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EU Fundamental Rights, EC Fundamental Freedoms and Private Law

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Abstract: Originally, private law was considered to be immune from the effect of fundamental rights, the function of which was limited to being individual defenses against the vigilant eye of the state. This traditional view, however, has been put under pressure as a result of the growing effect of fundamental rights in private law, which makes it possible to speak about the tendency towards the constitutionalization of private law. Although until recently this tendency has primarily manifested itself in the national law of many EU Member States as a result of the readiness of the domestic courts to grant effect to fundamental rights embodied in national constitutions and international human rights instruments in purely private law disputes, an interesting perspective on the issue is also provided by EU law. The aim of this article is to trace in EU law the signs of the developments which have been occurring in national legal systems with regard to the effect of fundamental rights in private law, and, in the light of this, to outline possible directions in the evolution of the relationship between private law, on the one hand, and EC fundamental freedoms and EU fundamental rights, on the other, in the context of EU law.

Résumé: A l'origine, les droits fondamentaux étaient considérés sans effet sur le droit privé, leur fonction se limitant à la défense de l'individu contre le regard inquisiteur de l'État. Toutefois, cette tradition a été mise à l'épreuve par l'effet croissant des droits fondamentaux en droit privé, ce qui nous permet de parler d'une tendance vers un droit privé constitutionnalisé. Même si cette tendance s'est jusqu'à récemment manifestée plutôt dans le droit national de nombreux États membres de l'Union européenne suite au fait que les tribunaux nationaux ont été prêts à attribuer des effets dans les litiges purement privés aux droits fondamentaux inscrits dans les constitutions nationales et dans les instruments internationaux des droits de l'homme, une perspective intéressante est fournie par le droit communautaire. Le but de cet article est à la fois de repérer dans le droit communautaire les signes développés afférents aux effets des droits fondamentaux sur le droit privé qui se sont fait sentir (?) dans les systèmes légaux nationaux et d'exposer, à la lumière de ces données, les directions possibles de l'évolution de la relation entre le droit privé d'une part et les libertés fondamentales des communautés européennes et les droits fondamentaux communautaires d'autre part dans le contexte du droit communautaire.

Zusammenfassung: Ursprünglich sah man Privatrecht als immun vom Einfluß der Grundrechte an, deren Funktion darauf beschränkt war, die Rechte des Einzelnen gegen das wachsame Auge des Staates zu beschützen. Diese herkömmliche Auffassung kommt jedoch unter Druck auf Grund des zunehmenden Einflusses von Grundrechten auf das Privatrecht, was es möglich macht, von einer Tendenz zur Konstitutionalisierung des Privatrechts zu sprechen. Obwohl sich dies bis vor kurzem vor allem im nationalen Recht der Mitgliedstaaten manifestiert hat – dies in Folge der Bereitschaft nationaler Gerichte,

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Grundrechten sowohl aus nationalen Verfassungen als auch internationalen Menschenrechtsinstrumenten in rein privatrechtlichen Konflikten anzuerkennen – bietet auch das europäische Recht eine interessante Perspektive. Dieser Beitrag will die Spuren im europäischen Recht nachzeichnen, die die diesbezüglichen nationalen Entwicklungen hinterlassen haben. In diesem Licht werden mögliche Richtungen für die Entwicklung des Verhältnis zwischen Grundrechten und Privatrecht einerseits, und zwischen den Grundfreiheiten der EU und den europäischen Grundrechten andererseits, aufgezeigt.

1 Introduction

Originally, fundamental rights and private law were two separate worlds. As an aspect of public law, fundamental rights were considered to be individuals' defences against the vigilant eye of the state, and in this function, they did not have any impact on private law and conduct. However, as the time passed, it has become more and more difficult to draw a strict line between the world of fundamental rights and that of private law, in the same way as it has become increasingly difficult to draw such a line between public and private law in general. Gradually, relationships between private parties under private law have been losing their immunity from the effect of fundamental rights. Being no longer viewed as a completely closed autonomous system for governing relationships between private parties, private law has been opened up for the influence of fundamental rights or, in other words, for its constitutionalization.

Although until recently the tendency towards the constitutionalization of private law has primarily manifested itself on the national level, i.e. within domestic legal systems as a result of the readiness of the domestic courts to grant effect to fundamental rights embodied in national constitutions and international human rights instruments in purely private law disputes,[1] some interesting developments in this respect can also be traced on the European Union (EU) level.

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[1] Many authors have remarked upon the events that are taking place in this field and have speculated on future developments. For the Netherlands, see, for instance, E. HONDIUS, 'Open normen en grondrechten', (1994) 125 *Weekblad voor privaatrecht, notariaat en registratie*, 535; J.H. NIEUWENHUIS, 'De Constitutie van het burgerlijk recht', (2000) 6 *Rechtsgeleerd magazijn Themis*, 203; F.W. GROSHEIDE, 'Constitutionalisering van het burgerlijk recht?', (2001) 3 *Contracteren*, 48; C. MAK, 'Personality Rights in the Dutch and German Law of Obligations', in *Privaatrecht tussen autonomie en solidariteit*, Den Haag: Boom Juridische uitgevers, 2003, p. 169; J.M. SMITS, 'Constitutionalisering van het vermogensrecht', *Preadviezen uitgebracht voor de Nederlandse Vereiniging voor Rechtsverhelijking'*, Deventer: Kluwer, 2003; O. CHEREDNYCHENKO, 'The Constitutionalization of Contract Law: Something New under the Sun?', (2004) 8.1 *Electronic Journal of Comparative Law*, http://www.ejcl.org/81/art81-3.html; S.D. LINDENBERGH, 'Constitutionalisering van contractenrecht. Over de werking van fundamentele rechten in contractuele verhoudingen', *Weekblad voor Privaatrecht, Notariaat en Registratie* 6602 (2004), 977. For Germany, see, for example, C. STARCK, 'Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court' and A. HELDRICH and G.M. REHM, 'Importing Constitutional Values through Blanket Clauses', in D. Friedmann and D. Barak-Erez (eds.), *Human Rights in Private Law*, Hart Publishing, 2001, 97 and 113, with further references. For the UK, see, for example, H. BEALE and N. PITTAM, 'The Impact of the Human Rights Act 1998 on English Tort and Contract Law' and R. ELLGER, 'The European Convention of Human Rights and Fundamental Freedoms and German Private Law', in Friedmann and Barak-Erez, *op. cit.*, 131 and 161, with further references.

As early as in 1986 the Court of Justice, which has played a major role in transforming EC law from international into supranational law, characterized the Treaties which are the foundation of the European Communities as 'a Constitutional Charter'.[2] Although the EC treaty cannot by its nature be equated with the constitutions of the national states, as will be demonstrated below, the position of EC fundamental freedoms (free movement of goods, services, persons, and capital), which constitute the main principles of EC primary law reveals strong similarities with the position of constitutional rights as contained in national constitutions. Furthermore, between February 2002 and July 2003 the European Convention drew up a Draft Treaty establishing a Constitution for Europe which, among other things, has incorporated the previously non-binding Nice Charter of Fundamental Rights of the EU as it was proclaimed in December 2000.[3] Although after the French and Dutch referendums the future of the Constitution for Europe became rather uncertain, this cannot be said about the EU fundamental rights because, in essence, these rights must be respected in the Union already under the existing EU law. When the three EC Treaties were originally signed in the 1950s, they contained no express provisions concerning the protection of fundamental rights in the conduct of Community affairs. However, governed by the common constitutional traditions of the Member States and by the fundamental rights recognized in the international human rights treaties, first and foremost, in the European Convention on Human Rights, the Court of Justice over the years has in its case-law developed what effectively amounts to an unwritten charter of rights for the Community, and this development has gradually been given formal recognition within the amended EU and EC Treaties.[4] According to Article 6(1), (2) of the EU treaty currently in force, the Union shall respect fundamental rights, as guaranteed by the European Convention of Human Rights and as they result from the constitutional traditions common to the Member States, as general principles of Community law. The inclusion of the extensive catalogue of fundamental rights in the Draft Constitution for Europe can certainly be considered to be the culminating point in this development and a novelty in European primary law, but it does not constitute something radically different from that what had been achieved in EU law before. Certain possibilities for the development of fundamental rights protection similar to that which has been secured by the national constitutions had already been opened up. Moreover, whatever the destiny

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[2] Case 294/83, *Parti Ecologiste 'Les Verts'* v. *European Parliament*, [1986] ECR 1339. See also Case C-134/91, *Weber* v. *European Parliament*, [1993] ECR I-1093.

[3] EU leaders reached agreement on a new Constitutional Treaty for Europe at the European Council in Brussels on 17 and 18 June 2004. However, the Constitution can only enter into force once it has been ratified by all the Member States in accordance with their respective constitutional provisions (parliamentary approval and/or referendum).

[4] On this development see, for example, P. CRAIG AND G. DE BÚRCA, *EU Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 1998, 331-337.

of the current Draft of the Constitution for Europe would be, it appears that there is no way back any more as far as the recognition of the binding character of the Charter of Fundamental Rights of the EU is concerned. Therefore, Part II of the Draft Constitution for Europe devoted to EU fundamental rights has not lost its significance today.[5]

Against this background my aim here is to trace in EU law the signs of the developments which have been occurring on the national level with regard to the effect of fundamental rights in relations between private parties under private law, and in the light of that, to outline possible directions in the evolution of the relationship between private law, on the one hand, and EC fundamental freedoms and EU fundamental rights, on the other, in the context of EU law.[6] Considering the fact that in contrast with the national level where the relationship between only two actors – private law and constitutional rights – is at stake, private law in the EU law perspective may be affected by both EC freedoms and EU fundamental rights and therefore the relationship in question is tripartite, the structure of this article will be the following. First of all, in order to illustrate the issues and concepts which may reappear on the EU level in the context of the interaction between private law, EC freedoms and EU fundamental rights, I will focus on the experience accumulated on the national level with regard to the effect of fundamental rights as enshrined in national constitutions, i.e. constitutional rights, in private law. For this purpose, by using the example of the private law case decided by the German Constitutional Court, in section 2 I will briefly discuss the approach taken to the constitutionalization of private law in the German legal system where the doctrine and practice have been setting the tone of the whole debate on this issue for more than half a century. Subsequently, in sections 3 and 4 I will move to the EU level and focus on the actual and potential impact of EC freedoms and EU fundamental rights, respectively, on the relationships between private parties under the national private law of the Member States. Before reaching final conclusions in section 6, in section 5 I will discuss the private law aspects of the problem of the conflict between EC freedoms and EU

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[5] On the importance of the inclusion of the Charter in the Draft Constitution, see, for example, M. HESSELINK, 'The Politics of a European Civil Code', (2004) 10 *European Law Journal*, 675, at 682; B. HESS, 'Die Konstitutionalisierung des europäischen Privat- und Prozessrechts', *Juristen Zeitung* 11 (2005), 540, in particular, at 550.

[6] For the purposes of the present article, I will use the terms 'fundamental rights' to refer, depending on the context, to rights embodied in the national constitutions and international human rights instruments such as the European Convention on Human Rights; 'constitutional rights' in the sense of fundamental rights enshrined in the national constitutions; 'basic rights' as fundamental rights embodied in the German Constitution; 'EU fundamental rights' in the sense of unwritten fundamental rights developed by the European Court of Justice in EU law and rights laid down in the Charter of Fundamental Rights of the EU which is now part of the Draft Constitution for Europe; and 'EC fundamental freedoms', 'EC freedoms', or 'fundamental freedoms' as referring to four free movement provisions in the EC Treaty – free movement of goods, services, persons, and capital.

fundamental rights in a private law context and its possible implications for the relationship between private law and EC freedoms.

2 The Effect of Fundamental Rights in Private Law from the National Law Perspective

2.1 The German Handelsvertreter Case as an Example

In 1990 the Federal Constitutional Court (*Bundesverfassungsgericht*) delivered a judgment in the *Handelsvertreter* case[7] which can be considered to be one of the most striking examples of the constitutionalization of private law as a result of the strong impact of fundamental rights.

The dispute in this case arose between a commercial agent and a wine company – the agent's principal. While still working for the company, the agent also undertook to sell wines for the competitor of this company. Complications arose from a non-competition clause which the agent and his first principal had included in their contractual agreement. Such agreements are governed by section 90a of the Commercial Code. In accordance with this provision, the parties had agreed that for the two years after the termination of the contractual relationship the agent would be barred from working in any capacity for any competitor of the company. Moreover, in the event that the termination of the contract was brought about by culpable behaviour on the part of the agent, the parties agreed that the agent would not be entitled to any compensation.

Accordingly, when the fact that the agent had been working for the competitor came to the attention of his first principal, the latter terminated the contractual agreement with immediate effect and applied for an injunction restraining the agent from working for a competitor. The injunction was granted by the German Supreme Court in private law matters (*Bundesgerichtshof*) which held that the agreement on competition was valid: as a self-employed and professionally and economically independent merchant[8] the agent had been free to weigh the risks and advantages of the contract as a whole.

This decision by the Supreme Curt was, however, overturned by the decision of the Constitutional Court which had been resorted to by the agent by means of a constitutional complaint. The Constitutional Court agreed with the agent's claim that by granting an injunction prohibiting him from working for the competitor the Supreme Court had violated his basic right to freedom of profession guaranteed by Article 12 (1) of the German Constitution (*Grundgesetz*) and reasoned as follows.[9] The Court pointed out that the decisions of the private law courts granting the injunction had restricted the agent's freedom of profession. This limitation of the

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[7] BVerfG 7 February 1990, *BVerfGE* 81, 242 (*Handelsvertreter*).

[8] This is what commercial agents are under the German Commercial Code.

[9] *Handelsvertreter*, *op. cit.* note 7 *supra*, in particular, at 253 -263.

basic right, however, does not primarily result from the acts of the State: the agent had himself consented to the non-competition clause in the contract and had thus exercised his personal freedom; such an autonomous arrangement must, in principle, be respected by the State. At the same time, the Constitutional Court emphasized that private autonomy was only granted within the confines of private law, which, in its turn, cannot be contrary to the principles embodied in basic rights. In cases where there is an inequality of bargaining power when one party is so dominant as to be able to dictate to the other the terms of the contract, contract law alone cannot guarantee the balance of interests and the *legislature*, according to the Court, is *obliged* to restore the parity in order to *ensure the protection of basic rights*. In its view, even when the legislator omits to adopt mandatory contract law for particular areas of everyday life or types of contract, the task of discharging *the duty to protect basic rights* is directed in such a case to the *courts* which give effect to the basic rights in situations of disturbed contractual parity using the means available within private law.

Applying these general considerations, the Constitutional Court acknowledged that the legislator had regulated the conflict of interests between the principal, who had a legitimate interest to prevent competition from his former agents, and the agent, who often had little negotiating power, by introducing the mandatory provisions of section 90a in the Commercial Code which were designed to protect the agent. Thus, the validity of the agreement depended on the constitutionality of section 90a (2), second sentence, which relieved the principal from the obligation to pay compensation if the contract was rescinded because of the agent's culpable behaviour. According to the Court, the interests of both parties set limits on the broad discretionary power possessed by the legislator with regard to resolving the conflict between them, since the interests of both principals and agents are derived from basic rights. Neither the restriction of freedom nor its protection may be disproportional in the case of such an interplay of competing interests. The possibility of the refusal by the principal to pay any compensation whatsoever provided by section 90a (2), second sentence, of the Commercial Code was found by the Court to be disproportional. In its view, it was not necessary to impose such a severe sanction in order to counterbalance the competitive disadvantage suffered by the principal who had rescinded the contract, and agents could not reasonably be expected to suffer the drastic consequences of such a step. Accordingly, the Constitutional Court declared that section 90a (2), second sentence, was incompatible with Article 12 (1) of the Constitution. The private law courts, the Court observed, should have listened to the agent's arguments as to the unconstitutionality of this provision. This means that under Article 100 (1) of the Constitution, the private law courts should have asked the Constitutional Court to provide a decision on this question before deciding the dispute. As section 90a (2), second sentence, was held to be unconstitutional, the agreement based thereon collapsed and the case was referred back to the State Court of Appeal (*Oberlandesgericht*) for redetermination.

2.2 Fundamental Rights and Private Law in the German Legal System

The *Handelsvertreter* case provides a good illustration of the position of fundamental rights in the German legal order and the concepts used therein for giving effect to constitutional rights in private law. The essence of the German approach to the relationship between private law and constitutional rights can be summarized as follows.

Firstly, since the famous *Lüth* case[10] decided by the German Constitutional Court almost half a century ago, constitutional rights are regarded not only as individual defences against the State, but also as an 'objective system of values', which must apply throughout the whole legal order, directing and informing legislation, administrative acts and court decisions.

Secondly, since the Constitution contains an 'objective system of values' for the whole legal order, private law obviously also cannot escape from the influence of values underlying constitutional rights: under the *Lüth* doctrine, no rule of private law may conflict with these values, and all such rules must be construed in a way that gives effect to them. The values enshrined in the Constitution are the same for the whole legal order and therefore should be honored both in a public law relationship between an individual and the state and in a private law relationship between individuals. They permeate the state and society, public and private law, wherever the line between the two is to be drawn. This conception of constitutional rights explains why the Constitutional Court in *Handelsvertreter* held that the exercize of private autonomy guaranteed by private law could not be contrary to constitutional values.

Thirdly, the logical consequence of such reasoning is that constitutional rights should be given effect in private law and the most controversial issue is how this should be done. The German legal literature and practice offers three concepts which can be used for this purpose.

2.2.1 Direct Horizontal Effect

Before the *Lüth* case, the prominent German scholar Nipperdey advocated the concept that constitutional rights should apply not only against the state, but should also be *directly* applicable in private law relations – at least in the case of the most important constitutional rights.[11] This theory has come to be known as the 'theory of direct effect on third parties' (*Lehre der unmittellbaren Drittwirkung*). The implication of such an approach is that certain constitutional rights should ordinarily be binding on individuals and private groups in approximately the same manner and to the same extent as they are binding on the government. Thus, the legality of private

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[10] BVerfG 15 January 1958, *BVerfGE* 7, 198 (*Lüth*).

[11] See, for example, H.C. NIPPERDEY, 'Die Würde des Menschen', in K.A. Bettermann and H.C. Nipperdey (eds.), *Die Grundrechte: Handbuch der Theorie und praxis der Grundrechte*, Part II, Duncker & Humblot, 1954, 748 *et seq.*; L. ENNECCERUS and H.C. NIPPERDEY, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs*, Tübingen, 1959, Part I/1, 92 *et seq.*

persons' transactions and other acts becomes directly dependent upon the basic-rights clauses, and, if their violation is found, the role of established private law is only limited to providing for the consequences of illegality such as invalidity or damages.[12] Accordingly, the idea of direct horizontal effect implies that a private party has, in his action against another private party, a claim or a defence which is directly based on a constitutional right which overrides an otherwise applicable rule of private law. However, neither in *Lüth* nor in its subsequent case law did the German Constitutional Court adopt Nipperdey's theory and grant direct effect to constitutional rights in disputes between private parties under private law. Instead, it resorted to such concepts as indirect horizontal effect and the state duties to protect constitutional rights which are considered below.

2.2.2 Indirect Horizontal Effect

The most widely used concept which was introduced in the *Lüth* case and is still followed in practice is the idea of the indirect horizontal effect of constitutional rights. In contrast to direct horizontal effect, in this case a claim or defence is based on a provision in the Civil Code, which is not automatically overridden by the constitutional right in question, but only interpreted in the light thereof. According to the Constitutional Court in *Lüth*, a certain intellectual content radiates from constitutional law into private law and affects the interpretation of the existing private law rules.[13] A dispute between private parties on the rights and duties that arise from rules of conduct thus influenced by basic rights, the Court emphasized, 'remains substantively and procedurally a dispute of private law'.[14] Thus, even though the interpretation of private law should comply with the public law of the Constitution, it is nonetheless *private* law which is interpreted and applied to relationships between private parties. The best suited for the realization of such an influence are the general clauses of the Civil Code, such as section 826 concerning good morals, which are considered to be the entrance gates through which constitutional values may gain access to the private law sphere. In reaching this conclusion the Federal Constitutional Court adopted what has come to be known as the 'theory of indirect effect on third parties' (*Lehre der mittellbaren Drittwirkung*), which was first defended by Dürig in response to the theory of direct effect proposed by Nipperdey.[15] The major concern of Dürig, which led him to reject the idea of the direct effect of constitutional rights in private law and to opt for an intermediary solution, which he saw in the idea of indirect effect, was the concern about the preservation of the principle of party autonomy and the independence of private law.[16]

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[12] Compare Enneccerus and Nipperdey, *op. cit.* note 11 *supra*, at 95.

[13] *Lüth*, *op. cit.* note 10 *supra*, at 205.

[14] *Lüth*, *op. cit.* note 10 *supra*, at 205, (my translation).

[15] G. DÜRIG, 'Grundrechte und Zivlrechtsprechung', in T. Maunz (ed.), *Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung*, München, 1956, 157.

[16] Dürig, *op. cit.* note 15 *supra*, at 183-184.

2.2.3 State Duties to Protect Constitutional Rights

After many years of granting horizontal effect solely on the basis of the concept of indirect horizontal effect adopted in *Lüth*, in the *Handelsvertreter* case the German Constitutional Court introduced a new concept. Apparently, the need for such a new concept arose from the fact that the alleged violation of a constitutional right in this case arose in a *contract law* context when the *parties* had *agreed* upon the *content of the contract* themselves, thus exercising their *party autonomy*. Under these circumstances the Constitutional Court felt the need for a new approach which could justify the application of constitutional rights with regard to autonomous arrangements which are in conformity with the private law legislation in force. The solution was found in the introduction of the concept of 'state duties to protect constitutional rights' ('*grundrechtliche Schutzpflichten*'), which had previously only been applied in the context of public law, within the ambit of private law. By extending this concept in the field of private law in the *Handelsvertreter* case the Constitutional Court followed the theory of 'state duties to protect constitutional rights', which was primarily developed by Canaris who saw in it a new legal basis for the effect of constitutional rights in private law.[17] The Court, however, did not formally reject the theory of indirect effect. Rather, it opted for the complementary use of both the old and the new foundation for the purposes of giving effect to constitutional rights in private law.

The protective function of constitutional rights (*Schutzgebotsfunktion der Grundrechte)*, which imposes on the state the duty to protect constitutional rights, or, in other words, *positive* obligations, differs from the classical function of constitutional rights as defensive rights against the state (*Eingriffsverbotsfunktion der Grundrechte*), which prohibits any intrusions on the part of the state into constitutional rights and thus imposes *negative* obligations on the state. While the latter presupposes the duty of the state to *refrain* from action, the former, by contrast, imposes on the state a duty to *act* when constitutional rights of one individual are violated by another individual (and thus not by the state itself).[18] Accordingly, the issue which lies at the heart of the duty of the state to protect its citizens is not

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[17] C.-W. CANARIS, 'Grundrechte und Privatrecht', (1984) 184 *Archiv für die civilistiche Praxis*, 201, in particular, at 210 *et seq.*, 225 *et seq.* See also C.-W. CANARIS, *Grundrechte und Privatrecht*, Berlin/New York, 1999.

[18] Contrast the approach to the functions of constitutional rights in the German legal system with Judge Posner's dictum that the Constitution of the United States is 'a charter of negative rather than positive duties' in *Jackson* v. *City of Joliet* 715 F.2d 200, 203 (7th Circ. 1983). This view was affirmed by the US Supreme Court in *DeSchaner* v. *Winnebago County Department of Social services*, 489 U.S. 189 (1989) where the Court noted: '[N]othing in the language [or history] of the Due Process Clause…requires the State to protect the life, liberty, and property of the citizens against invasion by private actors…Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.' Compare, however, I.M. HEYMAN, 'The First Duty of Government: Protection, Liberty and the Fourteenth Amendment', (1991) 41 *Duke Law Journal*, 507.

whether public authorities have actively encroached upon the constitutional rights of private individuals, but whether, by failing to act, they allowed *private individuals* to encroach upon the constitutional rights of other private individuals. The main purpose of such a duty is thus to protect individuals from each other.[19]

Finally, as German experience shows, in most cases constitutional rights protect the interests of both parties to the private law dispute. Therefore, in contrast to the application of constitutional rights in a dispute between an individual and the state where only a private party (in most cases an individual) can invoke a violation of a constitutional right, in private law disputes both private parties can do so. As a consequence, a balance should be struck between two constitutional rights or, more exactly, two constitutionally protected private interests. Thus, for example, in the *Handelsvertreter* case the constitutional right to freedom of profession on the part of the agent had to be balanced against the constitutional right to freedom of contract on the part of the principal who had a legitimate interest in having the contract enforced. Such a balancing act must in principle be carried out by the legislator, or, in case of its failure, by the private law courts, which are also entitled to submit the issue of the constitutionality of the federal legislation to the Constitutional Court if they think that it is unconstitutional.[20] The Constitutional Court, however, can always be invoked against the decision of the private law court, in particular, in the case of its refusal to raise the issue of the constitutionality of the legislation.[21]

2.3 Perplexities Concerning the Constitutionalization of Private Law in German Law

Although in most cases one can approve the results reached as a consequence of taking the approach to the effect of constitutional rights in private law outlined above, important concerns have been expressed by many German lawyers, not only with a private law but also with a public law background, regarding the manner in which the constitutionalization of private law was advanced by the Federal Constitu-

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[19] Compare C. STARCK, 'State Duties of Protection and Fundamental Rights', http://www.puk.ac.za/lawper/2000-1/starck.html, section 2.2. In general, on the issue of state duties of protection, see also I. ISENSEE, 'Das Abwehrrecht und Staatliche Schutzpflicht', in J. Isensee/P. Kirchof (eds.), *Handbuch des Staatsrechts*, Part V, Heidelberg, 1992, 143, at 143 *et seq.*, 181 *et seq.*; E. KLEIN, 'Grundrechtliche Schutzpflicht des Staates', (1989) 42 *Neue Juristische Wochenschrift*, 1633, 1633 *et seq.*

[20] Article 100 (1) of the German Constitution.

[21] Article 93 (4a) of the German Constitution.

tional Court.[22] Among such concerns the following are particularly worth mentioning in the present context:

a) the extension of fundamental rights to relationships between private parties, in particular their use as a means of state intervention in the realm of contract law, poses a threat to private autonomy; that the Constitutional Court in *Handelsvertreter* disregarded the fact that at stake there was not only the statutory provision but a contract between two private parties provides evidence of the existence of such a threat;

b) the discussion as to what is socially and economically suitable for a specific community is shifted to the meta-level of broadly formulated constitutional values; as a consequence, the political process becomes closed and the courts, especially the Federal Constitutional Court, acquire broad powers, which normally belong to the legislator, in deciding highly sensitive political issues such as the boundaries of private autonomy; the judgement of the Constitutional Court in *Handelsvertreter*, in which the Court, without any examination as to whether there had indeed been an inequality of bargaining power between the parties in this particular case,[23] declared unconstitutional the statutory provision that had already struck the balance between the competing interests of agents and principals, illustrates this point;

c) as a result of shifting the authority to interpret private law core concepts, such as property, contract, tort, from the ordinary private law courts to the Federal Constitutional Court and the need to strike a balance between constitutional interests, there is a danger that the dogmatics of private law will be paralysed and that solid private law solutions that have become perceived as manifesta-

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[22] See, for example, U. DIEDERICHSEN, 'Das Bundesverfassungsgericht als oberstes Zivilgericht – ein Lehrstük der juristischen Methodenlehre', (1998) 198 *Archiv für die civilistiche Praxis*, 171, at 210 *et seq.*; A. RÖTHEL, 'Verfassungsprivatrecht aus Richterhand? Verfassungsbindung und Gesetzesbindung der Zivilgerichtsbarkeit', (2001) 41 *Juristische Schulung*, 424; D. MEDICUS, 'Der Grundsatz der Verhältnismäßigkeit im Privatrecht', (1992) 192 *Archiv für die civilistiche Praxis*, 35, at 54 *et seq.*; G. SPIEß, 'Inhaltskontrolle von Verträgen – das Ende privatautonomer Vertragsgestaltung?', (1994) 109 *Deutsches Verwaltungsblatt*, 1222 *et seq.*, in particular, at 1229; C. HILLGRUBER, 'Abschied von der Privatautonomie?', (1995) 28 *Zeitschrift für Rechtspolitik*, 6, in particular, at 9; S. OETER, 'Fundamental Rights and Their Impact on Private Law – Doctrine and Practice under the German Constitution', (1994) 12 *Tel Aviv University Studies in Law*, 7, at 15 *et seq.*; K. HESSE, *Verfassungsrecht und Privatrecht*, Heidelberg, 1988, 24; K. STERN, *Das Staatsrecht der Bundesrepubliek Deutschland*, III/1, München, 1988, § 76 IV, 1583.

[23] Compare W. ZÖLLNER, 'Regelungsspielräume im Schuldvertragsrecht', (1996) 196 *Archiv für die civilistiche Praxis*, 1, at 10. In the literature serious doubts were expressed as to whether the commercial agent in the *Handelsvertreter* case had indeed been the weaker party. See, for example, C. HILLGRUBER, 'Grundrechtsschutz im Vertragsrecht', (1991) 191 *Archiv für die civilistiche*, 69, at 79 *et seq.*; MEDICUS, *op. cit.* note 22 *supra*, at 64. For an overview of the arguments against the extension of fundamental rights to the private sphere in general, compare O. GERSTENBERG, 'Private Law and the New European Constitutional Settlement', (2004) 10 *European Law Journal*, 766, at 769.

tions of constitutional values will become superfluous; the autonomy of private law is thus at risk of disappearing;

d) the employment of a superficially reasoned technique of balancing between various constitutionally protected interests and the existence of the possibility to avoid a contract which had been freely entered into as a consequence of repealing the respective legislation, as in *Handelsvertreter*, constitutes a blow to the traditional values of the continental movement for the codification of private law – the legal certainty and predictability of judicial decisions.

Keeping in mind the German experience outlined above, in particular, the concepts used for giving effect to constitutional rights in purely private law relationships and controversies in connection with the constitutionalization of national private law by the German Constitutional Court, I will now turn to the EU dimension and in the subsequent sections I will focus on the actual and potential impact of EC freedoms and EU fundamental rights, respectively, on the relationships between private parties under the national private law of the Member States.

3 The Effect of EC Freedoms in Private Law

3.1 The Position of EC Freedoms in EC Law and National Private Law

EC Freedoms (free movement of goods, services, persons, and capital), which are now embodied in the Draft Constitution for Europe (Title III, Chapter I), have from the establishment of the three European Communities in the 1950s been the key principles of the economic constitution contained in the EC Treaty. The paramount importance of EC freedoms can already be seen from the terms which the European Court of Justice used to describe them, such as a 'fundamental Community provision',[24] 'one of the fundamental principles of the Treaty',[25] 'one of the foundations of the Community',[26] 'fundamental freedom',[27] and even 'fundamental right'.[28] This

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[24] Case C-44/89, *Corsica Ferries France* v. *Direction générale des douanes françaises*, [1989] ECR I-4441, para. 8 (in relation to all four freedoms).

[25] Case C-205/89, *Commission* v. *Greece*, [1991] ECR I-1361, para. 9; Case C-265/95, *Commission* v. *France*, [1997] ECR I-6959, para. 27 (in both cases in relation to the free movement of goods).

[26] Cases C-194/94, *CIA Security* v. *Signalson*, [1996] ECR I-2201, para. 40; Case C-443/98, *Unilever Italia* v. *Central Food*, [2000] ECR I-2201, para. 40 (in both cases in relation to goods).

[27] Case C-394/97, *Sami Heinonen*, [1999] ECR I-3599, para. 38 (in relation to the free movement of goods); Case C-360/99, *Canal Satélite Digital* v. *Spain*, [2002] ECR I-607, paras. 28-30 (in relation to the free movement of goods); Case C-281/98, *Roman Angonese* v. *Cassa di Risparmio di Bolzano*, [2000] ECR I-4139, para. 35 (in relation to the free movement of workers); Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge* v. *Republiek Österreich*, [2003] OJ C 184, 1, paras. 62 and 74 (in relation to the free movement of goods).

[28] Case 152/82, *Forcheri* v. *Belgium*, [1983] ECR 2323, para. 11 (in relation to the free movement of workers); Case 222/86, *UNSTEF* v. *Heylens*, [1987] ECR 4097, para. 14 (in relation to the free movement of workers); Case C-228/98, *Dounias* v. *Minister of Economic Affairs*, [2000] ECR I-577, para. 64 (in relation to the free movement of goods).

position of the Court was also reinforced in academic literature where EC freedoms were regarded as 'subjective public rights' (*subjektiv-öffentliche Rechte*),[29] 'constitutional rights but not fundamental constitutional rights',[30] 'economic constitutional rights',[31] or 'the principal elements of the economic Constitution of the Community',[32] to name but a few definitions.[33] Some even went so far as to regard EC freedoms as either assimilated or akin to fundamental rights of the kind enshrined in the European Convention on Human Rights.[34] Although at present the status of the four freedoms is not clear, since the *Van Gend & Loos* case[35] there has been general agreement that, being directly effective in the national legal orders of the Member States, fundamental freedoms constitute subjective rights of individuals which can be enforced in the courts.[36] It appears that whatever their status may be, to use the words of Roth and Oliver, 'at the end of the day, the essential issue is not whether the four freedoms are to be categorized as fundamental rights, but rather their relative importance in the Treaty'.[37]

That this importance is rather high as far as national private law is concerned can be seen from the developments which have already taken place or can potentially occur with regard to the four freedoms and which led some authors to conclude that

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[29] T. KINGREEN, *Die Sruktur der Grundfreiheiten des Europäischen Gemeinschaftsrechts,* Berlin, 1999, p. 15.

[30] J. BAQUERO CRUZ, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*, Hart, 2002, p. 81.

[31] J. GEKRATH, *L'émergence d'un droit constitutionnel pour l'Europe: modes de formation et sources d'inspiration de la constitution des Communautés et de l'Union européenne*, Bruxelles, 1997, 315.

[32] GEKRATH, *op. cit.* note 31 *supra*, at 315.

[33] For an overview of the various views in the literature see P. OLIVER and W.-H. ROTH, 'The Internal Market and the Four Freedoms, (2004) 41 *Common Market Law Review*, 407, at 410. For an overview of the views in German literature see, for example, K. MORTELMANS, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market – Towards a Concordance Rule', (2002) 39 *Common Market Law Review*, 1303, at 1314-1315.

[34] See, for example, A. BLECKMANN, 'Die Freiheiten des Gemeinsamen Marketes als Grundrechte', in R. Bieber *et al.* (eds.), *Das Europa der zweiten Generation – Gedächtnisschrift für Christoph Sasse*, Baden-Baden, 1981, 78.

[35] Case 26/62 *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen*, [1963] ECR 1. In that case the Court suggested that the direct effect of the EC treaty provisions leads to the creation of subjective rights of individuals. According to the Court at p. 13, 'Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect'. (The old Article 12 prohibited the imposition of new customs duties and charges equivalent thereto). This approach has also been followed by the Court in its subsequent cases. See, for example, Case 13/68, *Salgoil* v. *Italian Ministry for Foreign Trade*, [1973] ECR 453, at 461; Case C-41/74, *Van Duyn* v. *Home Office*, [1974] ECR 1337, at para. 15; ; Case C-265/78, *Ferwenda* v. *Produktschap voor Vee en Vlees*, [1980] ECR 617, para. 10; Case C-37/98, *The Queen and Secretary of Home Department, ex parte Savas,* [2000] ECR I-2927, at para. 68.

[36] Compare, for example, D. EHLERS, § 7, in D. Ehlers (ed.), *Europäische Grundrechte und Grundfreiheiten*, Berlin, 2003, 147, at 150.

[37] OLIVER and ROTH, *op. cit.* note 33 *supra*, at 410.

EC freedoms even have a meaning of objective law.[38] Firstly, EC freedoms influence all fields of the national law of Member States as well as EC law itself. As a consequence, the whole body of law of the Member States, including private law, and the secondary EC law has to be interpreted in conformity with the EC freedoms.[39] For private individuals this means that in litigation between each other, the provisions of Member State law, be it public law or private law, have to be interpreted in conformity with the EC freedoms.[40] In addition, private individuals can rely on the invalidity of a state measure in their relation with other private individuals, insofar as the measure violates an EC freedom.[41]

Secondly, EC freedoms provide private parties with rights not only against the state, but, in some cases, also in their relations with other private parties. EC freedoms, according to their wording, are binding on the Member States, which includes all organs of the state,[42] and on the Community and its organs.[43] For many years, the

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[38] Compare EHLERS, *op. cit.* note 36 *supra*, at 161. For those who deny the objective character of EC freedoms, see KINGREEN, *op. cit.* note 29 *supra*, at 200 *et seq.*

[39] Compare EHLERS, *op. cit.* note 36 *supra*, at 161. See also H.D. JARASS, 'Richtlinienkonforme bzw. EG-rechtskonforme Auslegung nationalen Rechts', (1991) 26 *Europarecht*, 211, at 222; *Idem*, 'Elemente einer Dogmatik der Grundfreiheiten', (1995) 30 *Europarecht*, p. 202, at p. 211; MORTELMANS, *op. cit.* note 33 *supra*, at 1324 *et seq.*; W. SCHROEDER, 'Die Auslegung des EU-Rechts', (2004) 44 *Juristische Schulung*, 180, at 181-182.

[40] B. BEUTLER *et al.* (eds), *Die Europäische Union*, Baden-Baden, 1993, p. 298; JARASS, (1991), *op. cit.* note 39 *supra*, at 222.

[41] Case 47/90, *Delhaize Fréres* v. *Promalvin and others*, [1992] ECR I-3669, at para. 29.

[42] Case 197/84, *Steinhauser* v. *City of Biarritz*, [1985] ECR 1819, at para. 16. It should also be noted that it is not only the Member State (and its institutions) in which the recipient of the relevant performance is resident or in which residence is required that is bound. The state of origin (and its institutions) is also bound. For the free movement of goods this follows directly from Article 29, but the same applies for the other fundamental freedoms as has been clarified by the Court of Justice in relation to the freedom of establishment and the free movement of workers. See as far as the freedom of establishment is concerned: Case 81/87, *R* v. *HM Treasury & Commissioners of Inland Revenue, ex parte Daily Mail & General Trust PLC*, [1988] ECR 5483, at para. 16; Case C-264/96 *Imperial Chemical Industries plc (ICI)* v. *Kenneth Hall Colmer (HM Inspector of Taxes)*, [1998] ECR I-4695, at para. 21; free movement of workers: Case C-415/93, *Union Royal Belge de Sociétés des Football Association ASBL* v. *Jean –Marc Bosman*, [1995] ECR I-4921, at para. 97.

[43] The Court of Justice has answered the question whether fundamental freedoms are binding upon the Community and its institutions in the affirmative on a number of occasions with regard to the free movement of goods (Case 15/83, *Denkavit Nederland*, [1984] ECR 2171, at para. 15; Case C-51/93, *Meyhui* v. *Scott Zwiesel Glaserke*, [1994] ECR I-3879, at para. 11. In the case of the other fundamental freedoms, the situation should be similar. See H.D. JARASS, 'A Unified Approach to the Fundamental Freedoms', in M. Andenas and W.-H. Roth (eds.), *Services and Free Movement in EU Law*, Oxford University Press, 2002, 152. According to him: 'This position is supported by the fundamental character shared by all the fundamental freedoms which should therefore apply at least by analogy to the Community and its organs. Secondary legislation thus has to be in line with the fundamental freedoms'. At the same time, the majority of the legal scholars seem to be of the opinion that the Community legislature is not bound by fundamental freedoms in the same way as the Member States and enjoys a margin of discretion and thus a greater freedom. On this see, in particular, MORTELMANS, *op. cit.* note 33 *supra*, at 1315 *et seq.* According to Mortelmans, this view is, in many judgements, also the Court's point of view.

ECJ maintained a strict line between the EC freedoms which, as constitutional rights in national legal orders, were not held to be applicable between private parties, and the Community rules on competition, which, by contrast, are explicitly addressed to undertakings and thus private parties.[44] After it had become clear that the dichotomy engendered lacunae in the application of Community law, the Court started a process of closing the gaps, which led to the competition rules being applied in certain circumstances – to Member States' behaviour[45] and, correspondingly, to the free movement rules being construed as imposing obligations on private parties.[46] The result of this process is the adoption of the two concepts which have previously been developed and/or applied in German law with regard to constitutional rights in private law – direct horizontal effect and state duties to protect EC freedoms. These concepts are of particular interest in the present context, and they will therefore be considered in more detail in the next subsections 3.2 and 3.3.

3.2 Direct Horizontal Effect of EC Freedoms

The direct horizontal effect of EC freedoms in private law implies that private parties are bound by fundamental freedoms in the same way as the Member States and thus can directly rely on a fundamental freedom in a dispute between each other. In private law terms this means that a contract which is contrary to a fundamental freedom can be declared void and/or an obligation to pay damages can arise. Because fundamental freedoms apply to the conduct of private parties directly, such concepts as fundamental freedoms as, let us say, objective values of the Community, which influence private law, or state duties to protect fundamental freedoms in private law are not needed in order to be able to apply a fundamental freedom in a private law case. The main argument in favour of the direct horizontal effect of EC freedoms, by which the Court of Justice was undoubtedly guided when it introduced this concept, is increasing the effectiveness of EC freedoms in the still ongoing process towards the realization of the internal market (the *effet utile* argument). This form of applying the EC freedoms in private law, however, represents the most radical solution which, as has already been mentioned above, was formally rejected in German law with regard to constitutional rights.

At the present time, the situation with the application of this radical solution to the problem of the effectiveness of EC freedoms looks in the following way. Direct

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[44] See, for example, Joined Cases 177 and 178/82, *Criminal proceedings against Van de Haar and Kaveka de Meern*, [1984] ECR 1797.

[45] See the line of cases starting with Case 13/77, *GB-INNO-BM* v. *ATAB*, [1977] ECR 2115, at paras. 28-29.

[46] Waelbroeck called this development the 'privatization' of free movement and the 'publicization' of competition. See D. WAELBROECK, 'Les rapports entre les règles sur la libre circulation des merchandises et les règles de concurrence applicables aux enterprises dans la CEE', in F. Capotorti *et al.* (eds.), *Liber Amicorum Pierre Pescatore: Du droit international au droit de l'intégration*, Baden-Baden, 1987, 781.

horizontal effect has been rejected in the domain of free movement of goods.[47] As yet, there has been no case-law as to its application in the case of the free movement of capital.[48] However, direct horizontal effect has already been applied by the Court mainly with regard to free movement of workers[49] and, to some extent, services[50] and establishment.[51]

The most far-reaching decisions with regard to the horizontal effect of EC freedoms have been delivered by the Court in the *Bosman*[52] and *Angonese*[53] cases both of which concerned the free movement of workers. In *Bosman* at stake was the compatibility (in particular, with the free movement of workers (Article 39 EC)) of the nationality clauses emanating from the representative football federations FIFA and UEFA, two private associations governed by Swiss law, and the so-called football transfer rules according to which a professional footballer was not free to move to a new club without the payment of a transfer fee, even if his contract with his previous club of affiliation had expired. First of all, the Court returned to the reasoning already adopted in its previous case-law[54] and repeated that not only the actions of public authorities, but also the rules of any other nature aimed at regulating gainful employment in a *collective* manner, fell within the scope of Article 39 EC.[55] Compared to its previous case-law, however, a giant leap forward was the finding by the Court that even though the transfer rules in question did not discriminate on the

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[47] *Van de Haar and Kaveka de Meern*, *op. cit.* note 44 *supra*, at paras. 11-12; Case 311/85, *Vereiniging van Vlaamse Reisbureau's* v. *Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, [1987] ECR 3801, at para. 30; Case 65/86, *Bayer* v. *Süllhover*, [1988] ECR 5249, at para. 11; Case C-159/00, *Sapod Audic*, [2002] ECR I-5031, at para. 74. For the discussion of this case law, see, for example, T. KÖRBER, *Grundfreiheiten und Privatrecht',* Siebeck: Mohr, 2004, 686 *et seq.*

[48] P.J.G. KAPTEYN *et al.* (eds.), *Het recht van de Europese Unie en van de Europese Gemeenschappen*, Kluwer, 2003, 633; KÖRBER, *op. cit.* note 47 *supra*, 711 *et seq.*

[49] Case 36/74, *Walrave and Koch* v. *Union Cycliste Internationale*, [1974] ECR 1405, at para. 20; *Bosman*, *op. cit.* note 42 *supra*, at paras. 82-83; Case C-176/96, *Jyri Lehtonen* v. *Fédération Royale Belge des Sociétés de Basket-ball ASBL*, [2000] ECR I-2681, at para. 35; Case C-411/98, *Angelo Ferlini* v. *Centre Hospitalier de Luxembourg*, [2000] ECR I-8081, at para. 50; *Angonese*, *op. cit.* note 27 *supra*, at paras. 29-36. For the discussion of this case law, see, for example, KÖRBER, *op. cit.* note 47 *supra*, 663 *et seq.*

[50] *Walrave and Koch*, *op. cit.* note 49 *supra*, at para. 20; Case 13/76, *Gaetano Donà* v. *Mantero*, [1976] ECR 1333, at para. 18; Joined Cases C-51/96 and C-191/97, *Christelle Deliège* v. *Asbl Ligue Francophone de judo et disciplines associées*, [2000] ECR I-2549, at para. 47; Case C-309/99, *Wouters and Savelbergh* v. *Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577, at para. 120. For the discussion of this case law, see, for example, KÖRBER, *op. cit.* note 47 *supra*, 663 *et seq.*

[51] *Wouters*, *op. cit.* note 50 *supra*, at para. 120. For the discussion of this case law, see, for example, KÖRBER, *op. cit.* note 47 *supra*, 682 *et seq.*

[52] *Bosman*, *op. cit.* note 42 *supra*.

[53] *Angonese*, *op. cit.* note 27 *supra*.

[54] *Walrave and Koch*, *op. cit.* note 49 *supra*.

[55] *Bosman*, *op. cit.* note 42 *supra*, at paras. 82-84.

grounds of nationality, they still directly affected players' access to the employment market and were thus capable of impeding workers' freedom of movement.[56]

Accordingly, the decision in *Bosman* represents the first occasion on which the Court has held the Treaty provisions on freedom of workers to be applicable in a dispute between two private parties concerning a truly non-discriminatory measure. The question, which was left unclear after *Bosman* and was answered five years later in the case of *Angonese*, was whether Article 39 on free movement of workers applied to *all* private measures or, rather, only to *collective* regulations. The Court has now ruled explicitly in *Angonese* that Article 39 applies to individual as well as collective private restrictions on the free movement of workers, at least if the measure is discriminatory. In this case, a private banking undertaking required that prospective employees should provide a certificate to be issued by the public authorities of Bolzano in order to prove their linguistic knowledge. The Court held that Article 39 'precludes an employer from requiring persons applying to take part in a recruitment competition to provide evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State'.[57] The question now remains whether only the discriminatory conduct of private parties is covered by Article 39 or whether non-discriminatory private measures are also caught by this article. What is clear, however, is that *purely* private law subjects and not only quasi-state organizations, such as the football federations involved in the *Bosman* case, are bound by the free movement of workers.

Thus, by adopting the direct effect of EC freedoms in disputes between private parties the Court of Justice went even further than the German Constitutional Court which formally did not follow such an approach with regard to constitutional rights in private law.

3.3 State Duties to Protect EC Freedoms in Private Law?

Besides increasing the effectiveness of EC freedoms in the still ongoing process towards the realization of the internal market by means of their direct application to the relationships between private parties, the European Court of Justice also took other steps with a view to making EC freedoms more effective in the private sphere. In the *Commission* v. *France* case[58] the Court used the concept of the state duties to protect EC freedoms in order to catch the conduct of private individuals – the same concept which had been used by the German Constitutional Court in the *Handelsvertreter* case in order to find a basis for the application of constitutional rights in a private law dispute.

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[56] *Bosman*, *op. cit.* note 42 *supra*, at para. 103.

[57] *Angonese*, *op. cit.* note 27 *supra*, at para. 46.

[58] Case C-265/95, *Commission* v. *France*, [1997] ECR I-6959.

At issue in *Commission* v. *France* were violent acts committed by French farmers, which were directed against agricultural products of other Member States. These actions had been going on for more than a decade and the French authorities had displayed an astonishing lack of action concerning these breaches of law and order. The Court of Justice ruled that Article 28 on the free movement of goods requires the Member States not merely to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read in conjunction with article 10 of the EC Treaty, to take all necessary measures to ensure that the fundamental freedom is respected on their territory.[59] Accordingly, now fundamental freedoms, when read together with the duty of loyal cooperation contained in Article 10 EC, impose a duty on the Community and its Member States to ensure compliance therewith in relations between private individuals.[60] An inadequate protection against the relevant activities of private individuals can constitute an infringement of fundamental freedoms by the state by way of an omission.[61] This also explains why the Treaty allows regulations adopted to flesh out EC freedoms to be directly binding on the citizen.

Although in the *Commission* v. *France* case the acts of private parties under French criminal law were at stake, it is not excluded that acts of private parties under national private law can also be attributed to the state – its legislator or private law courts.[62] In particular, the state duty to protect EC freedoms may lead to the obligation of the state to create private law which would be in conformity therewith.[63] Such

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[59] *Commission* v. *France*, *op. cit.* note 58 *supra*, at paras. 30-32.

[60] This approach was confirmed by the Court more recently in *Schmidberger, op. cit.* note 27 *supra*. However, in this case no violation of the state duty of protection was found.

[61] In the context of free movement of goods see *Commission* v. *France*, *op. cit.* note 58 *supra*, at paras. 30-32. See also the commentary to Article 28, in C, CALLIESS and M. RUFFERT (eds.), *Kommentar zu EU-Vertrag und EG-Vertrag*, (Neuwied, 1999), at paras. 48-49; R. Steinz, *Europarecht* Heidelberg, 1999, at para. 709; P. HIRSCH, 'Die aktuelle Rechtsprechung des EuGH zur Warenverkehrsfreiheit', (1999) 2 *Zeitschrift für europarechtliche Studien*, 508; P. SZCZEKALLA, 'Grundfreiheitliche Schutzpflichten – eine 'neue' Funktion der Grundfreiheiten des Gemeinschaftsrechts', (1998) 113 *Deutsches Verwaltungsblatt*; 219.

[62] In *Schmidberger*, *op. cit.* note 27 *supra*, in which the Court confirmed its approach in *Commission* v. *France*, again at issue were the acts of private parties under Austrian public and not private law.

[63] On this see, for example, R. STREINZ and S. LEIBLE, 'Die unmittelbare Drittwirkung der Grundfreiheiten – Überlegungen aus Anlass von EuGH, EuZW 2000, 468, Angonese', (2001) 11 *Europäische Zeitschrift für Wirtschaftsrecht*, 459, at 464 *et seq.*; D. EHLERS, 'Die Grundfreiheiten des europäischen Gemeinschaftsrechts Teil I', (2001) 23 *Juristische ausbildung*, 266, at 274; KINGREEN, *op. cit.* note 29 *supra*, at 192 *et seq.*; S. KADELBACH and N. PETERSEN, 'Die gemeinschaftsrechtliche Haftung für Verletzungen von Grundfreiheiten aus Anlass privaten Handelns', (2002) 29 *Europäische Grundrechte-Zeitschrift*, 213 *et seq.* For those in support of the duty to protect as the one which follows from the fundamental freedoms see, in particular, note by J. SCHWARZE to the judgement of the Court of Justice in *Commission* v. *France*, (1998) 33 *Europarecht*, 53 *et seq.*; SZCZEKALLA, *op. cit.* note 61 *supra*, at 219 *et seq.*; B. REMMERT, 'Grundfreiheiten und Privatrechtsordnung', (2003) 25 *Juristische Ausbildung*, 13, at 17.

an obligation would mean not only that discriminatory private law rules and indistinctly applicable private law rules capable of impeding the free movements are prohibited (and thus *de jure* discrimination is prohibited), but also *de facto* discrimination or restrictions of these free movements. What does this mean? The distinction between *de jure* and *de facto* situations in the context of private law arises from the fact that private law governs relationships between private individuals and creates a framework within which private parties are free to agree themselves upon their relationships with each other. Within the limits of private law private parties enjoy private autonomy. This entails that if the private law of a Member State opens up the possibility for a party to a contract to terminate this contract with a partner of a different nationality more easily than with a partner of the same nationality, the Member State does not infringe EC law as long as there is no duty to protect private parties from each other and in this way to comply with fundamental freedoms. In this case, EC freedoms may affect private law when one individual invokes the duty of protection incumbent on a Member State in a dispute with another private individual, as was the case in the German *Handelsvertreter*. As in German law, the duty of protection can primarily be directed towards the private law legislator and, if the latter does not fulfil its obligations, towards the private law courts. In this light, it can be argued that the development of the Member States' duties to protect fundamental freedoms has considerable potential to seriously affect private law.

3.4 EC Freedoms and the General Principle of Private Autonomy

Whether any further expansion of the direct horizontal effect of EC freedoms and the possible introduction of the state duties to protect EC freedoms within the realm of private law will result in the subordination of private law and conduct to fundamental freedoms depends on the implications of such developments for the general principle of private autonomy which lies at the heart of private law. Does the application of EC freedoms to private law relationships represent a strengthening of or a threat to the private autonomy of individuals?

At first sight the problem of the conflict between EC freedoms and party autonomy may sound somewhat paradoxical. How can EC freedoms which are meant to advance private autonomy in the Community pose a threat thereto? At closer inspection, however, it appears that the issue is not as paradoxical as it seems to be at first sight. Fundamental freedoms protect private initiative and private autonomy with a cross-border element,[64] and thus aim to protect the general interests of the Community. In order to secure this cross-border private autonomy the general principle of party autonomy, which allows private parties to discriminate and to consciously or unconsciously cause impediments to interstate trade, must be

[64] See, for example, P.-C. MÜLLER-GRAFF, in M. A. Dauses (ed.), *Handbuch des EG-Wirtschaftsrechts*, München, 1993, 104.

restricted. The direct horizontal effect of fundamental freedoms is indeed the most suitable for achieving this purpose. The question is, however, what will be left from the general principle of private autonomy in the case of the unlimited binding effect of fundamental freedoms on private parties. To take an extreme example, would one still be able to buy goods produced only in one's own Member State or will this private conduct also be caught by the prohibition of any restriction with regard to the free movement of goods?

If we look at the EC Treaty provisions and the case law of the Court of Justice on free movement, we can see that the justification grounds for limiting EC freedoms such as public policy, public security or public health, can, in principle, be successfully invoked only by Member States.[65] In this respect it is very surprising that when the football federation – the defendant in the *Bosman* case – objected to the direct horizontal effect of the free movement of workers by arguing that the Court's interpretation made Article 39 of the EC Treaty 'more restrictive in relation to individuals than in relation to Member States, which are alone in being able to rely on limitations justified on grounds of public policy, public security or public health',[66] the Court rejected this argument as being based on a false premise. According to the Court, 'there is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.'[67] In practice, it is hardly realistic, however, that individuals and private organizations will be able to successfully invoke limitation grounds which are developed for the Member States in order to justify their discriminatory or restrictive conduct. Private parties have mainly individual interests, and not the general interests that are to be protected by the state; private parties pursue private aims, their motivations and objectives are generally of a non-altruistic nature.[68] Nevertheless, the autonomy of private parties does not appear as a justification ground in the judgement of the Court which apparently does not acknowledge the problem of an inappropriate interference with it in the case of the direct horizontal effect of EC freedoms.

Accordingly, as a consequence of the approach taken by the Court of Justice with regard to the free movement of workers and, to some extent, services and establishment, the application of EC freedoms, which do not in themselves contain safe-

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[65] Compare J. SNELL, 'Private Parties and Free Movement of Goods and services', in Andenas and Roth, *op. cit.* note 43 *supra*, 211, at 231-232; W.-H. ROTH, 'Drittwirkung der Grundfreiheiten?', in O. Due *et al.* (eds.), *Festschrift für Ulrich Everling*, vol. II, Baden-Baden, 1995, 1231, at 1241-1242; OLIVER and ROTH, *op. cit.* note 33 *supra*, at 427.

[66] *Bosman*, *op. cit.* note 42 *supra*, at para. 85.

[67] *Bosman*, *op. cit.* note 42 *supra*, at para. 86. See also Case C-350/96, *Clean Car Autoservice* v. *Landeshauptmann von Wien*, [1998] ECR I-2521, at para. 24.

[68] Compare STREINZ and S. LEIBLE, *op. cit.* note 63 *supra*, at 461.

guards against their unlimited binding effect towards private parties, may result in severe limitations on private autonomy protected by private law. In fact, the impossibility of extending to private parties the limitation clauses, which are contained in constitutional rights provisions of the national constitutions and which are directed against the state, was one of the reasons why constitutional rights were not granted direct horizontal effect in German law. The Court of Justice, however, did not consider the threat to the general principle of party autonomy at all and thus took steps towards the unconditional subordination of private law and conduct to EC freedoms.

In the light of the dramatic consequences of the direct horizontal effect of EC freedoms on the general principle of private autonomy, and thus on private law as such, some authors saw a solution, which would secure the effectiveness of EC freedoms in the private sphere and, at the same time, would not jeopardize private autonomy, in the concept of state duties to protect EC freedoms.[69] The idea behind this is that the Member States are to be considered to be under the duty to protect EC freedoms against private parties by national law and, at the same time, to ensure respect for the private autonomy of its citizens.[70] In other words, '[the] national law (the legislator and the courts) of the Member States should be regarded as carrying responsibility for the protection of the internal market and thereby taking into account the interests of private persons and foremost the protection of their private autonomy'.[71] It should be borne in mind, however, that even if it is the concept of the state duties to protect EC freedoms which is adopted in order to increase the effectiveness of EC freedoms in Community law, just as in the case of the use of the state duties to protect constitutional rights in German law, the destiny of private law will ultimately depend on the approach taken by the court which has a final say in these matters, i.e. the European Court of Justice. Just as the threat to private autonomy can be posed by the direct horizontal effect of EC freedoms, it can also be posed by the state duties to protect them if, in order to fulfil their obligations, the Member States were obliged to create such private law that would under no circumstances allow private parties to discriminate and/or restrict free trade through their private contractual agreements and would thus limit the possibility for private parties to exercise their private autonomy. Only time will demonstrate whether the Court of Justice will replace the direct horizontal effect of EC freedoms by the state duties to protect them and, if so, whether it will adopt deferential attitude to the private law legislators and the private law courts of the Member States. As I will argue in the next section, such a development is not excluded considering the growing effect of EU fundamental rights which, among other things, also protect private law values.

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[69] See, for example, OLIVER and ROTH, *op. cit.* note 33 *supra*, at 427-429.

[70] OLIVER and ROTH, *op. cit.* note 33 *supra*, at 427.

[71] OLIVER AND ROTH, *op. cit.* note 33 *supra*, at 429.

4 The Effect of EU Fundamental Rights in Private Law

4.1 The Special Character of the Protection of Fundamental Rights in EU Law

Apart from EC freedoms, which as a result of the application of the concept of direct horizontal effect by the Court of Justice have already had a profound impact on private law, in particular, the contract law of the Member States, private law may soon also be deeply affected by EU fundamental rights. Although, in contrast to EC freedoms, no dispute exists with regard to the nature of EU fundamental rights, the character of their protection in EU law is, however, much more complicated than that of their counterparts in the national legal systems and even EC freedoms themselves. This becomes particularly clear if one looks at the text of the Nice Charter of Fundamental Rights of the EU which is now contained in Part II of the Draft Constitution for Europe.

According to Article II-51, first paragraph, of the Draft Constitution, fundamental rights of the Charter are addressed to the Institutions, bodies and agencies of the European Union with due regard to the principle of subsidiarity and to the Member States only when they are implementing Union law. The second paragraph explicitly specifies that the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Draft Constitution. Two points which are of importance in understanding the possible effects of fundamental rights on private law can be derived from this article. First, it makes it clear that *only EU institutions, bodies and agencies, and the Member States* are bound by EU fundamental rights. The wording of Article II-51 suggests that private parties are not bound by them. Secondly, the Member States are bound *only when they are implementing EU law*. This provision shows the special character of the protection of fundamental rights in the EU. The EU is not the organization whose principle task is the promotion of fundamental rights in its Member States. Fundamental rights apply in so far as the Union is competent to act. This is made unequivocally clear in the second paragraph of Article II-51, the inclusion of which obviously addresses the fear of the Member States that the sophisticated character of fundamental rights contained in the Charter will lead to the uncontrolled expansion of the competences of the Union.[72] As a result of this provision, many rights in the Charter can hardly be exercised because the EU does not have competence in many areas covered by the Charter rights. Thus, for example, it is difficult to see how the Charter's prohibition of torture is really relevant because the EU has no direct control over a police force or

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[72] See, for example, on the view of the British government and the House of Lords with regard to making the Charter legally binding by incorporating it into the Constitution, *The Draft Treaty establishing a European Constitution: Parts II and III*, Research Paper 03/58 of 7 June 2003, 12-17, http://www.parliament.uk. In fact, the same concern was also one of the reasons why the bill of rights was not included in the three EC Treaties which were signed in the 1950s. For a detailed overview of other reasons, see CRAIG and DE BÚRCA, *op. cit.* note 4 *supra*, 296-298.

an army. Accordingly, if there is no right in the substantive EU treaties then, whatever the Charter says, it cannot apply.

A further limitation in the reach of EU fundamental rights is connected with the fact that neither the EU Treaty nor the Draft Constitution provides for the possibility of a constitutional complaint against the alleged violations of EU fundamental rights comparable to the one existing under German law. Besides that, both documents are silent upon the question of whether EU fundamental rights are to be applicable in the relationships between private parties, which means that the development in this field is left to the European Court of Justice.[73]

Despite the considerable limitations in the scope of EU fundamental rights, it is submitted, however, that they have considerable potential in playing a very important role in the EU and can even lead to the extension of the EC competence in the field of private law in particular. Already prior to the adoption of the Charter and its inclusion in the Constitution for Europe, fundamental rights recognized by the Court of Justice as part of the Community legal order have been considered by many legal scholars to be objective norms.[74] Among the main reasons put forward for the recognition of these rights as the elements of the objective order are, firstly, that their content must be respected when adopting and implementing EC secondary law, and, secondly, EC law and national law must be interpreted in a way which is compatible with them.[75] As will be demonstrated in the next subsection 4.2, some indications of the possibility of a form of 'fundamental rights review' of Member States' actions exercized by the Court of Justice can already be found in the existing case law of the Court of Justice with regard to fundamental rights recognized by the Court. The recognition of the binding character of the Charter of Fundamental Rights of the EU may open up even new possibilities, in particular, for the effect of EU fundamental rights between private parties, which will be considered in subsection 4.3.

4.2 Possibilities for the Effect of EU Fundamental Rights in Private Law Under the Current Case Law of the Court of Justice

4.2.1 Fundamental rights review of EC legislation

First of all, in the same way as one is entitled to contest the constitutionality of the national legislation in the Constitutional Court in the German legal order, in the

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[73] See commentary to Article 51 of the Charter, in J. MEYER (ed.), *Kommentar zur Charta der Grundrechte der EU*, Baden-Baden, 2003, 31.

[74] Compare D., EHLERS § 13, in Ehlers, *op. cit.* note 36 *supra*, 319, at 329. See also H.-W. RENGELING, *Grundrechtsschutz in der Europäischen Gemeinschaft: Bestandsaufnahme und Analyse der Rechtsprechung des Europäischen Gerichtshofs zum Schutz der Grundrechte als allgemeine Rechtsgrundsätze*, München: Beck, 1993, 295 *et seq.*; H. GERSDORF, 'Funktionen der Gemeinschaftsgrundrechte im Lichte des Solange II-Beschlusses des Bundesverfassungsgerichts', (1994) 119 *Archiv des öffentliches Rechts*, 400, at 402 *et seq.*

[75] EHLERS, *op. cit.* note 74 *supra*, at 329.

Community legal order one can also challenge EC legislation, whether it is of a public law or private law character, for breaching fundamental rights recognized in the Community. Thus, for example, in the *Hauer* case,[76] the applicant was refused authorization to undertake the new planting of vines on a plot of land which she owned on the ground that the land was unsuitable for wine-growing. When she objected, she was told that the EC Council had in the meantime passed a regulation prohibiting the new planting of vines for the administrative unit in which her land was situated. She appealed against this decision to the German court in administrative matters, pleading the incompatibility of the Council Regulation with the constitutional right to property and the constitutional right to freely choose and practice one's trade or profession as guaranteed by the German Constitution. When the matter was referred to the Court of Justice for a preliminary ruling, it acknowledged the possibility of the fundamental rights review of Community legislation. At the same time, it emphasized that 'the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself',[77] and thus not in the light of German constitutional law. In this case the Court of Justice acknowledged the rights invoked before the German court as part of Community law, but denied that they had been impermissibly infringed in this case.

4.2.2 Review of the Member States' Measures for Compliance with EC legislation which reflects Fundamental Rights

Secondly, the European Court of Justice has considered the compatibility of national laws with the provisions of EC law which reflected certain legal rights and principles, in particular fundamental rights protected within the European Convention on Human Rights and recognized in the Community. Thus, in the *Rutili* case[78] decided by the Court in 1975 it had described provisions of Directive 64/221, which set limits on the restrictions which Member States could apply to the free movement of workers, as specific expressions of the more general principles enshrined in the European Convention on Human Rights. The restrictive measure adopted by France in that case had to be examined for compliance with the provisions of the Directive, which in turn reflected the provisions of the European Convention. A similar course of action was also followed by the Court of Justice in the *Johnston* case.[79] As in *Rutili*, the Court, when interpreting a particular provision of Community legislation – in this case Article 6 of the Equal Treatment Directive 76/207 establishing the require-

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[76] Case 44/79, *Hauer* v. *Land Rheinland-Pfalz*, [1979] ECR 3727. See also Case 11/70, *Internationale Handelsgesellschaft* v. *Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1970] ECR 1125.

[77] *Hauer*, *op. cit.* note 76 *supra*, at para. 14. This conclusion was also previously reached in *Handelsgesellschaft*, *op. cit.* note 76 *supra*.

[78] Case 36/75 *Rutili* v. *Minister for the Interior*, [1975] ECR 1219.

[79] Case 222/84 *Johnston* v. *Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651.

ment of judicial control – treated it as a specific manifestation of a recognized general principle of law. The Community provision was therefore to be read in the light of the corresponding principle in the European Convention on Human Rights dealing with access to court and an effective judicial remedy. The use of the fundamental rights laid down in the European Convention was here indirect, it being used as an interpretative aid to the written provisions of Community law against which a Member State's derogation was to be tested.

4.2.3 Fundamental Rights Review of the Member States' Measures which Implement Community Law

Thirdly, the Court of Justice has considered the compatibility of Member States' laws with EU fundamental rights where the States were implementing a Community law or scheme, and thus in some sense acting as agents on the Community's behalf. Thus, while *Rutili* and *Johnston* were cases referred to the Court of Justice under Article 234 (the former Article 177), so the ultimate question of the compatibility of the state measure with the particular right concerned was for the referring court to decide, in a later case in which the Commission brought enforcement proceedings against Germany the Court had to rule directly on whether Germany was in breach of Community law on account of its implementation of Regulation 1612/68 on migrant workers.[80] The issue turned on whether there was an obligation on the State, in interpreting and implementing a Community provision, to read it in a way which complied with fundamental rights requirements such as those in the European Convention on Human Rights. This question was answered by the Court in the affirmative, and the German legislation implementing the Regulation was found to be incompatible with Community law because Germany failed to respect those rights laid down in the European Convention. This approach was also confirmed by the Court of Justice in subsequent cases.[81]

4.2.4 Fundamental Rights Review of the Member States' Measures which Derogate from Community Law

Fourthly, the Court of Justice has undertaken a fundamental rights review not only in situations where the Member States were implementing Community law, but also where they were seeking to derogate from its provisions or to justify a restriction on Community rules in the interest of some conflicting national policy. The reasoning behind this extension of the scope of the Court's review is that by creating a national exception to the operation of Community rules, the Member States are still acting

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[80] Case 249/86 *Commission* v. *Germany*, [1989] ECR 1263.

[81] Case 63/83 *R.* v. *Kent Kirk*, [1984] ECR 2689; Cases 201 and 202/85 *Klensch* v. *Secrétaire d'Etat et à l'Agriculture et à la Viticulture*, [1986] ECR 3497; Case 5/88 *Wachauf* v. *Germany*, [1989] ECR 2609.

within the field of Community law and thus should be obliged to respect EU fundamental rights. According to the Court of Justice in the *ERT* case: 'In particular, where a Member State relies on the combined provisions of Articles 55 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under exceptions provided by the combined provisions of Article 56 and 66 only if they are compatible with the fundamental rights, the observance of which is ensured by the Court'.[82] This form of review can be considered to be more far-reaching than the previous two, representing 'a further extension of the Court's jurisdiction and a further encroachment by the general principles of law into legal systems of the Member States'.[83] A judge of the Court of Justice, commenting extrajudicially on the significance of the *ERT* judgement, remarked that 'anyone who reflects for a moment about how intimately some of those derogations are bound up with fundamental notions governing the relationship between States and their citizens cannot fail to appreciate the potential incidence of that judgment on national sovereignty'.[84] This approach by the Court of Justice was confirmed in the *Familia Press* case.[85] It is not entirely clear whether the expansion of the Court's review to the situations when Member States are derogating from Community law is compatible with the limitation contained in Article II-51 of the Draft Constitution under which Member States are only bound by fundamental rights when they are *implementing* EU law.[86] How the scope of the Court's review will develop still remains to be seen.

4.2.5 EU Fundamental Rights as a Justification for the Member States' Restrictions of the EC Freedoms

Finally, the Court of Justice has made it clear that EU fundamental rights can be used by the Member States in order to justify a restriction of EC freedoms. Thus, in the *Schmidberger* case[87] for the first time the Court was confronted with a situation where a Member State had invoked the necessity to protect fundamental rights to justify a restriction of the free movement of goods. The dispute in this case arose out of the fact that the Austrian authorities did not ban a demonstration which resulted in the complete closure of a major transit route for almost 30 hours as a result of

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[82] Case C-260/89, *Elliniki Radiophonia Tileorassi AE* v. *Dimotiki Etairia Pliroforissis and Sotirios Kouvelas*, [1991] ECR I-3925, para. 43.

[83] CRAIG and DE BÚRCA, *op. cit.* note 4 *supra*, at 327.

[84] D. MANCINI and D. KEELING, 'From *CILFIT* to *ERT*: The Constitutional Challenge facing the European Court', (1991) 11 *Yearbook of European Law*, 1, at 11-12.

[85] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs-GmbH* v. *Heinrich Bauer-Verlag*, [1997] 3 CMLR 1329.

[86] KAPTEYN, *op. cit.* note 48 *supra*, 357, at note 63.

[87] *Schmidberger*, *op. cit.* note 27 *supra*.

which the plaintiff – the international transport undertaking Schmidberger – suffered losses. The refusal to ban the demonstration in question was justified by the Austrian authorities on the ground of the need to respect such fundamental rights as freedom of expression and freedom of assembly. Among the questions posed for a preliminary reference to the Court of Justice by the national court was whether the Member State's obligation with regard to the principle of the free movement of goods takes precedence over fundamental rights. In answering this question, as a starting point the Court held as follows:

> '[S]ince both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods'.[88]

However, in the view of the Court, it should be taken into account that both the freedom of goods and the fundamental rights involved in this case – the freedom of expression and the freedom of assembly guaranteed by Articles 10 and 11 of the European Convention on Human Rights – were not absolute, being subject to certain limitations justified by objectives in the public interest. In such circumstances, in order to determine whether a fair balance was struck by the Austrian authorities between the interest of the transport undertaking in the exercise of the free movement of goods and the interest of the demonstrators in the exercise of their fundamental rights, in the view of the Court, these interests must be weighed having regard to all the circumstances of the case. According to the Court, although the national authorities enjoy a wide margin of discretion in this respect, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights. As a result of the balancing process between a fundamental freedom and fundamental rights the Court came to the conclusion that in this case the fundamental rights were to prevail over the free movement of goods.

A comparable conflict between EU fundamental rights and EC freedoms also arose in the *Omega* case.[89] The Bonn police authority issued an order against the German company Omega forbidding it from operating the games with the object of firing at human targets, such as a so-called 'laserdrome' involving simulated killing. For manufacturing this game Omega had co-operated with the British Company

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[88] *Schmidberger*, *op. cit.* note 27, at para. 74.

[89] Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH* v. *Oberbürgermeisterin der Bundesstadt Bonn*, [2004] OJ C 300, 3.

Pulsar Advanced Games Systems Ltd. The prohibition was issued on the ground that the 'laserdrome' constituted a danger to public order, since the acts of simulated homicide and the resulting trivialization of violence were contrary to fundamental values prevailing in public opinion. In the German courts Omega's objection against that order was rejected. According to the German Supreme Court in administrative law matters (*Bundesverwaltungsgericht*), the commercial exploitation of a 'killing game' in Omega's 'laserdrome' constituted an affront to the basic right to human dignity contained in article 1 of the German Constitution and, therefore, could not be allowed under national law. Because such a prohibition, in its view, constituted an infringement of Community law, the *Bundesverwaltungsgericht* submitted the following question to the Court of Justice for a preliminary ruling:

> 'Is it compatible with the provisions on freedom to provide services and the free movement of goods contained in the Treaty establishing the European Community for a particular commercial activity – in this case the operation of a so-called "laserdrome" involving simulated killing action – to be prohibited under national law because it offends against the values enshrined in the constitution?'[90]

The Court of Justice gave an affirmative answer to this question. According to it, the Community legal order strives to ensure respect for human dignity as a general principle of law, and therefore the objective of protecting human dignity is certainly compatible with it. In this respect, in the view of the Court, it is immaterial that, in German law, the principle of respect for human dignity has a particular status as an independent fundamental right. Following its reasoning in *Schmidberger*, the Court confirmed that the protection of fundamental rights was a legitimate interest which could justify a restriction of EC fundamental freedoms, in this case the freedom to provide services. Here, the Court brought fundamental rights under the notion of pubic policy which, under the EC Treaty, can be advanced as a justification ground for infringing the freedom to provide services. Consequently, the requirements imposed on the public policy exception were to be satisfied in order for the justification of the infringement to succeed. This implied that measures which restrict freedom to provide services in this case could be justified on public policy grounds only if they were necessary for the protection of the interests which they were intended to guarantee and only in so far as those objectives could not be attained by less restrictive measures. According to the Court, it was not necessary in that respect for the restrictive measure to correspond to a conception shared by *all* Member States concerning the precise way in which the fundamental right or legitimate interest in question was to be protected. Applying these considerations to the circumstances of

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[90] *Omega*, *op. cit.* note 89 *supra*, at para. 17.

the case, the Court ruled that the German prohibition of the 'laserdrome' satisfied both the requirement of need and that of proportionality, and therefore could not be regarded as a measure which unjustifiably undermined the freedom to provide services.

4.2.6 The 'Alignment' between EU Fundamental Rights and Private Law: How Far is the Court of Justice Prepared to Go?

Although private law has not yet been affected as a result of these developments in the Court's case law, its approach in the cases mentioned above has opened up possibilities for the impact of EU fundamental rights on the EC legislation in the field of private law as well as on the national private law, particularly contract law, of the Member States adopted in the course of the implementation of EC law. This seems to be probable, in particular, in the light of the fact that the Court of Justice does not make any distinction between public and private law. The extension of the reach of EU fundamental rights to situations when the Member States adopt legislation in the field of private law when implementing EC law or seek to derogate from it or restrict its application will mean that the private law of the Member States will have to be adopted and interpreted not only in conformity with EC freedoms, but also in conformity with EU fundamental rights. For private parties this will imply that in litigation with each other, provisions of the law as between the parties will be influenced by both EC freedoms and EU fundamental rights. Furthermore, the fundamental rights review of the EC legislation in the field of private law can have far-reaching consequences for the content of the private law of the Member States and especially for private parties acting in reliance on a particular piece of such legislation when it is still in force.

At present, however, it is difficult to predict how far the influence of EU fundamental rights on private law, particularly contract law, will extend. Many private law scholars today have been pointing to the need for an 'alignment' of private law, in particular, the 'principles of social justice in European contract law', with the 'constitutional principles already recognized in Europe' which 'include not only the individual civil liberties of the European Convention of Human Rights and Fundamental Freedoms, but also the rich set of social and economic rights recognized in the Nice Charter of the Fundamental Rights of the European Union'.[91] Moreover, the duty to observe EU fundamental rights imposed by Article II-51 of the Draft Constitution for Europe on the Institutions, bodies and agencies of the EU clearly implies that all legislation, including that in private law, should be in conformity with fundamental rights. This means that both 'the Common Frame of

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[91] STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, 'Social Justice in European Contract Law: a Manifesto, (2004) 10 *European Law Journal*, 653, at 667.

Reference'[92] and a 'non-sector-specific optional instrument',[93] which were indicated in the European Commission's European Contract Law Communication of October 2004[94] as the forms of the harmonization of contract law to be accomplished in the near future, will have to be scrutinized for compatibility with EU fundamental rights and thus integrated into the constitutional framework.

Whether the European Court of Justice is prepared to play an active role in making an 'alignment' between EU fundamental rights and the existing EC legislation in the field of private law is, nevertheless, not entirely obvious if one looks, for example, at the judgement of the Court in the *Dietzinger* case delivered in 1998. The facts of this case were quite similar to the famous *Bürgschaft* case[95] decided by the German Constitutional Court in 1993. In that case, being faced with the perspective of the misery of the daughter who had acted as a surety for her father's debts, the German Constitutional Court resorted to the constitutional right to party autonomy in conjunction with the principle of the social state and derived from it an obligation on the part of the private law courts to intervene by means of the general clauses of the Civil Code in contracts that are 'exceptionally onerous' for the weaker party.[96] In *Dietzinger*, considerable difficulties awaited Mr Dietzinger who, being without a regular income, had agreed to act as a surety for his parents' business debts and within a year had been sued by the bank for the payment of DM 50, 000 under the original contract. What was different from *Bürgschaft*, however, was that in this case at stake was not the interpretation of the general clauses of private law, but the interpretation of Council Directive 85/577/EEC of 1985 concerning the protection of consumers in respect of contracts negotiated away from business premises (Doorstep Selling Directive). Because the contract of suretyship had been concluded at the home of Mr Dietzinger's parents during a visit by an employee of the Bank to which Mr Dietzinger's mother had agreed over the telephone, he tried to rid himself of his liability by arguing that he had not been acting rationally, as the contract was signed away from business premises. In particular, he maintained that he had not been informed of his right to cancellation, in violation of the Law on the Cancellation of 'Doorstep' Transactions and Analogous Transactions which transposed the Directive into German law. The Regional Court (*Landgesgericht*) found in favour of the bank

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[92] Communication from the Commission to the European Parliament and the Council, European Contract Law and the Revision of the *acquis*: the Way Forward, 11 October 2004, COM (2004) 651 final, at 9 seq.

[93] Communication on European Contract Law, *op. cit.* note 92 *supra*, at 17 seq. (Annex II).

[94] Communication on European Contract Law, *op. cit.* note 92 *supra*; see also the European Commission's Action Plan 2003 for a more Coherent European Contract Law, 12 February 2003, COM (2003) 68 final.

[95] BVerfG 19 October 1993, *BVerfGE* 89, 214 (*Bürgshaft*).

[96] *Bürgshaft*, *op. cit.* note 95 *supra*, at 232. For a more detailed discussion of this case, see CHEREDNYCHENKO, *op. cit.* note 1 *supra*.

and ordered him to pay. This decision was, however, quashed by the Higher Regional Court (*Oberlandesgericht*). The bank then appealed on a point of law to the German Supreme Court (*Bundesgerichtshof*), which held that an interpretation of Directive 85/577 was necessary in order to determine the dispute. It therefore requested a preliminary ruling from the Court of Justice on the question of whether a contract of suretyship concluded by a natural person who is not acting in the course of a trade or profession is covered by the Doorstep Selling Directive.

What is striking about the decision of the Court of Justice in this case is that although the Court of Justice was certainly aware of the fundamental rights issues which under quite similar circumstances had arisen in the German *Bürgschaft* case, it did not engage in any debate on these issues in the context of interpreting the Doorstep Selling Directive. Instead, it limited itself to the following answer: '(...) a contract of guarantee concluded by a natural person who is not acting in the course of his trade or profession does not come within the scope of the directive where it guarantees repayment of a debt contracted by another person who, for his part, is acting within the course of his trade or profession'. In this way, the Court demonstrated its judicial self-restraint and its unwillingness to become involved in politically sensitive matters, leaving these matters for the Member States themselves to decide.[97] Whether the Court will adhere to this approach in the future or opt for more judicial activism in cases potentially involving fundamental rights issues remains to be seen. It is most likely that the Court will not disregard the impact of fundamental rights in those cases where they come into conflict with EC freedoms. The importance of the fundamental rights argument was demonstrated by the Court of Justice in the *Schmidberger* case where the Court did not ignore it. Although, by now, such a clash has only arisen in a public law context, there can be situations in which the same clash would occur in private law. This issue is discussed in more detail in section 5 in which an attempt is made to predict possible developments in the approach of the Court of Justice to the effect of EC freedoms in private law in the light of the growing importance of EU fundamental rights.

4.3 Potential Possibilities for the Effect of EU Fundamental Rights in Private Law

Although many ambiguities exist with regard to the scope of the fundamental rights enshrined in the Charter of the Fundamental Rights of the EU, their inclusion in the Draft Constitution for Europe appears to provide evidence that the Community and

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[97] For criticism of this judgement of the Court of Justice see Gestenberg, *op. cit.* note 23 *supra*, at 785. For a more detailed discussion of this case, see also O. GESTENBERG, '"Radicale rechtsfortbilung" in Europäischen Vertrags- und Haftungsrecht: Ein Beitrag zur Methodendiskussion', in C. Joerges and G. Teubner (eds.), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, Baden-Baden, 2003, 61 *et seq.*

the Member States are attaching more and more importance to the protection of fundamental rights in the EU and thus not only to the protection of EC fundamental freedoms. It remains to be seen what is going to occur and it is not that easy to predict whether the Court of Justice of 25 Member States as a result of the EU enlargement will be as activist as the Court of 15 Members States, especially in the first years of its activity. However, it is argued that several developments can take place which are of particular importance to private law.

4.3.1 EU Fundamental Rights as a Source of Strong Persuasive Authority in the Member States

Firstly, the provisions of the Charter can become a source of strong persuasive authority in the national legal systems of the Member States. Because of the fact that the Charter contains not only classical fundamental rights, but also a very extensive catalogue of social rights – such as the right to strike –, its impact on labour law, in particular labour contract law, can be considerable. Such a development has, in particular, been predicted by the Economist Intelligence Unit, which has considered it to be a real danger for the business community. According to its report, although many Charter rights cannot be used in the EU context due to a lack of competence, the Charter has 'a sting in the tail' precisely because it will be used by lawyers and judges in Member States to reinforce national social rights.[98] In this context, it is not excluded that the national courts of the Member States, especially constitutional courts, will grant horizontal effect to the Charter rights. Thus, in Germany, for example, the national courts, in particular, the Federal Constitutional Court, may grant to EU fundamental rights an effect which is comparable to that already exercized in German private law by the domestic constitutional rights. In the same way as the general clauses of private law are used as points of entry for constitutional rights in private law, they can also be used by the German courts to give effect to EU fundamental rights in national private law.[99] Comparable developments might also take place in other countries. How far-reaching they will be will ultimately depend on the approach taken by the national courts of the Member States.

4.3.2 The Right to 'Civis Europeus Sum' in Every Member State?

Secondly, in the *Kostandinis* case decided by the Court of Justice in 1991 one can find a really interesting opinion by Advocate General Jacobs. The essence of his approach is the following:

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[98] *The Draft Treaty establishing a European Constitution: Parts II and III*, Research Paper 03/58 of 7 June 2003, pp. 18-19, http://www.parliament.uk

[99] Compare M. KORT, 'Zwischen Marktmacht und Regulierung: Wohin steuert das europäische Arbeitsrecht?', (2004) 59 *Juristenzeitung*, 267, at 267.

> '...a Community national who goes to another Member State as a worker or self-employed person under Articles 48, 52 or 59[100] of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as national of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid done in the European Convention on Human Rights. In other words, he is entitled to say 'civis europeus sum' and to invoke that status in order to oppose any violation of his fundamental rights'.[101]

The position argued by the Advocate General suggests that whenever an EC national goes to another Member State in reliance on one of the EC freedoms, any failure to respect a fundamental right of that national, whether or not it is connected with his or her work, should constitute an infringement of EC law. As Binder explains:

> '[T]he position adopted by Advocate General Jacobs seems to represent a shift in thinking about the nature of the Community and the individuals who make it up. This change in conception can be described as a shift away from viewing the Community's primary purpose as lying in the forging of common economic interest among Member States – and thus viewing individuals as primarily 'economic beings' or factors of production (means to achieving that end) – and toward envisaging the Community's goal as bringing together the peoples of Europe and thus viewing individuals first and foremost as human beings (ends in and of themselves)'.[102]

The adoption of this new view would mean a dramatic expansion of the competence of the EU in the field of fundamental rights because simply the fact that a cross-border activity has taken place would be enough for EU fundamental rights to be applicable in the national legal orders of the Member States.

Although the view of the Advocate General in *Kostandinis* was rejected by the Court thirteen years ago, the possibility of its revival, however unforeseeable that may be at the moment, cannot be entirely excluded.[103] If there is such a development in EU

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[100] Articles 48, 52, and 59 are now Articles 39, 43, and 49, respectively.

[101] Case C-168/91 *Konstantinidis* v. *Stadt Altensteig, Standesamt, and Landratsamt Calw, Ordnungsamt*, [1993] ECR I-1191, Advocate General Jacobs, at para. 46.

[102] D.S. BINDER, 'The European Court of Justice and the Protection of Fundamental rights in the European Community: New developments and Future Possibilities in Expanding Fundamental Rights Review to member State Action', (1995), http://www.jeanmonnetprogram.org/papers/95/9504ind.html

[103] Compare P.-C. MÜLLER-GRAFF, 'Grundfreiheiten und Gemeinschaftsgrundrechte', in H.-J. Cremer *et al.* (eds.), *Tradition und Weltoffenheit des Rechts: festschrift für Helmut Steinberger*, Berlin, 2002, 1281, at 1284, 1288 *et seq.*

law, Europe can be confronted with the same issues which have been preoccupying the minds of national lawyers – how should EU fundamental rights affect private law and conduct in the EU. If, for instance, the German scenario was chosen, EU fundamental rights would be activated every time a cross-border element is present in a private law dispute. To give an example of such a situation one can once again use the German *Handelsvertreter* case with the only difference being that the agent would be of, say, Italian nationality and the fundamental right to freedom of profession that he would be invoking in order to challenge the contract and/or the German legislation would be of European and not of German origin.[104] The result of such a development may very well be the establishment of the state duties to protect EU fundamental rights in relationships between private parties or even the adoption of the direct horizontal effect of EU fundamental rights leading to the subordination of private law and conduct with a cross-border element to EU fundamental rights. In the case of such a scenario a great deal will depend on the willingness of the Court of Justice to interfere with the national laws of the Member States in order to ensure the protection of fundamental rights.

5 EC Freedoms vs. EU Fundamental Rights in a Private Law Context: Implications for Private Law

Although in some cases both EU fundamental rights and EC freedoms aim to protect the same values,[105] there are also situations, as we could see in *Schmidberger* in a public law context, when they can be in conflict with each other.[106] The latter situation is of particular importance for the problem of the relationship between private law on the one hand, and EC freedoms and EU fundamental rights, on the other, due to the fact that, as it was demonstrated in section 3.4 above, one of the possible conflicts can arise between EC freedoms and one of the core principles of private law – the general principle of private autonomy. Because private autonomy, which finds its expression in the freedom of contract, is not only a private law principle, but also a fundamental right which is to be protected in the EU,[107] the case where it comes

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[104] Freedom of profession is a recognized fundamental right in the Community legal order. On this, see M. RUFFERT, § 15, in Ehlers, *op. cit.* note 36 *supra*, at 364, with further references to the case-law of the Court of Justice. The Constitution for Europe now even contains two rights which can be relevant: Article II-15 (1) – freedom to choose an occupation and Article II-16 – freedom to conduct a business.

[105] See A. VON WALTER FRENZ, 'Grundfreiheiten und Grundrechte', (2002) 37 *Europarecht*, 603, at 609-610. An example of the overlap – the violation of the freedom of profession can at the same time constitute an infringement of the free movement of workers or establishment.

[106] On this issue, see, in particular, D. SCHINDLER, *Die Kollision von Grundfreiheiten und Gemeinschaftsgrundrechten: Entwurf eines Kollisionsmodells unter Zusammenführung der Schutzpflichten- und der Drittwirkungslehre*, Berlin: Duncken & Humblot, 2001; A. SCHULTS, *Das Verhältnis von Gemeinschaftsgrundrechten und Grundfreiheiten des EGV*, Berlin: Duncken & Humblot, 2005.

[107] The Court of Justice recognized the freedom of contract as a European fundamental right. See, for example, cases C-90 and C-91/90, [1991] ECR I-3617, at para. 13 (free choice of contractual partners). See also OLIVER and ROTH, *op. cit.* note 33 *supra*, at 427.

into conflict with one of the EC freedoms may without exaggeration be called a clash of titans where EU fundamental rights can play a role in protecting private parties from EC freedoms and other EC rules by providing a counterbalance to them.

In the existing case law of the Court of Justice, in which the Court granted direct horizontal effect to EC freedoms, one can find potential conflicts between fundamental rights and fundamental freedoms in a private law context, the existence of which, however, was not acknowledged by the Court. Thus, in the *Bosman* case,[108] while the footballer was protected by the free movement of workers or services, the football federations were protected by the fundamental right to private autonomy and to freedom of association. In *Angonese* the serious conflict arose between the free movement of workers on the part of the applicant and the right to freedom of contract and/or the right to conduct a business without interference on the part of the private bank. These conflicts, which arose in a private law context, were, however, not taken seriously by the Court of Justice in these cases.[109]

As far as the problem of how such collisions between EC freedoms and EU fundamental rights in private law disputes should be solved is concerned, it is of primary importance how EC freedoms and EU fundamental rights relate to each other. From a legal point of view the relationship between them can in principle be based on one of two models: whether EC freedoms and EU fundamental rights enjoy an equal status and therefore mutually limit each other which means that the conflict between the two can only be solved by balancing them against each other, or EU fundamental rights enjoy primacy over EC freedoms which means that EC freedoms cannot limit EU fundamental rights and no balancing between them is possible in a case of conflict.[110] The approach of the Court of Justice in the *Schmidberger* case appears to provide evidence that the Court refused to establish a hierarchical relationship between EC freedoms and EU fundamental rights by giving primacy to the latter and, instead, by undertaking a balancing between the free movement of goods,

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[108] *Bosman*, *op. cit.* note 42 *supra*.

[109] The conflict between fundamental rights and fundamental freedoms also arose in the criminal law context in *Commission* v. *France* in which, against the free movement of goods, the angry farmers could invoke their fundamental right to freedom of opinion and demonstration. In this case, however, no thorough balancing between the conflicting rights took place as was the case in *Schmidberger*.

[110] Compare C. BROWN, comment on the judgement of the Court of Justice in *Schmidberger*, (2003) 40 *Common market law review*, 1510; K.J.M. MORTELMANS, 'Botsende algemene belangen en de werking van de interne markt', (2004) 52 *Sociaal-economische wetgeving*, 240, at 248; F. DORSSEMONT, '"Met de vlam in de pijp...". Vrijheid van vergadering en meningsuiting, recht op collectieve actie versus vrij verkeer: primaat of belangenafweging?', (2004) 4 *Arbeidsrechtelijke Annotaties*, 77, at 81 *et seq.*; P.-C. MÜLLER-GRAFF, 'Grundfreiheiten und Gemeinschaftsgrundrechte', in H.-J. Cremer *et al.* (eds.), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger*, Berlin [etc.], 2002, 1281, at 1284 *et seq.*; A. VON WALTER FRENZ, 'Grundfreiheiten und Grundrechte', (2002) 37 *Europarecht*, 603, at 613 *et seq.*

on the one hand, and the fundamental rights to freedom of expression and freedom of assembly, on the other, it adopted the first model of the relationship. This means that in private law cases when an EC freedom comes into conflict with the fundamental right to private autonomy, the latter is not likely to enjoy automatic priority over the former, but the balancing of the competing interests of both private parties will have to take place.

The question which arises in this connection is how, from a legal-technical point of view, such weighing of EC freedoms and EU fundamental rights against each other can be accomplished considering the private law character of the relationship between the parties. It can be argued that the direct horizontal effect of EC freedoms finds its limitations in the obligation to observe EU fundamental rights which is incumbent on both the Community institutions, in particular the Court of Justice, and the Member States. Therefore, EC freedoms can only be applied in the way which is consistent with EU fundamental rights. In practical terms this means that the fundamental right to private autonomy can serve as a justification ground for the private party concerned in order to avoid the applicability of the free movement provision to its conduct. Under such circumstances the rationale for the direct horizontal effect seems to disappear as ultimately, even under this approach, EC freedoms would have to be balanced against the private law values which are now reinforced by the fundamental right to private autonomy. At the time when the direct horizontal effect was adopted in the *Bosman* and *Angonese* cases the very possibility of such balancing was not even considered by the Court. Moreover, the fact that as a result of the direct horizontal effect of EC freedoms an often politically sensitive balancing between EC freedoms and EU fundamental rights would have to be carried out by the national courts and/or the Court of Justice while the role of the national and the EC legislators in this process would be significantly limited, also does not provide much support for direct horizontal effect in the future.

It therefore appears much more likely that with the growing importance of EU fundamental rights, in particular the fundamental right to private autonomy, the Court of Justice will for the most part resort to the concept of the state duties of protection which is more suitable considering the need for striking a balance between EC freedoms and EU fundamental rights within the national private law of the Member States. It is not excluded that the *Commission* v. *France* case has introduced such a concept in Community law based on Article 10 of the EC Treaty not only with regard to EC freedoms but also with regard to fundamental rights. Moreover, the *Schmidberger* case seems to provide evidence that the Court of Justice accepts the relevance of the state duty to protect EU fundamental rights as a justification ground for restricting EC freedoms. In view of the growing importance of fundamental rights protection in the EU, the Court of Justice may use the concept of the state duties of protection in practice in order to make the Member States protect EU fundamental rights in private law.

In such a case, the Member States may be considered to be under the duty to protect EC freedoms and EU fundamental rights by creating private law which would

be compatible with both.[111] In practical terms this would imply that the private law legislator and the private law courts would be faced with the difficult task of striking an appropriate balance between EU fundamental rights and EC fundamental freedoms.[112] In particular, following the German approach, the task of striking such a balance may be imposed on the private law courts when the legislator fails to fulfil this. The weighing of competing interests would then mostly take place within the general clauses of private law, as in the case of giving effect to national constitutional rights. The European Court of Justice can also play a significant role in this process within the framework of the enforcement proceedings against the Member States for failure to fulfil their obligations under EC law as well as the preliminary ruling procedure. It is most likely that the Court will most often be confronted with balancing between EC freedoms and EU fundamental rights within the framework of the preliminary ruling procedure, in particular when the Court is specifically asked for ruling on the proper balance between the two in the circumstances of a concrete case.

Such a development can entail two different outcomes as far as the position of private law is concerned. On the one hand, EU fundamental rights, which protect, among other things, the general principle of private autonomy, may strengthen the private law tradition of the Member States when confronted with EC freedoms. In this respect, it is possible to say that EU fundamental rights set limits on the Member States' duties to protect EC freedoms by limiting the private autonomy of individuals.[113] With the recognition of the binding character of the Charter of Fundamental Rights of the EU the European Court of Justice, which has frequently been criticized for giving priority to EC fundamental freedoms at the expense of EU fundamental rights, is likely to pay more attention to fundamental rights and to be more careful in limiting the autonomy of private individuals which is now not only protected by private law but also by EU fundamental rights. On the other hand, if the European Court of Justice starts reshaping the private law of the Member States in cases where the balance between EC freedoms and private law values protected by EU fundamental rights had already been struck by the national legislator and, under the cover of the 'interpretation of EC law', nevertheless tends to impose its own view of the appropriate balance by giving preference to EC freedoms to the detriment of the EU fundamental right to private autonomy, then the private law of the Member States can gradually become subordinate to EC freedoms. That such a scenario is not unthinkable is also supported by the fact that the line between the interpretation and application of the EC Treaty is very thin in practice, in particular because many of the questions submitted to the Court of Justice by the national courts for a preliminary ruling are very detailed and can only be answered by a very specific response.[114]

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111 Compare REMMERT, *op. cit.* note 63 *supra*, at 18.

112 Compare REMMERT, *op. cit.* note 63 *supra*, at 18.

113 Compare von WALTER FRENZ, *op. cit.* note 110 *supra*, at 605.

114 On this issue see, in particular, CRAIG and DE BÚRCA, *op. cit.* note 4 *supra*, at 449-450.

Therefore, as has already been noted above, where the problem of the relationship between EC freedoms and the general principle of private autonomy was discussed, just as in case of the use of the state duties to protect constitutional rights in German law, the future of private law will ultimately depend on the approach taken by the court which has a final say in these matters, in this case the European Court of Justice.

6 Concluding Remarks

Although at present private law and conduct have only been affected by the direct horizontal effect of EC freedoms and it is not easy to predict the future of private law when the Charter of Fundamental Rights of the EU becomes binding, now one can already trace the signs of the European constitutionalization of private law and the considerable potential for its advancement in the years to come as a consequence of the growing impact on private law of EC freedoms, on the one hand, and EU fundamental rights, on the other.

The developments in the field of the relationship between EU fundamental rights, EC fundamental freedoms and the private law of the Member States on the EU level reveal striking similarities with the relationship between constitutional rights and private law in the German legal system. The distinguishing features of the latter such as the concept of the direct horizontal effect of constitutional rights and the concept of the state duties to protect constitutional rights as well as the need to strike a balance between, quite often, two competing constitutionally protected interests, find their counterparts in EU law. In particular, the supremacy of Community law, the direct horizontal effect of fundamental freedoms in private law disputes and their indirect effect through the application of the state duties of protection lead to the significant interference of EC freedoms with the national private law of the Member States. The strengthening of the protection of fundamental rights in the EU, however, has made it impossible to ignore the impact of EU fundamental rights when interpreting and applying EC freedoms and the secondary EC legislation based on these freedoms. The clash between EC freedoms and EU fundamental rights in a private law context can only be solved by balancing them against each other by the legislator within the private law legislation or by the courts within the framework of the general clauses. Accordingly, the development of the EU legal order of values based on EC freedoms and EU fundamental rights can give a new dimension to the constitutionalization of the national private law of the Member States leading to its European constitutionalization. Moreover, apart for the interpretation and application of fundamental freedoms in the light of fundamental rights, even a more far-reaching manifestation of the European constitutionalization may take place if EU fundamental rights themselves were to develop in the objective system of common EU values which should be respected in the Member States whenever persons from other Member States are exercising their EC freedoms. How unlikely this may seem at present, the recognition of the binding character of the Charter of Fundamental

Rights of the EU may open up many new possibilities for the constitutionalization of private law, including the most unforeseeable.

What the German experience teaches us, however, is that the benefits of ensuring respect for European fundamental rights and freedoms by means of the constitutionalization of private law should not be outweighed by the problems resulting from the reshaping of private law in conformity therewith by the European Court of Justice. One should keep in mind that the unlimited constitutionalization of private law may lead to the uncontrolled expansion of EU competence and the powers of the European judiciary, a further politicization of private law and disastrous consequences for legal certainty.

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