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From low to high intensity review in the protection of EU fundamental rights

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Abstract:	<p>The CJEU often reviews the validity of EU legislation for compliance with fundamental rights standards. Prior to the entry into force of the Lisbon Treaty, the CJEU's approach to fundamental rights review was characterised by a low-intensity standard of review. Since the elevation of the Charter to primary law status, the CJEU has come to subject EU legislation to far more rigorous levels of scrutiny. This paper critically evaluates the methodology utilised by the CJEU to determine whether low or high intensity proportionality review is deployed in cases where EU legislation limits fundamental rights. This question has yet to receive detailed consideration in the literature. Looking to the future of EU fundamental rights, the paper rejects the idea that the nature of the right can determine whether a restriction placed upon that right is subject to low or high intensity review. There are practical and normative grounds for rejecting this approach. Instead, the paper argues that the intensity of review should be modulated on the basis of the severity of the interference with the right in question. It is thus seriousness of interference and not the nature of the right in question which determines the applicable standard of review.</p>

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From low to high intensity review in the protection of EU fundamental rights¹

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Abstract

The CJEU often reviews the validity of EU legislation for compliance with fundamental rights standards. Prior to the entry into force of the Lisbon Treaty, the CJEU's approach to fundamental rights review was characterised by a low-intensity standard of review. Since the elevation of the Charter to primary law status, the CJEU has come to subject EU legislation to far more rigorous levels of scrutiny. This paper critically evaluates the methodology utilised by the CJEU to determine whether low or high intensity proportionality review is deployed in cases where EU legislation limits fundamental rights. This question has yet to receive detailed consideration in the literature. Looking to the future of EU fundamental rights, the paper rejects the idea that the *nature of the right* can determine whether a restriction placed upon that right is subject to low or high intensity review. There are practical and normative grounds for rejecting this approach. Instead, the paper argues that the intensity of review should be modulated on the basis of the *severity of the interference* with the right in question. It is thus seriousness of interference and not the nature of the right in question which determines the applicable standard of review.

Keywords

EU fundamental rights; CJEU; judicial review; proportionality; discretion;

1.) Introduction

The CJEU is often required to review the validity of EU legislation for compliance with fundamental rights protected by the Charter. Prior to the entry into force of the Lisbon Treaty, the CJEU's approach to fundamental rights review was characterised by the adoption of a low-intensity standard of review. Traditionally, the Court afforded the EU institutions a wide margin of discretion. The consequence was that judicial review of whether a restriction placed upon a fundamental right could be justified was limited to considering whether the contested measure was manifestly disproportionate in light of the objective pursued. Since the elevation of the Charter to primary law status, however, the CJEU has come to subject EU legislation to far more rigorous levels of scrutiny (in some cases at least). In *Digital Rights Ireland*, the Court held for the first time:

‘With regard to judicial review... where interferences with fundamental rights are at issue, *the extent of the EU legislature's discretion may prove to be limited*, depending on a number of factors, including, in particular, the area concerned, *the nature of the*

¹ Paper Presented at 6th Young European Law Scholars Conference on ‘The future of EU fundamental Rights’

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3 *right* at issue guaranteed by the Charter, the nature and *seriousness of the interference*
4 and the object pursued by the interference.²
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7 In that case, the EU legislature's discretion was reduced, with the result that judicial review
8 of the exercise of that discretion was 'strict'.³ This heightened intensity of review was
9 justified on the basis of 'the *important role* played by the protection of personal data in the
10 light of the fundamental right to respect for private life and the *extent and seriousness of the*
11 *interference* with that right.'⁴ Subsequent cases have confirmed this approach; Consequently,
12 in the post-Lisbon era, with one finds the Court now engaging in 'high intensity'
13 proportionality review of the EU acts that limit fundamental rights in certain contexts.⁵
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17 Notably, in setting down this fundamental shift in the approach to: (i) the scope of discretion
18 afforded to the EU legislature; and (ii) the subsequent intensification of proportionality
19 review in a fundamental rights context, the CJEU cited the Grand Chamber judgment of the
20 European Court of Human Rights (ECtHR) in *S and Marper v United Kingdom*, stating that
21 the reasoning in that judgment on Article 8 ECHR right to private and family life applied 'by
22 analogy.'⁶ In that judgment, the ECtHR held that the margin of appreciation left to competent
23 national authorities varies in cases where a judicial examination of a violation of a
24 Convention right is undertaken. The factors that lead to this varying margin of appreciation
25 were said to include: (i) the nature of the Convention right in issue; (ii) its importance for the
26 individual; (iii) the nature of the interference, and (iv) the object pursued by the
27 interference.⁷ This margin will tend to be narrower 'where the right at stake is crucial to the
28 individual's effective enjoyment of intimate or key rights' and where 'a particularly important
29 facet of an individual's existence or identity is at stake.'⁸ In contrast, whenever there is 'no
30 consensus within the Member States of the Council of Europe, either as to the relative
31 importance of the interest at stake or as to how best to protect it, the margin will be wider.'⁹
32 This approach to the margin of appreciation has been consistently adopted by the ECtHR.¹⁰
33 As Dzehtsiarou notes, factors (i) to (iv) above are subjective in nature and provide a broad
34 scope for judicial discretion. Moreover, the meaning of each of these criteria is not entirely
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43 ² *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd v Minister for Communications, Marine and*
44 *Natural Resources and others*, ECLI:EU:C:2014:238 para 47 (emphasis added).

45 ³ *ibid* para 48.

46 ⁴ *ibid* para 48 (emphasis added); see also *Case C-362/14, Maximilian Schrems v Data Protection*
47 *Commissioner*, ECLI:EU:C:2015:650 para 78.

48 ⁵ *Case C-601/15 PPU, J N v Staatssecretaris voor Veiligheid en Justitie*, ECLI:EU:C:2016:84; *Case C-18/16, K*
49 *v Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2017:680; *Case C-362/14, Schrems* (n 4). At the same
50 time, one also finds examples where the CJEU continues to subject EU legislation to a more traditional, low-
51 intensity form of review, such as *Case C-477/14, Pillbox 38 (UK) Ltd v The Secretary of State for Health*,
52 ECLI:EU:C:2016:324, paras 109-118. Accordingly, the contemporary landscape is one in which the standard of
53 review modulates. For present purposes, the key point is that the high-intensity review that we see post-Lisbon
54 is novel.
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56 ⁶ *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 2) para 47, citing *S. and Marper v. the United*
57 *Kingdom* [GC], nos. 30562/04 and 30566/04, § 102, ECHR 2008-V.

58 ⁷ *S and Marper*, ECtHR, s 102.

59 ⁸ *Ibid.*

60 ⁹ *Ibid.*

¹⁰ *Case of Breyer v Germany*, App. No. 50001/12, para 80

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3 clear. They are difficult to measure, and different people will reasonably disagree over their
4 meaning.¹¹
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7 Against this background, this paper critically evaluates the methodology utilised by the CJEU
8 to determine whether low or high intensity proportionality review is deployed in cases where
9 EU legislation limits fundamental rights. This question of when and why the intensity of
10 review varies in fundamental rights cases has yet to receive detailed consideration in the
11 literature. In looking to the future of fundamental rights review in the EU, the paper rejects
12 the idea that the *nature of the right* can determine whether a restriction placed upon that right
13 is subject to low or high intensity review.¹² There are practical and normative grounds for
14 rejecting this approach. Varying the intensity of review on the basis of the nature of the right
15 necessarily requires the CJEU to explain what the nature of the right in question is. It also
16 requires judicial explanation of why the nature of one right differs from that of other rights in
17 such a way as to justify differing intensities of review. It requires the Court to determine
18 which rights are 'important' enough to warrant high-intensity review and, concomitantly, to
19 decide that the nature of other rights is 'less important', thereby attracting low-intensity
20 review. These are not tasks well-suited to judicial determination. Nor is there any textual
21 basis in the Charter for varying the intensity of review on the basis of the nature of the right
22 in question.
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29 The paper argues that the better approach moving forward is to modulate the intensity of
30 review on the basis of the *severity of the interference* with the right in question. This
31 approach is far easier for the Court to operationalise than determining these matters on the
32 basis of the nature of rights. Serious interferences will lead to reduced discretion and high-
33 intensity review of the contested EU legislation. Conversely, whenever EU acts interfere with
34 rights to a limited extent (i.e., not meeting the 'seriousness' threshold), the EU legislature will
35 be afforded a wider margin of discretion and proportionality review will be conducted in a
36 less intensive fashion.
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42 2.) The pre-Lisbon era of low-intensity review

43 It is generally accepted that for much of the history of European integration, the CJEU
44 subjected the discretionary policy choices of the EU institutions to minimal degrees of
45 judicial scrutiny. In most cases where it was contended that EU legal acts had infringed
46 fundamental rights, the Court deployed a very light-touch standard of review. ~~In most cases,~~
47 ~~the Court deployed a very light-touch standard of review, particularly in cases where it was~~
48 ~~contended that EU legal acts had infringed fundamental rights.~~ Scant attention was given to
49 the reasoning of the EU institutions for their policy choices, with the consequence that not
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54 ¹¹ Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*
55 (1st edn, Cambridge University Press 2015) 135–136.

56 ¹² For the avoidance of doubt, this paper does not deal with 'absolute' fundamental rights such as the prohibition
57 against torture. These rights can never be legitimately restricted and interferences with those rights can never be
58 subject to proportionality balancing. The focus of the paper is therefore on all those 'relative' rights (which
59 make up the vast majority of the Charter's provisions) which may be restricted in the pursuit of legitimate public
60 interests and which are reviewed through recourse to the principle of proportionality.

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3 much was typically required by way of justification from those institutions in order for them
4 to defend the legality of their actions.¹³
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6 Many of these early cases concerned fundamental rights of an economic nature, such as the
7 right to property or the freedom to pursue a trade or profession.¹⁴ As De Witte notes, this is
8 readily explicable by the fact that fundamental rights review continued to be conducted
9 within the confines of an EC Treaty that remained heavily geared towards economic
10 integration.¹⁵ As is common in many legal systems, these economically oriented fundamental
11 rights were not construed as absolute constraints upon the Community's law-making
12 institutions. They could be legally restricted in certain circumstances to pursue policy
13 objectives that were of general interest to the wider Community as a whole.¹⁶ Such
14 restrictions were only legal, however, where they 'in fact correspond to objectives of general
15 interest pursued by the Community and...do not constitute a disproportionate and intolerable
16 interference which infringes upon the very substance of the rights guaranteed.'¹⁷
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22 This standard of review was utilized consistently by the Court when conducting fundamental
23 rights review of Community and then Union legal acts.¹⁸ The established judicial practice was
24 to first set out why the contested legal act corresponded to objectives of general interest
25 pursued by the EU. Then, without much by way of scrutiny, the Court would hold that, in
26 pursuing such objectives, there had been no disproportionate and intolerable interference
27 affecting the very substance of the right in question.¹⁹ Unlike the two or three stage
28 proportionality enquiry that has come to dominate CJEU practice today (see below), much of
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34 ¹³ For discussion see Albertina Albers-Llorens, 'Edging Towards Closer Scrutiny? The Court of Justice and Its
35 Review of the Compatibility of General Measures with the Protection of Economic Rights and Freedoms' in
36 Alan Dashwood and Anthony Arnall (eds), *A Constitutional Order of States? Essays in EU Law in Honour of
37 Alan Dashwood* (Hart Publishing 2011).

38 ¹⁴ Mattias Kumm, 'Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm' in Loïc
39 Azoulay and Miguel Poiars Maduro (eds), *The Past and Future of EU Law The Classics of EU Law Revisited
40 on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010); Armin Von Bogdandy, 'The European
41 Union as a Human Rights Organisation? Human Rights and the Core of the European Union' [2000] *Common
42 Market Law Review* 1307, 1323.

43 ¹⁵ Article 46 TEU excluded actions taken under the intergovernmental second and third pillars of the EU
44 construct from review by the CJEU. For discussion see Bruno de Witte, 'The Past and Future Role of the
45 European Court of Justice in the Protection of Human Rights' in Philip Alston (ed), *The EU and Human Rights*
(OUP 1999) 866–869.

46 ¹⁶ Paul Craig, *EU Administrative Law* (Oxford University Press 2012) 609. *Case 265/87, Hermann Schröder HS
47 Kraftfutter GmbH & Co KG v Hauptzollamt Gronau*, ECLI:EU:C:1989:303.; *Case 44/79, Liselotte Hauer v
48 Land Rheinland-Pfalz*, ECLI:EU:C:1979:290.; *Case 4-73, J Nold, Kohlen- und Baustoffgroßhandlung v
49 Commission of the European Communities* ECLI:EU:C:1974:51.

50 ¹⁷ *Case 265/87, Schröder* (n 16) para 15.

51 ¹⁸ *Joined cases C-184/02 and C-223/02, Spain and Finland v European Parliament and Council*
52 ECLI:EU:C:2004:497; *C-200/96, Metronome Musik* ECLI:EU:C:1998:172; *Joined cases C-248/95 and C-
53 249/95, SAM Schiffahrt GmbH and Heinz Stapf v Bundesrepublik Deutschland* ECLI:EU:C:1997:377.
54 *Case 44/79, Hauer* (n 16); *Case 59/83, SA Biovilac NV v European Economic Community*,
55 ECLI:EU:C:1984:380.; *Case 234/85, Staatsanwaltschaft Freiburg v Franz Keller*, ECLI:EU:C:1986:377.,

56 ¹⁹ *Case C-210/03, Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*,
57 EU:C:2004:802 paras 72-74; *Joined cases C-184/02 and C-223/02, Spain and Finland v European Parliament
58 and Council* (n 18) paras 58-61; *Case C-306/93, SMW Winzersekt* ECLI:EU:C:1994:407 paras 28-29. *Case
59 44/79, Hauer* (n 16) paras 23-30; *Case 4-73, Nold* (n 16) paras 14-15; *Case 11-70, Internationale
60 Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114
paras 14-20.

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3 the earlier (i.e. pre-Lisbon Treaty) fundamental rights jurisprudence was somewhat
4 unstructured. The Court focused largely on the suitability of the contested Community/Union
5 measure for achieving an objective in the general interest - invariably finding that it did.
6 Then, the CJEU would typically ignore the necessity stage of the enquiry before swiftly
7 concluding that no disproportionate infringement of the substance of a right had occurred.²⁰
8 Overall, there was evidently a reluctance to engage in any meaningful degree of scrutiny of
9 whether any less restrictive measures were available (necessity) and/or whether the overall
10 balance between rights and objectives was proportionate (proportionality *stricto sensu*).²¹ As
11 Tridimas notes, the Court opted instead to rely upon some notion of reasonableness or
12 arbitrary conduct. Rather than seriously engaging with some form of two or three step
13 proportionality test, the CJEU was content with reviewing whether the EC legislature
14 committed some manifest error when deciding that its policy was appropriate to achieve
15 objectives in the Community/Union interest.²² As was noted above, this light-touch approach
16 to fundamental rights review of European legal acts was subject to criticism in the literature -
17 since the EU institutions were always afforded a wide margin of discretion, the intensity of
18 review was weak, and the scrutiny of the reasoning of the EU institutions was minimal.
19 Indeed, the Court failed to 'provide for very structured or illuminating reasoning as to its
20 approach...'²³

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22 Despite the Court not always setting out why it adopted such a deferential approach to
23 fundamental rights review of Community/Union legal acts in the pre-Lisbon Treaty era, a
24 number of reasons are typically put forward to justify low-intensity review. The first is that in
25 an era where most legislative acts were adopted by the Council (often via unanimity voting),
26 the product of this intergovernmental decision making 'was perceived to benefit from the
27 traditional indirect democratic and constitutional legitimacy provided by the states.'²⁴ As
28 Maduro has argued, EU legislation that was adopted unanimously by the Member States in
29 the Council were deemed to possess a greater degree of indirect democratic legitimacy than
30 measures adopted by the independent bureaucracy of the Commission.²⁵ In the former AG's
31 view:

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33 'Where states fully controlled the process of decision making no real question of
34 legitimacy was raised. This was bound to determine the nature of constitutional
35 review in the...European Community. For example...no one thought it a priority to
36 provide for the review of a unanimous decision of member states in the Council.'²⁶

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²⁰ Harbo concludes that the early fundamental rights cases turned on a rudimentary form of the proportionality *stricto sensu* test. Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Hotei Publishing 2015) 55.

²¹ Takis Tridimas, 'Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 72.

²² *ibid.*

²³ Malu Beijer, 'Procedural Fundamental Rights Review by the Court of Justice of the European Union' in Eva Brems and Janneke Gerards (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) 203.

²⁴ Miguel Poyares Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism' (2005) 3 *International Journal of Constitutional Law* 332, 335.

²⁵ *ibid* 340 at fn 20.

²⁶ *ibid* 335.

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3 A second reason for the prevalence of low-intensity review was that most disputes arose in
4 areas of technical market regulation such as the Common Agricultural Policy (CAP).
5 Consequently, the Court was reluctant to interfere with discretionary policy choices entrusted
6 to the Commission and Council under the Treaties.²⁷ Respect for the separation of powers
7 thus loomed large, with the Court of Justice adhering to the mantra that it should not overturn
8 such choices simply because they believe things should have been done differently.²⁸ The
9 third is that, as has already been mentioned, the rights in question were typically economic in
10 nature (right to property, freedom to conduct a business etc.) It was common both under
11 international human rights documents and the common constitutional traditions of the
12 Member States for such rights to be capable of limitation in the pursuit of legitimate public
13 interests. Fourth and finally, it has been suggested that the pro-integrationist leanings of the
14 CJEU meant that it was reluctant to strike down EU legal acts that were the product of
15 political compromise and which, at the end of the day, served to further the goal of European
16 integration.²⁹
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25 3.) Fundamental rights review in the post-Lisbon era

26 Following the elevation of the Charter on Fundamental Rights to legally binding, primary law
27 status at the Treaty of Lisbon, there was much speculation in the literature as to whether this
28 would result in a shift in the Court's fundamental rights jurisprudence.³⁰ In particular, the
29 extent to which having a codified 'bill of rights' in the Charter might lead to a deviation from
30 the long-established, light-touch approach to judicial scrutiny of EU legislation for
31 compliance with fundamental rights (protected as general principles of law) was pondered.³¹
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35 a) *The development of 'high-intensity' fundamental rights review*

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37 Following the landmark judgment in Digital Rights Ireland, it is submitted that there has
38 indeed been a shift in the jurisprudence of the CJEU. Whereas the Court continues to subject
39 EU legislation to a traditional, light-touch form of fundamental rights review in certain cases,
40 one now also sees a novel, high-intensity form of fundamental rights review in others. ~~when it~~
41 ~~comes to the intensity of judicial review in (some) cases where EU legislation is contested on~~
42 ~~fundamental rights grounds.~~³² As was just noted, this high-intensity form of review stems
43 from Digital Rights Ireland,
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51 ²⁷ Paul Craig, 'Legality, Standing and Substantive Review in Community Law' (1994) 14 Oxford Journal of
52 Legal Studies 507, 530–535.

53 ²⁸ Juliane Kokott and Christoph Sobotta, 'The Evolution of the Principle of Proportionality in EU Law—
54 Towards an Anticipative Understanding?' 167, 169.

55 ²⁹ Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal
56 158, 172.

57 ³⁰ S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights
58 Law Review 645.

59 ³¹ Dorota Leczykiewicz, 'Constitutional Justice' and Judicial Review of EU Legislative Acts' in Dimitry
60 Kochenov, G De Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

³² *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 2).

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3 | ~~To recall from the introduction above, in that case, where~~ the CJEU found that the EU Data
4 Retention Directive interfered with the rights to a private life and the protection of personal
5 data as protected by Articles 7 and 8 CFR respectively. This was because the Directive
6 imposed various obligations upon entities to retain data. It also allowed public authorities
7 both broad access to data and powers to process such data in ways that led to wide-ranging
8 and serious interferences with the abovementioned fundamental rights. Having found that the
9 Directive restricted the rights in question, the CJEU turned to consider whether such
10 restrictions could be justified in light of the principle of proportionality enshrined in Article
11 52(1) CFR.³³ Then, in a novel innovation in the Court's case law, it held that 'with regard to
12 judicial review...where interferences with fundamental rights are at issue, *the extent of the*
13 *EU legislature's discretion may prove to be limited*, depending on a number of factors,
14 including, in particular, the area concerned, the *nature of the right* at issue guaranteed by the
15 Charter, the nature and *seriousness of the interference* and the object pursued by the
16 interference.'³⁴ The CJEU continued that 'in view of the *important role played by the*
17 *protection of personal data in the light of the fundamental right to respect for private life* and
18 the *extent and seriousness of the interference* with that right caused by Directive 2006/24, the
19 EU legislature's *discretion is reduced*, with the result that *review of that discretion should be*
20 *strict*.'³⁵

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Subsequent cases have confirmed this approach. The Court finds that the EU legislature's margin of discretion is reduced, with the consequence that judicial review of the exercise of that discretion is strict. This manifests itself via the adoption of a high-intensity standard of proportionality review that involves, inter alia, considering whether a restriction placed upon a fundamental right is limited to what is *strictly necessary* in the light of the objective pursued. For example, in JN the Court stressed that 'in view of the *importance of the right to liberty* enshrined in Article 6 of the Charter and the *gravity of the interference with that right* which detention represents, limitations on the exercise of the right must apply only in so far as is *strictly necessary*.'³⁶ This is a markedly different standard of fundamental rights review than was typically applied in the pre-Lisbon Treaty era. It has been remarked that recent judgments show that 'the Court has clearly 'tightened its grip' in the application of the proportionality test, at least when Charter rights are involved.'³⁷ In the post-Lisbon Treaty era, judgments like *Digital Rights Ireland* are said to show that the proportionality principle is deployed in a 'much stricter' fashion today in cases involving fundamental rights.³⁸ In terms of the reasons explaining why such a shift has taken place, it has been suggested that 'there are two...constitutional arguments that support the need for a more searching review of

³³ *ibid* para 46 and case law cited therein.

³⁴ *ibid* para 47 .

³⁵ *ibid* para 48.

³⁶ *Case C-601/15, J. N.* (n 5) para 56; See also *Case C-36/20 PPU, Ministerio Fiscal, ECLI:EU:C:2020:495* para 105; *Case C-18/16, K. v Staatssecretaris van Veiligheid en Justitie*, (n 5) para 40.

³⁷ AG Emilou, Proportionality in EU Law: Does One Size Fit All?, The King's College London Centre of European Law 47th Annual Lecture (2022)

³⁸ AG Emilou, *Ibid*.

measures of EU institutions...³⁹ First, the elevation of the Charter of Fundamental Rights to the level of binding primary law by the Treaty of Lisbon has ‘brought fundamental rights review of EU acts to the fore.’⁴⁰ Second, the absence of external review stemming from the failure of the EU to accede to the ECHR means that the mandate of reviewing the compatibility of EU legislation with fundamental rights falls exclusively to the CJEU. ‘In discharging that mandate, the high level of protection aimed at by the Charter entails the necessity of carrying out a full and efficient internal review of EU law and of the acts of EU institutions.’⁴¹

b) *The continuation of ‘low-intensity’ fundamental rights review*

It is important to note, however, that the post-Lisbon Treaty era has not brought about a shift towards high-intensity or strict fundamental rights review of EU legislation in all cases. Indeed, in many contemporary cases one still observes the traditional, light-touch approach to fundamental rights review. At times, the CJEU simply fails to clearly identify the margin of discretion to be afforded to the EU legislature and similarly fails to indicate the standard of proportionality review to be applied. At other times, the CJEU does not discuss the nature or importance of the right in question. Instead, in a manner that is reminiscent of the pre-Lisbon Treaty approach, a terse conclusion is reached as to the proportionality of the measure under review, without any meaningful degree of judicial scrutiny of the measure in question or the reasons proffered by the EU legislature in its defence.⁴²

In *Philip Morris*, for example, the claimants contended, *inter alia*, that an EU Directive which prohibited the placing of certain advertisements and statements on tobacco products violated their right, as a business, to freedom of expression and information as protected by Article 11 CFR.⁴³ In reviewing whether the contested EU legislation constituted a proportionate restriction upon this right, the CJEU first found that the legislation pursued the legitimate objective of protecting public health – an objective that various provisions of the EU Treaties require to be pursued in the definition and implementation of all Union policies.⁴⁴ There was held to be a ‘need to reconcile the requirements of the protection of those various fundamental rights and legitimate general interest objectives, protected by the EU legal order, and striking a fair balance between them.’⁴⁵ In striking this balance between the protection of public health and the right to freedom of expression and information, ‘the discretion enjoyed by the EU legislature, in determining the balance to be struck, varies for each of the goals

³⁹ *Opinion of Advocate General Bobek, Case C-134/15 Lidl GmbH & Co KG v Freistaat Sachsen*, ECLI:EU:C:2016:169, para 43.

⁴⁰ *ibid* para 43.

⁴¹ *ibid* para 44.

⁴² *Case C-352/20, HOLD Alapkezelő Befektetési Alapkezelő Zrt v Magyar Nemzeti Bank*, ECLI:EU:C:2022:606 para 82; *Case C-151/17, Swedish Match AB v Secretary of State for Health* ECLI:EU:C:2018:938 paras 86-90; *Case C-544/10, Deutsches Weintor eG v Land Rheinland-Pfalz*, ECLI:EU:C:2012:526.

⁴³ *Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health*, ECLI:EU:C:2016:325.

⁴⁴ Article 35 CFR, Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU.

⁴⁵ *Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health*, (n 43) para 154.

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3 justifying restrictions on that freedom and *depends on the nature of the activities in*
4 *question.*⁴⁶
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7 The implication here is that the discretion of the legislature, and subsequently the intensity of
8 proportionality review carried out by the CJEU, will vary depending on both the importance
9 of the goals being pursued by the EU legislature and ‘the nature of the activities in question.’
10 The latter quotation could be interpreted as being another way of saying ‘the nature of the
11 right in question.’ Such an interpretation is supported by the fact that the Court then
12 immediately draws attention to the crux of the claim - ‘[i]n the present case, the
13 claimants...rely, in essence, under Article 11 of the Charter, on the freedom to disseminate
14 information in pursuit of their commercial interests.’⁴⁷ From there, the Court was swift to
15 conclude that the goal of protecting human health outweighed the right to business
16 information, and that the restrictions placed upon the fundamental right to freedom of
17 expression did not go beyond what was necessary to achieve the objective of protecting
18 public health. Once again, the intensity of proportionality review was low, and the probing of
19 less restrictive measures conducted in a light-touch fashion.⁴⁸
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25 Another area where we see the continuation of low-intensity fundamental rights review is in
26 relation to the freedom to conduct a business (Article 16 CFR). This area of the jurisprudence
27 is also perhaps the closest the CJEU has come to explicitly endorsing the idea that the nature
28 of some rights protected by the Charter are different from others and/or that some rights are
29 more important than others. In *Sky Österreich*, it was argued that an EU Directive requiring
30 those holding exclusive broadcasting rights to authorise any other broadcaster to make short
31 news reports from their exclusive broadcasts - without being able to seek compensation
32 greater than the additional costs directly incurred in providing access to the signal - violated
33 the freedom to conduct a business (Article 16 CFR) of those holding exclusive broadcasting
34 rights.⁴⁹ This was because, inter alia, the holder of exclusive broadcasting rights could not
35 decide freely with which broadcasters it may wish to enter into an agreement regarding the
36 granting of the right to make short news reports. The Court held when reviewing EU
37 legislation in light of the freedom to conduct a business (Article 16 CFR) that that right was
38 not absolute but must be viewed in light of its social function. It continued:
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44 ‘On the basis of that case-law and in the light of the wording of Article 16 of the
45 Charter, which differs from the wording of the other fundamental freedoms laid down
46 in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter,
47 the freedom to conduct a business may be subject to a broad range of interventions on
48 the part of public authorities which may limit the exercise of economic activity in the
49 public interest.’⁵⁰
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52 Somewhat frustratingly, no further explanation is given as to the content of Titles II and IV of
53 the Charter, or why their difference in wording is legally significant in this context. However,
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56 ⁴⁶ *ibid* para 155.

57 ⁴⁷ *ibid* para 155.

58 ⁴⁸ *ibid* para 159-160.

59 ⁴⁹ *Case C-283/11, Sky Österreich GmbH v Österreichischer Rundfunk* ECLI:EU:C:2013:28.

60 ⁵⁰ *ibid* para 46.

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3 the Court then immediately proclaimed that ‘that circumstance’ (meaning the fact that the
4 freedom to conduct a business may be subject to a broad range of interventions in the public
5 interest) ‘is reflected, inter alia, in the way in which Article 52(1) of the Charter requires the
6 principle of proportionality to be implemented.’⁵¹ From there, it was noted that the Directive
7 in question sought to strike a balance between the exclusive broadcasting rights of private
8 companies, on the one hand, and access of the general public to information (right to receive
9 information protected by Article 11(1) CFR), coupled with the aim of promoting media
10 pluralism (Article 11(2) CFR), on the other. In reviewing whether the contested Directive’s
11 provisions were suitable, necessary, and struck an appropriate balance between various rights
12 and interests, the CJEU once again engaged in a light-touch form of proportionality review.
13 Consequently, despite there plausibly being less restrictive alternatives open to the EU
14 legislature, the EU legislature was entitled to conclude (i.e., had a broad margin of discretion)
15 that no such alternatives would have achieved the objective of the legislation as effectively.⁵²
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21 **4.) Evaluation – what determines the applicable standard of review?**

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23 What (if anything) explains this difference in approach when it comes to the scope of
24 discretion afforded to the EU legislature and the intensity of proportionality review in
25 fundamental rights cases? Why is it that some EU legal acts which place restrictions on
26 fundamental rights continue to be subject to low-intensity proportionality review, whereas
27 others attract a much more stringent, high-intensity review from the Court?
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31 As noted above, the CJEU has held that the extent of the EU legislature’s discretion may
32 prove to be limited, and the intensity of proportionality review will vary, on the basis of a
33 number of factors, including: (i) the area concerned; (ii) the nature of the right at issue
34 guaranteed by the Charter; (iii) the nature and seriousness of the interference; and (iv) the
35 object pursued by the interference.⁵³ As AG Bobek pointed out in *Lidl*, it follows from this
36 body of case law that ‘the strictness of the Court’s judicial review, and in particular the
37 intrusiveness of the proportionality review, may differ from case to case.’⁵⁴ What is not clear
38 from this, however, is whether there is any methodology to be deployed in the judicial
39 determination of which of the four factors (i) – (iv) are determinative in any given case. In
40 *Lidl* itself, the AG held, without further explanation, that the two determinative variables in
41 the case at hand were the substantive area of EU law concerned and the *nature of the rights* in
42 question.⁵⁵ Why these two factors appeared to be relevant to the AG, whilst others such as the
43 seriousness of the interference were not, is not explained. In other cases where the
44 abovementioned list of variables has been explicitly addressed by the CJEU, the determining
45 factors have been: (i) the *nature or importance of the right* enshrined in the Charter; and (ii)
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53 ⁵¹ *ibid* para 47; *Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health*, (n 43)
54 paras 153-155.

55 ⁵² *Case C-283/11, Sky Österreich* (n 49) paras 52-57; see also *Case T-732/14, Sberbank of Russia OAO v*
56 *Council and Commission*, ECLI:EU:T:2018:541 paras 141-158; *Case C-157/14, Société Neptune Distribution v*
57 *Ministre de l’Économie et des Finances*, ECLI:EU:C:2015:823 paras 67-76.

58 ⁵³ *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 2) para 47.

59 ⁵⁴ *Opinion of Advocate General Bobek, Case C-134/15 Lidl GmbH & Co. KG v Freistaat Sachsen*, (n 39) para
60 37.

⁵⁵ AG Bobek *Lidl* para 37.

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3 the *seriousness of the interference* with that right.⁵⁶ Once again, the reasons as to why these
4 two factors are determinative for the standard of proportionality review to be conducted
5 remains unexplained.
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8 There therefore appears to be a great deal of judicial discretion involved in both: (a)
9 determining which of the four factors listed in *Digital Rights Ireland* ((i) to (iv)) are engaged
10 in a given fundamental rights dispute; and (b) the meaning and significance that is to be
11 ascribed to each of those factors so selected by the Court.
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14 a) *The nature of the right determines the intensity of review*

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16 Despite these ambiguities, it is clear from the jurisprudence to date that the *nature* of the
17 fundamental right that has been restricted in a given case plays a vital role in the margin of
18 discretion afforded to the EU legislature and the subsequent intensity of proportionality
19 review conducted by the CJEU. In what follows, it shall be shown that, notwithstanding its
20 common usage by the Court, attempting to modulate the intensity of review based on the
21 “nature” of the fundamental right in question runs up against several doctrinal and normative
22 problems and should, therefore, be abandoned. Varying the intensity of review based on the
23 nature of the right necessarily requires the CJEU to explain what the nature of the right in
24 question is. It also requires judicial explanation of why the nature of one right differs from
25 that of other rights in such a way as to justify differing intensities of review. It requires the
26 Court to determine which rights are ‘important’ enough to warrant high-intensity review and,
27 concomitantly, to decide that the nature of other rights is ‘less important’, thereby attracting
28 low-intensity review. As illustrated below, the CJEU has not yet been able to convincingly
29 explain why the nature of certain fundamental rights results in them being ascribed an
30 importance that other rights enshrined in the Charter do not. Furthermore, there is no textual
31 basis in the Charter for varying the intensity of review on the basis of the nature or
32 importance of the right in question.
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41 ~~This necessarily requires one to consider how the CJEU should go about determining the~~
42 ~~nature or importance of a particular right protected by the Charter? It further requires one to~~
43 ~~analyse whether identifying the nature of a right is indeed the best way of modulating the~~
44 ~~scope of discretion afforded to the EU legislature and the intensity of proportionality review~~
45 ~~conducted by the CJEU?~~
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48 To begin, in this regard, consider again the reasoning of the CJEU in *Sky Österreich* and
49 other judgments discussed above. These judgments may be understood to mean that the
50 nature of the right to freely conduct a business is different than other fundamental rights
51 listed in Title II of the CFR. Absent any further guidance from the Court, this could well be
52 what was meant by noting that the freedom to conduct a business in Article 16 CFR differs
53 from the wording of the other fundamental freedoms laid down in Title II thereof, yet is
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⁵⁶ *Case C-601/15, J. N.* (n 5) para 56; *Case C-362/14, Schrems* (n 4) para 78.

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3 similar to that of certain provisions of Title IV of the Charter.⁵⁷ If this distinction is correct, it
4 follows that a broader range of restrictions in the pursuit of the public interest may be
5 permissible when restricting those rights which the CJEU deems to be of a different nature
6 (rights contained in Title IV CFR) than other rights contained in Title II CFR. The problem
7 with this, however, is that in *Phillip Morris* a very similar approach was taken with respect to
8 the classic civil and political right to freedom of expression (albeit the right to dissemination
9 by a business of commercial information as protected by Article 11 CFR).⁵⁸

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14 It may well be, therefore, that it is the predominantly economic nature of the right (freedom
15 to conduct a business, the right to property, the right to disseminate commercial information
16 etc.) which is determinative of its relative importance from the perspective of the CJEU. If
17 this is correct – meaning that one can indeed distinguish between rights of greater and lesser
18 importance based on their economic or other nature - it seems to follow that the intensity of
19 proportionality review to be deployed will vary in accordance with the nature of the right in
20 question. Support for this view comes from the abovementioned opinion of AG Bobek in
21 *Lidl*, where it was stated that ‘the broad discretion enjoyed by the Commission is also
22 confirmed in the present case by the nature of the right at issue. As the Court has stated, the
23 freedom to conduct a business ‘may be subject to a broad range of interventions on the part of
24 public authorities which may limit the exercise of economic activity in the public interest.’⁵⁹

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30 The problem with this approach, however, is that the same can be said of many other rights
31 protected by the Charter which are not economically oriented in nature. Examples here
32 include the right to liberty, the right to private and family life and the right to the protection
33 of personal data (Articles 6,7 and 8 respectively), all of which can be subject to restrictions
34 via a broad range of interventions taken in the pursuit of the public interest.⁶⁰ And yet, as we
35 have seen, in some circumstances, interferences with those rights in the pursuit of the public
36 interest have resulted in the margin of discretion enjoyed by the EU legislature being reduced
37 and the intensity of proportionality review being heightened.⁶¹ It is for this same reason that
38 we can rule out the possibility that those rights which are protected by both the Charter and
39 the ECHR (e.g. right to private life or freedom of expression) attract high-intensity review,
40 whereas those (predominantly social and economic rights) which are only protected by the
41 Charter (e.g. the freedom to conduct a business) attract low-intensity review.⁶²

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47 ⁵⁷ *Case C-283/11, Sky Österreich* (n 49) para 46. Notably, the rights contained under Title II of the Charter
48 (Freedoms) contain those classic civil and political rights (such as right to freedom of religion, of expression and
49 of assembly); whereas the rights contained in Title IV of the Charter (Solidarity) contains a mixture of workers’
50 rights (such as collective bargaining and protection from unjustified dismissal), along with social and economic
51 rights (such as healthcare and social security assistance).

52 ⁵⁸ *Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health*, (n 43).

53 ⁵⁹ *Opinion of Advocate General Bobek, Case C-134/15 Lidl GmbH & Co. KG v Freistaat Sachsen*, (n 39) para
54 39 and case law cited therein.

55 ⁶⁰ *In Case C-184/20, OT v Vyriausioji tarnybinės etikos komisija, ECLI:EU:C:2022:601* para 70.

56 ⁶¹ *Case C-311/18, Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems (Schrems II)*
57 *ECLI:EU:C:2020:559* paras 172-176; *Case C-601/15, J. N.* (n 5); *Case C-18/16, K. v Staatssecretaris van*
58 *Veiligheid en Justitie*, (n 5); *Case C-362/14, Schrems* (n 4); *Joined Cases C-293/12 and C-594/12, Digital*
59 *Rights Ireland* (n 2).

60 ⁶² I am grateful to Prof. Monica Claes for raising this point with me and for her very helpful comments on
61 various other aspects of this paper.

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5 One possible way of interpreting this line of jurisprudence would simply be to say that the
6 rights to liberty, to private life and to data protection (Article 6, 7 and 8 CFR respectively) are
7 simply more important than rights of an economic nature such as the freedom to conduct a
8 business or the right to property (Articles 16 and 17 CFR). In other words, EU legal acts
9 interfering with the rights to liberty, to a private life or the protection of personal data should
10 be subject to more searching review by the CJEU than interferences with the freedom to
11 conduct a business or the right to property, and that this differentiation in the standard of
12 review stems from the relative importance of the rights in question. This interpretation
13 certainly appears to have some support in the case law discussed thus far, where the nature of
14 the right in question is explicitly listed as one of the factors which leads to a variation in the
15 margin of discretion afforded to the EU legislature and the intensity of proportionality review
16 conducted by the Court. Commenting upon this possibility, Peers et al. state that ‘if the Court
17 believes that different types of proportionality test should apply where different charter rights
18 are involved (as it expressly stated in *Sky Österreich*), it should explain its reasoning and the
19 implications of such a distinction further, and must ensure that it applies this distinction
20 consistently.’⁶³

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27 However, there are further problems with taking such an approach. Neither the Charter in
28 general, nor Article 52(1) CFR in particular, distinguishes Charter rights on the basis of their
29 importance, distinguishes between the importance of Charter rights, or mandates that varying
30 intensities of review be adopted on the basis of the nature of the right in question.⁶⁴ One
31 cannot find any explanation to this effect in the Explanations relating to the Charter either.⁶⁵
32 ‘[I]t is worth noting that there is no hierarchy of qualified rights under the Charter. Given
33 that all qualified rights stand on an equal footing, conflicts between them must be solved by
34 striking the right balance.’⁶⁶ And yet, to say that the nature or importance of a particular
35 fundamental right is the determining factor when it comes to the CJEU’s adoption of low or
36 high intensity proportionality review means, in essence, that there is a hierarchy of important
37 and less important fundamental rights in the Charter. The key to this hierarchical ordering of
38 rights lies in the manner with which the Court utilises the proportionality principle to achieve
39 variable intensities of judicial review depending upon the nature or importance of the right in
40 question. EU legislation continues to be reviewed in a low-intensity fashion whenever the
41 Court believes that the right is of a lesser importance, e.g., fundamental rights of an economic
42 nature, such as the right to property, the freedom to conduct a business etc. In contrast, a
43 much more robust, high-intensity approach to review is utilised when it comes to purported
44 interferences with other, ‘more-important’ rights, such as the right to family life, to a private
45 life, to data protection, and to liberty and security of the person.

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55 ⁶³ Steve Peers and Sacha Prechal, ‘Scope and Interpretation of Rights and Principles’ in Steve Peers and others
56 (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014) 1485.

57 ⁶⁴ The exception being absolute rights such as the right not to be tortured, subject to inhuman and degrading
58 treatment or enslaved. See Articles 1, 4, 5 and 52(3) CFR.

59 ⁶⁵ Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/17,.

60 ⁶⁶ Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *European
Constitutional Law Review* 375, 392–393.

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3 Now, there may well be sound philosophical, moral or other reasons as to why some rights
4 are to be conceived of as being more important than others.⁶⁷ The reason why the prohibition
5 of torture and inhuman or degrading treatment admits of no exceptions in the public interest
6 (otherwise known as an absolute right), whereas many other fundamental human rights like
7 the right to a fair trial or the right to freedom of thought, conscience and religion (known as
8 relative rights) do permit of such exceptions would be a classic example here. There may
9 even be sound philosophical, moral or other reasons to support the proposition that even
10 amongst non-absolute rights, some such rights are more important than others. If so, it might
11 well follow that courts should conduct high-intensity proportionality review whenever
12 ‘important’ rights are interfered with, and low-intensity review whenever ‘less important’
13 rights are interfered with.⁶⁸ What does not follow from this, however, is that it should be for
14 the CJEU to determine what the nature of fundamental rights protected under the Charter are,
15 or whether certain rights are more important than others. Moreover, from the perspective of
16 the posited law in the Charter, the problem with according different rights different levels of
17 importance based upon their nature is that such an approach is not mandated by either the text
18 of the Charter or the explanations relating to it. Nor is there any indication in the relevant
19 secondary legislation that the EU institutions have intended to accord a more important status
20 and/or level of protection to certain Charter rights relative to others. Furthermore, in the cases
21 where the CJEU has held that high-intensity proportionality review should be deployed on
22 accounts of the importance of the right in question, there is never any further explanation
23 given as to why such a right is important. For example, in cases where EU legislation
24 authorises the detention of individuals and is alleged to interfere with their right to liberty, the
25 Court simply asserts that ‘in view of the *importance of the right to liberty* enshrined in Article
26 6 of the Charter and the *gravity of the interference with that right* which detention represents,
27 limitations on the exercise of the right must apply only in so far as is *strictly necessary*.’⁶⁹ But
28 why is the right to liberty accorded such importance? On what grounds is importance
29 evaluated and measured in this context? And why do cases involving restrictions on the right
30 to property or the freedom to conduct a business not similarly mention the importance of
31 those rights when calibrating the correct standard of proportionality review? The same
32 omission of any explanation as to why the fundamental right is viewed as being important
33 can be seen in relation to the rights to private life and data protection.⁷⁰

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46 *b.) The seriousness of the interference with the right determines the intensity of review*

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48 When viewed in light of the case law as a whole Based on the above, it is submitted that there
49 are both analytical and normative shortcomings with the CJEU’s practice of modulating the
50 intensity of fundamental rights review based upon the nature of the right. That the nature of

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53 ⁶⁷ Fernando Suárez Müller, ‘The Hierarchy of Human Rights and the Transcendental System of Right’ (2019)
54 20 Human Rights Review 47.

55 ⁶⁸ For discussion see Paul Craig, ‘Varying intensity of judicial review: a conceptual analysis’ (2022) Public
56 Law, 442-462, 447.

57 ⁶⁹ *Case C-601/15, J. N.* (n 5) para 56; See also *Case C-72/22 PPU, MA, ECLI:EU:C:2022:505*; *Case C-36/20*
58 *PPU, Ministerio Fiscal, ECLI:EU:C:2020:495* (n 36) para 105; *Case C-18/16, K. v Staatssecretaris van*
59 *Veiligheid en Justitie*, (n 5) para 40.

60 ⁷⁰ *Case C-362/14, Schrems* (n 4) para 78; *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 2)
paras 47-48; *Case C-72/22 PPU, M.A., ECLI:EU:C:2022:505* (n 69) para 83.

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3 the right is an important factor for the CJEU in determining the intensity of review seems to
4 be undeniable based on the case law. As argued above, however, that very same case law
5 fails to explain why the nature of some Charter rights differ from others and/or are more or
6 less important than others. In what follows, it is contended that the better view, both
7 analytically and normatively, is that the intensity of proportionality review conducted by the
8 CJEU should depends upon the seriousness of the interference with the fundamental right in
9 question. Whenever EU legal acts ‘seriously’ interfere with fundamental rights protected by
10 the Charter, the EU legislature’s discretion will be reduced, and proportionality review will
11 be ‘strict’. On this view, the nature of the right (right to private life, right to protection of
12 personal data, freedom to conduct a business, right to property, right to equality before the
13 law etc.) is irrelevant. Serious interferences will result in the CJEU utilising the
14 proportionality principle in order to determine whether the legislation in question is ‘strictly
15 necessary for the purpose of attaining the objective pursued.’⁷¹

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21 Conversely, whenever EU legal acts interfere with Charter rights to a limited or even
22 negligible extent (i.e. not meeting the threshold of ‘seriousness’), the EU legislature will be
23 afforded a wider margin of discretion and proportionality review will be conducted in a less
24 intensive fashion.⁷² ~~Support for this view can be found This much is made clear when one~~
25 ~~considers that~~ in post-Lisbon cases like *Sky Österreich*⁷³, *Schwarz*⁷⁴ and *Rzecznik Praw*
26 *Obywatelskich (RPO)*⁷⁵, where the Court did *not* find that there had been a serious restriction
27 of the fundamental rights engaged in those disputes (the right to freely conduct a business, to
28 private life and to equal treatment respectively). Consequently, the scope of discretion
29 afforded to the EU legislature in these cases was not explicitly restricted and the Court did
30 not deploy the high intensity, strictly necessary standard of review.⁷⁶ ~~Similarly, in a number~~
31 ~~of cases where EU legislation has placed minimal restrictions upon fundamental rights,~~
32 Similarly, in a number of cases where EU legislation has placed minimal restrictions upon
33 fundamental rights, the CJEU has continued to afford the EU legislature a wide margin of
34 discretion and the traditional, manifestly disproportionate standard of review was adopted as
35 a result, the CJEU has continued to afford the EU legislature a wide margin of discretion and
36 adopted its traditional, manifestly disproportionate standard of review.⁷⁷

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43 Notably, there are some indications in the recent case law pertaining to Member State
44 obligations under the Charter that an emphasis is now being placed upon the seriousness of
45 the interference with the right in question when it comes to determining the appropriate
46 intensity of proportionality review. In relation to the rights to a private life and the protection
47 of personal data, in particular, the Court has recently held that ‘whether the Member States
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52 ⁷¹ *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 2) para 62.

53 ⁷² *Case C-12/11, Denise McDonagh v Ryanair Ltd*, ECLI:EU:C:2013:43; *Case C-544/10, Deutsches Weintor* (n
54 42).

55 ⁷³ *Case C-283/11, Sky Österreich* (n 49) para 94.

56 ⁷⁴ *Case C-291/12, Michael Schwarz v Stadt Bochum*, ECLI:EU:C:2013:670 paras 31-53.

57 ⁷⁵ *Case C-390/15, Rzecznik Praw Obywatelskich (RPO) and others* ECLI:EU:C:2017:174 paras 52-72.

58 ⁷⁶ *Case C-283/11, Sky Österreich* (n 49) para 50; *Case C-291/12, Michael Schwarz v Stadt Bochum*, (n 74) para
59 40.

60 ⁷⁷ *Case C-157/14, Société Neptune Distribution v Ministre de l'Économie et des Finances*, (n 52) para 76 and
case law cited therein.

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3 may justify a limitation on the rights guaranteed in Articles 7 and 8 of the Charter must be
4 assessed by *measuring the seriousness of the interference which such a limitation entails* and
5 by verifying that the importance of the objective of general interest pursued by that limitation
6 is proportionate to that seriousness.⁷⁸ It is submitted that such an approach should be
7 consistently embraced by the CJEU in the future when reviewing EU legislation for
8 fundamental rights compliance. Reasoning along these lines would also be a welcome
9 development in relation to fundamental rights review of EU legislation in the future.

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11 ~~It is submitted, therefore, that~~ Accordingly, –the margin of discretion to be afforded to the EU
12 legislature and the subsequent intensity of proportionality review to be deployed by the CJEU
13 should be modulated on the basis of the seriousness of the interference with the fundamental
14 right in question. From a practical perspective, it is much easier for lawyers and judges to try
15 to conceptualise, argue about, and ultimately determine whether the actions of a public
16 authority constitute a serious interference with a right than it is to argue over the nature and
17 relative importance of rights in abstract terms. Married to this practical consideration is the
18 consideration of doctrinal clarity. As the above analysis of the case law has shown, the CJEU
19 has thus far been unable to convincingly explain why, for example, the right to the protection
20 of personal data is worthy of the label ‘important’, whereas the right to property is not.

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22 In contrast, determining whether restrictions placed upon a fundamental right meets the
23 threshold of being ‘particularly serious’ appears to be both more workable in practice and
24 easier to explain doctrinally. For example, in *J.N* the claimants challenged an EU Directive
25 that allowed Member State authorities to detain third country nationals who applied for
26 international protection in order to protect national security or public order.⁷⁹ These powers of
27 detention were challenged on the grounds that they interfered with Article 6 CFR, which
28 provides that everyone has the right to liberty and security of person.⁸⁰ In the Courts view,
29 detaining applicants for reasons of national security did indeed place a limit upon the right to
30 liberty and such a right could, in principle, be restricted in the pursuit of such a legitimate
31 objective. In examining whether the powers of detention provided for by the Directive were
32 necessary, the CJEU emphasised that ‘in view of the importance of the right to liberty
33 enshrined in Article 6 of the Charter and the gravity of the interference with that right which
34 detention represents, limitations on the exercise of the right must apply only in so far as is
35 strictly necessary.’⁸¹ Although not explained clearly by the Court, the seriousness of the
36 interference with the right to liberty stems from the fact that the Directive allowed for an
37 individual’s detention. Detention is by definition a serious interference with the right to
38 liberty, whereas other types of measures which restrict the liberty of the individual in the
39 name of protecting national security often do not meet the same level of severity e.g., orders
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55 ⁷⁸ Commissioner of An Garda Síochána and Others, C-140/20, EU:C:2022:258, paragraph 53 and the case-law
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57 ⁷⁹ Article 8(3), Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying
58 down standards for the reception of applicants for international protection [2013] OJ L 180, p. 96–116.

59 ⁸⁰ Article 6 CFR.

60 ⁸¹ *Case C-601/15, J. N.* (n 5) para 56; See also *Case C-18/16, K. v Staatssecretaris van Veiligheid en Justitie*, (n 5) para 40.

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3 mandating where an individual may not travel to or may not reside.⁸² Accordingly, in light of
4 this serious interference with the right to liberty, the CJEU engaged in high-intensity review
5 of the contested EU legislation.⁸³
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8 Further clarification is provided in cases pertaining to the right to private life and the
9 protection of personal data (Articles 7 and 8 CFR). In *Digital Rights Ireland*, having held that
10 the discretion of the EU legislature would be reduced, and the intensity of proportionality
11 review be enhanced, the CJEU found that the data retention Directive pursued objectives of
12 general EU interest; namely, to contribute to the fight against serious crime, international
13 terrorism and, ultimately, to public security.⁸⁴ Whilst this was of the ‘utmost importance in
14 order to ensure public security...such an objective of general interest, however fundamental it
15 may be, does not, in itself, justify a retention measure such as that established by Directive
16 2006/24 being considered to be necessary for the purpose of that fight.’⁸⁵ In reviewing
17 whether this was the case, the CJEU engaged in close scrutiny of the substance of the
18 Directive, noting that the rules on retention covered *all* means of electronic communication of
19 *all* subscribers or registered users of electronic communications networks. This meant that
20 the Directive potentially allowed for interference with the rights of the *entire* European
21 population, since the data of persons with no connection to organized or serious crime could
22 be retained by relevant national authorities without exception.⁸⁶ There were also no
23 meaningful limits in the Directive to regulate the access to, and subsequent use of, personal
24 data by national authorities. Finally, the rule that all data must be retained for a minimum of 6
25 months and a maximum of 24 months was not based on any objective criteria and failed to
26 distinguish between different types or uses of personal data.⁸⁷ As a result, the Directive did
27 not set down clear and precise rules governing the extent of the interference with rights
28 contained in Articles 7 and 8 CFR. The Directive led to wide-ranging and particularly serious
29 interference with fundamental rights. Moreover, such interference was not precisely
30 circumscribed by provisions aimed at ensuring that it was actually limited to what was
31 ‘strictly necessary.’⁸⁸
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40 More recently, the CJEU has further clarified this concept of serious interference with regards
41 to fundamental rights review. In *OT*, for example, it was held that ‘*in order to assess the*
42 *seriousness of that interference*, account must be taken, inter alia, of the nature of the
43 personal data at issue, in particular of any sensitivity of those data, and of the nature of, and
44 specific methods for, the processing of the data at issue, in particular of the number of
45 persons having access to those data and the methods of accessing them.’⁸⁹ In making this
46 assessment, factors such as the public disclosure online of personal information about
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52 ⁸² For discussion of the different ways in which the right to liberty may be restricted beyond the classic (and
53 serious) interference caused by detention, see *Secretary of State for the Home Department v AP* [2010] UKSC
54 24 & 26, per Lord Brown.

55 ⁸³ *Case C-601/15, J. N.* (n 5) paras 57-67.

56 ⁸⁴ *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 2) paras 41-44.

57 ⁸⁵ *ibid* para 51.

58 ⁸⁶ *ibid* para 56.

59 ⁸⁷ *ibid* paras 58-64.

60 ⁸⁸ *ibid* para 65.

⁸⁹ *In Case C-184/20, OT v Vyriausioji tarnybinės etikos komisija, ECLI:EU:C:2022:601* (n 60) para 99.

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3 individuals, the volume and frequency of information disclosed, the content and nature of that
4 information, and the number of people capable accessing that information are all relevant
5 factors in determining the seriousness of the interference with the right.⁹⁰
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8 When considered together, these recent judgments confirm that whenever EU legal acts lead
9 to serious interferences with fundamental rights contained in the Charter, the EU legislature's
10 discretion will be reduced and proportionality review will be strict. In terms of what
11 constitutes a 'serious' interference with fundamental rights, this will largely depend upon the
12 facts of each individual case.⁹¹ Nonetheless, these examples (albeit limited in number)
13 provide some guidance. It is clear that empowering authorities to deprive an individual of
14 their liberty would meet this threshold. So too would granting public authorities widespread
15 and largely unchecked access to personal data. In all such cases, various objectively
16 verifiable factors such as the scope, content, frequency, and availability of personal data are
17 factored into the analysis of whether an interference with the right is serious or not. Whilst
18 further case law is needed to clarify this point, it seems that imposing detentions, or failing to
19 prevent the widespread disclosure of personal information online to an unlimited number of
20 people, are far more serious restrictions upon fundamental rights than, say, limiting the
21 freedom to conduct a business by prohibiting the advertising of electronic cigarettes in certain
22 media.⁹² Crucially, the nature or importance of the right in question is irrelevant in making
23 this determination.
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30 5. Conclusion

31 This paper has cast a critical eye over the CJEU's approach to reviewing EU legislation for
32 compliance with fundamental rights protected by the EU Charter of Fundamental Rights. In
33 so doing, it has critically assessed the methodology utilised by the CJEU to determine
34 whether low or high intensity proportionality review is deployed in fundamental rights cases.
35 Based on that analysis, it has been contended that the Court's attempts to vary the scope of
36 discretion afforded to the EU legislature and the subsequent intensity of proportionality
37 review to be deployed on the basis of the *nature of the fundamental right* at issue should be
38 rejected. Varying the intensity of review on the basis of the nature of the right necessarily
39 requires the CJEU to explain what the nature of the right in question is. It also requires
40 judicial explanation of why the nature of one right differs from that of other rights in such a
41 way as to justify differing intensities of review. It requires the Court to determine which
42 rights are 'important' enough to warrant high-intensity review and, concomitantly, to decide
43 that the nature of other rights is 'less important', thereby attracting low-intensity review. It
44 has been argued that the CJEU has not yet been able to convincingly explain why the nature
45 of certain fundamental rights results in them being ascribed an importance that other rights
46 enshrined in the Charter do not. It has further been argued that there is no textual basis in the
47 Charter for varying the intensity of review on the basis of the nature or importance of the
48 right in question. Turning to the future of fundamental rights review of EU legislation, it is
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57 ⁹⁰ *ibid* paras 100-105.

58 ⁹¹ For discussion see *Opinion of Advocate General Emiliou, Case C-389/21 P, European Central Bank (ECB) v*
59 *Crédit Lyonnais*, ECLI:EU:C:2022:844 paras 63-75.

60 ⁹² *Case C-477/14, Pillbox 38 (UK) Ltd v The Secretary of State for Health*, (n 5) paras 109-118.

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3 submitted that the better approach is to modulate the intensity of review on the basis of the
4 *severity of the interference* with the right in question. There is some evidence of precisely this
5 approach now being taken by the CJEU when reviewing the compliance of Member State
6 actions and measures with Charter rights. That approach should also be embraced on a
7 consistent basis by the Court when conducting fundamental rights review of EU legislation.
8 This approach is It is far easier for the Court to operationalise than determining these matters
9 on the basis of the nature of rights. Serious interferences will lead to the reduced discretion of
10 the EU legislature and high-intensity review of the contested EU legislation. Conversely,
11 whenever EU acts interfere with rights to a limited extent (i.e., not meeting the ‘seriousness’
12 threshold), the EU legislature will be afforded a wider margin of discretion and
13 proportionality review will be conducted in a less intensive fashion.
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For Peer Review

From low to high intensity review in the protection of EU fundamental rights¹

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Abstract

The CJEU often reviews the validity of EU legislation for compliance with fundamental rights standards. Prior to the entry into force of the Lisbon Treaty, the CJEU's approach to fundamental rights review was characterised by a low-intensity standard of review. Since the elevation of the Charter to primary law status, the CJEU has come to subject EU legislation to far more rigorous levels of scrutiny. This paper critically evaluates the methodology utilised by the CJEU to determine whether low or high intensity proportionality review is deployed in cases where EU legislation limits fundamental rights. This question has yet to receive detailed consideration in the literature. Looking to the future of EU fundamental rights, the paper rejects the idea that the *nature of the right* can determine whether a restriction placed upon that right is subject to low or high intensity review. There are practical and normative grounds for rejecting this approach. Instead, the paper argues that the intensity of review should be modulated on the basis of the *severity of the interference* with the right in question. It is thus seriousness of interference and not the nature of the right in question which determines the applicable standard of review.

Keywords

EU fundamental rights; CJEU; judicial review; proportionality; discretion;

1.) Introduction

The CJEU is often required to review the validity of EU legislation for compliance with fundamental rights protected by the Charter. Prior to the entry into force of the Lisbon Treaty, the CJEU's approach to fundamental rights review was characterised by the adoption of a low-intensity standard of review. Traditionally, the Court afforded the EU institutions a wide margin of discretion. The consequence was that judicial review of whether a restriction placed upon a fundamental right could be justified was limited to considering whether the contested measure was manifestly disproportionate in light of the objective pursued. Since the elevation of the Charter to primary law status, however, the CJEU has come to subject EU legislation to far more rigorous levels of scrutiny (in some cases at least). In *Digital Rights Ireland*, the Court held for the first time:

‘With regard to judicial review... where interferences with fundamental rights are at issue, *the extent of the EU legislature's discretion may prove to be limited*, depending on a number of factors, including, in particular, the area concerned, *the nature of the*

¹ Paper Presented at 6th Young European Law Scholars Conference on ‘The future of EU fundamental Rights’

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3 *right* at issue guaranteed by the Charter, the nature and *seriousness of the interference*
4 and the object pursued by the interference.²
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7 In that case, the EU legislature's discretion was reduced, with the result that judicial review
8 of the exercise of that discretion was 'strict'.³ This heightened intensity of review was
9 justified on the basis of 'the *important role* played by the protection of personal data in the
10 light of the fundamental right to respect for private life and the *extent and seriousness of the*
11 *interference* with that right.'⁴ Subsequent cases have confirmed this approach, with the Court
12 now engaging in 'high intensity' proportionality review of the EU acts that limit fundamental
13 rights in certain contexts.⁵
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17 Notably, in setting down this fundamental shift in the approach to: (i) the scope of discretion
18 afforded to the EU legislature; and (ii) the subsequent intensification of proportionality
19 review in a fundamental rights context, the CJEU cited the Grand Chamber judgment of the
20 European Court of Human Rights (ECtHR) in *S and Marper v United Kingdom*, stating that
21 the reasoning in that judgment on Article 8 ECHR right to private and family life applied 'by
22 analogy.'⁶ In that judgment, the ECtHR held that the margin of appreciation left to competent
23 national authorities varies in cases where a judicial examination of a violation of a
24 Convention right is undertaken. The factors that lead to this varying margin of appreciation
25 were said to include: (i) the nature of the Convention right in issue; (ii) its importance for the
26 individual; (iii) the nature of the interference, and (iv) the object pursued by the
27 interference.⁷ This margin will tend to be narrower 'where the right at stake is crucial to the
28 individual's effective enjoyment of intimate or key rights' and where 'a particularly important
29 facet of an individual's existence or identity is at stake.'⁸ In contrast, whenever there is 'no
30 consensus within the Member States of the Council of Europe, either as to the relative
31 importance of the interest at stake or as to how best to protect it, the margin will be wider.'⁹
32 This approach to the margin of appreciation has been consistently adopted by the ECtHR.¹⁰
33 As Dzehtsiarou notes, factors (i) to (iv) above are subjective in nature and provide a broad
34 scope for judicial discretion. Moreover, the meaning of each of these criteria is not entirely
35 clear. They are difficult to measure, and different people will reasonably disagree over their
36 meaning.¹¹
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47 ² *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd v Minister for Communications, Marine and*
48 *Natural Resources and others*, ECLI:EU:C:2014:238 para 47 (emphasis added).

49 ³ *ibid* para 48.

50 ⁴ *ibid* para 48 (emphasis added); see also *Case C-362/14, Maximilian Schrems v Data Protection*
51 *Commissioner*, ECLI:EU:C:2015:650 para 78.

52 ⁵ *Case C-601/15 PPU, J N v Staatssecretaris voor Veiligheid en Justitie*, ECLI:EU:C:2016:84; *Case C-18/16, K*
53 *v Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2017:680; *Case C-362/14, Schrems* (n 3).

54 ⁶ *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 1) para 47, citing *S. and Marper v. the United*
55 *Kingdom [GC]*, nos. 30562/04 and 30566/04, § 102, ECHR 2008-V.

56 ⁷ *S and Marper*, ECtHR, s 102.

57 ⁸ *Ibid.*

58 ⁹ *Ibid.*

59 ¹⁰ *Case of Breyer v Germany*, App. No. 50001/12, para 80

60 ¹¹ Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*
(1st edn, Cambridge University Press 2015) 135–136.

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3 Against this background, this paper critically evaluates the methodology utilised by the CJEU
4 to determine whether low or high intensity proportionality review is deployed in cases where
5 EU legislation limits fundamental rights. This question of when and why the intensity of
6 review varies in fundamental rights cases has yet to receive detailed consideration in the
7 literature. In looking to the future of fundamental rights review in the EU, the paper rejects
8 the idea that the *nature of the right* can determine whether a restriction placed upon that right
9 is subject to low or high intensity review.¹² There are practical and normative grounds for
10 rejecting this approach. Varying the intensity of review on the basis of the nature of the right
11 necessarily requires the CJEU to explain what the nature of the right in question is. It also
12 requires judicial explanation of why the nature of one right differs from that of other rights in
13 such a way as to justify differing intensities of review. It requires the Court to determine
14 which rights are ‘important’ enough to warrant high-intensity review and, concomitantly, to
15 decide that the nature of other rights is ‘less important’, thereby attracting low-intensity
16 review. These are not tasks well-suited to judicial determination. Nor is there any textual
17 basis in the Charter for varying the intensity of review on the basis of the nature of the right
18 in question.
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26 The paper argues that the better approach moving forward is to modulate the intensity of
27 review on the basis of the *severity of the interference* with the right in question. This
28 approach is far easier for the Court to operationalise than determining these matters on the
29 basis of the nature of rights. Serious interferences will lead to reduced discretion and high-
30 intensity review of the contested EU legislation. Conversely, whenever EU acts interfere with
31 rights to a limited extent (i.e., not meeting the ‘seriousness’ threshold), the EU legislature will
32 be afforded a wider margin of discretion and proportionality review will be conducted in a
33 less intensive fashion.
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38 2.) The pre-Lisbon era of low-intensity review

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40 It is generally accepted that for much of the history of European integration, the CJEU
41 subjected the discretionary policy choices of the EU institutions to minimal degrees of
42 judicial scrutiny. In most cases, the Court deployed a very light-touch standard of review,
43 particularly in cases where it was contended that EU legal acts had infringed fundamental
44 rights. Scant attention was given to the reasoning of the EU institutions for their policy
45 choices, with the consequence that not much was typically required by way of justification
46 from those institutions in order for them to defend the legality of their actions.¹³
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53 ¹² For the avoidance of doubt, this paper does not deal with ‘absolute’ fundamental rights such as the prohibition
54 against torture. These rights can never be legitimately restricted and interferences with those rights can never be
55 subject to proportionality balancing. The focus of the paper is therefore on all those ‘relative’ rights (which
56 make up the vast majority of the Charter’s provisions) which may be restricted in the pursuit of legitimate public
57 interests and which are reviewed through recourse to the principle of proportionality.

58 ¹³ For discussion see Albertina Albers-Llorens, ‘Edging Towards Closer Scrutiny? The Court of Justice and Its
59 Review of the Compatibility of General Measures with the Protection of Economic Rights and Freedoms’ in
60 Alan Dashwood and Anthony Arnall (eds), *A Constitutional Order of States? Essays in EU Law in Honour of
Alan Dashwood* (Hart Publishing 2011).

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3 Many of these early cases concerned fundamental rights of an economic nature, such as the
4 right to property or the freedom to pursue a trade or profession.¹⁴ As De Witte notes, this is
5 readily explicable by the fact that fundamental rights review continued to be conducted
6 within the confines of an EC Treaty that remained heavily geared towards economic
7 integration.¹⁵ As is common in many legal systems, these economically oriented fundamental
8 rights were not construed as absolute constraints upon the Community's law-making
9 institutions. They could be legally restricted in certain circumstances to pursue policy
10 objectives that were of general interest to the wider Community as a whole.¹⁶ Such
11 restrictions were only legal, however, where they 'in fact correspond to objectives of general
12 interest pursued by the Community and...do not constitute a disproportionate and intolerable
13 interference which infringes upon the very substance of the rights guaranteed.'¹⁷

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19 This standard of review was utilized consistently by the Court when conducting fundamental
20 rights review of Community and then Union legal acts.¹⁸ The established judicial practice was
21 to first set out why the contested legal act corresponded to objectives of general interest
22 pursued by the EU. Then, without much by way of scrutiny, the Court would hold that, in
23 pursuing such objectives, there had been no disproportionate and intolerable interference
24 affecting the very substance of the right in question.¹⁹ Unlike the two or three stage
25 proportionality enquiry that has come to dominate CJEU practice today (see below), much of
26 the earlier (i.e. pre-Lisbon Treaty) fundamental rights jurisprudence was somewhat
27 unstructured. The Court focused largely on the suitability of the contested Community/Union
28 measure for achieving an objective in the general interest - invariably finding that it did.
29 Then, the CJEU would typically ignore the necessity stage of the enquiry before swiftly
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38 ¹⁴ Mattias Kumm, 'Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm' in Loïc
39 Azoulay and Miguel Poiras Maduro (eds), *The Past and Future of EU Law The Classics of EU Law Revisited*
40 *on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010); Armin Von Bogdandy, 'The European
41 Union as a Human Rights Organisation? Human Rights and the Core of the European Union' [2000] *Common*
42 *Market Law Review* 1307, 1323.

43 ¹⁵ Article 46 TEU excluded actions taken under the intergovernmental second and third pillars of the EU
44 construct from review by the CJEU. For discussion see Bruno de Witte, 'The Past and Future Role of the
45 European Court of Justice in the Protection of Human Rights' in Philip Alston (ed), *The EU and Human Rights*
46 (OUP 1999) 866–869.

47 ¹⁶ Paul Craig, *EU Administrative Law* (Oxford University Press 2012) 609. *Case 265/87, Hermann Schröder HS*
48 *Kraftfutter GmbH & Co KG v Hauptzollamt Gronau*, ECLI:EU:C:1989:303,; *Case 44/79, Liselotte Hauer v*
49 *Land Rheinland-Pfalz*, ECLI:EU:C:1979:290,; *Case 4-73, J Nold, Kohlen- und Baustoffgroßhandlung v*
50 *Commission of the European Communities* ECLI:EU:C:1974:51.

51 ¹⁷ *Case 265/87, Schröder* (n 15) para 15.

52 ¹⁸ *Joined cases C-184/02 and C-223/02, Spain and Finland v European Parliament and Council*
53 ECLI:EU:C:2004:497; *C-200/96, Metronome Musik* ECLI:EU:C:1998:172; *Joined cases C-248/95 and C-*
54 *249/95, SAM Schiffahrt GmbH and Heinz Stapf v Bundesrepublik Deutschland* ECLI:EU:C:1997:377.
55 *Case 44/79, Hauer* (n 15); *Case 59/83, SA Biovilac NV v European Economic Community*,
56 ECLI:EU:C:1984:380,; *Case 234/85, Staatsanwaltschaft Freiburg v Franz Keller*, ECLI:EU:C:1986:377,.

57 ¹⁹ *Case C-210/03, Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*,
58 EU:C:2004:802 paras 72-74; *Joined cases C-184/02 and C-223/02, Spain and Finland v European Parliament*
59 *and Council* (n 17) paras 58-61; *Case C-306/93, SMW Winzersekt* ECLI:EU:C:1994:407 paras 28-29. *Case*
60 *44/79, Hauer* (n 15) paras 23-30; *Case 4-73, Nold* (n 15) paras 14-15; *Case 11-70, Internationale*
Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel, ECLI:EU:C:1970:114
paras 14-20.

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3 concluding that no disproportionate infringement of the substance of a right had occurred.²⁰
4 Overall, there was evidently a reluctance to engage in any meaningful degree of scrutiny of
5 whether any less restrictive measures were available (necessity) and/or whether the overall
6 balance between rights and objectives was proportionate (proportionality *stricto sensu*).²¹ As
7 Tridimas notes, the Court opted instead to rely upon some notion of reasonableness or
8 arbitrary conduct. Rather than seriously engaging with some form of two or three step
9 proportionality test, the CJEU was content with reviewing whether the EC legislature
10 committed some manifest error when deciding that its policy was appropriate to achieve
11 objectives in the Community/Union interest.²² As was noted above, this light-touch approach
12 to fundamental rights review of European legal acts was subject to criticism in the literature -
13 since the EU institutions were always afforded a wide margin of discretion, the intensity of
14 review was weak, and the scrutiny of the reasoning of the EU institutions was minimal.
15 Indeed, the Court failed to 'provide for very structured or illuminating reasoning as to its
16 approach...'²³

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23 Despite the Court not always setting out why it adopted such a deferential approach to
24 fundamental rights review of Community/Union legal acts in the pre-Lisbon Treaty era, a
25 number of reasons are typically put forward to justify low-intensity review. The first is that in
26 an era where most legislative acts were adopted by the Council (often via unanimity voting),
27 the product of this intergovernmental decision making 'was perceived to benefit from the
28 traditional indirect democratic and constitutional legitimacy provided by the states.'²⁴ As
29 Maduro has argued, EU legislation that was adopted unanimously by the Member States in
30 the Council were deemed to possess a greater degree of indirect democratic legitimacy than
31 measures adopted by the independent bureaucracy of the Commission.²⁵ In the former AG's
32 view:
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37 'Where states fully controlled the process of decision making no real question of
38 legitimacy was raised. This was bound to determine the nature of constitutional
39 review in the...European Community. For example...no one thought it a priority to
40 provide for the review of a unanimous decision of member states in the Council.'²⁶
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43 A second reason for the prevalence of low-intensity review was that most disputes arose in
44 areas of technical market regulation such as the Common Agricultural Policy (CAP).
45 Consequently, the Court was reluctant to interfere with discretionary policy choices entrusted
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49 ²⁰ Harbo concludes that the early fundamental rights cases turned on a rudimentary form of the proportionality
50 *stricto sensu* test. Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Hotei Publishing
51 2015) 55.

52 ²¹ Takis Tridimas, 'Proportionality in European Community Law: Searching for the Appropriate Standard of
53 Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 72.

54 ²² *ibid*.

55 ²³ Malu Beijer, 'Procedural Fundamental Rights Review by the Court of Justice of the European Union' in Eva
56 Brems and Janneke Gerards (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge
57 University Press 2017) 203.

58 ²⁴ Miguel Poyares Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the
59 Authority of Constitutionalism' (2005) 3 *International Journal of Constitutional Law* 332, 335.

60 ²⁵ *ibid* 340 at fn 20.

²⁶ *ibid* 335.

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3 to the Commission and Council under the Treaties.²⁷ Respect for the separation of powers
4 thus loomed large, with the Court of Justice adhering to the mantra that it should not overturn
5 such choices simply because they believe things should have been done differently.²⁸ The
6 third is that, as has already been mentioned, the rights in question were typically economic in
7 nature (right to property, freedom to conduct a business etc.) It was common both under
8 international human rights documents and the common constitutional traditions of the
9 Member States for such rights to be capable of limitation in the pursuit of legitimate public
10 interests. Fourth and finally, it has been suggested that the pro-integrationist leanings of the
11 CJEU meant that it was reluctant to strike down EU legal acts that were the product of
12 political compromise and which, at the end of the day, served to further the goal of European
13 integration.²⁹
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21 3.) Fundamental rights review in the post-Lisbon era

22 Following the elevation of the Charter on Fundamental Rights to legally binding, primary law
23 status at the Treaty of Lisbon, there was much speculation in the literature as to whether this
24 would result in a shift in the Court's fundamental rights jurisprudence.³⁰ In particular, the
25 extent to which having a codified 'bill of rights' in the Charter might lead to a deviation from
26 the long-established, light-touch approach to judicial scrutiny of EU legislation for
27 compliance with fundamental rights (protected as general principles of law) was pondered.³¹
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31 a) *The development of 'high-intensity' fundamental rights review*

32 Following the landmark judgment in Digital Rights Ireland, it is submitted that there has
33 indeed been a shift in the jurisprudence of the CJEU when it comes to the intensity of judicial
34 review in (some) cases where EU legislation is contested on fundamental rights grounds.³²
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39 To recall from the introduction above, in that case, the CJEU found that the EU Data
40 Retention Directive interfered with the rights to a private life and the protection of personal
41 data as protected by Articles 7 and 8 CFR respectively. This was because the Directive
42 imposed various obligations upon entities to retain data. It also allowed public authorities
43 both broad access to data and powers to process such data in ways that led to wide-ranging
44 and serious interferences with the abovementioned fundamental rights. Having found that the
45 Directive restricted the rights in question, the CJEU turned to consider whether such
46 restrictions could be justified in light of the principle of proportionality enshrined in Article
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51 ²⁷ Paul Craig, 'Legality, Standing and Substantive Review in Community Law' (1994) 14 Oxford Journal of
52 Legal Studies 507, 530–535.

53 ²⁸ Juliane Kokott and Christoph Sobotta, 'The Evolution of the Principle of Proportionality in EU Law—
54 Towards an Anticipative Understanding?' 167, 169.

55 ²⁹ Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal
56 158, 172.

57 ³⁰ S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights
58 Law Review 645.

59 ³¹ Dorota Leczykiewicz, 'Constitutional Justice' and Judicial Review of EU Legislative Acts' in Dimitry
60 Kochenov, G De Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

³² *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 1).

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3 52(1) CFR.³³ Then, in a novel innovation in the Court's case law, it held that 'with regard to
4 judicial review... where interferences with fundamental rights are at issue, *the extent of the*
5 *EU legislature's discretion may prove to be limited*, depending on a number of factors,
6 including, in particular, the area concerned, the *nature of the right* at issue guaranteed by the
7 Charter, the nature and *seriousness of the interference* and the object pursued by the
8 interference.'³⁴ The CJEU continued that 'in view of the *important role played by the*
9 *protection of personal data in the light of the fundamental right to respect for private life* and
10 *the extent and seriousness of the interference* with that right caused by Directive 2006/24, the
11 EU legislature's *discretion is reduced*, with the result that *review of that discretion should be*
12 *strict*.'³⁵

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18 Subsequent cases have confirmed this approach. The Court finds that the EU legislature's
19 margin of discretion is reduced, with the consequence that judicial review of the exercise of
20 that discretion is strict. This manifests itself via the adoption of a high-intensity standard of
21 proportionality review that involves, inter alia, considering whether a restriction placed upon
22 a fundamental right is limited to what is *strictly necessary* in the light of the objective
23 pursued. For example, in JN the Court stressed that 'in view of the *importance of the right to*
24 *liberty* enshrined in Article 6 of the Charter and the *gravity of the interference with that right*
25 which detention represents, limitations on the exercise of the right must apply only in so far
26 as is *strictly necessary*.'³⁶ This is a markedly different standard of fundamental rights review
27 than was typically applied in the pre-Lisbon Treaty era. It has been remarked that recent
28 judgments show that 'the Court has clearly 'tightened its grip' in the application of the
29 proportionality test, at least when Charter rights are involved.'³⁷ In the post-Lisbon Treaty
30 era, judgments like *Digital Rights Ireland* are said to show that the proportionality principle
31 is deployed in a 'much stricter' fashion today in cases involving fundamental rights.³⁸ In
32 terms of the reasons explaining why such a shift has taken place, it has been suggested that
33 'there are two... constitutional arguments that support the need for a more searching review of
34 measures of EU institutions...'³⁹ First, the elevation of the Charter of Fundamental Rights to
35 the level of binding primary law by the Treaty of Lisbon has 'brought fundamental rights
36 review of EU acts to the fore.'⁴⁰ Second, the absence of external review stemming from the
37 failure of the EU to accede to the ECHR means that the mandate of reviewing the
38 compatibility of EU legislation with fundamental rights falls exclusively to the CJEU. 'In
39 discharging that mandate, the high level of protection aimed at by the Charter entails the
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51 ³³ *ibid* para 46 and case law cited therein.

52 ³⁴ *ibid* para 47 .

53 ³⁵ *ibid* para 48.

54 ³⁶ *Case C-601/15, J. N.* (n 4) para 56; See also *Case C-36/20 PPU, Ministerio Fiscal*, ECLI:EU:C:2020:495
55 para 105; *Case C-18/16, K. v Staatssecretaris van Veiligheid en Justitie*, (n 4) para 40.

56 ³⁷ AG Emilou, Proportionality in EU Law: Does One Size Fit All?, The King's College London Centre of
57 European Law 47th Annual Lecture (2022)

58 ³⁸ AG Emilou, *Ibid*.

59 ³⁹ *Opinion of Advocate General Bobek, Case C-134/15 Lidl GmbH & Co KG v Freistaat Sachsen*,
60 ECLI:EU:C:2016:169, para 43.

⁴⁰ *ibid* para 43.

necessity of carrying out a full and efficient internal review of EU law and of the acts of EU institutions.⁴¹

b) *The continuation of 'low-intensity' fundamental rights review*

It is important to note, however, that the post-Lisbon Treaty era has not brought about a shift towards high-intensity or strict fundamental rights review of EU legislation in all cases. Indeed, in many contemporary cases one still observes the traditional, light-touch approach to fundamental rights review. At times, the CJEU simply fails to clearly identify the margin of discretion to be afforded to the EU legislature and similarly fails to indicate the standard of proportionality review to be applied. At other times, the CJEU does not discuss the nature or importance of the right in question. Instead, in a manner that is reminiscent of the pre-Lisbon Treaty approach, a terse conclusion is reached as to the proportionality of the measure under review, without any meaningful degree of judicial scrutiny of the measure in question or the reasons proffered by the EU legislature in its defence.⁴²

In *Philip Morris*, for example, the claimants contended, *inter alia*, that an EU Directive which prohibited the placing of certain advertisements and statements on tobacco products violated their right, as a business, to freedom of expression and information as protected by Article 11 CFR.⁴³ In reviewing whether the contested EU legislation constituted a proportionate restriction upon this right, the CJEU first found that the legislation pursued the legitimate objective of protecting public health – an objective that various provisions of the EU Treaties require to be pursued in the definition and implementation of all Union policies.⁴⁴ There was held to be a 'need to reconcile the requirements of the protection of those various fundamental rights and legitimate general interest objectives, protected by the EU legal order, and striking a fair balance between them.'⁴⁵ In striking this balance between the protection of public health and the right to freedom of expression and information, 'the discretion enjoyed by the EU legislature, in determining the balance to be struck, varies for each of the goals justifying restrictions on that freedom and *depends on the nature of the activities in question*.'⁴⁶

The implication here is that the discretion of the legislature, and subsequently the intensity of proportionality review carried out by the CJEU, will vary depending on both the importance of the goals being pursued by the EU legislature and 'the nature of the activities in question.' The latter quotation could be interpreted as being another way of saying 'the nature of the right in question.' Such an interpretation is supported by the fact that the Court then immediately draws attention to the crux of the claim - '[i]n the present case, the

⁴¹ *ibid* para 44.

⁴² *Case C-352/20, HOLD Alapkezelő Befektetési Alapkezelő Zrt v Magyar Nemzeti Bank*, ECLI:EU:C:2022:606 para 82; *Case C-151/17, Swedish Match AB v Secretary of State for Health* ECLI:EU:C:2018:938 paras 86-90; *Case C-544/10, Deutsches Weintor eG v Land Rheinland-Pfalz*, ECLI:EU:C:2012:526.

⁴³ *Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health*, ECLI:EU:C:2016:325.

⁴⁴ Article 35 CFR, Articles 9 TFEU, 114(3) TFEU and 168(1) TFEU.

⁴⁵ *Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health*, (n 42) para 154.

⁴⁶ *ibid* para 155.

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3 claimants...rely, in essence, under Article 11 of the Charter, on the freedom to disseminate
4 information in pursuit of their commercial interests.⁴⁷ From there, the Court was swift to
5 conclude that the goal of protecting human health outweighed the right to business
6 information, and that the restrictions placed upon the fundamental right to freedom of
7 expression did not go beyond what was necessary to achieve the objective of protecting
8 public health. Once again, the intensity of proportionality review was low, and the probing of
9 less restrictive measures conducted in a light-touch fashion.⁴⁸

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13 Another area where we see the continuation of low-intensity fundamental rights review is in
14 relation to the freedom to conduct a business (Article 16 CFR). This area of the jurisprudence
15 is also perhaps the closest the CJEU has come to explicitly endorsing the idea that the nature
16 of some rights protected by the Charter are different from others and/or that some rights are
17 more important than others. In *Sky Österreich*, it was argued that an EU Directive requiring
18 those holding exclusive broadcasting rights to authorise any other broadcaster to make short
19 news reports from their exclusive broadcasts - without being able to seek compensation
20 greater than the additional costs directly incurred in providing access to the signal - violated
21 the freedom to conduct a business (Article 16 CFR) of those holding exclusive broadcasting
22 rights.⁴⁹ This was because, inter alia, the holder of exclusive broadcasting rights could not
23 decide freely with which broadcasters it may wish to enter into an agreement regarding the
24 granting of the right to make short news reports. The Court held when reviewing EU
25 legislation in light of the freedom to conduct a business (Article 16 CFR) that that right was
26 not absolute but must be viewed in light of its social function. It continued:
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33 ‘On the basis of that case-law and in the light of the wording of Article 16 of the
34 Charter, which differs from the wording of the other fundamental freedoms laid down
35 in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter,
36 the freedom to conduct a business may be subject to a broad range of interventions on
37 the part of public authorities which may limit the exercise of economic activity in the
38 public interest.’⁵⁰

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41 Somewhat frustratingly, no further explanation is given as to the content of Titles II and IV of
42 the Charter, or why their difference in wording is legally significant in this context. However,
43 the Court then immediately proclaimed that ‘that circumstance’ (meaning the fact that the
44 freedom to conduct a business may be subject to a broad range of interventions in the public
45 interest) ‘is reflected, inter alia, in the way in which Article 52(1) of the Charter requires the
46 principle of proportionality to be implemented.’⁵¹ From there, it was noted that the Directive
47 in question sought to strike a balance between the exclusive broadcasting rights of private
48 companies, on the one hand, and access of the general public to information (right to receive
49 information protected by Article 11(1) CFR), coupled with the aim of promoting media
50 pluralism (Article 11(2) CFR), on the other. In reviewing whether the contested Directive’s
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56 ⁴⁷ *ibid* para 155.

57 ⁴⁸ *ibid* para 159-160.

58 ⁴⁹ *Case C-283/11, Sky Österreich GmbH v Österreichischer Rundfunk* ECLI:EU:C:2013:28.

59 ⁵⁰ *ibid* para 46.

60 ⁵¹ *ibid* para 47; *Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health*, (n 42)
paras 153-155.

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3 provisions were suitable, necessary, and struck an appropriate balance between various rights
4 and interests, the CJEU once again engaged in a light-touch form of proportionality review.
5 Consequently, despite there plausibly being less restrictive alternatives open to the EU
6 legislature, the EU legislature was entitled to conclude (i.e., had a broad margin of discretion)
7 that no such alternatives would have achieved the objective of the legislation as effectively.⁵²
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10 **4.) Evaluation – what determines the applicable standard of review?**

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12 What (if anything) explains this difference in approach when it comes to the scope of
13 discretion afforded to the EU legislature and the intensity of proportionality review in
14 fundamental rights cases? Why is it that some EU legal acts which place restrictions on
15 fundamental rights continue to be subject to low-intensity proportionality review, whereas
16 others attract a much more stringent, high-intensity review from the Court?
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20 As noted above, the CJEU has held that the extent of the EU legislature's discretion may
21 prove to be limited, and the intensity of proportionality review will vary, on the basis of a
22 number of factors, including: (i) the area concerned; (ii) the nature of the right at issue
23 guaranteed by the Charter; (iii) the nature and seriousness of the interference; and (iv) the
24 object pursued by the interference.⁵³ As AG Bobek pointed out in *Lidl*, it follows from this
25 body of case law that 'the strictness of the Court's judicial review, and in particular the
26 intrusiveness of the proportionality review, may differ from case to case.⁵⁴ What is not clear
27 from this, however, is whether there is any methodology to be deployed in the judicial
28 determination of which of the four factors (i) – (iv) are determinative in any given case. In
29 *Lidl* itself, the AG held, without further explanation, that the two determinative variables in
30 the case at hand were the substantive area of EU law concerned and the *nature of the rights* in
31 question.⁵⁵ Why these two factors appeared to be relevant to the AG, whilst others such as the
32 seriousness of the interference were not, is not explained. In other cases where the
33 abovementioned list of variables has been explicitly addressed by the CJEU, the determining
34 factors have been: (i) the *nature or importance of the right* enshrined in the Charter; and (ii)
35 the *seriousness of the interference* with that right.⁵⁶ Once again, the reasons as to why these
36 two factors are determinative for the standard of proportionality review to be conducted
37 remains unexplained.
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44 There therefore appears to be a great deal of judicial discretion involved in both: (a)
45 determining which of the four factors listed in Digital Rights Ireland ((i) to (iv)) are engaged
46 in a given fundamental rights dispute; and (b) the meaning and significance that is to be
47 ascribed to each of those factors so selected by the Court.
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50 *a) The nature of the right determines the intensity of review*

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54 ⁵² *Case C-283/11, Sky Österreich* (n 48) paras 52-57; see also *Case T-732/14, Sberbank of Russia OAO v*
55 *Council and Commission*, ECLI:EU:T:2018:541 paras 141-158; *Case C-157/14, Société Neptune Distribution v*
56 *Ministre de l'Économie et des Finances*, ECLI:EU:C:2015:823 paras 67-76.

57 ⁵³ *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 1) para 47.

58 ⁵⁴ *Opinion of Advocate General Bobek, Case C-134/15 Lidl GmbH & Co. KG v Freistaat Sachsen*, (n 38) para
59 37.

60 ⁵⁵ AG Bobek *Lidl* para 37.

⁵⁶ *Case C-601/15, J. N.* (n 4) para 56; *Case C-362/14, Schrems* (n 3) para 78.

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3 Despite these ambiguities, it is clear from the jurisprudence to date that the *nature* of the
4 fundamental right that has been restricted in a given case plays a vital role in the margin of
5 discretion afforded to the EU legislature and the subsequent intensity of proportionality
6 review conducted by the CJEU. This necessarily requires one to consider how the CJEU
7 should go about determining the nature or importance of a particular right protected by the
8 Charter? It further requires one to analyse whether identifying the nature of a right is indeed
9 the best way of modulating the scope of discretion afforded to the EU legislature and the
10 intensity of proportionality review conducted by the CJEU?
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14 In this regard, the reasoning of the CJEU in *Sky Österreich* and other judgments discussed
15 above may be understood to mean that the nature of the right to freely conduct a business is
16 different than other fundamental rights listed in Title II of the CFR. Absent any further
17 guidance from the Court, this could well be what was meant by noting that the freedom to
18 conduct a business in Article 16 CFR differs from the wording of the other fundamental
19 freedoms laid down in Title II thereof, yet is similar to that of certain provisions of Title IV
20 of the Charter.⁵⁷ If this distinction is correct, it follows that a broader range of restrictions in
21 the pursuit of the public interest may be permissible when restricting those rights which the
22 CJEU deems to be of a different nature (rights contained in Title IV CFR) than other rights
23 contained in Title II CFR. The problem with this, however, is that in *Phillip Morris* a very
24 similar approach was taken with respect to the classic civil and political right to freedom of
25 expression (albeit the right to dissemination by a business of commercial information as
26 protected by Article 11 CFR).⁵⁸
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33 It may well be, therefore, that it is the predominantly economic nature of the right (freedom
34 to conduct a business, the right to property, the right to disseminate commercial information
35 etc.) which is determinative of its relative importance from the perspective of the CJEU. If
36 this is correct – meaning that one can indeed distinguish between rights of greater and lesser
37 importance based on their economic or other nature - it seems to follow that the intensity of
38 proportionality review to be deployed will vary in accordance with the nature of the right in
39 question. Support for this view comes from the abovementioned opinion of AG Bobek in
40 *Lidl*, where it was stated that ‘the broad discretion enjoyed by the Commission is also
41 confirmed in the present case by the nature of the right at issue. As the Court has stated, the
42 freedom to conduct a business ‘may be subject to a broad range of interventions on the part of
43 public authorities which may limit the exercise of economic activity in the public interest.’⁵⁹
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49 The problem with this approach, however, is that the same can be said of many other rights
50 protected by the Charter which are not economically oriented in nature. Examples here
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53 ⁵⁷ *Case C-283/11, Sky Österreich* (n 48) para 46. Notably, the rights contained under Title II of the Charter
54 (Freedoms) contain those classic civil and political rights (such as right to freedom of religion, of expression and
55 of assembly); whereas the rights contained in Title IV of the Charter (Solidarity) contains a mixture of workers’
56 rights (such as collective bargaining and protection from unjustified dismissal), along with social and economic
57 rights (such as healthcare and social security assistance).

58 *Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health*, (n 42).

59 *Opinion of Advocate General Bobek, Case C-134/15 Lidl GmbH & Co. KG v Freistaat Sachsen*, (n 38) para
60 39 and case law cited therein.

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3 include the right to liberty, the right to private and family life and the right to the protection
4 of personal data (Articles 6,7 and 8 respectively), all of which can be subject to restrictions
5 via a broad range of interventions taken in the pursuit of the public interest.⁶⁰ And yet, as we
6 have seen, in some circumstances, interferences with those rights in the pursuit of the public
7 interest have resulted in the margin of discretion enjoyed by the EU legislature being reduced
8 and the intensity of proportionality review being heightened.⁶¹ It is for this same reason that
9 we can rule out the possibility that those rights which are protected by both the Charter and
10 the ECHR (e.g. right to private life or freedom of expression) attract high-intensity review,
11 whereas those (predominantly social and economic rights) which are only protected by the
12 Charter (e.g. the freedom to conduct a business) attract low-intensity review.⁶²
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18 One possible way of interpreting this line of jurisprudence would simply be to say that the
19 rights to liberty, to private life and to data protection (Article 6, 7 and 8 CFR respectively) are
20 simply more important than rights of an economic nature such as the freedom to conduct a
21 business or the right to property (Articles 16 and 17 CFR). In other words, EU legal acts
22 interfering with the rights to liberty, to a private life or the protection of personal data should
23 be subject to more searching review by the CJEU than interferences with the freedom to
24 conduct a business or the right to property, and that this differentiation in the standard of
25 review stems from the relative importance of the rights in question. This interpretation
26 certainly appears to have some support in the case law discussed thus far, where the nature of
27 the right in question is explicitly listed as one of the factors which leads to a variation in the
28 margin of discretion afforded to the EU legislature and the intensity of proportionality review
29 conducted by the Court. Commenting upon this possibility, Peers et al. state that ‘if the Court
30 believes that different types of proportionality test should apply where different charter rights
31 are involved (as it expressly stated in *Sky Österreich*), it should explain its reasoning and the
32 implications of such a distinction further, and must ensure that it applies this distinction
33 consistently.’⁶³
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40 However, there are further problems with taking such an approach. Neither the Charter in
41 general, nor Article 52(1) CFR in particular, distinguishes between the importance of Charter
42 rights, or mandates that varying intensities of review be adopted on the basis of the nature of
43 the right in question.⁶⁴ One cannot find any explanation to this effect in the Explanations
44 relating to the Charter either.⁶⁵ ‘[I]t is worth noting that there is no hierarchy of qualified
45 rights under the Charter. Given that all qualified rights stand on an equal footing, conflicts
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50 ⁶⁰ In Case C-184/20, *OT v Vyriausioji tarnybinės etikos komisija*, ECLI:EU:C:2022:601 para 70.

51 ⁶¹ Case C-311/18, *Data Protection Commissioner v Facebook Ireland Ltd, Maximilian Schrems (Schrems II)*
52 ECLI:EU:C:2020:559 paras 172-176; Case C-601/15, *J. N.* (n 4); Case C-18/16, *K. v Staatssecretaris van*
53 *Veiligheid en Justitie*, (n 4); Case C-362/14, *Schrems* (n 3); *Joined Cases C-293/12 and C-594/12, Digital*
54 *Rights Ireland* (n 1).

55 ⁶² I am grateful to Prof. Monica Claes for raising this point with me and for her very helpful comments on
56 various other aspects of this paper.

57 ⁶³ Steve Peers and Sacha Prechal, ‘Scope and Interpretation of Rights and Principles’ in Steve Peers and others
58 (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014) 1485.

59 ⁶⁴ The exception being absolute rights such as the right not to be tortured, subject to inhuman and degrading
60 treatment or enslaved. See Articles 1, 4, 5 and 52(3) CFR.

⁶⁵ Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/17,.

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3 between them must be solved by striking the right balance.⁶⁶ And yet, to say that the nature
4 or importance of a particular fundamental right is the determining factor when it comes to the
5 CJEU's adoption of low or high intensity proportionality review means, in essence, that there
6 is a hierarchy of important and less important fundamental rights in the Charter. The key to
7 this hierarchical ordering of rights lies in the manner with which the Court utilises the
8 proportionality principle to achieve variable intensities of judicial review depending upon the
9 nature or importance of the right in question. EU legislation continues to be reviewed in a
10 low-intensity fashion whenever the Court believes that the right is of a lesser importance,
11 e.g., fundamental rights of an economic nature, such as the right to property, the freedom to
12 conduct a business etc. In contrast, a much more robust, high-intensity approach to review is
13 utilised when it comes to purported interferences with other, 'more-important' rights, such as
14 the right to family life, to a private life, to data protection, and to liberty and security of the
15 person.
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21 Now, there may well be sound philosophical, moral or other reasons as to why some rights
22 are to be conceived of as being more important than others.⁶⁷ The reason why the prohibition
23 of torture and inhuman or degrading treatment admits of no exceptions in the public interest
24 (otherwise known as an absolute right), whereas many other fundamental human rights like
25 the right to a fair trial or the right to freedom of thought, conscience and religion (known as
26 relative rights) do permit of such exceptions would be a classic example here. There may
27 even be sound philosophical, moral or other reasons to support the proposition that even
28 amongst non-absolute rights, some such rights are more important than others. If so, it might
29 well follow that courts should conduct high-intensity proportionality review whenever
30 'important' rights are interfered with, and low-intensity review whenever 'less important'
31 rights are interfered with.⁶⁸ What does not follow from this, however, is that it should be for
32 the CJEU to determine what the nature of fundamental rights protected under the Charter are,
33 or whether certain rights are more important than others. Moreover, from the perspective of
34 the posited law in the Charter, the problem with according different rights different levels of
35 importance based upon their nature is that such an approach is not mandated by either the text
36 of the Charter or the explanations relating to it. Nor is there any indication in the relevant
37 secondary legislation that the EU institutions have intended to accord a more important status
38 and/or level of protection to certain Charter rights relative to others. Furthermore, in the cases
39 where the CJEU has held that high-intensity proportionality review should be deployed on
40 accounts of the importance of the right in question, there is never any further explanation
41 given as to why such a right is important. For example, in cases where EU legislation
42 authorises the detention of individuals and is alleged to interfere with their right to liberty, the
43 Court simply asserts that 'in view of the *importance of the right to liberty* enshrined in Article
44 6 of the Charter and the *gravity of the interference with that right* which detention represents,
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55 ⁶⁶ Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European
56 Constitutional Law Review 375, 392–393.

57 ⁶⁷ Fernando Suárez Müller, 'The Hierarchy of Human Rights and the Transcendental System of Right' (2019)
58 20 Human Rights Review 47.

59 ⁶⁸ For discussion see Paul Craig, 'Varying intensity of judicial review: a conceptual analysis' (2022) Public
60 Law, 442–462, 447.

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3 limitations on the exercise of the right must apply only in so far as is *strictly necessary*.⁶⁹ But
4 why is the right to liberty accorded such importance? On what grounds is importance
5 evaluated and measured in this context? And why do cases involving restrictions on the right
6 to property or the freedom to conduct a business not similarly mention the importance of
7 those rights when calibrating the correct standard of proportionality review? The same
8 omission of any explanation as to why the fundamental right is viewed as being important
9 can be seen in relation to the rights to private life and data protection.⁷⁰

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14 *b.) The seriousness of the interference with the right determines the intensity of review*

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16 When viewed in light of the case law as a whole, it is submitted that the better view is that the
17 intensity of proportionality review conducted by the CJEU depends upon the seriousness of
18 the interference with the fundamental right in question. Whenever EU legal acts ‘seriously’
19 interfere with fundamental rights protected by the Charter, the EU legislature’s discretion will
20 be reduced, and proportionality review will be ‘strict’. On this view, the nature of the right
21 (right to private life, right to protection of personal data, freedom to conduct a business, right
22 to property, right to equality before the law etc.) is irrelevant. Serious interferences will result
23 in the CJEU utilising the proportionality principle in order to determine whether the
24 legislation in question is ‘strictly necessary for the purpose of attaining the objective
25 pursued.’⁷¹

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30 Conversely, whenever EU legal acts interfere with Charter rights to a limited or even
31 negligible extent (i.e. not meeting the threshold of ‘seriousness’), the EU legislature will be
32 afforded a wider margin of discretion and proportionality review will be conducted in a less
33 intensive fashion.⁷² This much is made clear when one considers that in post-Lisbon cases
34 like *Sky Österreich*⁷³, *Schwarz*⁷⁴ and *Rzecznik Praw Obywatelskich (RPO)*⁷⁵, the Court did
35 *not* find that there had been a serious restriction of the fundamental rights engaged in those
36 disputes (the right to freely conduct a business, to private life and to equal treatment
37 respectively). Consequently, the scope of discretion afforded to the EU legislature in these
38 cases was not explicitly restricted and the Court did not deploy the high intensity, strictly
39 necessary standard of review.⁷⁶ Similarly, in a number of cases where EU legislation has
40 placed minimal restrictions upon fundamental rights, the CJEU has continued to afford the
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⁶⁹ *Case C-601/15, J. N.* (n 4) para 56; See also *Case C-72/22 PPU, MA*, ECLI:EU:C:2022:505; *Case C-36/20 PPU, Ministerio Fiscal*, ECLI:EU:C:2020:495 (n 35) para 105; *Case C-18/16, K. v Staatssecretaris van Veiligheid en Justitie*, (n 4) para 40.

⁷⁰ *Case C-362/14, Schrems* (n 3) para 78; *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 1) paras 47-48; *Case C-72/22 PPU, M.A.*, ECLI:EU:C:2022:505 (n 66) para 83.

⁷¹ *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 1) para 62.

⁷² *Case C-12/11, Denise McDonagh v Ryanair Ltd*, ECLI:EU:C:2013:43; *Case C-544/10, Deutsches Weintor* (n 41).

⁷³ *Case C-283/11, Sky Österreich* (n 48) para 94.

⁷⁴ *Case C-291/12, Michael Schwarz v Stadt Bochum*, ECLI:EU:C:2013:670 paras 31-53.

⁷⁵ *Case C-390/15, Rzecznik Praw Obywatelskich (RPO) and others* ECLI:EU:C:2017:174 paras 52-72.

⁷⁶ *Case C-283/11, Sky Österreich* (n 48) para 50; *Case C-291/12, Michael Schwarz v Stadt Bochum*, (n 71) para 40.

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3 EU legislature a wide margin of discretion and adopted its traditional, manifestly
4 disproportionate standard of review.⁷⁷
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7 Notably, there are some indications in the recent case law pertaining to Member State
8 obligations under the Charter that an emphasis is now being placed upon the seriousness of
9 the interference with the right in question when it comes to determining the appropriate
10 intensity of proportionality review. In relation to the rights to a private life and the protection
11 of personal data, in particular, the Court has recently held that ‘whether the Member States
12 may justify a limitation on the rights guaranteed in Articles 7 and 8 of the Charter must be
13 assessed by *measuring the seriousness of the interference which such a limitation entails* and
14 by verifying that the importance of the objective of general interest pursued by that limitation
15 is proportionate to that seriousness.’⁷⁸ Reasoning along these lines would also be a welcome
16 development in relation to fundamental rights review of EU legislation in the future.
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21 It is submitted, therefore, that the margin of discretion to be afforded to the EU legislature
22 and the subsequent intensity of proportionality review to be deployed by the CJEU should be
23 modulated on the basis of the seriousness of the interference with the fundamental right in
24 question. From a practical perspective, it is much easier for lawyers and judges to try to
25 conceptualise, argue about, and ultimately determine whether the actions of a public authority
26 constitute a serious interference with a right than it is to argue over the nature and relative
27 importance of rights in abstract terms. Married to this practical consideration is the
28 consideration of doctrinal clarity. As the above analysis of the case law has shown, the CJEU
29 has thus far been unable to convincingly explain why, for example, the right to the protection
30 of personal data is worthy of the label ‘important’, whereas the right to property is not.
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35 In contrast, determining whether restrictions placed upon a fundamental right meets the
36 threshold of being ‘particularly serious’ appears to be both more workable in practice and
37 easier to explain doctrinally. For example, in *J.N* the claimants challenged an EU Directive
38 that allowed Member State authorities to detain third country nationals who applied for
39 international protection in order to protect national security or public order.⁷⁹ These powers of
40 detention were challenged on the grounds that they interfered with Article 6 CFR, which
41 provides that everyone has the right to liberty and security of person.⁸⁰ In the Courts view,
42 detaining applicants for reasons of national security did indeed place a limit upon the right to
43 liberty and such a right could, in principle, be restricted in the pursuit of such a legitimate
44 objective. In examining whether the powers of detention provided for by the Directive were
45 necessary, the CJEU emphasised that ‘in view of the importance of the right to liberty
46 enshrined in Article 6 of the Charter and the gravity of the interference with that right which
47 detention represents, limitations on the exercise of the right must apply only in so far as is
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55 ⁷⁷ *Case C-157/14, Société Neptune Distribution v Ministre de l'Économie et des Finances*, (n 51) para 76 and
56 case law cited therein.

57 ⁷⁸ *Commissioner of An Garda Síochána and Others, C-140/20, EU:C:2022:258*, paragraph 53 and the case-law
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59 ⁷⁹ Article 8(3), Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying
60 down standards for the reception of applicants for international protection [2013] OJ L 180, p. 96–116.

⁸⁰ Article 6 CFR.

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3 strictly necessary.⁸¹ Although not explained clearly by the Court, the seriousness of the
4 interference with the right to liberty stems from the fact that the Directive allowed for an
5 individual's detention. Detention is by definition a serious interference with the right to
6 liberty, whereas other types of measures which restrict the liberty of the individual in the
7 name of protecting national security often do not meet the same level of severity e.g., orders
8 mandating where an individual may not travel to or may not reside.⁸² Accordingly, in light of
9 this serious interference with the right to liberty, the CJEU engaged in high-intensity review
10 of the contested EU legislation.⁸³
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14 Further clarification is provided in cases pertaining to the right to private life and the
15 protection of personal data (Articles 7 and 8 CFR). In *Digital Rights Ireland*, having held that
16 the discretion of the EU legislature would be reduced, and the intensity of proportionality
17 review be enhanced, the CJEU found that the data retention Directive pursued objectives of
18 general EU interest; namely, to contribute to the fight against serious crime, international
19 terrorism and, ultimately, to public security.⁸⁴ Whilst this was of the 'utmost importance in
20 order to ensure public security...such an objective of general interest, however fundamental it
21 may be, does not, in itself, justify a retention measure such as that established by Directive
22 2006/24 being considered to be necessary for the purpose of that fight.'⁸⁵ In reviewing
23 whether this was the case, the CJEU engaged in close scrutiny of the substance of the
24 Directive, noting that the rules on retention covered *all* means of electronic communication of
25 *all* subscribers or registered users of electronic communications networks. This meant that
26 the Directive potentially allowed for interference with the rights of the *entire* European
27 population, since the data of persons with no connection to organized or serious crime could
28 be retained by relevant national authorities without exception.⁸⁶ There were also no
29 meaningful limits in the Directive to regulate the access to, and subsequent use of, personal
30 data by national authorities. Finally, the rule that all data must be retained for a minimum of 6
31 months and a maximum of 24 months was not based on any objective criteria and failed to
32 distinguish between different types or uses of personal data.⁸⁷ As a result, the Directive did
33 not set down clear and precise rules governing the extent of the interference with rights
34 contained in Articles 7 and 8 CFR. The Directive led to wide-ranging and particularly serious
35 interference with fundamental rights. Moreover, such interference was not precisely
36 circumscribed by provisions aimed at ensuring that it was actually limited to what was
37 'strictly necessary.'⁸⁸
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51 ⁸¹ *Case C-601/15, J. N.* (n 4) para 56; See also *Case C-18/16, K. v Staatssecretaris van Veiligheid en Justitie*, (n
52 4) para 40.

53 ⁸² For discussion of the different ways in which the right to liberty may be restricted beyond the classic (and
54 serious) interference caused by detention, see *Secretary of State for the Home Department v AP* [2010] UKSC
55 24 & 26, per Lord Brown.

56 ⁸³ *Case C-601/15, J. N.* (n 4) paras 57-67.

57 ⁸⁴ *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 1) paras 41-44.

58 ⁸⁵ *ibid* para 51.

59 ⁸⁶ *ibid* para 56.

60 ⁸⁷ *ibid* paras 58-64.

⁸⁸ *ibid* para 65.

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3 More recently, the CJEU has further clarified this concept of serious interference with regards
4 to fundamental rights review. In *OT*, for example, it was held that ‘*in order to assess the*
5 *seriousness of that interference*, account must be taken, inter alia, of the nature of the
6 personal data at issue, in particular of any sensitivity of those data, and of the nature of, and
7 specific methods for, the processing of the data at issue, in particular of the number of
8 persons having access to those data and the methods of accessing them.’⁸⁹ In making this
9 assessment, factors such as the public disclosure online of personal information about
10 individuals, the volume and frequency of information disclosed, the content and nature of that
11 information, and the number of people capable accessing that information are all relevant
12 factors in determining the seriousness of the interference with the right.⁹⁰

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17 When considered together, these recent judgments confirm that whenever EU legal acts lead
18 to serious interferences with fundamental rights contained in the Charter, the EU legislature’s
19 discretion will be reduced and proportionality review will be strict. In terms of what
20 constitutes a ‘serious’ interference with fundamental rights, this will largely depend upon the
21 facts of each individual case.⁹¹ Nonetheless, these examples (albeit limited in number)
22 provide some guidance. It is clear that empowering authorities to deprive an individual of
23 their liberty would meet this threshold. So too would granting public authorities widespread
24 and largely unchecked access to personal data. In all such cases, various objectively
25 verifiable factors such as the scope, content, frequency, and availability of personal data are
26 factored into the analysis of whether an interference with the right is serious or not. Whilst
27 further case law is needed to clarify this point, it seems that imposing detentions, or failing to
28 prevent the widespread disclosure of personal information online to an unlimited number of
29 people, are far more serious restrictions upon fundamental rights than, say, limiting the
30 freedom to conduct a business by prohibiting the advertising of electronic cigarettes in certain
31 media.⁹² Crucially, the nature or importance of the right in question is irrelevant in making
32 this determination.

33 34 35 36 37 38 39 **5. Conclusion**

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41 This paper has cast a critical eye over the CJEU’s approach to reviewing EU legislation for
42 compliance with fundamental rights protected by the EU Charter of Fundamental Rights. In
43 so doing, it has critically assessed the methodology utilised by the CJEU to determine
44 whether low or high intensity proportionality review is deployed in fundamental rights cases.
45 Based on that analysis, it has been contended that the Court’s attempts to vary the scope of
46 discretion afforded to the EU legislature and the subsequent intensity of proportionality
47 review to be deployed on the basis of the *nature of the fundamental right* at issue should be
48 rejected. Varying the intensity of review on the basis of the nature of the right necessarily
49 requires the CJEU to explain what the nature of the right in question is. It also requires
50 judicial explanation of why the nature of one right differs from that of other rights in such a
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55 ⁸⁹ *In Case C-184/20, OT v Vyriausioji tarnybinės etikos komisija*, ECLI:EU:C:2022:601 (n 59) para 99.

56 ⁹⁰ *ibid* paras 100-105.

57 ⁹¹ For discussion see *Opinion of Advocate General Emiliou, Case C-389/21 P, European Central Bank (ECB) v*
58 *Crédit Lyonnais*, ECLI:EU:C:2022:844 paras 63-75.

59 ⁹² *Case C-477/14, Pillbox 38 (UK) Ltd v The Secretary of State for Health*, ECLI:EU:C:2016:324, paras 109-
60 118.

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3 way as to justify differing intensities of review. It requires the Court to determine which
4 rights are ‘important’ enough to warrant high-intensity review and, concomitantly, to decide
5 that the nature of other rights is ‘less important’, thereby attracting low-intensity review. It
6 has been argued that the CJEU has not yet been able to convincingly explain why the nature
7 of certain fundamental rights results in them being ascribed an importance that other rights
8 enshrined in the Charter do not. It has further been argued that there is no textual basis in the
9 Charter for varying the intensity of review on the basis of the nature or importance of the
10 right in question. Turning to the future of fundamental rights review of EU legislation, it is
11 submitted that the better approach is to modulate the intensity of review on the basis of the
12 *severity of the interference* with the right in question. This approach is far easier for the Court
13 to operationalise than determining these matters on the basis of the nature of rights. Serious
14 interferences will lead to the reduced discretion of the EU legislature and high-intensity
15 review of the contested EU legislation. Conversely, whenever EU acts interfere with rights to
16 a limited extent (i.e., not meeting the ‘seriousness’ threshold), the EU legislature will be
17 afforded a wider margin of discretion and proportionality review will be conducted in a less
18 intensive fashion.
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