

FREEDOMS

# Freedom to conduct a business: exploring the dimensions of a fundamental right



EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS



This report addresses matters related to the freedom to conduct a business (Article 16) falling under Title II 'Freedoms' of the Charter of Fundamental Rights of the European Union.

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FRA – European Union Agency for Fundamental Rights  
Schwarzenbergplatz 11 – 1040 Vienna – Austria  
Tel. +43 158030-0 – Fax +43 158030-699  
Email: [info@fra.europa.eu](mailto:info@fra.europa.eu) – [fra.europa.eu](http://fra.europa.eu)

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# **Freedom to conduct a business: exploring the dimensions of a fundamental right**

## Charter of Fundamental Rights of the European Union - Article 16 in all EU languages

EU language	Article 16
BG	Свобода на стопанската инициатива
CS	Svoboda podnikání
DA	Frihed til at oprette og drive egen virksomhed
DE	Unternehmerische Freiheit
ET	Ettevõtlusvabadus
EL	Επιχειρηματική ελευθερία
EN	Freedom to conduct a business
ES	Libertad de empresa
FR	Liberté d'entreprise
GA	Saoirse chun gnó a sheoladh
HR	Sloboda poduzetništva
IT	Libertà d'impresa
LV	Darījumdarbības brīvība
LT	Laisvė užsiimti verslu
HU	A vállalkozás szabadsága
MT	Il-libertà ta' l-intrapriża
NL	De vrijheid van ondernemerschap
PL	Wolność prowadzenia działalności gospodarczej
PT	Liberdade de empresa
RO	Libertatea de a desfășura o activitate comercială
SK	Sloboda podnikania
SL	Svoboda gospodarske pobude
FI	Elinkeinovapaus
SV	Näringsfrihet



# Foreword

Fundamental rights are not peripheral to the European Union (EU) but at the heart of an integrated Europe. They are enshrined in the Charter of Fundamental Rights of the European Union, which has now been in effect for five years and establish minimum guarantees in the area of EU law. In addition, Articles 8 and 10 of the Treaty on the Functioning of the European Union (TFEU) stipulate the EU must ensure equality between men and women, and combat discrimination based on ethnic origin, disability, or any other ground. The EU also has cross-cutting fundamental rights obligations in areas such as data protection, which is covered by Article 16 TFEU.

This report seeks to explain and analyse the enabling characteristics of fundamental rights. It does so by looking at one particular right in the Charter of Fundamental Rights of the EU – Article 16 on the freedom to conduct a business. Article 16 is one of the less traditional rights contained in the Charter. Nonetheless, it introduces a concept crucial to modern society. The freedom to conduct a business is about enabling individual aspirations to flourish, about encouraging entrepreneurship and innovation, and about social and economic development. As many parts of the EU still struggle to overcome the effects of the economic crisis, promoting economic growth is clearly essential. At the same time, this can be achieved within the broader framework of respect for fundamental rights.

In the same vein, the new European Commission, which took up its work in late 2014, has prioritised jobs, growth and investment, with an emphasis on creating a good regulatory environment and promoting a climate of entrepreneurship. This was subsequently incorporated into the European Commission's 2015 Work Programme as one of the four objectives of its Jobs, Growth and Investment Package.

In addition, in its Conclusions of 26–27 June 2014, 'Strategic Agenda for the Union in Times of Change', the European Council focused on five priorities, including "stronger economies with more jobs", "societies enabled to empower and protect" and a "trusted area of fundamental freedoms". This underlines the need for economic growth alongside respect for fundamental rights. Specific activities relate to issues such as "promot[ing] a climate of entrepreneurship and job creation".

It is not least in this context that fundamental rights should be considered an enabling factor that must be placed firmly at the centre of the EU's activities. The freedom to conduct a business is a fundamental right, and as such is first and foremost justifiable for that very reason – for being a right. The concept of rights, however, can also be empowering, since people, or companies in this case, may claim that their fundamental right has been unduly restricted. In this respect, freedom to conduct a business is a complex right, as opinions differ concerning the line to draw between the freedom to conduct a business and other rights, such as data protection or the right to health. This report seeks to clarify some of the arguments on both sides, enabling an informed debate on this little-used Article of the Charter.

**Constantinos Manolopoulos**

*Director a.i.*

# Country codes

Code	EU Member State
AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HR	Croatia
HU	Hungary
IE	Ireland
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom



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# Introduction

The EU faces many challenges at present, not least concerning its economic future. Following the economic crisis, living standards in many places around the EU have fallen, while unemployment has risen and poverty – or fear of it – has increased. This report seeks to demonstrate that the fulfilment of fundamental rights can help to improve the situation and achieve the EU’s 2020 goals set out in its strategy for growth.<sup>1</sup>

Fundamental rights<sup>2</sup> are traditionally understood to be a means of ensuring the state does not restrict people’s way of life in an unnecessary or disproportionate way. However, human rights legislation is not just restrictive in its nature but also enabling. One of the 50 substantive articles of the Charter of Fundamental Rights of the European Union (the Charter) is Article 16: “freedom to conduct a business”.<sup>3</sup> This report explores how the EU and its Member States conceive and apply this right. To this end, it examines both the obstacles to the enjoyment of this right and outlines promising practices around the EU that could subsequently be adapted for use in other countries.

The essence of the freedom to conduct a business is to enable individual aspirations and expression to flourish, and to promote entrepreneurship and innovation, which in turn is indispensable for sustainable social and economic development. Respect for the freedom to conduct a business can help to reduce unemployment, spur entrepreneurship and innovation, and support inclusive growth, as set out in the ‘Europe 2020’ strategy, by:

- ensuring proportionate demands on companies that result from competing priorities (such as data retention to fight crime);
- granting ‘the freedom to conduct a business’ constitutional status, by putting the right on a par with other rights and enabling it to serve as a counterweight against them;
- removing unjustified restrictions – intended or not – for all people legally entitled to ‘conduct a business’ and bringing in new perspectives and ideas (such as those of women or immigrant entrepreneurs);

- encouraging promotional schemes for underrepresented groups with a potential to contribute to entrepreneurship and innovation (in addition to women or immigrants, also youth, the elderly, people with disabilities and Roma);
- promoting simplified mechanisms for setting up and operating businesses (such as through online one-stop-shops, low-threshold dispute settlement and obstacle-removing mechanisms).

The freedom to conduct a business formulated explicitly as it has been in Article 16 of the Charter is a relatively new right. This report explains that the content of the right broadly corresponds to elements and applications of more traditional rights such as the right to work or the right to property. It also explores the meaning and scope of Article 16 of the Charter, both from an EU perspective and in the form in which it is expressed in the constitutional or other legal documents of the EU’s Member States.

The analysis is divided into three chapters. The first examines the meaning of the freedom to conduct a business and the EU policy context. The second addresses its scope under EU law, as well as under national law in EU Member States. Finally, the third chapter explores the freedom to conduct a business in practice in relation to specific population groups, as well as how access to justice is achieved in relation to the freedom to conduct a business. Additional information can be found in the annexes, notably comparative data from a range of sources on conducting a business.

This report can be read alongside another FRA report, published in June 2015, on *Severe labour exploitation: workers moving within or into the European Union*.<sup>4</sup> It underlines how certain employers in sectors of the economy – such as agriculture, construction, accommodation and food service activities – can serve to undermine core fundamental rights in the workplace if their businesses are not underpinned by respect for and implementation of fundamental rights. At the same time, as severe labour exploitation can seriously affect workers’ rights, it also impacts negatively on legitimate business interests that uphold the law and treat workers in compliance with fundamental rights. This situation creates an unfair playing field with respect to business and should be taken into consideration within the broader framework of law and policy that seeks to promote freedom to conduct a business.

1 See, for example, Council of Europe, Council of Europe Commissioner for Human Rights (2013).

2 Fundamental rights is the term used for the ‘constitutional’ rights of the EU. They correspond closely to what in international law is referred to as human rights.

3 For example, in French *Liberté d’entreprise* and in German *Unternehmerische Freiheit*; for all other EU languages, see the table on the inside front cover.

4 FRA (2015a).

The research for this report was initiated by a formal request to FRA from the European Commission, which asked for a study into the existence and interpretation of the freedom to conduct a business. FRA commenced in-house research in 2012 and contracted research on the 28 EU Member States in the first half of 2013. In the second half of 2013, a second round of more focused research was carried out in 13 Member States, selected because relevant case law or promising practices warranted more in-depth investigation. FRA took particular care to undertake research in those Member States where political or social developments suggested that

freedom to conduct a business was at risk for specific groups, for example women or immigrants. Another topic of attention was access to justice in this context. The 13 Member States in which research was conducted are: Belgium, Estonia, France, Greece, Ireland, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Spain, and the United Kingdom. The research included interviews with representatives of a diverse range of business interests, including entrepreneurs, representatives of specific groups and/or people working in the area of justice dealing with business issues (see [Chapter 3](#)).



# 1

## What do fundamental rights have to do with business?



### 1.1. Freedom to conduct a business – meaning and scope

The Charter of Fundamental Rights of the European Union is divided into six ‘titles’ or chapters.<sup>5</sup> The 14 rights under ‘Freedom’ include rights commonly found in international human rights law instruments, such as liberty and security, privacy, and freedom of expression. The title also contains the right to work (Article 15), which comprises the right to freely choose an occupation, to establishment, and for authorised third country nationals working in an EU Member States to benefit from working conditions equivalent to those of EU citizens.<sup>6</sup> Added to this is Article 16, the ‘freedom to conduct a business’.<sup>7</sup> The provision is brief and formulated in a fairly vague manner: “The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.” Through the close connection between property and business, Article 16 is also linked to the right to property (Article 17).

Article 16 of the Charter has been subject to some interpretation and commentary.<sup>8</sup> The Court of Justice of the European Union (CJEU) started to develop elements of the right as early as the mid-1970s – long before the Charter came into existence in 2000 – on the basis of rights stemming from the common constitutional traditions as well as the EU common market freedoms, including the freedom of movement.<sup>9</sup> 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 (see Section 2.3. for details).

With the Charter becoming legally binding in 2009, the right has come to occupy a more prominent role. It is being used more forcefully to balance other rights and underpin proportionality tests of various intrusive measures. In recent years, the CJEU has for instance ruled that freedom to conduct a business trumps disproportionate obligations for businesses to retain data,<sup>10</sup> but is secondary to consumers’ right to health.<sup>11</sup> The CJEU has even used Article 16 to balance workers’ rights (see textbox on CJEU case law). The number of judgments in

5 On details of the Charter, see FRA’s Charterpedia: <http://fra.europa.eu/en/charterpedia>.

6 United Nations (UN) (1966), Art. 6.

7 See e.g. Court of Justice of the European Union (CJEU), C-426/11, *Alemo-Herron and Others v. Parkwood Leisure Ltd*, 18 July 2013, para. 36 which presents Article 16 as a counterweight to labour rights (maintained collective bargaining agreements for workers in transfer of undertaking).

8 See the commentary by Dean Spielman from 2006, forming part of the systematic explanations made of all provisions of the Charter by the then existing EU Network of Independent Experts on Fundamental Rights, [http://infoportal.fra.europa.eu/InfoPortal/infobaseShowContent.do?btnCat\\_302&btnCountryBr ead\\_169](http://infoportal.fra.europa.eu/InfoPortal/infobaseShowContent.do?btnCat_302&btnCountryBr ead_169). There are also more academic comments on the provision, such as Braibant, G. (2001); Oliver, P. (2013); Usai, A. (2010), pp. 1867–1888; Peers, S., Herve, T., Kenner, J. and Ward, A. (eds.) (2014), pp. 437–463. See also the site of the European Parliament dedicated to Article 16, [www.europarl.europa.eu/compar/libe/elsj/charter/art16/default\\_en.htm](http://www.europarl.europa.eu/compar/libe/elsj/charter/art16/default_en.htm).

9 European Union (2007), p. 17.

10 CJEU, C-70/10, *Scarlet Extended SA*, 24 November 2011; CJEU, C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, 16 February 2012.

11 CJEU, C-544/10, *Deutsches Weintor eG v. Land Rheinland-Pfalz*, 6 September 2012.

which it referred to Article 16 increased from just two in 2011 to nine in 2013 (see Section 2.2.).

### CJEU on freedom to conduct a business: a modern supplement to workers' rights

The relationship between the freedom to conduct a business and the rights of employees is complex, which is partly mirrored by the different approaches to labour market flexibility in the legislation of individual EU Member States. One example is the treatment of employees as 'independent contractors' which is legal in some Member States (such as the 'zero-hour contracts' in the United Kingdom) but has been outlawed in others (such as the 'Svarc system' in the Czech Republic) due to its adverse effects in the area of social security and its distortion of balanced employment relations.

In the case of *Alemo-Herron and Others v. Parkwood Leisure Ltd.*, following the request made by the Supreme Court of the United Kingdom, the CJEU ruled that Article 16 must be applied in a way that balances the rights of employees with the employer's freedom to conduct a business. The context of this ruling was an EU directive approximating legislation on the rights of employees. The court held that Member States are precluded from applying "dynamic clauses" which refer to collective agreements negotiated and adopted after the date of transfer unless the new employer is able to participate in the negotiation process of such collective agreements. It is not possible for "[...] Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee's freedom to conduct a business [...]."

CJEU, C-426-11, *Alemo-Herron and Others v. Parkwood Leisure Ltd.*, 18 July 2013, paras. 36-37

There are no explicit parallels to Article 16 in international human rights law instruments, even though the European Court of Human Rights (ECtHR) has recognised elements of the right in the European Convention on Human Rights (ECHR), particularly those deriving from the freedom to enjoy the right to property (Article 1 of the Protocol No. 1 to the ECHR (the right to enjoy one's property))<sup>12</sup> and those related to the freedom of expression (Article 10 of the ECHR, freedom of 'commercial' expression).<sup>13</sup> The Council of Europe's sister-instrument to the ECHR, the European Social Charter (ESC), guarantees the right to work (Article 1) and more explicitly the right to earn one's "living in an occupation freely

entered upon" (Article 1 (2)).<sup>14</sup> This provision could be used under certain circumstances related to the freedom to conduct a business,<sup>15</sup> in particular in cases where there are disproportionate obstacles to setting up a business in order to make a profit.

At the level of the United Nations (UN), any 'freedom to conduct a business-related' complaint would have to be framed from the perspective of the right to pursue a chosen occupation, guaranteed by the International Covenant on Economic, Social and Cultural Rights (ICESCR) in Article 6 (1) (the right to work). The expert committee monitoring the implementation of the ICESCR interprets this provision as including "all forms of work, whether independent work or dependant wage-paid work".<sup>16</sup> It has repeatedly urged states to respect and protect self-employment, recommending such measures as increased incentives and subsidies for private businesses,<sup>17</sup> support for setting up microbusinesses and vocational training,<sup>18</sup> as well as assistance to marginalised groups for opening their own businesses.<sup>19</sup> An example from a state report submitted under the ICESCR on Article 6 makes apparent the link between the right and the freedom to conduct a business.

### Monitoring by the UN Committee on Economic, Social and Cultural Rights: States microeconomic policies

*"The Government of Canada is encouraging greater demand for labour through a wide range of microeconomic policy actions. These include: improving access to investment capital, particularly for small businesses and exporters; improving access to business information; and promoting science and technology and the growth of high-technology industries. Steps are also being taken to make it easier for businesses to operate by, for example, reducing the paper and regulatory burden, and by setting or updating the policy and regulatory frameworks for emerging or key sectors to support their future development. In addition, the payroll tax levied for employment insurance has been reduced and the 1996 budget launched a review of tax laws that most affect job creation, including corporate income, capital and payroll taxes".*

*Third periodic report submitted by Canada in accordance with Articles 16 and 17 of the ICESCR, UN doc. E/1994/104/Add.17, 10 December 1998, para. 121*

12 ECtHR, *Smith Kline and French Laboratories v. the Netherlands*, No. 12633/87, 4 October 1990.

13 ECtHR, *Krone Verlag GmbH & Co. KG v. Austria (No. 3)*, No. 39069/97, 11 December 2003; ECtHR, *Casado Coca v. Spain*, No. 15450/89, judgment of 24 February 1994; ECtHR, *Barthold v. Germany*, No. 8734/79, 25 March 1985. See also ECtHR, *Anheuser Busch v. Portugal*, No. 73049/01, 11 January 2007, para. 72; ECtHR, *Ghigo v. Malta*, No. 31122/05, 26 September 2006, para. 50.

14 For the full convention text, see <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>.

15 Such a case would have to be started by a collective complaint being lodged before the monitoring committee by a series of actors against a state having accepted the procedure. For more details, see [www.coe.int/t/dghl/monitoring/socialcharter/presentation/aboutcharter\\_EN.asp#Une\\_proc%C3%A9dure\\_de\\_%C3%A9clamations\\_collectives](http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/aboutcharter_EN.asp#Une_proc%C3%A9dure_de_%C3%A9clamations_collectives).

16 UN, Committee on Economic, Social and Cultural Rights (CESCR) (2006), para. 6.

17 UN, CESCR (2008a), para. 17.

18 UN, CESCR (2012), para. 14(c).

19 UN, CESCR (2008b), para. 37.

Specifically for persons with disabilities, the UN Convention on the Rights of Persons with Disabilities (CRPD), Article 27, stipulates that “[w]ork and employment” must be accessible to all on an equal basis. The Article also specifies that states shall (f) “[p]romote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one’s own business”. The CRPD monitoring body in several of its concluding observations encouraged states to develop self-employment programmes for persons with disabilities to promote their inclusion in the labour market.<sup>20</sup>

Until now, no relevant cases have been lodged under the CRPD or the ICESCR optional protocols that allows for such individual complaints to be brought to the relevant monitoring body.

To whom and under which circumstances is the freedom to conduct a business applicable? The starting point of Article 16 appears to be that there are no restrictions: the right applies to natural but also legal persons – for instance companies.<sup>21</sup> However, as a consequence of the right being commonly measured against a scale of proportionality, it would be reasonable to expect that individuals and smaller businesses would in practice benefit the most, as even small infringements of the right are likely to have a relatively larger impact on them.<sup>22</sup>

What does it mean to ‘conduct a business’? In principle, it would include any legitimate form of profit-making activity conducted by one or several individuals ‘in company’. The right seems to encompass the full ‘life-cycle’ of such activities, for instance from setting

up a company,<sup>23</sup> through operating one, to insolvency or closing a business.<sup>24</sup>

It should be stressed that like all rights of the Charter, it applies only insofar as it relates to actions by EU institutions, or when Member States are acting within the scope of EU law. Consequently, the freedom to conduct a business is not applicable ‘across the board’. Still, the CJEU has interpreted ‘implementation by EU Member States’ fairly broadly, and the internal market is certainly a core element of the responsibilities of the EU. The implications of the freedom to conduct a business should therefore not be underestimated. The examples provided in this report relate to both obstacles and promising practices linked to the freedom to conduct a business, and they have not been selected to necessarily fall within the remit of EU law.

A further clarification is needed in relation to the right of establishment. The TFEU includes this right under Title IV (“free movement of persons, services and capital”), Chapter 2. The chapter contains seven provisions (Articles 49–55), where Article 49 is the portal provision while the remaining one provides for the delimitations of EU action and definitions in relation to the right of establishment. Article 49 reads:

*“[R]estrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.*

*Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms [...], under the conditions laid down for its own nationals by the law of the country where such establishment is effected [...].”*

20 UN, Committee on the Rights of Persons with Disabilities (CRPD) (2012a), para. 41; UN, CRPD (2012b), para. 44.

21 For the scope of ‘company’, see *Consolidated version of the Treaty on the Functioning of the European Union*, OJ C 326/12, 26 October 2012, Article 54 (2), p. 47–390, according to which “‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making”.

22 European Commission (2003). Article 2 of this Recommendation defines SMEs as “enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding €50 million, and/or an annual balance sheet total not exceeding €43 million”, and a small enterprise as one “which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed €10 million.”

23 Article 15 (2) of the Charter includes “the right of establishment” but relates specifically to EU citizens doing so “in any Member State”. A “freedom of establishment”, as an EU common market principle, is also explicit in the Treaty on the Functioning of the European Union, Article 49 (see CJEU, Case C-244/11, *European Commission v. Hellenic Republic*, 8 November 2012); Article 45 deals with non-discrimination on the basis of nationality of workers within the EU.

24 See European Commission (2014a). Reference is made to Article 16 of the Charter insofar as “(19) Court confirmation of a restructuring plan is necessary to ensure that the reduction of the rights of creditors is proportionate to the benefits of the restructuring and that creditors have access to an effective remedy, in full compliance with the freedom to conduct a business and the right to property as enshrined in the Charter of Fundamental Rights of the European Union. The court should therefore reject a plan where it is likely that the attempted restructuring reduces the rights of dissenting creditors below what they could reasonably expect to receive in the absence of a restructuring of the debtor’s business.”

Chapter 3 of Title IV deals with “Services”, with Article 56 providing that “restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended”.

These aspects of free movement of persons and services (and any related companies or firms)<sup>25</sup> are applicable at all times and to all persons on an equal basis, irrespective of the EU Member State in which they are active or trying to become active. The freedom to conduct a business, as described in Article 16 of the Charter, adds to this, by providing for an ‘enhanced’ protection for businesses to conduct their affairs, compared to the narrower area of EU action or that of Member States acting in the area of EU law. Importantly, an important part of this enhanced protection is that it is not limited to EU citizens, but applies to any individual, as well as companies. The freedom to conduct a business also does not – in contrast to the TFEU-provisions – hinge on a cross-border situation.

Leaving aside the specific fundamental right of the freedom to conduct a business, the area the right seeks to regulate is closely related to how easy it is to do business. There have been various attempts to measure the ease of doing business and rank the relative complexity of establishing and running a company, such as the World Bank’s ‘Doing Business – measuring business regulations’.<sup>26</sup> Even though the reliability and relevance of such schemes are regularly criticised, they do at least give a crude picture of comparative interest, and the elements of the index provide insights that are more telling than the composite index and its simple (albeit attractive) ranking. The World Bank’s ease of doing business index, for instance, ranks economies from one (highest) to 189 (lowest). A high ranking indicates a regulatory environment conducive to business operation. The rankings cover a total of 10 topics: starting a business; dealing with construction permits; getting electricity; registering property; getting credit; protecting investors; paying taxes; trading across borders; enforcing

contracts; resolving insolvency.<sup>27</sup> For a detailed overview, including tabularised information on EU Member States, see Annexes 2 and 3.

## 1.2. European Union policy context

The freedom to conduct a business is relevant to a range of EU policies related to the Single Market, economic growth, and entrepreneurship. The need to provide a stable economic environment conducive to the development of business is emphasised throughout a wide range of EU instruments, including the EU’s growth strategy ‘Europe 2020’ and the ‘Stockholm Programme’ – the five year (2010–2014) EU strategic guidance for justice and home affairs.<sup>28</sup> Listed below are some of the key current policies and other initiatives taken at EU level, mainly aimed at supply-side economics – spurring the economy by simplifying for entrepreneurship and business to operate.

### Promising practice

#### EU cohesion policy: Ombudsman investigates protection of fundamental rights

The European Ombudsman has opened an investigation on her own initiative into the respect for fundamental rights in the EU’s cohesion policy. The Ombudsman has received many complaints in this area, for example about problems small businesses face when accessing EU funds, or from applicants for EU projects who allege discrimination in the way EU funds are allocated or applied. The Ombudsman’s investigation focuses on the Commission’s role in ensuring that EU funding is used in ways that comply with the Charter of Fundamental Rights and that do not discriminate on the grounds of age, gender, ethnicity or disability, for instance.

For more information, see [www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54419/html.bookmark](http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54419/html.bookmark)

Europe 2020, the EU’s overall economic strategy, was launched in 2010 to promote smart, sustainable and inclusive growth. It was conceived as the EU’s response both to the global economic crisis as well as, more generally, to the various long-term challenges to the competitiveness of Europe’s economy in the global arena, such as globalisation, pressure on natural resources

25 The second paragraph of Article 54 defines companies or firms as “constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.”

26 [www.doingbusiness.org/rankings](http://doingbusiness.org/rankings); see also the explanatory note, <http://doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB14-Chapters/DB14-Ease-of-doing-business-and-distance-to-frontier.pdf>; and the ‘Regional Profile: European Union (EU) 2012’, [www.doingbusiness.org/~media/FPDKM/Doing%20Business/Documents/Profiles/Regional/DB2012/DB12-European-Union.pdf](http://doingbusiness.org/~media/FPDKM/Doing%20Business/Documents/Profiles/Regional/DB2012/DB12-European-Union.pdf).

27 See also World Trade Indicators 2009/10 developed by the World Bank as a wide-ranging database and innovative ranking tool designed to benchmark trade policy and performance: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/TRADE/0,,contentMDK:22421950~pagePK:148956~piPK:216618~theSitePK:239071,00.html>.

28 European Council (2010).

and an ageing population. The ultimate purpose of the measures outlined in the strategy lies in “creating an environment conducive to growth and job creation in the EU, because it is the only way to continue financing our way of life.”<sup>29</sup> To approach this goal and make Europe more competitive, the strategy emphasises the necessity of “moving ahead with structural reforms”.<sup>30</sup>

To this end, the strategy contains several broad “flagship initiatives”. One of them, “An industrial policy for the globalisation era”, aims at improving the business environment, notably for Small and Medium Enterprises (SMEs). Other initiatives that are relevant to the freedom to conduct a business concern calls for further innovation (“Innovation Union”), more digitalisation (“A digital agenda for Europe”) and support for the further development of the concept of ‘flexicurity’ in the labour market, including more labour mobility (“An agenda for new skills and jobs” and “Youth on the move” initiatives).<sup>31</sup>

While developing the strategy, the European Commission adopted in 2013 the Entrepreneurship 2020 Action Plan ‘Reigniting the entrepreneurial spirit in Europe’. The Action Plan sets out a number of measures to be taken at both EU and Member State level to support entrepreneurship in Europe, concentrating on three areas: developing entrepreneurial education and training, creating the right business environment, and establishing role models and reaching out to specific groups. It emphasises the need to stimulate the creation of new companies, especially SMEs, as the key factor in providing new employment opportunities.<sup>32</sup> Among specific measures, the Action Plan envisages more support for micro-financing, facilitating business transfers within the EU, reforming insolvency procedures or further reducing regulatory burden in follow-up of the 2007 Action Programme for Reducing Administrative Burdens in the EU.<sup>33</sup> The Action Plan also calls upon EU Member States to take further steps towards creating a business-friendly environment at the national level, including reducing the time for licensing and other authorisations necessary to start a business activity to one month by the end of 2015, facilitating SMEs’ access to public procurement or setting up ‘one-stop-shops’ for entrepreneurs to bring together all business support services.

<sup>29</sup> European Commission (2013a), p. 8.

<sup>30</sup> *Ibid*, p. 3.

<sup>31</sup> European Commission (2010); see also the Innovation Union Scoreboard, [http://ec.europa.eu/enterprise/policies/innovation/policy/innovation-scoreboard/index\\_en.htm](http://ec.europa.eu/enterprise/policies/innovation/policy/innovation-scoreboard/index_en.htm).

<sup>32</sup> European Commission (2013b), p. 4.

<sup>33</sup> According to the European Commission, on basis of the 2007 Action Programme the EU had adopted measures to reduce regulatory burden worth €30.8 billion in annual savings. *Ibid*, p. 18.

### Promising practice

#### Greek and Italian Presidency priorities: economic growth and job creation

Supporting economic growth and job creation were among the main programme priorities of the Hellenic Presidency of the Council of the EU in the first half of 2014 (alternative sources of financing for businesses, revision of the EU insolvency rules) and of the Italian Presidency in the second half of the year (special attention to SMEs).

*Greece (2013), Programme of the Hellenic Presidency of the Council of the European Union.*

*Italy (2014), Programme of the Italian Presidency of the Council of the European Union.*

Neither the Strategy nor the Action Plan explicitly refer to Article 16 of the Charter on the freedom to conduct a business. However, both instruments clearly link some of the existing obstacles to growth and competitiveness, particularly in terms of regulatory burden, to concepts that are integral to the freedom to conduct a business (see Section 2.2 on CJEU case law regarding the constitutive elements of this freedom) – notably fair and free competition, but also more generally business certainty and a level playing field for business activities.<sup>34</sup> In highlighting that “to make entrepreneurship the growth engine for our economy, Europe needs a thorough, far-reaching cultural change”,<sup>35</sup> the Action Plan underlines the urgent need to reshape Europe’s approach to free enterprise. As Article 16 clearly underpins the call for such a cultural change, the incorporation of the freedom to conduct a business into the list of fundamental rights enshrined in the Charter can be seen as one of the first symptoms of this new approach that could eventually see freedom to conduct a business as vital for the EU’s future prosperity, and an integral element of the Internal Market. It should be noted that the link between the deregulation of the business environment and the four fundamental freedoms that constitute the Internal Market is reiterated in other strategic documents, such as the EU Justice Agenda for 2020, which emphasises the role of the EU justice policy in supporting economic recovery, growth and structural reforms.<sup>36</sup>

Europe 2020: Neither the Strategy nor the Action Plan explicitly refer to Article 16 of the Charter on the freedom to conduct a business.

The goals and policies outlined in the aforementioned strategic documents are reflected in a number of concrete legislative and other measures that aim to remove the existing obstacles to

<sup>34</sup> *Ibid*, p. 19.

<sup>35</sup> *Ibid*, p. 4.

<sup>36</sup> European Commission (2014b).

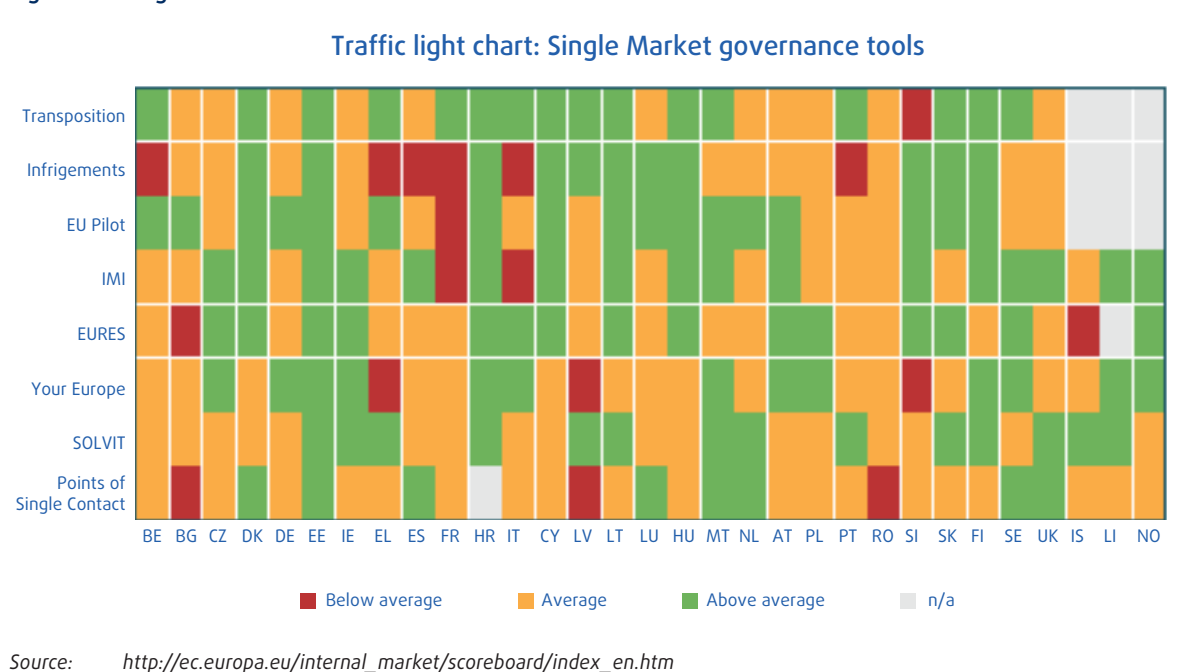
equal access to the freedom to conduct a business. In 2013, the Professional Qualifications Directive was modernised,<sup>37</sup> introducing, for instance, a European Professional Card that will allow cardholders to obtain the recognition of their qualifications in a simplified and accelerated manner. The same instrument imposes stricter rules on EU Member States for placing professions on the lists of regulated professions, by introducing a system of regular mutual evaluations of these lists. In the framework of reforming EU insolvency rules, the European Commission announced in 2013 its new initiative to set up minimum standards in the field of pre-insolvency procedures that would remove obstacles to cross-border trade and investment between EU Member States.<sup>38</sup> As part of enacting the ‘Digital Single Market’, a regulation on electronic identification and trust services for electronic transactions was adopted in 2014, allowing for the mutual recognition of national e-identification systems by other EU Member States, and increasing the convenience and security of electronic communication, including commercial contracts or electronic participation in public calls for tenders across the EU.<sup>39</sup>

In recent years, the European Commission has undertaken public consultations to identify legal and practical problems faced by entrepreneurs in the Internal Market. For example, it conducted a broad consultation with SMEs and business organisations in the

framework of the Regulatory Fitness and Performance Programme (REFIT), launched in 2012,<sup>40</sup> and part of the EU’s smart regulation policy. The consultation pointed to the 10 most burdensome EU laws for SMEs, including chemicals legislation, procedures for awarding public contracts or the previously mentioned recognition of professional qualifications. In March 2013 the European Commission presented the results of the consultation with a set of follow up actions.<sup>41</sup> To this end, the Commission annually publishes a scoreboard (see Figure 1) covering EU regulatory initiatives expected to have a significant impact on SMEs, which tracks the progress of relevant EU legislation within the entire legislative cycle, including its implementation by Member States.<sup>42</sup>

To facilitate the creation and operation of businesses as envisaged by the Europe 2020 strategy, particularly SMEs, the EU Programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises (COSME) was set up with a budget of € 2.3 billion. In the period 2014–2020, COSME is to provide guarantees for banks and other financial intermediaries, information and assistance in finding business partners in other EU Member States as well as worldwide, tailored programmes for specific population groups such as young people, women or senior entrepreneurs, and to collect SME’s opinions on EU legislation. Further incentives are available through other channels, such as

Figure 1: Single Market Scoreboard – overview



37 European Parliament, Council of the European Union (2013), Directive 2013/55/EU.  
 38 European Commission (2013c), p. 9.  
 39 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

40 European Commission (2012a).  
 41 European Commission (2013d).  
 42 For more information on public consultation undertaken by the European Commission, see also the website of the European Business Test Panel.



the European Commission's Future Internet Public-Private-Partnership that aims to provide grants to highly innovative start-ups and SMEs.<sup>43</sup> EU Structural Funds are another possible source of funding through innovative initiatives, such as the community-led local development (CLLD) projects.

#### Promising practice

### Providing risk finance to benefit small and medium-sized enterprises across Europe

Established in 1994, the European Investment Fund (EIF) – a public-private partnership with the European Commission and the European Investment Bank as one of its main stakeholders – supports Europe's small and medium-sized businesses (SME) by helping them to access finance. By offering an 'Integrated Risk Finance Product Range of SME finance', EIF complements the products offered by the European Investment Bank (EIB).

For more information, see [www.eif.org](http://www.eif.org)

#### Promising practice

### Community-led local development

Community-led local development (CLLD) is a specific tool to be used at the local level. According to the European Commission, "CLLD can mobilise and involve local communities and organisations to contribute to achieving the Europe 2020 Strategy goals of smart, sustainable and inclusive growth, fostering territorial cohesion and reaching specific policy objectives." CLLD key components are local action groups consisting of representatives of local public and private socio-economic interests, coherent and transparent local development strategies, and a coherent and targeted area and population coverage. During the 2014-2020 programming period, the Commission will seek to simplify and expand the use of CLLD as a development tool and has proposed a single methodology allowing for the connected and integrated use of EU Structural Funds covered by the Common Strategic Framework.

This comprises the European Regional Development Fund, European Social Fund, European Agricultural Fund for Regional Development, European Maritime and Fisheries Fund and Cohesion Fund. For more information, see [http://ec.europa.eu/regional\\_policy](http://ec.europa.eu/regional_policy)

The European Commission has taken a number of innovative steps to promote entrepreneurship in the EU. In November 2011 it launched the Social Business Initiative (SBI), to support the social enterprise sector, which one in four businesses founded in the EU belong to.<sup>44</sup>

The overarching objective of social enterprises is not to make a profit, but to have a social impact and serve their community by contributing not only to employment, but also to social cohesion. Following this initiative, the Commission set up a consultative Group of Experts on Social Entrepreneurship (GECES) in May 2012. In January 2014, the Commission launched its directly managed Employment and Social Innovation (EaSI) programme with a total budget of €919,469,000. This programme brings together three EU programmes managed separately between 2007 and 2013: Progress, Eures and Progress Microfinance. The latter programme aims primarily to increase the availability and accessibility of microfinance for vulnerable groups and micro-enterprises, as well as access to finance for social enterprises.<sup>45</sup> To further facilitate access to financing, the European Commission published in March 2014 its Communication on *Unleashing the potential of Crowdfunding in the European Union*:

*"Crowdfunding generally refers to an open call to the public to raise funds for a specific project. In 2012 about €735 million was raised for all forms of crowdfunding in Europe and the predicted figure for 2013 is around €1 billion. [...] It is one of the newly emerging financing models that increasingly contribute to helping start-ups move up the "funding escalator" and contribute to building a pluralistic and resilient social market economy. Crowdfunding has real potential to finance different types of projects, such as innovative, creative and cultural projects, or activities of social entrepreneurs, that have difficulties in accessing other forms of financing."*<sup>46</sup>

Crowdfunding addresses barriers to traditional financing forms by improving access to funds for new entrepreneurs. According to the Commission Communication, "crowdfunding has also high potential benefits for innovation, research and development, and it could contribute to growth, community development and job creation [...]. Compared to other types of finance, it can also reduce costs and administrative burden for enterprises, notably SMEs."<sup>47</sup>

43 European Commission (2013e); see also Enterprise Europe Network, <http://een.ec.europa.eu/>.

44 European Commission (2011a), p 3.

45 For more information, see <http://ec.europa.eu/social/main.jsp?catId=1081>.

46 European Commission (2014c), p. 2.

47 European Commission (2014c), p. 5.

### Promising practice

#### Accessing basic banking for all – link to freedom to conduct a business?

The EU has introduced a legislative proposal that would ensure that all EU citizens can have a bank account and a debit card. This would ensure that all citizens can access payment services and be part of the economic society. A bank account, in turn, is for all practical purposes a pre-condition for entrepreneurship and conducting a business.

For more information, see: [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0139\(COD\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/0139(COD))

As mentioned above, various EU initiatives recognise the need to target certain population groups that face specific obstacles when setting up and operating a business. Significant attention has been paid to young people as a population group particularly affected by the economic crisis. However, this attention is primarily focused on youth unemployment rather than on young people as potential businesspeople. To top up available EU financial support to the regions where youth unemployment and inactivity is most prevalent, the Council and the European Parliament agreed to create a dedicated Youth Employment Initiative for Member States with regions where youth unemployment exceeds 25%,<sup>48</sup> providing an opportunity for these Member States to draw on special funding.<sup>49</sup> At the beginning of 2014, a Eurofound study on the working conditions for young people entering the labour market gave some interesting examples of national programmes that support young people in starting their own enterprise.<sup>50</sup> On the basis of a request by the Greek presidency, in June 2014 the European Economic and Social Committee put forward recommendations based on current practices in Member States, and identified several measures that can help address youth unemployment.<sup>51</sup> The EU itself promotes young people's entrepreneurship through its Erasmus for Young Entrepreneurs programme, which offers entrepreneurs who are starting their business the opportunity to learn from experienced owners of small businesses in other EU Member States.

The European Agenda for the Integration of Third-Country Nationals<sup>52</sup> emphasises the potential of migrants as entrepreneurs and calls upon EU Member States to reinforce their creativity and innovation capacity, including by enhancing access to information on the conditions to set up businesses. The document looks beyond the issue of migrant integration within the EU and pre-

sents entrepreneurship of third-country nationals as an opportunity to foster development, employment and investment opportunities in the countries of origin.

Other measures at the European level include the European network of cities for local integration policies for migrants (CLIP).<sup>53</sup> The network includes 30 European cities working together to support the social and economic integration of migrants by sharing experiences, research and workshops. One of the areas CLIP covers is ethnic entrepreneurship as part of economic development and integration strategy for migrants. A series of recommendations and case studies were made on the basis of research on promoting ethnic entrepreneurship in European cities.<sup>54</sup> The European Commission also hosted a series of conferences to exchange good practice cases in the promotion of migrant entrepreneurship, including a conference on 'Entrepreneurial Diversity in a Unified Europe' in March 2008.<sup>55</sup>

### Promising practice

#### Supporting migrant entrepreneurship

The Council of Europe set up several local platforms to address migrant entrepreneurship through the Intercultural Cities programme, as well as the Supplier Diversity project, which it set up together with the Migration Policy Group. A new initiative on diversity in the economy and local integration (DELI) was set up to support migrants' economic integration through policy road maps identifying, assessing and prioritising opportunities and trade-offs as well as finance mechanisms.

For more information, see <http://pjp-eu.coe.int/web/deli/challenge>

Several EU-level initiatives also aim to encourage female entrepreneurship and tackle obstacles faced by women entrepreneurs, such as the European Network of Female Entrepreneurship Ambassadors or the European Network of Mentors for Women Entrepreneurs. Following on from the project 'Promoting Entrepreneurship amongst women', the European Commission established an online portal dedicated to the promotion of women's entrepreneurship, which collects information on related networks, projects and events.<sup>56</sup> Other initiatives are being developed within the wider framework of the EU equality policy. In February 2014, Athens hosted a consultation meeting organised by the European Institute on Gender Equality (EIGE), concentrating

48 European Commission (2013f).

49 European Commission (2014d).

50 Eurofound (2014).

51 European Commission, European Economic and Social Committee (2014).

52 European Commission (2011b).

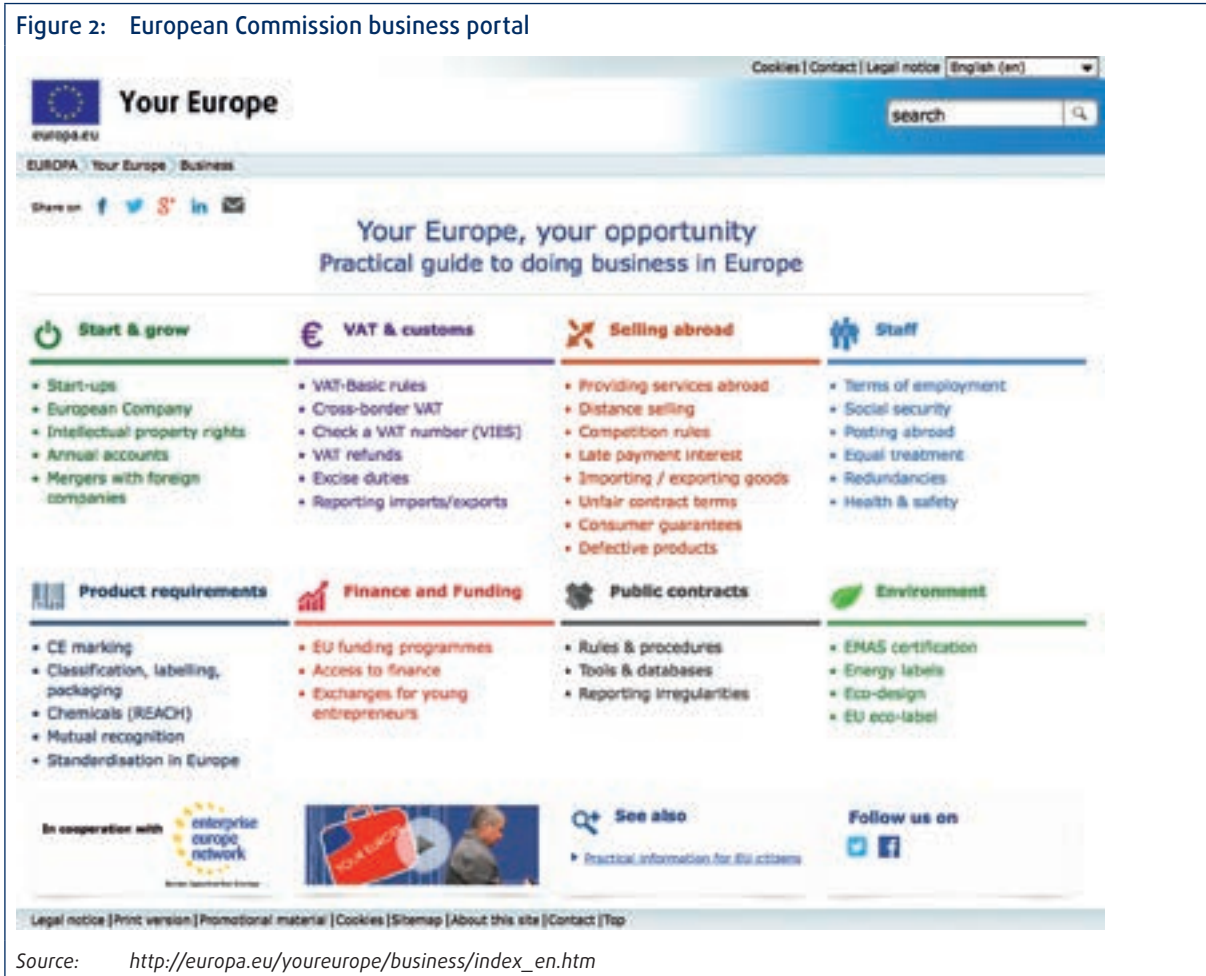
53 Eurofound (2013).

54 Eurofound, Rath, J., (2011).

55 For more information, see [http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item\\_id=3294](http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=3294).

56 European Commission, Women Entrepreneurship Portal.

Figure 2: European Commission business portal



Source: [http://europa.eu/youreurope/business/index\\_en.htm](http://europa.eu/youreurope/business/index_en.htm)

on the exchange of experience and potential good practices concerning female entrepreneurship.<sup>57</sup>

Furthermore, possible impacts on the freedom to conduct a business are also being tested in the preparation of other legislative acts, together with established rights such as the freedom of expression and information or the right to property, which shows the growing importance attached to this right by the EU legislator.<sup>58</sup>

The European Commission, in cooperation with the Member States, has also taken steps to facilitate entrepreneurship specifically across EU borders. Its online business portal provides information on doing business in Europe, including a practical guide on selling abroad. In 2002, it established SOLVIT, a mechanism providing citizens as well as businesses who are active across borders with fast and pragmatic solutions to problems caused by the breach of EU law by a public authority.

57 For more information, see From practices with potential to good practices on female entrepreneurship - Consultation meeting.

58 See, for instance, European Commission (2013g), Recital 23, referring to the freedom to conduct a business, and European Commission (2012b), Recital 20.

Each Member State has a SOLVIT centre, which acts as an informal alternative to other problem-solving mechanisms, such as national court procedures, formal complaints to the Commission and petitions. Most cases in the area of business relate to taxation, notably the reimbursement of VAT. Member States' performance in their roles as home or lead centres in SOLVIT procedures is assessed by the Commission's Internal Market Scoreboard.

While it is undeniable that the EU takes concrete action in areas that are of direct relevance to further promoting the freedom to conduct a business, it should be noted that progress is often slower than expected. In its report to the European Council of June 2013 on the progress achieved in respect of the Compact for Growth and Jobs, the European Commission reported that of 28 specific actions envisaged in the area of deepening the Single Market, 12 were "on track", 13 required "more effort", and three showed "no or little progress".<sup>59</sup> Such a record is not unusual, particularly where more ambitious goals are set. However, given the fact that the measures contained in the Compact for Growth and Jobs

59 European Commission (2013h), table p. 1-2.

Figure 3: Single Market Scoreboard – indicators for SOLVIT

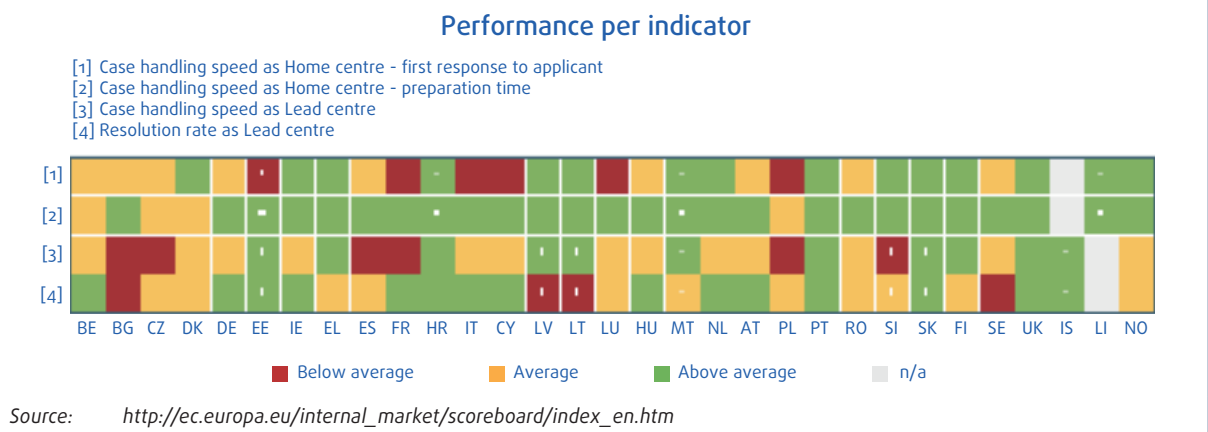


Figure 4: SOLVIT – examples

### French company gets VAT refund from Germany



**A French company requested a VAT refund from the German authorities – but the request remained unanswered for 10 months.**

**Thanks to SOLVIT's intervention, the procedure was speeded up and the company received the amount it had asked for.**

Solved within 6 weeks.

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### Portuguese football club obtains VAT refund



**A Portuguese football club bought a player from a Romanian club for €2 500 000, including €475 000 in VAT.**

**The club claimed a VAT refund from the Romanian authorities, but 8 months later had still received no reply.**

**After SOLVIT's intervention, the Romanian tax authorities refunded the VAT.**

Solved within 4 weeks.

Source: [http://ec.europa.eu/solvit/problems-solved/taxation/index\\_en.htm](http://ec.europa.eu/solvit/problems-solved/taxation/index_en.htm)

were to provide an immediate impulse to the European economy, the implications of underachievement can perhaps be seen as more severe than in other policy areas.

Finally, while EU efforts to create an environment conducive to the growth and operation of businesses are primarily internally oriented, the international economic and political context should not be forgotten. The global implications of the current economic crisis and the globalised nature of the world economy itself have spurred other countries, as well as the UN, to seek global solutions. 'Growth and employment' has thus

become one of the eleven areas that the United Nations Development Group proposed to discuss in preparation of the post-2015 development agenda which will build upon the Millennium Development Goals.<sup>60</sup> Should this area become one of the future cornerstones of the UN development agenda, it would add significant external momentum to the EU's attempts to reform its own attitude to entrepreneurship.

<sup>60</sup> For more information, see UN, Economic and Social Council, 'Millennium Development Goals and post-2015 Development Agenda'.

Promising practice

## Guiding businesses to comply with human rights obligations

In 2014, a drafting group under the auspices of the Council of Europe tabled draft recommendations to member states on human rights and business. These are intended for subsequent adoption by the Committee of Ministers of the Council of Europe. The recommendations seek to reaffirm the UN standards in the area – *Guiding Principles on Business and Human Rights*, endorsed by the United Nations Human Rights Council on 16 June 2011 (Document A/HRC/17/31). The Council of Europe draft recommendations stress the role of its member states in ensuring that businesses comply with human rights obligations.

For further information, see: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other\\_Committees/HR\\_and\\_Business/Default\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_Committees/HR_and_Business/Default_en.asp)



# 2

## Freedom to conduct a business and its scope



In December 2009, with the entry into force of the Lisbon Treaty, the EU Charter of Fundamental Rights became legally binding, equal to the treaties. The freedom to conduct a business subsequently gained increasing traction in EU as well as national courts.

Two main issues may have an impact on the scope of the freedom to conduct a business at EU-level. First, the freedom to conduct a business is not an absolute right (Article 52 (1) of the Charter makes this clear). Second, it must be balanced against other Charter rights (see also Section 1.1 on the limited application of the freedom to conduct a business as well as its relationship with TFEU-provisions on the right to establishment). Limitations arising from this are evident at both the EU and Member State level. They range from general public interest considerations including public health and safety, to very specific bans linked to an individual's qualifications or conduct. This chapter elaborates on the scope of the right protected by Article 16 of the Charter, by demonstrating how these limitations are applied and may be overcome in practice.

### 2.1. The EU Charter of Fundamental Rights

The freedom to conduct a business as guaranteed by Article 16 of the Charter is derived from the case law of the CJEU, which itself was inspired by the national laws of EU Member States. Its main aim is to safeguard the right of each person in the EU to pursue a business without being subject to either discrimination or disproportionate restrictions.<sup>61</sup>

<sup>61</sup> See, for instance, CJEU, C-230/78, *Eridania*, 27 September 1979, paras. 20–22; CJEU, C-240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)*, 7 February 1985, paras. 9–13; CJEU, C-200/96, *Metronome Musik GmbH*, 28 April 1998, para. 21. See also [www.eucharter.org/home.php?page\\_id=91](http://www.eucharter.org/home.php?page_id=91), as well as the EU Network of Independent Experts on Fundamental Rights (2002).

According to the relevant CJEU case law, the right of freedom to conduct a business consists of:<sup>62</sup>

- a) the freedom to exercise an economic or commercial activity;
- b) the freedom of contract;
- c) free competition.

The Charter distinguishes between the freedom to conduct a business and the right of establishment in another Member State (Article 15 (2)).<sup>63</sup> While the right of establishment primarily protects the freedom to move within the EU for the purpose of setting up a business in another Member State, the freedom to conduct a business is not restricted to such contexts: it applies in all situations that fall under the scope of application of EU law, whether or not there is a trans-border element.<sup>64</sup>

Despite this difference, these two rights are often invoked together in cross-border cases, where individuals must first set up businesses before running them. In fact, before the Charter became legally binding, the CJEU considered the freedom to conduct a business to be closely linked to or even part of the freedom to establish a business.<sup>65</sup>

<sup>62</sup> See, for example, CJEU, C-4/73 *Nold v. Commission*, 14 May 1974; Opinion of the Advocate General Kokott in CJEU, C-441/07 P, *Commission v. Alrosa Company Ltd.*, 29 June 2010, para. 225; Opinion of the Advocate General Cruz Villalón in CJEU, C-426/11, *Alemo-Herron v. Parkwood Leisure Ltd.*, 19 February 2013, para. 54.

<sup>63</sup> As for the relationship between Article 16 and 17 (right to property) of the Charter, see the Opinion of the Advocate General Cruz Villalón in CJEU, C-426/11, *Alemo-Herron v. Parkwood Leisure Ltd.*, 19 February 2013, para. 51.

<sup>64</sup> *Ibid.*

<sup>65</sup> See, for instance, Opinion of the Advocate General Trstenjak in CJEU, C-316/09, *MSD Sharp & Dohme GmbH v. Merckle GmbH*, 5 May 2011, para. 34. See also Blanke, H.-J. and Mangiameli, S. (2012) and Tryfonidou, A. (2011).

Relevant guidance on the scope of the freedom can be found in CJEU case law, which has shaped it by elaborating on the concrete conditions under which this freedom can be restricted.

## 2.2. CJEU case law

Since the coming into force of the Lisbon Treaty in late 2009, the CJEU has increasingly referred to the Charter. In 2010, 30 judgments referred to one or several of its provisions. In 2013, this number increased to 143.<sup>66</sup> In fact, the CJEU used the Charter more often in 2013 than during the whole period from its proclamation in 2000 until late 2009 when it became legally binding.<sup>67</sup>

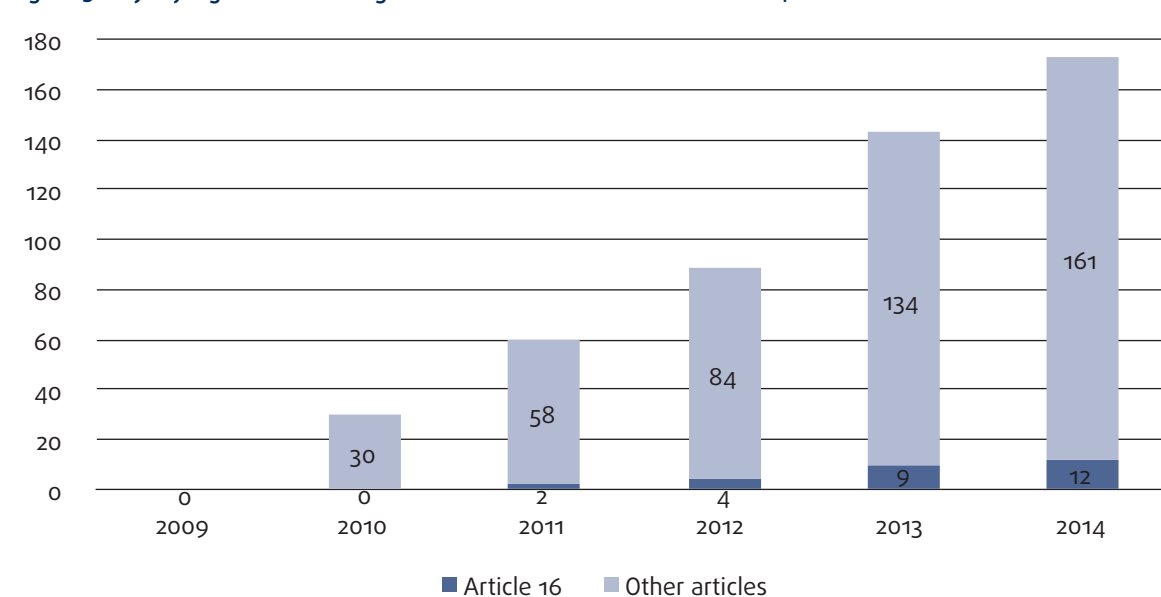
The number of judgments that refer specifically to Article 16 is limited, but increased from two in 2011 to nine in 2013, and to 12 in 2014. Figure 5 provides an overview of the number of CJEU judgments referring to Charter rights from 2010 to 31 December 2014, including the

number of those referring to Article 16; Annex 1 contains a table with the judgments referring to Article 16 from 1 January 2011 (since there were no such judgments in prior years) to 31 December 2014.

In 2013, Article 16 was referred to in nine out of 143 (6.3 %) of the cases mentioning the Charter.<sup>68</sup> Despite the continuous increase (as is clear from Figure 5: up from four out of 88 (4.8 %) in 2012 and two out of 60 (3.3 %) in 2011), this is still a much lower share than that of other Charter articles. According to European Commission data, the right to an effective remedy and to a fair trial (Article 47) was cited in about a quarter (26 %) of all cases referencing the Charter in 2013, the right to good administration (Article 41) in almost a fifth (17 %), and the right to property (Article 17) in about a tenth (11 %).<sup>69</sup>

The Charter is also increasingly being referenced by national courts requesting preliminary rulings.<sup>70</sup> However, there has been no increase in requests related to

Figure 5: CJEU judgments referring to Article 16 of the Charter 2010–2014



Source: FRA search on [www.curia.europa.eu](http://www.curia.europa.eu), 2015

<sup>66</sup> These numbers were retrieved by the FRA using the CJEU online search engine at [www.curia.europa.eu](http://www.curia.europa.eu). The number of judgments includes judgments (not orders, decisions, opinions or any other documents) issued by all the three courts of the EU – Court of Justice, General Court and Civil Service Tribunal, whether they have been published in the European Court Reports (ECR) or not. The number of judgments referring to Article 16 of the Charter includes all the judgments which expressly mentioned Article 16. The numbers used by the FRA may differ (depending on how the search is conducted and how cases are counted) from those cited in the 2010–2013 annual reports of the European Commission due to possible differences in search and counting methodology and consequently also from that used in FRA's Annual report, FRA (2014).

<sup>67</sup> See FRA (2014), p. 21.

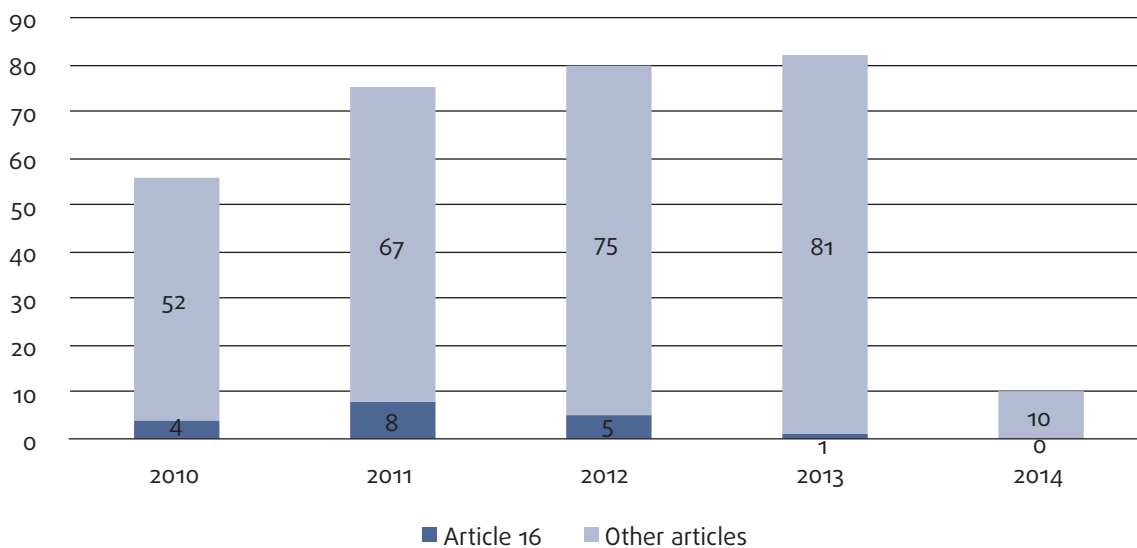
<sup>68</sup> See *supra* note 71.

<sup>69</sup> European Commission (2014e), Part 1 of 2, p. 9. Note that these numbers are based on the calculations done by the European Commission, which differ from the search done for this report. The general proportions are nevertheless applicable irrespective of how cases are counted.

<sup>70</sup> These numbers were retrieved by the FRA using the CJEU online search engine at [www.curia.europa.eu](http://www.curia.europa.eu). The number of requests on the basis of Article 16 of the Charter includes all the requests for preliminary ruling, submitted on the given year, which expressly mentioned Article 16. The numbers used by the FRA may differ from those cited in the 2010–2013 annual reports of the European Commission due to possible differences in search and counting methodology. The numbers for 2014 are tentative.



Figure 6: Requests for preliminary rulings to the CJEU on Article 16 of the Charter, 2010–2014



Source: FRA search on [www.curia.europa.eu](http://www.curia.europa.eu), 2015

Article 16 specifically. Possible reasons for this could include the relatively unexplored nature of the right in CJEU jurisprudence.

National courts also increasingly reference the Charter in cases not involving the CJEU.<sup>71</sup>

### 2.2.1. Freedom to conduct a business as a non-absolute right

The freedom to conduct a business is not an absolute right which cannot be subjected to legitimate restrictions.<sup>72</sup> The Charter enables restrictions to be imposed on the exercise of the right to set up and run a business, provided that such restrictions correspond to objectives of general interest pursued by the EU and do not constitute a disproportionate and intolerable interference in relation to the aim pursued, impairing the very substance of the rights guaranteed.<sup>73</sup>

<sup>71</sup> See FRA (2014). During 2013, such cases were identified in 24 of the 28 EU Member States, with the total number of cases being 69. This is a mere selection of the likely many more cases from national level but represents an important part of the most relevant jurisprudence. The selected cases mainly dealt with asylum and migration, as well as effective remedy and fair trial (Article 47 of the Charter) and the right to good administration (Art. 41). Article 16, along with roughly 20 remaining Charter articles, was not referenced in any of the 69 selected cases from the national level not involving the CJEU.

<sup>72</sup> See also Collins, H. (ed.) (2004), pp. 91–92.

<sup>73</sup> Article 52 of the Charter and the *Explanations relating to the Charter of Fundamental Rights*. See also CJEU, *Joined cases C-184/02 and C-223/02, Kingdom of Spain and Republic of Finland v. European Parliament and Council of the European Union*, paras. 52–54.

### Freedom of contract and public health

In the case *Deutsches Weintor*, the CJEU ruled that the blanket prohibition under Regulation 1924/2006 on wine producers or distributors using ‘easy digest’ health claims, even if that claim is inherently correct, is compatible with the Charter. According to the court, such a ban would not substantially restrict the freedom to choose an occupation and/or to conduct a business, but would merely limit the way in which producers and distributors market and promote the products concerned. The court further stressed that these freedoms are not absolute and must be balanced with the requirements of Article 35 of the Charter, which requires the definition and implementation of all EU policies and activities to ensure a high level of human health protection. In this respect, the court also recalled that – due to the risks of addiction and abuse, as well as the harmful effects known to be linked to alcohol consumption – alcoholic beverages represent a special category of foods that is subject to particularly strict regulation, including concerning advertising. In that context, the CJEU ruled that the total prohibition of any (digestion) health claims for wines/alcoholic beverages may be regarded as necessary.

*CJEU, C-544/10, Deutsches Weintor eG v. Land Rheinland-Pfalz, 6 September 2012. Compare with CJEU, Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, ABNA Ltd and Others. v. Secretary of State for Health and Others, 6 December 2005 (provision that required manufacturers of feeding stuffs to provide customers with the exact ingredients of their products was held to be contrary to the principle of proportionality, given that it was not justified on health grounds or indeed any other grounds)*

Such restrictions have been imposed on the freedom to conduct a business to ensure public safety,<sup>74</sup> public

<sup>74</sup> E.g. in the context of road safety, see CJEU *Joined cases C-184/02 and C-223/02, Kingdom of Spain and Republic of Finland v. European Parliament and Council of the European Union*, 9 September 2004.

health,<sup>75</sup> in the context of the fight against terrorism,<sup>76</sup> sanctions in the framework of the Common Foreign and Security Policy,<sup>77</sup> but particularly often in relation to fundamental freedoms such as free movement of goods<sup>78</sup> and services.<sup>79</sup>

More particularly, when establishing the competition rules necessary for the functioning of the internal market, the EU adopts many rules that are claimed to limit business activity by their very nature.<sup>80</sup> They do so notably by requiring the prior authorization of mergers, prohibiting the abuse of a dominant position and prohibiting agreements that restrict competition where their positive effects do not outweigh this negative effect. Hence, to safeguard the fundamental freedom to conduct a business, it is essential that the relevant competition law as well as its application by the authorities charged with its implementation is subject to effective judicial control, to ensure that the restriction is proportionate and does not go beyond what is necessary to achieve the aim: a free internal market.<sup>81</sup>

### Freedom of contract and milk quotas

In the case of *Neu*, the freedom to 'do business with' relaxed the way in which the milk quota regime embodied in secondary EU law was applied. According to the CJEU: "the freedom to pursue a trade or profession [...] includes, as a specific expression of that freedom, the freedom to choose whom to do business with. That freedom of choice would not be guaranteed if a change of dairy by a producer, of his own volition, were capable of leading to a reduction in his individual reference quantity as a result of the allocation of a part thereof to the national reserve, when no such reduction can be made where the producer continues to supply the same dairy. Rules to that effect would be such as to discourage producers from changing purchaser in order to supply the dairy offering them the most favourable conditions."

*CJEU, Joined cases C-90/90 and C-91/90, Jean Neu and Others v. Secrétaire d'État à l'Agriculture et à la Viticulture, 10 July 1991*

- 75 E.g. CJEU, C-376/98, *Germany v. Parliament*, 5 October 2000, which concerned tobacco advertising.
- 76 In this context, see for instance, CJEU, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council of the European Union and EC Commission*, 3 September 2008, in relation to the limits imposed on property rights. See also Parliamentary Assembly of the Council of Europe (PACE) (2001).
- 77 See the pending cases General Court, T-392/11, *Iran Transfo v. Council* (action brought on 22 July 2011) and General Court, T-404/11, *Turbo v. Council* (action brought on 25 July 2011) in relation to the Council Decision 2011/299/CFSP of 23 May 2011 amending Decision 2010/413/CFSP concerning restrictive measures against Iran.
- 78 CJEU C-112/00, *Schmidberger*, 20 June 2003.
- 79 CJEU C-36/02, *Omega*, 14 October 2004. See also Morijn, J. (2006), pp. 15–40.
- 80 E.g. General Court, T-41/96, *Bayer v. Commission*, 16 October 2000, para. 180.
- 81 E.g. CJEU, C-320/03, *Commission v. Austria*, 15 November 2005. See also Drexler, J. et al. (eds) (2011).

### Enforcing effective competition and freedom of contract

When it finds an infringement of EU antitrust rules, the European Commission is empowered by EU law to adopt measures (injunctions) that are "proportionate to the infringement committed and necessary to bring the infringement to an end". An important limitation on the Commission's power stems, however, from the freedom of contract, which is one of the three components of the freedom to conduct a business. The CJEU was confronted with this issue in *Automec II*.<sup>\*</sup> There, the complainant had been refused an injunction by the Commission requiring BMW to supply it with vehicles and complained about it before the CJEU. The CJEU, however, confirmed the Commission's decision. It stated that infringements arising from the application of an illegal distribution system could be eliminated by the abandonment or amendment of the distribution system instead of imposing an obligation to allow the use of certain trademarks. The Commission could not order the party to enter into a contractual relationship because this would constitute a disproportionate restriction of the freedom of contract.<sup>\*\*</sup>

<sup>\*</sup> General Court, T-24/90, *Automec Srl v. Commission of the European Communities*, 18 September 1992, para. 51

<sup>\*\*</sup> See also *Anderman, S. D.*, (2009), p. 104

### 2.2.2. Balancing freedom to conduct a business with other fundamental rights

The scope of the freedom to establish and conduct a business is also determined by the fact that the Charter contains other fundamental rights and values that in practice often need to be balanced with the freedom to conduct a business. Besides the rights of workers (see Section 1.1.), this also applies to freedom of expression,<sup>82</sup> intellectual property rights,<sup>83</sup> or consumer protection.<sup>84</sup>

- 82 CJEU, C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, 22 January 2013, paras. 30–68 (in this case the CJEU concluded that the limitation of the obligation aiming to safeguard the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter on the freedom to conduct a business is justified and that it is in line with the principle of proportionality).
- 83 CJEU, C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 24 November 2011.
- 84 CJEU, C-12/11, *Denise McDonagh v. Ryanair Ltd*, 31 January 2013 (Ryanair's argument that its obligation as an air carrier to provide care to passengers whose flight has been cancelled due to extraordinary circumstances (such as the closure of airspace following the eruption of the Eyjafjallajökull volcano) disproportionately interferes with its right under Article 16 of the Charter, was not upheld). See also CJEU, C-281/09, *European Commission v. Kingdom of Spain*, 24 November 2011 (balancing between, on the one hand, the funding requirements of television broadcasters, their freedom to conduct a business and respect for their editorial independence, and, on the other hand, protection of the interest of consumers, as television viewers, against excessive advertising).

In such cases, the CJEU has to weigh the competing fundamental rights and strike a fair balance, taking into account the specific circumstances of the given case.

### Balancing freedom to conduct a business with the right to intellectual property

In a procedure for preliminary ruling in the case *Scarlet Extended SA v. SABAM*, the main question referred to the CJEU was whether the relevant EU legislation in the field of intellectual property rights in the information society should be interpreted to preclude an injunction against an internet service provider (ISP) to introduce a system for filtering electronic communications (especially involving peer-to-peer software) to prevent file sharing that infringes copyrights. Balancing the right to intellectual property of individuals affected by measures introduced by the ISP under Article 17 (2) of the Charter against the right of the ISP to conduct a business freely as enshrined in Article 16, the CJEU ruled that the injunction imposing an obligation on the ISP to install and maintain at its expense a complicated and costly computer system to monitor all electronic communications made through the network for an unlimited period of time so as to protect the rights of the copyright holders limits the ISP's freedom to conduct a business under Article 16 of the Charter in a disproportionate way. It concluded, therefore, that the injunction to install a filtering system violated the fair balance between the protection of rights enjoyed by copyright holders and the right of freedom to conduct business enjoyed by ISPs.

Similarly, in the *UPC* case, the CJEU was asked to balance the rights to intellectual property, the internet access provider's freedom to conduct a business, and internet users' freedom of information. The court was asked whether the freedom to conduct a business, which internet service providers enjoy under Article 16 of the Charter, precluded an order imposed on ISP to block its customers' access to a copyright-infringing website. The CJEU confirmed that such an injunction restricted the freedom to conduct a business since it limited the free use of the resources at ISPs' disposal, obliging them to take measures which may represent a significant cost for them, impacting considerably on the organisation of their business activities or requiring difficult and complex technical solutions. However, according to the court, such an order did not infringe the very substance of the freedom of an internet service provider to conduct a business. At the same time, national rules must be in place to enable the ISPs to assert their rights before national courts.

*CJEU, C-70/10, Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), 24 November 2011*  
*CJEU, C-314/12, UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH, 27 March 2014*

## 2.3. National level

### 2.3.1. Constitutional law

Despite its relatively recent explicit emergence among internationally recognised human rights, national legislation of some EU Member States granting the freedom to conduct a business dates back as far as the late 18<sup>th</sup> century. The 1791 Allarde Decree (*décret d'Allarde*) and Le Chapelier Law (*loi Le Chapelier*) enacted the freedom to pursue or exercise one's "trade [...] profession, business of craft"<sup>85</sup> within the framework of abolishing the guild system in France. An important reason was to ensure equal access to certain professions. In Denmark, the guild system also gave way to a more modern economic model, when the first Danish Constitution (*Grundloven*) of 1849 expressly abolished all restrictions on free and equal access to trade not based on public interest.<sup>86</sup> The Royal Ordinance of 1864 on the extension of freedom of trade granted every man and woman the right to carry on any business such as commerce, manufacture or craft in Sweden.<sup>87</sup> In Austria, the Basic Liberties Law (*Staatsgrundgesetz*) of 1867 in its Article 6 granted to every national the right to practice every kind of gainful activity subject to the conditions of the law.<sup>88</sup> After the dissolution of the Austro-Hungarian Empire, the principle was adopted into the legal order of some of its successor states in Central and South-Eastern Europe, only to be suppressed again by the communist regimes in the post-Second World War period, which viewed any free market elements of the economy with obvious suspicion.<sup>89</sup>

Most EU Member States nevertheless first introduced freedom to conduct a business into their legal system in the 20<sup>th</sup> century, often as part of the process of the countries' transition to parliamentary democracy, or as part of their return to free market economy. This was the case of Germany and Italy in the late 1940s, Greece, Portugal and Spain in the 1970s and the countries of Central and South-Eastern Europe in the 1990s (see Figure 7).

85 Chérot, J.-Y. (2002), p. 1.

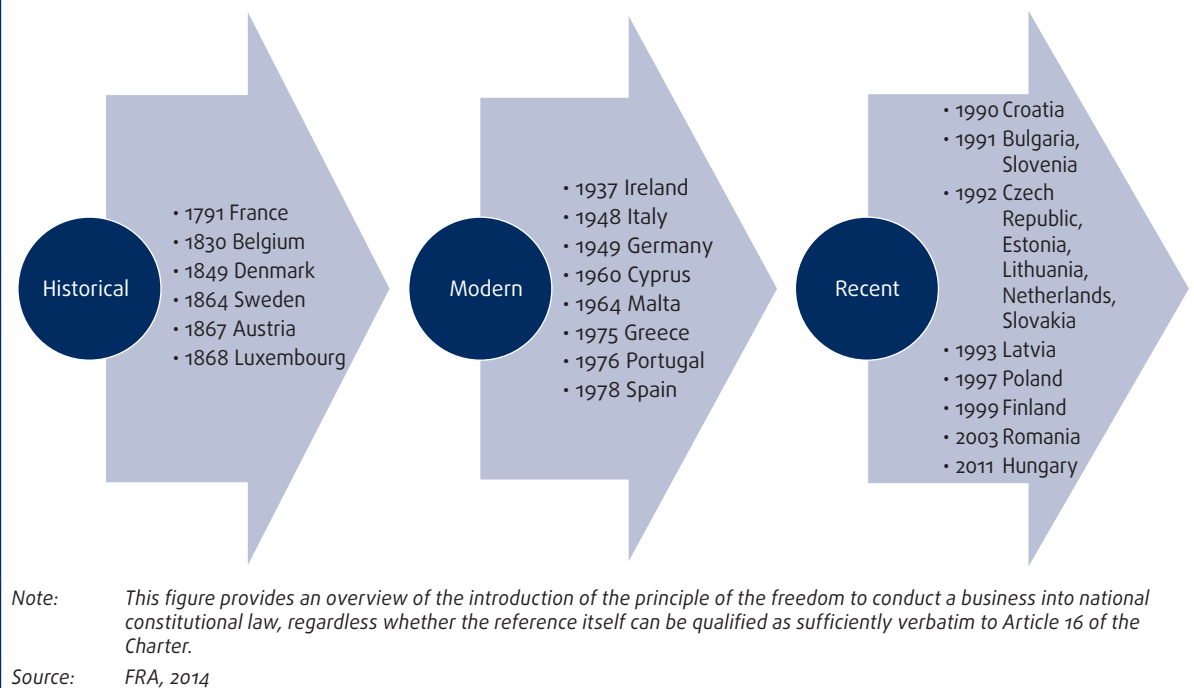
86 Zahle, H. (2006), pp. 501–508.

87 Adlercreutz, A., Nyström, B. (2010), p. 35.

88 Austria (1867).

89 See for example Constitution of the Czechoslovak Republic of 1920, Art. 108, as opposed Constitution of the Czechoslovak Socialist Republic of 1960, Art. 9, that favoured "socialist ownership" and restricted private enterprise to that based on owner's personal labour, banning the exploitation of the work of others.

**Figure 7: Timeline showing the introduction of the freedom to conduct a business in the constitutional law of EU Member States**



In all EU Member States with the exception of the United Kingdom, rights relevant to the freedom to conduct a business are to some extent enshrined in constitutional law. The extent and manner in which this freedom is present in the national constitutional order however varies greatly, seemingly in accordance with the nature of the constitutional text of the respective EU Member State. It can generally be stated that more detailed and/or recent constitutions are more likely to provide an explicit reference to the freedom to conduct a business, while older and more succinct texts require more interpretation to determine the presence of this principle.

The United Kingdom, however, has no written Constitution, and its statutory law or case law make no explicit reference to the freedom to conduct a business as a fundamental right. The main sources of legal provisions that facilitate the formation and operation of companies and competition law are the Companies Act of 2006<sup>90</sup>, the Competition Act of 1998<sup>91</sup> and the Enterprise Act of 2002.<sup>92</sup> It should however be noted that principles such as the right to property or the freedom of contract are firmly rooted in United Kingdom law and have been upheld in extensive case law.<sup>93</sup>

References that can be seen as close to verbatim to Article 16 of the Charter or that have been subsequently

interpreted by national courts as encompassing the right to conduct a business can be found in the constitutions of 22 EU Member States (see Table 1). Some constitutional texts directly grant the freedom to conduct a business (such as the constitutions of the Czech Republic or Sweden), others the right to engage freely in entrepreneurial or commercial activities (Cyprus, Estonia), or they provide another sufficiently direct foundation for the constitutional protection of this right, such as the Italian Constitution, which enshrines the freedom of private economic enterprise.<sup>94</sup>

Some constitutional texts contain explicit limits to the exercise of the right to conduct a business. This is notably the case of the Spanish Constitution: “Free enterprise is recognised within the framework of a market economy. The public authorities guarantee and protect its exercise and the safeguarding of productivity in accordance with the demands of the general economy and, as the case may be, of economic planning.”<sup>95</sup> Other constitutions, while expressly guaranteeing this freedom, also contain instruments for restricting it, such as the Polish Constitution, which places the freedom of economic activity squarely within the framework of social market economy and allows it to be limited for “important public reasons”.<sup>96</sup> Other possible grounds for limiting the freedom to conduct a business often include more general reasons such as the “common

90 United Kingdom (2006).

91 United Kingdom (1998).

92 United Kingdom (2002).

93 See e.g. United Kingdom Court of Appeal, *Printing and Numerical Registering Co v. Sampson* (1875), 19 Eq 462.

94 Italy (1947), Art. 41.

95 Spain (2011), Section 38.

96 Poland (1997), Art. 20 and 22.

Table 1: Freedom to conduct a business as constitutional right, by EU Member State

EU Member State	Definition in the constitution or reference in jurisprudence
AT	"Every national can [...] practice every kind of gainful activity."
BE*	
BG	"The economy of the Republic of Bulgaria shall be based on free economic initiative."
CY	"Every person has the right to [...] carry on any occupation, trade or business."
CZ	"Everybody has the right [...] to conduct a business or carry out other economic activity."
DE	<i>Jurisprudence (e.g. decision of the Constitutional Court of 8 February 1972 in the Steinmetz Wettbewerbs case)</i>
DK	"Any restriction on the free and equal access to trade, which is not based on the public interest, shall be abolished by law."
EE	"Estonian citizens have the right to engage in enterprise."
EL*	
ES	"Free enterprise is recognised within the framework of a market economy."
FI	"Everyone has the right [...] to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice."
FR	<i>Jurisprudence (e.g. decision of the Constitutional Council of 16 January 1982)</i>
HR	"Entrepreneurial and market freedom shall be the basis of the economic system."
HU	"The economy of Hungary shall be based [...] on freedom of enterprise [...]. Everyone shall have the right [...] to engage in entrepreneurial activities."
IE	<i>Jurisprudence (e.g. decision of the High Court of 1975 in the Central Dublin Development Association case)</i>
IT	"Private economic enterprise shall be free."
LT	"Lithuania's economy shall be based on [...] individual freedom of economic activity and initiative [...]. Each human being may freely choose a job or business [...]."
LU	"The law guarantees freedom of trade and industry, the exercise of the professions [...]."
LV*	
MT**	
NL*	
PL	"A social market economy, based on the freedom of economic activity, private ownership [...] shall be the basis of the economic system of the Republic of Poland."
PT	"Private economic enterprise shall be freely exercised [...]."
RO	"Free access of persons to an economic activity, free enterprise, and their exercise under the law shall be guaranteed."
SE	"Restrictions on the right to conduct business or practice a profession can only be imposed for the protection of essential public interests."
SI	"Free economic initiative shall be guaranteed."
SK	"Everyone has [...] the right to engage in entrepreneurial or other gainful activity."
UK***	

Note: \* For Belgium, Greece, Latvia and the Netherlands, the constitutions contain only general or vague references.  
 \*\* In Malta, freedom to conduct a business is not a right enforceable by courts.  
 \*\*\* For the United Kingdom, statutory law and case law were examined due to the absence of a written constitution.

Source: FRA, 2014

good" (Italy),<sup>97</sup> "general interest" (Portugal)<sup>98</sup> or "public interest" (Slovenia),<sup>99</sup> or even "any restrictions that may be imposed by the legislature" (Luxembourg).<sup>100</sup>

Constitutions of other EU Member States contain more general references that might not necessarily be understood as directly granting the freedom to conduct

a business as an enforceable fundamental right, such as those merely providing the right to freely choose an occupation (Belgium, Latvia or the Netherlands). While obliging the state to encourage private economic enterprise, the Maltese Constitution expressly states that this is not a right enforceable by courts.<sup>101</sup> Finally, the present Constitution of Greece provides only a vague reference to the right of all persons to "participate in the social, economic and political life of the country".<sup>102</sup>

97 Italy (1947), Art. 41.

98 Portugal (2005), Art. 61.

99 Slovenia (1991), Art. 74.

100 Luxembourg (1868), Art. II, 11 sub. 6.

101 Malta (1964), Art. 18-21.

102 Greece (2008).

**Table 2: Constitutional inclusion of the three constitutive elements of the freedom to conduct a business, by EU Member State**

	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK
Freedom of economic activity	✓			✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓				✓	✓	✓	✓	✓	✓	
Freedom of contract				✓																								
Free competition			✓							✓			✓	✓	✓		✓					✓	✓	✓		✓	✓	

Source: FRA, 2014

In the absence of an express reference in national constitutional law, courts in some EU Member States nevertheless deduce the existence of the freedom to conduct a business from more general constitutional principles, such as the general occupational and professional freedom in Germany<sup>103</sup> or the right to property in Ireland.<sup>104</sup> Finally, in France, while Article 17 of the Declaration of Human and Citizens' Rights stipulates the inviolable right to property, the Constitutional Court in its 1982 ruling decided to construct the existence of the freedom to conduct a business as a constitutional right on the basis of perhaps the most general of all rights, enshrined in Article 4, which states that "Liberty consists in being able to do that which does not harm others".<sup>105</sup>

EU Member States that do not expressly include the freedom to conduct a business in their constitution provide for it in other instruments of national law, most commonly in commercial and civil law codes. In the legal order of the Netherlands, the freedom to conduct a business is considered to be of constitutional nature despite not being contained in the Dutch constitution.<sup>106</sup> Legislation of some EU Member States particularly emphasises this principle in relation to small and medium sized enterprises (Bulgaria, Italy).<sup>107</sup> In Belgium, the Allarde Decree continues to provide the foundation of the freedom to conduct a business, supplemented by

more contemporary legal acts.<sup>108</sup> To solidify the position of this principle within its legal system and elevate it among fundamental rights, a failed proposal was tabled in the Belgian Senate to add an express reference to the freedom to conduct a business to the Belgian Constitution in 2006.<sup>109</sup>

While the constitutional law of EU Member States generally, as discussed, contains at least some reference to the freedom to exercise economic or commercial activity, the other two constituent elements of the freedom to conduct a business identified in CJEU case law, freedom of contract and free competition, appear significantly less often. Free competition is emphasised as a guiding economic principle in the constitutions of Hungary, Portugal and Slovakia for instance. Freedom of contract is then usually dealt with within the framework of national commercial or civil law, not constitutional law, with the notable exception of Cyprus (see Table 2).

### 2.3.2. Ordinary laws

Explicit reference to the notion of freedom to conduct a business in national constitutional law is undeniably a useful instrument for enforcing this right. However, reference alone does not necessarily fully reflect the applicability of this right vis-à-vis various legal and administrative barriers and obstacles, and thus cannot serve as an overall indicator of the business-friendly nature of the legal systems of the respective EU Member States.

National law of EU Member States tends to look at business from the regulatory point of view rather than further elaborating upon the 'human right' dimension embodied by Article 16 of the Charter. As the primary

103 Germany, Constitutional Court (1972), *Steinmetz-Wettbewerb* (BVerfG – 1 BvR 170/71), decision of 8 February 1972.

104 Ireland, *Pigs Marketing Board v. Donnelly* (Dublin) Ltd 1939 IR 413, 29 November 1978; *Central Dublin Development Association Ltd v. Attorney General*, (1975) 109 ILTR 69, 30 June 1975.

105 France, Constitutional Council (*Conseil constitutionnel*), Decision No. 81-132, 16 January 1982.

106 The Netherlands (2008), Books 2 and 3; Raaijmakers, M.J.G.C. (2006), p. 8-9.

107 Bulgaria (1999), Art. 14; Italy (2011).

108 Such as Article 3 of the Belgian Special Law To Reform the Institutions (*Bijzondere Wet ter Hervorming der Instellingen*).

109 Belgium, Senate (Senaat) (2010).

focus is on setting up conditions for founding, operating and terminating business activities, such national law logically tends to restrict the freedom to conduct a business rather than enhance it. Legislative and administrative restrictions to the freedom to conduct a business at the national level can be identified in a number of areas, including in the licensing of various types of businesses and professions or the protection of public order or free competition, as well as the protection of other values – health, environment or intellectual property. These issues are further discussed in [Chapter 3](#), which examines selected obstacles and promising practices in relation to the freedom to conduct a business in EU Member States.

Besides the above restrictions, the national law of EU Member States contains a number of other conditions for setting up and operating a business that can potentially distort the equal access to the freedom to conduct a business. Some could be seen as governed by common sense and not constituting serious obstacles, such as the legal requirement to hold a bank account in Denmark<sup>110</sup> – and in this context consider the development to make a bank account a ‘right’ across the EU.<sup>111</sup> The ‘public order’ notion, including the possible requirement of proving one’s criminal record when requesting a business licence, is perhaps more controversial. In Portugal, the Insolvency and Company Recovery Code determines that when the insolvency has been classified as deliberate, the responsible parties are prohibited from engaging in commercial activities for periods ranging from two to 10 years.<sup>112</sup>

Perhaps the most common and easily overlooked restriction on the freedom to conduct a business is age. Persons under the age of 18 years are generally excluded from or restricted in exercising the freedom to conduct a business in most EU Member States, either *per se* or because they are unable to fulfil other legal or factual conditions linked to opening their own business bank account, or are subject to stricter labour law regulations. The average age of entrepreneurs is, nonetheless, declining, particularly in online business – a trend that some states have attempted to respond to. An example of such a response is the 2010 amendment of the French Commercial Code that allows legally emancipated minors to operate a business with the approval of a court.<sup>113</sup>

Ordinary legislation does not, however, only play a restrictive role. In some EU Member States it is directly linked to the constitutional provisions setting out the freedom to conduct a business. In Finland, the general

principle contained in Article 18 of the Constitution is elaborated upon in detail by the Act on the Right to Pursue a Trade. In Section 1, the Act grants equal business rights to all citizens of the European Economic Area (EEA) and to every legal person with a registered branch in Finland and its main office within the EEA.<sup>114</sup> In Sweden, the right to conduct a business is protected within the framework of anti-discrimination legislation, with Article 10 of the Discrimination Act prohibiting discrimination with regard to starting or running a business or exercising a profession.<sup>115</sup>

In France, references to this freedom can be found across various legal instruments. The *Loi Royer* on trade and craft states in Article 1 that “freedom and entrepreneurial spirit are the foundation for commerce and craft”,<sup>116</sup> and the Act on social dialogue and the continuity of the public service in regular public land-based passenger transport, Article 1, expressly qualifies the freedom of trade and industry as a freedom of “constitutional value” (see Section 2.3.1. on national constitutional law).<sup>117</sup> The Postal and Electronic Communications Code then refers to the freedom to conduct a business in addition to the freedom of communication and intellectual property rights.<sup>118</sup> In Latvia, the slightly vague constitutional provision that can be interpreted as providing for the freedom to conduct a business is somewhat clarified by Article 4 of the country’s Commercial Code, which stipulates that “restrictions on commercial activities may only be specified by law or on the basis of law” and that “merchants (entrepreneurs) have the right to freely choose types of commercial activities that are not prohibited by law”.<sup>119</sup>

Furthermore, as pointed out earlier, some essential elements of the freedom to conduct a business, notably the freedom of contract, are also usually stipulated in civil and commercial law rather than directly in constitutional law. Examples include the civil codes of Hungary<sup>120</sup> and Malta.<sup>121</sup> In a number of EU Member States, the freedom of contract is quite extensive, or has recently been subject to significant deregulation. This includes no longer enforcing formerly compulsory but today largely obsolete attributes of contracts, such as their fully written form (see for example the new Civil Code in the Czech Republic, which became applicable in 2014).<sup>122</sup>

110 Denmark (2012).

111 European Commission (2014f).

112 Portugal (2004), Art. 189(2)(c).

113 France (2006), Art. L 121-2.

114 Finland (1919).

115 Sweden (2008).

116 France (1973).

117 France (2007).

118 France (2004).

119 Latvia (2000).

120 Hungary (2013).

121 Malta, House of Representatives (1874), Art. 982(2).

122 Czech Republic (2012), Art. 1(2).

### 2.3.3. Scope of the freedom to conduct a business: public interest case law

At national level, the scope of the freedom to conduct a business is similarly affected by the fact that the right is not absolute and that there are often other fundamental rights that it has to be balanced against. In general, the scope of the right is limited by public interest considerations, which may form the basis of measures restricting the freedom to conduct a business either directly or indirectly.

As economic freedom is a constitutional right in several national legal systems, any limitations on the freedom to conduct a business are judged on the basis of strict criteria. In particular, any limitations must have a legitimate aim, be relevant to the subject and the character of the regulated professional activity and must respect the principle of proportionality.

#### Safeguarding a constitutional right: strict criteria to uphold the freedom to conduct a business

A company in Greece applied for a license to expand a supermarket, which was rejected. The Council of State found that the Constitution consolidates the freedom to establish commercial stores as an exercise of economic activity. The national law requiring an administrative permit therefore introduced a limitation to a constitutionally consolidated freedom, which could be accepted only if justified by specific reasons of public interest, if clear and objective criteria determine the competence of the administration, it is adequately justified by the special nature of the regulated issue and is within the limits of the principle of proportionality. The Council of State also held that the discretionary powers of the administration when regulating private economic activity should be limited only to what is strictly necessary.

*Greece, Judgment 694/2013, Council of State (Plenary), 18 February 2013*

Notable exceptions to this generally applicable approach are found in Belgium and Poland. In Belgium, freedom to conduct a business is neither a fundamental nor a constitutional right, but rather has the force of ordinary law.<sup>123</sup> In Poland, limitations upon economic freedom may be imposed only by means of statute and only for important public reasons.<sup>124</sup> However, this is a lower

threshold than the one required for limiting other constitutional freedoms and rights.<sup>125</sup>

#### Considering the proportionality of restrictions based on public health

A regional law in Spain prohibited the advertisement of alcoholic beverages anywhere that their sale, supply or consumption is forbidden. This resulted in a claim against the marketing campaign of a company selling such beverages. The Supreme Court held that the freedom of enterprise shall not generally prevail over the right to health. When they collide, an examination of interests shall be carried out, establishing reasonable restrictions that allow both interests to be respected. Restrictions to the freedom of enterprise are deemed to be legal as long as it is not proven that the right or goods could be protected by less restrictive means. The Court ruled that in this case the protection of consumers and health should prevail over the alleged breach of the freedom of enterprise, particularly as the alcoholic beverages company did not prove that consumers' health could be protected by less restrictive means than by withdrawing the publicity in the city.

*Spain, Supreme Court – Civil Division (Sala Civil del Tribunal Supremo), Decision STS 891/2010, 3 January 2011*

When refused permission to install diagnostic medical equipment in Portugal, the plaintiff appealed to the court alleging the unconstitutional nature of the norms cited to justify the refusal. 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 right to conduct a business, including in the health sector, is not an absolute right, but is a right upon which the state can introduce limits and restrictions related to the "general interest" and "ensuring suitable standards of quality and efficiency in health institutions", as well as 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 proportional to exercising the rights and interests in question and admissible restrictions.

*Portugal, Central Administrative Court of Northern Portugal, No. 00382/07-3BECBR, 9 November 2012*

<sup>123</sup> Philipsen, G. (2007), p. 10 and 13.

<sup>124</sup> Poland (1997), Art. 22: Limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons ("Ograniczenie wolności działalności gospodarczej jest dopuszczalne tylko w drodze ustawy i tylko ze względu na ważny interes publiczny.").

<sup>125</sup> Poland (1997), Art. 31 (3): Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights ("Ograniczenia w zakresie korzystania z konstytucyjnych wolności i praw mogą być ustanawiane tylko w ustawie i tylko wtedy, gdy są konieczne w demokratycznym państwie dla jego bezpieczeństwa lub porządku publicznego, bądź dla ochrony środowiska, zdrowia i moralności publicznej, albo wolności i praw innych osób. Ograniczenia te nie mogą naruszać istoty wolności i praw").



A wide range of public interest considerations may justify restrictions to the freedom to conduct a business. In general, these considerations fall within the spheres of public safety or public health. Once a public interest in restricting the freedom to conduct a business is established, national courts will typically consider whether the proposed restriction is proportionate to achieving the stated aim.

Besides general considerations of public health and safety, national courts are also often asked to determine the scope of the freedom to establish and conduct business when balanced with a variety of individual rights and freedoms. While such rights are often specific and individually enforceable, using them as a balance to the freedom to conduct a business often also serves wider public interest gains. For example, lawyers' freedom to conduct a business may be restricted to guarantee an individual's right to a fair trial, whilst also ensuring a fair and efficient justice system overall.

### Restricting the freedom to conduct a business to guarantee a fair trial

An amendment to the Attorney's Act in Slovenia allowed courts to appoint legal aid lawyers against their will where insufficient lawyers were available to work pro bono and a breach of constitutionally guaranteed defence rights was therefore likely. In addition, the Bar Association was allowed to fix the fees for such representation. The court found the mandatory appointment process to be in the public interest and necessary to safeguard the constitutional right of access to justice. Furthermore, while lawyers' commercial activities are protected by the right to free economic initiative and may therefore be subject to freely negotiated fees, mandatory legal representation is not a commercial activity but rather one in the public interest, carried out upon authorisation by the state and paid by state funds. The amendment was therefore compatible with the Constitution and in fact rectified a previously unconstitutional situation.

*Slovenia, Constitutional Court, U-II-1/09, 5 May 2009*

### Balancing the freedom to conduct a business with intellectual property rights

The internet service providers Xs4all and Ziggo had been ordered by a district court in the Netherlands in 2011 to block access to the file-sharing site 'The Pirate Bay' on grounds of copyright infringement. But the Court of Appeals overturned the ruling, since the providers could show, for instance, that the block had not been sufficiently effective. In applying the case law from the CJEU, the Court of Appeal held that entrepreneurial freedom outweighs intellectual property rights, because the blockades are disproportionate and ineffective.

### Balancing freedom to conduct a business with the right to data protection

A public institution named eHealth-platform was established in Belgium to ensure the secure exchange of personal health data between actors in the health sector. A claim against the establishment of this platform was brought by private undertakings active in the sector. The court held that considering the nature of the tasks given to the eHealth-platform and the sensitive nature of the data, the limitations introduced could not be considered unreasonable or disproportionate to the goal of exchanging health data in a maximally secure way. They were therefore compatible with the Constitution.

*Belgium, Constitutional Court (Grondwettelijk Hof), No. 29/2010, 18 March 2010*

In addition to general considerations related to the restriction of the freedom to conduct a business in the public interest, FRA findings indicate that in certain circumstances, EU Member States impose additional, more burdensome conditions on individuals or companies wishing to conduct a business. Exceptionally, it may be in the public interest to prevent individuals from establishing or conducting a business entirely.

As such prevention will in most cases amount to a breach of the constitutional right of freedom to conduct a business, Member State courts have been particularly careful in establishing lawful justifications for the provision in question. These further limitations and prohibitions can be generally applicable bans on conducting a business, as well as individually applicable prohibitions directed at a specific company or type of business. One form of generally applicable ban is the concept of state monopoly. In such cases, the state retains a high level of control over business in certain sectors, either preventing individuals or companies from conducting business, or subjecting them to exclusive state control and authorisation.

### State monopolies

The Constitutional Court in Italy rejected the question posed by a Regional Administrative Tribunal concerning the concentration of public air transport in the Alitalia-CAI case as unfounded. In judging on the balance between the freedom of taking economic initiative established in Article 41, paragraph 1 of the Constitution (of which free competition is a consequence) and the social utility of such an initiative, the court paid particular attention to the intent of ensuring the continuity of air transport on all domestic routes, including those not economically convenient, to avoid the dissolution of a company of significant size and the loss of corporate value, in view of protecting the employment levels and strategic needs of the national economy.

## Gambling monopolies

The legislature in France established an online gambling system under exclusive state control. An independent administrative authority was created and charged with accrediting new operators, monitoring their adherence to obligations and participating in the fight against illegal operators. In light of the risks arising from the illegal online gambling market, the Constitutional Council held that these measures constituted a proportionate balance between the freedom to conduct a business and the protection of public order.

*France, Constitutional Council, Decision No. 2010-605 DC, 12 May 2010, Journal officiel, 13 May 2010, p. 8897, texte No. 2, cons. 24 et 25, Rec. p. 78*

In Germany, Bavarian legislation established a state monopoly for gambling, excluding private providers from the market entirely and without exception in the name of fighting gambling addiction and protecting minors. The Constitutional Court held that the Bavarian state monopoly on gambling was incompatible with Article 12(1) GG unless it was geared strictly toward fighting addiction and formulated and interpreted accordingly. The law did not include any provisions to ensure this, leaving open the question of whether it was in fact aimed at protecting the state's financial interests. It was therefore a justified but disproportionate interference with Article 12(1) GG. The legislator was required to amend the law in accordance with the Constitution, having due regard to Article 12(1) GG.

*Germany, Constitutional Court, Judgment 1 BvR 1054/01, 28 March 2006*

An individual or company can also be prohibited from conducting a business based on individual characteristics. Often, these relate to professional conduct – including criminal activities – indicating that the individual in question is not or no longer fit to conduct his or her business.<sup>126</sup> In several Member States it is then considered to be in the public interest to restrict or even revoke the freedom to conduct a business, often for a specified period of time. Prohibitions may be attached to the starting as well as the continuation of a business. For example, where a license or permit is required, it may be denied at the outset or later revoked.

## Unethical professional conduct and business bans

A District Court in Sweden convicted a man for aggravated fraud and tax evasion. He was sentenced to 10 months in prison and a three year business ban under the Trading Prohibition Act (*lagen om näringsförbud*). Considering the freedom to conduct a business (*näringsfrihet*), the Court of Appeal ruled that the accused was exempted from the trading prohibition. He was allowed to work as an

employee even in the business in which he had committed the economic crimes; however, he was not allowed to be involved in the company's management, including financial management.

*Sweden, Court of Appeal, RH 2008:63, 15 February 2008*

A Court of Appeal in Portugal dealt with the question of whether a law imposing a two to 10 year ban on business by persons who had been found to have caused deliberate insolvency was compatible with the constitutional right similar to the freedom to conduct a business. The court held that the basis for the ban was justified by the need to defend the general credibility of business and the offices in question. However, this did not equate to incapacity to work, nor was it intended to protect the subject of the ban, but aimed to safeguard a collective interest. The court concluded that a restriction of the business, for which a material reason can be cited based on the collective or general interest, is compatible with the Constitution. It responds to constitutionally admissible interests or requirements such as guaranteeing the efficient functioning of markets and balanced competition between companies.

*Portugal, Court of Appeal of Coimbra, Case No. 2273/10.1TBLRA-B.C1, 7 February 2012*

## Revocating licenses in the public interest

In Greece, a pharmacist's license was revoked upon him turning 70. The Council of State held that professional freedom is a specific expression of Constitutional rights and constitutes an indispensable part of the personality of every individual. The law can impose limitations to this freedom for reasons of public or social interest but these must be relevant to the subject and the character of the regulated professional activity. In this case, the set age limit was an objective limitation in the exercise of a profession, which was not contrary to the Constitution or the principle of proportionality, as it could not be considered to go beyond the necessary measure for the achievement of a given objective, in this case the protection of public health.

*Greece, Council of State (Plenary), Judgment 2204/2010, 25 June 2010*

In Denmark, a barrister's professional status was revoked until further notice due to professional negligence. After this revocation, the lawyer pursued further training and worked in short-term positions. The Supreme Court found that even though the revocation of the status of barrister constituted a serious interference in a lawyer's ability to do business and even though eight years had passed, the applicant's actions following the decision were not sufficient to invalidate the status revocation. The revocation was upheld.

*Denmark, Judgment U.2008.474H, 28 November 2007*

126 Sweden (1986).

### 2.3.4. Scope of the freedom to conduct a business: case law on different stages of the business cycle

The delimitation of the scope of the freedom to conduct a business can also be analysed from the perspective of the different stages of the business cycle. Establishing a business usually entails various types of registration or licence obligations, and the actual running of an already established business is then subject to certain further rules and regulations.

#### Establishing a business

In principle, starting a business should merely require registering it, by notifying the relevant (local) authority. Such simple registration requirements must be distinguished from more specific registration obligations with different professional bodies. For many types of business, registration with the relevant chambers of commerce or other professional bodies is required. This is usually the case where stricter regulation and better oversight of a sector is in the public interest.

Registration is in turn dependent upon specific conditions being fulfilled by the individual or company seeking to register. Such conditions may relate to age, nationality, education or training of the individual wishing to start a business in the respective field. In practice therefore, these conditions often amount to a requirement to gain permission from the public authorities to conduct a business.

#### Upholding professional standards and ensuring a high-quality service

A law in Germany determined that only companies with a certain number of employees and management staff registered with the chamber of architects could themselves register with the chamber and therefore be permitted to use the word “architect” or related terms to describe their business. The applicant was a company which had not itself registered with the chamber, but was managed by a registered architect. The Constitutional Court held that the provisions relating to registration with the chamber of architects were not unconstitutional, as they were justified by the public interest in consumer protection in the area of architectural services, suitable for this purpose and proportionate. However, the provisions relating to limited companies such as the applicant would only be necessary and therefore compatible with the Constitution if they were interpreted as requiring the company to register only if it intended to advertise its own nature as being within a related architectural field. Where the company merely advertised its employees’ expertise in these fields, it was sufficient that these individuals be required to register.

*Germany, Constitutional Court, Judgment BVerfG- 1 BvR 1350/04, 2 February 2008*

In other cases, national rules impose different permit or license requirements. For example, some Member States oblige individuals or companies to acquire a permit or license to conduct certain types of business, thus imposing a duty to gain permission from the public authorities to start a business. This is the case for businesses in sectors which in all cases have immediate effects on public health, order or safety, e.g. trade in pharmaceuticals, weapons or particular foodstuffs. It can also apply to businesses that usually have an impact on other protected public interests, such as the environment or cultural and historical sites. In some Member States, the conditions attached to such permits or licenses can be extensive. In addition, permits or licenses must usually be renewed regularly and upon any change of the specific circumstances under which they were granted, enabling a more continuous form of oversight than the fulfilment of static and generally applicable criteria upon registration.

#### Permits to establish a business

A law in Finland required *Finland (2010)*, Constitutional Law Committee Statement 32/2010 (2010), 21 October 2010.

It should be noted that several Member States have recently undertaken measures to simplify licensing requirements and reduce the scope of business activities requiring permission. For example, the Business Environment Improvement Action Plan in Lithuania has reduced and simplified the procedures for obtaining licences and permits. The so-called top sector policy in the Netherlands takes the same approach, limited however to nine sectors with a particularly strong market position and high knowledge intensity. In 2010, Portugal introduced an initiative to remove licensing requirements altogether.

*Lithuania, Ministry of Economy et al. (2011)*, Lithuania : National Reform Programme, April 2011

*The Netherlands, House of Representatives (Tweede Kamer der Staten-Generaal) (2012)*, Parliamentary documents (Kamerstukken) II, 2011-2012, 32 637, No. 35, p. 1. See also the website of the Dutch National government (Rijksoverheid) (2013), Investing in top sectors (Investeren in topsectoren), [www.rijksoverheid.nl/onderwerpen/ondernemersklimaat-en-innovatie/investeren-in-topsectoren](http://www.rijksoverheid.nl/onderwerpen/ondernemersklimaat-en-innovatie/investeren-in-topsectoren)

### Promising practice

#### “Zero licensing” in Portugal

The “Zero Licensing” initiative seeks to continue reforms to modernise the state, and is a commitment of the 2010 Simplex Programme, aiming to dematerialise administrative procedures at an electronic contact point accessible through the Company Portal, viz. the “Entrepreneur’s Counter” and to reduce administrative costs for individuals and companies by eliminating licences, permits, inspections and prior conditions for specific activities, substituting them by systematic *a posteriori* monitoring and mechanisms for effectively ensuring that promoters are responsible. Dematerialising administrative procedures and eliminating the need for licences, permits, inspections and prior conditions makes access to specific activities easier, quicker and cheaper.

Portugal, Simplex programme, [www.simplex.pt/avaliacoes.html](http://www.simplex.pt/avaliacoes.html)

### Conducting a business

Further to restrictions imposed on accessing or entering a certain business sector, national legislation also sets out conditions for carrying out a business once started. Based on examples found in the 28 Member States, such restrictions may be divided into two distinct categories – generally applicable restrictions regulating all businesses or entire sectors (such as generally applicable opening hours, maximum weekly working hours or other safety-related regulation), and conditions attached only to individual businesses (related either to the particular business itself or its immediate environment).

#### Generally applicable limitations: shop opening hours

Several shop owners in Austria were not allowed to open their shops (mainly during evenings and week-ends) due to the restrictions contained in the Opening Hours Act (*Öffnungszeitengesetzes*). The Constitutional Court confirmed that the public interest in relation to the weekend prevails over the interests of entrepreneurs to freely conduct their business.

Austria, Judgment G66/11, 14 June 2012

A regional authority in the Czech Republic adopted a decree limiting the opening hours of a bar owned by the plaintiff, while leaving the determination of opening hours of other bars up to their owners. The High Court held that, as the decree limited exclusively the business of the plaintiff, it was not possible to consider it a normative administrative act. The decree was considered an individual act regulating the right and obligations of an individual. The plaintiff was therefore entitled to damages resulting from the violation of his right to conduct a business or to engage in other economic activities.

Czech Republic, Decision of the High Court of Justice No. 28 Cdo 542/2011, 13 April 2011

#### Generally applicable limitations: Sunday trading

The Labour Code in France allows local government authorities to impose a weekly closing day on all establishments engaged in the same profession in the same geographical area. The aim of this provision is to ensure equality between establishments of the same profession, whatever their size, regarding weekly rest days. The Constitutional Council held that this interference with the freedom to conduct business responds to a pattern of general interest, and is proportionate to the pursued objective.

France, Constitutional Council, Decision No. 2010-89 QPC, 21 January 2011, Journal officiel, 22 January 2011, p. 1387, texte No. 66, cons. 4 and 5

The Constitutional Court of Croatia initiated proceedings to review the constitutionality of the Trade Act, following a complaint by a local authority that the prohibition of Sunday trading “directly and indirectly decreases the budgetary income of local and regional authorities” since it prevents local and regional authorities from realising the income from the taxes provided for in the Financing Units of Local Self-Government Act. The court found that the prohibition did not meet the criteria of exceptionality or proportionality necessary to justify limiting entrepreneurial freedom, as the legitimate aim of protecting employees’ rights could be achieved through less burdensome means. The court also held that the loss of jobs to be anticipated following this prohibition would be likely to affect women more severely than men due to the nature of businesses usually active on Sundays (including travel agencies and caterers, for example), thus deepening gender inequality in the workplace. The restrictive provisions of the Trade Act were consequently annulled, and traders now decide their own trading hours, subject to consumer needs and employees’ rights.

Croatia, Constitutional Court, U-I/642/2009, 19 June 2009

#### Individually applicable limitations: establishing a business strategy and making policy decisions

An applicant in Germany was required by law to abolish the bonus system used in her casinos. She was informed that her failure to do so would result in a fine and the closure of her business. The Federal Administrative Court considered that based on the provision’s public interest aim of preventing gambling addiction, the prohibition for certain types of bonus systems should be interpreted broadly. The system used by the applicant fell within the prohibited category, and non-compliance with this prohibition could be subject to enforcement measures. The German Commercial Code only protects the freedom to conduct a business related to starting a business or entering a trade sector. The carrying out of business may be subject to interference in line with regional policing regulations. This is so even where additional conditions have previously been imposed and complied with to achieve the registration of a business.

Germany, Federal Administrative Court, Judgment BVerwG 8 C 12.09, 31 March 2010

The Court of Appeal in France, after noting that an employer requiring the wearing of uniforms should launder the uniforms, ordered the establishment of a weekly system of collection, washing and ironing of dirty uniforms, and of providing of clean uniforms in special lockers the following week. The Court of Cassation held that such an injunction is contrary to the fundamental principle of the freedom to conduct a business.

*France, Court of Cassation, Social Chamber, Appeal No. 11-26585, 12 December 2012*



# 3

## Exercising the freedom to conduct a business in practice: selected obstacles and promising practices



FRA research into the policies and practices of 13 selected EU Member States identified several practical obstacles faced by those exercising their freedom to conduct a business, as well as different promising practices put in place to overcome some of these obstacles. As outlined in the Introduction, the findings are based both on research into national legislation and policies as well as information provided by selected respondents from various fields who shared their subjective views on key obstacles and promising practices. This chapter does not aim to be exhaustive but to provide examples of promising practices from selected EU Member States.

The most common issues identified as constituting barriers to the freedom to conduct a business are onerous regulatory requirements imposed on businesses by different laws. They include, among others, various frequent and duplicating reporting obligations and inspections in Ireland<sup>127</sup> and Poland<sup>128</sup> that could sometimes be reduced by more information-sharing among the competent authorities, or overly lengthy administrative procedures in Greece<sup>129</sup> and Lithuania.<sup>130</sup> The development of various e-tools and particularly virtual one-stop-shops to overcome some of the administrative burden seems to be a welcome practice in this respect. Notable examples include the launch of an online business registration system in Lithuania in 2010 which significantly reduces the period required for business incorporation or the introduction of e-government elements in Estonia or Slovakia (see the Promising practices on e-Government and on Verksamst.se).

### Promising practice

#### Simplified proceedings: e-Government

In 2013, following the example of some other EU countries, Slovakia adopted a new Act on e-Government allowing private entities to officially communicate with public authorities solely by electronic means, including to file documents, applications and requests. Since 2011, a system of transparent public contracts has also been in place in Slovakia that requires the majority of contracts involving a public body, as well as orders and invoices, to be published online.

The general quality of laws and their alleged rigidity, particularly in the field of employment legislation, was referred to as an obstacle in Poland<sup>131</sup> and the United Kingdom,<sup>132</sup> as well as in Ireland, where the system of corporate law is often criticized for being too complex and outdated.<sup>133</sup>

Another very common barrier is linked to difficulties in accessing credit, particularly during an economic crisis. This issue seems to be of serious concern in various EU Member States such as Greece,<sup>134</sup> the Netherlands<sup>135</sup> and Romania<sup>136</sup>, as well as in a number of others, particularly in relation to SMEs. In this context, promising practices have been identified in a number

127 Ireland, Small Firms Association (2012).

128 Niedbał J. (2013).

129 Greece, Observatory of the Business Environment (Παρατηρητήριο Επιχειρηματικού Περιβάλλοντος) (2013).

130 Fuks, E. (2012).

131 Poland, Association of Entrepreneurs and Employers (Związek Przedsiębiorców i pracodawców) (2013).

132 Beecroft, A. (2011).

133 Ireland, Company Law Review Group (2013); Ireland, Company Law Review Group (2001), p. 35.

134 Greece, Observatory of the Business Environment (Παρατηρητήριο Επιχειρηματικού Περιβάλλοντος) (2013).

135 The Netherlands, House of Representatives (Tweede Kamer der Staten-Generaal) (2013), No. 61, p. 14.

136 Romania, Ernst and Young Romania (2012), p. 14.

of countries. Belgium,<sup>137</sup> France<sup>138</sup>, the Netherlands<sup>139</sup>, Romania<sup>140</sup> and the United Kingdom<sup>141</sup> have adopted programmes to enhance the availability of government grants and various other forms of support for obtaining the funding necessary to establish and operate a business. Examples vary from supporting micro-credits to crowd-funding initiatives aimed at the creation of partnerships between businesses and academic and research institutions.

#### Promising practice

##### Verksamt.se

Verksamt.se is a website on which three Swedish government agencies have collected and structured information and services relevant to individuals considering, starting, running, developing or closing their own business. The site also serves as the operative place for the Swedish Point of Single Contact.



For more information, see [www.verksamt.se/en/web/international/home](http://www.verksamt.se/en/web/international/home)

Finally, while it is outside the scope of this report to look at the taxation policies of EU Member States, there are some interesting examples in this respect, such as the favourable taxation on innovation introduced in Luxembourg in 2010.<sup>142</sup>

<sup>137</sup> Belgium, Participation Fund.

<sup>138</sup> France, 'FinPart-P2Pventure' Association (2012).

<sup>139</sup> Netherlands, Qredits private microfinance foundation.

<sup>140</sup> Romania, Ministry of Economy, Direction for Small and Medium Enterprises Programmes (*Ministerul Economiei, Directia Implementare Programe pentru Intreprinderi Mici si Mijlocii*).

<sup>141</sup> United Kingdom, Department for Business, Innovation and Skills (2013). See the webpage for examples of other activities.

<sup>142</sup> Luxembourg, Law of 21 December 2007 introducing Article 50bis to the Income Tax Law (LITL) Law of 19 December 2008 introducing the exemption of IP from Net Worth Tax (§60bis Valuation Law) and extending the scope of the IP regime to domain names. Circular of 5 March 2009 issued by the Luxembourg tax authorities providing administrative guidance on how the IP regime should be applied in practice. See Muntendam, F. (2011).

The next two sections look at existing obstacles and promising practices relevant to the freedom to conduct a business in relation to two specific focus areas: population groups (in Belgium, Denmark, France, Lithuania, Luxembourg and Romania) and access to justice (in Belgium, Estonia, Lithuania, Spain, Ireland, Poland, Slovakia, Romania and the United Kingdom).

### 3.1. Freedom to conduct a business in relation to specific population groups

Freedom to conduct a business has particular implications for specific population groups, such as young people, migrants, minorities (e.g. Roma), women, and persons with disabilities. These population groups are often a minority among entrepreneurs and may therefore face additional obstacles concerning their freedom to establish and run a business. A closer look at these obstacles as well as at the actions to promote the freedom to conduct a business for these entrepreneurs is therefore interesting.

In addition to obstacles to the freedom to conduct a business that affect entrepreneurs generally, such as regulations, taxation systems or restrictive legislative contexts, there are additional direct and indirect barriers to establishing and promoting businesses that affect particular population groups to a greater extent, and some obstacles that are only applicable to particular more vulnerable groups. In these instances, targeted policies that address these challenges are necessary to fully promote and protect the freedom to conduct a business.

The main barriers that the identified population groups face concerning the freedom to conduct a business include: discrimination; having limited business networks because of lack of experience or being new to a particular country or field; facing other difficulties linked to level of education, status, being a foreigner or social exclusion; and certain legal requirements being applied that may not take into account the needs or specificities of certain segments of the population. This lack of financial, human and social capital can create significant obstacles to entrepreneurs. In Luxembourg for instance, a lack of information on the documentation and steps required for registering a business was identified as a difficulty faced by youth, women and migrant entrepreneurs.<sup>143</sup>

<sup>143</sup> Luxembourg, Ministry of Equal Opportunities (*Ministère de l'Égalité des chances*) (2011).



## Obstacles to conducting a business in national family law

Brad Brubaker, an Ohio native, met his British partner, Paul Feakes, in California in 1995. Brubaker moved to London and eventually acquired British citizenship. They entered into a civil partnership, which under the British legislation is identical in all but name to marriage. When they later moved to Italy and decided to open an art gallery in the Tuscan seaside town of Pietrasanta, however, Italy did not recognise their partnership. In contrast to the normal treatment for married couples establishing a family business, they were forced to register the gallery in Brubaker's name alone, while Paul Feakes had to be listed as an employee – with a contract and payroll, and all the costly extra paperwork that it entailed. "That's when we realised the discrimination of it," explained Brad Brubaker. "People think Europe is so far ahead, and I guess in some ways it is. But it's not quite there yet." They decided not to go to court.

*For more information, see: Geitner, P. (2012), 'On gay marriage, Europe strains to square 27 interests', The New York Times, 25 July 2012*

In recent years, the economic crisis has had an impact on consumer confidence, as well as on entrepreneurs' own willingness to take on additional business risks. This may be felt particularly strongly by some population groups. High legal fees or other costs may also disproportionately limit the access to the freedom to conduct a business for particular population groups. Similarly, accessing financial capital to start or sustain a business may also be challenging for some entrepreneurs belonging to these population groups. This was reported as a key obstacle to the freedom to conduct a business for population groups in Belgium,<sup>144</sup> France, Luxembourg, Lithuania, the Netherlands, Romania, and Spain.

Conversely, many members of these population groups may be increasingly driven towards self-employment, as entrepreneurs, because of difficult economic times, high unemployment and limited traditional job opportunities. In Spain for instance, where the unemployment rate in the wake of the economic crisis rose above 25 %, the establishment of micro or small companies increased. The challenges many face to establish these companies reveal the range of sociological, psychosocial, economic and legal barriers to the freedom to conduct a business, as well as the existence of discrimination, both vertical and horizontal.

Table 3 gives an overview of the population groups that were the subject of further FRA research in relation to the freedom to conduct a business across EU Member States.

In light of the particular implications linked to the freedom to conduct a business for specific population groups, EU Member States have developed a variety of initiatives and measures to promote entrepreneurship and the freedom to conduct a business.

However, in a number of Member States, such initiatives would benefit from a strengthening of the institutional framework and improved coordination across policy areas. In Belgium for instance, these initiatives are often fragmented and poorly coordinated, according to the Belgian Central Council for Economy, a body established in 1948 to favour the preparation of recommendations jointly by unions and employers' organisations.<sup>145</sup> Centralised institutions that could coordinate initiatives could increase their impact and effectiveness. There is thus still room for improvement for promoting entrepreneurship activities among young people, migrants, women, minorities and persons with disabilities.

**Table 3: Further information on the freedom to conduct a business in relation to specific population groups by EU Member State**

EU Member State	Youth & young entrepreneurs	Migrants	Minorities	Women	Persons with disabilities
BE	✓	✓			✓
DK			✓	✓	✓
FR		✓		✓	✓
LU	✓	✓		✓	
LT	✓	✓			
NL	✓	✓	✓	✓	✓
RO	✓			✓	

Source: FRA, 2014

<sup>144</sup> Van Laer, K. (2011), p. 264.

<sup>145</sup> Belgium, Central Council for Economy (*Conseil Central de l'Économie/Centrale Raad voor het Bedrijfsleven*) (2010), p. 45.

### 3.1.1. Freedom to conduct a business and youth

Young entrepreneurs are one of the groups that face particular challenges to the freedom to conduct a business. Their exposure to the business environment is limited, and many face difficulties in navigating the complex systems and regulatory requirements associated with setting up a business, from accounting to bookkeeping, labour safety, taxation systems, and other regulations. They are often unable to hire professional assistance to support the process. Limited job experience coupled with limited knowledge of the market and procedures, as well as a lack of strategic business planning, puts young entrepreneurs in a particularly difficult situation when establishing new businesses. Lack of business knowledge and practical experience also risks limiting the lifespan of a new enterprise, with many businesses set up by young entrepreneurs surviving less than a few years. Such barriers were pointed out in a number of countries including Belgium, Lithuania, and Luxembourg.

In Lithuania for instance, a youth organisation representative pointed out that even when young entrepreneurs have a good business idea,

*“they usually do not have a clear understanding of how the business is functioning. Moreover, after business incorporation, young businesspersons are not able to understand or deal with the huge number of statutory requirements with respect to accounting and book-keeping, labour safety, and applicable taxes. Moreover, they cannot afford to hire professional assistance to arrange this documentation on their behalf.”<sup>146</sup>*

Having a limited business network generally hinders the survival and success of new businesses, and is a problem young entrepreneurs often face.

Additionally, young entrepreneurs tend to lack in competence in terms of creating sustainable and successful business plans and other strategies necessary for business survival and development. One major problem is not knowing where to turn to for advice or information on setting up a business and receiving support in navigating the business environment. In the Netherlands, the information necessary for young entrepreneurs to set up a business was identified as being neither transparent nor accessible enough.<sup>147</sup> In Luxembourg and in France, young entrepreneurs often lack encouragement, and in Romania, in addition to heavy administrative burdens for setting up a business, it was reported

that there are few support networks to promote young entrepreneurs. A survey reported by the French media claimed that while 48 % of student respondents indicated that they wanted to create a business one day, only 1 % ended up doing so.<sup>148</sup>

One of the biggest challenges facing youth entrepreneurs across Europe is a lack of start-up capital with which to set up a business. This is connected to the fact that young entrepreneurs, with little experience and a limited financial history, often struggle to secure bank loans, as banks tend to support proven trustworthy and established businesses. This was identified as a main obstacle to freedom to conduct a business in Belgium,<sup>149</sup> Lithuania, Luxembourg, the Netherlands and Romania.

A report in Romania on ‘The Entrepreneurs Speak – the Barometer of the Perception on the entrepreneurship environment’ revealed that 93 % of individuals interviewed stated that financing was a major issue for young entrepreneurs.<sup>150</sup> According to another report, by the Akcees Education Association, in 2013, young entrepreneurs were more concerned about burdensome administrative procedures and more discouraged by the level of corruption and high levels of taxes in Romania than older age groups.<sup>151</sup>

At the European level, some efforts have been made to support youth entrepreneurs. The Europe 2020 strategy recognises entrepreneurship and self-employment as key to achieving smart, sustainable and inclusive growth.<sup>152</sup> As part of the Europe 2020 strategy, several flagship initiatives have been developed, including an agenda for new skills and jobs, the ‘Youth on the Move’ initiatives on education and employment, and the European platform against poverty and social exclusion, all aimed at increasing knowledge of entrepreneurship and self-employment, building capacity, promoting protective measures for entrepreneurship and self-employment, and supporting entrepreneurship financially, for example through the European Social Fund, European Regional Development Fund and the European Progress Microfinance Facility. Additionally, the European Commission’s Social Business Initiative has also taken steps to give more visibility for social enterprises, including through the Youth in Action, Erasmus and other educational programmes, which serve as enabling tools to provide funding, educate and train social entrepreneurs in Europe (see also Section 1.2.).<sup>153</sup> The Social Busi-

<sup>146</sup> Lithuania – interview with representative of a youth organization “Club of Youth Entrepreneurs”.

<sup>147</sup> The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2012), No. 16, p. 7.

<sup>148</sup> Bonnet, J. and Pilczer, C. (2012).

<sup>149</sup> Van Laer, K. (ed.) (2011), p. 268.

<sup>150</sup> Romania, Ernst and Young Romania (2012), p. 12.

<sup>151</sup> Romania, Akcees Education Association (*Asociatia Akcees*) (2013), p. 15.

<sup>152</sup> European Commission, DG Employment, social affairs and inclusion, ‘Supporting entrepreneurs and the self-employed’.

<sup>153</sup> European Commission (2011a); see also the website of Social Economy Europe and European Commission (2014g).



ness Initiative also works to improve access to finance, including through micro-credit provision and by gathering information on crowd-funding and internet-based fundraising for businesses.

At the national level, Member States have developed policies and other action plans to address the specific needs and challenges faced by youth entrepreneurs. Government initiatives as well as programmes designed by schools and universities to encourage young people towards entrepreneurial careers have been put into place in several countries, including in the Netherlands.<sup>154</sup> In Lithuania similar measures have been a part of the government's implementation of the EC Entrepreneurship Action Plan 2020 to promote and encourage specific target groups, among them young people, in entrepreneurship.

### Promising practice

#### Young Enterprise & Create Young Entrepreneur Luxembourg

Young Enterprise is an initiative to promote the creativity and entrepreneurial spirit of young entrepreneurs through student competitions and educational programmes. Students are asked to create a business plan and present it before a jury composed of private sector and academic representatives. The winning team is invited to present its business plan at a European competition. The Young Entrepreneurs Luxembourg is a branch of Junior Achievement Worldwide (JA).

For more information, see [www.innovation.public.lu/fr/ir-luxembourg/jeunes-scientifiques/jonk-entrepreneuren/index.html](http://www.innovation.public.lu/fr/ir-luxembourg/jeunes-scientifiques/jonk-entrepreneuren/index.html)

The *Jeune Chambre Economique Luxembourg* organises a 'Create Young Entrepreneur Luxembourg' competition and award for young entrepreneurs. The prize is €1,500 and provides recognition to young entrepreneurs for dynamic, new approaches. The award also generates publicity with national ministries and large private sector companies, and attracts international attention.

For more information, see [www.aecca.fr/cyelwebsite/](http://www.aecca.fr/cyelwebsite/)

In Lithuania, many civic initiatives and projects have been initiated to encourage young people to start their own business. The most successfully implemented initiative to date is the 'First-year business support basket', a service package financed by the Ministry of Economy and run by 'Enterprise Lithuania', which includes consultancies and trainings distributed to young entrepreneurs who intend to start up a business within a period

<sup>154</sup> The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2012), No. 16, pp. 1-2; [www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2011/10/06/brief-onderwijs-en-ondernemerschap.html](http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2011/10/06/brief-onderwijs-en-ondernemerschap.html).

of six months. The service provides advice on financial management, commercial law, marketing and sales strategies, and is also supported by partner institutions that offer pro-bono services and exemption from bank charges for the first year of business activity, among other support services.

In Romania the national 'Programme for stimulating the establishment and development of microenterprises for young entrepreneurs', started by the Ministry of Economy in 2011, supports the development of businesses by entrepreneurs under the age of 35 through subsidies and state guarantees for credit.<sup>155</sup>

To overcome the problem of access to credit, the Netherlands is developing an 'Action plan young innovative entrepreneurs' (*Actieplan Jonge innovatieve ondernemers*). Through this plan, the government is investing in making financing more accessible, for example through microcredit systems and so-called Seed and Pre-Seed funds.<sup>156</sup> Similar state provision of financial aid to young entrepreneurs was established in Luxembourg.<sup>157</sup>

Besides organising market meetings between governmental buyers and young entrepreneurs, the Dutch Contracting Regulation (*Aanbestedingswet*) was reformed in such a way that smaller and novel companies are offered better chances to compete for public contracts.<sup>158</sup> This increases the competitiveness of young entrepreneurs, who often run relatively small businesses and have no track record yet. The new Contracting Regulation entered into force in April 2013.

### Promising practice

#### Erasmus +

Erasmus+ is the EU's 2014–2020 funding programme for education, training, youth and sport. The programme will have a budget of €14.7 billion, providing opportunities for over four million Europeans to study, train, gain work experience and volunteer abroad. It aims to tackle the skills gap currently faced in Europe by boosting skills and employability.

For more information, see [http://ec.europa.eu/programmes/erasmus-plus/index\\_en.htm](http://ec.europa.eu/programmes/erasmus-plus/index_en.htm)

<sup>155</sup> Romania, Ministry of Economy, Direction for Small and Medium Enterprises Programmes (*Ministerul Economiei, Directia Implementare Programe pentru Intreprinderi Mici si Mijlocii*), Programul pentru stimularea infiintarii si dezvoltarii microintreprinderilor de catre intreprinzatorii tineri.

<sup>156</sup> The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2011), No. 1, p. 13.

<sup>157</sup> Luxembourg, Ministry of Economy and Foreign Trade (2009).

<sup>158</sup> The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2012), No. 16, p. 8.

### 3.1.2. Freedom to conduct a business and migrants and ethnic minorities

#### Non-EU migrants

Migrants are another population group that are important to consider in the context of freedom to conduct a business. While migrants make up a minority of business owners in most Member States, in some, they constitute a large share of entrepreneurs. It is estimated that in France, for instance, non-EU nationals created 25,000 companies in 2010, which amounted to 4 % of all newly established companies.<sup>159</sup> The reasons for migrants to enter into entrepreneurial activities vary. In situations where high unemployment rates put many at risk of being in a vulnerable social and economic situation, starting a company may be a way to overcome a lack of traditional employment opportunities, as was reported in Belgium.<sup>160</sup> Migrants in many European countries tend to have lower traditional skill sets, and may thus prefer to start their own businesses in case they do not find other employment opportunities. However, the survival rate of businesses started by migrants is often relatively low compared to those started by nationals, particularly when it comes to first generation migrants.<sup>161</sup> Still, in some cases migrant entrepreneurs manage to thrive by finding niches in the market and using craftsmanship and low pricing as competitive advantages, as was found by a study conducted in the Netherlands.<sup>162</sup>

Migrants face many obstacles to the freedom to conduct a business, from securing financial capital for starting up a business, through problems with the recognition of qualifications, language barriers, lack of social networks and social capital to support business sustainability and growth, to limited knowledge of legal requirements and regulatory procedures, and in many cases cultural differences and discrimination. In some countries, such as France, there are also restrictions on the types of businesses foreign nationals are allowed to open or run, such as licensed premises, gaming establishments or casinos, private monitoring, security or transportation of funds, insurance or stock trading.<sup>163</sup>

One of the obstacles for migrants to the freedom to conduct a business identified in the research was the

limited access to or difficulties in securing financing or loans to start-up or sustain a business. In Belgium, Luxembourg, the Netherlands and Spain, problems included the fact that bank services were little used, and access to credit was difficult. Discrimination may contribute to this issue, as was identified in the Netherlands, where an anti-discrimination agency pointed out that having a migrant cultural background or a lack of proficiency in Dutch had most likely played a role in migrant entrepreneurs' credit applications being turned down by banks and municipal institutions.<sup>164</sup>

Another obstacle identified is lack of knowledge of the host country's business environment, including lack of ability to navigate the administrative system, barriers to accessing information and difficulties in registering with the relevant authorities.<sup>165</sup> These problems may be compounded by language difficulties, as many migrants have limited proficiency and knowledge of the host country's language. This was reported as an obstacle in Belgium and the Netherlands.

Furthermore, lower educational and professional qualifications among migrants may also be a barrier to the freedom to conduct a business, limiting opportunities for both employment and entrepreneurial pursuits. Related to this is the problem of the recognition of degrees obtained abroad, which may limit certain professions or skills by requiring a certificate or proof of practical experience. A special license or qualification equivalence is often required to perform particular jobs, as is the case in Belgium.<sup>166</sup>

Countries' migration and integration policies may also have an indirect impact on the freedom to conduct a business of migrants. For example, a study by the British Counsel and Migration policy group, 'Migrant integration policy index (MIPEX)' in 2011 revealed that Lithuania is one of the most difficult Member States as regards non-EU immigrant access and integration – among 31 countries where research was conducted, Lithuania was ranked 27<sup>th</sup>.<sup>167</sup> Low levels of immigration and negative perceptions of migrants in Lithuania have led to national policies relevant to the freedom to conduct a business being more focused on supporting the business pursuits of Lithuanians returning home after working abroad than on supporting immigrant groups.

In some cases, positive measures have been taken to support migrants' freedom to conduct a business. In

159 France, Agency for entrepreneurship (*Agence pour la création d'entreprises*, APCE). For more information, see France, APCE (2014).

160 Belgium, Participation Fund (*Participatiefonds*) (2006a), p. 117.

161 K. Kourtit and P. Nijkamp (2012), p. 10.

162 D. Bleeker, A. Bruins, R. Braaksma (2011), pp. 87–89.

163 France, (Art. L 31 of the Code for licensed premises), (Art. 3 of the Act of 15 June 1907 as amended by Act of 9 June 1977), (Decree of 14 August 1939).

164 Interview with representative on 11 December 2013.

165 Belgium, Central Council for Economy (*Conseil Central de l'Economie/Centrale Raad voor het Bedrijfsleven*) (2010), p. 22.

166 *Ibid.*

167 Migration Policy Group (2011), Migrant integration policy index (MIPEX): 2011, [www.mipex.eu/lithuania](http://www.mipex.eu/lithuania).

Belgium, the Flemish Community has decided that procedures for recognising degrees should be conducted free of charge by the Ministry of Education.<sup>168</sup> The Belgian Participation Fund also provides microcredit loans at lower interest rates and with few requirements for migrant entrepreneurs to set up a business. These initiatives help migrants to overcome some of the barriers they face in the host country. Several specialised services have also been put in place to support migrant entrepreneurs, such as Stebo in Genk, PELS in Brussels, *Collectif des Femmes* in Louvain-la-Neuve, and MIREC in Charleroi. These services provide information, courses and training, to raise awareness about procedures related to conducting a business, for instance.

While there are no national programmes for supporting migrant entrepreneurs in Lithuania, NGOs have been active in terms of providing possibilities to migrants to seek support for their businesses. They offer consultations on the Lithuanian legal system, employment opportunities, matters related to establishing a business, and business taxation. The project consultation centre 'PLUS'<sup>169</sup> provides expert consultations to migrants on a weekly basis, where concerned persons may address their everyday problems related to business establishment and organisation in Lithuania.

### Ethnic minorities – Roma

Minorities may face additional barriers to setting up and running businesses. Discrimination in access to credit, access to business support services, or when applying for business licenses and registration, may all pose major challenges to the freedom to conduct a business. Minority groups such as the Roma, Europe's largest minority population, may be at an even greater disadvantage, due to high levels of discrimination and a socio-economic status which is often lower than that of non-Roma entrepreneurs. Little existing research was identified related to the freedom to conduct a business for minorities, and there are only a few examples relating to Roma and freedom to conduct a business.

Access to start-up capital and loans was seen as an obstacle to the freedom to conduct a business in the Netherlands<sup>170</sup>, in particular concerning access to credit for Roma and Sinti entrepreneurs. Discrimination on the basis of ethnicity and negative perceptions of Roma and Sinti by non-Roma was reported as contributing to discriminatory behaviour by banks and other agencies when Roma entrepreneurs apply for business financing. An additional obstacle for Roma and Sinti entrepreneurs

in the Netherlands is a lack of knowledge on where to turn for business support and advice.<sup>171</sup>

Discrimination may be the biggest obstacle to Roma entrepreneurs. Distrust from financial institutions, creditors and investors may create difficulties in securing business financing. Discrimination by consumers or business support organisations can limit an entrepreneur's ability to set up, register and run a business, and may impact on a new business' sustainability.

### FRA PUBLICATION

#### FRA Roma pilot survey results

In 2011, FRA – in cooperation with the European Commission, the United Nations Development Programme (UNDP) and the World Bank – conducted a pilot survey of Roma and non-Roma populations living nearby. The study collected data in 11 EU Member States on their situation as regards employment, education, housing and health, as well as issues of equal treatment and rights awareness.

The survey results show that employment rates for Roma are particularly low in all the Member States surveyed. Only 28 % of Roma and 45 % of non-Roma living nearby aged 16 and above indicated paid work as their main activity. A considerable proportion of Roma in paid work face precarious employment conditions: 23 % held ad hoc jobs, 21 % were self-employed and 9 % were employed part-time.

Self-reported Roma unemployment rates were three times higher than for non-Roma nearby and the general population. Nevertheless, 74 % of unemployed Roma said that they were currently looking for work.

Policies supporting self-employment should have a broader focus, going beyond income generation to ensure equal access to social security.

*Source: FRA (2012), The situation of Roma in 11 EU Member States. Survey results at a glance, Luxembourg, Publications Office*

Some promising initiatives to support entrepreneurs from minority backgrounds were identified. In Belgium, a centre promoting the equality of opportunities in entrepreneurship, entitled Stebo, offers educational training to minority groups.<sup>172</sup> In Denmark, the Ethnic Trade and Industry Centre for Entrepreneurs (*Center for Etnisk Erhvervsfremme*)<sup>173</sup> aims to promote the establishment and growth of business for ethnic minority entrepreneurs and business owners.

Some targeted initiatives to support Roma entrepreneurs were also identified. An organisation in the Netherlands offers support to its members with starting and

168 Belgium, Participation Fund (*Participatiefonds*) (2006b), p. 27.

169 Lithuania, Consultation and information center PLUS (*Konsultavimo ir informavimo centras PLIUS*).

170 Interview with spokesperson for Roma and Sinti organisation in the Netherlands on 15 October 2013.

171 Interview with entrepreneur in the Netherlands on 16 October 2013.

172 Belgium, Participation Fund (*Participatiefonds*) (2006b), p. 72.

173 <http://startvaekst.dk/etniskerhvervsfremme.dk>.

running a business by providing assistance in administration and offering other support and advice.<sup>174</sup>

### 3.1.3. Freedom to conduct a business and women

Women face specific challenges in business and in regard to the freedom to conduct a business. These challenges impact not only on women's freedom to conduct a business, but also on the right of women to equality and non-discrimination. Obstacles remain for female entrepreneurs in terms of balancing family and work life, changing career paths, as well as the issue of gendered roles and stereotypes, which persist in many societies.

Women in many Member States are still confronted by prejudice, as they tend to be under-represented in decision-making processes and in the highest-level company management positions. In France, despite increasing numbers of female managers and senior staff in recent years, a study commissioned by the Economic, Social and Environmental Council on Eurolist A companies showed that only 7 % of decision making posts in management positions were held by women and only 10 % of board members of CAC 40 companies were women.<sup>175</sup> The glass ceiling in business hinders women from becoming partners in firms, indirectly impacting the freedom to conduct a business.

#### EIGE: Gender inequality in economic decision-making

*"Women are greatly under-represented among board members of the largest quoted companies (12 % on average in the EU in 2010) and among members of central banks (18 % on average in the EU in 2010) in the vast majority of Member States. This sub-domain is the one that bears the lowest score of the Gender Equality Index, 29 out of 100. The variability across Member States is high and ranges from almost 5 out of 100 in Cyprus and Luxembourg to 60.3 out of 100 in Sweden. This is an important finding, given the launch by the European Commission in 2011 of the 'Women on the board pledge for Europe' – a call on publicly listed companies in Europe to sign a voluntary commitment to increase women's presence on corporate boards to 30 % by 2015 and 40 % by 2020, by means of actively recruiting qualified women to replace outgoing male members."*

EIGE Gender Equality Index – Main Findings, 2013

Women also tend to be more involved in part-time work than men. In Austria, Belgium, Germany and Luxembourg, women represent more than 80 % of part-time workers.

174 Dutch Association of the Sinti, Roma and Mobile home residents (Vereniging Sinti, Roma en Woonwagengebruikers Nederland, VSRWN). Interview with Chairman on 15 October 2013.

175 France, Economic, social and environmental council (Conseil économique, social et environnemental) (2007), p.48.

On average, in the EU-28 in 2012, although women represented 46 % of those in employment, they accounted for 76 % of those working on a part-time basis and for only 38 % of those working full-time.<sup>176</sup> This is in part due to women trying to balance work and family life – women often work part-time to gain flexibility.

These challenges have resulted in lower shares of female than male entrepreneurs and business owners, and women being less likely to start a business than men. This is illustrated in statistics from Belgium<sup>177</sup> and the Netherlands, where the percentage of women under the age of 24 amongst start-up entrepreneurs was lower than the average for all ages. The percentage of all female starters was 38 %.<sup>178</sup> Furthermore, only 12 % of the female workforce were entrepreneurs in 2011, compared to 18 % of the male workforce.<sup>179</sup> In France, although 47% of the workforce is female, women entrepreneurs are also outnumbered by men; only 38 % of 170,000 start-ups in 2011 were created by women.<sup>180</sup> Across the EU Member States during the 2008–2012 period, 10 % of women in employment were self-employed, whereas for men the corresponding figure was 18 %.<sup>181</sup>

Discrimination on the basis of gender further contributes to the problem of the glass ceiling for women in business and for female entrepreneurs. Many prejudices and stereotypes against women in business remain, from those alleging that women cannot make good entrepreneurs, to social stereotypes that limit women's entrepreneurial behaviour and motivation to push to the top and develop their careers. Case studies have shown that women felt they were not taken seriously by financial institutions and insurance companies when trying to obtain a loan, and some were requested to have their spouses co-sign for credit applications.<sup>182</sup>

Research conducted on female entrepreneurs cited a variety of reasons explaining why women tend to shy away from entrepreneurial activities. One reason is the challenge of balancing work and family life. In a study conducted in France, 70 % of women entrepreneurs interviewed indicated difficulties in reconciling family and personal life, 19 % found it difficult to access markets and customers, and 16 % found it difficult to obtain financing.<sup>183</sup> This is partly connected to age, and

176 European Institute for Gender Equality (EIGE) (2014a).

177 Belgium, Central Council for Economy (Conseil Central de l'Économie/Centrale Raad voor het Bedrijfsleven) (2010), p. 39.

178 The Netherlands, Dutch Chamber of Commerce (Kamer van Koophandel Nederland) (2013), p. 6.

179 Statline, Statistics Netherlands (Centraal Bureau voor de Statistiek, CBS) (2013).

180 France, Economic, social and environmental council (Conseil économique, social et environnemental) (2009).

181 EIGE (2014a).

182 VNO-NCW West FemaleNetwork (VNO-NCW West VrouwenNetwerk) (2013).

183 De Beaufort, V. (2008), pp. 6-7.

the fact that many women who start businesses are of childbearing age. Other evidence from Belgium showed that the motivations for becoming an entrepreneur may differ between men and women: whereas men mainly start businesses to acquire personal autonomy, women are often driven into entrepreneurship by various events in life.<sup>184</sup> Despite many women still wanting to start a business and launch an entrepreneurial career, the difficulties related to balancing work and private life without proper support from social systems, added to discrimination, can impact significantly on women's freedom to conduct a business.

Additional obstacles include restrictions in maternity and paternity leave, as well as a lack of child support systems that could support female entrepreneurs in fully exercising their freedom to conduct a business. According to a report by EIGE on gender equality and economic independence, women aged 25–34 are particularly likely to opt out of entrepreneurship due to the combined effect of inadequate maternity support systems, attitudes associated to women and motherhood, and stereotypical portrayal of entrepreneurs as men in popular media, education and government policies.<sup>185</sup>

## FRA PUBLICATION

### Violence against women: an EU-wide survey

Women may be subject to violence and sexual harassment by supervisors and colleagues, but also by clients, customers and patients. Findings from the 2011–2012 FRA survey on violence against women reveal that 64 % of female business owners have experienced sexual harassment since the age of 15, compared with 55 % on average across all occupational groups. According to the survey, sexual harassment is more commonly experienced by women in the highest occupational groups. In the professional occupational category which includes independent professions such as lawyers, doctors or architects, the share of women who have experienced sexual harassment thus reaches 74 %.

From these findings, it can be concluded that professional women may be exposed to situations of risk in occupations where they frequently come into contact with men or in work environments whose cultures fail to address sexual harassment. They may also be more alert to what constitutes sexual harassment.

Source: FRA (2014), *Violence against women: an EU-Wide survey. Main results*, Luxembourg, Publications Office

When women do participate in business, they tend to be less represented in a number of stereotypically 'male-dominated' industries, including scientific and technical professions.<sup>186</sup> In much of Europe today, despite progress towards gender equality in the work-

force, there still remains a gendered division in many industries and trades.

A variety of initiatives have been established to support women in business and female entrepreneurs (see further Section 1.2.). On the European level, the European Social Fund, for instance, supports entrepreneurship through financial aid and business support services targeted towards women entrepreneurs.<sup>187</sup>

EIGE held a consultation meeting in February 2014 to identify practices with potential in the area of women's entrepreneurship. During this meeting, experts from the EU-28 Member States and the countries of the Instrument for Pre-Accession Assistance (IPA) identified good practices in three thematic areas related to women's entrepreneurship: training, networking and funding. The meeting's report presents a selection of good practices which are considered effective in addressing the specific challenges faced by women entrepreneurs and which could be transferred to a different national context.<sup>188</sup>

In France, more women than men have established businesses, and businesses created by women have also demonstrated a higher survival rate than those created by men. This may be due to several initiatives to support female entrepreneurs, including the *Centres d'information aux droits des femmes* (CIDF), which have set up training sessions and individual interviews focused on entrepreneurship, including assistance in developing business plans, methodological support for conducting market studies and information on business financing and support.<sup>189</sup>

Financial support programmes to help women secure loans for businesses have been set up in Croatia<sup>190</sup> and France.<sup>191</sup> Some countries have also established action plans or other programmes to support female entrepreneurs, including resource centres for women that provide additional training, networking and mentoring, for instance in Denmark,<sup>192</sup> Romania,<sup>193</sup> Spain,<sup>194</sup> and Sweden.<sup>195</sup>

187 For more information, see European Social Fund.

188 EIGE (2014b).

189 For more information, see [www.infofemmes.com](http://www.infofemmes.com).

190 Croatia, Ministry of Economy, work and entrepreneurship (2009/2010).

191 Fonds de garantie à l'initiative des femmes.

192 Action plan for female entrepreneurs (*Handlingsplan for kvindelige iværksættere*).

193 Romania, Ministry of Economy, Direction for Small and Medium Enterprises Programmes (*Ministerul Economiei, Directia Implementare Programe pentru Intreprinderi Mici si Mijlocii*), 'Programul national multianual pentru dezvoltarea culturii antreprenoriale in randul femeilor manager din sectorul intreprinderilor mici si mijlocii'.

194 Programa de Apoyo Empresarial a las Mujeres (PAEM), Business Support Programme for Women – online information service, <http://www.camaravalencia.com/es-ES/proyectos/autonomicos/creacion-de-empresa/Paginas/programa-de-apoyo-empresarial-mujeres-PAEM.aspx>.

195 Sweden, Ministry of Enterprise (*Näringsdepartementet*) (2012).

184 Lambrecht, J. and Pirnay, F. (2003).

185 EIGE (2014a).

186 France, (2009a) and (2009b).

### Promising practice

#### Kvinnovasjon [a constructed word that brings together women and innovation, similar to 'Wom-ovation']

Norway offers an interesting perspective from outside the EU. Kvinnovasjon is a Norwegian organisation that aims to support, motivate and inspire female entrepreneurship. It provides a forum for established and prospective businesswomen to meet and exchange ideas and experiences. The [kvinnovasjon.no](http://kvinnovasjon.no) website also includes a 15-step checklist with advice for female entrepreneurs regarding sales strategy, funding, marketing and many more.

For more information, see <http://kvinnovasjon.no/>

#### Promoting Women's Entrepreneurship – Tillväxtverket

The Swedish Agency for Economic and Regional Growth (Tillväxtverket) is the national coordinator for the programme 'Promoting women's entrepreneurship'. The programme has included the 'Golden Rules of Leadership' initiative, which was launched in April 2013 and intended to increase the number of women in leadership positions. The Agency has also published a booklet on 'Women's Entrepreneurship in Sweden', in cooperation with two other government actors.

For more information, see <http://tillvaxtverket.se/ovrigt/englishpages/promotingwomensentrepreneurship.4.5a5c099513972cd7fe35bf9.html>

In Belgium the 'Womed Award', granted by the Organisation for the Self-Employed and SMEs (UNIZO) and Markant, a network of female entrepreneurs, celebrates the most promising female entrepreneur of the year and continuously searches for female entrepreneurial talent. Markant also hosts workshops, lectures, and seminars to support women's careers.

The Lithuanian Trade and Industry Association has established an NGO entitled 'Network of Business Women'.<sup>196</sup> Its main purpose is to raise women's business awareness and help them to develop the skills required for business activities development.

A network has been developed in France that includes business start-up incubators dedicated to creative women in the field of innovative services to individuals and businesses,<sup>197</sup> as well as an association created by female entrepreneurs providing support and advice during the business development phase.<sup>198</sup>

<sup>196</sup> Lithuania, Network of Business Women (*Verslo moterų tinklas*).

<sup>197</sup> Les Pionnières.

<sup>198</sup> Entreprenre au Féminin Bretagne.

At the European level, some efforts have also been made to improve the situation of women in business, such as fostering gender balance on company boards.<sup>199</sup>

### 3.1.4. Freedom to conduct a business and entrepreneurs with disabilities

Article 27 of the UN Convention on the Rights of Persons with Disabilities (CRPD) on work and employment refers specifically to the obligation of state parties to "promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business". Ratified by 25 EU Member States and by the EU itself in December 2010, the CRPD sets obligations for those that have ratified it with a view to ensuring that persons with disabilities enjoy, in an equal manner, their fundamental rights. In practice, however, persons with disabilities may face specific barriers to the freedom to conduct a business. Depending on the nature of the disability, entrepreneurs may face limitations in terms of independence, work time, physical energy and capacity, mobility, and infrastructure needed at the workplace, all of which have implications for the freedom to conduct a business.

People with disabilities represent around one-sixth of the EU's overall working-age population, but are under-represented among entrepreneurs in most countries. In France for instance, persons with disabilities represent only 2.5 % of self-employed workers.<sup>200</sup> The unemployment rate of persons with disabilities also tends to be higher than that of the general population. Data from a disability and health household survey in France shows that the unemployment rate of persons with an administratively recognised disability was 22 %, compared to only 9 % for all people aged 15 to 64.<sup>201</sup> Becoming an entrepreneur may allow some persons with disabilities to manage their own time and work from home, distribute their energy evenly during the day, overcome potential losses in independence, and thus find an alternative to traditional employment.

Often entrepreneurs with disabilities have difficulties securing adequate funding to start a business, or may also face uncertainty about the financial consequences

<sup>199</sup> Council of the European Union (2013).

<sup>200</sup> Some EU Member States represent a possible exception to this trend. In the Netherlands where 9 % of persons without a disability are active as entrepreneurs, the share is 10 % among persons with mild physical disabilities, and even 13 % for persons with moderate to severe disabilities. Entrepreneurs with disabilities however often work as freelancers and hence have no employees. See De Klerk, M. (ed.) (2007), p. 85.

<sup>201</sup> Insee (2008).



of setting up a business.<sup>202</sup> Such barriers in access to credit were identified in France and the Netherlands.

Entrepreneurs with disabilities may also face specific obstacles in terms of access to information and advice that is up to date, reliable, tailored to their situation, and presented in a format accessible to them. Without access to the proper information, entrepreneurs with disabilities may face serious obstacles to the freedom to conduct a business. A study in the Netherlands reported that limited access to information left entrepreneurs with disabilities feeling that there was nowhere to turn to with questions about understanding their own capacity and resilience and what that meant for their businesses, whether part-time entrepreneurship was possible, and how to communicate with clients.<sup>203</sup>

Additionally, establishing a business may limit rights to social benefits, leaving entrepreneurs with disabilities in a vulnerable position, without adequate social protection.

To overcome some of the difficulties that entrepreneurs with disabilities face and to pre-empt the potential incompatibility of legal requirements for businesses with the special needs/concerns of entrepreneurs with disabilities, several Member States including Bulgaria, France, Luxembourg, and Romania, have adapted their legal frameworks to include specific laws on persons with disabilities. In Bulgaria, the Integration of People with Disabilities Act obliges employers to adapt working places to the needs of persons with disabilities and indicates that special programmes and projects to initiate and develop independent business activity by persons with disabilities have to be adopted.<sup>204</sup>

A 2006 Romanian law provides an incentive indirectly supporting “protected enterprises” – businesses established and operated by persons with disabilities.<sup>205</sup>

In France, companies with more than 20 employees must employ a workforce including at least 6 % of workers who have a disability. To do so, they receive financial support from the state.<sup>206</sup> This law, however, does not address issues of equality in access to training, independence and funding.

In Luxembourg, persons with disabilities may receive additional support and benefits, and may be allowed partial or total exemption from social security charges supported by the state budget.<sup>207</sup>

202 Van Tilburg Communication (*Van Tilburg Communicatie*) (2013).

203 *Ibid.*

204 Bulgaria (2005), Art. 23 and 31.

205 Romania (2007a), Art. 44.

206 France (1987).

207 Luxembourg (2003).

Some positive examples show that efforts are being made to encourage and support entrepreneurs with disabilities. In Belgium, a study conducted by the Catholic University of Leuven on risk groups in work and entrepreneurship in 2011 showed that persons with disabilities were more likely to start and conduct a business than other population groups.<sup>208</sup>

A variety of promising practices have been established to support entrepreneurs and persons with disabilities. Some of the most promising initiatives have been legislation. In Belgium, the Flemish government supports entrepreneurs with a recognised disability through support fees for the first few years of a business.<sup>209</sup> In addition, support organisations such as Hazo (Independent Entrepreneurs with Disabilities) support persons with disabilities who would like to start their own businesses.

In Sweden<sup>210</sup> and in Denmark,<sup>211</sup> policies have been implemented to provide financial support to entrepreneurs with disabilities through special grant programmes.

On the European level, the European Social Fund supports entrepreneurship through financial aid and business support services targeted towards disadvantaged persons and persons with disabilities.<sup>212</sup>

### 3.2. Freedom to conduct a business and access to justice

For the freedom to conduct a business to be effective in practice, 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. It is in this spirit that this section looks at the obstacles and promising practices concerning the access to justice of those conducting a business.

Time consuming and prolonged litigation (length of proceedings) was identified as one of the biggest obstacle in most of the countries participating in the second phase of the research, namely in Estonia,<sup>213</sup> Greece,<sup>214</sup>

208 Van Laer, K. (ed.) (2011), p. 267.

209 For more information, see [www.vdab.be/arbeidshandicap/znvop.shtml](http://www.vdab.be/arbeidshandicap/znvop.shtml).

210 Sweden, The Swedish Public Employment Service (*Arbetsförmedlingen*), Special Business Startup Grant (*Särskilt stöd vid start av näringsverksamhet*).

211 Denmark (2009).

212 For more information, see European Social Fund.

213 Estonia, Ministry of Justice (*Justiitsministeerium*) (2013).

214 European Commission (2013i), pp. 6-11.

## Promising practice

## Shortening proceedings: e-tools, simplified dispute resolution and small claims procedures

E-tools have been introduced in some countries, including Estonia, Poland and Slovakia, to make court proceedings less bureaucratic and lengthy. The initiation of civil, administrative and criminal judicial proceedings online can indeed represent a secure, fast and convenient way to claim rights related to the freedom to conduct a business. It makes it easier both for legal professionals and also any other person that has a claim to settle the issue without going to the courthouse. This is especially helpful for SMEs filing a fast payment order proceeding. Allowing remote access to all documents contained in the court file removes administrative obstacles relating to the currently applicable rules on access to the court file.

In some EU Member States, interviewees reported specific rules adopted to streamline existing judicial procedures or structures and hence make proceedings less lengthy. In Lithuania, entrepreneurs are allowed to choose simplified and hence speedier procedures concerning debt recovery or the resolution of certain disputes. In Poland, the strict procedural rules on evidence applicable exclusively to entrepreneurs were abolished. A rapid procedure for payment order was introduced in Estonia, to increase the speed of simple monetary claims and procedural economy. For the procedure to be used, there needs to be a contractual relationship (or a proof of an agreement) between the parties, and the claim must be for a specific sum of money. It is a formalised procedure, in which the court does not scrutinise the basis of the claim. In this context, European procedures such as the order for payment and small claims procedures seem particularly useful since they simplify and speed up cross-border cases, and also make it easier to enforce a claim against a defendant in another EU country.

For more information on e-tools, see: Estonia, [www.e-toimik.ee](http://www.e-toimik.ee) and [www.rik.ee/en/e-file](http://www.rik.ee/en/e-file); Poland (2009a), *The Act amending the Code of Civil Proceedings and some other acts* (Ustawa z dnia 9 stycznia 2009 o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw), 9 January 2009; Slovakia, <https://lt.justice.gov.sk/default.aspx>

For more information on procedural rules, see: Poland (2009b), *The Act amending the Code of Civil Proceedings and some other acts* (Ustawa z dnia 16 września 2011 o zmianie ustawy Kodeks postępowania cywilnego oraz niektórych innych ustaw), 16 September 2011; and Estonia, Vutt, M. (2011), *Maksekäsu kiirmenetluse kohtupraktika probleemide*, Tartu, Supreme Court

Ireland,<sup>215</sup> Lithuania,<sup>216</sup> Poland,<sup>217</sup> Romania,<sup>218</sup> Slovakia,<sup>219</sup> and Spain.<sup>220</sup> The excessive duration of court proceedings and ineffective enforcement of final judgments renders legal protection illusory. The delayed enforcement of debts is particularly detrimental to business. The lack of effective procedures makes operating a business highly risky. Small and medium businesses in particular may face problems with executing delayed debts. A specific reference can be made in this context to the EU Justice Scoreboard, which offers, among others, an overview of the average length of bankruptcy proceedings in different EU Member States.

The other main obstacle identified in Estonia,<sup>221</sup> Ireland,<sup>222</sup> Romania,<sup>223</sup> Spain<sup>224</sup> and the United Kingdom<sup>225</sup>

relates to the costs of litigation, including the cost of legal services. In some cases, this also includes the quality of such services, which should not only be accurate and reliable but also good value for money and client-centred. According to businesses interviewed in these countries, legal action is simply too expensive and time consuming to be feasible while running a business on a day-to-day basis and surviving in the marketplace.

The high cost of legal fees can impinge on the important legal right of access to justice, increase the cost of doing business, increase the cost of living more generally and adversely affect competitiveness and the economy. According to interviews, state fees for court proceedings are currently a problem for some micro and small businesses in some countries, as they might not have sufficient resources to pay them, since state fees depend on the value of the claim. In this context, it is important to highlight that the rights to an effective remedy and to a fair trial as guaranteed by Article 47 of the Charter are not necessarily limited to private individuals. In a procedure for preliminary ruling in the case *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, the CJEU ruled that legal persons should be allowed to rely on the principle of effective judicial protection, including potential access to legal aid.<sup>226</sup>

215 Ireland, R. MacCormac (2013); see also Ireland, Working Group on a Court of Appeal (2009).

216 Lithuania, interview with the representative of the legal consultancy company.

217 Poland, Business Centre Club (2013), p. 4.

218 Romania, Superior Council of Magistracy (*Consiliul Superior al Magistraturii*) (2012).

219 Slovakia, Ministry of Justice of the Slovak Republic (*Ministerstvo spravodlivosti Slovenskej republiky*) (2013), p. 243.

220 Spain, Barcelona Bar Association (*Il·lustre Col·legi d'Advocats de Barcelona*, ICAB) (2013).

221 Vutt, M., Lillsaar, M., Rohtmet, E. (2011).

222 Minihan, M. (2013). See also Ireland, World Bank (2013); Ireland, M. Brennan (2010).

223 Romania, interview with the District Court judge.

224 Spain, Barcelona Bar Association (*Il·lustre Col·legi d'Advocats de Barcelona*, ICAB) (2013).

225 United Kingdom, LSB (Pascoe Pleasence and Nigel J. Balmer) (2013). Interview with the representative of Legal Services Board, Alex Roy.

226 CJEU, C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010.

## Promising practice

**Reducing the costs of legal proceedings: alternative business structures, law reform and legal aid for SMEs**

To address the problem of the high costs of legal services, the United Kingdom introduced the so-called alternative business structures (ABSs), which came into force on 6 October 2011. The basic idea is that law firms have the freedom to share the management and control of their business between lawyers and non-lawyers. The ABS model is designed to offer novel opportunities to law firms seeking to diversify their businesses, experiment with the outsourcing of legal advice, and, more generally, to open up competition in legal services and make them less bureaucratic, more accessible and affordable for consumers but also businesses, in particular SMEs. Furthermore, by adopting new rules on the damages cap for patent claims in relation to intellectual property, companies in the United Kingdom claiming damages for violation of their intellectual property rights will be able to reduce their legal costs by taking lower value, less complex cases to the cheaper Patents County Court, avoiding a more expensive High Court claim.

In Ireland, the government proposed to have specific legislation directly regulating the country's legal services. This legislation establishes that legal professions should be independently regulated, to improve access to the profession, competition among legal professionals, increase transparency of the costs of legal advice and representation, and specify procedures for the adequate redress of consumer complaints.

In Estonia, an initiative called the *Legal first aid for SMEs* is available. It is run by the Estonian Union of Small and Medium Sized Enterprises in cooperation with the Ministry of Economic Affairs and Communications and allows the businesses – members of the union – to get basic legal aid for no charge.

*For more information, see: United Kingdom, Legal Services Act 2007, Chapter 29; and interview with the representative of Legal Services Board, Alex Roy; Ireland, Oireachtas (2011), Legal Services Regulation Bill Explanatory Memorandum, October 2011; Estonia, www.evea.ee/index.php/teenused-liikmetele-2/oigusabi.*

The situation also seems to be complex regarding out-of-court settlements, such as alternative dispute resolution (ADR) mechanisms, which are usually regarded as more easily accessible, less formal and faster than court proceedings. Settling disputes outside of court not only reduces time and legal costs, but also ameliorates the stress of contested proceedings. One way of promoting an ADR culture in business circles is by providing specific training for representatives of SMEs. These representatives can then form regional networks of trained mediators and be available to provide mediation to SMEs (United Kingdom<sup>227</sup>) or establish a special ADR court (Lithuania),<sup>228</sup> which in some cases provides its services online (Spain).<sup>229</sup> However, the lack of ADR structures and relevant statutory framework was reported as one of the obstacles by business representatives in Ireland.<sup>230</sup> Although available, the alternative dispute resolution methods have very low credibility in Slovakia<sup>231</sup> and are also unpopular and still rather unknown in Lithuania<sup>232</sup> and Greece.<sup>233</sup>

In addition to the obstacles highlighted above faced by several EU Member States, the second phase of the research also identified country-specific concerns. One of the main concerns of the United Kingdom business representatives, for example, was reputational damage, arising from allegations made in the employment proceedings that were widely reported in the media before an employer had any opportunity to rebut them.<sup>234</sup> In Slovakia<sup>235</sup> and Romania,<sup>236</sup> the lack of legal certainty in the existing case law of domestic courts seems to contribute to creating access to justice obstacles for businesses. It is not unusual that domestic courts issue different rulings on similar cases, or even that the same court (or the same senate) does so. In Lithuania,<sup>237</sup> the absence of common court practice in respect of the enforcement of precautionary (interim) measures in commercial disputes is considered to be an obstacle. In Romania,<sup>238</sup> furthermore, the quality of the legislation generates considerable difficulties regarding the correct interpretation and use in practice by businesses, as does the lack of awareness of the legal framework

227 United Kingdom, Department for Business, Innovation and Skills (2012).

228 See the website of the Lithuanian Court of Arbitration: [www.arbitrazoteismas.lt](http://www.arbitrazoteismas.lt).

229 Spain, Madrid Arbitration Court.

230 Ireland, Law Reform Commission (2008).

231 Slovakia, interview with Adrián Barger from the law firm specializing in commercial law, commercial litigation, arbitration and alternative dispute resolution.

232 Lithuania, interview with the representative of the legal office, providing legal support to the legal entities and representing them in commercial disputes.

233 Greece, interviews with representatives of the business, legal and ADR communities.

234 United Kingdom, British Chambers of Commerce (BCC) (2010).

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in Belgium. A related problem in Romania<sup>239</sup> and Lithuania<sup>240</sup> is the division of the burden of proof in some cases where the state party seems to enjoy certain privileges and the power to impose fines on the business concerned, leaving it up to company to initiate judicial proceedings to resolve the matter.

A specific concern regarding the competence and sufficient expertise of appointed experts at courts was highlighted in Poland.<sup>241</sup> The Polish courts often rely on the assessment of the appointed court experts, especially when the case requires highly specialist knowledge in the area of economics. Opinions of incompetent court experts who lack knowledge in the field of economics have a negative impact on entrepreneurs seeking justice. A related issues identified in Estonia relates to the lack of people with a business education among the police and the state attorney's office, which makes it difficult to investigate complex financial and economic crimes.<sup>242</sup> In Spain, the lack of awareness among legal professionals concerning the existing European standards creates unnecessary obstacles for those seeking justice.<sup>243</sup>

## Promising practice

### Non-judicial proceedings

Businesses in some countries have access to a non-judicial body that can provide guidance or even adopt measures to help entrepreneurs to enforce their rights. In Poland, the Ombudsperson for Entrepreneurs was established.<sup>243</sup> It is a social, pro-bono institution, independent from the state. It operates in the Confederation Lewiatan, which was established in January 1999 as a nation-wide representation of employers to the state and trade unions. The position of the Ombudsperson was created to collect and assess information on violations or abuse of the freedom to conduct a business by law enforcement agencies, government departments and local government and regulatory bodies. Based on this data, the Ombudsperson was supposed to appeal to authorities for the change of law or practice. The function of the Community Ombudsperson for Entrepreneurs is at the moment performed by an attorney at law acting pro-bono. He has been the Ombudsperson for Entrepreneur for about ten years. The Ombudsperson states he has no staff or secretariat at his disposal, and his capacity for action is thus very limited.

In Spain,<sup>244</sup> the Defender of the Employer, established by a confederation representing Catalan business organisations and enterprises, provides its services to entrepreneurs who can point to any situation in which they consider that their rights, either as natural persons or as legal entities, have been threatened or harmed by the action or non-action of local, regional or Spanish-wide public administrations.

239 Romania (2007b), Art. 141.

240 Lithuania, interview with the representative of the legal office, providing legal support to the legal entities and representing them in commercial disputes.

241 Bartuś, Z. (2013).

242 Estonia, interviews with representatives of SOLVIT and business, legal, judicial and ADR communities.

243 Spain, interviews with representatives of academic, legal and business communities.

244 [www.konfederacjalewiatan.pl/opinie/spoleczny\\_rzecznik\\_przedsiębiorcow](http://www.konfederacjalewiatan.pl/opinie/spoleczny_rzecznik_przedsiębiorcow).

245 Spain, Foment del Treball Nacional.



# Conclusions – the way forward

The right of freedom to conduct a business can contribute to the achievement of the strategic goals set out in the Europe 2020 growth strategy, which aims to establish a smart, sustainable and inclusive economy. A fundamental rights-based approach to economic growth is of particular importance in times of austerity, when many Member States are still struggling with the consequences of the economic crisis and are seeking new approaches to fighting poverty and social exclusion. While exploring the meaning and scope of Article 16 of the Charter and how it relates to the objectives of Europe 2020, this report therefore sought to highlight shortcomings as well as promising practices in the application of the right to freedom to conduct a business at the EU as well as at Member State level.

FRA research has revealed that, while a number of initiatives related to the freedom to conduct a business have been implemented at both EU and the Member State level, much remains to be done to fully realise the potential of Article 16. The link between freedom to conduct a business and economic growth is particularly strong in three of the five Europe 2020 objectives: employment, innovation and social inclusion. However, one key issue identified by FRA research is that hardly any of the many strategies relevant to these three areas, whether at EU or Member State level, refer to Article 16 of the Charter. While elements of the right of freedom to conduct a business underpin many of these strategies, no overt connection is made between the fundamental right and its possible contribution to growth.

As highlighted in FRA's 2013 Annual Report, fundamental rights have a dual role: they do not just act as a shield; they are also an enabling 'sword' that can point towards the design, adoption and implementation of certain initiatives.<sup>246</sup> This is supported by provisions of the TFEU which require the Union, "in all its activities" to "take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health" (Article 9). All EU policies, including in the area of business, should therefore be underpinned by a comprehensive fundamental rights-based approach. In line with this, explicit reference should be made to Article 16 of the Charter in all policies relevant to this fundamental right. This approach would also enhance the consistency of EU instruments across many policy areas.

At the EU level, the Commission has played a particularly active role in establishing and promoting strategies related to freedom to conduct a business. However, according to the Commission's own evaluation, more than half of the specific policy actions intended to deepen the Single Market in line with the Compact for Growth and Jobs require "more effort" or have shown "no or little progress".<sup>247</sup> The Commission should consider implementing mechanisms to measure the progress of policy actions according not only to single market goals, but also with reference to the elements of Article 16 as elaborated in this report. The Internal Market Scoreboard could serve as a basis for such tools.

References to Article 16 remain limited in the jurisprudence of the CJEU, both in preliminary ruling requests by Member States and in judgments by the court. As also highlighted in FRA's 2014 Annual Report, the Charter as a whole is increasingly referred to in national requests for preliminary rulings and judgments by the court.<sup>248</sup> The same cannot be said of Article 16, which the court referenced in only 3 % of Charter relevant cases in 2013. Guidance regarding the application of this right may therefore have considerable potential. On the other hand, increased references to Article 16 would contribute to greater certainty regarding its scope and underline its status as equal to that of other fundamental rights protected by the Charter, which would be welcomed.

FRA research has revealed significant differences in the development and implementation of the right of freedom to conduct a business across the EU Member States. Freedom to conduct a business is an explicit constitutional right in all 27 Member States, except the United Kingdom, which does not have a written constitution. However, the nature and scope of the constitutional provisions related to Article 16 vary widely, with the right being further elaborated upon by national secondary law in many cases, and the conditions regarding its limitation depending heavily on historical developments at the national level. Recently, steps have been taken by all Member States to remove excessive regulation and alleviate the administrative burdens faced by entrepreneurs, particularly SMEs. The increasing and widespread use of online tools and one-stop-shops for registration and information is particularly positive in this regard. Nonetheless, comparative findings show that in some Member States significant obstacles remain, including overly long and complicated administrative procedures, unduly onerous reporting obligations, difficulties

<sup>246</sup> FRA (2015b), p. 12.

<sup>247</sup> European Commission (2013h), table p. 1-2.

<sup>248</sup> FRA (2014).

in accessing credit and a lack of coordination between responsible bodies.

Member States should be encouraged to remove unreasonable obstacles. Promising practices such as those highlighted throughout this report should be further examined and shared among Member States. Evidence showing that the removal of unreasonable obstacles and the promotion of promising practices equals increased, sustainable growth is also needed. Member States could give more explicit protection to Article 16 as distinct from other elements such as the right to property or occupational freedom. This could amount to a more level playing field, especially for entrepreneurs operating across EU borders, and remove further restrictions to the freedom to conduct business that are not justified by sound public interest reasons or that are disproportionate.

This report has sought in particular to demonstrate the relevance of Article 16 of the Charter to achieving inclusive economic growth. Significant efforts have been made both at the EU and Member State level concerning the promotion of entrepreneurship among various underrepresented population groups including women, migrants and persons with disabilities. To fulfil the potential of Article 16 to contribute to the goals of the Europe 2020 strategy by ensuring the fullest possible participation of entrepreneurs from these groups, more

must be done to identify and remove remaining barriers specific to them. More effort should be invested in identifying and sharing promising practices among Member States. In particular, the adoption of a fundamental rights-based approach as advocated by FRA should ensure that austerity measures in times of economic crisis do not limit the ability of persons belonging to these groups from fully exercising their right of freedom to conduct a business.

The Commission's Action Plan highlighted that, "to make entrepreneurship the growth engine for our economy, Europe needs a thorough, far-reaching cultural change".<sup>249</sup> This underlines the urgent need to reshape Europe's approach to free enterprise and supports the adoption of a fundamental rights-based approach to economic growth, with Article 16 of the Charter at the centre of any future action in this field. Fundamental rights should increasingly be mainstreamed throughout EU policies to fulfil their potential as not only a limiting, but also a creating force with the potential to inspire change. In line with such an approach and based on FRA research findings, more needs to be done to not only identify barriers and obstacles to the freedom to conduct a business, but also to address them speedily and consistently across the EU – and with Article 16 as a fundamental right in clear focus – while remaining vigilant about the potential social implications of a shift from employment to entrepreneurship.

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# Annexes

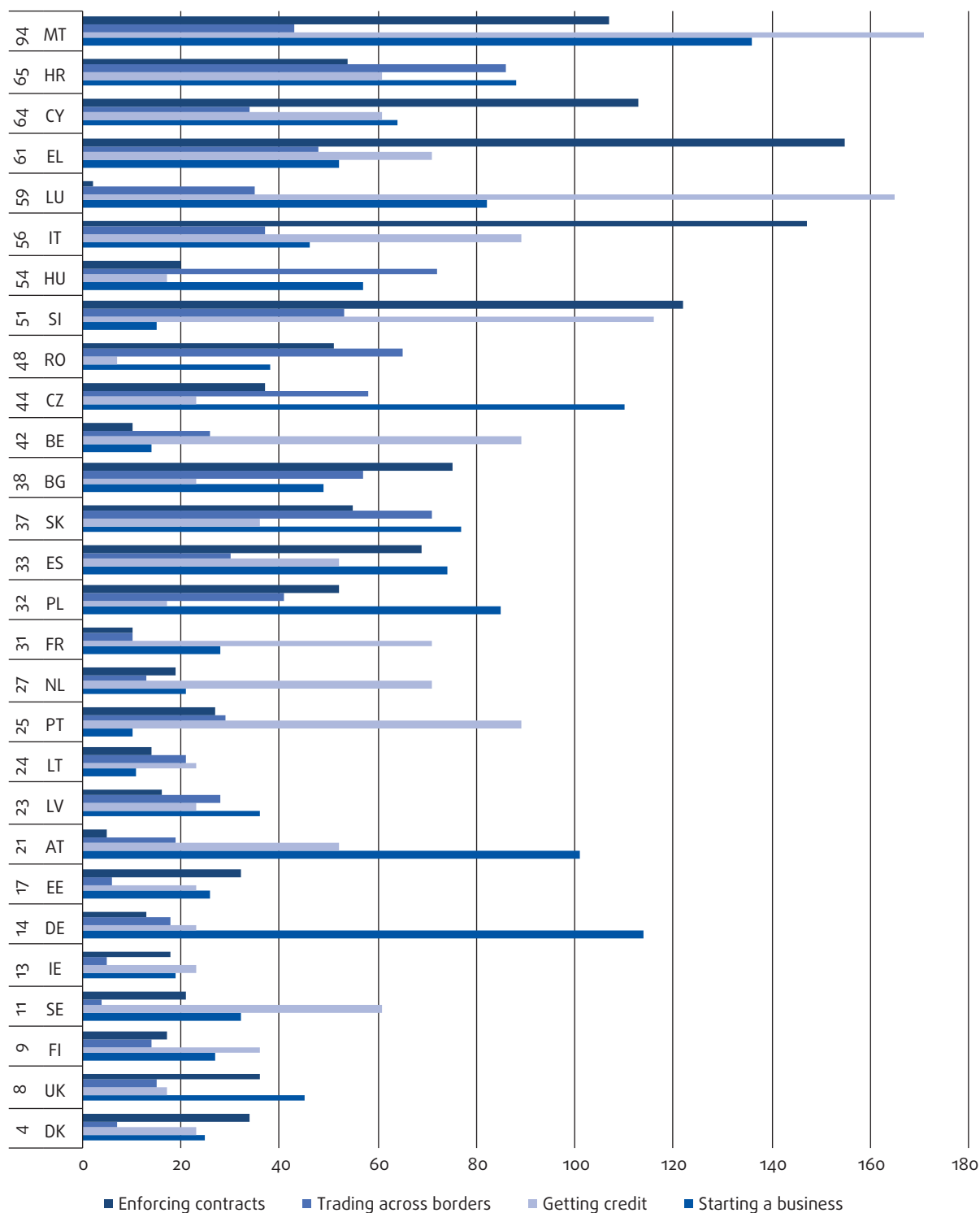
## Annex 1: CJEU judgments on Article 16 of the Charter

Table A1: List of CJEU judgments on Article 16 of the Charter

	Case	Date	Name of the parties	Subject-matter
2014	T-309/10	21 January	<i>Klein v. Commission</i>	Public health
	C-367/12	13 February	<i>Sokoll-Seebacher</i>	Freedom of establishment
	T-256/11	27 February	<i>Ezz and Others v. Council</i>	External relations
	C-314-12	27 March	<i>UPC Telekabel Wien</i>	Approximation of laws
	C-390-12	30 April	<i>Pfleger and Others</i>	Freedom to provide services
	T-17/12	30 April	<i>Hagenmeyer and Hahn v. Commission</i>	Public health
	C-483/12	8 May	<i>Pelckmans Turnhout</i>	Principles, objectives and tasks of the Treaties
	C-56/13	22 May	<i>Érsekcsanádi Mezőgazdasági</i>	Agriculture and Fisheries
	T-614/13	26 September	<i>Romonta v. Commission</i>	Environment
	T-629/13	26 September	<i>Molda v. Commission</i>	Environment
	T-630/13	26 September	<i>DK Recycling und Roheisen v. Commission</i>	Environment
	T-631/13	26 September	<i>Raffinerie Heide v. Commission</i>	Environment
T-634/13	26 September	<i>UPC Telekabel Wien</i>	Environment	
2013	C-283/11	22 January	<i>Sky Österreich</i>	Freedom of establishment
	C-12/11	31 January	<i>McDonagh</i>	Transport
	C-426/11	18 July	<i>Alemo-Herron and Others</i>	Social policy
	T-333/10	16 September	<i>ATC and Others v. Commission</i>	Provisions governing the institutions
	T-434/11	6 September	<i>Europäisch-Iranische Handelsbank v. Council</i>	External relations
	T-545/11	8 October	<i>Stichting Greenpeace Nederland and PAN Europe v. Commission</i>	Agriculture and Fisheries
	T-432/10	16 October	<i>Vivendi v. Commission</i>	Competition
	C-101/12	17 October	<i>Schaible</i>	Agriculture and Fisheries
C-348/12	28 November	<i>Council v. Manufacturing Support &amp; Procurement Kala Naft</i>	External relations	
2012	C-360/10	16 February	<i>SABAM</i>	Approximation of laws
	C-1/11	29 March	<i>Interseroh Scrap and Metals Trading</i>	Environment
	C-510/10	26 April	<i>DR and TV2 Danmark</i>	Freedom of establishment
	C-544/10	6 September	<i>Deutsches Weintor</i>	Approximation of laws
2011	C-70/10	24 November	<i>Scarlet Extended</i>	Freedom of establishment
	T-52/09	14 December	<i>Nycomed Danmark v. EMA</i>	Approximation of laws

## Annex 2: World Bank ease of doing business rankings in 2014

Figure A1: Ranking of EU Member States and selected elements underpinning the ranking, in order of ranking, EU-28

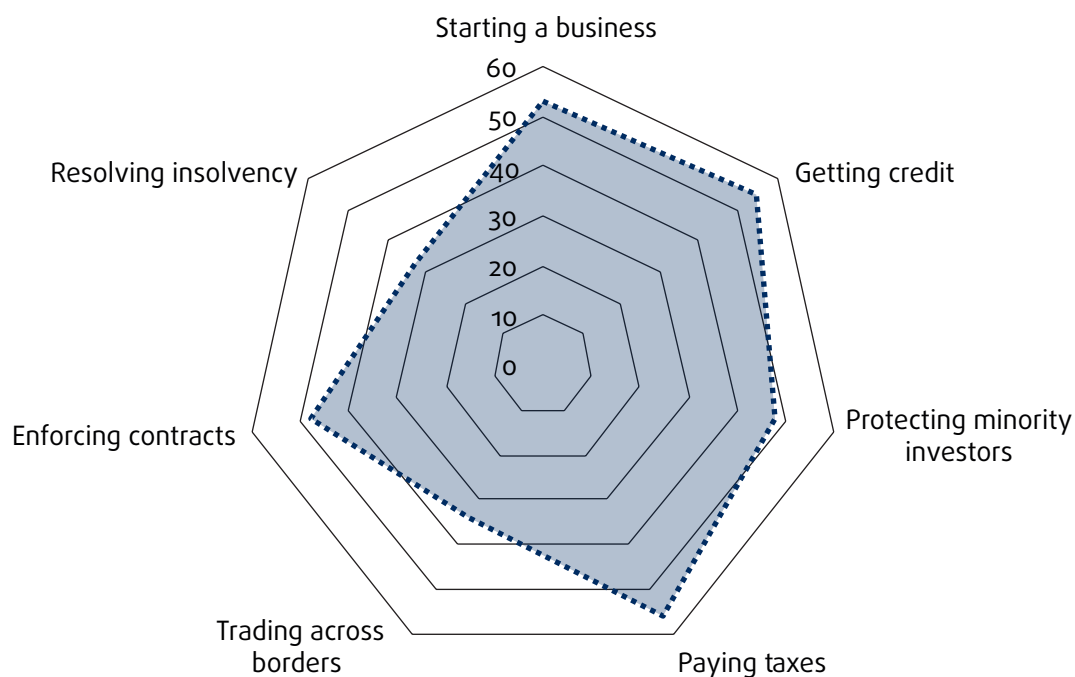


Note: The World Bank Ease of doing business index ranks economies from 1 to 189. A high ranking (a low numerical rank) means that the regulatory environment is conducive to business operation. The index is based on 10 indicators that measure various aspects of domestic business regulation. The data for the 2014 index was collected through several rounds of interaction (questionnaires, conference calls, written correspondence and country visits) with around 10,700 expert respondents (both private sector practitioners and government officials), conducted between June 2013 and June 2014.

Source: [www.doingbusiness.org/rankings](http://www.doingbusiness.org/rankings)



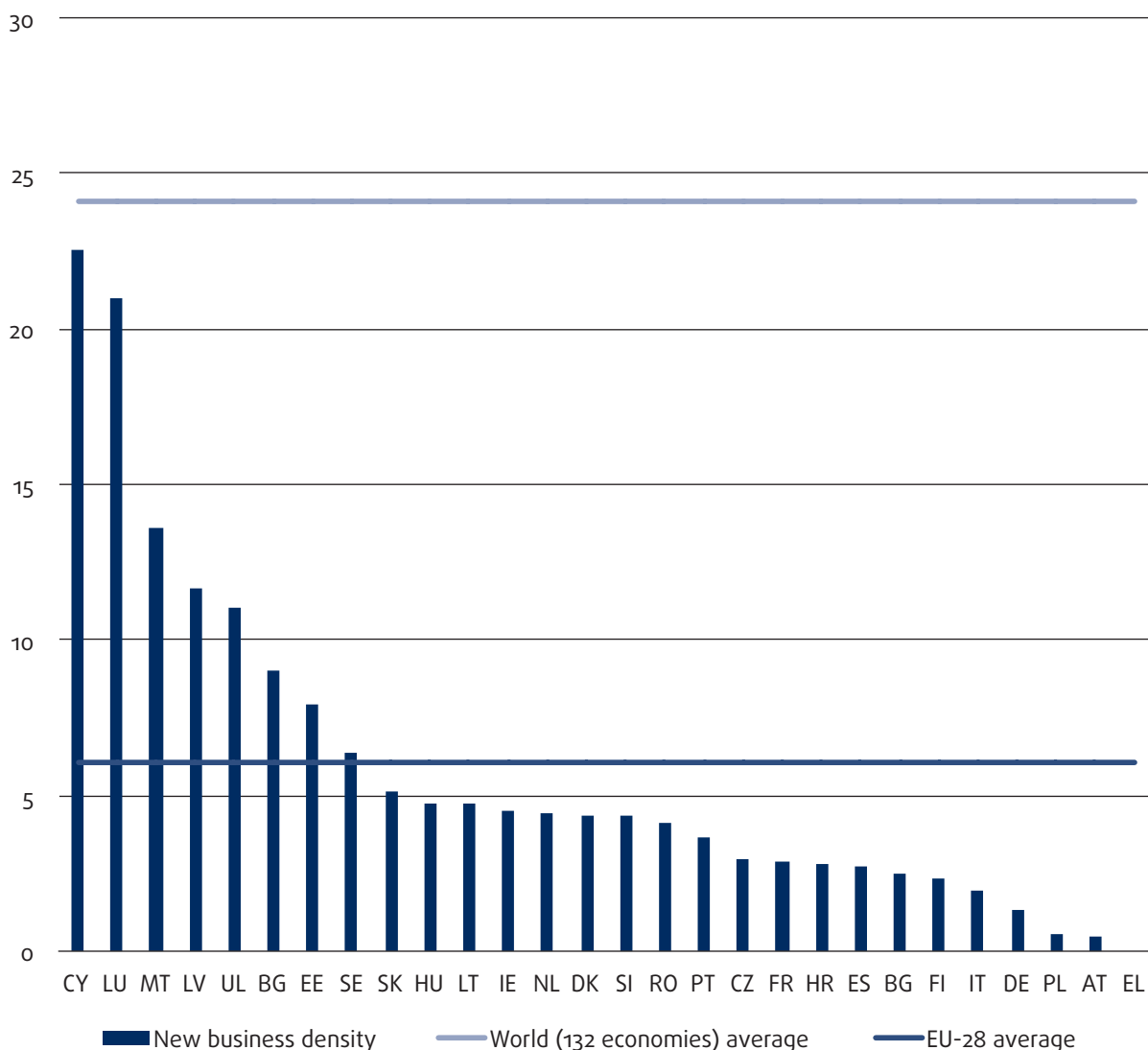
Figure A2: Ease of doing business 2014, by components, average EU-28



*Note:* The World Bank Ease of doing business index ranks economies from 1 to 189. A high ranking (a low numerical rank) means that the regulatory environment is conducive to business operation. The index is based on 10 indicators that measure various aspects of domestic business regulation. The data for the 2014 index was collected through several rounds of interaction (questionnaires, conference calls, written correspondence and country visits) with around 10,700 expert respondents (both private sector practitioners and government officials), conducted between June 2013 and June 2014.

*Source:* [www.doingbusiness.org/rankings](http://www.doingbusiness.org/rankings)

Figure A3: Entrepreneurship – new business density, EU Member State

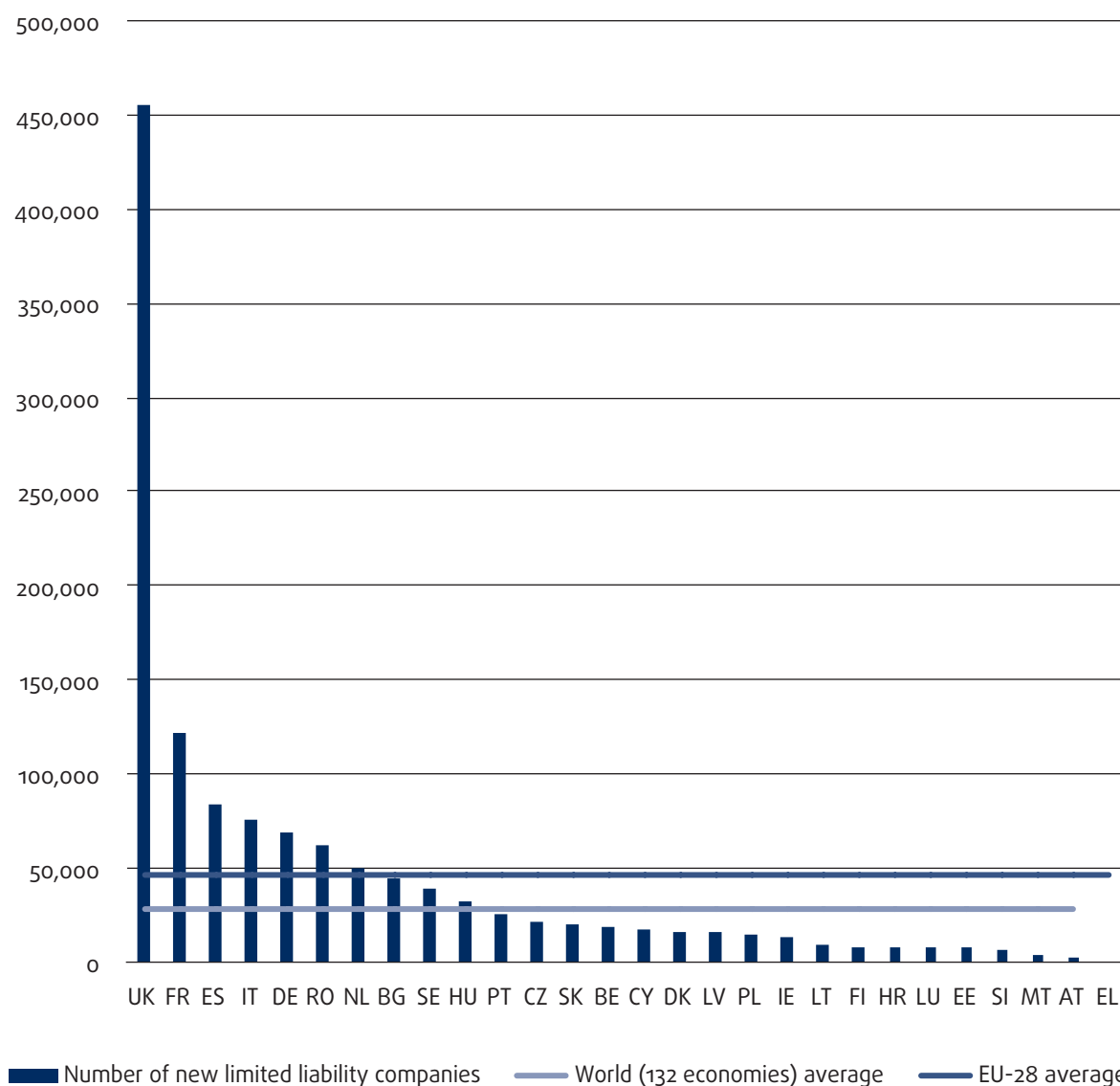


Notes: The world average (132) is brought up very high due to in particular the Virgin Islands, with an exceptionally high density; excluding the Virgin Islands, the world average would be below that of the EU average (at 4.40).  
 The Entrepreneurship Database of the World Bank Doing Business Project measures new business entry density – the number of newly registered firms with limited liability per 1,000 working-age people (those ages 15–64) per calendar year. This indicator quantifies the impact of regulatory, political, and macroeconomic institutional changes on new business registration. The 2013 Entrepreneurship Database contains annual data on the number of newly registered firms over the period of 2004–2012. The data collection process, which was completed in June 2013, involved telephone interviews and email correspondence with 139 national business registries.

Source: [www.doingbusiness.org/rankings](http://www.doingbusiness.org/rankings)



Figure A4: Entrepreneurship – number of new limited liability companies, by EU Member State

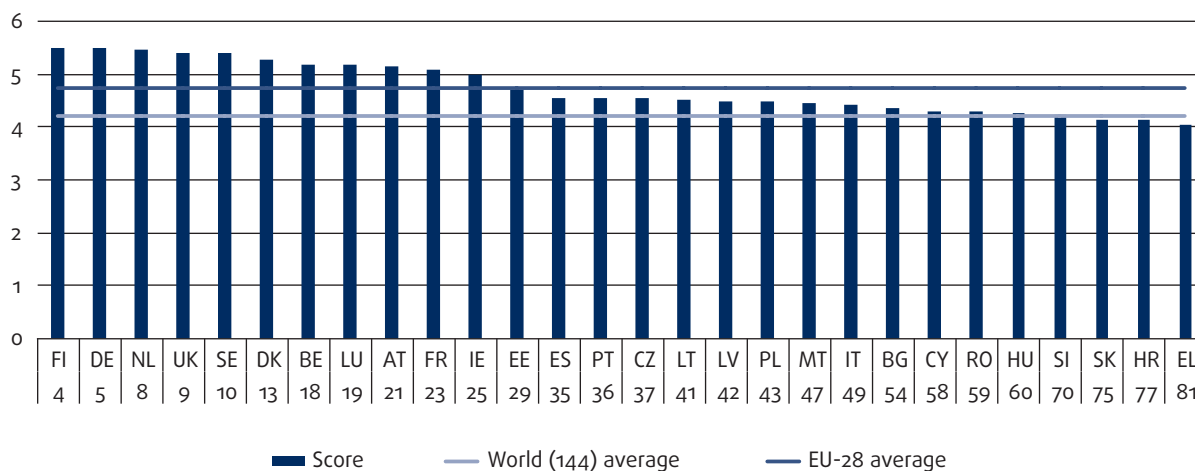


*Note:* The Entrepreneurship Database of the World Bank Doing Business Project measures new business entry density. The main input for calculating this indicator is the number of newly registered companies with limited liability (or its equivalent), per calendar year. Limited liability refers to those cases in which the financial liability of the firm's members is limited to the value of their investment in the company. The number of newly registered companies for the 2013 Database was collected from 139 national business registries, which provided information for the period 2004-2012.

*Source:* [www.doingbusiness.org/rankings](http://www.doingbusiness.org/rankings)

## Annex 3: World Economic Forum, Global Competitiveness Index 2014–2015

Figure A5: Burden of government regulation, by EU Member State



Note: The Global Competitiveness Index (GCI) developed by the World Economic Forum is a tool that assesses the competitiveness of 144 economies. The GCI includes a weighted average of twelve different components of competitiveness, measured through statistical data obtained from international organizations (UNESCO, IMF, WHO), and through the World Economic Forum's annual Executive Opinion Survey, which captures the opinion of business leaders around the world on topics for which data sources are scarce or non-existent.

Source: [www.weforum.org/issues/global-competitiveness](http://www.weforum.org/issues/global-competitiveness)





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## HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

The European Union (EU) faces many challenges at present, not least concerning its economic future. Following the economic crisis, living standards in many places around the EU have fallen, while unemployment has risen and poverty – or fear of it – has increased. This FRA report seeks to demonstrate that the fulfilment of fundamental rights can help to achieve the strategic goals set out in the Europe 2020 growth strategy, which aims to establish a smart, sustainable and inclusive economy. Fundamental rights should thus be increasingly mainstreamed throughout EU policies, to fulfil their potential as not only a limiting but also a creating force to inspire change.

One important right in this context is the freedom to conduct a business, as set out in Article 16 of the Charter of Fundamental Rights of the European Union. Although one of the less traditional rights, it nonetheless introduces a concept crucial to modern society. Freedom to conduct a business is about enabling individual aspirations and expression to flourish, about encouraging entrepreneurship and innovation, and about social and economic development. This report explores how the EU and its Member States conceive and apply this right. To this end, it both examines the obstacles to the enjoyment of this right and outlines promising practices around the EU that could subsequently be adapted for use in other countries.

FRA research reveals that significant differences exist in the development and implementation of the right of freedom to conduct a business across the EU Member States, and while a number of initiatives have been implemented at both EU and the Member State level, much remains to be done to fully realise the potential of Article 16.

**Свобода на стопанската инициатива – Svoboda podnikání – Frihed til at oprette og drive egen virksomhed – Unternehmerische Freiheit – Ettevõtluvabadus – Επιχειρηματική ελευθερία – Freedom to conduct a business – Libertad de empresa – Liberté d’entreprise – Saoirse chun gnó a sheoladh – Sloboda poduzetništva – Libertà d’impresa – Darījumsdarbības brīvība – Laisvē užsiimti verslu – A vállalkozás szabadsága – Il-libertà ta’ l-intrapriża – De vrijheid van ondernemerschap – Wolność prowadzenia działalności gospodarczej – Liberdade de empresa – Libertatea de a desfășura o activitate comercială – Sloboda podnikania – Svoboda gospodarske pobude – Elinkeinovapaus – Näringsfrihet**

