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RESEARCH ARTICLE

Freedom to Conduct Business During the Covid-19 Pandemic

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Unprecedented restrictions on various human rights were applied during the COVID-19 pandemic, and considered crucial in most cases to halt the spread of infection. Yet, a number of critical issues were raised concerning the scope and proportionality of said restrictions. Among these, the freedom to conduct business was one of the most affected by measures implemented in the first lockdown which was applied in many Member States of the European Union. This article analyzes the protection of this freedom in situations of emergency, its conflict with the right to health, and explores whether jurisprudential and doctrinal bases applicable before the pandemic could be applied or if new principles need to be developed to address unprecedented situations like COVID-19. The criteria to determine the proportionality of these restrictions from the perspective of International and EU human rights law are also discussed. The authors argue that the freedom to conduct business, although not envisaged directly in the European Convention on Human Rights, is part of the right to property, and thus should be protected in the same manner. Based on that, the approach to the deprivation of the right to use property and denial of the essence of the freedom to conduct business should be applied similarly, though not identically, to the approach of *de facto* expropriation, where a question of full or partial compensation may be relevant in case of substantial business losses. For other restrictions the availability of compensatory measures should be one of the key aspects while considering the proportionality of COVID-19 measures in restricting the rights of individuals or businesses.

Keywords: Freedom to conduct a business; emergency situation; COVID-19 measures; human rights restrictions; proportionality of restrictions; right to health; right to property

1 Introduction

Restrictions applied to halt the spread of infection during the COVID-19 pandemic, though crucial in many cases, led to serious ramifications for businesses in many Member States of the European Union (hereinafter "EU") during the first lockdown that took place in spring 2020.

International financial institutions report that containment measures had a very large impact on economic activity and amounted to a loss of about 15 percent in industrial production over a 30-day period following their implementation.[1] For example, in Lithuania, the outcome of restrictions applied in response to COVID-19 was the most detrimental to the services sector, with a reduction of income by 98.96 percent in the travel agencies sector, 70.30 percent in the accommodation services sector, and 67.32 percent in air transport service (during the second quarter of 2020, compared to sales revenues during the same period in 2019).[2] Given the extensive scope of these measures, practitioners and researchers raise a number of critical issues as to their proportionality.

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[1] International Monetary Fund, 'The Economic Effects of COVID-19 Containment Measures' (August 2020) IMF Working Paper WP/20/158 <https://www.imf.org/-/media/Files/Publications/WP/2020/English/wpiea2020158-print-pdf.ashx> accessed 5 December 2020.

[2] Dangis Gudelis, 'Evaluation of the Impact of Policy Measures of Government Response to the COVID-19 Pandemic in Lithuania' in Lyra Jakulevičienė and Vytautas Sinkevičius (eds), *Lietuvos teisė 2020: esminiai pokyčiai. I dalis. COVID-19 pandemijos sprendimai: teisiniai, valdymo ir ekonominiai aspektai* (translation: 'Lithuanian law 2020: substantive changes. Part I. COVID-19 related decisions from the legal, governance and economic perspective') (Mykolo Romerio Universitetas 2020) 141.

This article aims to assess the restrictions on business activity applied during the COVID-19 pandemic from the perspective of International and EU law and the relationship between the competing right to health and freedom to conduct business. The restrictions applied by EU Member States ranged from limitations imposed on the exercise of business activities in certain sectors to a total ban on the provision of services or sales. For instance, the provision of certain services (beauty services, non-essential medical services, tourism, etc.) and shops selling non-essential items were completely shut down. This practice raises several questions that will be analyzed in this article, with a view of ascertaining whether case law and doctrinal bases applicable before the pandemic could be applied or if new legal responses to address unprecedented situations like COVID-19 are required. First, the scope of protection of the freedom to conduct business under International and EU human rights law in situations of national emergency (like the COVID-19 pandemic). Second, the relationship between the right to health and the freedom to conduct business in such emergencies. Third, the lawfulness and legitimacy of restrictions proposed under International and EU law (as far as it relates to the measures undertaken by the Member States while implementing EU law), paying particular attention to their scope and duration. And finally, the role of compensatory financial measures of Governments while assessing the proportionality of the measures imposed.

The legal research was conducted mainly comparatively, reflecting on the different sources that review the protection of the right to property and the freedom to conduct business. It relies on an analysis of the jurisprudence of European and national courts before the pandemic and applies it to the current emergency context. As European decisions on restrictions in the COVID-19 pandemic are still lacking, national jurisprudence is used to illustrate the emerging approaches. The analysis builds upon the concept of balancing judicial methodology and the compliance of COVID-19-related restrictions on the one hand, and the requirements of International and EU human rights law on the other.

The article mostly refers to the measures implemented (particular attention is paid to harsh restrictions such as the closure of premises or the restriction of business activities) in the first lockdown (spring 2020). Sufficiently valid data has yet to be collected for the second wave of measures (autumn and winter 2020–21) at the time of writing this article, and as such, they are omitted from analysis.

A review of the literature available on the freedom of business demonstrates that, unlike restrictions imposed on other rights, where ample research already exists, scientific analyses of the impact of restrictions on the freedom of business are limited. The freedom to conduct business in the EU and its restrictions are analyzed in the works of Andrea Usai and Eduardo Gill-Pedro, the balancing of fundamental rights and economic freedoms is examined by Sybe A. de Vries, Xavier Groussot, Gunnar Thor Petursson, and S. Greer, and the question of compensation in case of emergencies is dealt with in the works of Steve P. Calandrillo and others. There is correspondingly more extensive literature on the right to health in the context of the current pandemic (Oona Hathaway *et al.*, José Luiz Gondim dos Santos *et al.*, and others), but as Nyamutata states, little is available in terms of broader research on the nexus between public health interventions and human rights during the pandemic.[3] Few sources analyze specifically its relationship to the freedom to conduct business (e.g., Conrad Nyamutata, Juan Pablo Bohoslavsky, Ruth Keating and Duncan Sinclair).

Considering that the developments related to measures implemented by EU countries against COVID-19 are very recent, and that the crisis consuming the world at the moment is unprecedented, the analysis will provide new input into policy and legal developments in order to prepare for future crises.

2 Protection of Freedom to Conduct Business in the European Legal Order

It might seem odd that the Charter of Fundamental Rights of the EU (hereinafter "the Charter") is the first legally binding document to explicitly recognize the freedom to conduct a business in the EU legal order in Article 16. Neither the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR") nor the EU Treaties mention this as a fundamental right.[4] The right is also absent from the European Social Charter and other major international human rights instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Social, Economic and Cultural Rights.[5] However, the Court of Justice of the

[3] Conrad Nyamutata, 'Do Civil Liberties Really Matter During Pandemics? Approaches to Coronavirus Disease (COVID-19)' (2020) 9(1) International Human Rights Law Review 62, 69.

[4] Andrea Usai, 'The Freedom to Conduct a Business in the EU, Its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social, and Political Integration' (2013) 14(9) German Law Journal 1867, 1868.

[5] Eduardo Gill-Pedro, 'Freedom to Conduct Business in EU Law: Freedom from Interference or Freedom from Domination?' (2017) 9(2) European Journal of Legal Studies 103, 114.

EU (hereinafter "CJEU"), the European Commission, and the European Court of Human Rights (hereinafter "ECtHR") have used Article 1 of Additional Protocol No. 1 to the ECHR—on the protection of private property—as a basis for inferring the principles protecting the right to economic initiative.[6] According to the established jurisprudence of the ECtHR, the freedom to conduct business is considered as derived (i.e., not expressly provided) from Article 1 of Protocol 1 to the ECHR. For example, in *Iatridis v. Greece*, the ECtHR made clear that the ECHR defends, among other things, the freedom of contracts that is a component of the freedom of economic activity.[7] According to Schwier, the *Iatridis* judgment brings the freedom to conduct business most closely to the guarantees of the Convention. Also, in *Tre Traktorer Aktiebolag v. Sweden* and subsequent judgments, the ECtHR held that a license to conduct business is property, and its annulment is a restriction of the right guaranteed by Article 1 of Protocol 1.[8] However, it is not the license but the economic interest, i.e., the possibility to have income from licensed activities, that is the object of protection.[9] At the same time, it must be recalled that Article 1 of Protocol 1 does not create a right to acquire property.[10] Future income constitutes a "possession" only if the income has been earned or where an enforceable claim to it exists.[11]

The freedom to conduct a business enshrined in Article 16 of the Charter is quite broad. The CJEU started to develop elements of the right as early as the mid-1970s on the basis of rights stemming from the common constitutional traditions, as well as the four EU common market freedoms, including the freedom of movement. A concept similar to the freedom to conduct a business has existed in EU Member States' legislation for over 200 years and in Member State constitutions for more than 150 years.[12] At the EU level, the legal act establishing fundamental rights recognizes the freedom to conduct a business not only as a fundamental right of the person, but also as a principle of law.[13] According to Oliver, upon entry into force of the Treaty of Lisbon on 1 December 2009, Article 16 seamlessly replaced the pre-existing fundamental right to conduct a business which had existed as a general principle of Union law.[14] The same idea can be found in Article 6(3) of the Treaty on EU that provides: '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

The freedom to conduct business includes any legitimate form of profit-making activity conducted by one or several individuals 'in company'. This right encompasses the full 'life-cycle' of such activities, from setting up a company, through operating one, to insolvency or closing a business.[15] According to the explanations to the Charter and CJEU case-law, freedom to conduct business in Article 16 of the Charter covers the freedom to exercise an economic or commercial activity, the freedom of contract, and free competition.[16] In CJEU case-law, it is also accepted that the freedom to conduct business is closely related to the property right protected under Article 17 of the Charter.[17] Advocate General Villalón supports this position and mentions that this freedom acts to protect economic initiative and economic activity.[18] On the other hand, the freedom to

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[6] Usai (n 4) 1868.

[7] *Iatridis v Greece* App no 31107/96 (ECtHR, 25 March 1999) para 14.

[8] *Tre Traktörer Aktiebolag v Sweden* App no 10873/84 (ECtHR, 7 July 1989) paras 43–44.

[9] *Faccio v Italy* App no 33/04 (ECtHR, 31 March 2009); *Tre Traktörer Aktiebolag v Sweden* App no 10873/84 (ECtHR, 7 July 1989).

[10] *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018) para 137.

[11] *Ian Edgar (Liverpool) Ltd v the United Kingdom* App no 37683/97 (ECtHR, 25 January 2000); *Wendenburg and Others v Germany* App no 71630/01 (ECtHR, 6 February 2003); *Levänen and Others v Finland* App no 34600/03 (ECtHR, 11 April 2006); *Anheuser-Busch Inc v Portugal* App no 73049/01 (ECtHR, 11 January 2007) para 64; *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018) para 137.

[12] European Union Agency for Fundamental Rights (FRA), 'Freedom to Conduct a Business: Exploring the Dimensions of a Fundamental Right' (Publications Office of the European Union 2015) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf> accessed 15 January 2021.

[13] Agnė Juškevičiūtė-Vilienė, 'Asmens ūkinės veiklos laisvės konstituciniai pagrindai Lietuvoje: ekonominės, istorinės ir lyginamosios įžvalgos. Daktaro disertacija, socialiniai mokslai, teisė (01 S)' (translation: 'Constitutional basis of freedom to conduct a business: economic, historical and comparative considerations') (DPhil thesis, Vilnius University 2017) 352.

[14] Peter J Oliver, 'What Purpose Does Article 16 of the Charter Serve?' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds), *General Principles of EU Law and European Private Law* (Wolters Kluwer 2013) 283.

[15] FRA (n 12).

[16] Case C-4/73 *Nold v Commission* [1974] ECR 1974-00491; Case C-441/07 *Commission v Alrosa Company Ltd* [2010] ECR I-05949, Opinion of AG Kokott, para 225; Case C-426/11 *Alemo-Herron v Parkwood Leisure Ltd* [2013] ECLI:EU:C:2013:82, Opinion of AG Cruz Villalón, para 54; 'Explanations Relating to the Charter of Fundamental Rights' [2007] OJ C303/17.

[17] See for example the liability for legislative activity in Joined Cases C-120/06 P and 121/06 P *FIAMM v Council and Commission* and *Fedon & Figli and Fedon America v Council and Commission* [2008] ECR I-06513, para 122.

[18] Case C-426/11 *Alemo-Herron v Parkwood Leisure Ltd* [2013] ECLI:EU:C:2013:82, Opinion of AG Cruz Villalón, para 51.

conduct business is often used in the case-law of the CJEU as a counterweight to other fundamental rights, such as the right to the protection of privacy, health, and intellectual property rights.[19]

At the same time, the freedom to conduct business, the freedom to choose an occupation, and the right to engage in work (Article 15 of the Charter), and the right to property (Article 17 of the Charter), form the basis of the Charter's economic freedoms. Juškevičiūtė-Vilienė explains the relationship between Articles 16 and 17 by arguing that the business freedom is understood as ensuring the free economic process of businesses, while the right to property protects the result achieved by a person during the free economic process.[20] Even before entry into force of the Charter, the jurisprudence of the CJEU testified that violations of the freedom to conduct business have usually been dealt with in conjunction with an infringement of the right to property. In *Liselotte Hauer v. Land Rheinland*, the CJEU first examined whether the restriction imposed on the establishment of new wineries was contrary to the right to property and subsequently if it was contrary to the freedom to conduct business.[21]

Some national high courts also recognize the relationship between the right to property and the freedom to conduct business, as property is considered as the main condition for the realization of the freedom to conduct business – when the right to property is restricted, the freedom to conduct business also becomes limited[22] and vice versa. Once property has been properly protected from illegal attempts, assumptions for the freedom to conduct business will be created and it will show up as a possibility to dispose of and benefit from the property, as well as to transfer it by free will or acquire property objects. Not all national constitutions explicitly provide a freedom to conduct business. For example, the German Constitution does not establish this freedom *expressis verbis*;[23] however, the Federal Constitutional Court points out that this freedom derives from the freedom to pursue a trade or profession.[24] The theory of German law often takes the view that economic freedom also arises indirectly from the right to property, the right to liberty, freedom of association, the right to freedom of movement, and the principle of equality.[25] German legal scholars point out that 'freedom to pursue a trade or profession' is a key condition for the legal system of a progressive, free society.[26] The state must provide the widest possible space for this freedom, i.e., this freedom guarantees the right to defend oneself against state intervention.[27] Finally, German legal doctrine refers not only to the individual aspect of this freedom but also to the social dimension, since both the interests of an economic operator and their social cooperation with other persons that realize business opportunities (e.g., employees, contractors, public authorities) are important in the course of economic activity.[28]

The authors of this article acknowledge that in CJEU case-law, pleas based on arguments related solely to the infringement of the freedom to conduct business were unsuccessful.[29] However, this can be explained by a very close relationship between the freedom to conduct business, protected by Article 16 of the Charter, and the right to property, protected by Article 1 of Protocol 1 of the ECHR. As Oliver states, pleas founded on the right to property itself have nearly always been roundly rejected by the Court. This is in part due to the broad justifications accepted by the Court on restrictions of this right under the ECHR.[30]

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[19] ibid para 53.

[20] Juškevičiūtė-Vilienė, 'Constitutional basis of freedom to conduct a business: economic, historical and comparative considerations' (n 13) 338.

[21] Case C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 1979-03727.

[22] Ruling no 28/08 of Constitutional Court of the Republic of Lithuania of 2 March 2009.

[23] Article 12 of Basic Law states that all Germans have the right to freely choose their profession, place of work and educational institutions. The performance of professional duties may be regulated by law and on the basis of law.

[24] Judgment of 6 March 1958, BverfG 596/56.

[25] See eg Henning Schwier, *Der Schutz der 'Unternehmerischen Freiheit' nach Artikel 16 der Charta der Grundrechte der Europäischen Union* (Peterlang 2008) 40; Peter Badura, *Wirtschaftsverfassung und Wirtschaftsverwaltung* (Mohr Siebeck 2011) 22–52.

[26] Fritz Rittner, *Unternehmerfreiheit und Unternehmensrecht zwischen Kapitalismus, Sozialismus und Laborismus* (CH Beck 1998) 17.

[27] ibid 35.

[28] Theodor Maunz, *Grungesetz. Kommentar* (CH Beck 2015) <https://beck-online.beck.de/?vpath=bibdata/komm/MaunzDuerigKoGG%5F69/cont/MaunzDuerigKoGG.htm> accessed 20 November 2020.

[29] Case C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR I-3727; Case C-90/90 *Jean Neu and others v Secrétaire d'Etat à l'Agriculture et à la Viticulture* [1991] ECR I-3617; Joined Cases C-453/03 *ABNA Ltd and Others v Secretary of State for Health and Food Standards Agency*, 11/04 *Fratelli Martini & C SpA and Cargill Srl v Ministero delle Politiche Agricole e Forestali and Others*, 12/04 *Ferrari Mangimi Srl and Associazione nazionale tra i produttori di alimenti zootecnici (Assalzoo) v Ministero delle Politiche Agricole e Forestali and Others* and 194/04 *Nederlandse Vereniging Diervoederindustrie (Nevedi) v Productschap Diervoeder* [2005] ECR I-10423; Case C-12/11 *Denise McDonagh v Ryanair Ltd* [2013] ECLI:EU:C:2013:43.

[30] Oliver (n 14) 298.

In summary, in the ECHR, the EU context, and national jurisdictions, the freedom to conduct a business, despite being recognized as a stand-alone right in Article 16 of the Charter, still relies to a large extent on the protection of the right to property as interpreted by the ECtHR and the CJEU.

3 Freedom to Conduct a Business and the Right to Health

Although some authors and organizations claim[31] that states disregarded human rights in the face of the pandemic, the situation is much more complex. Indeed, the restrictions applied by states to various human rights during the pandemic involved the collision between two fundamental rights – the obligation of states to ensure the right to health and medical care enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR") and Articles 11 and 13 of the European Social Charter: the freedom to conduct a business and the right to property of private individuals and companies. The right to health under the ICESCR covers the prevention, treatment and control by Governments of the spread of infectious diseases, designed to protect the health of the population.[32] This right comprises access to health facilities, goods, services, and 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases'.[33] The right to health also includes the right to treatment, which itself includes the creation of a system of urgent medical care in cases of accidents, epidemics, and similar health hazards.[34] While the ECHR does not explicitly provide for this right, Oona Hathaway *et al.* claim that ECtHR case-law has generally established that agents of Contracting States must 'refrain from acts or omissions of a life-threatening nature, or which place the health of individuals at grave risk' and 'refrain from treatment which damages a person's physical health'.[35] Therefore, the lack of control over the spread of the coronavirus, as could be seen from the most affected European countries, could have influenced the obligation of states to ensure the right to health care, and even the right to life for a certain part of their population. In light of this, many European states sacrificed other individual rights, as well as the freedom to conduct a business, for a certain period to better protect the right to health. What needs to be ascertained is under which conditions the right to health could prevail over economic rights.

As Nyamutata states, in cases of enormous disease outbreaks, states typically adopt and enforce radical measures to contain the spread of the infection.[36] When the life and health of populations are at stake, business cannot go on as usual. Governments must ensure that public health systems do not collapse, and that health policies and protections are not eroded but rather remain robust and capable of controlling the spread of the disease. When faced with making a decision about protecting lives versus the economy, human rights must inform the debate.[37] Some authors refer to the critically high rate of contagion of COVID-19 that can lead to a potential collapse of healthcare systems[38] as a justification for extreme restrictions that have been imposed. Certain Governments have resorted to such measures as nationalizing private health care businesses (Spain) or ordering businesses to produce medical appliances (USA), which were barely lawful under human rights law. Other States appear to be promoting an approach of "saving the economy" at all cost, including by risking the health and lives of the majority of their populations (economy-centric approach).[39] Nyamutata concludes that the law on the management of pandemics and jurisprudence pay little attention to human rights during disease outbreaks.[40]

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[31] See eg Human Rights Watch, 'Human Rights Dimensions of COVID-19 Response' (*Human Rights Watch*, 19 March 2020) <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response#_Toc35446578> accessed 20 November 2020.

[32] United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 14' (11 August 2000) E/C.12/2000/4, para 16.

[33] ibid.

[34] ibid.

[35] Oona Hathaway, Mark Stevens and Preston Lim, 'COVID-19 and International Law Series: Human Rights Law – Right to Health' (*Just Security*, 20 November 2020) <https://www.justsecurity.org/73447/covid-19-and-international-law-series-human-rights-law-right-to-health/> accessed 13 October 2020.

[36] Nyamutata (n 3).

[37] Juan Pablo Bohoslavsky, 'COVID-19 Economy vs Human Rights: A Misleading Dichotomy' (*Health and Human Rights Journal*, 20 April 2020) <https://www.hhrjournal.org/2020/04/covid-19-economy-vs-human-rights-a-misleading-dichotomy/> accessed 15 October 2020.

[38] José Luiz Gondim dos Santos and others, 'Collision of Fundamental Human Rights and the Right to Health Access During the Novel Coronavirus Pandemic' (*Frontiers in Public Health*, 8 January 2021) <https://www.frontiersin.org/articles/10.3389/fpubh.2020.570243/full> accessed 25 September 2021.

[39] ibid.

[40] Nyamutata (n 3) 94.

How is this relationship reflected in the ECHR and the Charter? First, the right to property (Art. 1 of Protocol 1 of ECHR)—which serves as the basis of protection of the freedom to conduct business—is recognized by the ECtHR as not absolute, and the Court allows for restrictions to be imposed on public health grounds. Second, the freedom to conduct business under Article 16 of the Charter must be compatible with other rights in the Charter, and thus possible restrictions in the public interest could range from reasons of public health and safety to reasons related to the qualification or activity of the person.[41] Indeed, this right must be compatible with Article 35 of the Charter: the right to health care providing a right of access to preventive health care and the right to benefit from medical treatment, as well as the requirement to ensure a high level of human health protection in the definition and implementation of all Union policies and activities. In practice, restrictions were applied to ensure public health, in the context of the fight against terrorism, etc. The freedom to conduct business also needs to be compatible with the rights of employees, freedom of expression, intellectual property rights, and the protection of consumers. Notably, the CJEU, while considering the public interest at stake, provides the State with more discretion in the field of public health than in other fields, because the protection of the health and life of individuals, including healthcare, occupies a special position among public interests.[42]

De Vries claims that '[a]s conflicting rights cannot always be fully reconciled, the courts are forced to conduct a balancing exercise'.[43] The CJEU states that the EU legislature is required to strike a balance between the freedom to conduct a business on the one hand, and other fundamental freedoms of EU citizens on the other. Where several rights and fundamental freedoms protected by the EU legal order are at issue, the assessment of the possible disproportionate nature of a provision of EU law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and striking a fair balance between them.[44] In case of competing fundamental rights, the Court would seek to establish a fair balance, taking into account all the specific circumstances of a particular case.[45] Thus, when these two rights collide, it is important to ensure that both the interests of society and of businesses are respected. Although the freedom to conduct business can be restricted for the purpose of ensuring the health of society, such restrictions must be legitimate in the sense that no less restricting measures are available. In balancing opposing fundamental rights, the ECtHR employs a 'margin of appreciation' test,[46] which is similar to that of 'fair balance' in the CJEU. At the same time, the law of balancing has been criticized for various reasons, one of which is the considerable degree of discretion used in the balancing process, leading to subjectivity and value judgments.[47] De Vries also mentions other methodologies that have been used by the European courts, like the concept of *categorisation* or similar variation, referred to as the "exclusionary reasons" concept;[48] however, balancing seems to be the prevailing judicial technique.

Furthermore, public health discourse indicates that states, when implementing interventions in the right to public health, must adhere to four principles: a) the harm (evidence that a clear and measurable harm to others would eventuate without intervention) should be established to justify intervention, b) the least restrictive means (actions should be proportionate), c) reciprocity (individuals sacrifice their liberties for the common good of society), and d) transparency (duty to justify interventions).[49]

Considering that public health is an unquestionable public good, the protection of which falls within the remit of the State, it is necessary to ensure that it is carried out properly, but at the same time, in a way that restricts the rights of others as little as possible. This is the task of every State in the event of a pandemic. Every State was trying to answer the same question: how to protect public health without compromising the freedom of movement, assembly, and the freedom to conduct business. According to Nyamutata, coercive

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[41] FRA (n 12).

[42] Sybe A de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9(1) Utrecht Law Review 169, 173–74.

[43] ibid 170.

[44] See, to that effect, Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-271, paras 65–66 and Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* [2012] ECLI:EU:C:2012:526, para 47.

[45] FRA (n 12) 24–25.

[46] de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (n 42) 183.

[47] Xavier Groussot and Gunnar Thor Petursson, 'Balancing as a Judicial Methodology of EU Constitutional Adjudication' in Sybe A de Vries, Xavier Groussot and Gunnar Thor Petursson (eds), *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as 'tightrope' walker* (Eleven International Publishing 2012) 51.

[48] More about this: de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (n 42) 171–72.

[49] Nyamutata (n 3) 73, re-citing R E G Upshur, 'Principles for the Justification of Public Health Intervention' (2002) 93(2) Can J Public Health 101.

public health measures such as quarantine and isolation can be legitimately justified if the public health interests of society are carefully balanced against the freedom of the individual.[50] To pass the balancing test, the benefits to the public should outweigh the burdens or harms that quarantine may place on individuals.[51]

Before the COVID-19 pandemic, national jurisprudence of European countries confirmed that public health considerations have taken precedence over the right to property or freedom to conduct business on some occasions. Among these, the Constitutional Court of Lithuania decided that the restrictions, in the form of abolishment of the validity of licenses to engage in wholesale or retail trade in alcoholic beverages, were lawful in order to protect fair competition, rights of consumers and other persons, public health, public order, security of society, and the financial interests of the state.[52] In another case, the Court also stated that restrictions on places where gaming is organized were not in conflict with the general interests of society as they were made to protect public health, public order, and the security of society.[53] In a case on the obligation to manage oil waste, an important condition for the freedom to conduct business of oil producers and importers, the Court concluded that the state has to regulate economic activity in such a way that serves the general welfare of the nation. Thus, restrictions were found not to contradict the Constitution of Lithuania,[54] as they were implemented to protect the environment and human health, and to preserve the natural resources for future generations.[55] In this case, the Court held that public and human health is one of the most important public values, and that the protection of health is an important constitutional objective, a public interest, and a function of the state. Therefore, a limitation on the freedom to conduct business, with the goal of protecting people's health, should be treated as though it was designed to ensure the general welfare of the nation.[56] The Supreme Court of Spain held that the freedom of enterprise should not generally prevail over the right to health. When these two fundamental rights collide, an examination of interests shall be carried out, establishing proportional restrictions which respect both interests. Restrictions on the freedom of enterprise are deemed legal as long as it is not proven that the right could be protected by less restrictive means. In this case, the Court ruled that the protection of consumers and health should prevail over the freedom of enterprise, since the alcoholic beverages company did not prove that consumers' health could be protected by less restrictive means than by withdrawing publicity in the city.[57] The Central Administrative Court of Northern Portugal held that nothing in that norm clashed with the right to create a private company in the health sector. The freedom to conduct a business, including in the health sector, is not an absolute right, but a right on which the state can impose limits and restrictions related to the 'general interest' and 'ensuring suitable standards of quality and efficiency in health institutions', and requirements of 'discipline and monitoring in terms of production, distribution, marketing and the use of means of treatment and diagnostics' so that the state can ensure the right to health protection. The Court decided that the norms did not violate the freedom to conduct a business since they were appropriate and proportionate to exercising the rights and interests in question, and thus were admissible restrictions.[58] Juškevičiūtė-Vilienė, after analysing the jurisprudence of the German Federal Constitutional Court, points out that, in deciding upon the validity of restrictions on the freedom to conduct business, the protection of public health is considered very important and is relevant in the ongoing assessment.[59] She distinguishes two cases of professional freedom regulation examined by the Federal Constitutional Court, which were subjected to an evaluation of whether they were in line with important community interests—namely, the regulation of the provision of medical services to ensure public health care,[60] and the regulation of the

[50] Nyamutata (n 3) 91, re-citing L O Gostin, *Public Health Law: Power, Duty, Restraint* (2nd edn, Milbank Memorial Fund and University of California Press 2007).

[51] ibid.

[52] Ruling no 02/06-23/06-37/06-50/06-31/07 of Constitutional Court of the Republic of Lithuania of 21 January 2008.

[53] Ruling no 10/2009 of Constitutional Court of the Republic of Lithuania of 21 June 2011.

[54] Lithuania is one of the countries that has provisions protecting the freedom of economic activity in the Constitution. Article 46 of The Constitution states that 'Lithuania's economy shall be based on the right to private ownership, freedom of individual economic activity, and initiative. The State shall support economic efforts and initiative, which are useful to the community. The State shall regulate economic activity so that it serves the general welfare of the people'.

[55] Ruling no KT18-N7/2014 of Constitutional Court of the Republic of Lithuania of 9 May 2014.

[56] ibid para 5.3.1.

[57] Decision STS 891/2010 of Supreme Court of Spain of 3 January 2011.

[58] Decision no 00382/07.3BECBR, Central Administrative Court of Northern Portugal of 9 November 2012.

[59] Agnė Juškevičiūtė-Vilienė, 'Comparative Aspects of Constitutional Bases for Freedom of Economic Activity' (2015) 96 Teisė 162, 162–86.

[60] Judgement of 20 March 2001, BverfG 491/96.

establishment of pharmacies to ensure public health.[61] An analysis of these cases leads to the conclusion that the freedom to conduct business can be restricted in favor of certain fundamental rights and freedoms if the requirements for these restrictions are fulfilled. In practice, courts frequently adjudicate in favor of the right to health as an important public interest and justify various conditions that states introduce for the exercise of the freedom to conduct business activities.

4 Assessment of Restrictions Applied to Businesses During the COVID-19 Pandemic

4.1 Requirements for Restrictions and Broad Margin of Appreciation

In cases where restrictions applied in various EU countries on the freedom to conduct business during the pandemic related to the application of EU law, said restrictions need to be analyzed from the perspective of international legal instruments, such as the ECHR (Art. 1 of Protocol 1) and the Charter (Articles 16 and 17), that either explicitly or implicitly recognize this freedom. As stated earlier, the right to property based on Article 1 of Protocol 1 of the ECHR is not an absolute right, as the 'state has the right to adopt such legal acts that are necessary [...] for the protection of common interest'. Any interference with this right requires a legitimate aim to protect a common interest and needs to be proportionate to the objective sought. In other words, an appropriate balance needs to be attained between individual and public interests.[62] The CJEU has established similar criteria for interference with the right to property.[63] It has affirmed that the right to property is not absolute: it can be restricted as long as the restriction is consistent with the general objectives pursued by the EU. Most importantly, however, the interference should not be disproportionate or intolerable.[64]

Although the freedom to conduct business under Article 16 of the Charter does not provide for any limitations, it is accepted that this freedom can be restricted on the basis of Article 52(1) of the Charter. It is well established in CJEU case-law that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organization of the market, provided that these restrictions in fact correspond to objectives of general interest pursued by the Union and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights.[65]

The CJEU observed in *Sky Österreich*[66] that the freedom to conduct business is not absolute, but must be viewed in relation to its social function[67] and may be subject to a broad range of interventions on the part of public authorities, which may limit the exercise of economic activity in the public interest.[68] Pursuant to Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognized by the Charter must be: a) provided for by law and respect the essence of those rights and freedoms, b) in compliance with the principle of proportionality, c) necessary, and actually meet the objectives of general interest pursued by the EU or the need to protect the rights and freedoms of others. Thus, any such interference in the implementation of this freedom with regard to the establishment or performance of business activities, either by the EU or by Member States acting within the scope of EU law, must be justified and proportionate, and in light of an objective recognized as legitimate under EU law.[69] The proportionality requirement entails that measures adopted do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question. When there is a choice between several appropriate measures, the least onerous ought to succeed, and the disadvantages caused must not be dispropor-

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[61] Judgement of 6 March 1958, BverfG 596/56.

[62] Ruth Keating and Duncan Sinclair, 'Coronavirus legislation and interference with economic interests: A1P1 as enforceable under the Human Rights Act 1998' (*Thomson Reuters Practical Law*) <https://uk.practicallaw.thomsonreuters.com/w-025-5713?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&firstPage=true> accessed 14 December 2020.

[63] Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* [2000] ECR I-08419; Case C-74/99 *The Queen v Secretary of State for Health and Others* [2000] ECR I-08599, Opinion of AG Fennelly, para 147. For the proportionality principle see: Joined Cases C-402/05 and 415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351, para 356; Phillip Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* (Hart 2014) 199.

[64] Case C-265/87 *Hermann Schräder HS Kraftfutter GmbH & Co KG v Hauptzollamt Gronau* [1989] ECR I-02237, para 15.

[65] Case C-292/97 *Kjell Karlsson and Others* [2000] ECR I-02737, para 45.

[66] Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECLI:EU:C:2013:28.

[67] See, to that effect, Joined Cases C-184/02 and 223/02 *Kingdom of Spain and Republic of Finland v European Parliament and Council of the European Union* [2004] ECR I-7789, paras 51–52; Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* [2012] ECLI:EU:C:2012:526, para 54 and the case-law cited.

[68] Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECLI:EU:C:2013:28, para 46.

[69] Gill-Pedro (n 5) 123.

tionate to the aims pursued.[70] As Scarcello concludes, the debate on Article 52(1) is ultimately a debate on the core of EU law, one which exposes the deepest ethical commitments of commentators. However, these cannot prevail over descriptive accuracy if scholarship is to fulfil its main function. Moreover, the fear of balancing, and of its potential to revitalize values, might turn out to be misplaced: balancing does not necessarily mean immoral reasoning.[71] Alexy states: '[i]f the absolute principle guarantees individual rights, then its legal illimitability leads to the conclusion that when the right it protects of one person conflicts with the similar rights of other individuals, the latter must give way, which is inconsistent'.[72]

The main problem of constitutional rights to protection stems from the fact that to protect one side is to interfere with the other. This 'dialectic of protection and interference' gives rise to the notion that there can always be only one correct constitutional solution where both rights—the protective right and the defensive right—have to be optimized according to the rules of proportionality.[73] The ECtHR and the CJEU, in deciding about the legitimacy of restrictions applied to the freedom to conduct business either implicitly through a right to property or explicitly, have recognized a broad margin of discretion that States have to legislate in these cases,[74] in particular, in the context of political and economic transitions.[75] State authorities' assessment should be accepted unless the interference was manifestly unreasonable and imposed an excessive burden on the person concerned.[76] Not only must the measure taken have a legitimate aim, that is, be "in the public interest," but there must also be a reasonable relationship of proportionality between the means employed and the aims sought to be realized. As mentioned earlier, this notion is also known as the "fair balance test" that must be struck between the demands of the general interest of the community and the requirement of the protection of individual fundamental rights. If the person concerned has had to bear 'an individual and excessive burden', this test will fail.[77]

As demonstrated by ECtHR case-law, for applicants who filed complaints against austerity measures of states (e.g., social insurance and wage reduction measures and taxation) in response to financial crises, the States' regulation was often found to comply with the requirements of Article 1 of Protocol 1. The criteria that the Court found to be important were: the temporary nature of such restrictions, whether the measures were taken to offset the consequences of an economic crisis, whether the authorities had the public interest in mind, if a particular measure had been part of a much wider programme, and that the restrictions had not been disproportionate and had not represented a threat to the applicants' livelihood.[78]

On the "public interest" issue in the context of Article 16 of the Charter, the CJEU found in the abovementioned *Sky Österreich* that the EU legislature was entitled to impose limitations on the freedom to conduct business. The Court gave priority to public access to information over contractual freedom; that is, over the freedom to conduct a business. At the national level, the Austrian Constitutional Court (in a similar situation not related to the pandemic) held that the public interest for shops not to operate during the weekend takes precedence over the interest of businesses to perform economic activity.[79] A similar restriction was deemed proportionate by the Constitutional Council in France.[80] However, both these cases concerned limitations on the working hours of shops rather than a total ban on their activities, as was the case during the lockdowns.

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[70] The CJEU has considered that the disadvantages caused must not be disproportionate to the aims pursued, see: Case C-343/09 *Afton Chemical v Secretary of State for Transport* [2010] ECR I-7027; Joined Cases C-581/10 and 629/10 *Nelson and Others v Deutsche Lufthansa AG and TUI Travel plc and Others v Civil Aviation Authority* [2012] ECLI:EU:C:2012:657.

[71] Orlando Scarcello, 'Preserving the "Essence" of Fundamental Rights under Article 52 (1) of the Charter: A Sisyphen Task?' (2020) 16(4) European Constitutional Law Review 647.

[72] Robert Alexy, A *Theory of Constitutional Rights* (Oxford University Press 2010) 62.

[73] Robert Alexy, 'On Constitutional Rights to Protection' (2009) 3(1) Legisprudence 1–17.

[74] Gloria M Alvarez and Metka Potocnik, 'The Battle of the Giants: EU Law, ECHR and the Energy Charter Treaty; the Rematch to Protect Property Rights in Europe' (working paper, submitted in 2019) 14.

[75] *Valkov and Others v Bulgaria* App nos 2033/04 and others (ECtHR, 25 October 2011) para 96.

[76] *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v the United Kingdom* App no 44302/02 (ECtHR, 30 August 2007) para 66.

[77] *James and Others v UK* App no 8793/79 (ECtHR, 11 May 1984) paras 46, 50; *Vékony v Hungary* App no 65681/13 (ECtHR, 13 January 2015) para 33.

[78] *Mockienė v Lithuania* App no 75916/13 (ECtHR, 4 July 2017); *Da Silva Carvalho Rico v Portugal* App no 13341/14 (ECtHR, 1 September 2015); *Savickas and Others v Lithuania* App nos 66365/09 and 5 others (ECtHR, 15 October 2013); *Da Conceição Mateus and Santos Januário v Portugal* App nos 62235/12 and 57725/12 (ECtHR, 8 October 2013); *Koufaki and Adedy v Greece* App nos 57665/12 and 57657/12 (ECtHR, 7 May 2013).

[79] Judgment G66/11 of 14 June 2012 (Austria).

[80] Quoted from FRA (n 12) 34; France, Constitutional Council, Decision No 2010-89 QPC, 21 January 2011, Journal officiel, 22 January 2011, texte no 66, cons 4 and 5, 1387.

In assessing whether restrictions applied during the pandemic by various European states were legitimate, it is important to consider that they varied a lot, from limiting business operations to a certain degree (e.g., only allowing take-away or delivery from restaurants) to a total ban on economic activity (e.g., travel, shops selling non-essential goods or services, theaters, large events). Therefore, the assessment should differ accordingly. In some cases, the essence of the right to operate as such was denied, which could mean the failure to find a balance between the rights. In other cases, certain restrictions could be considered proportionate, as the right to life and health of a large part of the population was at stake and mitigating measures for businesses were undertaken. The subsequent analysis is based upon requirements drawn from the ECHR and the Charter: a) legitimate aim; b) provided by law; c) necessary and proportionate to the objectives sought (balancing test and least onerous alternative).

4.2 Legitimate Aim

While analyzing the aim of COVID-19-related restrictions, it may be observed that the introduction of measures that would halt the spread of a highly contagious infection for the purpose of the protection of public health was legitimately aimed at protecting the common interest. Jovičic argues that '[b]eing a highly infectious disease potentially leading to death, COVID-19 has required the adoption of special measures to contain the virus, such as restrictions on the freedom of movement, liberty and security, the right to work and the right to education'.[81] There is an agreement in the public health sector that isolation is an effective approach in dealing with contagious diseases like COVID-19, which can spread from droplets in the air. However, the effectiveness of mass aggressive quarantine measures is still a matter of debate. It is also argued that compulsory quarantine and extensive travel restrictions may do more harm than good.[82] In assessing the measures applied to reduce the risk of coronavirus to the health of society, the nature of the virus needs to be considered, and state discretion might be broad in such cases as COVID-19.

However, even if the objective was legitimate, the measures undertaken should be proportionate to the objectives sought. Thus, examining the question of "fair balance" includes considerations of the seriousness of the threat posed by the virus, survival, and health of the population on the one hand, and the seriousness of consequences for businesses on the other.

4.3 Compatibility of Restrictions with Other Requirements

The first type of restrictions to be analyzed is the closure of business premises. As the aim was found to be legitimate as discussed in the previous section, other requirements will be verified. With regard to the requirement for restrictions to be introduced on the basis of law, in some of the countries that applied the total ban on certain business activities during the lockdowns, the law did not provide for a legal basis to completely deny this right, but only to limit it;[83] thus, the lawfulness of such restrictions could be questioned. Taking into account the nature of interference, it was evident that due to these restrictions on economic activities, businesses could not operate normally, fulfil their commitments under contracts, or make use of property for business purposes.[84] As businesses could not use their property due to the closure of premises and the ban on the provision of certain services in many countries, the right to property was substantially affected.[85]

For some businesses, such as those that could not trade online or provide services, the interference was at the extreme end of the scale. A closure of premises could in effect equate to the complete closure of a business or an inability to operate commercially.[86] Some authors claim that these could be considered as measures of control over the use of property, or more general state interference into the enjoyment of property,

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[81] Sanja Jovičic, 'COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights' (2021) 21 ERA Forum 545, 550.

[82] Aditya Patel and others, 'Quarantine an effective mode for control of the spread of COVID19? A review' (2020) 9(8) J Family Med Prim Care 3867.

[83] Toma Birmontienė and Jolita Miliuvienė, 'Pandemic challenges for the protection of human rights and freedoms' in Lyra Jakulevičienė and Vytautas Sinkevičius (eds), *Lietuvos teisė 2020: esminiai pokyčiai. I dalis.' COVID-19 pandemijos sprendimai: teisiniai, valdymo ir ekonominiai aspektai* (translation: 'Lithuanian law 2020: substantive changes. Part I. COVID-19 related decisions from the legal, governance and economic perspective') (Mykolo Romerio Universitetas 2020) 47–65.

[84] Legal Briefings, 'COVID-19: pressure points: the right to property (UK)' (*Herbert Smith Freehills,* 22 April 2020) <https://www.herbertsmithfreehills.com/latest-thinking/covid-19-pressure-points-the-right-to-property-uk> accessed 15 December 2020.

[85] Keating and Sinclair (n 62).

[86] ibid.

and accordingly, not violating the right to property.[87] However, it is important to note that in these cases, the interference, although not deprivation of property per se, amounted to an overall denial of the right to use property, and thus the restrictions could be equated to *de facto* expropriation. Therefore, it could only be lawful if appropriately compensated (as will be analyzed in Section 5). At the same time, expropriation implies a permanent denial of the right, or at least denial without a defined term of cancellation of restrictions, while in the case of the current pandemic, this denial was limited in time and was not irreversible. Thus, the owners were aware that such deprivation was temporary. Nevertheless, if a direct parallel between expropriation and COVID-19-related measures affecting business entities (under the current normative framework) could not be drawn, the similarities between the two are obvious, and necessitate a similar approach. In the context of the Charter, a total ban on business activities could be considered a deprivation of the essence of the freedom to conduct business, contrary to Article 16 of the Charter, as the CJEU held in *Nold* that the right may be restricted, but it cannot be denied. Such denial could be considered disproportionate to the objectives sought, especially since alternative measures to reduce risks (such as mask wearing and social distancing) were available. Research indicates that social distancing reduces the number of infected people.[88] However, several aspects should be considered to accept the legitimacy of the measures. Firstly, the unprecedented impact of the pandemic and existing risks, including the high transmissibility rate of SARS-CoV-2, and the fact that there were no developed medicines or vaccines available against the virus in 2020. Secondly, uncertainty as to the spread of the virus and the measures to contain it. Uncertainty was at the forefront during the lockdown of spring 2020, as the methods of transmissibility were not completely understood by scientists, while increased awareness of the virus during the subsequent lockdowns in 2021 has led to less restrictive measures being imposed on businesses (mask requirements, sanitary passports, etc.). In the context of these theoretical considerations, the practice of states demonstrates uneven approaches, which confirms that for some it was possible to introduce alternative measures and not resort to the most extreme restrictions. It could be observed that the scope of restrictions needs to correlate with the situation in the country with regard to the prevalence of COVID-19. In some countries, this was not the case. For instance, in Lithuania, which had fewer than 200 daily new cases in the spring of 2020, restrictions on economic activity were particularly strict (full closure of premises of sports, entertainment, non-essential sales, etc.), and were only later relaxed. On the other hand, in the United Kingdom, more lenient measures had been undertaken from the very beginning, and they were regularly monitored and gradually relaxed;[89] thus, it could be considered that a fair balance was struck between the public interest and the protection of individual rights.[90]

The second type of restrictions was applied on the provision of services (in presence), but businesses could still operate in alternative ways. The impact of this kind of restriction may be lesser, but it was substantial enough to be an interference.[91] For instance, the closure of cafés and restaurants but permission for certain activities (e.g., home delivery) had a significant impact on such businesses. Notwithstanding, a fair balance could be established, as the businesses were allowed to operate subject to certain conditions, which were necessary to ensure that the spread of infection was reduced. Accordingly, although the losses by businesses could have been substantive and some may not have survived during the pandemic without additional support (with direct financial consequences for many individuals), the restrictions were not disproportionate.[92] The arguments for this conclusion could be summarized as follows. Firstly, the economic benefits cannot outweigh the need to protect fundamental rights, such as the right to life or health, as the lack of control over the infection could and did result in the loss of lives, i.e., irreversible harms. Secondly, most states, if not all, applied mitigating measures to businesses to compensate for the losses. Thirdly, although the measures were aimed at protecting the life and health of many individuals, they were applied temporarily. At the same

[87] LexisNexis, 'Coronavirus (COVID-19), A1P1 and compensation under the European Convention on Human Rights' (*Twenty Essex*, 8 April 2020) <https://twentyessex.com/wp-content/uploads/2020/04/A1P1-and-COVID-19-GN-AP-April-2020.pdf> accessed 15 December 2020.

[88] Dos Santos and others (n 38).

[89] Keating and Sinclair (n 62).

[90] ibid.

[91] Legal Briefings (n 84).

[92] The CJEU has considered that the disadvantages caused must not be disproportionate to the aims pursued, see: Case C-343/09 *Afton Chemical v Secretary of State for Transport* [2010] ECR I-7027, para 45 and Joined Cases C-581/10 and 629/10 *Nelson and Others v Deutsche Lufthansa AG and TUI Travel plc and Others v Civil Aviation Authority* [2012] ECLI:EU:C:2012:657, para 71 and the case-law cited.

time, this general conclusion is without prejudice to the situations where an opposite result of the assessment could be reached (restrictions could be considered disproportionate).

The third type of restriction that was used during the pandemic was a combination of various measures to mitigate the risks of infection. These measures were applied during the second and third waves and included social distancing, wearing of masks, vaccination, sanitary passports, and others. At the time of writing this contribution, their effects on businesses are still not clear, and so they are excluded from evaluation in this article.

To sum up, the restrictions applied to limit or prohibit economic activity amounted to an interference in the right to property and freedom to conduct business, but such interference could be justified either because it was not disproportionate, or by virtue of compensation paid to those businesses for whom this interference could be equated to expropriation.

5 The Role of Compensatory Measures

The taking of property without the payment of a reasonable amount based on its value would normally constitute a disproportionate interference, which could not be considered justifiable under Article 1 of Protocol 1 of the ECHR.[93] Based on this, Nyamutata concludes that if states chose to arbitrarily deprive shareholders of their companies during COVID-19, in the public interest, such measures would be regarded as having a legitimate aim, and would be acceptable in a democratic society as long as fair compensation was paid.[94] However, in the case of COVID-19 measures, when property was not taken away, but the right to use it was constrained or completely denied, the question may be raised if the same requirement of compensation is required for this interference to be lawful, or if different rules should be applied. In addition, as many Governments applied compensatory measures in order to mitigate the negative consequences encountered as a result of restrictions imposed on the freedom to conduct business, could these measures be considered as proper 'compensation' for substantive restrictions on the right to use the property, or do they play a different role? This included financial support for businesses and individual service providers, e.g., tax deferrals, compensation of rental costs, subsidies for SMEs, and downtime subsidies.

For the freedom to conduct business to be effective, it cannot be separated from the right to an effective remedy, including effective enforcement. The possibility of enforcing this fundamental freedom is central to making it a reality.[95] If we conclude that a state's policy power to regulate the internal market, freedom of operating business, and the possession of property is extensive, we have to answer whether the state has an obligation to compensate business owners for their losses that were caused by these restrictions (especially in cases where a fair balance between the general interest of protecting public health and economic activities must be found). One way for the property owner and business operator of "non-essential" companies is to claim compensation because of *de facto* expropriation. Nyamutata agrees that the consolation only lies in the right to reasonable compensation.[96] Guerra-Pujol, while making a similar conclusion, states that if an economic shutdown is indeed the most effective method of saving lives during a pandemic (by requiring most people to stay at home and most businesses to shut down), then everyone who is inconvenienced by the shutdown (rich or poor, small business or large) must be compensated for this inconvenience as soon as possible by the governmental entities that ordered the shutdown.[97] Here the question of whether there is a legal ground for such compensation is raised. The ECtHR stated that where an individual's property has been expropriated, there should be a procedure ensuring an overall assessment of the consequences of the expropriation, including the award of an amount of compensation in line with the value of the expropriated property, the determination of the persons entitled to compensation, and the settlement of any other issues relating to the expropriation. Where an issue of general interest is at stake, it is necessary that the public authorities act in good time and in an appropriate and consistent manner.[98] According to the interpretation of Article 1 of Protocol 1 of the ECHR, the ECtHR has considered that in the case of *de facto* expropriation, compensation is always required regardless of the public purpose of the measure, although not explicitly mentioned in the Article. The public purpose might, in some circumstances, reduce

[93] *Lithgow and Others v UK* App nos 9006/80 and others (ECtHR, 8 July 1986) para 121.

[94] Nyamutata (n 3) 97.

[95] FRA (n 12).

[96] Nyamutata (n 3) 62–98.

[97] F E Guerra-Pujol, 'Lockdowns as Takings' (21 July 2021) 29 <http://doi.org/10.2139/ssrn.3567003> accessed 12 November 2021.

[98] *Kostov and others v Bulgaria* App nos 66581/12 and 25054/15 (ECtHR, 14 May 2020) para 63.

the amount of compensation that the state has to pay, but some amount of compensation is still required.[99] It could be discussed that only in a case of a national emergency could the non-payment of compensation be justified. Secondly, where the state interference does not amount to *de facto* expropriation, but is seen as control of the use of the property, the amount of compensation paid is considered an important factor when determining if the measure was proportional.[100] For instance, the ECtHR, while solving a case concerning taxation during the economic crisis, i.e., severance pay at an overall rate of 52%, found that state regulation determining the tax rate had been disproportionate to the legitimate aim pursued. The Court reached this conclusion despite the wide discretion that the state enjoyed in matters of taxation and even assuming that the measure served the interest of the state budget at a time of economic hardship. The Court noted that the rate had considerably exceeded the one applied to all other revenues; that the applicant had suffered a substantial loss of income as a result of her unemployment; and that the tax had been directly deducted by the employer from the severance pay without any individualized assessment of her situation and had been imposed on the income related to activities occurring prior to the material tax year.[101] In another case concerning the imposition of taxes on high income, the Court found that the decisions taken by the state had not gone beyond the limit of the discretion allowed to authorities in questions of taxation and had not upset the balance between the general interest and the protection of the companies' individual rights.[102]

In the EU context, proportionality between the measure and the policy objectives is the core standard to establish interference with an individual's property right. This has created ambiguity and uncertainty for the property owner, as the level of compensation might vary in accordance with this "proportionality test". Equally, there is no clear approach to the calculation of compensation. Moreover, the CJEU has freely spoken about the EU fundamental right to property as one which does not necessarily include a general right of full compensation.[103] This approach is supported by the priority given to the proportionality test and the measure implemented aiming to preserve a legitimate public interest, which may call for a lesser reimbursement than the full market value.[104] Some authors claim that restrictions of economic activities during the pandemic are likely to be more justified when the executive power undertakes additional economic protection measures.[105]

The ECtHR in its case law repeats that the amount of compensation for expropriation does not have to be full in all circumstances. In some cases, when the other values being protected by taking the property from the owner are greater, such as measures of economic reform or measures designed to achieve greater social justice or other exceptional circumstances, the compensation may call for less than reimbursement of the full market value. On the other hand, the Court states that partial compensation will be just if it does not impose a disproportionate burden on the applicant.[106] In *Lithgow and Others,* the Court examined an issue relating to the nationalization of companies engaged in the aircraft and shipbuilding industries, as part of the economic, social and political programme run by the party that had won the elections, which was intended to provide a sounder organizational and economic footing and bring to the authorities a desirably greater degree of public control and accountability. The Court held that, in this context, the arrangements for compensating the shareholders concerned were fair and not unreasonable compared to the full value of the shares.[107] Thus, if we consider that states have engaged in providing extensive support to businesses to mitigate the negative consequences of the lockdown, even if such support does not compensate for all losses, then it could, in certain respects, be considered as compensation for extensive interference and denial of the freedom to conduct business.

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[99] Steve P Calandrillo, 'Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?' (2003) 64 Ohio State Law Journal 451.

[100] *Platakou v Greece* App no 38460/97 (ECtHR, 5 September 2001) para 55; *The Holy Monasteries v Greece* App nos 13092/87 and 13984/88 (ECtHR, 9 December 1994) para 71.

[101] *NKM v Hungary* App no 66529/11 (ECtHR, 14 May 2013) paras 66–74.

[102] *P Plaisier BV v the Netherlands* App nos 46184/16 and others (ECtHR, 14 November 2017) paras 77–97.

[103] Case C-347/03 *ERSA v Ministero delle Politiche Agricole e Forestali* [2005] ECR I-03785.

[104] Strik (n 63) 203.

[105] Sarah Joseph, 'COVID 19 and Human Rights: Past, Present and Future' (Journal of International Humanitarian Legal Studies, Forthcoming; Griffith University Law School Research Paper No 20-3, 2020) 6 <Https://Ssrn.Com/Abstract=3574491> accessed 15 November 2020.

[106] *James and Others v UK* App no 8793/79 (ECtHR, 11 May 1984) para 54; *Papachelas v Greece* App no 31423/96 (ECtHR, 25 March 1999) para 48; *The Holy Monasteries v Greece* App nos 13092/87 and 13984/88 (ECtHR, 9 December 1994) paras 70–71; *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v the United Kingdom* App no 44302/02 (ECtHR, 30 August 2007) para 54; *Urbárska Obec Trenčianske Biskupice v Slovakia* App no 74258/01 (ECtHR, 27 November 2007) para 115.

[107] *Lithgow and Others v UK* App nos 9006/80 and others (ECtHR, 8 July 1986).

6 Conclusions

Neither the ECtHR nor the CJEU have had an opportunity so far to adjudicate on such an extraordinary situation as the pandemic, but it can be inferred from their case-law that some states' policy decisions regulating property rights, and particularly different types of possessions and other proprietary interests of business entities and individuals restricted during the quarantine might be protected under Article 1 of Protocol No. 1 of the ECHR and Article 17 of the Charter (for the latter, as far as it relates to the measures undertaken by the Member States while implementing European Union law).

Accordingly, in cases of a full ban on economic activities, thus, denial of the right to use property and freedom to conduct business, the same rules should be applied *inter alia* to those measures related to COVID-19 as applicable under Article 1 of Protocol No. 1 of the ECHR, i.e., if not full, then at least partial compensation should be provided. Where the state interference did not amount to *de facto* expropriation (the right was not denied and was just restricted to some extent), but was seen as control of the use of property, the amount of compensation paid could be considered an important factor when determining if the measure was proportional to the objectives sought. The current normative framework does not fully reflect the needs during the pandemic in case of extreme restrictions denying the freedom to conduct business, as an element of permanence is missing. However, this normative framework could be used as a basis for developing adapted legal approaches that would ensure an appropriate balance between the right to health and the freedom to conduct business.

Despite numerous substantial negative effects on businesses in Europe as a result of COVID-19-related restrictions, a general conclusion can be made that, in principle, a fair balance could be established between the objectives to protect public health and restrictions on economic activities (where they did not amount to a full deprivation of the freedom). In considering this, it is important that: a) the majority of businesses were allowed to operate subject to certain conditions, which were necessary to ensure a reduction of the spread of infection; b) economic benefits cannot outweigh the need to protect fundamental rights, such as the right to life or health; c) mitigating measures to businesses to compensate for losses were applied; and d) restrictions were of a temporary nature.

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Competing Interests

The authors have no competing interests to declare.

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