, 2011; Feiler, 2010; Article 29 Working Party, 2005). The Commission had also recognised some rights concerns, though without directly stating that the DRD violated rights, in an evaluation report in which it decided that data retention rules should be revised (European Commission, 2011b). Before any revision process could begin, however, the ECJ annulled the DRD.

In *Digital Rights Ireland* the ECJ decided that although interference with privacy and data protection rights was in pursuit of a legitimate aim (national security), the provisions of the DRD were disproportionate to this aim. In applying its proportionality test to the DRD, the ECJ set out what its shortcomings were, though some issues remain unclear. The Court highlighted three specific shortcomings of the DRD: the blanket coverage of data retention to practically all European citizens, the absence of rules regarding access and use of the retained data by national authorities, and the blanket application of the 6 to 24 month retention period for all data without differentiation of the usefulness of the data. Granger and Irion (2014: 843) argue that it is these three reasons that caused the DRD to be struck down, noting that the ECJ drew directly on the case law of the ECtHR.[[56]](#footnote-57) However, two further shortcomings were also highlighted by the ECJ, though not as prominently: the absence of rules regarding the security of stored data and a requirement to store data within the EU.[[57]](#footnote-58) These two further shortcomings were premised on the standards of the DPD and the E-Privacy directive rather than the case law of the ECtHR, which may explain why they appeared to be given less prominence. Kühling and Heitzer (2014: 264-265) include these two further reasons in their explanation of why the DRD was struck down. As a result, there is now some lack of clarity as to what the exact scope of the Court’s proportionality test is for the balance between data protection and data retention. Whilst this shortcoming may be limited to the specific case of data retention, it is certainly relevant if the EU legislators are to replace the DRD in the future, as the Commission has suggested.

*Digital Rights Ireland* marks a significant moment in the protection of rights by the ECJ. Buoyed by the Charter of Fundamental Rights being granted legal value, the ECJ has demonstrated its willingness to exert judicial review of EU legislation through the application of a strict proportionality test to ensure that fundamental rights are respected (Granger and Irion, 2014: 844-845). Granger and Irion (2014: 850), drawing on Steve Peers, argue that if the ECJ persists in exercising this oversight over the EU legislators, *Digital Rights Ireland* may mark a ‘”foundational moment” in EU constitutionalism’ due to its potential to reconfigure EU inter-institutional relations. It also appears that the other EU institutions are taking this new oversight seriously. The legal service of the Council has issued guidance stating that legislators must conduct a strict assessment of proportionality and necessity if measures seriously restrict fundamental rights (Ferraro and Carmona, 2015: 21). According to an official in the Commission, the case has been used to bolster the role of mainstreaming fundamental rights in order to avoid future embarrassment.[[58]](#footnote-59) The indication from *Digital Rights Ireland* is that the ECJ is rather strict when it comes to ensuring rights are adequately respected in EU legislation, rather than these issues being left to national authorities when transposing Union law (Kühling and Heitzer, 2014: 266).

However, the exact scope of this oversight is not clear. It is notable that data protection and privacy rights are among the most well developed in the case law of the ECJ (see P. Oliver, 2009; Kranenborg, 2014). Granger and Irion (2014: 846) highlight that non-discrimination based on sex, due process rights, and the right to property also appear to enjoy a higher level of protection. Whilst this should come as little surprise, given that the judicial enforcement of civil rights such as these is not usually controversial in Europe, it is not clear if such judicial oversight would take place for the full body of rights in the EU’s Charter. As highlighted in chapter five, the Court’s record on social rights has been criticised for appearing to be afforded a secondary status. Furthermore, Granger and Irion highlight that the ECJ downplayed the internal market basis for the DRD in *Digital Rights Ireland* and emphasised the ‘unofficial’ security objective of data retention. This, they argue, was to allow the Court to build on a trend whereby security measures are afforded a stricter rights test, whilst allowing a lower standard to be applied to internal market measures (Granger and Irion, 2014: 846-847). Essentially, it is clear to the EU legislators that there is a strict standard to be met when they are legislating on data retention at least, but the level of judicial oversight for many other rights and internal market measures remains to be clarified.

It should also be noted that *Digital Rights Ireland* was not the first time the DRD had been examined by the Court. As highlighted above, the Irish Government unsuccessfully challenged the legality of the directive based on treaty competence. In addition to this case, the Commission hauled Sweden before the ECJ for not transposing the DRD into national law, resulting in a fine of 3 million Euros.[[59]](#footnote-60) Neither of these cases considered the compatibility with fundamental rights. It was only when an NGO called Digital Rights Ireland directly challenged the DRD on rights grounds that the Court considered this issue. Combined with the difficulties in accessing the ECJ (see de Witte, 1999: 875-877), this succession of cases does not make for a particularly efficient mechanism of rights protection.

Despite several shortcomings, *Digital Rights Ireland* is an important case for two reasons. First, a strong commitment to the protection of data protection and privacy rights has been demonstrated. It should be noted that this point marks a continuation of a trend apparent prior to the Charter gaining legal value, which is that the ECJ was generally considered to protect civil rights to a high standard. In *Digital Rights Ireland*, the fact that the ECJ drew on the case law of the ECtHR helped to ensure consistency between these two rights regimes in Europe. Second, the ECJ has demonstrated a willingness to step up its judicial review of the EU legislators to protect (certain) rights. This second point does appear to have been influenced by the entry into force of the Treaty of Lisbon and the Charter being granted legal value similar to that of the EU treaties. The Charter being granted legal value indicates the political acceptance of the primacy of rights by the EU member states. The Court has indicated that this is a commitment it takes seriously.

### 4.3.2. Anti-Trade in Counterfeiting Agreement

Between 2008 and 2012, a group of advanced capitalist states, led by the United States and Japan and including the EU as a single bloc, negotiated ACTA. The purpose of ACTA had been to establish an international framework for enforcing intellectual property rights, including combating internet piracy. Internet piracy is generally considered to be a civil offence in Europe: the wilful infringement of copyrighted property (mainly film, music, and television shows) through downloading and sharing. It is in combating internet piracy that infringement of fundamental rights to privacy and data protection are most at risk, which is the focus of this section. Throughout the negotiation period for ACTA there had been numerous interventions by the European Parliament, the EDPS, and European academics, as well as street protests in numerous European cities, all highlighting the absence of transparency of the negotiations and potential conflicts with fundamental rights in the treaty (see Matthews and Zikovska, 2013; Baraliuc et al. 2012). Within the EU, ACTA was supported by the Commission and the Council, the latter having adopted the treaty by unanimity in 2011. However, the Parliament, exercising new powers granted to it under the Lisbon treaty (Article 281 TFEU), refused consent in 2012, thus preventing the EU from ratifying ACTA.

In its resolution rejecting ACTA, the Parliament did not state any specific reasons for its actions (European Parliament, 2012). However, previous resolutions by the Parliament on this issue had highlighted several concerns, including the general absence of transparency over negotiations, the exclusion of the Parliament itself, and concerns over fundamental rights (European Parliament, 2010). The Parliament also drew on the opinion of the EDPS, which focused on potential incompatibilities between ACTA and the fundamental rights to privacy and data protection. As EU standards on fundamental rights played a role in the rejection of ACTA, it is necessary to understand what issues were raised.

However, it should be noted that the text of ACTA outlines many proposed anti-piracy measures as voluntary, does not provide precise details on these measures, and states that any action to enforce intellectual property rights in a digital environment should also ‘preserve’ fundamental rights. Yet the voluntary and vague nature of these proposed measures to combat internet piracy has not allayed fears over their interference with rights. There is scepticism that the rights standards alluded to in ACTA are not equal to those stipulated by the ECJ (EDPS, 2012a: 14-15). Nonetheless, it should be noted that due to the voluntary wording of anti-piracy measures, it is not clear if ACTA would or would not have met the fundamental rights standards of the ECJ. The Commission certainly felt that there was no danger of rights infringement (see Matthews and Zikovska, 2013) and requested that the ECJ examined ACTA just in case, but this request was withdrawn as the Parliament rejected the treaty anyway.

Two key areas of ECJ case law on privacy and data protection in particular do not sit comfortably with ACTA provisions: monitoring and filtering online communications and extra-judicial activities involving the transfer of personal information. In the cases of *Scarlet Extended[[60]](#footnote-61)* and *Netlog[[61]](#footnote-62)* national courts, at the behest of copyright holders, had obliged the providers of online communication services to set up monitoring and filtering systems that effectively process the personal data of all users. It should be recalled, as outlined above, that the E-Privacy Directive prohibits monitoring of communications networks. Although this prohibition is subject to exceptions such as the enforcement of criminal law, the civil nature of online copyright infringement that these monitoring system were designed to combat meant that this exemption did not apply. The ECJ found these systems to be incompatible with EU law as they, *inter alia*, interfered with individual users’ right to privacy due to indiscriminate monitoring of all users’ personal information sent over online communications networks (Baraluic et al. 2012: 97). Building on these cases, the EDPS considers that such invasive large-scale monitoring is disproportionate to combating internet piracy, which tends to be small-scale and non-profit copyright infringement, whilst targeting monitoring of select individuals suspected of copyright infringement in the context of judicial proceedings would strike the appropriate balance (EDPS, 2012a: 6). The ECJ has also set out when it is appropriate for the personal information of suspected copyright infringers to be transferred between actors. In the cases of *Promusicae[[62]](#footnote-63)* and *Bonnier Audio[[63]](#footnote-64)* it was established that personal information passed from internet service providers to copyright holders in the context of civil judicial proceedings strikes a fair balance between the protection of privacy and combating internet piracy. The EDPS has taken these cases to mean that only judicial authorities can order personal information held by providers of electronic communications to be disclosed to copyright holders (EDPS, 2012a: 11).

The EDPS raised specific concerns with two enforcement mechanisms contained in Article 27 of ACTA: a commitment to promote cooperative efforts within the business community to address internet piracy (i.e. between internet service providers and copyright holders) and a mechanism through which a competent authority may order an online service provider to disclose personal information of suspected copyright infringers to copyright holders. The EDPS felt that for such enforcement mechanisms to effectively work they would require widespread monitoring of online communications and also raised concerns that the term ‘competent authority’ would potentially allow for non-judicial authorisation of disclosure of personal data (EDPS, 2012a: 10-13). Both issues risked running afoul of the ECJ case law mentioned above. This largely boils down to the nature of internet piracy and how it can be tackled. Detecting internet piracy tends to involve monitoring the communications of all users over a network in order to determine those engaging in illegal activities. It is this type of widespread monitoring that the EDPS fears ACTA promotes under its provision on cooperative efforts within the business community, not least because copyright holders have repeatedly pursued such strategies (Baraluic et al 2012: 95-99). Furthermore, some level of monitoring would be required for copyright holders to even identify suspects before they could request personal information from a competent authority.

Although other issues also contributed to the Parliament’s rejection of ACTA, not least the Parliament’s own indignation about its exclusion and absence of transparency, fundamental rights concerns about widespread monitoring and extra-judicial enforcement were key issues (Matthews and Zikovska, 2013). As demonstrated in chapter three, the Parliament has historically been a vocal defender of fundamental rights but had often lacked the political power to put words into action. Now with enhanced powers granted by the Lisbon Treaty, the Parliament has shown that it is willing to continue defending rights. However, this event should not be exaggerated. As highlighted above, data protection and privacy rights are fairly traditional civil rights and enjoy a particularly well developed framework in the EU. Data protection and privacy rights are amongst those rights that feature most prominently in the case law of the ECJ and also enjoy additional detailed insights from a dedicated EU data protection supervisor, thus ensuring their prominence when potential interference arises. As chapter fivedemonstrates, it is not clear that social rights enjoyed this same level of attention from the Parliament. Nonetheless, with a history of commitments to rights issues, an increased role of the Parliament looks set to ensure that data protection and privacy rights will play a prominent role in relevant EU affairs.

### 4.3.3. Reform of Data Protection Laws

In 2012 the Commission launched a reform of EU data protection rules. This reform package was based on a new stand-alone treaty competence on data protection (Article 16 TFEU). Two pieces of legislation have been negotiated simultaneously: the General Data Protection Regulation (GDPR) to replace the 1995 DPD and the Directive on Data Protection in Police and Crime (DDPPC) to replace the data protection framework decision under the now defunct third pillar. The incentive behind this legislative reform is similar to that of the original Data Protection Directive in 1995: the harmonisation of data protection rules to support the single market and to ensure the protection of fundamental rights. It has been widely recognised that the DPD failed to ensure an adequate level of harmonisation due to national variations in implementation, leading to the choice of a regulation as the legislative instrument for general data protection (European Commission, 2012a). The pace of technological change, particularly the growth of the internet and emergence of online services, has also necessitated that the legal framework for data protection is updated. This section considers, in turn, the GDPR and the DDPPC and what implications they have for rights protection in the EU.

The legislative process for the GDPR was quite long and contentious, eventually entering informal ‘trilogue’ negotiations between the Commission, Council, and Parliament. It is thought to be one of the most lobbied bills in the history of the EU, with over 3,000 amendments tabled in Parliament and strong pressure from both industry (particularly US based internet companies that thrive on data) and privacy campaigners (Cannataci, 2013: 15). It has been argued that industry lobbyists attempted to scupper the regulation by encouraging amiable MEPs to table excessive amendments to prevent it passing through the legislative process (Cannataci, 2013: 15; EDRi, 2013). Differences of opinion among member states on specific provisions also led to lengthy delays (EUobserver, 2013). As a regulation, the GDPR applies directly to member states. There is no scope for domestic transposition to smooth over differences in national contexts, making agreement among national governments more difficult.

Nonetheless, the GDPR appears to have overcome these hurdles largely intact. The reason for this is that the institutions of the EU were largely in agreement over the need for a new data protection regulation. The original proposal from the Commission was generally received positively, being described as a ‘a cause for celebration for human rights’ by some academics (de Hert and Papakonstantinou, 2012: 141) and as constituting ‘a huge step forward for data protection in Europe’ by the EDPS (EDPS, 2012b: 3). Due to strong domestic standards of data protection in Germany and France and the strength of these states in the Council of the EU, the Council has had a generally favourable attitude towards this regulation (Spahiu, 2015: 3). However, it should be noted that the Council’s position was closer to the standards already contained in the DPD. Essentially, it recognised the need for a regulation to ensure the harmonisation of data protection, but felt the actual provisions of the regulation should be close to the original DPD (Peers, 2015). The Parliament did seek to establish higher and clearer rights standards, but not to significantly depart from the original proposal of the Commission (Peers, 2015; see also Bessant, 2015: 16-17; Erdos, 2015: 558 on balancing expression and privacy rights).

The outcome of this legislative process is a regulation that largely mirrors the original DPD it is to replace, but also contains some enhanced data protection provisions. The old framework of imposing obligations on data controllers and data processors and granting rights to individuals is retained, though it has been suggested that concepts such as data controller and data processors may no longer fully encapsulate the nature of online and cloud computing (de Hert and Papakonstantinou, 2012: 133). However, the GDPR does take into account some modern technologies, including the fact that it is now possible for data processing to be invasive without knowing the actual personal identity of an individual. For example, it states that data processing covers online identifiers such as Internet Protocol addresses and internet cookies, which could be combined with other data to create personally identifiable information (Costa and Poullet, 2012: 255). The new provisions include obligations on data controllers to ensure data portability, implement principles of data protection by design and by default, to appoint data protection officers (for companies over a certain size), and inform users if their data is hacked. Data protection authorities have been granted enhanced powers to fine and sanction data controllers. Individuals have been granted enhanced provisions on ensuring their consent is sought for processing, to access their information, and the right to be forgotten (see Costa and Poullet, 2012; de Hert and Papakonstantinou, 2012; Council of the EU, 2015). It is this last provision, the right to be forgotten, that has proved most controversial and is worth considering in more detail.

The right to be forgotten is essentially a means for individual to exert some level of control over their personal data. If requested by an individual, data controllers must delete the personal information they hold on that individual, unless a specific criteria for retaining that information is met (see Council of the EU, 2015a: 107-108). This was viewed as an advancement of the right to erasure already in the 1995 DPD, which was limited to only data that does not comply with the provisions of the DPD itself. The right to be forgotten has developed in response to the permanence and ubiquity of information on the internet. Whilst some view it as a necessary means to assert individual control over easily accessible information (Spahiu, 2015; Bernal, 2011), others have raised fears about restrictions on freedom of expression and creeping censorship (Rosen, 2012).

Whilst earlier debates around this right centred on its inclusion on the GDPR, it has received significantly more attention recently due to the ECJ ruling in *Google Spain[[64]](#footnote-65)* in 2014 that the right to be forgotten already exists in EU law. Based on the rights to privacy and data protection and the provisions of the DPD (including those on erasure of personal data), the ECJ ordered the search engine Google to remove links to a newspaper article detailing a Spanish man’s financial difficulties. In doing so, the ECJ set out that the rights to privacy and data protection override the economic interest of the search engine and the right of the public to access information, unless the personal information in question were to relate to an individual in public life.[[65]](#footnote-66) Following this case, Google has developed a procedure based on the ECJ’s reasoning through which it processes deletion requests by individuals.

One of the key criticisms that scholars have levied at the ECJ is that it did not consider freedom of expression when balancing the right to be forgotten against other rights (Kulk and Borgesius, 2014; Frantziou, 2014). Fears have been raised that the right to be forgotten established in *Google Spain* may not be compatible with the case law of the ECtHR, which has itself refrained from establishing such a right in similar cases by giving more weight to freedom of expression and society’s right to access information (Frantziou, 2014: 773-774). However, these fears of incompatibility rest primarily on the ECJ failure to account for balancing freedom of expression in its reasoning. In its provision on the right to be forgotten, the GDPR provides for an exception where freedom of expression is at stake. This means that any future ECJ cases on the issue should therefore have to directly consider the balance between these competing fundamental rights, thus overcoming this central criticism.

The DDPPC has followed the same path as the GDPR. After years of negotiations at the EU level, the directive eventually entered informal trilogue discussions at the end of 2015. The Commission’s original proposal for the DDPPC was immediately met with a negative response. The EDPS stated that it was ‘seriously disappointed’ as the directive provided ‘an inadequate level of protection, by far inferior to the proposed [GDPR]’ (EDPS, 2012b: 4). Whilst the GDPR enjoyed more widespread support in the Parliament, the DDPPC was more contentious (see also Ermert, 2013).[[66]](#footnote-67) The Parliament proposed various amendments in an attempt to improve the level of protection of rights. These amendments included pushing the directive towards establishing minimum standards on rights, bolstering the principles on which data should be processed, and enhancing the powers of national data protection authorities to provide oversight (European Parliament, 2014a). However, these amendments have been subject to intense scrutiny and reluctance from member states in the Council, where the DDPPC has proven to be particularly controversial (Council of the EU, 2015b). A number of member states, including Germany, the UK, and Spain, were reluctant to move forward on the issue when the framework decision it is designed to replace had not even been fully implemented. The UK also held the position that it considered the much criticised rights standards of the Framework Decision to be adequate (Council of the EU, 2013a: 2). The indications from the EU’s data protection bodies are that rights issues remain. In a more recent opinion, the EDPS adopted a conciliatory tone, noting its previous disappointment, but focusing instead on urging the legislators to adopt higher rights standards (EDPS, 2015). The EU’s other data protection body, the Article 29 Working Party, also raised fears that the directive does not limit interferences with individuals’ private lives to what is strictly necessary, which it noted is required by the ECJ (Article 29 Working Party, 2015: 2).

It should be noted that despite the criticisms, the DDPPC is considered superior to the framework decision that has replaced (EDPS, 2015). In particular, the proposed directive will cover domestic data processing, thereby departing from the problematic scope associated with the Framework Decision (Hijmans and Scirocco, 2009). The DDPPC approaches data protection in standard EU fashion: it sets out conditions in which it is legitimate to process personal data, obligations that authorities processing data have towards data subjects, rights of individuals concerning their data, and the role for independent supervisory authorities. In various provisions, the Commission has demonstrated that it has sought to ensure the provisions of the directive match the standards of the Council of Europe recommendation on the use of personal data in the police sector and the case law of the ECtHR (see Articles 5, 6, and 8 in particular, European Commission, 2012a).

However, fundamental rights concerns are present, particularly after the Council added several provisions. In its final opinion on the directive, the EDPS warned that the ECJ has developed a strict proportionality test on data protection in *Digital Rights Ireland* and highlighted three areas of concern: allowing data processing for purposes other than that for which the data was originally collected, inadequate rights to access and information for individuals to their personal data, and lower levels of oversight by independent data protection authorities than in the GDPR (EDPS, 2015). In these areas, the EDPS stated that the directive also risks falling below the standards of the Council of Europe (EDPS, 2015: 6-9). Similar concerns have also been raised by the Article 29 Working Party, which has drawn on rights case law of both the ECJ and ECtHR to argue that the interferences with the rights to privacy and data protection in the DDPPC risk not being limited to what is strictly necessary (Article 29 Working Party, 2015: 2). The final compromise text of the directive, post-trilogue process, has added some qualifications to these areas of concern, though it remains to be seen if these meet the rights standard of the ECJ (and possibly the ECtHR, if the EU eventually accedes to it). Finally, criticisms have been levied at the decision to create a separate regime using a directive for data processing in police and crime. It has been noted that the use of a directive is inconsistent with the stated aim of harmonising data protection rules, given that the rationale behind the GDPR was that the previous directive in this area had failed to ensure harmonisation (Cannataci, 2013: 15). This means that different standards of rights protection will not only exist between different actors within states, it is also very likely that different EU member states will have different levels of rights protection in their law enforcement agencies.

It should also be noted that the DDPPC does not apply to the activities of state security bodies. This should not be particularly surprising, as national security largely remains outside of the competence of the EU (see Title V, TEU). However, it is worth highlighting given the revelations made by Edward Snowden in 2013 regarding mass surveillance programmes undertaken by several states (see Ball, Borger, and Greenwald, 2013 for details). Whilst the bulk of these revelations regarded the United States’ National Security Agency, within the EU the UK’s Government Communications Headquarters was (and likely still is) heavily engaged in this type of surveillance. This indiscriminate mass surveillance is almost certainly a violation of fundamental rights to privacy and data protection as it surpasses the level of data retention found illegal by the ECJ in *Digital Rights Ireland*. Despite national security falling outside the jurisdiction of the ECJ, the Court has still been able to exert its authority where possible. In the case of *Schrems[[67]](#footnote-68)* in 2015, the ECJ struck down a Commission decision authorising EU citizens’ personal data to be transferred to the US under a programme known as ‘Safe Harbour’, a programme that allowed US companies to provide services within the EU whilst processing personal data back in the US. Max Schrems argued that mass and indiscriminate access to personal data by US authorities once the data had been transferred to the US, as revealed by Edward Snowden, was a violation of the fundamental rights to privacy and data protection, which was upheld by the ECJ.[[68]](#footnote-69) It should also be noted that the European Parliament has been particularly critical of US and UK spying programmes, having passed several resolutions and set up an inquiry by the LIBE Committee (see, for example, European Parliament, 2014b). However, the EU largely lacks the competence to act in this area. Even if it did, it is unlikely member states would consent to any changes here. Not only was the UK heavily involved in surveillance, the security services of other member states also collaborated with US and its spy programmes (Dworkin, 2015: 4). Essentially, the point is that the DDPPC sets out some level of data protection for law enforcement, but not for state security bodies. This means that violations of the rights to privacy and data protection most likely continued to happen on a massive scale within certain EU states.

These pieces of legislation and their process through the institutions of the EU demonstrate some important insights into fundamental rights. The GDPR continues the trend already seen in data protection (outside of police and crime) prior to the Treaty of Lisbon. That is, there is a clear recognition that data protection requires a specialised legal framework to ensure that both the single market functions smoothly and rights are adequately protected. This framework involves creating a legal definition for new actors (i.e. data controllers and processes), obligations on those actors, establishing specific rights for individuals, and ensuring oversight by appropriate technocratic bodies. Whilst the key elements of this framework were established by the DPD back in 1995, the GDPR demonstrates that legislative steps are still viewed as necessary to ensure the adequate protection of privacy and personal information rights, particularly in light of technological advancements in data processing. The DDPPC also makes some attempts to create a legal framework for data processing in police and crime, but falls short of the standards of the GDPR. Again, the need to legislate in this area has been recognised, but barriers to cooperation primarily due to sovereignty concerns amongst member states have impeded developments. The areas covered by the GDPR have experienced EU activity for over two decades, helping to smooth out concerns over the impact of the regulation. Law enforcement, on the other hand, has only recently been exposed to EU activities and remains a key area of sovereignty for national governments.

## 4.4. Discussion and Conclusion

My overarching argument is that fundamental rights have developed in the EU as part of a process to support and legitimise the European integration project, having been constructed in a *post hoc* and *ad hoc* fashion primarily by the ECJ and endorsed by the political institutions as outlined in chapter three. This development has shaped how fundamental rights are understood in the context of European integration, such as what rights are protected and how they are to be protected, as European actors have sought to mould rights to support the dominant approach to integration. Fundamental rights, which are more commonly associated with national constitutional orders and the Council of Europe, are understood in a specific fashion in the EU that has been shaped by their historic development. Yet whilst this historic development bears grave implications for social rights, as explored in chapters five and six, the process of the construction of rights has generally suited the nature of civil rights. The ease through which civil rights can be protected via judicial enforcement has seen them feature prominently in the case law of the ECJ and therefore in process of construction of fundamental rights in the EU. The indication from chapter three is that civil rights are adequately protected in the EU. The purpose of this chapter has been to analyse in detail how two civil rights, the rights to privacy and to data protection, are protected in practice and to explore if the changes introduce by the Treaty of Lisbon in 2009 have altered how rights are protected.

Viewing the development of fundamental rights through the lens of critical constructivism highlights the importance of institutional and paradigmatic factors that have shaped how rights are understood. Chapter three focused on how these factors have led to the broader concept of fundamental rights being understood primarily in terms of civil rights. It should be recalled that on the institutional side, the ability of the ECJ to reinterpret the treaties to introduce rights while facing constraints arising out of formal rules and informal expectations was central to shaping how the concept of fundamental rights is understood. The barriers to positive political developments arising mainly out of the absence of consensus in the Council reinforced the importance of the ECJ’s construction of rights. On the paradigmatic side, itself influenced by these institutional factors, the dominance of embedded neoliberal economic principles has tempered the strength of the legal value afforded to rights, though this side is of more concern to the realisation of social rights as addressed in subsequent chapters. Examining specific civil rights, the rights to privacy and protection of data, it has been possible to draw out further details of how these institutional and paradigmatic factors have impact on civil rights.

As chapter two outlined, barriers to positive integration and the role of the ECJ have contributed to neoliberalism becoming embedded in the EU and that neoliberalism and civil rights are generally compatible with one another due to their shared liberal heritage. The convergence between neoliberal ideas, particularly regarding the creation and expansion of the market, and data protection and privacy rights has underpinned key legislative developments in this area. From the DPD to the GDPR, ensuring a single set of standards for data protection rights across the EU has gone hand-in-hand with upholding and expanding the single market. Though the necessity of taking action to ensure the functioning of the EU single market has permitted some interference with the freedom of individual private actors due to its post-national nature, particularly when viewed in contrast to the very lightly regulated US model, the goal of ensuring market competition has remained a key motivation. This convergence of liberal interests is reminiscent of the early introduction of civil rights alongside economic liberalism in the 18th and 19th centuries, in which civil rights were used to help break down barriers to capitalist free market competition. These legislative developments have also been aided by the compatibility between protecting data rights and privacy and the institutional framework of the EU, particularly regulatory style that does not entail significant public spending and is more reliant on quasi-autonomous technocratic agencies and judicial enforcement (see Majone, 2005).

However, it is also evident that data protection and privacy developments are not reducible to neoliberal or market principles. At times, heightened security concerns have led to legislation being passed (or rather, rushed through) that undermine privacy and data protection rights. In such situations, the checks and balances of the EU have eventually remedied the situation, particularly due to the strong institutional role of the ECJ and the ease at which these rights can be protected judicially. It is evident from this chapter that the protection of data rights and privacy is a goal in itself, beyond the convergence with neoliberal economics. If neoliberal market competition were the only goal, the EU legislators would be expected legislate lower standards than those that have been created – which, as highlighted above, has not been the case. The protection of these rights has also advanced beyond their association with upholding the single market. In one case, the European Parliament has struck ACTA at least partially on the basis of interference with data protection and privacy rights, which arguably runs counter to neoliberal ideas about the freedom afforded to market actors. Finally, legislative developments on data protection have advanced beyond the single market as the EU has sought to regulate data protection in the police sector, albeit to a lower standard than the new single market regulation.

These examples demonstrated how the institutional framework of the EU has played a key role in enhancing the protection of civil rights by ensuring that checks and balances are in place, which is consistent with the argument developed in chapter three regarding the compatibility of the EU institutional framework with civil rights and the absence of any serious tensions with the neoliberal paradigm. The strength of the ECJ in the institutional framework of the EU and the ease at which data protection rights may be protected via judicial enforcement has ensured that even when the EU legislators fall short, violations of rights can be remedied. While the ECJ has historically enjoyed a strong position within the institutional framework of the EU, the more prominent role granted to fundamental rights by the entry into force of the Charter and its inclusion of an explicit right to the protection of personal data appears to have enhanced the power of the Court and its willingness to exert full judicial review of EU legislation. The enhanced role of the European Parliament since the Treaty of Lisbon has directly contributed to a more prominent consideration of rights, as it provides an institutional actor with a strong track record of promoting rights with a means to puts words into action. The Parliament has demonstrated its willingness to exercise its new power to scupper international agreements on the basis of inadequate protection of rights. Where the institutional framework of the EU permits it, fundamental rights do appear capable of surpassing neoliberal economic principles as core values of the EU. Yet any potential development here is restricted by the way in which the institutional framework is structurally predisposed towards civil rights and their liberal background that renders them more compatible with neoliberal economics.

The developments surrounding privacy and data protection rights in contemporary EU politics demonstrate a fairly strong and well-functioning framework for the protection of rights. This should not be particularly surprising. Privacy and data protection fit comfortably with the concept of judicial enforcement that has traditionally characterised civil rights protection, as the level of ECJ case law in this area has shown, and pose few problems to how European integration has traditionally been pursued. Yet the way in which privacy and data protection rights are protected goes beyond judicial enforcement in the traditional sense. It is not sufficient for a court to simply restrain the state or public authorities. Instead, an entire legal framework has been actively constructed to ensure that privacy and data protection are adequately protected. This framework still retains a strong judicial element: it ultimately relies on courts to be the final arbitrator. Yet for courts to be effective, a framework defining key terms and actors, imposing responsibilities, creating enforceable rights for individuals, and establishing technocratic bodies to provide oversight has been created. The provision of expertise by bodies such as the EDPS and Article 29 Working Party has ensured that data protection issues do not go unnoticed and the strengthening of the role of the Parliament has ensured that a body receptive to rights issues has the power to act. Where legislative developments have undermined rights, the ECJ has stepped in, albeit with some time delay. These developments represent an important development in how civil rights are protected: the recognition that certain civil rights require active steps by political actors to create a framework to ensure rights are respected, including through the creation of technocratic bodies. The major exception to this is data retention by security services and spy agencies, though this is an area that has generally not been subjected to national data protection or privacy laws either.

Though the general standard of rights protection at the EU level is generally high, key differences remain between EU institutional actors. These differences are consistent with the institutional approaches to rights seen in other chapters. The Council has generally proven to be the most reluctant actor when it comes to improving data protection standards. Whilst high domestic standards in France and Germany have helped to ensure that proposed EU standards are high, the difficulties in negotiating an agreement, particularly with governments keen to retain sovereign control of data processing such as the UK, have generally impeded developments. Whether it is negotiating an international treaty or EU legislation, the standards agreed in the Council have tended towards a lower level of protection. Furthermore, in areas of more acute sovereignty concerns, such as law enforcement, member states have been particularly reluctant to establish high standards at the EU level, opting (eventually) for a directive that allows for more national flexibility despite the drawbacks evident from experience with the DPD. The Parliament, by contrast, has demonstrated more support for higher levels of protection, though how far it is willing to push has varied. The desire to achieve a legislative outcome has resulted in the Parliament compromising when negotiating EU legislation. As the case of the DRD demonstrates, this compromise is sometimes too low. Yet the Parliament has also adopted a tougher stance at times, though this cannot be put down to rights concerns alone. The Parliament’s own fury at being excluded from negotiations and sustained pressure from NGOs and street protests all contributed to the refusal to consent to ACTA. In between these two positions is the Commission, the institution that has been the driving force behind the legislative developments and often adopting a position palatable to both the Council and Parliament.

Finally, it is necessary to put the findings of this chapter regarding how rights are understood into the context of the broader understanding of fundamental rights found in chapter three. Chapter three highlighted how fundamental rights are predominately viewed as civil rights, limited in scope to the jurisdiction of the ECJ, and as of equal value to certain core economic principles. Given that this understanding of fundamental rights has developed primarily around civil rights in the first place, there is not too much to add. The developments around data protection have helped to solidify civil rights at the top of the legal hierarchy and the ECJ’s further development of judicial review powers has potentially enhanced this, yet the absence of direct clashes between these rights and the freedoms of the single market mean that the relationship between rights and neoliberal economic principles cannot be drawn out too much further. It is notable that the legislative developments around data protection and privacy rights have been motivated by both a desire to protect these rights and to uphold the single market freedoms. This convergence of rights protection-single market interests leaves the equal value historically afforded to both principles unchanged, though the development of a directive on data protection in police and crime does indicate a tentative step towards uncoupling these interests. Data protection rights are also firmly within the jurisdiction of the ECJ as they are not addressed under any OMCs or economic governance procedures, though the jurisdictional scope has expanded due to the abolition of the pillar structure and incorporation of police and crime matters into the EU legal framework. The main advancement in data protection and privacy rights is the idea that civil rights sometimes require the creation of a specialised legal framework complete with expert bodies in order to ensure adequate protection, thereby incorporating the idea of fundamental rights as programmatic principles to be implemented via legislation. Yet it should be noted that this conception of data rights was present before the Charter advanced the programmatic principle.

# 5. Labour Rights in the European Union

The focus of this chapter is the EU’s engagement with the fundamental labour rights to collective bargaining, protection against unfair dismissal, and fair pay. These are three core labour rights that have played a crucial role in the process of de-commodification of labour that has characterised the post-World War II European social settlements. As European integration has advanced ever further, areas of labour policy that previously fell outside of the scope of direct EU activities have increasingly become encompassed under the sphere of EU influence. The expansion of EU competences in this area has also coincided with a shift towards a greater acceptance of neoliberal ideas about how the state should engage with the economy and society, as highlighted in chapters one and two, which has resulted in downward pressure on labour. In particular, the Eurozone crisis that began at the end of 2009 and the political response to this crisis have had a strong impact on the realisation of labour rights, as well as social rights more broadly. The labour rights covered in this chapter provide a means to analyse how the EU has engaged with those fundamental rights that represent social values and the issue of justiciable and programmatic rights that has characterised social rights in the EU. How the EU engages with labour rights has strong implications for the future of the social settlements that have hitherto characterised post-war European society.

The three labour rights addressed in this chapter have been selected for a variety of reasons. As already noted, collective bargaining, employment protection, and fair pay have played a central role in the post-war European order. These three issues are also strongly interlinked, as in many European states collective bargaining plays a key role in determining employment conditions and pay. Furthermore, these rights also cross-cut the judicial and programmatic nature ascribed to fundamental rights. The right to collective bargaining is of a similar nature to many civil rights as it does not require significant public spending to uphold, an argument that is often used to deny social rights justiciability. Indeed, the ECJ has recognised the right to collective bargaining as a fundamental right in its case law, though as noted in chapter two the engagement of the ECJ in this area has been subject to criticism from labour lawyers and trade unions. The rights to protection against unfair dismissal and fair pay tend to require either legislative or collective action and so are often not immediately justiciable. It is also notable that whilst the rights to collective bargaining and protection against unfair dismissal are both in the Charter of Fundamental Rights (Articles 28 and 30 Charter of Fundamental Rights, respectively), the right to fair pay is not present in this catalogue of rights. Yet the right to fair pay does appear in the ESC (Article 4 ESC), whilst many national constitutions also contain a right to minimum or fair pay. As noted in chapter three, the sources of rights in the EU are broader than just the Charter and include the ESC and national constitutions (see also Bercusson, 2005a: 170 on social rights and the Charter). Finally, it is necessary to specify one aspect that this chapter does not address. Non-discrimination on grounds such as gender, sexual orientation, age, race, ethnicity, and disability is an important part of employment protection and fair pay, but is often addressed separately under the right to non-discrimination. This chapter is concerned with labour rights as a means to redress the power imbalance between labour and capital (see McKay, 2013: 192-193). This is not to suggest that non-discrimination aspects of employment protection and fair pay are not important. Rather, these issues are addressed in the following chapter, which is specifically on non-discrimination and equality.

It should be recalled that the dominant understanding of fundamental rights in the EU constructed throughout their development is that rights are primarily civil rights, applicable only under the jurisdiction of the ECJ, and of equal value to market principles embedded in the treaties. Social rights have historically been afforded a secondary status and the issues surrounding their inclusion in the Charter has restricted their scope for future development. The nature of social rights is also less certain, as only certain select rights (such as collective bargaining) have been explicitly ruled on by the ECJ, whilst most others are thought to be of a programmatic nature. The purpose of this chapter is to analyse the EU’s engagement with specific labour rights to determine if this broader understanding of rights is accurate, to see if there have been any further developments since the Charter gained legal value in 2009, and to consider the implications of the way in which the EU has constructed fundamental rights in this area. To do this, this chapter highlights appropriate rights standards by looking to the ESC under the Council of Europe, considers the history of EU engagement with labour rights before the Charter gained legal value in 2009, and then looks to the post-2009 period to analyse developments in the EU that affect fundamental rights. The reason for this approach should be considered in light of the critical constructivist framework highlighted in chapter one. This framework highlights the importance of analysing critically how the prevailing political order on rights has been constructed, looking to the ideas that underpin it and how they have been shaped by different actors. Whilst chapter three looked at the development of rights more broadly within the constitutional order of the EU, this chapter focuses specifically on how labour rights have been understood within the political activities of the EU. In particular, the focus of this chapter allows it to draw out the relationship between neoliberal values and fundamental social rights and to consider the realisation of rights as programmatic principles.

The findings of this chapter are broadly consistent with the dominant understanding of fundamental rights ascertained from chapter three, with developments since 2009 following the same path. That is, social rights are still conceptualised as second class rights of lesser value to neoliberal economic principles and the scope of rights has remained limited to the jurisdiction of the ECJ. Both of these aspects of the understanding of fundamental rights are particularly important in this case, as the response to the Eurozone crisis has seen the further development of new governance procedures that have prioritised neoliberal principles without any procedural mechanism to ensure the protection of rights. Through reference to the social rights standards in the ESC under the Council of Europe, it is evident that EU activity in response to the Eurozone crisis has contributed to social rights being undermined.

This chapter proceeds in three stages. First, labour rights standards under the ESC at the Council of Europe are highlighted in order to identify appropriate European standards in this area. Second, the history of EU engagement with labour rights prior to the Charter gaining legal value at the end of 2009 is considered. Finally, the primary focus of this chapter is an analysis of EU activity in the Eurozone since 2009. It is notable that since 2009, there has been a marked absence of traditional EU legislative activity on labour issues and a significant shift towards new governance methods under EMU in the form of the European Semester and the bail-out mechanisms. The final section therefore focuses specifically on these new governance reforms in EMU.

## 5.1. Labour Rights under the Council of Europe

As highlighted in chapter two, the Council of Europe has developed a range of social rights standards in the ESC. To briefly recap, the ESC was first signed in 1961 and revised in 1996, in which a number of new rights were added. The intention is for the revised ESC to replace the original 1961 version, though both are currently in force as not all European states have signed or ratified the revised version. There are also two monitoring and enforcement systems currently in effect under the ESC that are administered by the ECSR. The first is the reporting procedure. The ECSR monitors compliance with the ESC on a multi-annual cycle based on implementation reports submitted by national governments. To ensure the work load of the ECSR is manageable the rights in the ESC are subdivided into four thematic groups, for which conclusions are adopted for one group every year. The conclusions adopted by the ECSR identify whether or not the state party is in conformity with the ESC rights and have contributed towards the development of a body of standards. It should be noted that it takes four years for the ECSR to examine compliance with the full body of rights in the ESC. The labour rights that are the focus of this chapter constitute one thematic group. The second enforcement system is the collective complaints mechanism, which was introduced by an additional protocol in 1995. This mechanism follows a quasi-judicial procedure by allowing social partners and NGOs to lodge complaints that can then be heard and ruled on by the ECSR. Both monitoring and enforcement mechanisms are soft-law and can only result in recommendations being directed towards state parties. Whilst all EU member states are subject to the monitoring procedure, only 12 are party to the collective complaints mechanism (as of 2016). Both of these systems have contributed towards the development of standards on social rights, which are referred to as case law by the Council of Europe.

In developing social rights standards, the ECSR tends to engage with rights in terms of both minimum standards and progressive realisation. The principle of progressive realisation includes non-retrogression, which has been developed significantly by the UN Committee on Economic, Social, and Cultural Rights (de Witte, 2005: 164) and has been emphasised by the Council of Europe in the context of the Eurozone crisis (Council of Europe Commissioner for Human Rights, 2013: 7). So in addition to having to ensure that minimum standards are met for each right, state parties are also committed to working progressively towards higher standards that involves not regressing on those standards already achieved. When engaging with cases where a state has regressed on previously attained rights standard, the ECSR tends to adopt a proportionality test to consider any mitigating circumstances, including economic contexts such as the current Eurozone crisis (ECSR, 2014a).

For most rights, the minimum standards tend to be better defined in the case law of the ECSR as decades of issuing annual conclusions combined with the more recent collective complaints mechanism have resulted in a large body of decisions on what does and does not constitute conformity with the ESC. Non-retrogression, on the other hand, tends to be addressed in an ad hoc manner due to the nature of this principle and so the higher standards that should be progressively sought are often not clearly articulated. Below, some of the standards relevant to the right to fair remuneration, right to protection against dismissal, and the right to collective bargaining are highlighted. It should be noted that the full body of case law of the ECSR is rather lengthy, with its digest alone running to some 373 pages (see ECSR, 2008), and so an exhaustive account is beyond the scope of this chapter. These rights standards are returned to in the final section of this chapter to illustrate the how the response to the Eurozone crisis has undermined social rights.

The minimum standard for the right to fair remuneration (Article 4[1] ESC) is fairly straightforward: net wages should be no lower than 60% of the national median wage, though wages between 50% and 60% may be permissible if it can be shown that they provide for a decent standard of living (ECSR, 2008: 43). There does not appear to be a clear standard for the progressive realisation of the right to fair remuneration. The right to protection against unfair dismissal is spread across two rights in the ESC. The original 1961 version did not originally directly address this issue, though Article 4(4) requires a reasonable period of notice for termination of employment in order to ensure the effective exercise of the right to fair remuneration. Under this article, minimum thresholds for notice periods or pay equivalent to notice periods rise in line with length of service and must apply to all categories of employee. That is, more than one week’s notice for less than six month service, more than two weeks’ notice for over six month service, and so on (ECSR, 2008: 47). Article 24 on the right to protection in cases of termination of employment was added in the revised ESC in 1996. Its focus is more towards ensuring workers are protected in the event of dismissal on a range of unjustified grounds, such as trade union membership, maternity or paternity leave, race, sex, political opinion, illness, or disability. Compensation for dismissal should also be high enough to dissuade employers from engaging in unfair practices (ECSR, 2008: 151-154). For the right to collective bargaining, the minimum standards relate primarily to how state authorities engage with bargaining practices. The emphasis is on collective bargaining being voluntary, with the ECSR determining that changes to bargaining structures without the consent or consultation of social partners is a violation of this right (ECSR, 2014b: 26). The ECSR has also stipulated that collective bargaining should take place on the national and regional/sectoral level in both the public and private sectors, though these standards appear to be treated as for progressive realisation (ECSR, 2008: 53).

## 5.2. Labour Policy in the EU

Historically the EU has had limited competence to engage with labour market policy and therefore legislate on labour rights. In the original treaties competence was limited mainly to eliminating discrimination on the grounds of nationality and gender for workers. Attempts to develop EU involvement in labour and social policy from the mid-1980s onwards were seen by some as vital to the creating of ‘Social Europe’ and the need to establish the legitimacy of the EU beyond market integration (Leibfried, 2015: 266-267). As highlighted in chapter three, the drafting of the Community Charter on Social Rights of Workers was part of this process (see also Smismans, 2010: 56-57). However, various barriers have impeded developments. The heterogeneity of pre-existing national approaches to social and labour policies have made it particularly difficult to establish a common standard at the EU level, whilst the domestic legitimacy these policies are associated with and the democratic deficit of the EU have also made national governments reluctant to delegate powers away (Liebfried, 2015; Scharpf, 2010; 1997). Some of these barriers have been slowly overcome over time, as successive treaty reforms from the late 1980s onwards have delegated more powers over social and labour policy to the EU level and progressively moved from highly restrictive unanimity rules in the Council towards qualified majority voting (Liebfried, 2015: 268-269). Yet the ability of the EU legislators to create legislation on labour rights remains constrained by these barriers. In comparison to the single market, EU laws on labour markets are severely underdeveloped. Furthermore, competence over pay, trade unions and collective bargaining, and imposing lock-outs has been explicitly excluded from EU competence (see Article 153 TFEU).

In the late 1970s the EU legislators made use of treaty provisions designed to ensure the functioning of the internal market to create the Collective Redundancies Directive (1975), Acquired Rights Directive (1977), and Insolvent Companies Directive (1980) (see Rhodes, 2015: 301). The competence of the EU to legislate on labour issues expanded greatly in the 1990s, first with the social agreement annexed to the Treaty of Maastricht in 1992 and then with the social chapter fully incorporated into the Treaty of Amsterdam in 1997. As a result, the 1990s saw a number of directives adopted in this area, including the Working Time Directive (1992), Pregnant Workers Directive (1992), Young Workers Directive (1994), European Works Council Directive (1994), Posted Workers Directive (1996), Parental Leave Directive (1996), Part Time Work Directive (1997), Fixed Term Work Directive (1999), and the Temporary Agency Work Directive (2008) (Liebfried, 2015: 272-273). These directives do offer some level of protection to workers and have given some practical effect to labour rights. Of the labour rights considered in this chapter, protection against unfair dismissal is addressed in several of these directives. For example, protection against unfair dismissal during collective redundancies and during a transfer of undertaking and on the grounds of pregnancy and requesting parental leave is guaranteed by EU law to varying extents. The three atypical work directives (part time work, fixed term work, and temporary agency work) are designed to ensure non-discrimination between atypical workers and those on standard contracts, which entails some degree of employment protection.

However, this EU legislation on labour rights has been criticised for providing a low level of protection for workers. Due to the barriers arising out of the heterogeneity of national labour laws and reluctance among national governments to delegate away powers, the directives mentioned above have all established only minimum standards. This is supposed to set an EU-wide baseline whilst allowing member states to adopt higher domestic standards. In fact, the treaty basis for competence over labour policy stipulates that the EU legislators may only adopt minimum requirements (Article 153, TFEU). However, the capability of member states to adopt higher standards is not so clear. First, in some cases the ECJ has directly prevented member states from adopting higher standards than the minimum stipulated in a directive in order to protect the freedom of movement of services. This was the situation in the *Laval*-quartet cases and the Posted Workers Directive, as outlined in chapter three (see also Kilpatrick, 2012; Barnard and Deakin, 2011). It should be noted that after the *Laval* ruling, Sweden amended its domestic legislation to ensure conformity with the ECJ’s restrictions on the right to collective bargaining in light of the freedom to provide services. This domestic legislative change along with the ECJ’s decision necessitating it has been subject to a challenge before the collective complaints mechanism of the ESC. The ECSR has ruled that whilst it cannot pass judgement on EU law or decisions of the ECJ, the changes made by the Swedish authorities are not in conformity with the right to bargain collectively (ECSR, 2014). Second, these directives do little to mitigate downward pressure arising out of the single market as any member states pursuing higher standards may suffer a loss of competitiveness vis-a-vis states with lower standards and cheaper production (Höpner and Schäfer, 2010; Scharpf, 2010). This downward pressure has been exacerbated by the eastward expansion of the EU to post-communist states with lower labour and living standards and the formation of the single currency that has prevented member states from using currency devaluation to increase competitiveness (Liebfried, 2015: 285; Bohle, 2009; Bieling and Schulten, 2003).

Criticisms have also been levied at EU labour legislation for its limited scope of application and for being focused on supplementing the single market rather than as ends in themselves (Hunt, 2003: 55-57). Many directives contain opt-outs and often only apply to certain categories of workers (Hunt, 2003: 55), whilst the nature of some directives means that their application is limited (i.e, European Works Councils Directive only applies to European-wide companies). To overcome unanimity rules in the Council for labour market legislation, some of the earlier directives were based on treaty provisions designed to ensure the functioning of the internal market (now Article 114 TFEU). This meant that labour legislation served a dual purpose of protecting labour standards only to the extent that the internal market functioned smoothly, which has lowered their potential to protect workers’ rights (Rhodes, 2015: 301; Hunt, 2003: 56). Even with the Treaty of Lisbon expanding qualified majority voting rules on many labour market competences, the treaty provisions still state that any directives should avoid imposing burdens on small and medium size business. The atypical workers directives have also been criticised for seeking to normalise and promote this type of work (particularly temporary agency work, see Chacartegui, 2013) and for being based on assumptions that workers benefit from atypical working relations (Davies, 2013). Liebfried (2015: 266-273) characterises the above EU legislative developments as a ‘limited success of activist social policy’ that has seen the EU develop a level of social policy only comparable to pre-New Deal federal social policy of the United States of America. Hunt (2003: 55) suggests that, in terms of fundamental rights, ‘the rights contained in Community legislation are not fundamental if we are to consider this to mean unequivocal and universal’.

Given the formidable barriers facing traditional legislation for EU-level labour policy, an alternative approach was developed in the late 1990s and 2000s called the Open Method of Coordination (OMC). To overcome issues with limited EU legislative competences and the reluctance of national governments to delegate the necessary powers for traditional hard law, the OMC instead focused on coordinating national policies by setting out an EU-level framework, identifying appropriate indicators, and using soft-law pressures in an attempt to ensure compliance. The OMC primarily involves the Council and the Commission playing an active role, with the Parliament and ECJ largely uninvolved. It was first used with the European Employment Strategy in the 1990s and was later expanded to a number of different policy areas, including social protection and inclusion (see Armstrong, 2010: 30-39). The Lisbon Strategy launched in 2000 attempted to better coordinate the different OMCs that had emerged around various policy areas and ensure consistency with the economic principles underpinning EMU. As the governance structure of these coordination procedures has continued to develop and bear significant implications for labour rights, particularly due to the Eurozone crisis, they are explained in more detail in the next section.

Despite some early hopes, the European Employment Strategy and later Lisbon Strategy have not seen fundamental labour rights play a strong role. Initially, the Commission presented an approach to employment policy in the 1993 White Paper on Growth, Competitiveness, and Employment that was considered quite balanced. Alongside some reforms aimed at deregulating labour markets were proposals on a large-scale, Keynesian style investment to stimulate the EU economies and create jobs, amounting to 600bn ECU[[69]](#footnote-70) aiming to create 15 million jobs over five years (Ashiagbor, 2005: 91-93). However, national governments were unwilling to commit to this level of public spending and delegate such powers to the EU level. When employment coordination finally came to be incorporated into the treaties in the Treaty of Amsterdam, it was on the condition that it would not influence the criteria or timetable for EMU (Ashiagbor, 2005: 93, 111). As highlighted in chapter two, EMU has been premised on neoliberal ideas including a commitment to low inflation, delegation of monetary policy to an independent central bank, and a commitment to fiscal restraint and low levels of debt. The restrictive public spending criteria and anti-inflationary bias in EMU has narrowed the possible policy solutions available to employment issues (Smismans, 2005; Tidow, 2003; Szyszczak, 2000). Instead, the European Employment Strategy and the Lisbon Strategy have been dominated by a dominant neoliberal paradigm focused on supply side reforms designed to increase the flexibility of labour markets to stimulate employment growth (Hager, 2009; Smismans, 2005; Ashiagbor, 2005). The key term used to characterise the approach to labour market policy under the Lisbon Strategy is ‘flexicurity’, lifted from the Danish model of high labour market flexibility combined with strong social security measures. However, in the context of the policy proposals being championed by the EU it has been noted that policy tends towards more flexibility and less security (see Deakin and Reed, 2000; Ashiagbor, 2001). The prioritisation of flexibility has strong implications for labour rights, as labour market regulation is reconceptualised as a regulatory burden and employment protection standards sacrificed in order to pursue employment creation (Ashiagbor, 2001: 311). It is also notable that fundamental rights have played no role in the formation of the indicators and thresholds used in the European Employment Strategy or the Lisbon Strategy (see Smismans, 2005 on where rights could feature in the OMC). There are no references to the standards created by the ECSR outlined in the section above.

It is widely accepted that the approach to employment using the OMC has been dominated by a neoliberal paradigm that promotes labour market flexibility and deregulation (see Hager, 2009; Ryner, 2009; Smismans, 2005; Ashiagbor, 2005; Young, 2003; van Apeldoorn, 2003; Deakin and Reed, 2000). Many scholars have conceptualised the neoliberal framing of EMU and the Lisbon Strategy in terms of a neo-Gramscian hegemonic discourse (Ryner, 2009; Smismans, 2005; van Apeldoorn, 2003), particularly due to the way in which the parameters of the debate over employment policy have been constrained and directed towards labour market flexibility by the constitutional privilege afforded to sound monetary policy and fiscal constraint. As noted in chapter one and two, EMU should be conceptualised as neoliberal, though whether neoliberalism is truly hegemonic or not remains open to question. The degree to which the OMC procedures have been able to actually influence labour market policy at the national level is not too clear. Bieling and Schulten (2003: 243) highlight that almost all EU member states have now adopted guidelines promoting wage moderation in their corporatist arrangements, which they argue is due to the competitive pressure created by EMU. Similarly, other critical political economists have highlighted neoliberal reforms to the domestic political economy across the EU (Clift, 2003; Ryner, 2003; Jessop, 2003; Talani and Cervino, 2003). Yet these changes are often in response to the pressures created by EMU rather than due to peer pressure under the OMC, though, as highlighted above, the policy direction adopted at the European level has been constrained by what is possible within the confines of EMU premised on technocratic monetary policy premised on low inflation and restrictions on public spending. However, it is also notable that in some social and labour policy areas many member states have been reluctant to enact neoliberal reforms that have been promoted under EMU and the Lisbon Strategy in the 2000s, as domestic forces have retained strong support for higher standards and have blocked change (Pavolini et al. 2015). So despite pressure from the EU, labour market regulations in many southern European states in particular remained unchanged – at least until the Eurozone crisis, as highlighted below.

The EU has sought to engage with labour policy through both traditional legislation and new forms of governance by soft-law coordination. Yet despite advances over the last 20 years, there is still a large gap between economic and social integration. In the single market, legislation has been adopted to provide for minimum standards in several core areas of the labour market, yet progress here has been fraught with difficulties. As highlighted in chapters two and three, market freedoms have enjoy a privileged constitutional position that surpasses the position achieved by social values, including labour policy, resulting in a neoliberal order. With the entry into force of the Treaty of Lisbon and its commitment to a social market economy and the Charter of Fundamental Rights, there is scope for greater consideration to be given to social values. However, the reluctance of national governments to legislate on labour issues remains a barrier. In EMU, neoliberal principles about the organisation of macroeconomic policy have been prioritised and labour market policy reconceptualised to fit this dominant paradigm. In both areas, fundamental labour rights have been absent. In traditional legislation, the preambles of directives often refer to respective rights, though the utility of these directives for the actual attainment of fundamental labour rights has been drawn into question for various reasons highlighted above. In the coordination of labour policy under EMU there have been no references to fundamental labour rights. The standards for labour rights developed by the ECSR under the ESC (or any other social rights body, such as the UN Committee on Economic, Social, and Cultural Rights or the International Labour Organisation) have not featured in the EU’s engagement with labour policy. If the labour rights in the Charter of Fundamental Rights are to be implemented by legislative action, as the Charter indicates, there is some way to go for the EU.

## 5.3. Fundamental Labour Rights and Contemporary EU Politics

Since 2009 all major EU developments regarding labour rights have taken place under the new governance mechanisms of EMU, which have been influenced significantly by the Eurozone crisis. There has been no significant new EU labour legislation through the traditional legislative procedures. Plans to revise the PWD, mooted by the Commission in response to the backlash against the ECJ’s interpretation in *Laval*, have not come to fruition. The only EU labour legislation development has been the Posted Workers Enforcement Directive in 2014, which was focused on compliance with the original PWD rather than addressing the issues arising from the *Laval-*quartet cases. It should be noted that even prior to 2009, the 2000s saw very little in terms of legislative developments with only the Temporary Agency Workers Directive (2008) passed. Even before the Eurozone crisis, attention had been shifting towards policy coordination under EMU. Since the Eurozone crisis, there have been significant reforms to the governance of EMU that have greatly enhanced the capability of EU actors to intervene in the domestic affairs of member states on a range of issues, including labour rights. However, it should be noted that the pressure that EU institutions can bring to bear on member states varies, as highlighted in more detail below. To be clear, most of the reforms to EMU in response to the Eurozone crisis have concerned only Eurozone states. Member states that have not adopted the Euro are still technically members of EMU, but are not subject to any of its enforcement mechanisms. As such, the main focus of this chapter is on those developments that affect Eurozone states.

This section sets out below the reforms to the governance of EMU and their impact on rights. The analysis has been conducted by focusing on a wide range of documents over the period 2010 to 2014, including the Annual Growth Surveys and its annex on the Joint Employment Report, the Country-specific Recommendations, the In-Depth Reviews under the Macroeconomic Imbalance Procedure, and the Structural Adjustment Programmes for those states requiring financial assistance. These documents are explained in more detail below. Where relevant, interviews with officials at the EU have been used to provide additional insights. This section proceeds in two steps: first, the changes in governance procedures are outlined and, second, the substance of policy stipulations and their impact on rights is analysed. The below sections build on the argument, first developed in chapter two, that EMU is founded on a neoliberal economic paradigm.

### 5.3.1. The Evolving Governance Structure of EMU

Prior to the Eurozone crisis member states were already engaged in coordinating a range of domestic policies, labour policy included. The Lisbon Strategy launched in 2000 and relaunched in 2005 attempted to coordinate various OMCs and ensured consistency with the economic principles underpinning EMU outlined in the Maastricht convergence criteria in 1992 and reiterated in the Stability and Growth Pact in 1997. Since the onset of the Eurozone crisis, there have been numerous changes to the governance of EMU. In 2010 the Lisbon Strategy was replaced by a new growth strategy, Europe 2020, and the European Semester was launched to further integrate macroeconomic policy and the policies covered by the OMCs into one framework. Reform packages in 2011 (called the Six Pack) and 2013 (called the Two Pack) enhanced the Excessive Deficit Procedure (EDP), which was first created by the SGP in 1997, and introduced an entirely new mechanism called the Macroeconomic Imbalance Procedure (MIP). These procedures operate under the European Semester and were created by ordinary EU legislation. However, the constraints of formal EU procedures and the timeliness required to respond to a growing crisis has meant that some changes have also been pursued through other means. In 2010 the European Financial Stability Mechanism (ESFM) and the European Financial Stability Facility (EFSF) were created, which are to be phased out and replaced by the European Stability Mechanism (ESM) from 2012 onwards. As highlighted below, these financial assistance mechanisms were created by a mix of EU and intergovernmental arrangements. To be clear, the term governance of the EMU is used here to refer broadly to all of these aspects, inside and outside of the stricter confines of EU law.

The European Semester functions as an annual reporting cycle involving the Commission and the Council. The Commission begins the process by publishing an Annual Growth Survey (AGS) on the whole EU and a set of draft Country-specific Recommendations (CSRs) for each member state. Both the AGS and CSRs are backed by detailed thematic Country Reports drawn up by the Commission, which account for the socio-economic situation in each member state and the implementation of reforms from previous cycles of the European Semester. National governments discuss and endorse the AGS and CSRs in the Council and present reform programmes on how they intend to meet their policy recommendations, though the Commission’s draft CSRs are rarely altered[[70]](#footnote-71) (see also Copeland and James, 2014). Under reforms introduced by the Two Pack in 2013, governments of the Eurozone states have to submit their annual budgets for approval from the Commission, before they are even debated in their respective national parliaments (Articles 3-7, Council Regulation (EU) 473/2013). Essentially, under the European Semester member states are subjected to a high degree of EU involvement in the setting of policy aims and regular surveillance of their implementation (de la Porte and Heins, 2014: 14). Furthermore, whilst the European Semester was designed primarily with macroeconomics in mind and is dominated by economic actors (that is, the economic and finance bodies of the Commission and Council, see de la Porte and Heins, 2015: 9; Oberndorfer, 2014: 47), it encompasses social and labour policy areas. When everything is running smoothly, the European Semester allows EU interference with national policies and a high degree of surveillance, but cannot do much to force national governments to enact policy recommendations if they do not wish to (or face domestic barriers to reforms).

Whilst the European Semester process highlighted above constitutes the ordinary operating procedures for the governance of EMU, when Eurozone states are judged to be suffering an economic imbalance there are two enforcement mechanisms that come into action. It should be noted, though, that it is actually rather common since the European Semester was launched for Eurozone states to be experiencing an imbalance and therefore subject to some level of enforcement procedure. The two enforcement mechanisms are the EDP and the MIP. The EDP was originally introduced by the SGP in 1997 and was enhanced considerably by the Six Pack (2011) and Two Pack (2013), which streamlined the process through reverse qualified majority voting and expanded the scope of policy recommendations. The MIP was introduced by the Six Pack reforms in 2011. The EDP can be launched if a Eurozone state is in breach of either the 3% deficit or the 60% debt rules, whilst the MIP is premised on a broader set of indicators on macroeconomic competitiveness, including current account and unit labour costs (Scharpf, 2011: 32). If a Eurozone state is judged by the Commission to be experiencing an excessive economic imbalance, it is compelled to enact reforms to address the situation by submitting a reform programme. If the reform programme is deemed insufficient, the member state can be compelled to submit a new programme and can be sanctioned if an insufficient reform programme is submitted again (Article 3(2), Regulation (EU) 1174/2011). A corrective plan is then issued to the state experiencing the imbalance. Policy recommendations arising out of corrective plans, including on labour laws, are integrated into the CSRs that states received under the European Semester and identifiable by the explanatory text preceding the recommendations (Bekker, 2015: 8). Sanctions amounting to 0.1% and 0.2% of GDP can be levied if the Eurozone state is deemed not to have taken the recommended action and are enacted using the so-called reverse qualified majority voting rules. That is, the Commission can make a recommendation for a sanction that is deemed accepted unless actively blocked by a qualified majority in the Council within 10 days (Scharpf, 2011: 32; de la Porte and Heins, 2015: 16). The legality of reverse qualified majority voting rules has been called into question, given the absence of a treaty basis (Oberndorfer, 2015: 189). However, it is worth noting that although the enforcement procedures have been opened against many Eurozone states, none have gone so far as to actually impose any financial sanctions. The introduction of reverse qualified majority voting was intended to streamline the enforcement process and create a credible threat of sanction, which, provided the state in question complies, should not necessarily lead to sanctions. The indication from academic research on these procedures so far, though they have only been operating in their enhanced forms for several years, is that Eurozone states tend to comply with recommendations (see de la Porte and Heins, 2015: 24; Pavolini et al. 2015).

For those Eurozone states hit the hardest by the crisis and in need of financial assistance, new institutions outside of the formal framework of the EU were constructed. Before the Eurozone crisis, the EU was poorly equipped to handle any large-scale financial assistance programmes, known more commonly as bail-outs. In 2010, the EFSM was created by Council Regulation (EU) 407/2010 using the normal EU legislative procedures, but it was limited to lending about 60 billion Euros and could only operate under narrow legal parameters (Armstrong, 2013: 605). At the same time, the EFSF was created by intergovernmental framework agreement outside of the EU procedures and with a larger budget of up to 440 billion Euros. These developments were followed in 2012 by a more permanent mechanism called the ESM (with a lending capacity of 500 billion Euros) which was created by an international treaty, again outside of the legal framework of the EU, though in 2011 the Treaty on the Functioning of the EU was amended by European Council Decision 2011/199 to create a provision for a financial stability mechanism with a view to incorporate the ESM into the treaties at a later date (Armstrong, 2013: 605). Yet despite the main bulk of the bail-out funds being created by intergovernmental agreement outside of the EU, EU institutions are still heavily involved. The management of bail-outs is handled by the European Commission, the European Central Bank, and the IMF, known commonly as the Troika. States including Greece, Spain, Portugal, and Ireland have all received financial assistance from the EFSM, EFSF, or ESM (or a combination of these funds). To receive the funds, the national governments of these states had to sign a Memorandum of Understanding with the Troika that has imposed a strict set of conditionality (policy changes to be enacted to secure release of funds) combined with intensive surveillance, mainly carried out by the Commission (de la Porte and Heins, 2015: 14; Armstrong, 2013: 606; see also Dukelow, 2015; Theodoropoulou, 2015). Given the involvement of EU institutions in these procedures, there is some level of uncertainty over whether or not this is truly outside of EU law. Whilst the ECJ has so far refused to hear cases concerning Troika mandated reforms, Barnard (2013b: 277) has maintained that such a legal challenge may still be possible.

Finally, in-between the enforcement procedures of the European Semester and the bail-out mechanisms outside of the formal framework of the EU are informal procedures of ‘backroom diplomacy’ and ‘implicit conditionality’ (Sacchi, 2015; Pavolini et al. 2015; de la Porte and Natali, 2014). By their very nature, these procedures are more secretive and so are not based on any formal legislation or agreements, as the above mechanisms are. Whilst pressure being applied through informal backroom procedures has long been assumed as part of any process involving intergovernmental aspects, it is only since two letters sent by the ECB to the governments of Spain and Italy were leaked in 2011 that the extent of this kind of pressure in the Eurozone has been theorised. Sacchi (2015: 77) has coined the term ‘implicit conditionality’, which refers to the use of access to support funds and the threat of the aforementioned formal bail-out mechanisms to induce policy change. The ECB used its bond-purchasing scheme, which was seen as vital to relieve pressure on government bond markets, to impose policy conditions on Italy and Spain that were specified in letters sent directly to their prime ministers (Sacchi, 2015; Meardi, 2012). These cases are only known about because these letters were leaked. It is not known if other Eurozone states have experienced similar pressure.

These changes brought about largely in response to the Eurozone crisis have been described as a kind of hybrid form of governance combining elements of both coordination and rules-based approaches, of both hard and soft law (Armstrong, 2013: 610). There has been a marked increase in the use of executive decision making and a hardening of European-level mechanisms used to pressure national government to adopt reforms (Bauer and Becker, 2014: 219-223; Armstrong, 2013: 617). Enforcement under EMU now increasingly falls to executive actors in the Commission and Council, rather than through judicial means as under the Community method. Oberndorfer (2015: 189) has described these developments as a kind of ‘authoritarian constitutionalism’, having moved away from the legalism and passive consensus that characterised Gill’s (1998) idea of new constitutionalism. Furthermore, it appears to be primarily the Commission that administers the governance of EMU (Bauer and Becker, 2014), of which the Directorate-General on Economic and Financial Affairs has taken the lead.[[71]](#footnote-72) It is the Commission that conducts the economic analysis and surveillance of Eurozone states, publishes the AGS, drafts the CSRs, and is responsible for launching proceedings under the enforcement mechanisms that can only be blocked by a qualified majority in the Council.

What is also notable about the governance of EMU is the complete absence of any fundamental rights mechanisms. Various reasons were given for the absence of rights mechanisms when this was raised with EU officials in interviews. It was emphasised that the Memorandums of Understanding used to set out policy conditionality for the bail-out funds were outside of EU law and therefore not subject to the scope of application of the Charter of Fundamental Rights.[[72]](#footnote-73) It is beyond the scope of this chapter to ascertain whether the bail-out mechanisms should be exempt from fundamental rights mechanisms, though it is notable that legal scholars have been critical of such an exemption (see Fischer-Lescano, 2014b; Barnard, 2013). With regards to the European Semester, it was emphasised that the Charter and mainstreaming processes were developed with a legal process in mind and that the macroeconomic coordination style of the European Semester meant that it was not clear how rights could be applied.[[73]](#footnote-74) Both the European Semester and the bail-out programmes were designed around a macroeconomic framework and when labour policy is taken into account it tends to be viewed in terms of economic goals rather than rights, which are viewed as an inappropriate measure due to the perceived need to deal with the immediate economic aspects of the crisis.[[74]](#footnote-75) In the (rather strongly put) words of one official in the European Parliament, ‘the Charter is there but you can respect it or not respect it, nobody gives a damn’.[[75]](#footnote-76) As highlighted in chapter three, the Commission’s (2010) strategy for implementing the Charter has involved a move towards new governance mechanisms such as impact assessments and mainstreaming, though there were uncertainties around how these mechanisms would be applied to social rights. It appears that the unique nature of the governance arrangements of the Eurozone and their development outside of the traditional Community method have continued to hinder the application of fundamental rights.

### 5.3.2. Policies of EMU

The governance structures of EMU have strengthened the ability of executive actors in the EU to hand down policy recommendations that can be backed by various pressures, whether it is access to financial support from the bail-out mechanisms or the ECB or the threat of financial sanctions via the EDP and MIP. The policies being promoted under EMU and the ideas about the economy underpinning them are of vital importance to fundamental labour rights. This section analyses the labour policies being championed by EU institutions, links them back to the governance structure highlighted above, and situates them in light of appropriate rights standards from the ECSR. Given the magnitude of EMU processes and the complexity of the different arrangements applied to member states, this section is approached in a manner designed to provide a fair overview of the policy paradigm of EMU. It starts by looking to Europe 2020, which is the 10 year growth strategy that identifies the overarching policy directions for economic, labour, and social issues. It should be noted that the Europe 2020 strategy is non-binding, but does highlight how policies and problems are conceptualised at the EU level. Following Europe 2020, the AGSs are looked to in order to see how policies have been conceptualised when it comes to the annual European Semester. In order to get an idea of the specific policies being promoted in individual states, examples are drawn from the CSRs, conditionality set out in letters from the ECB, and the Memorandums of Understanding. In particular, examples from Italy and Spain are looked to for insights into the CSRs as they have also both received direct pressure from the ECB and have seen a different response from the ECSR on the compatibility of their reforms with labour rights. To provide insights into the Memorandums of Understanding and the bail-out mechanisms, Greece and Portugal are examined. Given the wide-reaching extent of the reforms implemented in these four states that would require considerably more space to go into details on, the examples in this section are focused on where those reforms have been successfully challenged by fundamental rights mechanisms (see Lo Faro, 2014; Gomes, 2014; Yannakourou, 2014 for more details on these states).

There are two primary themes that characterise Europe 2020: sustainability and competitiveness (Council of the EU, 2010a; 2010b). Similar to the Lisbon Strategy that preceded it, Europe 2020 has been shaped to the economic goals of the Maastricht convergence criteria and SGP. As highlighted above, this commits EU member states to a particular understanding of sustainable finances, namely public debt below 60%, public deficit below 3%, and price stability in the form of low inflation. The first two economic guidelines are of particular relevance to employment and labour issues. Guideline 1 concerns sustainable public finances. It is quite clear: ‘Member States should vigorously implement budgetary consolidation strategies under the Stability and Growth Pact (SGP) and, in particular, recommendations addressed to Member States under the excessive deficit procedure, and/or in memoranda of understanding, in the case of balance-of-payments support’ (Council of the EU, 2010a: 31). This means active fiscal retrenchment for any state over the reference values and fiscal restraint in other states to ensure they remain within the values. However, Europe 2020 goes beyond the previous Lisbon Strategy by expanding economic policy coordination to a far wider array of macroeconomic indicators. Central to this is the measure of current account balance, and its associated indicators on current account balance, export market share, and unit labour costs. Guideline 2 is on addressing macroeconomic imbalances, for which lack of competitiveness is presented as the primary cause. The action suggested by the Council in this area is worth quoting at length:

Member States should encourage the right framework conditions for wage bargaining systems and labour cost developments consistent with price stability, productivity trends over the medium-term and the need to reduce macroeconomic imbalances. Where appropriate, adequate wage setting in the public sector should be regarded as an important signal to ensure wage moderation in the private sector in line with the need to improve competitiveness. Wage setting frameworks, including minimum wages, should allow for wage formation processes that take into account differences in skills and local labour market conditions and respond to large divergences in economic performance across regions, sectors and companies within a country. The social partners have an important role to play in this context. (Council of the EU, 2010a: 31)

This guideline subordinates key areas of labour policy – wage bargaining systems, the minimum wage, and public sector wages – to economic policy. The Commission confirms this prioritisation of economic policy, ‘the Council is to adopt broad economic policy guidelines (Article 121) and employment guidelines (Article 148), specifying that the latter must be consistent with the former’ (European Commission, 2010a: 3). The sustainability of public finances and competitiveness in the economy are the key themes that underpin Europe 2020.

There are four employment guidelines in Europe 2020, contained in a separate document to the economic ones. The first is most relevant to employment and labour rights. Guideline 7 (which happens to be the first employment guideline, as they are listed after the economic guidelines) is on increasing labour market participation of women and men, reducing structural unemployment, and promoting job quality. It sets a headline target of 75% employment rate for women and men by 2020. This is to be achieved through active labour market policies (ALMPs), which are clearly stated to be ‘key to increasing labour market participation’, along with a balance of flexibility and security in employment, or, as noted above, ‘flexicurity’ (Council of the EU, 2010b: 49). Particularly interesting is the final paragraph of explanation on Guideline 7. It states clearly that ‘policies to make work pay remain important’, yet the following sentence then states ‘in line with economic policy guideline 2, Member States should encourage the right framework conditions for wage bargaining and labour cost development consistent with price stability and productivity trends’ (Council of the EU, 2010b: 49). Making work pay and wage bargaining consistent with price stability and productivity trends are two very different things. Economic policy guideline 2, which was quoted above, even outlines these measures, along with public sector wage setting, as signals to ensure wage moderation.

What is meant by active labour market policies (ALMPs) and the balance of flexibility and security? These terms are inter-linked. There are two sides to ALMPs. First, they provide training and educational services to ensure that unemployed workers are (re)trained and have the skills appropriate for the economy so they can enter employment quickly. This underpins the security side of the flexibility and security balance. According to the European Commission (2012b: 5) ‘job security should increasingly give way to employment security’. Sufficient training and education schemes ensure a swift transition between jobs and long-term employment security. Employment Guidelines 8 and 9 both focus on this training and educational side and are designed to ensure a skilled workforce with access to lifelong learning (Guideline 8) and a high quality of education and training systems (Guideline 9). The second side of ALMPs involves the use of sanctions for those on unemployment benefit to condition them to take up training schemes and employment. In the words of the Commission, this removal of social protection is designed to ‘increase the payoff from employment by making unemployment more costly to incentivize workers to engage in active job search and to work’ (European Commission, 2012b: 6). Furthermore, this can also include workfare schemes, whereby the receipt of unemployment benefit becomes conditional on a person entering employment without receiving an actual wage (European Commission, 2012b: 5). However, as noted below, none of the actual recommendations go as far as to stipulate workfare reforms to unemployment benefit, though they do include the use of sanctions for training and employment uptake. The provision of training and education schemes as part of the security side is particularly important, as the flexibility side is focused on flexibility for business. As demonstrated below, this includes the removal of more extensive employment protection legislation and the restructuring of wage bargaining and setting mechanisms to be more responsive to price stability and productivity.

It should be noted that there are both positive and negative sides to ALMPs. The Guidelines and their use of ALMPs focus more on training and educational schemes than on policies such as welfare sanctions. This is consistent with research outlined by the Commission that shows higher expenditure on ALMPs, which tend to go on training and educational programmes, coupled with lower rates in unemployment (European Commission, 2012b: 3). Training and education is also the main strategy employed in the Youth Employment Package aimed at tackling youth unemployment. Guideline 7 also mentions ensuring the adequacy of social security systems, though it links this to responsibilities of the unemployed to seek work, and the quality of work and employment conditions. However, whilst mentioned in the guidelines, these areas do not feature heavily in the recommendations, as demonstrated below. Finally, Guideline 10 is on promoting social inclusion and combating poverty. This includes enhancing social protection systems, ensuring the provision of high quality and sustainable public services, and addressing in-work poverty. The primary mechanism to pursue social inclusion and address poverty is employment. A headline target of listing 20 million people out of poverty by 2020 is set by Guideline 10.

The Europe 2020 strategy when viewed in the context of the governance structures highlighted above already indicates a prioritisation of macroeconomic concerns over social. Guidelines 1 and 2, on sustainable public finances and macroeconomic competitiveness, mirror the only enforcement mechanisms of EMU, the EDP and MIP. These guidelines also encompass a far broader array of policy areas, as achieving macroeconomic competitiveness includes ensuring that bargaining systems and labour costs are consistent with this goal. This prioritisation of economic concerns was mirrored by officials in the Commission. One official in DG Employment, Social Affairs, and Inclusion stated that their instructions are that all policies they propose must be of relevance to macroeconomic competitiveness, though sometimes social issues do get through to the final CSRs. There is an assumption that austerity will lead to growth which will lead to more jobs that will lead to a reduction in poverty, though little attention to the issue whereby reducing employment standards will lead to in-work poverty or the association between austerity and poverty.[[76]](#footnote-77) Yet there is also a clear social side to Europe 2020, which was viewed as a key victory for social actors when the strategy was first launched. However, as demonstrated below, the operation of EMU has seen this social side dwindle. In the words of one official from a Brussels-based European anti-poverty NGO, ‘Europe 2020 is dead […] the poverty target is a total embarrassment’.[[77]](#footnote-78) Furthermore, it is evident that the overarching policy direction of EMU is (or rather, remains) neoliberal (see below; see also Ryner, 2015; Oberndorfer, 2015; Menendez, 2013). The commitment to fiscal restraint has remained a key target and has now been joined by a conception of macroeconomic competitiveness premised on constraining labour and freeing capital. Labour market regulations have been reconceptualised as rigidities forming a barrier to growth.

The key mechanism for the implementation of the Europe 2020 strategy is the European Semester, as it is under the remit of the European Semester that all relevant policies are coordinated. As mentioned above, the AGSs launch the annual semester process by identifying the policy direction for that year. From the very first AGS in 2010 (covering the 2011 European Semester), the context has been dominated by the Eurozone crisis that has brought low growth, high levels of debt, high unemployment, and even higher youth unemployment to Europe. Three core policy areas are identified for reform: ‘rigorous fiscal consolidation for enhancing macroeconomic stability, labour market reforms for higher employment, and growth enhancing measures’ (European Commission, 2010b: 3). Under the need to reform labour markets to promote employment, the Commission is critical of those member states it believes to have excessive employment protection for creating ‘labour market rigidities’, stating that this ‘should be reformed to reduce over-protection of workers with permanent contracts’ (European Commission, 2010b: 7). The focus is on reducing so-called excess employment protection and aligning those on permanent contracts with those on temporary contracts, though the balance of this alignment between downgrading protection in permanent contracts and upgrading protection in temporary contracts is not clear. The 2010 AGS also includes the promotion of a single open-ended contract designed to achieve this alignment of permanent and temporary contracts (European Commission, 2010b: 7), though this proposal is not prominent any the subsequent AGSs. Furthermore, the 2010 AGS does not limit labour market reforms to only employment promotion. According to the Commission, member states with large current account deficits and high indebtedness should pursue corrective measures that ‘could include strict and sustained wage moderation, including the revision of indexation clauses in bargaining systems’. The AGS’s since then have largely followed the same pattern. Wage bargaining mechanisms are targeted for reform to enhance competitiveness and employment protection to be liberalised to reduce rigidity in the labour market (European Commission, 2011c: 10-12; 2012c; 2013a).

Spain and Italy have both been placed under severe pressure to enact reforms under both the European Semester and informally by the ECB. Spain actually also received a bail-out, but the accompanying Memorandum of Understanding focused exclusively on the financial sector and did not stipulate any labour reforms. All of the pressure to adopt labour market reforms in both states has come via the European Semester or from the ECB. For example, in the 2011 European Semester Spain was issued with policy recommendations to reform collective bargaining and wage indexation systems to ensure growth reflects productivity and local and firm level conditions and to grant firms internal flexibility (for which Spain was to consult social partners on) and to commit to reforms to combat segmentation of the labour market and to promote employment (Council of the EU, 2011b: 4). This recommendation was issued prior to the MIP being adopted and so was not directly attached to any enforcement mechanism. The 2012, 2013, and 2014 sets of CSRs put further pressure on Spain to implement labour market reforms to reduce segmentation and increase effectiveness of ALMPs, all of which were adopted under the MIP (Council of the EU, 2012a; 2013b; 2014a). However, the content of these labour market reforms were left rather vague in the CSRs. More specific details of labour market reforms were issued in the form of a letter from the ECB in 2011. In this letter, the ECB directed Spain to enact reforms including the need to reform wage bargaining systems to ‘strengthen role of firm-level agreements’ and ‘with a view to ensuring an effective decentralisation of wage negotiations’, and to ‘reduce the possibility for industry-level agreements (at national or regional level) to limit the applicability of firm-level agreements’ (ECB, 2011a). The letter also instructed Spain to ‘take exceptional action to encourage private sector wage moderation’ and introduce an ‘exceptional new labour contract with only very low severance pay’ (ECB, 2011a).

Italy received similar policy recommendations and pressure on labour market issues. In the 2011 European Semester Italy received policy recommendations to combat labour market segmentation, review dismissal rules and procedures, and to decentralise collective bargaining to link wage growth to productivity and local and firm level conditions (Council of the EU, 2011c). Similar to Spain, this 2011 CSR was not linked to any enforcement mechanism, but the 2012, 2013, and 2014 CSRs placed continuous pressure on Italy to implement the aforementioned labour market reforms and to evaluate the need for further action, which were linked to the MIP (Council of the EU, 2012b; 2013c; 2014b). Italy also received a letter from the ECB outlining the need for these reforms in more detail, again including ‘further reform the collective wage bargaining system allowing firm-level agreements to tailor wages and working conditions to firms' specific needs’ and pressure to review hiring and dismissal rules (ECB, 2011b). Of particular interest is that, unlike Spain, Italy was actually told by the ECB to implement these reforms by decree law and to later seek parliamentary approval. As highlighted above, these kinds of letters are underpinned by an asymmetry of power whereby the purchasing of government bonds to alleviate market tensions on debt and the threat of having to enter formal bail-out mechanisms increase the influence of ECB (Sacchi, 2015: 77).

Both Italy and Spain implemented these labour market reforms, enacting domestic changes on dismissal rules, wages, and collective bargaining. Essentially, the wishes of the EU institutions were largely fulfilled (see Pavolini et al. 2015: 64-68; Meardi, 2012: 13-15). Both Italy and Spain were reviewed by the ECSR’s multi-annual monitoring framework on labour rights covering the time period from January 2009 to December 2012, thereby providing an appropriate means to gauge the compliance of these reforms with the fundamental labour rights to collective bargaining, protection against unfair dismissal, and fair pay. It should be noted that this time period is limited and that although it covers many of the important labour market reforms, there are later developments that the ECSR has not yet reported on. What is particularly interesting is that despite being pressured to implement similar reforms, the findings on Italy and Spain differ. In Spain, the ECSR was particularly critical of many of the reforms implemented. According to the ECSR (2015a), the minimum wage set by Royal Decree No. 1888/2011 and specific wages in the public sector were too low and violated the right to fair remuneration. Law No. 3/2012 on labour market reforms did not provide adequate protection against unfair dismissal and the new special entrepreneur contract contained an excessively long period without employment protection and so undermined the right to reasonable notice of termination of employment. The reforms to collective bargaining were imposed on social partners without their agreement and allowed employers at the firm level to unilaterally derogate from higher collective agreements, thus undermining the right to collective bargaining (ECSR, 2015a: 12-26).

Yet in Italy, despite implementing similar reforms, the ECSR did not find as many instances of non-conformity with fundamental labour rights, at least not for measures introduced by recent legislation. However, it is worth noting that the ECSR did request further information from the Italian government on several of the reforms introduced to dismissal rules and collective bargaining (ECSR, 2015b: 17-18, 25). The reporting procedure is limited to some extent by the compliance of governments sending adequate information. In the context of the intense political activity necessitated by the response to the Eurozone crisis, sending reports to the ECSR may not have been too high on the priorities of the Italian state and some leniency may have been afforded. It should also be noted that some crisis-response reforms have also been challenged before the Italian constitutional court, though the only success has been the challenge to a pay cut to the judiciary (see Lo Faro, 2014: 61). The absence of fundamental rights mechanisms in the governance of EMU has therefore allowed policies to be championed by the EU institutions that have undermined rights standards, at least when it comes to key employment rights. This does not suggest that all labour market policies being promoted under the European Semester and by the ECB violate rights. Italy appears to have trodden a fine line by not going quite as far as Spain when implementing the reforms requested, which have the potential to undermine rights.

Those Eurozone states worst hit by the crisis have had to seek bail-outs, or face the risk of a sovereign debt default. Portugal requested financial assistance in 2011 and was granted a total of 79 billion Euros, divided evenly from the EFSM, EFSF, and the IMF. It should be recalled that the EFSM was created by a Council regulation, whilst the EFSF was created by intergovernmental agreement outside the legal framework of the EU. The disbursement of funds was conditional on a Memorandum of Understanding, which specified in significant detail a wide-range of reforms to be implemented (European Commission, 2011d). This included many labour market reforms following a similar approach to those mentioned above. The Memorandum of Understanding stipulated that ‘comprehensive labour market reforms’, including reductions in employment protection, wage reductions in the public sector, and measures to ensure collective bargaining on wages is responsive to firm level conditions to improve competitiveness (European Commission, 2011d: 24-25).

These reforms were implemented and Portugal secured access to all of the funds promised before leaving its financial assistance programme in 2014. However, several of these domestic reforms were subject to fundamental rights challenges. Portuguese courts had lodged complaints before the ECJ, asking if austerity measures were compatible with the rights to equality and fair and just working conditions in the Charter of Fundamental Rights, but the ECJ ruled the complaints inadmissible for being outside of its jurisdiction (see Barnard, 2013). The most notable successful challenges were made to the Portuguese constitutional court. In Judgement 353/2012 the emergency reforms cutting public sector workers’ pay and holiday subsidies were ruled unconstitutional for violating the principle of equality between public and private workers (Gomes, 2014: 80). In Judgement 602/2013 reforms to the Portuguese Labour Code, which made it easier to dismiss workers, were ruled unconstitutional for allowing employers too much freedom to fire workers and for excessive interference with collective agreements and individual contracts (Gomes, 2014: 83-84). Both of these judgements noted that the reforms were in the context of the Memorandum of Understanding and access to financial assistance. Furthermore, the ECSR (2015c) has also found Portugal to be in a state of non-conformity with the right to fair remuneration concerning the minimum wage and reasonable notice of dismissal and the right to collective bargaining, though the ECSR has focused mainly on issues present before the Portugal’s financial assistance package for these findings.

Greece was arguably the worst hit state by the Eurozone crisis and has faced considerable pressure to enact wide-ranging reforms spread across multiple bail-out packages. The first bail-out package was signed in 2010 and the second in 2012 (and a third in 2015, though this falls outside the time period covered in this chapter). The Memorandums of Understanding accompanied the two bail-out packages were enacted by being appended to Greek law (Yannakourou, 2014: 19-20). These Memorandums of Understanding contained significant and far-reaching reforms to the labour market (European Commission, 2010c: 21-22; 2012d: 37-38). This included reforms to decentralise collective bargaining to the company level and allow for firm-level derogations, the weakening of trade union bargaining power by enhancing the role of state (namely by moving minimum wage from being determined by collective agreement to the state, imposing maximum duration of 3 years on collective agreements, and restrictions on recourse to arbitration), the introduction of a sub-minimum wage for workers under the age of 25, and measures to facilitate dismissals by extending the probationary period to 12 months and reducing severance pay (Yannakourou, 2014: 20; European Commission, 2010c; 2012d).

The Council of State (the highest administrative court in Greece) has generally upheld these labour market reforms based on the need to respond to the exceptional economic circumstances, with one exception. The reforms to weaken the power of trade unions and enhance the role of the state over determining the minimum wage, imposing a maximum duration of 3 years on collective agreements, and restricting recourse to arbitration were ruled unconstitutional in 2014 for interfering with Articles 22 and 23 of the Greek Constitution (which contains various workers’ and trade union rights) (Yannakourou, 2015). This ruling by the Greek Council of State is particularly important, as Greece has actually opted out of the articles covering collective bargaining in the ESC, under which the ECSR has been critical of the other labour market reforms that the Council of State appeared comfortable with. The ECSR has upheld a complaint via its collective complaints mechanism which found that the 12 month probationary period provided no notice period or severance pay and therefore was not in conformity with the right to reasonable notice of termination of employment. The ECSR also found, via its normal reporting procedure, that in Greece the minimum wage and the special sub-minimum wage for young workers was set at too low a level and therefore was not in conformity with the right to fair remuneration (ECSR, 2015d: 12-19).

It is notable that there is an absence of fundamental rights mechanisms in the governance arrangements of EMU. There are no measures to ensure that rights standards arising out of the case law of the ECJ are respected, let alone the standards developed by the rights bodies such as the ECSR under the Council of Europe. As highlighted above, the ECSR has developed a clear set of standards that could have been utilised by the EU institutions to guide their policy recommendations. It is also evident that the policy direction of EMU has followed a path hostile to social rights standards, one that has been broadly identified as neoliberal (Bonefeld, 2015; Hall, 2012; Stockhammer, 2012; Heyes, Lewis, and Clark, 2012). Even when bodies such as the ECSR have determined that rights have been violated, there is acknowledgment of these issues in the European Semester or the bail-out mechanisms. The flexibility of labour markets is to be increased by reducing employment protection, putting downward pressure on wages, and decentralising collective bargaining, thus reducing the power of labour and increasing the power of capital. Crucially, this neoliberal policy direction has been prioritised over social concerns. The only enforcement mechanisms in the European Semester are premised on economic indicators and the bail-out mechanisms have prioritised macroeconomic competitiveness as a solution to problems of high debt. It was highlighted by one official in the European Commission that it is the Directorate-General for Economic and Financial Affairs that was in charge of negotiating the bail-out packages on behalf of the Commission,[[78]](#footnote-79) whilst the involvement of the ECB and the IMF clearly indicates a prioritisation of economic concerns within the institutional framework of the bail-out packages. As one official in the Commission highlighted, it is actually the Anglo-liberal UK model of labour market (de)regulation that the Commission primarily looks to for policy ideas for the labour market, though with the caveat that the Commission would not deregulate quite as far as the UK has.[[79]](#footnote-80) It is relevant to note that the UK has amongst the lowest level of conformity with the ESC labour rights standards of any EU state (ECSR, 2015e). This means that Eurozone states are being pulled in two directions. On the one hand, they have an obligation to the rights standards embodied in treaties such as the ESC overseen by the ECSR and, in some cases, in national constitutions with oversight from the highest courts. On the other hand, they have an obligation to the governance of EMU and the neoliberal principles it has embodied.

The prioritisation of neoliberal principles has led to a number of fundamental labour rights being undermined at the behest of EU institutions, as demonstrated above. This does not necessarily lead to rights being undermined, as the example from Italy shows, though there is clearly a high risk that is exacerbated by the absence of fundamental rights mechanisms in the governance of EMU. Whilst space limitations within this chapter have allowed it to only address four Eurozone states, it is worth noting that research has highlighted rights concerns arising out of austerity across Europe. This includes reports by the UN High Commissioner on Human Rights (2013) and the Council of Europe Commissioner for Human Rights (2013) and academic research (Fischer-Lescano, 2014b; Lörcher, 2014; Schömann, 2014; Ewing and Hendy, 2014; Yannakourou, 2014; Gomes, 2014; Lo Faro, 2014). These are violations of fundamental rights that have occurred not only because of the impact of the Eurozone crisis itself, but because of the political response to the crisis that has prioritised a neoliberal economic paradigm above all other concerns. Yet it is notable that top-down pressure from EU institutions has varied. De la Porte and Heins (2015: 14) set out a spectrum of EU involvement in labour market and social policy, from very high (the bail-out mechanisms) to medium/high (enforcement mechanisms under the European Semester and ECB involvement) to low (naming and shaming with soft recommendations). Those states that receive softer policy recommendations under the European Semester, particularly those states that have not adopted the Euro and therefore face no prospect of enforcement mechanisms, have not been addressed here. This chapter has instead focused on those states that have faced medium to very high EU involvement in order to highlight the link between EU institutions and rights-violating reforms enacted by national governments. Yet even when issuing soft policy recommendations, it is not clear that the institutions of the EU are (or should be) absolved of their fundamental rights obligations. The Charter of Fundamental Rights, it should be recalled, is addressed at the institutions of the EU and makes no distinction between their hard law and soft law activities.

## 5.4. Discussion and Conclusion

It should be recalled that the purpose of the case studies that constitute chapters four, five, and six is to analyse how different rights have been utilised by the EU institutions since the Charter became legally binding at the end of 2009 in order to see how the EU has engaged with these issues and determine if the dominant understanding of fundamental rights developed in chapter three has developed in any way. In the context of the critical constructivist theoretical framework, my argument is that fundamental rights have been constructed by EU institutional actors and influenced by institutional and paradigmatic dynamics. That is, both the institutional arrangement of the EU and the relationships between rights and neoliberal economic principles have affected how rights are conceptualised and integrated into political activities. The argument developed in chapter three is that the dominant understanding of fundamental rights in the EU is one that has prioritised civil over social rights, confined rights to the jurisdiction of the ECJ, and placed neoliberal economic principles on the same level as fundamental civil rights.

This chapter has focused on two aspects of the dominant understanding of rights in the EU: the institutional restriction of rights to areas where the ECJ holds jurisdiction and the relationship between social rights and neoliberal economic principles. In particular, this chapter set out to determine if the changes introduced by the Treaty of Lisbon have expanded the application of rights to all EU activities and if the position of social rights has been enhanced vis-à-vis economic principles. To do this, this chapter focused specifically on how the fundamental labour rights to protection against unfair dismissal, fair wages, and collective bargaining have featured in contemporary EU political activities. Historically, these labour issues have been addressed in the EU through legislative developments setting out EU-wide minimum standards, though recent case law from the ECJ has undermined this approach to some extent when these standards clash with internal market freedoms. In the 2000s, a new coordination based method emerged without the involvement of the ECJ or recourse to any mechanisms designed to protect fundamental rights. Since the end of 2009, this coordination approach has developed stronger mechanisms to impose top-down pressure on Eurozone states and has become increasingly dominated by neoliberal economic principles, particularly regarding macroeconomic competitiveness. Despite the inclusion of labour rights in the Charter as programmatic principles to be implemented via legislation and the commitment to a social market economy in the Treaty of Lisbon, developments concerning labour rights since the end of 2009 have not only seen an absence of any EU legislation on labour rights, but also the incorporation of labour issues under a macroeconomic framework without any rights mechanisms. This chapter has therefore found that the scope of application of rights has remains constrained and social rights have retained their lesser position in comparison to neoliberal economic principles. In fact, compared to the treatment of social rights prior to 2010, the situation regarding social rights in the EU has deteriorated.

The relationship between the institutional structure of the EU and the paradigm of neoliberalism has played a key role when it comes to social rights. As highlighted in chapter one, these two dynamics are a key part of critical constructivism and provide vital insights into how fundamental rights have developed. On the institutional side, it was highlighted how the different roles of the EU actors are constrained by the institutional structure of the EU (largely written into the Treaties, but also open to some interpretation) and the legitimate expectations of political society as to the proper behaviour of different actors (for example, the ECJ is expected to act in a court-like manner in European society). The dominant understanding of rights developed historically over a long period of time and enshrined in the Charter of Fundamental Rights may result in an ideational path dependency (Hay, 2008), as actors perceive of fundamental rights in this specific fashion and do not recognise a reason to change it. These factors can be seen in the case of labour rights. Since 2010, there have been no EU legislative developments concerning labour rights (or any other social rights, for that matter) and all political activity in this area has taken place in the context of the governance of the Eurozone. The institutional barriers to legislative developments on labour issues, including the need for unanimity and exclusion from EU competence for collective bargaining and pay (Leibfried, 2015: 268-269), have hindered new legislation and pushed the EU towards coordination based approaches under the governance of EMU. The institutional structure of the governance of EMU excludes the ECJ and the Parliament. The two actors that have been most active in the area of fundamental rights, including social rights, have been unable to influence policy direction. The association of fundamental rights with the case law of the ECJ, which has remained even when it comes to the development of means to mainstream rights by the Commission, has ensured that the institutional actors in control of the governance of EMU have felt little restraint from rights developments when acting in this area. By contrast, the neoliberal principles embedded at the core of EMU have strengthened. Spurred on the by the Eurozone crisis, the core economic principles underpinning EMU have expanded from sustainable debt to macroeconomic competitiveness, a far broader concept enveloping labour market regulations. This has seen the expansion of neoliberal policy ideas to core areas of labour rights.

The relationship between rights and neoliberal economic principles in the EU has also been a key part of recent developments around labour rights. As highlighted above, institutional dynamics have contributed towards the exacerbation of tensions between rights and economic principles by excluding those institutional actors with a stronger deference towards rights. Yet even if the ECJ and the Parliament were involved in the governance of EMU, it is not clear if this alone would redress the labour rights violations that have occurred. As highlighted in chapter two, neoliberal economic principles have been embedded at the core of EMU from the outset. The developments around Europe 2020, the European Semester, and the bail-out mechanisms show that neoliberal principles have only become further embedded as the policy direction has become defined by the need to achieve macroeconomic competitiveness by putting downward pressure on labour. Flexible labour markets, wage constraint, and decentralised collective bargaining are all key components of neoliberalism. Where these neoliberal ideas have come into conflict with labour rights, they have reigned supreme.

There are two important implications of this chapter. First, it adds weight to the dominant understanding of fundamental rights developed in chapter three. This understanding is that fundamental rights, as conceived by the EU, are predominately civil rights, limited to the scope of the ECJ, and of equal value to neoliberal economic principles. It was argued in chapter three that this specific understanding of fundamental rights has been shaped by the way in which rights have been constructed in the EU, particularly the influence of the institutional framework and position of dominant neoliberal economic ideas. As demonstrated above, social rights have retained their lesser position, neoliberal economic principles have been prioritised over social rights, and the scope of application of rights has not been expanded to areas outside of the jurisdiction of the ECJ. Again, the institutional framework of the EU and the presence of dominant neoliberal economic ideas have continued to shape the development of specific labour rights. Second, there are potentially severe consequences arising out of the way in which the EU has engaged with labour issues. Through reference to the ECSR, it is clear that labour rights standards are being undermined due to EU involvement which may in turn undermine the legitimacy of the European project as post-war social settlements are disrupted in favour of a new neoliberal order. As highlighted in chapter three, the primary purpose of the Charter of Fundamental Rights, according to the European Council, was to enhance the legitimacy of the EU by increasing the visibility of its rights protections. It is evident that when it comes to labour rights at least, the fundamental rights guarantees in the EU are hollow.

# 6. Disability Rights in the European Union

The focus of this chapter is on the EU’s engagement with the issue of disability regarding the fundamental right to equality and non-discrimination. Over the last couple of decades, the EU, as part of a global trend, has increasingly addressed disability issues through the lens of fundamental rights. This has culminated in the agreement of the Convention on the Rights of Persons with Disabilities (CRPD) at the United Nations in 2007. This is the first international human rights treaty that the EU has played an active role negotiating and has become a signatory to. The CRPD is themed around the principle of equality and non-discrimination, but recognises that people with disabilities face a number of unique barriers to achieving equality that have been insufficiently addressed by older fundamental rights instruments. The development of disability rights, as part of the broader concept of fundamental rights, has helped to drive forward new and innovative principles, particularly around the concept of substantive equality and an active role for public authorities.

It is necessary to recap some of the primary findings on how fundamental rights are broadly understood in the EU. Rights are viewed as predominately civil rights, limited to the jurisdiction of the ECJ, and of equal value to neoliberal economic principles. Some developments in the 2000s have begun to challenge this dominant conception of rights, particularly the inclusion of social rights in the Charter of Fundamental Rights as principles to be implemented by policy. Whilst the distinction applied to social rights as principles to be implemented by policy has undermined social rights to a certain extent by affording them lesser value than civil rights, it has also challenged the judicial conception of rights by highlighting alternative, policy-based means to implement rights. However, as chapter five on labour rights has highlighted, there has been very little in terms of legislative implementation of those programmatic social rights, whilst neoliberal economic principles remain embedded in the ethos of the EU and create tensions for social rights. Civil rights, on the other hand, tend to enjoy a stronger level of protection due to their compatibility with the institutional framework of the EU and the neoliberal paradigm embedded within it, as highlighted in chapter four. One of the particularly interesting aspects of equality and non-discrimination rights is that they cross-cut this civil and social rights divide – they can be associated with principles underpinning either of these types of right. As highlighted in greater detail in section one, below, equality from a civil rights perspective involves the prohibition of direct discrimination by restricting what actors can do, while equality from a social rights perspectives goes further and sets out a positive duty for the state to actively end structural disadvantages embedded in society.

To put this chapter into context, the conceptual framework of this thesis should be recalled. Approaching from a critical constructivist perspective, it is argued here that it is the way in which fundamental rights as a concept are understood that is of key importance. That is, it is necessary to look at how actors have constructed rights in the EU and how those actors responsible for their protection and realisation understand rights. As highlighted in the earlier chapters, this process of construction is shaped by dynamics pertaining to institutional and paradigmatic factors. The institutional structure of the EU that affords different roles and capabilities to different actors affects the influence these actors have over the construction of rights. The presence of strongly embedded paradigms about neoliberal economic principles affects the role of rights, particularly the substantive elements associated with social rights. The previous two chapters have focused on drawing out these aspects in particular when it comes to analysing how specific rights have conceptualised in contemporary political activities. This chapter includes a more specific focus on how rights are understood in the EU and their relationship to cutting-edge international rights developments. As a socially constructed concept, rights are also constantly evolving as new rights and methods of protection are developed. Disability equality is an area that has seen the most recent international developments around fundamental rights with the signing of the UN CRPD, to which the EU is a signatory. How this international advancement of rights interacts with how rights are understood in the EU needs to be analysed.

Disability rights raise some challenges to this dominant conception of fundamental rights and therefore make for an interesting case study. The widespread acceptance of the social model of disability, outlined in more detail below, has promoted the idea that it is the way in which society is organised that plays a key role in disabling individuals, rather than personal limitations caused solely by individuals’ own impairments. It has now been broadly recognised, at least rhetorically, that the disadvantages faced by people with disabilities are fundamental rights issues and that the full and effective realisation of rights of people with disabilities requires a proactive approach by public authorities to remedy structural disadvantages in society. This means that fundamental rights must be conceptualised in a fashion where public authorities or the state must actively ensure their realisation in order to ensure equal access to rights. As highlighted in previous chapters (particularly chapter two), historically it was only social rights that were associated with the need for a proactive approach on behalf of public authorities, whilst civil rights have been associated with restrictions on public authority. Non-discrimination and equality rights have historically challenged the civil-social rights dichotomy that has characterised many international and European rights developments. Due to the growing acceptance of structural disadvantages in society, disability equality has contributed significantly to overcoming this distinction. Rights to housing, social security, justice, private and family life, and community life cannot be enjoyed simply because these things exist in society for the majority of people; measures must be in place to ensure effective realisation of these rights for people with disabilities. This is recognised to some extent in the EU’s Charter of Fundamental Rights by Article 26 on the integration of persons with disabilities, which recognises the right of disabled people to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community. The idea of a proactive duty on public authorities is recognised to a far greater degree in the UN CRPD. As highlighted below, the CRPD lists a range of civil and social rights and provides specific details on what must be done to effectively realise these rights. The development of rights of persons with disabilities has been at the forefront of breaking down the distinction between civil and social rights and the role of public bodies in ensuring the effective realisation of rights. However, many of these more cutting edge developments have taken place at the UN level and in the context of the CRPD. Questions remain as how the UN CRPD has influenced the conception of disability rights at the EU level and how developments associated with disability rights have influenced the way in which fundamental rights are understood more generally.

The main argument of this chapter is that disability rights developments, in both the Charter of Fundamental Rights and the CRPD, have tentatively pushed the EU towards adopting a more proactive approach to fundamental rights, but have generally not resulted in any significant change. Institutional barriers have largely prevented any significant legislative developments; while there have been some advancement beyond the restrictive scope of the neoliberal paradigm in policy framing in soft law areas, though these are restricted mainly to the Commission’s Disability Strategy. The institutional barriers have mainly been associated with the need for unanimity among national governments for equalities legislation which has stalled the progress of the Proposed Equality Directive (PED), though the enhanced role of the European Parliament post-Lisbon treaty has helped to push through some limited advancement in the regulations for the structural funds. Yet it should be noted that one of the key reasons for contemporary developments appearing limited is that the EU was already fairly advanced in the area of disability equality rights, though mainly from a more formal equality civil rights perspective. As early as 2000, key legislation on disability already addressed this issue from a rights perspective based on the right to non-discrimination in employment, which contained some provisions on a positive duty to actively alter workplaces to redress discrimination. Developments around fundamental rights in the EU since then such as the Charter of Fundamental Rights and the UN CRPD have not significantly altered this non-discrimination approach, despite these developments broadening the scope of equality to unequivocally include a broader array of rights areas and containing stronger provisions on positive obligations. These institutional barriers that have restricted developments around disability equality have ensured that despite the advancements of the UN CRPD, the approach to disability equality in the EU creates minimal tensions with its neoliberal paradigm. As the impact of the CRPD has been boxed into the Disability Strategy (though with some indication of a slightly greater incorporation into the most recent structural fund regulations), the substantive elements of ensuring disability equality that would conflict with neoliberal principles (a tension that was highlighted in chapter two) have had little influence outside of specific disability soft-law policy.

This chapter proceeds in three sections. Section one discusses some of the concepts central to disability and fundamental rights and draws on the UN CRPD to highlight international standards on disability rights. The medical and social models of disability and their relationship to different conceptions of equality and rights-based approaches are highlighted. Section two focuses the history of disability policy at the EU level, providing vital context to contemporary developments. This covers the development of the social model of disability and the adoption of a non-discrimination rights-based approach at the EU. Section three examines contemporary disability policy from a fundamental rights perspective. It focuses on four areas: the Disability Strategy, the Proposed Equality Directive, the European Platform against Poverty, and the EU Structural Funds.

## 6.1. Models of disability and conceptions of equality

In order to fully understand how policies towards persons with disabilities have developed, it is necessary to understand how the concept of disability is understood. In many countries, and now at the EU level, disability activists have put considerable effort into developing an understanding of disability that challenges old practices of separation and segregation. This has given rise to what is commonly referred to as different models of disability, which result in significantly different approaches to policy. Two models are outlined here: the medical model and the social model.[[80]](#footnote-81) Below, a brief account of each of these models is outlined.

The medical model of disability highlights the condition of an individual’s health and what they can or cannot do as a result of this. Where medical solutions are not available to treat a condition, limitations on an individual’s capabilities are accepted as natural and policy is directed towards more passive support and charity. Many of the older charitable organisations have been organised along these lines, staffed and run by able-bodied persons, often in the medical professions, based on the idea that they know best for disabled persons (Oliver, 1990). This has also resulted in the segregation of many persons deemed incapable of engaging in wider society, placing them in special hospitals, care homes, and schools and in sheltered housing and employment. Whilst such segregation has increasingly become considered unacceptable – though it certainly continues across the EU (see FRA, 2012) – not all policies associated with the medical model are viewed so negatively by disability activists and academics. Welfare policies for income replacement for persons with disabilities unable to work and for covering the additional costs of having a disability have generally been underpinned by the medical model, yet have played a vital role in lifting people out of poverty (Waddington and Diller, 2002; Hvinden, 2009). That being said, there is plenty of scope for improvement of the way in which welfare policies function, as highlighted below.

Many disabled people found that the medical model did not fully reflect their experiences and set out to challenge it. Developing a social model of disability, activists and academics have drawn attention to the role society plays in disabling those who have impairment (M. Oliver, 2009). In short, through various environmental and attitudinal barriers, society is designed in such a way that discriminates and disadvantages those with impairment. According to Michael Oliver, one of the key proponents of the social model, the ‘barriers people encounter include inaccessible education systems, working environments, inadequate disability benefits, discriminatory health and social support services, inaccessible transport, houses and public buildings and amenities, and the devaluation of disabled persons through negative images in the media’ (M. Oliver, 2009: 47). For example, if a post office is only accessible via a flight of stairs, an individual in a wheelchair may not be able to access this service. The interaction between the impairment (inability to walk) and the design of society (prevalence of stairs in the built environment) has acted to disable an individual. Many buildings in society remain inaccessible for such reasons. In addition to physical barriers, attitudinal barriers cause people to experience disability. Ideas about what an impaired person is capable of, as described by Gerald Quinn, are often ‘highly inaccurate and rest on encrusted layers of unexamined presuppositions that have piled up over the centuries’ (Quinn, 2007: 245). Michael Oliver (2009: 47) highlights that we live in ‘a society that devalues disabled persons and disabled lifestyles’, in which such misconceptions run rife. The social model aims to break down these barriers by reshaping society to allow the full inclusion of disabled persons.

As the social model has become increasingly accepted politically, policies have been introduced to address the exclusion disabled persons experience in society. Foremost amongst these policies is the prohibition of discrimination based on disability, which has been identified as a rights based approach based predominately on the right to non-discrimination. As highlighted in greater detail below, this has inspired the adoption of a directive at the EU level prohibiting discrimination based on disability, among other protected characteristics, in employment and has included limited provisions on an obligation for employers to provide reasonable accommodation for disabled workers. However, there have been a couple of problems highlighted by scholars with the way in which this non-discrimination rights approach has been utilised in practice.

The first problem is that this rights approach has been imposed on top of pre-existing welfare policies based on the medical model. This has resulted in tensions between two sets of policies based on different assumptions and organisational structures (Waddington and Diller, 2002; Hvinden, 2009). There have been repeated calls to reform social welfare policies along the lines of the social model, to move away from assumptions based on incapacity that support the exclusion of disabled persons and towards the active support of inclusion of mainstream society. For example, welfare policies based on assumptions of incapacity that passively support disabled people can result in exclusion from society, a form of discrimination. Despite highlighting the shortcomings of social welfare policies based on a medical model, disability activists have continued to express support for welfare policies and it is widely accepted that welfare and rights based approaches complement each other (Hvinden, 2009; Keleman, 2011; Waddington and Diller, 2002). In any case, critiques of some of the medical assumptions underpinning certain welfare policies should not be confused with critiques of welfare from a neoliberal economic perspective, as made by some governments (Harris, Owen, and Gould, 2012; M. Oliver, 2009).

The second problem with this non-discrimination rights-based approach is its deference to formal equality resulting in an ability to adequately address structural disadvantages in society. It should be emphasised, however, that this a problem that is more associated with a narrower focus on non-discrimination rather than a rights-based approach per se. As highlighted below, this is an issue that has frequently emerged in the context of the EU. In short, formal equality assumes that all people in society are on equal footing once irrelevant characteristics are removed from decision making processes. It is assumed that it is sufficient to simply prohibit actors from directly discriminating against those with a protected characteristic and is associated more with the liberalism that has underpinned civil rights, as highlighted in chapter two. This basically treats those who are disadvantaged the same way as those who are not, thus privileging dominant norms in society and ignoring structural disadvantage embedded in society (Fredman, 2005: 202-203; Bell, 2003). Substantive equality, on the other hand, recognises that some people suffer structural disadvantages in society that limits their capacity to enjoy life on a par with those who do not face the same barriers. This cannot be adequately addressed by only prohibiting direct discrimination. These structural disadvantages are often not the result of direct or even conscious discrimination, but rather emerge from the way in which society is structured and the hierarchies and dominant norms that have formed within it. For full and meaningful equality to be achieved, society must be reshaped to challenge dominant norms. This requires a proactive role for the state to intervene in society to ensure that everybody has the agency to make free choice (Fredman, 2005: 214). An approach to disability based on the right to non-discrimination premised on formal equality is not sufficient to meet the goals of the social model, given the recognition of structural disadvantage in the social model. In the context of the key rights-based legislative developments in the EU, disability has primarily been addressed through formal equality. However, some elements of an approach to non-discrimination based on substantive equality do also exist. For example, provisions on reasonable accommodation allow for proactive steps to be taken to address structural disadvantage in society and the concept of discrimination includes indirect discrimination. That is, apparently neutral provisions that result in someone being discriminated against. Yet these elements do not go too far. According to Quinn and Flynn (2012: 24), the ‘non-discrimination remedies as such are not consciously designed to bring about structural change, still less to address the accumulated disadvantages facing persons with disabilities’, though on occasion such structural change does occur as a by-product.

It has been argued that the reluctance to move this rights approach significantly beyond formal equality is due to an unwillingness to impose financial burdens on the private actors, particularly businesses (Fredman, 2005: 208; O’Brien, 2011; 2014a; Harris, Owen, and Gould, 2012). Structural change in society inherently involves interference with the market and, in some situations, higher public spending, which has become less politically acceptable as more states and the EU increasingly adopt neoliberal economic ideas, as highlighted in the previous chapter. In certain states, such as the UK, these neoliberal tendencies have resulted in reforms that have not been conductive to the participation of disabled people in society, despite containing some rhetorical commitment to the social model (Harris, Owen, and Gould, 2012; M. Oliver, 2009: 47; Beresford and Holden, 2000). It is argued below that a clash with economic values has limited the effectiveness of anti-discrimination law by preventing a more substantive equality focus. Implementing a social model of disability and achieving substantive equality may not be compatible with the economic ideas currently dominating policy.

Despite the aforementioned issues with approaching disability issues from a rights perspective, there are a number of positive developments. By approaching disability from a right to non-discrimination perspective, disability issues have become tied into the broader fundamental rights framework. Over time, the disadvantages faced by people with disabilities have slowly become recognised as a fundamental rights issue. Disability issues have now moved from being included in non-discrimination provisions to becoming firmly entrenched in the canon of fundamental rights with their own UN treaty in 2007: the CRPD.

The CRPD moves beyond a narrower non-discrimination rights approach by including a number of substantive equality provisions. This convention is broadly themed around the concept of non-discrimination and equality and there is a clear endorsement of substantive equality due to the way in which discrimination is defined and the inclusion of many social rights (Waddington, 2009a). Article 5 of the CRPD on equality and non-discrimination includes the need to provide reasonable accommodation to promote equality and other specific measures necessary to achieve de facto equality. The Convention lists a number of civil and social rights. These rights include, but are not limited to, access to justice (Article 13), protection of the integrity of the person (Article 17), respect for privacy (Article 22), education (Article 24), health (Article 25), employment (Article 27), and adequate standard of living and social protection (Article 28). Whilst many of these rights generally exist in other international rights documents, the CRPD specifically applies these rights to the context of disability often by including a proactive duty to ensure their realisation. For example, the right to education contains a commitment to not exclude people with disabilities from mainstream education, which is currently a widespread form of discrimination. Several new rights are also included that are more specific to the experiences of people with disabilities, including accessibility (Article 9), the right to independent living (Article 19), and personal mobility (Article 20). In order to ensure the effective realisation of these rights, the CRPD commits signatories to ‘adopt all appropriate legislative, administrative and other measures’, to ‘modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities’, and to ‘take measures to the maximum of available resources’ in order to achieve the full realisation of social rights (Article 4, CRPD). The CRPD also commits signatories to effective monitoring and data collection systems to ensure the necessary information is available to adequately enforce the rights it contains (Lawson and Priestly, 2013). These are strong and far-reaching commitments. The obligation to take action and the scope of rights contained in the CRPD goes beyond the EU’s Charter of Fundamental Rights.

In addition to its rather far reaching provisions on substantive equality for people with disabilities, the CRPD has a second importance for this case study of disability. It is the first international fundamental rights document which the EU has negotiated and signed. However, it should be noted that during the negotiations the EU was not supportive of the focus on substantive rights beyond non-discrimination (de Búrca, 2010). Instead, it favoured an approach based along the lines of its non-discrimination rights-based approach that was discussed above and fought for the inclusion of provisions on reasonable accommodation, as this is the way in which the EU already engaged with disability. Nonetheless, the EU delegation still took on a leading role in the negotiations of the CRPD. Its reliance on civil society organisations to strengthen its position as an international actor also helped to temper the delegations reluctance on a substantive rights based approach, which was strongly favoured by both civil society organisations and many Latin American states (de Búrca, 2010). Whilst some EU member states were somewhat ambivalent about a new UN treaty on disability rights, the Commission saw an opportunity to bolster the reputation of the EU as an international actor and so took on a leading role in the negotiations (de Búrca, 2010).

The EU’s non-discrimination approach is compatible with the CRPD. For example, the headline EU legislation on disability, the Employment Equality Directive (2000), is considered to be broadly in line with the CRPD, though several minor issues exist (Lawson, 2009: 89). However, more needs to be done at the EU level to ensure full compliance with the CRPD and to bring about full realisation of the rights of persons with disabilities. There have been issues with the absence of a definition of disability in EU law which has resulted in the ECJ not endorsing the social model of disability. This issue emerged in the case of *Chacon Navas[[81]](#footnote-82)* in 2006, in which the ECJ adopted a medical definition of disability. The use of a medical definition of disability was thought to have been remedied in *HK Danmark[[82]](#footnote-83)* in 2011 as the ECJ adopted a definition in line with the social model. However, the recent case of *Glatzel[[83]](#footnote-84)* in 2014 has shown that the ECJ continues to struggle with a social definition of disability (O’Brien, 2014b). Current anti-discrimination legislation at the EU level is also limited to employment and training only, raising issues with the scope of protection being too narrow. Issues have also been raised with the adequacy of the way in which disability has been mainstreamed in existing legislation and the need for a thorough review of all existing legislation, policies, and funding instruments (Waddington, 2009a: 139; Quinn and Doyle, 2012). Essentially, whilst the EU may currently meet the minimum standards of the CRPD, more needs to be done to ensure the full realisation of rights for people with disabilities.

## 6.2. Disability Issues in the EU

The purpose of this section is to explain the development of disability policy in the EU. It proceeds in three steps. First, the introduction and development of disability policy at the EU level is outlined through the various action plans and strategies. This includes the shift from the medical model of disability to the social model and the development of non-legislative mechanisms to engage with disability issues. The next section looks at the headline piece of legislation in this area, the Employment Equality Directive and discusses some of the principles it is based on. The final section offers a brief account of other legislation in which disability has been mainstreamed in.

### 6.2.1. Action Plans and Strategies: from welfare to civil rights

From the 1970s onwards the EU has established action plans and strategies to engage with disability policies. Over the decades, these strategies have developed significantly, moving from attempts to coordinate national welfare policies towards disability to endorsing a civil rights premised on non-discrimination. Early engagement with disability issues in the EU took the form of action programmes and attempts to coordinate a common EU approach to social welfare policy. At this time, member states predominately took an approach to disability based on the provision of social welfare services underpinned by the medical model. This meant that European level action was taking place in a field where member states were already very active, limiting the scope for new policies to be developed. The 1970s saw the inclusion of disability in the Community social action programmes and a specific programme titled ‘Vocational Rehabilitation of Handicapped Persons’ that ran from 1974 to 1979. However, the approach at this time was criticised for having ‘no coherent philosophy whatsoever’ behind it, as it was instead motivated by a desire to do something about the conditions of institutions for mental health in Greece, which was one of the new accession states at the time (Quinn and Flynn, 2012: 34).

The 1980s saw more attention focused towards trying to harmonise national welfare policies towards disabled persons, though the EU lacked the competence for this to be done effectively. Another action programme was launched and focused on the social integration of disabled persons and there was an attempt to pass a directive to create a European policy on employment quotas, though this failed due to the inability to overcome national differences in these schemes among member states (Mabbett, 2005: 107). There is little evidence of these action programmes and their attempts to harmonise national policies having much impact (Keleman, 2009: 209). Whilst the focus during the 1980s in the European Community remained along the lines of coordinating welfare practices, a specialist Disability Unit was formed in the European Commission that would later go on to pave the way for the introduction of a rights-based approach (Quinn and Flynn, 2012: 36). This Disability Unit managed two successive HELIOS (Handicapped People in the European Community Living Independently in an Open Society) programmes that created a platform for disability groups in civil society to develop and promote a common rights-based approach. In particular, the HELIOS II programme in 1993 led to the formation of the European Disability Forum, a European-wide NGO representing disabled people that has been particularly influential within the EU (Mabbett, 2005: 108).

Slowly, the consensus among policy-makers around a social welfare approach based on the medical model of disability began to break down as disabled people’s organisations lobbied continuously in favour of the social model. Based on these developments, EU actors saw an opportunity to take advantage of the growing acceptance of the social model and looked to the rights-based approach that was being pioneered in the United States but was largely undeveloped in Europe. By adopting an approach to disability based on the rights to non-discrimination, the EU could shore up its social credentials by engaging in disability policy without stepping on the toes of member states’ domestic programmes and without the need for instruments such as high public spending (Quinn and Flynn, 2012: 37-38; Keleman, 2011). By 1996 the Commission had more or less fully endorsed the social model approach to disability in a communication on ‘equality of opportunity for people with disabilities’ and embarked upon a rights-based approach focused on non-discrimination (Quinn and Flynn, 2012: 37-38). This 1996 strategy involved establishing the idea of mainstreaming disability issues in the legislative process, further consolidating the involvement of disability NGOs in civil society, and increasing coordination of national policy through the formation of the High Level Group of civil servants (Quinn, 2007: 238). It also called on member states to tackle barriers in society in areas such as transport, buildings, housing, and improve welfare to ensure social inclusion. Like the earlier action plans, however, the EU lacked any powers to enforce these calls.

Though the 2000s have generally been characterised by legislative developments on disability, particularly following the EU being granted competence on non-discrimination in this area in the Treaty of Amsterdam (1997), the Commission has continued to develop disability strategies and utilise a range of non-legislative instruments. 2003 was designated the European Year of Persons with Disabilities, in which activity was focusing on awareness raising of disability issues (Quinn, 2007: 238). A new action plan on equal opportunities (2004-2010) was also launched in the same year, which continued a social model approach to disability (Lawson, 2009: 85). Similar to the 1996 strategy, it focused on mainstreaming disability into relevant EU policies and reinforcing the coordination of national policies and the involvement of disabled people (European Commission, 2003: 3).

The over-arching approach of the Commission to disability, found in documents such as the 1996 Strategy and the 2003 Action Plan, demonstrate a commitment to substantive equality based on the right to non-discrimination. Numerous areas of society are identified where people with disabilities suffer inequality, such as in employment, education and learning, and access to the built environment (see European Commission, 2003). This recognises that the way in which society functions acts to disadvantage people with disabilities and must be reformed through proactive means. Various governance mechanisms are employed to address these issues and many small-scale initiatives have been launched, such as awareness-raising campaigns and pilot schemes. The EU Structural Funds have been earmarked to support disability programmes in member states, particularly in labour market and social participation projects. The Open Method of Coordination is highlighted as a means to influence national policies on employment and social welfare that are crucial to people with disabilities. However, these approaches have not always been successful. The Structural Funds have been criticised for supporting segregation of people with disabilities by funding institutionalised care homes (Quinn and Doyle, 2012: 70) and the Open Method of Coordination has been criticised for not taking a rights-based approach (Mabbett, 2005: 109) and for subordinating social policies to economic goals (O’Brien, 2014a: 739). According to Hosking (2013: 97), ‘despite the extensive scope of EU disability initiatives, the promise of significant and meaningful improvement in the social situation of disabled people remains unfulfilled.’

The development of EU action plans and strategies demonstrate a clear shift from a focus on coordinating national social welfare policies underpinned by the medical model towards endorsing the social model. The adoption of the social model of disability has formed the basis for a rights-based approach, which has mainly focused on the right to non-discrimination. The disability strategies do recognise the need to intervene in society in order to properly end discrimination and bring about de facto equality, which is an inherent part of the social model of disability. However, the ability of the EU institutions to achieve this has been constrained due to its limited competence in many of the policy areas central to the lives of people with disabilities and the inability of national governments to agree on action.

### 6.2.2. Legislation on the Prohibition of Discrimination

The power to legislate on non-discrimination was introduced by the Treaty of Amsterdam as Article 13 TEC (now Article 19 TFEU), which entered into force in 1999. This led rather quickly to Directive 2000/78/EC, also known as the Employment Equality Directive, which prohibits discrimination on the grounds of sexual orientation, religion or belief, age, and disability in the workplace. In terms of legislation on disability, this directive marks the culmination of the civil rights approach in the EU.

As mentioned above, early attempts by the EU to engage in disability policy were fraught with difficulty. The Commission was attempting to expand its influence to an area of policy already well developed at the national level and where national governments felt strongly about retaining competences. The variation in organisation of welfare support across states and the financial costs involved prevented European integration of the prevailing approach to disability policy of the 20th Century (Mabbett, 2005: 102). During the 1990s, an opening for disability policy at the EU level emerged as several different strands of ideas converged. Disability activists had been successful in raising the profile of the social model of disability and the discrimination that disabled people face in society, particularly at the United Nations and with new civil rights legislation in the United States. A civil rights approach to disability is also compatible with the EU’s regulatory style, which, due to a relatively small budget and bureaucracy, relies more on the creation of laws at the EU level that can then be implemented and enforced by national authorities and individual litigants within member states (Keleman, 2011). At this time, the EU was also looking for new opportunities to promote social policy in order to put a ‘human face’ on European integration as a means to balance against the predominately economic nature of integration so far (Quinn and Flynn, 2012: 37). However, disability non-discrimination measures still had to be compatible with the principles underpinning the EU. Quinn (2007: 236) describes the ‘twin impulses’ behind disability law reform as ‘enhancing economic rationality and honouring human rights’, as discrimination is considered to be economically irrational. However, the need to justify anti-discrimination measures on economic grounds as well as fundamental rights has implications for their effectiveness, leading to criticisms that economic concerns have limited the degree to which these measures can bring about the substantive change necessary for full equality (O’Brien, 2011; 2014a).

There are three primary components to the Employment Equality Directive: prohibition of direct discrimination and harassment, prohibition of indirect discrimination, and the provision of reasonable accommodation. The prohibition of direct discrimination is fairly straightforward; it prohibits a disabled individual being treated less favourably than a non-disabled individual in a comparable situation. This provision has been interpreted to also cover discrimination by association by the ECJ in the case of *Coleman[[84]](#footnote-85)* in 2008. The prohibition of indirect discrimination is an important development for disabled persons and endorses the social model of disability, as it recognises that practices that may appear neutral can actually result in discrimination. This challenges dominant norms in society that have often developed without disabled people in mind and, as a result, may unintentionally discriminate. However, indirect discrimination may be justified if it is based on objective justification and in pursuit of a legitimate aim or if it is remedied by reasonable accommodation (Article 2, Directive 2000/78/EC). Reasonable accommodation is a key tool towards disability equality and one of the more cutting edge developments at the EU level. It provides that an employer must take reasonable steps to accommodate a worker with a disability, provided this does not constitute a disproportionate burden. This can include delegating non-essential functions of a job to other workers, allowing flexible working time, physical adaptations to the workplace, or the provision of specialist equipment. It also provides for a more direct and individual focus, overcoming the lack of direct accountability that has reduced the effectiveness of more general programmes (Quinn, 2007: 246). The Employment Equality Directive also allows member states to take additional positive action to achieve full equality, but does not require this.

The Employment Equality Directive has been lauded for the steps it has taken towards disability equality. Prior to this directive, only three EU member states had anti-discrimination measures on disability. The concepts of indirect discrimination and reasonable accommodation are both important tools for full equality and both contain elements of a more substantive conception of equality, though overall the directive leans towards formal equality. As mentioned above, formal equality involves characteristics deemed irrelevant, such as race or disability, being removed from the decision making process, thus all people should be treated equally. The prohibition of direct discrimination follows the logic of formal equality, whilst indirect discrimination and reasonable accommodation are premised on substantive equality.

Disability anti-discrimination law in the EU has been critiqued for a number of reasons. The provisions on reasonable accommodation do not appear to create any enforceable rights, despite denial of reasonable accommodation being broadly recognised as a form of discrimination (Quinn, 2007: 164; Waddington and Bell, 2011). The wording of the directive can be read to suggest that it is up to member states’ discretion as to how to implement it, particularly when it comes to creating state aid schemes designed to off-set the cost of accommodations (Mabbett, 2005: 111-112). The directive certainly permits member states to create a legally enforceable right to reasonable accommodation, but there have not been any cases before the ECJ to clarify if such an obligation exists in EU law. As mentioned above, failure to provide reasonable accommodation can be justified on the grounds of cost. That is, if it is considered to impose a disproportionate burden. It has been argued that the determination of what constitutes a disproportionate burden is weighted in favour of the employer, thereby reducing the utility of this provision (Fredman, 2005: 209; O’Brien, 2014a: 730). By allowing employers to refuse reasonable accommodation on the grounds of cost, the directive does not fully redress structural inequalities in society as per the social model of disability and the idea of substantive equality. Issues have also been raised with the way reasonable accommodation interacts with indirect discrimination. The directive allows indirect discriminatory practices to continue if reasonable accommodation is used to remedy the situation for an individual affected. However, this means that whilst the individual immediately affected may suffer no ill consequences, the continuation of the indirect discriminatory practice could potentially affect a wider array of persons without a clear personal connection and therefore no means for redress (O’Brien, 2014a; Waddington and Hendriks, 2002: 415). Furthermore, whilst reasonable accommodation is a step in the direction of the social model, it is also notable that the Employment Equality Directive does not require any positive action (though it does explicitly permit positive action, see Article 7, Directive 2000/78/EC) that is generally consider to be vital to overcoming structural barriers in society. Beyond the provisions on reasonable accommodation, O’Brien (2011: 46) has been particularly critical of the EU for continued tolerance of indirect disability discrimination in areas of discrimination by association, discrimination by declaration, and discriminatory practices of disclosure, which she argues is due to the economic rationality that underpins the EU non-discrimination law. The material scope of the directive itself has also been criticised for limiting its application to employment and training only, thus reducing the ability of EU law to bring about substantive equality (Waddington and Diller, 2002).

There are also some issues with ensuring compliance with the anti-discrimination measures in the Employment Equality Directive. Unlike the Race Equality Directive, the employment directive did not require independent monitoring and enforcement bodies to be established (Mabbett, 2005: 114), though such organisations have spread across European states anyway (Pegram, 2010). Instead, the directive relies on judicial enforcement and individual litigation (Keleman, 2011). Concerns have been raised about the suitability of such a judicial approach due to barriers to accessing justice for persons with disabilities and the degree to which the justice system adequately takes disability issues into consideration (Flynn and Lawson, 2013: 8-12; Clement and Reeds, 2005). Problems have also emerged from the absence of a definition of disability in the Employment Equality Directive. The ECJ has been criticised for adopting a medical definition of disability in *Chacon Navas[[85]](#footnote-86)* in 2005 (Quinn, 2007: 256). Though a social model understanding of disability was used in *HK Danmark[[86]](#footnote-87)* in 2013, it has been argued that the more recent case of *Glatzel[[87]](#footnote-88)* in 2014 demonstrates a continued uneasiness with the social model at the ECJ (O’Brien, 2014b).

Despite the above criticisms, this directive should not be understated; it is the key piece of legislation on disability rights in the EU. The inclusion of provisions on indirect discrimination and a positive obligation to provide reasonable accommodation are innovative developments in the context of rights. This moves the concept of non-discrimination away from a restrictive notion of restraints on action towards the need to take change social norms once considered to be neutral and to actively take steps to remedy discriminatory situations. However, its narrow focus on employment and training and the limitations on the use of reasonable accommodation demonstrate that the EU still have some way to go for disability equality.

### 6.2.3. Mainstreaming Disability in EU legislation

As mentioned above, mainstreaming disability issues was established in 1996. It has also been applied to gender and racial equality. The concept of mainstreaming is rather broad as it imposes a positive duty on EU institutions to consider disability (or race or gender) in all appropriate areas of policy and decision-making (see Shaw, 2004 on mainstreaming). The Disability Unit in the European Commission holds responsibility for ensuring that disability issues are raised and mainstreamed when relevant. Mainstreaming allows the EU to go beyond specialist disability legislation (such as the Employment Equality Directive, see below) and ensure that all legislation contributes to breaking down barriers to equality in society. Given the limitations on EU competence, the legislation in this area has tended to come under treaty provisions on either internal market harmonisation (Article 114 TFEU) or transport policy (Article 100 TFEU).

Lisa Waddington (2009b: 584-586) provides a comprehensive account of the legislation passed under treaty provisions on the internal market. Directive 2001/85/EC on vehicles carrying more than 8 passengers stipulates that there must be certain accessibility features for persons with reduced mobility and visual impairments. Directive 95/16/EC on lifts requires that they must be accessible for disabled persons. Directive 1999/5/EC on radio and telecommunication terminal equipment contains provisions that such equipment supports features to allow use by disabled persons. Directive 2002/21/EC and Directive 2002/22/EC cover electronic communications networks and require that national authorities facilitate access and ensure services are affordable for disabled users. Directives 2004/17/EC and 2004/18/EC on public procurement provide for disability accessibility to be taken into account during the procurement process. Legislation in the area of transport has also paid attention to disability issues, mainly focusing on ensuring disability access to ships and high speed passenger crafts (Directive 2003/24/EC) and to trans-European rail services (Directive 2001/16/EC). There are special measures provide care for disabled passengers in the event of denied boarding or cancellation of flights in Regulation 261/2004. In addition to this, Regulation 1107/2006 is specifically on the rights of disabled persons and persons with reduced mobility when travelling by air (Waddington, 2009a: 123-126).

However, whilst there do appear to be a number of directives that include some provisions on persons with disabilities, the EU has also been criticised for numerous missed opportunities (Waddington, 2009b: 580-582). For example, safety laws on consumer products and toys have not contained disability specific provisions. This is particularly a problem in the EU’s internal market due to the principle of mutual recognition. Under this principle, goods and services that meet national standards in one member state can be sold in any other member state, with any restriction on trade having to be justified to the satisfaction of the ECJ. This allows goods and services from member states with lower disability standards to enter the internal market and be sold in any other member state. The ECJ has a mixed record when it comes to allowing restrictions on such goods and services for public safety reasons and has been said to often adopt a more deregulatory position (Waddington, 2009b: 580-581). Even when such national standards are implemented and upheld before the ECJ, it has been argued that only larger member states can impose higher disability requirements without fear of producers and service providers moving their business elsewhere (Waddington, 2009b: 582). There have also been missed opportunities in the directives on parental leave and part-time work, as non-discrimination clauses were originally included in early drafts but later dropped due to opposition in the Council (Mabbett, 2005: 109). In addition to this, the existing directives that have included some attention to disability may not be to a high enough standard, as the recent adoption of the UN Convention on Rights of Persons with Disabilities has brought attention to (Waddington, 2009a: 136).

Missed opportunities aside, these directives and regulations represent further endorsement of the social model of disability and a commitment to ending discrimination in society. It is recognised that, if left to its own accord, many aspects of society will develop without paying due regard to people with disabilities, as has historically been the case. By incorporating disability provisions into legislation on the internal market and transport, the EU has been able to tackle disability discrimination in a wider array of areas than its specific anti-discrimination legislation.

### 6.2.4. The State of Disability Equality Prior to the Lisbon Treaty

The trends in disability rights at the EU level are evident from these developments over the last several decades. A rights based approach to disability with a tendency towards formal equality has developed at the European level, whilst social welfare programmes and their potential for more substantive equality remain at the national level. It has been suggested that this rights approach has been adopted to enhance the legitimacy of the EU and because of its appropriateness for the institutional structure and regulatory style of the EU (Quinn and Flynn, 2012; Keleman, 2011). Some of the shortcomings of this approach in the EU have been attributed to its commitment to formal equality (Waddington and Diller, 2002; Quinn and Flynn, 2012), which has also been put down to the neoliberal economic ethos of the EU (O’Brien, 2011; 2014) and the reluctance of member states to delegate powers over social policy and spending necessary for a more substantive approach (Mabbett, 2005).

These developments so far suggest that disability rights have been conceptualised in line with the broader fundamental rights developments analysed in chapter three. Formal equality is associated with the traditional approach to civil rights as prohibitions on certain actions, whilst substantive equality involves positive duties that tend to be associated with social rights. The EU’s engagement with disability issues has not clearly endorsed one approach to equality over the other. The action plans and strategies devised by the Commission and some of the examples of mainstreaming disability equality in legislation do demonstrate an endorsement of substantive equality and the social model of disability. The premier piece of legislation on disability equality, the Employment Equality Directive, offers some endorsement of substantive equality, but also contains a number of restrictions that limit its potential here. As highlighted above, some scholars have suggested that it is the neoliberal economic ethos of the EU that has contributed to restrictions on the effectiveness of disability anti-discrimination law (see O’Brien, 2014a; 2011). It should be recalled that in chapter three it is argued that fundamental rights have been conceptualised as predominately civil rights of equal value to economic principles and with social rights afforded a lesser status. The conceptualisation of non-discrimination and disability equality in the period prior to 2009 is broadly in line with these broader ideas of fundamental rights as it has leaned towards an understanding associated with ideas about civil rights, though they do show some signs of advancing this understanding to include more positive obligations. In 2009 the Charter of Fundamental Rights was given legal value, which holds some potential to enhance the role of social rights and promote the incorporation of rights as programmatic principles into legislative activity. More importantly, perhaps, in 2010 the EU ratified the UN CRPD containing far stronger provisions on substantive equality and social rights, including positive obligations. As highlighted above, experts such as Waddington (2009a: 133-135) have suggested that the EU’s existing approach is broadly adequate, but there is an obligation to adopt further legislation in this area to ensure compliance with the CRPD.

## 6.3. Disability in Contemporary EU Politics

As highlighted above, the dominant approach to disability has been based on the right to non-discrimination and an endorsement of the social model. This right to non-discrimination has oscillated between approaches premised on both formal and substantive equality, as disability strategies have been committed to substantive equality but key legislative developments have fallen short. Developments at the end of the 2000s have the potential to advance how disability equality rights are understood. The EU Charter of Fundamental Rights was granted legal value at the end of 2009, which may enhance the role of social rights and their association with substantive equality. More importantly, the UN CRPD was signed by the EU in 2007 and ratified in 2010. As highlighted above, the CRPD contains a far stronger endorsement of substantive equality and positive obligations, including on equal access of disabled people to a wide array of social rights. In light of these developments, this section analyses contemporary developments on disability in the EU in order to determine what influence, if any, these rights instruments have had. This section proceeds in four parts. First, the Disability Strategy 2010-2020 is looked at as it is the over-arching EU strategy on disability. The next three parts look at areas that are central to implementing this strategy. They are the proposed equality directive, the structural funds, and the social dimension of the Europe 2020 strategy.

### 6.3.1. Disability Strategy

The Commission’s latest Disability Strategy was launched in 2010 and covers the period up until 2020. It is similar in style and substance to its predecessor strategies in that it adopts the social model of disability and adopts a rights-based approach. There are two elements of this strategy in particular that are important to highlight. First, although it covers a broader array of priority areas indicating a stronger endorsement of substantive equality, this commitment is not matched by an ambitious legislative programme. Second, despite a few initial references to the Charter of Fundamental Rights and the CRPD, the strategy retains a primarily non-discrimination based approach rather than engage with a broader rights discourse.

The strategy highlights a number of priority areas in which action is to be taken to foster the inclusion of people with disabilities. These areas are rather broad, covering accessibility, participation, equality, employment, education and training, social protection, and health (European Commission, 2010d: 5-9). These areas demonstrate a commitment to substantive equality and the social model. Accessibility includes intervening in society to ensure access to the physical environment, transportation, and information and communication technology. Participation spans access to recreational and leisure services and support for community-living, again demonstrating a recognition of the need to reshape the way society functions to ensure disabled people full participation. The sections on employment, education, and healthcare are primarily aimed at ensuring people with disabilities have equal access to these services. Social protection is the only area that is not addressed in terms of equal access and non-discrimination as it is instead in the context of poverty reduction in the context of the European Platform against Poverty, which is addressed in more detail below (European Commission, 2010d). Basically, the strategy addresses disability primarily in terms of the right to non-discrimination based on the social model of disability. An acknowledgement of structural barriers in society is demonstrated in each priority area indicating a clear endorsement of the social model of disability and a shift towards a more substantive understanding of equality. Where non-discrimination is not used to frame the issue, such as in social protection, no other fundamental rights are used to frame the issue. Social protection is addressed in terms of general poverty reduction rather than as a right to social protection.

The Commission’s Strategy also alludes to how the strategy is to achieve it aims. The strategy itself highlights three general instruments to support its aims: awareness raising, financial support through the structural funds, and data collection and monitoring (European Commission, 2010d: 9-10). An accompanying document lists a number of specific means through which the Commission intends to pursue the strategy (European Commission, 2010e). However, it is clear that these actions fall short. Only three pieces of legislation are mentioned. One of these, the Proposed Equality Directive, had begun its legislative process back in 2008. It is looked at in detail below, but it is worth noting at this point that it is currently not expected to become law due to opposition from certain member states, namely Germany (Waddington, 2011). The other two legislative proposals envisaged are a European accessibility act and a regulation on the rights of persons with reduced mobility travelling by road, rail, and sea. Neither of these has materialised and the timescale in which they were to be proposed has passed (European Commission, 2010e: 3). The barriers encountered by the Proposed Equality Directive, that is, the difficulties in achieving sufficient support among member states, may help to partially explain this, though both pieces of legislation are far less ambitious than this directive and there it is said that there is more support for disability developments (Waddington, 2011: 170). According to officials in the Commission and from a major European disability NGO, there is no appetite in the Commission for proposals that are not directly related to economic growth.[[88]](#footnote-89) These legislative proposals in the Strategy also represent a continuation of the EU’s existing approach. The Proposed Equality Directive is designed to expand on the pre-existing Employment Equality Directive and the proposed regulation on rights of persons with reduced mobility traveling by road, rail, and sea expands on a pre-existing regulation on travelling by air. It should also be recalled that it has been argued that the signing of the CRPD requires a full review of existing legislation and policy so as to ensure conformity (Quinn and Doyle, 2012: 70). However, there have been no moves at the EU level to engage in such a review.

Many of the actions envisaged by the Commission, of which there are many, are rather small-scale and of a soft law nature (see European Commission, 2010e). These commitments are generally based around issues such as reporting and evaluating on existing projects, promoting engagement with people with disabilities, identifying areas of improvement, and encouraging positive developments through various soft means (see also Clifford, 2011). This includes coordination through Europe 2020 programmes and the structural funds, which are looked at in more detail below. The Strategy also outlines reforms to the governance structure of the EU, which were required by Article 33 of the CRPD. These include the formation of focal points to take lead on implementing and reporting on the CRPD, coordination mechanisms across the institution of the EU, a monitoring framework, and procedures to engage with civil society organisations. Whilst these initiatives do demonstrate some enthusiasm on the part of the Commission to bring about substantive equality, they have been critiqued for not appearing to have resulted in any significant or meaningful improvement of the lives of people with disabilities (Hosking, 2013: 97). Furthermore, reorganisation within the Commission has also moved the unit with responsibility for disability issues out of DG Justice and into DG Employment, Social Affairs, and Inclusion. This move has been received critically by officials within DG Justice, where it has been suggested that the move might be connected to a plan to bury the Proposed Equality Directive and, whether intentional or not, has acted to undermine the rights of persons with disabilities.[[89]](#footnote-90) An official from a major European disability NGO also suggested that the reorganisation of the disability unit is a ‘step backwards’, noting that it might create problems for mainstreaming fundamental rights as different thematic units (such as the units on Roma and Gender equality) remain in DG Justice and thus increase the internal coordination required when mainstreaming rights.[[90]](#footnote-91) Whilst the absence of legislative activities may be justified due to competence and subsidiarity barriers, the absence of effective action in areas where the EU does have power indicates that the Disability Strategy commitment to substantive equality developments has struggled to have practical impact.

The Strategy is broadly placed in the context of empowering people with disabilities to fully enjoy their rights. Three sources are drawn upon to demonstrate the EU’s mandate in this area: the Charter of Fundamental Rights provisions on human dignity (Article 1), the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community (Article 26), and the right to non-discrimination (Article 21); the provisions on non-discrimination in the Treaty on the Functioning of the EU (Articles 10 & 19 TFEU); and a general reference to the UN CRPD (European Commission, 2010d: 3). Beyond this mandate for action, rights discourse is utilised more sparsely throughout the priority areas of the Strategy. The rights basis for non-discrimination is reiterated in the priority area on equality, as may be expected. With the exception of social protection, the other priority areas – accessibility, participation, employment, education and training, and health – are all addressed primarily in terms of equal access and non-discrimination. Participation contains some mention of exercising the fundamental rights to independent living, free movement, and access to cultural, recreational, and sports activities. Beyond this, there is no specific mention of any of the other rights relevant to these priority areas or any mention of the specific rights in the CRPD. Specific rights to accessibility, participation, employment, education and training, social protection, or healthcare are not used to frame these issues.

The choice to focus on non-discrimination and equality rather than specific rights in the priority areas is not itself a problem under the CRPD. Non-discrimination is still considered a rights-based approach and the EU is under no obligation to utilise the language of a broader array of rights when engaging in areas covered by those rights. However, this does indicate reluctance in the EU to engage in a broader substantive rights-based approach to disability that fully endorses the CRPD. This approach is consistent with the EU’s position in the drafting of the CRPD, where it supported a non-discrimination based approach but was not too supportive of the substantive rights-based approach that was eventually taken (de Búrca, 2010). This reluctance to engage with a broader array of substantive rights is also compounded by the absence of any legislative developments or reviews of existing legislation to ensure compliance with the CRPD. Limitations of the Disability Strategy have been put down to the way in which it has developed on the periphery of the EU and has had to fit to pre-existing political and economic structures (Hosking, 2013: 97). Issues of competence, gaining agreement among member states, and clashes with the current economic orthodoxy of the EU have created difficulties for an effective disability policy (O’Brien, 2014a). The adoption of the EU Charter of Fundamental Rights and the UN Convention on Rights of Persons with Disabilities has not been sufficient to overcome these barriers.

### 6.3.2. Attempting to legislate for equality: Proposed Equality Directive

In 2008 the Commission proposed a new general equality directive. In 2015, this directive remains unfinished, having reached an impasse in the Council primarily caused by the staunch opposition of Germany (Waddington, 2011). Yet despite well-grounded scepticism over this directive ever becoming law, it provides an excellent insight into the debates and disagreements amongst member states and the institutions of the EU on the issue of equality and non-discrimination. The Proposed Equality Directive is the main legislative development concerning disability and demonstrates a clear continuation of the EU’s rights-based approach premised on non-discrimination, which continues to oscillate between formal and substantive conceptions of equality. This approach should come as little surprise. This proposed directive is based on Article 19 TFEU, which allows the EU to legislate to combat discrimination in areas where it has competence. However, this provision is subject to unanimity rules in the Council, meaning the support of every member state is required. Germany has remained resolutely opposed despite efforts by the Commission and Parliament to win over support, though it has been suggested that other reluctant states such as the Czech Republic and Malta have softened their opposition.[[91]](#footnote-92) It has also been suggested by an official in the Parliament that it is not only Germany that has blocked developments, as member states have generally been reluctant about the potential costs and keep coming up with excuses to delay progress.[[92]](#footnote-93) As highlighted below, disagreements over the potential cost (particularly concerning disability provisions on general accessibility and reasonable accommodation) have created barriers to adoption.

The Proposed Equality Directive is rather broad. It covers the characteristics of disability, race, religion, age, sexual orientation, and gender and the fields of education, social protection, and goods and services. One of its aims is to bring the various different equality directives into line with one another, thereby addressing the hierarchy of anti-discrimination law that has emerged in the EU (Waddington, 2011). For example, currently disability discrimination is prohibited only in employment and vocational training, whilst the Racial Equality Directive (2000) prohibits discrimination in employment and vocational training, education, social protection, healthcare, and goods and services. It has also been argued, with regard to disability, that the Proposed Equality Directive is necessary to bring the EU in line with the CRPD due to the scope of existing anti-discrimination legislation being too narrow (Clifford, 2011: 19). If this directive does not become law, the EU may find itself not in compliance with the CRPD.

There are three key parts of the proposed directive that are relevant to how non-discrimination based on disability is understood: the concept of discrimination itself, the introduction of a new concept (to the EU) on general accessibility, and the scope of the directive. These three points are addressed in turn below.

First, the proposed directive itself demonstrates some advancement in the EU’s conception of non-discrimination. The concept of discrimination outlined in Article 2 of the directive and has been broadened slightly compared to the older Employment Equality Directive. In addition to direct discrimination, indirect discrimination, harassment, and instruction to discrimination (all of which can also be found in the older directive on employment), denial of reasonable accommodation and direct discrimination by association are considered to be discrimination (European Commission, 2008: 7-8). The denial of reasonable accommodation constituting a form of discrimination is an entirely new addition, which the Commission recognised is necessary to bring the EU in line with the CRPD (European Commission, 2008: 7). Direct discrimination by association had actually already been introduced into EU law by the ECJ in the case of *Coleman*, but would be placed on a clearer legal basis by its inclusion in this directive.

However, as O’Brien (2011: 35-36) highlights, the directive has failed to go further than the minimum required by the ECJ. In particular, the Parliament unsuccessfully pushed for the addition of indirect discrimination by association, discrimination by assumed association, and discrimination by association in cases where a person is associated with the provision of reasonable accommodation (European Parliament, 2009: 24-25). The Parliament also tried to introduce provisions on multiple discrimination (based on a combination of grounds, sometimes referred to as intersectional discrimination) and discrimination based on assumption about a protected characteristic (for example, discrimination resulting from an assumption about an individual being disabled, regard of whether or not that individual is actually disabled) (European Parliament, 2009: 23-28) As the Parliament was unsuccessful in getting these provisions included, the types of discrimination covered by the proposed directive are actually rather narrow and do not address the full scope of potential discrimination in contemporary society. The main barrier to the inclusion of a more extensive concept of discrimination is lack of agreement among member states, as the progress reports by the Council demonstrate. Even the more restrictive notion of direct discrimination by association is still subject to disagreement among several national governments (Council of the EU, 2014c: 21). According to O’Brien (2011), disagreement among member states on the types of discrimination covered is primarily over fears of the potential cost on business that these provisions could entail. In particular, those member states with less experience with strong anti-discrimination laws have not been keen on stronger measures. The need for unanimity in the Council has severely limited potential developments in the concept of discrimination in EU law.

Second, the Proposed Equality Directive introduces a new provision in Article 4 on general accessibility for disability. This is arguably the most significant development for disability to come out of the proposed directive (European Commission, 2008: 9). Similar to the concept of reasonable accommodation (which is also included in the proposed directive), general accessibility requires other actors in society to make modifications to accommodate disabled people. Yet whilst reasonable accommodation is more individualistic and requires an individual disabled person to be present in a situation for changes to be made, general accessibility creates an anticipatory duty for service providers to ensure their services are accessible (European Commission, 2008: 9). This includes physical alterations to things such as housing and the built environment and changes to the way in which many services are provided. For example, for information to be provided in braille or other alternative formats. The need for reasonable accommodation should therefore be reduced as services and the built environment become more accessible by default. An anticipatory duty on general accessibility constitutes a clear advancement of the EU’s endorsement of the social model of disability and its commitment to substantive equality, as it recognises that society is predominately designed in a fashion that does not account for the needs of people with disabilities. The idea is to change the way services are provided to ensure that they are accessible by default.

However, once again this commitment to substantive equality is limited by concerns over economic costs among member states. The original proposal for Article 4 contained provisions allowing for exemption from the duty of general accessibility based on disproportionate burden, fundamental alterations, the life cycle of the goods or services, and the size and resources of the organisation providing the service (European Commission, 2008: 20). The Parliament attempted to alter these provisions so that disproportionate burden would be understood in terms of measures that would be impracticable or unsafe rather than due to financial cost (European Parliament, 2009: 34). However, negotiations in the Council have retained the disproportionate burden provisions on financial costs and have even added more exemptions from the general accessibility duty. This includes specific exemptions for property (based on historical, cultural, artistic, or architectural value), safety and practicality, the relationship between the disabled person and the service provider, and whether or not there would be a negative impact on disabled people if the measure is not provided (Council of the EU, 2014c: 29). These additions have been viewed in the Parliament and by disability NGOs as an attempt to water down the practical use (and cost) of the general accessibility duty.[[93]](#footnote-94) Furthermore, as the progress report indicates, these provisions are still subject to considerable debate and reservations, particularly over the potential costs of the general accessibility duty (Council of the EU, 2014c: 29). As one official in the European Commission emphasised, disagreement among national governments over this cost is one of the major unresolved issues.[[94]](#footnote-95) Yet even if exemptions were included to lower potential costs, it has also been suggested that the Parliament would not accept a watered down version of the proposed directive.[[95]](#footnote-96) Fears have been raised that the way in which disproportionate burden is understood in the EU is more already restrictive than the standard set in the CRPD and has been limited by fears of costs outweighing the potential benefits of disability equality (see O’Brien, 2011).

Third, the proposed Equality Directive also constitutes some advancement in the areas of life it covers. Article 3 of the original Commission proposal covered: ‘social protection, including social security and healthcare; social advantages; education; and access to goods and services’ (European Commission, 2008: 19). However, issues regarding the competence of the EU and acute concerns among member states over interference with areas that they feel are under national competence have limited developments here. Negotiations over the directive in the Council have made a number of changes that have reduced the potential scope. Later versions of the directive have been re-phrased to cover only access to social protection, healthcare, and education, along with definitions of what access specifically means (Council of the EU, 2014c: 24). A number of explicit exemptions have also been added by the Council. These exemptions do not only include the organisation of social protection and education systems (which may be justified on subsidiarity grounds), but also aspects even relating to access to these services including the delivery, conditions, and eligibility of welfare (Council of the EU, 2014c: 25). Furthermore, the most recent progress report on the directive contains a number of reservations by member states, including even on the inclusion of social protection and education (Council of the EU, 2014c: 25). These limitations have the potential to considerably reduce the utility of this directive. For example, the directive, as it currently stands, would likely allow segregated education for disabled children to continue. This runs counter to Article 24 of the CRPD, which commits the EU and state parties to inclusive mainstream education. National governments have justified their opposition to the reach of this anti-discrimination directive into areas such as education by reference to the limitations of the EU’s competence (Council of the EU, 2014c; see also Waddington, 2011). However, it should be noted that no equivalent restrictions exist in the Racial Equality Directive, which, as mentioned above, covers social protection, healthcare, education, and access to goods and services. Once again, the Parliament has pushed unsuccessfully for stronger measures here, including wording the provision on education in a way that respects national competence in education but also commits member states to uphold the right to education for disabled people and allow for difference in access based only on objective justification (European Parliament, 2009: 30).

The negotiations at the EU level around the Proposed Equality Directive demonstrate the type of institutional barriers that face legislative developments. There is a gulf between the Parliament, supporting more extensive measures, and the Council, where disagreement among national governments has stalled the legislative process and watered down its provisions. The proposed directive has the potential to directly affect areas of welfare provision that national governments have attempted to resist direct EU interference with for decades. The cost of disability provisions, particularly on general accessibility and reasonable accommodation, have resulted in significant opposition and stalling tactics (O’Brien, 2011; Waddington, 2011). The problems faced by the directive should not be underestimated. As highlighted above, an official in the Parliament noted that a watered down directive may not be acceptable. This view is not confined to the Parliament. According to one official from a disability NGO, ‘at a certain point if the level of protection were lowered even more then we would have to call for not supporting the adoption [of the Proposed Equality Directive] anymore’.[[96]](#footnote-97) It has been suggested that there is sufficient support among national governments for legislative developments specifically on disability, indicating that it is the inclusion of multiple characteristics that have prevented the proposed Equality Directive from becoming law (Waddington, 2011). This has raised the prospect of the proposed directive being withdrawn and replaced by one exclusively on disability. Whilst the Parliament would certainly not be pleased with such a move, it may prefer to see a disability non-discrimination directive passed rather than none at all (Waddington, 2011: 183). However, as demonstrated above, the disability provisions of the Proposed Equality Directive are still subject to significant debate within the Council, primarily due to the cost to business that they may entail. There is no guarantee that a disability specific directive would pass through the legislative process without being watered-down. The necessity of unanimity in the Council means such reluctance can create a formidable barrier.

Whether or not this directive eventually becomes law, the negotiations have highlighted the barriers faced by disability developments in the EU. Even the non-discrimination approach, originally favoured by the EU partially due to its ability to garner support, is stretched thin. Each step towards substantive equality has been met by intense debate and disagreement, eventually resulting in provisions being watered-down. The ability of the EU to further develop its anti-discrimination rights-based approach in hard law is severely constrained by the absence of consensus among national governments. The pressure to conform to the stronger conception of substantive equality embedded in the CRPD has not been sufficient to overcome these barriers. The Parliament has been consistent in its efforts to improve the substantive provisions of the proposed directive and has used the CRPD to strengthen this position, yet this too has not been sufficient in the face of resolute opposition from key national governments in the Council. Whilst the Disability Strategy represents a stronger endorsement of substantive equality, the debates and disagreements around the Proposed Equality Directive demonstrate that this approach has not yet extended to hard law.

### 6.3.3. Coordination of Social Policies: European Platform against Poverty

Many of the policy areas that most affect the lives of people with disabilities remain under stronger member state control. However, interference from the EU level into areas of economic, employment, and social policy has increased considerably over the last two decades. In the 2000s Open Methods of Coordination were developed around employment and social inclusion and were integrated alongside the Stability and Growth Pact on economic coordination. In 2010, the Europe 2020 growth strategy incorporated these different areas of policy coordination under the framework of the European Semester. As discussed in greater detail in chapter four on employment and labour rights, the policy recommendations that have come out of the European Semester have prioritised economic coordination based on neoliberal values. Despite clear indication that the policies proposed impact on fundamental rights, many having a negative impact, there was no evidence of rights influencing developments in the European Semester. As the practice of the European Semester was examined in chapter four, this section will limit its focus on how social policy is conceptualised at the EU level in the policy platforms. For social policy, this is primarily addressed in the European Platform against Poverty and in the Social Investment Package. As these policy areas are of key importance to the realisation of rights of people with disabilities, it is necessary to examine how the issue of disability is addressed in these policy platforms.

The European Platform against Poverty was launched in 2010 as one of the seven flagship initiatives of the Europe 2020 growth strategy. It adopts what has been termed a social investment approach, which has been elaborated on in the Commission’s communication on the Social Investment Package in 2013. A target has been set of lifting 20 million people out of poverty and increasing the employment rate of people aged 20-64 to 75% by 2020 (European Commission, 2010f). This is to be achieved by policy coordination under EU guidance and is backed by the use of EU structural funds, which are looked at in the next section.

The European Platform against Poverty and the Social Investment Package highlights a number of policy areas in which action should be taken. What is immediately evident is that neither a disability nor fundamental rights focus has been used to frame the policies being proposed. There is only the occasional reference to fundamental rights in the Commission’s communication on the European Platform against Poverty, for example it is noted that access to affordable accommodation is a fundamental right when homelessness is addressed and there is a general recognition that promoting fundamental rights is a core objective of the EU (European Commission, 2010f). It is recognised that disabled people are at a higher risk of poverty and require targeted interventions to address the disability discrimination and the 2010 Disability Strategy is highlighted, but there is nothing that could be classed as mainstreaming disability issues (European Commission, 2010f). The European Platform against Poverty is based around a number of policy themes: access to employment, education and training, social protection and essential services, and social inclusion and anti-discrimination. It is only in the area of social inclusion and anti-discrimination that disability is really addressed, which is done primarily by means of reference to the Disability Strategy (European Commission, 2010f: 9-10).

The Commission’s communication on the Social Investment Package is similar. There is a single mention of the Charter of Fundamental Rights at the beginning and only the occasional mention of any specific rights throughout the rest of the document (European Commission, 2013b). There are also only sparse references to disability throughout, which are limited to a brief recognition that disabled people face increased social hardship and a few mentions of disability in examples of issues that policies should address. One of these examples recognises a role for accessible transport and adapted housing as a form of social investment to allow disable people to remain in charge of their lives and reduce the need for long-term care (European Commission, 2013b: 14).

In short, neither the European Platform against Poverty nor the Social Investment Package address policies in terms of fundamental rights and do not demonstrate that much attention has been given to the issue of disability. Although there are the occasional fleeting references to the concept of rights of the Charter of Fundamental Rights, there is no specific reference to the UN CRPD or the importance of social and welfare services to realising the rights of disabled people. The Disability Strategy and the EU’s flagship social policy packages are not coordinated with one another, which has been subject to criticism. According to one official from a major European disability NGO, the Disability Strategy and the Europe 2020 packages ‘are really two separate documents handled by two separate units and it does not quite fit in and the targets are not reached’.[[97]](#footnote-98)

The absence of fundamental rights and attention to disability in the framing of social and welfare policies raise some concerns over the EU’s commitment to these issues, but do not necessarily mean that disabled people are disadvantaged or that rights are being undermined. Looking at how these documents address the issue of poverty provides some insights on what kind of impact they may have. The primary solution to the issue of poverty is through entering employment, with social and welfare services geared towards investment in people to ensure their ability to enter employment (European Commission, 2013b). This focus on employment approach is also evident in the use of the European Social Funds, which is addressed below. The issue of employment was addressed in detail in chapter four, which examined EU level engagement with the labour market and found that the approach taken risks raising in-work poverty through its focus on flexibilising labour markets and reducing unit labour costs. As such, this section focuses on the implications on state provision of public and welfare services.

There are three areas of focus in the EU’s approach to social protection systems and public services. They are adequate income support, access to quality services, and inclusive labour markets (European Commission, 2013c: 9-15). Measures are to be taken to provide adequate income support, but in a manner that avoids ‘inactivity traps’ and is conditional on activation measures (European Commission, 2013c). Social protection systems are also conceptualised within a framework of fiscal sustainability necessitated by the Eurozone crisis and an ageing population, in which greater efficiency is to be achieved through service consolidation and better outcomes (European Commission, 2010f: 7). Whilst welfare provision is to be low enough to maintain pressure to seek employment, high quality services are to be in place to help reduce poverty. This includes education, healthcare, childcare, social housing, employment services, and care for the elderly. Some of these, such as childcare, education, and employment services, are conceived of as ‘enabling services’ as they allow individuals to enter employment, whilst others appear more focused on poverty reduction through non-employment means (European Commission, 2013c: 15). There has been some recognition of the need for accessible transport and adapted housing when it comes to the provision of high quality services, which is mentioned once in the Commission’s Social Investment Package (European Commission, 2013c: 14). Inclusive labour markets include both active labour market policies and incentives for businesses through tax allowances and wage subsidies, including for adaptations to workplaces for people with disabilities (European Commission, 2013c: 11-13). In short, the main thrust of this social investment approach is to move the focus of social protection away from passive support and towards enhancing the individual’s capacity to enter the labour market as the best route out of poverty. As highlighted in chapter five, the approach to labour market policy has not been consistent with fundamental labour rights.

The approach to social and welfare policy being promoted by the Commission has several implications for rights. Rights to employment, education, vocational training, healthcare, and to social protection could be enhanced by the types of policies being proposed. However, as noted above, it is not clear that fundamental rights have been given adequate attention, which increases the likelihood of rights being undermined by negligence. Take social protection, for example. Whilst it is stated that income support should be adequate, it is also to be kept low enough to ensure financial incentives to enter employment. The Commission states that its preference is to measure appropriate incomes by budgets referenced to a list of goods and services as it believes that ‘the debate on the adequacy of minimum income measured in relation to the median income (whether it is 60%, 50%, or 40%) is not conclusive’ (European Commission, 2013c: 9). However, as highlighted in chapter five, it is measures in relation to the median income that expert bodies on social rights have used to determine if income support levels are sufficient, in particular if incomes fall below 50% of national median income (see ECSR, 2008: 43). As the Commission has departed from this measure and focused on keeping income support low, it risks undermining the right to social protection by supporting policies that push income support below the 50% median income threshold. In addition to this, the lack of visible consideration given to people with disabilities also has implications. It should be recalled that one of the core principles of the social model is that it is the way in which society functions (including state support), which has often been the result of not considering the rights of persons with disabilities rather than because of intentional discrimination. This principle is enshrined in the CRPD, which states clearly that all policies and programmes are to account for the protection and promotion of the rights of disabled people. As there is no indication that the rights of people with disabilities have been fully taken into account, the policies envisaged in the European Platform against Poverty and the Social Investment Package may end up perpetuating disadvantage in society.

### 6.3.4. Direct Spending by the EU: Structural Funds

The European Structural and Investment Funds account for about one third of the EU’s total budget. For the current 2014-2020 funding period, this amounts to 351.8 billion Euros. These structural funds are not constrained by EU competence limitations as traditional legislation is. Instead, they are able to be applied to a variety of services in society that are central to the lives of people with disabilities, though their priority areas are defined in line with the Europe 2020 growth strategy. The structural funds are regulated by one general regulation and several specific regulations for each individual fund. Whilst there are a number of different individual funds, the two of relevance here are the European Social Fund (ESF) and the European Regional Development Fund (ERDF). Management of these funds is shared between the European Commission and the member states. Operational programmes for the use of structural funds are drafted by national governments in consultation with the Commission and subject to final approval by the Commission. Member states receive an allocated block of funding based on their operational programmes, which are then disbursed via successive calls for tender. As the primary area of EU spending, the structural funds are a particularly relevant area to analyse the EU’s commitment to the fundamental rights of people with disabilities. As highlighted below, there are two key areas of spending that have had a direct impact on people with disabilities: the use of the ERDF to fund institutional care homes and the use of the ESF for employment and training initiatives. These areas show mixed findings. The ERDF funds have been used in a way that violates the rights of persons with disabilities by supporting institutional care homes, whilst the ESF has broadly upheld the non-discrimination focus in employment. These issues have taken place in the 2007-2013 funding period. The new regulations for the 2014 to 2020 funding period contain additional measures aimed at ensuring respect for fundamental rights, which may remedy the rights violations funded by the ERDF.

Neither the general regulation nor the fund specific regulations for the period 2007-2013 contained any mention of fundamental rights. These regulations were established prior to the Charter of Fundamental Rights being made legally binding, though it had been solemnly proclaimed by the EU institutions, and prior to the CRPD being signed. However, the principle of non-discrimination is contained in Article 16 of the General Regulation for the structural funds (Council Regulation (EC) 1083/2006), and references to non-discrimination, equality, and social inclusion are made throughout the regulation on the European Social Fund (Council Regulation (EC) 1081/2006). Non-discrimination is understood to specifically include accessibility for people with disabilities in Article 16 of the General Regulation. However, a report commissioned by the European Commission into the use of this non-discrimination provision in funded programmes found that it was poorly implemented for disability (Public Policy and Management Institute, 2009: 5). This report found that non-discrimination was understood as in a negative-action fashion, in that it required only the prevention of discrimination in the funded programmes rather than the promotion of the principle of non-discrimination. The inclusion of non-discrimination in the Operational Programmes of national governments was found to have been primarily of a declaratory nature, with few examples of any practice of the principle of non-discrimination in programmes. The principle of accessibility for people with disabilities was also found to have been inadequately addressed (Public Policy and Management Institute, 2009: 3-5; Quinn and Doyle, 2012). In 2009 the European Commission published a ‘toolkit’ for ensuring accessibility and non-discrimination of people with disabilities in the structural funds, providing some detailed guidance on how these principles should be implemented (European Commission, 2009b). However, according to Quinn and Doyle (2012: 70), although many ‘fine-sounding policy instruments on disability had been adopted by the EU’, problems have persisted.

The primary problem associated with the structural funds for people with disabilities has been the use of the ERDF to build or renovate institutional care homes for people with disabilities. Institutional care homes are considered to segregate disabled people and exclude them from full and meaningful participation in society. This constitutes a form of discrimination as well as a violation of a range of rights, for example to dignity, education and employment, and to private life. The Convention on Rights of Persons with Disabilities now specifically addresses this issue in Article 19, which provides for disabled people having the right to live and participate in the community.

The use of the ERDF to support institutional care has been a focal point of numerous campaigns by disability NGOs. For example, the European Coalition for Community Living has criticised the gap between the objectives and rhetoric of the Commission and the reality for those still living in institutional care homes. The use of structural funds for institutional care homes has been primarily identified in Bulgaria, Hungary, Latvia, Lithuania, Romania, and Slovakia (European Coalition for Community Living, 2010: 10). Whilst much of the responsibility for how these funds are used do lie with the managing authorities at the member state level, there has been insufficient oversight and pressure from the European Commission to ensure funds are used in a way that is compatible with the aims and values of the EU, namely non-discrimination and fundamental rights. The Commission has recognised these problems. In 2009 the Commission convened an ad hoc Expert Group on the transition from institutional care to community care. A number of recommendations were issued by this expert group, including on the use of structural funds (see European Expert Group on the Transition from Institutional to Community-based Care, 2012). The new structural fund regulations established in 2014, as discussed below, have been positively received by disability NGOs and are expected to address the issue of institutional care homes (European Coalition for Community Living, 2013).

The ESF has also been used to fund a number of initiatives that address people with disabilities. The ESF is primarily aimed at supporting the EU’s growth strategy, currently Europe 2020, and is focused on employment and access to employment. A review of the ESF by the Commission found that 42% of the ESF budget for 2007-2013, which is roughly 49.5bn Euros, went on programmes that included people with disabilities. However, whilst this may seem a high proportion, these programmes cover multiple groups of people, not just people with disabilities (European Commission, 2010g). The actual participation rate for disabled people in funded projects is significantly lower, at 3% per year for the first two years of the 2007-2013 funding cycle, which is roughly in line with the participation rate for the previous 2000-2006 funding cycle (European Commission, 2010g: 41-43). This participation rate is disproportionately low, as it is estimated that 16% of the EU’s working age population have a disability and they are more likely to not be in employment than able-bodied persons. This indicates that attention to disability has not been properly mainstreamed in the ESF.

The types of initiatives funded by the ESF are entirely focused on supporting employment targets. Many of the funded projects focus on supporting individuals, through methods such as guidance and counselling, personalised services on job hunting and placements, vocational training and education, and through the use of assistive technology. Some projects are focused on improving links between care services, education systems, and employment services to ensure that the full range of services that some people with disabilities rely on are integrated and geared towards employment (European Commission, 2010g: 76). Whilst the focus of these funded projects has been primarily based on employment, improving the employment rate and ensuring access to education and training helps to combat discrimination against disabled people in society. Some specific projects have also been in the context of combating discrimination through support into employment (see European Commission, 2010g: 53), though, as noted above, anti-discrimination clauses have not been implemented consistently across all member states. Though it has not adopted a rights-based approach, barring some inclusion of non-discrimination, the use of the ESF has generally been consistent with the EU’s non-discrimination approach to disability. The somewhat narrow focus on employability of individuals, though with some scope for projects on service provision, means that the ESF in 2007-2013 was not sufficient to implement the full package of substantive provisions in the CRPD, but nor has it violated the principles of the CRPD.

Steps have been taken to address the shortcomings of the structural funds when it comes to disability. As mentioned above, the Commission has adopted a social investment approach to social and welfare policy. The latest communication on this approach, the Social Investment Package (2013b), specifically applies social investment to the European Social Fund. Whilst employment and training initiatives of the type already funded in previous ESF funding periods are a large part of this social investment approach, it also draws attention to the need for high quality services. The examples provided in the Commission’s communication on the Social Investment Package do include the need for accessible transport and adapted housing (European Commission, 2013b), indicating that the ESF could be used in the future to fund initiatives that take a more comprehensive approach to social inclusion for people with disabilities. However, whilst this approach is underpinned by the recognition that such measures are necessary to achieve substantive equality and end discrimination faced by people with disabilities, fundamental rights discourse is not utilised.

The latest General Regulation for the funds was adopted in 2013 and covers the period from 2014 to 2020. Of key importance is the inclusion of the concept of *ex-ante* conditionality in the framework for the disbursement of the structural funds. The *ex-ante* conditionalities set out pre-conditions that must be met by member states in order to access funds, which are set out under a number of themes. Two of these themes are of particular importance. First, under the theme of anti-discrimination member states must demonstrate the administrative capacity to implement EU anti-discrimination policy, including arrangements for the inclusion of equality bodies and for the training of staff. Second, disability is included as its own theme and includes measures to demonstrate the administrative capacity to implement the UN CRPD. This includes arrangements for the consultation of disability NGOs, training staff on the practical application of the CRPD, and measures to monitor CRPD provisions on accessibility (see Annex XI, Council Regulation (EU) 1303/2013). In addition to these two themes, there are also conditions set out on employment, education and training, and social inclusion. The *ex-ante* conditionality significantly strengthens the commitment to non-discrimination and the rights of persons with disabilities at the EU level and sets out to ensure that problems associated with administrative capacity at the member state level are addressed. As noted above, the problems of EU funding institutional care homes undermining the right to community living was primarily due to managing authorities at the domestic level combined with an absence of clear EU oversight and guidance. The inclusion of measures on the CRPD as well as anti-discrimination demonstrates that the EU is beginning to move beyond its non-discrimination rights-based approach to disability and fully utilise a broader rights-based approach.

However, the inclusion of anti-discrimination and the CRPD in the *ex-ante* conditionality was not without controversy. According to Quinn and Doyle (2012: 85), national governments in the Council reacted quite negatively to the concept of *ex-ante* conditionality when the regulation was first proposed by the Commission and removed key *ex ante* provisions on anti-discrimination and disability in its first reading. Once again, it was left to the Parliament to rescue these commitments to fundamental rights and non-discrimination. The discord between the Council and the Parliament eventually led to a ‘trialogue negotiations’, a special procedure used in the legislative process to bring together the Council, Parliament, and the Commission to hammer out their disagreements. As described by Quinn and Doyle (2013: 63) ‘to its immense credit, the European Parliament delegation in the trialogue process held its ground and insisted on retention of the relevant *ex ante* conditionality’.

In summary, structural funds provide several key insights into fundamental rights in the EU. The Commission appears willing to incorporate a stronger rights-based approach into the framework for the disbursement of the structural funds. Among the other institutional actors, once again agreement was difficult to reach in the Council and the strongest support has come from the Parliament. Fundamental rights rely on strong support from actors such as the Parliament in order to become embedded in legislative developments. As these stronger rights-provisions in the framework for the structural funds are still new, it remains to be seen how effective they are at tackling the issues identified above. Disability NGOs have been generally quite positive about the early impact of these changes (European Coalition for Community Living, 2013). The actual policy content of the structural funds has not adopted a rights-based approach. Though the social investment approach has expanded beyond employment and training to incorporate social protection and public services, this has not been on the basis of realising fundamental rights in these policy areas. Instead, it is the realisation of employment targets as a means to eventually reduce poverty that these policies are conceptualised. What is also notable is that it is primarily the CRPD driving forward developments. It should be recalled that the requirements of the CRPD on issues such as procedures for decision making, mainstreaming, and monitoring are far stricter than the EU’s Charter of Fundamental Rights. In the new regulations of the structural funds, it is the requirements of the CRPD that are referred to. Whilst this is fine and well for disability rights, the implication is that other rights for non-disabled people may not be so well respected, which is consistent with the findings in chapter four on employment and social rights.

## 6.4. Discussion and Conclusion

This chapter has looked at the relationship between fundamental rights and disability policy, focusing on developments around equality rights. As highlighted in the previous chapters, there has been a significant schism between civil and social rights in the EU. Yet equality rights do not fall neatly into this divide. While the ideas of formal equality fit more comfortably with a traditional notion of civil rights, the move towards substantive equality incorporates ideas about positive duties more associated with social rights. Nowhere is this clearer than with disability equality, as the development of the social model of disability has emphasised how discrimination arises out of dominant societal norms that go beyond direct discrimination. This notion of substantive equality has been fully endorsed in the UN CRPD, which the EU has signed and ratified. Looking at the issue of disability provides insights into how non-discrimination and equality rights have developed in the EU in light of international advancements. Approaching from a critical constructivist perspective, attention has been on how the institutional structure of the EU and the presence of strongly embedded neoliberal principles have affected further developments and if recent rights developments have affected the dominant understanding of fundamental rights in the EU.

It should be recalled that critical constructivism draws attention to how the concept of fundamental rights is socially constructed and how this process of construction is affected by different structural factors. The institutional structure of the EU, particularly the different capabilities afforded to different institutions and the presence of veto points, affects the way in which rights can be constructed. The presence of dominant ideas already embedded in the EU, particularly those strongly associated with the successful pursuit of integration, influences the adoption of new ideas. As highlighted in chapter three, these institutional and paradigmatic dynamics have shaped the development of the general concept of fundamental rights. Fundamental rights have been conceived of as predominately civil rights, of equal value to neoliberal economic values, and limited to the jurisdictional of the ECJ. This case study has sought to draw out the tensions within the conception of fundamental rights as civil rights, particularly due to the above mention issued with formal and substantive equality, and jurisdictional scope of rights activities.

Disability was one of the areas in which the EU adopted a rights-based approach early on. Since 1996 there had been a rhetorical commitment to pursuing non-discrimination and equality for people with disabilities and since the year 2000 this commitment had been put into practice in the Employment Equality Directive. This was a rights-based approach that was focused mainly on the right to non-discrimination and was premised more on formal equality, the problems of which have been highlighted above, and was largely in line with the dominant conception of fundamental rights highlighted in chapter three. Similar to the argument advanced in chapter four on the dual market and rights incentives for data protection legislation, this is an approach to disability equality that is compatible with the dominant neoliberal paradigm and the institutional framework of the EU. Once again, the interest in upholding a fundamental right has converged with the need to support the single market, this time by eliminating discrimination disincentives to the free movement of persons and services. As Höpner and Schäfer (2010: 25) state, ‘equal opportunity policy in the form of non-discrimination policy aims to create *free but fair* markets [emphasis in text]’. Minor interference in the form of the prohibition of discrimination (itself also considered economically irrational) is tolerated in order to uphold free access to the single market. The neoliberal focus on creating and upholding markets, as highlighted in chapter one, converges with the normative desire to restrict discrimination. As expanded on in chapter two, the history of the development of civil rights saw their development alongside the economic liberalism underpinning the emergence of capitalism. This trend has re-emerged in the EU, where it is the supranational nature of the single market and the need to remove national barriers that has seen the convergence of market and civil rights aims. Furthermore, this formal equality approach, with its absence of significant spending commitments and reliance on judicial enforcement, can be achieved within the regulatory style of the EU without any significant changes (Majone, 2005).

Yet while the EU’s older rights-based approach to disability equality was more reliant on ideas of formal equality, the entry into force of the Charter of Fundamental Rights and, more importantly, the signing of the UN CRPD committed the EU to a more substantive conception of equality. The UN CRPD is very much clear on the fully array of rights of disabled people and how they should be realised. The CRPD’s inclusion of equal enjoyment of many areas of life as substantive rights – for example, social protection, housing, general accessibility, access to justice, and independent living in the community -- implied that the EU’s narrower formal non-discrimination approach would need to be expanded and raised the prospect of more serious conflict with neoliberal principles on restrictive public spending and the utility of the free market to deliver these services.

The impact of these recent fundamental rights developments on contemporary areas of EU disability policy has been somewhat limited. The clearest evidence of impact has been on the Commission’s Disability Strategy 2010-2020, which has expanded its non-discrimination approach to cover more aspects of life in society. This adopts a more substantive approach to equality, but does not go quite as far as to frame issues of social protection, health services, and education as rights themselves, as the CRPD does. Rather, these issues are still addressed in terms of non-discrimination and equality, albeit with the recognition that public authorities have a role to play in ensuring disabled people can enjoy equal access. This means that people with disabilities should have equal access to these kinds of services on a par with able bodied persons, rather than having a direct fundamental right to claim social protection, health services, or education and training. The Disability Strategy marks both a continuation of the pre-existing approach to disability at the EU level and the incorporation of an expanded focus to areas covered by the CRPD. This continuation of the non-discrimination based approach is important, as drafting the Disability Strategy is an area where the Commission enjoys more freedom to frame the issues as it pleases without facing barriers in institutions such as the Council. As noted by de Búrca (2010), above, the Commission was not keen on including substantive issues such as social protection and health as rights themselves in the negotiations for the CRPD and instead preferred to continue its own approach in which they issues are addressed in terms of non-discrimination and equal access. Despite the CRPD widespread use of rights discourse on a broad array of issues, the Commission has largely retained its non-discrimination based approach but with an enhanced substantive focus. Even where the institutional barriers to adopting a more substantive rights-based approach to disability are low, the Commission has dragged its feet. This demonstrates the embedded and path dependent nature of the Commission’s understanding of disability issues from a non-discrimination perspective. Nonetheless, the adoption of a more substantive equality approach to disability is compatible with the CRPD and does raise some challenge to dominant neoliberal ideas about the role of the state, though this is limited to soft-law.

However, beyond the rhetorical commitments of the Disability Strategy, fundamental rights have generally had less influence shaping and re-shaping policy. The Proposed Equality Directive, which sought to expand the EU’s current non-discrimination approach from employment to more areas of life and enhance substantive equality provisions on disability, has reached an impasse in the Council caused by the inability of national governments to reach an agreement. These disagreements show a clear concern over the cost of intervening in society and the limits to which the principles of a more substantive equality approach can garner political support when it comes to practical implementation. The Parliament has remained committed to the Proposed Equality Directive and the gulf between the two institutions may be insurmountable. The development of fundamental rights has not been sufficient to overcome these institutional barriers in the Council, which have continued to hold back the degree to which the EU can engage in a meaningful manner with rights. The new regulations for the structural funds are the only example of any legislative developments, which have focused on ensuring that the governance framework for disbursement of funds has the administrative capacity to ensure respect for disability rights. These changes, known as the *ex-ante* conditionalities, were not easily attained, as they required strong support from the European Parliament to overcome opposition among national governments in the Council. This is largely consistent with the history of the development of rights in the EU, in which a particularly enthusiastic Parliament has repeatedly sought to advance rights against a reluctant Council. The civil rights based understanding of fundamental rights has remained the primarily approach in proposed legislation, albeit with some expansion on points of substantive equality, and may even have exhausted its potential to garner the agreement necessary to create actual law. Any potential challenge to the dominance of neoliberal principles from legislative developments pursuing substantive equality have been kept to a minimum.

The policy content of the EU’s strategy for social and welfare policy, in the European Platform against Poverty and the Social Investment Package, has not focused on the realisation of fundamental rights. There is some evidence that disability equality issues such as accessibility have been given some consideration, but these concerns cannot be said to be central to the EU strategy here. The social side of the EU has remained predominately focused on policies to get people into employment, generally considered to be a supply-side neoliberal approach to employment policy (Kountouros, 2011; Ashiagbor, 2005; Tidow, 2003). The relative absence of attention to disability rights in the EU’s social policy coordination demonstrates the difficulty fundamental rights framing faces when it comes to social and welfare policy. This indicates that rather than being mainstreamed throughout all policies, disability rights are instead boxed into their own strategy and therefore risk becoming peripheral. The absence of rights discourse in this area of social policy may not be too surprising, particularly as most member states tend not to frame social policy directly in terms of rights as well, yet does highlight a problem with the programmatic application of fundamental social rights as outlined in Charter five. With little potential oversight from the ECJ in social policy coordination, there appears to have been little perceived need to mainstream fundamental rights into social policy. The embarrassment caused by *Digital Rights Ireland* and its impact on the need to mainstream civil rights in legislation, as highlighted in chapters three and four, has not been matched by any developments with social rights.

The institutional structure of the EU and the presence of a strong pre-existing conception of fundamental rights have limited the influence of further international rights developments. Despite the strong and unambiguous support for social rights and positive duties in the CRPD, the non-discrimination based approach from the EU has remained relatively stable. There has been some advancement on substantive equality in the Disability Strategy, but these are not matched by legislative developments or mainstreaming in other social policy activities. One of the key barriers to legislative developments has been the prospect of a high economic cost for the measures required to achieve substantive equality. Similarly, it was highlighted in chapter five that social policy coordination has become encompassed under a framework prioritising neoliberal principles. Within the area of disability, there have been fewer direct clashes between equality and neoliberalism, though the reluctance towards substantive equality developments does mean that little has been done to redress this imbalance.

In terms of the dominant conception of fundamental rights developed throughout their historic construction in the EU, political activities around disability equality have changed little. Fundamental rights are broadly understood as legally enforceable civil rights of equal value to neoliberal economic principles and applicable only within the jurisdiction of the ECJ. Pressures to adopt a more substantive equality approach to disability and incorporate a broader array of social rights for disabled people have led to changes mainly in the non-binding Disability Strategy, but have had little influence in other policy areas. The institutional barriers to legislative developments remain strong. Whilst a clash with neoliberal economic principles have not been explicit in this area, it is notable that the premier legislative development of the Employment Equality Directive was premised on the twin purpose of tackling discrimination and supporting the single market freedoms, thus demonstrating a convergence of these interests. Yet even where these interests converge, they may not always overcome barriers to positive developments as the debates over the PED has demonstrated. The PED would expand non-discrimination from employment to the rest of the single market (namely freedom of movement of goods and service) and so continues this convergence of rights protection-single market interests, but even here concerns over financial cost and subsidiarity among national governments have stalled developments. In summary, recent fundamental rights developments in the Charter and the CRPD have put pressure on the EU to promote a more substantive conception of equality and strengthen the role of social rights, but have been hindered by the institutional framework of the EU and the presence of a strong non-discrimination approach to disability. The boundaries of the EU’s dominant conception of fundamental rights have been pushed, but largely remain unchanged.

# Conclusion

My research in this thesis is motivated by a simple question: what is the role of fundamental rights in the EU? The motivation behind this question is premised on the recognition that the EU is a polity like no other. The EU bears many similarities to a state: it wields public power and can make laws that bind the European people and the treaties have formed a de facto constitution backed by a court that sits at the very top of the legal hierarchy in Europe. Yet the EU is also not a state. It can only legislate in areas it has been explicitly granted competence in and it remains far removed from the democratic legitimacy that underpins European states today. The EU has also historically integrated along predominately economic lines, enshrining freedoms of the internal market and the economic principles of EMU in the treaties. This leaves the EU able to directly affect the fundamental rights of Europeans in many ways, whilst also facing constraints in how it can act. The motivation behind this question is also premised on the recognition that Europe is changing as the long period of post-World War II social settlements and stable growth is slowly replaced by rising inequality and economic uncertainty. The EU is intertwined with this process of change. The developments brought about by the Treaty of Lisbon were meant to signify a more balanced EU underpinned by fundamental rights, a shift that would shore up the social and human faces to counterbalance the economic association that has historically dominated integration. Foremost among these developments was a binding Charter of Fundamental Rights of the same legal value as the Treaties.

The answer to this question has required a critical engagement with fundamental rights. Taking stock of the role of fundamental rights across Europe, it is evident from chapter two that rights in different polities share many similarities and contain key differences. There are the purpose-built rights regimes of the ECHR and ESC created under the Council of Europe, with their enforcement and monitoring mechanisms designed to focus specifically on upholding rights. There are also the constitutional arrangements of European states that contain fundamental rights guarantees, with their rights-mechanisms designed to function as part of the social settlement that underpins the legitimacy of the state. As chapter two also outlined, the history of EU integration has been premised on economics and has increasingly taken a more neoliberal turn, resulting in potentials areas of convergence and tension between fundamental rights and neoliberal economics. Recognising that there is no one precise way in which fundamental rights and their relationship to other dominant ideas are understood, it has been necessary to approach the study of rights from a perspective capable of engaging with how rights have been constructed and how this affects their utility. Constructivism draws attention to the socially constructed nature of political concepts, both fundamental rights and economic paradigms, but has struggled to engage with power dynamics underpinning different sets of ideas. Critical theory, particularly from a neo-Gramscian perspective first championed in International Relations by Robert Cox in the early 1980s, provides insights into power dynamics and an account of dominant economic ideas, but has hitherto not been applied to fundamental rights. Combining insights from both perspectives into a critical constructivist framework provides a means to analyse the construction of fundamental rights in the EU in light of their relationship with other sets of dominant ideas. In particular, this critical constructivist framework has drawn attention to the influence of the institutional structure of the EU and the presence of dominant neoliberal ideas about the relationship between economics, politics, and society.

The main argument that has been advanced in this thesis is that the role of fundamental rights in the EU is shaped by the way in which they have been constructed by EU actors, influenced by the institutional structure of the EU and the dominance of neoliberal ideas that have become intertwined with EU integration. That is, the different institutional roles and power dynamics of the EU institutional actors (including the informal expectations of those actors) and the procedures for political developments along with the prominence of dominant neoliberal ideas have affected how fundamental rights have been constructed. These influences have been present in both the historical construction of the general concept of fundamental rights, as set out in chapter three, and in the specific application (or in some cases, absence of application) of rights to their relevant political activities, as set out in chapters four, five, and six.

In particular, the key actor that has constructed and shaped fundamental rights in the EU has been the ECJ. Throughout the history of their development, fundamental rights have been shaped by the nature of the ECJ as a judicial actor within the framework of the EU. The institutional role and social expectations of how such a court should act have allowed the ECJ to behave in an innovative manner to introduce and develop the concept of rights despite their absence in the original treaties, but have also constrained the degree to which the Court could construct the role of rights, namely with regards to what rights are protected, when they are applicable, and how they relate to the neoliberal economic principles that have underpinned EU integration. The other institutional actors of the EU have largely followed this dominant conception of fundamental rights, though there are some variations. The institutional actor that has consistently supported a stronger role for fundamental rights and greater recognition of social rights in particular, the European Parliament, has lacked the institutional capabilities to translate this support into binding developments. Those institutions that represent national governments directly (that is, the Council of the EU and the European Council) and therefore have the greatest capability to enhance the role of rights in the EU by amending the treaties or passing legislation have been more or less paralysed by disagreement and largely inactive on the issue of rights. When the political will among national governments did finally emerge when the decision was made to adopt an EU Charter of Fundamental Rights, it was on the basis that it was primarily the pre-existing understanding of fundamental rights already constructed by the ECJ that would simply be endorsed. Although the legal value granted to the Charter of Fundamental Rights in 2009 did suggest some potential scope for enhancing the role of rights in the EU, developments since then in specific policy areas have largely followed the same path. The institutional framework of the EU and the presence of dominant neoliberal ideas have continued to shape how fundamental rights are understood by political actors.

The way in which fundamental rights have been constructed has led to a unique understanding of rights in the EU. Fundamental rights are understood in the EU as predominately legally enforceable civil rights, of equal value to core neoliberal economic principles, and applicable only within the confines of the jurisdiction of the ECJ. Social rights hold a lesser status than civil rights and economic principles. While this dominant understanding of rights at the surface level does not appear too significantly different from how rights are understood within many EU states, when viewed in the context of the prioritisation of neoliberal economic principles (both legally in the single market and politically in EMU) the full implications become clearer. The relationship between neoliberal economic principles and fundamental rights is particularly interesting as parallels can be drawn with the history of the development of rights in Europe, as outlined in chapter two. The historical association of the growth of civil rights with economic liberalism as a means to construct and expand space for the modern market has again been evident with the process of European market building. While civil rights are certainly not reducible to market building, as the case studies in chapters four and six highlight, this convergence between upholding and expanding the single market and protecting specific rights has seen legislative developments in both data protection and equality and non-discrimination. The key EU legislative developments regarding fundamental rights covered here have mainly been in areas where protecting rights converges with upholding the single market, though recent developments in data protection have begun to move beyond this relationship. Social rights, on the other hand, have historically existed in a state of tensions with economic liberalism, though the period of embedded liberalism when welfare states and strong labour market regulations emerged saw a compromise between these principles for some time. While barriers prevented social rights developments from taking place in the EU for many years, national social settlements were largely respected and insulated from EU-level economic principles. As neoliberal ideas became more dominant in the EU, the tensions between these principles has re-emerged and seen social rights subordinated to economic ideals.

As highlighted above, this specific understanding of rights has been shaped by the institutional structure of the EU and the presence of core ideas about economics and integration. As rights have developed as both a *post hoc* and *ad hoc* project after the process of EU integration began, the way in which they are understood has been moulded to fit the dominant approach to integration and have struggled to become established as core principles. The establishment of the Charter of Fundamental Rights indicated some prospect of this understanding of fundamental rights changing, particularly due to its inclusion of social rights and its provisions on the application of rights. Yet, as the case studies in chapters four, five, and six have demonstrated, this unique EU understanding of rights has remained fairly stable since the Charter became legally binding. A clear path dependent process can be seen, wherein the ECJ as the first EU actor to really engage with fundamental rights has shaped how they are understood and embedded this understanding of rights firmly in the EU. Social rights have continued to be afforded a lesser status and subordinated to neoliberal economic principles. The scope of application of rights remains constrained to areas where the ECJ holds jurisdiction, the importance of which has been enhanced by the expansion of the governance of the Eurozone through executive decision-making with no recourse to judicial oversight. Civil rights have continued to enjoy a high level of protection.

While the case studies confirm this dominant understanding of fundamental rights and show that changes since 2009 have not led to any path-altering developments, they also draw out the nuances of what this broader understanding of rights means for specific rights by drawing on appropriate international rights standards.

As perhaps would be expected, the civil rights of data protection and privacy looked at in chapter four have seen the strongest developments since the Charter became binding, though largely following the same path as before. Interestingly, the Charter of Fundamental Rights contains a concept of rights as programmatic principles to be implemented by policy, which had been widely considered to apply to social rights. The only instance in the case studies examined here of legislation being passed that was specifically designed to implement a fundamental right was actually on data protection and privacy, two core civil rights, in the GDPR and DDPPC. Yet these developments were not particularly new, the EU already had a history of legislating on data protection and privacy since 1995. High standards of rights protection have also been demonstrated out with legislation, as the European Parliament has taken a strong stance (its position enhanced by backing from technocratic expert actors) by rejecting the ACTA and the ECJ has struck down an entire directive, both for interference with data protection and privacy rights. In line with the argument developed in chapter three, the case study on data protection and privacy rights has found that the EU remains favourable to civil rights. The regulatory nature of the EU and the compatibility between civil rights and neoliberal economic principles have helped to overcome the traditional barriers to positive integration. Yet chapter four has also shown the EU enhancing the role of civil rights. The link between upholding the single market and data protection may have played a crucial role in developing EU legislation in this area, but the presence of strong expert bodies and campaign groups has helped to enhance rights protections in the revision of this EU legislation and push legislative developments beyond the market and into realm of police and crime. Though there have been instances of data protection and privacy rights being endangered by EU action, in both the DRD and the intention to sign ACTA, these have been effectively remedied within the institutional framework of the EU. By all indications, the system appears to function well for civil rights. Furthermore, the EU has generally been at the forefront of international developments on data protection rights, with its legislative developments more detailed, yet still largely premised on, earlier instruments developed under the Council of Europe.

The social rights to collective bargaining, protection against unfair dismissal, and fair wages looked at in chapter five drew out more of the problems of the dominant understanding of fundamental rights. Historically fundamental rights have been constructed in a fashion that has seen social rights afforded lesser value than neoliberal economic principles and their scope of application restricted to areas where the ECJ has jurisdiction. This understanding of social rights has been largely brought about due to the judicial nature of the construction of rights in the EU and the uncertainties around the justiciability of social rights in Europe in contrast to the clear legal value afforded to the neoliberal economic principles in the EU treaties. Despite some indications that the Charter of Fundamental Rights could redress these issues, particularly due to the political nature of its drafting, developments since 2009 have shown that the situation has deteriorated, with grave consequences for the realisation of social rights in Europe. There have been few developments in the single market, wherein the prioritisation of neoliberal market freedoms over the right to collective bargaining and legislative efforts to permit higher domestic standards in the *Laval-*quartet cases in the 2000s has not been redressed. Instead, recent developments relevant to the labour rights analysed have taken place within the governance of EMU, in which the combination of the institutional structure of the EU and the dominance of neoliberal economic principles have combined to exclude fundamental social rights and allow the promotion of policies hostile to these rights. The power of neoliberal ideas on macroeconomic competitiveness in particular, which are written into both the treaties and the legislation governing the governance framework of EMU, has shaped the response to the policy direction of EMU. The absence of those actors with a stronger history of rights activism, the Parliament and (to a lesser extent on social rights) the ECJ, and the absence of any rights mechanisms in the governance of EMU has ensured that little stands in the way of this policy direction underpinned by neoliberal principles. The result has been the undermining of social rights across Europe, particularly in southern European states. By looking to appropriate social rights standards under the Council of Europe, and select constitutional courts where applicable, it is clear that the governance of the Eurozone is contributing directly to social rights being violated.

While the protection of civil rights is strong and social rights weak, disability equality, looked at in chapter six, very much sits in the middle. Disability equality raises some interesting issues for the dominant EU conception of fundamental rights as equality and non-discrimination do not fit too neatly into the civil-social rights dichotomy. The different conceptions of formal and substantive equality do reflect this dichotomy to some extent, but there are many aspects that overlap when applied to the issue of disability due to the development of the social model. This chapter has also allowed a focus on the relationship between the EU’s conception of disability rights and recent international developments, as the EU ratified the UN CRPD in 2011. In the 1990s and 2000s, the EU addressed disability in terms of non-discrimination primarily in terms of formal equality, but with some elements of substantive equality based on the social model of disability. This approach is consistent with the broader understanding of fundamental rights in the EU and is broadly consistent with the approach later endorsed in the CRPD, though it does not go far enough to ensure full compliance with the CRPD. Since 2009, there have been some limited advancements along the lines of the CRPD in how disability equality is addressed, but these have been limited to the Commission’s Disability Strategy and the new regulations governing the EU structural funds and have not been matched by substantive legislative developments or mainstreaming in other policy platforms. Institutional barriers to legislative developments have stalled the further developments, severely limiting the degree to which the EU can fully incorporate the advancements on disability rights made in the CRPD. One of the key barriers to further hard law developments has been the fear of high costs among national governments that positive obligations to achieve equality for people with disabilities would entail. Whilst such a fear over costs does not necessarily imply a prioritisation of neoliberal economic principles, it does demonstrate a continuing barrier to moving beyond an economic and market based EU.

Several reoccurring themes have become apparent across different rights. The key legislative developments designed to ensure the realisation of specific rights have generally also been premised on upholding the neoliberal freedoms that underpin the single market. This includes the legislation implemented to protect data and privacy rights and the legislation implemented to protect individuals against discrimination, as highlighted in chapters four and six. The convergence of protecting rights and strengthening the single market has aided legislative developments, but at the same time has reinforced the idea that fundamental rights and the neoliberal principles underpinning the single market are of equal value. This convergence of interests leading to legislative developments should not come as a surprise, as chapter three highlighted the institutional barriers to positive integration that has pushed integration to be pursued along market lines based on the neoliberal principles underpinning the single market and chapter two drew attention to the historic relationship and compatibility between civil rights and economic liberalism. The interaction between the institutional framework and the neoliberal paradigm embedded within the EU has conditioned the way in which rights can be realised. There has also been a recurring theme whereby the Parliament has consistently pushed for higher rights standards in legislative developments, in line with the way in which the Parliament promoted rights developments in chapter three, though these tend to be whittled down during negotiations in the Council. As the power of the Parliament has been enhanced over time, most recently by the Treaty of Lisbon, the rights-standards in legislative developments should be expected to improve. The new data protection legislation looked at in chapter four and the new regulations for the structural funds looked at in chapter six both had to enter trilogue negotiations as a last ditch attempt to reach agreement between the Parliament and Council, demonstrating how far the Parliament’s commitment to rights goes.

## Contribution to Literature

The primary contribution of my research is on addressing fundamental rights in a critical manner as a socially constructed concept. To reiterate, the key argument is that fundamental rights have been constructed in a unique manner in the EU due to their historical development, which has shaped the role that rights play today. This development has been affected primarily by the institutional structure of the EU and the presence of dominant neoliberal ideas. The result is a dominant conception of fundamental rights as civil rights of equal value to neoliberal economic principles and restricted in scope to where the ECJ has jurisdiction, with social rights afforded a secondary and less fundamental status. This provides an account of fundamental rights that dives beneath the surface rhetoric of the repeated commitment to rights made by solemn declarations and even that implied in the Charter of Fundamental Rights, thereby drawing out the contradictions and inconsistencies of the dominant conception of rights in the EU. Such a critical constructivist approach to the study of fundamental rights in the EU is itself unique and is an original contribution. How this fits into the existing literature is explained below.

The existing literature on rights in the EU has generally not engaged too critically with the construction of fundamental rights, though such an approach is not necessarily too far removed from some existing research. As noted in the introduction to this thesis, legal scholars dominate the study of fundamental rights in the EU. There are many accounts of the case law of the ECJ, of which a number have been drawn upon here (see, for example, de Vries, 2013; Groussot, Pech, and Petursson, 2013; Weatherill, 2013; de Witte, 2005; 1999; Maduro, 1999). Although not advanced explicitly in terms of constructivism or critical theory, these accounts of legal developments tend to treat the protection of fundamental rights as something that is constructed by the ECJ through its legal decision making. The case law created by the ECJ is taken to represent how rights should be conceptualised, as representing the reality that is the state of law on fundamental rights. In doing so, these legal scholars acknowledge some of the institutional constraints on the Court and the way in which it balances fundamental rights against other ideas, often the freedoms of the internal market. Yet whilst this literature does provide a strong account of the case law of the ECJ, it does not adequately address the broader issues of the protection of fundamental rights beyond the legal realm. There tends to be an assumption in this literature about the prospects of redressing any shortcomings of the legal protection of rights through political developments. There is also often little engagement in this legal literature with how fundamental rights are conceptualised in non-legal political activities, despite a growing recognition of the need for positive action to protect rights (see de Schutter, 2010; de Witte, 1999). The contribution of my research to this literature is to provide a more comprehensive account of the role of fundamental rights in the EU by acknowledging the institutional and ideational barriers that rights face politically as well as legally and by drawing out the relationship between the predominately judicial construction of rights and how they are understood beyond the ECJ. Given these barriers, this contribution casts doubt on the ability of politics to adequately address the shortcomings in fundamental rights. By analysing the construction of fundamental rights that appreciates the role of both legal and political institutional actors, the links between the legal construction of rights and the political application (or absence of application) of rights to their relevant policy areas is drawn out and a more comprehensive account of the role is fundamental rights in the EU is provided.

Although rare, there are a couple of scholars who have addressed fundamental rights as socially constructed by treating rights as a political myth. Williams (2004) provides an excellent account elucidating what he calls the bifurcation between the internal and external approaches to rights in the EU, highlighting how the process of construction of rights as a mythical narrative added in retroactively has allowed a particular malleability between internal and external applications. The association between rights and the legitimacy and authenticity sought by EU actors is a key part of their developments that he identifies. Yet by focusing primarily on the internal-external split in the application of rights, the contradictions and tensions of the internal application of rights are left under-theorised. This mantle has been taken up to some extent by Stijn Smismans. Smismans (2010) focuses exclusively on the construction of fundamental rights in the EU as a myth and highlights key foundational moments, but does not situate it in relation to other sets of neoliberal economic ideas or the institutional structure of the EU or engage with the application of this fundamental rights myth to actual policies and political activities. So whilst these contributions do add some much needed insights into the political construction of rights, they do not go far enough. By drawing out the factors that have shaped the construction of rights and linking the legal and political aspects of this process, my research provides a more comprehensive account of the construction of fundamental rights. In particular, the relationship between neoliberal economic principles embedded in the EU and the construction of fundamental rights as competing for the core constitutional space is absent in both the contributions of Williams and Smismans. As noted below, this aspect of fundamental rights is of central importance. In addition to this, my research goes further by analysing the dominant understanding of fundamental rights as applied to specific policy areas to draw out how this broader understanding functions in practice. This has allowed my research to highlight some of the nuances of this understanding of rights, such as how it has shaped the conception of disability equality and the relationship between formal and substantive equality and how it has permitted the development of a whole area of macroeconomic governance without any oversight from rights mechanisms.

The final primary contribution of this research is to the literature on the tensions between neoliberal principles and social values in the EU. As highlighted above, a number of legal scholars have written about this and drawn out these issues within the confines of the case law of the ECJ. Some have been particularly critical (see Barnard, 2013; Augenstein, 2013; Christodoulidis, 2013). Yet these accounts tend not to address issues that have arisen outside of the legal reasoning of the ECJ, namely in the governance of EMU as addressed in chapter five. On the other hand, many scholars researching EMU have focused the prioritisation of neoliberal economic principles over social values. This includes some legal scholars (Oberndorfer, 2014; Fischer-Lescano, 2014a; Kilpatrick and de Witte, 2014; Lörcher, 2014), though it is predominately addressed by critical political economists (Ryner, 2015; Wigger, 2014; Stockhammer, 2012; Drahokoupil, van Apeldoorn, and Horn, 2009). Legal scholars who have focused on fundamental rights have tended to analyse the use (or *potential* use) of national and international rights bodies to oppose austerity and macroeconomic restructuring, but without making any direct link to how policies so hostile to rights have been promoted by EU institutions despite the supposed guarantees of the Charter of Fundamental Rights. Critical political economists have focused on the means through which the EU has championed such policies, but without any consideration of the role of fundamental rights. Given the absence of rights mechanisms in the governance of the EU, such an omission is perhaps understandable. Yet this still constitutes a gap in the literature as to how an EU that is supposedly founded on fundamental rights and has a Charter of Fundamental Rights of ‘the same legal value [as] the Treaties’ (Article 6, TEU) and that lists numerous social rights is capable of acting in a manner that directly undermines those same rights. My research directly addresses this phenomenon by analysing the asymmetrical relationship between neoliberal economic principles and social rights and the jurisdictional constraints that have characterised the EU’s understanding of fundamental rights since their very introduction to the EU. These aspects of the dominant understanding of fundamental rights in the EU have allowed governance mechanisms to be developed in EMU that directly undermine rights. Acknowledging how fundamental rights are understood in the EU is of vital importance to that research that has focused on resistance and opposition. In the legal scholarship that has looked to alternative rights national and international mechanisms (Kilpatrick and de Witte, 2014; de Brito, 2014; Lörcher, 2014), it is generally acknowledged that rights mechanisms are either soft law (usually the case with international avenues) or addressed by courts at a lower level without a direct link to the EU (as is the case with national avenues). Critical political economists from a neo-Gramscian background have generally held a commitment to the idea of academic research contributing to emancipatory movements (Wigger, 2014; Drahokoupil, van Apeldoorn, and Horn, 2009; Cox, 1981). Both of these bodies of literature can benefit from theorising the link between EU fundamental rights and oppositional strategies challenging macroeconomic restructuring, particularly as the EU remains rhetorically committed to social rights (even launching a proposal for a European Pillar of Social Rights in March 2016). To do this, it is vital to understand how the EU actually conceptualises rights in the first place.

## Implications and Further Research

It has been noted by some that the EU may not have become a human rights organisation (de Vries, 2013: 187), though the implications of the way in which fundamental rights are understood in the EU are potentially more significant. The dominant understanding of fundamental rights moulded to fit the process of EU integration indicates a return to a liberal order of the type similar to the ‘disembedded liberalism’ that characterised capitalist Europe prior to World War II (see Ruggie, 1982: 385). As argued by Thomas Piketty, levels of inequality and poverty are returning to levels not seen since the Great Depression (Piketty, 2013). As suggested throughout this thesis, and particularly in chapter five, EU institutions are contributing directly to the undermining of social settlements that underpin modern European states. Neoliberal economic principles in both the single market and the governance of EMU (though more in the latter than the former) have been prioritised over social values. Social rights in national constitutions and the ESC embodied the social settlements that have brought stability to Europe, but are now being dismantled through pressure from the EU despite the supposed rights obligations that are meant to constrain EU action.

The implications of the prioritisation of neoliberal economic principles over fundamental social rights are also an area for further study. Already there is research focused on welfare and labour restructuring in EU states (Pavolini et al 2015; Sacchi, 2015; Schnyder and Jackson, 2013; Gualmini and Schmidt, 2013), though without a clear link to the way in which these social settlements are linked to constitutional orders or international rights regimes. Those scholars that have looked at rights tend to focus more narrowly on individual rights-based challenges before constitutional courts or international mechanisms (de Brito, 2014; Nolan, 2014; Psychogiopoulou, 2014; Lörcher, 2014). Based on the focus on the construction and dominant understanding of fundamental rights highlighted throughout this thesis, research focusing more exclusively on specific states could draw out the dynamics of change and local understandings of rights and their role in constitutional order. Furthermore, just as the EU understanding of fundamental rights was moulded to fit the approach to integration and principles it is premised on, national conceptions of fundamental rights may undergo changes in the context of the new macroeconomic environment they find themselves in. Similar changes could also occur at the international level at the Council of Europe, ILO, or UN. As the way in which fundamental rights are constructed and understood by actors is affected by institutional factors and the presence of other paradigms, these processes must be investigated in the context of other rights regimes.

There is also scope for further research on rights at the EU level. The issues of neoliberal economic principles being prioritised over social rights was based on a case study of three labour rights. Whilst it was noted that there is other research on social rights being undermined (including that mentioned above), a broader focus incorporating other social rights would help to draw out other implications of the prioritisation of neoliberal economics. This is particularly relevant for the welfare state, where the right to health and right to social security may be affected. As highlighted previously, EMU is premised on fiscal restraint when it comes to public spending. Of course, the long term viability of public services like social security and public health provision is dependent on them being financially sustainable, but how the EU’s focus on these principles and their relationship to austerity affects the actual current provision of these services is an important area for further research. The indication from this thesis is that rights do not feature in the way these policy areas are conceptualised at the EU level, but what this means for their provision is not immediately clear.

The scope for further research at the EU level also goes beyond social rights and their relationship to neoliberal economic principles. In the area of civil rights, the EU has recently expanded its scope to cover what it calls an Area of Freedom, Security, and Justice. De Búrca (2013) suggests that this expansion accounts for a significant increase in the number of fundamental rights cases before the ECJ. As highlighted in chapter four, the new directive covering data protection in police and crime affairs comes under this new area, but faced many barriers to agreement among national governments due to the sensitivity of this area. How effectively the EU is able to act to protect fundamental rights in this area remains to be seen. This expansion of the scope of integration also moves the traditional Union method of legislation beyond the single market and into a significant area of non-economic policy. It is possible that such a move could disrupt the privileged position enjoyed by the four freedoms of the internal market in the EU legal order as non-economic principles become prioritised, potentially leading to a stronger role for fundamental rights.

One final area of further research concerns the development of key ideas about constitutional arrangements that could contribute to integration studies. Critical constructivism emphasises the importance of analysing where prevailing orders have come from and the factors that shape their development. The emphasis in my research has been on the impact of the institutional structure of the EU and of competing neoliberal ideas on shaping how fundamental rights have developed and the role they play today in the EU. What this means is that a concept that is widely considered across Europe to be a key constitutional principle has been shaped and moulded in the EU not just by the constitutional legitimacy of this concept, but by their process of construction through the EU institutional framework and competing neoliberal ideas. Yet fundamental rights are just one constitutional concept, albeit a particularly important one, among a range of principles that underpin modern European democracy. There are other ideas associated with the legitimate exercise of public authority in Europe, which is of particular importance to issues such as the democratic deficit that have dogged the legitimacy of the EU. The EU is often conceptualised as a *sui generis* institution of which its institutional actors and procedures have developed in a unique fashion to suit the realistic prospects of how integration can proceed. Research has already engaged with this issue from neofunctionalist/supranationalist and historical institutionalist perspectives, yet has often not directly considered the impact of embedded ideas about economic organisation. Analysing the broader constitutional developments of the EU from a critical constructivist perspective would provide insights into how neoliberal ideas embedded in the EU treaties and strongly associated with the pursuit of integration have shaped the development of the entire organisation of the EU.

In closing, the two Europes alluded to in the introduction and expanded on in chapter two have exerted a significant influence on the development of fundamental rights. The rights-based constitutional orders and European regimes under the Council of Europe have collided with the neoliberal economic order of the EU and combined to form something rather unique. The economic premise of EU integration has remained intact and it is fundamental rights that have been twisted to fit this mould. The surface level EU commitments to fundamental rights found in the treaties and in the Charter of Fundamental Rights mask a deeper understanding of rights that has restricted their utility when tensions with the neoliberalism come to a head. While civil rights fit with the institutional arrangement and neoliberal paradigm of the EU and enjoy a strong level of protection, social rights have been relegated to a secondary status. Whether or not the EU’s commitment to fundamental rights understood in this way is enough to secure its legitimacy in face of future crises and instability remains to be seen.

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Working Group II (2002b) ‘Summary of the meeting held 17.09.02 chaired by Commission Antonio Vitorino’ Convention on the Future of Europe. CONV 295/02. 17 August

Working Group II (2002c) ‘Final Report of Working Group II’ Convention on the Future of Europe. CONV 354/02. 22 October

Working Group II (2002d) ‘Compromise proposals concerning draft adjustments in the horizontal articles’ Convention on the Future of Europe. Working Document 23. 4 October

# List of interviews conducted

Interview with official from major European anti-poverty NGO, 12 June 2015

Interview with official in European Commission, DG Justice, 15 June 2015

Interview with official in European Commission, DG Employment, 16 June 2015

Interview with official in European Commission, 16 June 2015

Interview with official in European Commission, DG Employment, 17 June 2015

Interview with official from major European Disability NGO, 17 June 2015

Interview with official in European Parliament, LIBE Committee, 18 June 2015

Interview with official in European Parliament, LIBE Committee, 18 June 2015

Interview with official in European Commission, DG Employment, 18 June 2015

Interview with official in European Commission, DG Justice, 2 July 2015

Interview with official in European Commission, DG Justice, 11 July 2015

Interview with official in European Commission, DG Employment, 18 August 2015

1. It should be noted that Stijn Smismans has drawn on critical approaches in other work, such as his analysis of the neoliberal framing of the Open Method of Coordination and its implication for rights (see Smismans, 2005), though he has not incorporated such an account into his focus on more constitutional rights developments. [↑](#footnote-ref-2)
2. It should be noted the extent to which free markets emerge spontaneously based on human nature, as the classical liberal free market thesis suggests, is contested (see Polanyi, 2001; Marshall, 1950). This issue is returned to briefly in chapter two when discussing the relationship between civil rights and liberalism. [↑](#footnote-ref-3)
3. Greece had accepted compulsory jurisdiction of the court (Art. 46), but not individual petitions (Art. 25) at this point [↑](#footnote-ref-4)
4. The possible exception here is the right to education (Article 2 of Protocol 1 to the ECHR, added in 1952), which can sometimes be regarded as a social right (see Fabre, 2005 on this right in constitutions) [↑](#footnote-ref-5)
5. *Solange I* [1974] Federal Constitutional Court of Germany, case BvL 52/71, 37, 271 [↑](#footnote-ref-6)
6. *Solange II* [1986] Federal Constitutional Court of Germany, case BvL 197/83, 73, 339 [↑](#footnote-ref-7)
7. It should be noted that Austria’s constitution is split over a number of documents and the primary document. Civil rights are listed in a basic law statute from 1867. Following the ratification of the ECHR in 1958, the ECHR was also transposed into domestic law and has served as a source of rights of constitutional value since 1964 (the 6 year delay owing to some unintended legal issues during the original transposition into domestic law, see Drzemczewski, 1983: 97) [↑](#footnote-ref-8)
8. The details of the reporting procedure are somewhat complex, as the number of signatories to the ESC means that the ECSR has a significant amount of work. The social rights of the ESC are sub-divided into four thematic groups. The ECSR adopts conclusions for each state on a single thematic group every year, meaning that it takes a four year cycle for the ECSR to report on every right in the ESC. Furthermore, those states that have signed the collective complaints mechanism are themselves divided into two groups. For each four year cycle, one of these groups receives only a simplified report. [↑](#footnote-ref-9)
9. These 12 are: Croatia, Denmark, France, Germany, UK, Greece, Ireland, Luxembourg, Poland, Netherlands, Portugal, and Spain. [↑](#footnote-ref-10)
10. These 6 are: Austria, Belgium, Bulgaria, Slovakia, Slovenia, and Sweden. [↑](#footnote-ref-11)
11. *Van Gen den Loos* [1963] ECJ, Case C-26/62 [↑](#footnote-ref-12)
12. *Costa v ENEL* [1964] ECJ, Case C-6/64 [↑](#footnote-ref-13)
13. *Stauder v City of Ulm.* [1969]. ECJ. Case C-29/69 [↑](#footnote-ref-14)
14. *Dassonville* [1974] ECJ, Case C-8/74 [↑](#footnote-ref-15)
15. *Cassis de Dijion* [1979] ECJ, Case C-120/78 [↑](#footnote-ref-16)
16. *Defrenne v Sabena* [1976] ECJ, Case C-43/75 [↑](#footnote-ref-17)
17. This situation may be changing in light of the Eurozone crisis. As Oberndorfer (2015) and Clau-Losada and Horn (2015) have highlighted, austerity has been imposed in the Eurozone without popular consent and often in face of significant opposition and protest. A sustained reliance on authoritarian methods to impose austerity, such as the ‘gag’ law in Spain (Kassam, 2015), may indicate a prioritisation of neoliberal economic principles at the expense of civil rights. As this is a more recent phenomenon, it is not addressed in this thesis, though it should be considered an area for future research. [↑](#footnote-ref-18)
18. *Stork v ECSC High Authority* [1959] ECJ, Case C-1/58 [↑](#footnote-ref-19)
19. *Ruhrkohlen v ECSC High Authority* [1961] ECJ, Case C-13/60 [↑](#footnote-ref-20)
20. *Sgarlata v Commission* [1965] ECJ, Case C-40/64 [↑](#footnote-ref-21)
21. *Van Gen den Loos* [1963] ECJ, Case C-26/62 [↑](#footnote-ref-22)
22. *Costa v ENEL* [1964] ECJ, Case C-6/64 [↑](#footnote-ref-23)
23. *Stauder v City of Ulm.* [1969]. ECJ, Case C-29/69, [↑](#footnote-ref-24)
24. *Internationale Handelsgesellschaft* [1970]. ECJ, Case 11/70. [↑](#footnote-ref-25)
25. *Nold, K. v European Commission* [1974]. ECJ, Case 4-73, [↑](#footnote-ref-26)
26. *Solange I - Beschluss* [1974] Federal Constitutional Court of Germany, 37, 271, BvL 52/71 [↑](#footnote-ref-27)
27. *Hauer v Land Rhineland-Pfaz.* [1979]. ECJ. Case C-44/79. [↑](#footnote-ref-28)
28. *Digital Rights Ireland v Minister for Communications.* [2014] ECJ Cases C-293/12 & C-594/12. [↑](#footnote-ref-29)
29. *Defrenne v Sabena* [1976] ECJ, Case C-43/75 [↑](#footnote-ref-30)
30. *Wachauf v Germany* [1989] ECJ, Case C-5/88. [↑](#footnote-ref-31)
31. *ERT v DEP [1991]* ECJ, Case C-260/89. [↑](#footnote-ref-32)
32. *Rutili v Minister for the Interior.* [1975] ECJ, Case C-36/75. [↑](#footnote-ref-33)
33. *Schmidberger v Austria.* [2003] ECJ, Case C-112/00. [↑](#footnote-ref-34)
34. *Omega Spielhallen* [2004] ECJ, Case C-36/02. [↑](#footnote-ref-35)
35. *Finnish Seaman’s Union v Viking Line.* [2007] ECJ, Case C-438/05. [↑](#footnote-ref-36)
36. *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECJ, Case C-341/05. [↑](#footnote-ref-37)
37. *Rüffert v Land Niedersachsen* [2008] ECJ., Case C-346/06 [↑](#footnote-ref-38)
38. *Rush Portuguesa v Office National d'Immigration.* [1990] ECJ, Case C-113/89 [↑](#footnote-ref-39)
39. Particularly earlier on in the development of fundamental rights, these issues were often addressed in the context of a future European Union. As such, they commonly feature in reports or resolutions on European Union. It should be recognised that these early reports concern a conception of a future EU that is not necessarily representative of the current EU established in 1992, particularly as the current EU has maintained its strong bias towards economic issues and lacks social integration. [↑](#footnote-ref-40)
40. Interview with official in European Parliament LIBE Committee. 18th June 2015 [↑](#footnote-ref-41)
41. Interview with official in European Commission DG Justice, 2nd July 2015 [↑](#footnote-ref-42)
42. Interview with official in European Commission DG Justice, 2nd July 2015; Interview with official in European Commission DG Justice, 11th July 2015 [↑](#footnote-ref-43)
43. *Weber and* *Saravia v Germany.* [2006] ECtHR, No.54934/00. [↑](#footnote-ref-44)
44. *B.B v France,* [2009] ECtHR, No. 5335/06. [↑](#footnote-ref-45)
45. *S. and Marper v UK* [2008]ECtHR,Nos. 30562/04 and 30566/04. [↑](#footnote-ref-46)
46. *Axel Springer v Germany* [2012]ECtHR, No. 39954/08. [↑](#footnote-ref-47)
47. *Biriuk v Lithuania* [2008] ECtHR,No. 23373/03. [↑](#footnote-ref-48)
48. *Mosley v UK*. [2011] ECtHR, No. 48009/08. [↑](#footnote-ref-49)
49. *Parliament v Council and Commission (PNR)*, [2006]. ECJ Case C-317/04 and C-318/04 [↑](#footnote-ref-50)
50. *Schrems v Data Protection Commissioner*, [2015]. ECJ. Case C-362/14 [↑](#footnote-ref-51)
51. Despite the term ‘EU Cookie Directive’ being used here, it should be noted that this is not a stand-alone directive. It was a directive that amended several other pieces of legislation, including the E-Privacy Directive. It is commonly referred to as the ‘EU Cookie Directive’ or sometimes just ‘EU cookie law’ due to its provisions requiring websites to seek consent prior to using cookies. [↑](#footnote-ref-52)
52. Under the Third Pillar, the powers of the ECJ were severely limited under Title VI of the pre-Lisbon Treaty on the European Union. Upon the entry into force of the Treaty of Lisbon, transitional arrangements were put in place to retain these limited powers for a period of 5 years. That period ended in December 2014. [↑](#footnote-ref-53)
53. As chapter two highlighted the historic convergence of civil rights and economic liberalism in the birth of capitalism, it would be questioned to some extent how ‘neo’ or new the market constructing aspect of neoliberalism is. While this may be more of a question for political economists, it should be noted that the nature of state activity is distinct in each period. The introduction of economic liberalism was focused on deconstructing feudal and aristocratic practices, whilst neoliberalism is more concerned with changing the role of the modern state and its provision of welfare. [↑](#footnote-ref-54)
54. *Digital Rights Ireland & Kartner Landesregierung* [2014] ECJ. Joined cases C-293/12 and C-594/12 [↑](#footnote-ref-55)
55. De Witte (1999: 881-882) highlights how some agricultural legislation had been struck down by the ECJ on a rights basis. However, these cases were very limited in scope and relied on Article 40(3) of the original Treaty Establishing the European Economic Community, which prohibited discrimination between producers or consumers. Prior to Digital Rights Ireland, the ECJ was considered by many to be rather deferential towards EU legislation (Granger and Irion, 2015; Coppel and O’Neil. 1992). [↑](#footnote-ref-56)
56. *Digital Rights Ireland & Kartner Landesregierung* [2014]. ECJ. Joined cases C-293/12 and C-594/12, paras. 54-65 [↑](#footnote-ref-57)
57. *Digital Rights Ireland & Kartner Landesregierung* [2014]. ECJ.Joined cases C-293/12 and C-594/12, paras. 65-68 [↑](#footnote-ref-58)
58. Interview with official in European Commission DG Justice, 2nd July 2015 [↑](#footnote-ref-59)
59. *Commission v Sweden* [2013] ECJ, Case C-270/11 [↑](#footnote-ref-60)
60. *Scarlet Extended v SABAM*, [2011] ECJ, C-70/10 [↑](#footnote-ref-61)
61. *Netlog v SABAM*, [2012] ECJ, C-360/10 [↑](#footnote-ref-62)
62. *Promusicae v Telefonica,* [2008] ECJ, C-275/06 [↑](#footnote-ref-63)
63. *Bonnier Audio v Perfect Communication Sweden,* [2012] ECJ,C-461/10 [↑](#footnote-ref-64)
64. *Google Spain* [2014] ECJ, C-131/12 [↑](#footnote-ref-65)
65. *Google Spain* [2014] ECJ, C-131/12 [↑](#footnote-ref-66)
66. The GDPR had enjoyed quite widespread support in the Parliament, being passed by 621 votes to 10. The DDPPC, on the other hand, was more divisive and was passed by 371 votes to 276. [↑](#footnote-ref-67)
67. *Schrems v Data Protection Commissioner.* [2015] ECJ, C-362/14. [↑](#footnote-ref-68)
68. *Schrems v Data Protection Commissioner.* [2015] ECJ, C-362/14. [↑](#footnote-ref-69)
69. The European Currency Unit was the unit of account for the EU prior to the adoption of the Euro. [↑](#footnote-ref-70)
70. Interview with official in DG Employment, 17th June 2015 [↑](#footnote-ref-71)
71. Interview with official in European Commission DG Employment 17th June 2015; Interview with official in European Commission DG Employment 16th June 2015 [↑](#footnote-ref-72)
72. Interview with official in European Commission DG Justice, 2nd July 2015; Interview with Official in DG Justice, 11th July 2015 [↑](#footnote-ref-73)
73. Interview with official in European Commission DG Justice, 2nd July 2015; Interview with Official in DG Justice, 11th July 2015 [↑](#footnote-ref-74)
74. Interview with official in European Commission DG Employment 16th June 2015 [↑](#footnote-ref-75)
75. Interview with official from European Parliament, 18th June 2015 [↑](#footnote-ref-76)
76. Interview with official in European Commission DG Employment, 17th June 2015 [↑](#footnote-ref-77)
77. Interview with official from social NGO, 12th June 2015 [↑](#footnote-ref-78)
78. Interview with official in European Commission DG Employment 16th June 2015 [↑](#footnote-ref-79)
79. Interview with official in European Commission DG Employment, 16th June 2015 [↑](#footnote-ref-80)
80. It should be noted that different scholars sometimes uses different terms when it comes to models of disability. Whilst it is not my intention to engage with the debates over different models or to draw out the nuances of certain models, it is worth highlighting that what some scholars refer to as a social welfare model (see, for example, Quinn and Flynn, 2012; Waddington and Diller, 2002) should not be confused with the social model. Often this social welfare model is contrasted to a civil rights model, which is similar, but contains key differences to, the use of the term social model in this thesis (for reasons explained in this chapter). [↑](#footnote-ref-81)
81. *Chacon Navas* [2006]. ECJ Case C-13/05. ECR I-06467 [↑](#footnote-ref-82)
82. *HK Danmark* [2013]. ECJ. Case C-335/11 & C-337/11. Not yet reported [↑](#footnote-ref-83)
83. *Glatzel* [2014]. ECJ Case C356/12. Not yet reported [↑](#footnote-ref-84)
84. *Coleman* [2008]. ECJ, Case C-303/06 [↑](#footnote-ref-85)
85. *Chacon Navas* [2006]. ECJ, Case C-13/05. [↑](#footnote-ref-86)
86. *HK Danmark* [2013]. ECJ, Case C-335/11 & C-337/11 [↑](#footnote-ref-87)
87. *Glatzel* [2014]. ECJ, Case C356/12 [↑](#footnote-ref-88)
88. Interview with official from major disability NGO working with EU, 17th June 2015; Interview with official in European Commission, 16th June 2015 [↑](#footnote-ref-89)
89. Interview with official in European Commission DG Justice, 2nd July 2015 [↑](#footnote-ref-90)
90. Interview with official major European disability NGO, 17th June 2015 [↑](#footnote-ref-91)
91. Interview with official in European Commission, 16th June 2015; interview with official in European Parliament LIBE Committee 18th June 2015 [↑](#footnote-ref-92)
92. Interview with official in European Parliament LIBE Committee, 18th June 2015 [↑](#footnote-ref-93)
93. Interview with official in European Parliament LIBE Committee, 18th June 2015; Interview with official in major European disability NGO, 17th June 2015 [↑](#footnote-ref-94)
94. Interview with official in European Commission, 16th June 2015 [↑](#footnote-ref-95)
95. Interview with official in European Parliament LIBE Committee, 18th June 2015 [↑](#footnote-ref-96)
96. Interview with official in major European disability NGO, 17th June 2015 [↑](#footnote-ref-97)
97. Interview with official in major European disability NGO, 17th June 2015 [↑](#footnote-ref-98)