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**Horizontal effect of fundamental rights and freedoms – much ado about nothing?  
German, Polish and EU theories compared after *Viking Line***

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## **Horizontal effect of fundamental rights and freedoms – much ado about nothing?**

### **German, Polish and EU theories compared after *Viking Line***

Dr. Joanna Krzeminska-Vamvaka\*

#### **Abstract**

The paper examines the theory of horizontal effect of fundamental rights and freedoms, known also as *Drittwirkung*. It introduces relevant doctrines in Germany and Poland in order to then focus on the EU theory shaped in the case law of the European Court of Justice, most notably in the landmark *Viking Line* judgment. Highly formalized German approach is confronted with more flexible attitudes developed by the ECJ and in Poland. The paper demonstrates the exceptionality of horizontal effect and its links with the principle of effectiveness which lies at the core of the modern systems of human rights protection. It also argues that the distinction between direct and indirect effect can be blurred, may depend on the available causes of action and consequently should not be overrated.

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## I. INTRODUCTION

The EU Treaties (TEU, TFEU)<sup>1</sup> do not explicitly resolve the question of horizontal effect of fundamental rights and freedoms. It is nothing unusual. Also the national constitutions do not normally yield an explicit answer as to whether and how fundamental rights and freedoms influence private law relationships. Provisions of this kind are an exception in the European constitutions. Article 18 (1) of the Portuguese Constitution, for example, reads that the constitutional provisions relating to rights, freedoms and safeguards are directly applicable to and binding on public and private persons and bodies.<sup>2</sup> Usually, however, horizontal effect cannot be derived from the texts of the European constitutions.<sup>3</sup> It is not surprising given the traditional understanding of fundamental rights as protections against the power of the state. However, threats to fundamental rights originating in private action are on the rise and require guarantees actionable against private individuals.

Horizontal effect is not a novelty in the EU law. The ECJ<sup>4</sup> held on several occasions that common market fundamental freedoms (CMFFs) imposed actionable obligations on individuals and that private persons could rely on the relevant Treaty (then TEC<sup>5</sup>) provisions in actions against other private persons. In most prominent cases the ECJ scrutinised the rules of sporting organisations which restricted the free movement of persons. It held that “*the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy.*”<sup>6</sup>

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<sup>1</sup> Treaty on the European Union and Treaty on the Functioning of the European Union. For consolidated versions see: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:en:HTML>. This paper discusses developments preceding the entry into force of the Treaty of Lisbon and will occasionally refer to the EC Treaty (TEC). The term EU law covers *inter alia* what has been formerly referred to as EC or Community law.

<sup>2</sup> English translation of the Portuguese Constitution available at <[http://www.parlamento.pt/ingles/cons\\_leg/erp-ing](http://www.parlamento.pt/ingles/cons_leg/erp-ing)>.

<sup>3</sup> See the Research Training Network ‘Fundamental Rights and Private Law in the European Union’.

<sup>4</sup> European Court of Justice. Formally speaking, the Court of Justice of the European Union includes the Court of Justice, General Court, specialized courts.

<sup>5</sup> See n 1 above.

<sup>6</sup> Case C-36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405, para 18; Case C-415/93 *Union Royale Belge des Societes de Football Association and Others v Bosman and Others* [1995] ECR I-4921, para 83; Cases C-/96 & C-191/97 *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97)* [2000] ECR I-2549, para 47, Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139, para 32; C-176/96 *Jyri*

In *Bosman*<sup>7</sup> a football player could not be hired by a new club in another Member State (MS) due to transfer rules of football organisations. In *Walrave*<sup>8</sup> the international cyclist union required that pacemaker and stayer were of the same nationality. In *Angonesse*,<sup>9</sup> a bank refused to recognise that an applicant for a job was bilingual because he could not present a specific language certificate. The ECJ held that the requirement to prove bilingualism exclusively by means of a particular certificate issued in one province of a Member State was discriminatory and thus run counter to the TEC provisions on fundamental freedoms.

In *Commission v France*<sup>10</sup> French farmers demonstrated against imports of Spanish products and the ECJ found France liable for failure to ensure the freedom of movement of goods. In *Schmidberger*<sup>11</sup> a transport company sued Austria for authorising demonstration which blocked one of the most important transport routes. The ECJ found that the limitation of freedom of movement of goods was justified due to the fact that the demonstration was peaceful (unlike in *Commission v France*) and announced in advance. In those cases the horizontal effect had a form of indirect effect through state protective duties (state under duty to protect CMFFs of individuals against violations by other individuals).

Other examples suggested in the legal scholarship include an insurance company that would only insure local goods, a magazine that sells only domestic advertisements, a shop that sells only domestic goods or refuses to sell certain imports.<sup>12</sup>

The discussion so far concentrated mainly on the horizontal effect of fundamental freedoms but cases like *Bosman* or *Angonesse* could have served as examples of horizontal effect of fundamental rights (freedom of assembly and association and freedom of economic activity). The ECJ, however, limited its considerations to the horizontal effect of the freedom of movement

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*Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* [2000] ECR I-2681, para 35; for an in-depth analysis see in particular K Preedy, *Die Bindung Privater an die europäischen Grundfreiheiten* (Berlin 2003); M Jaensch *Die unmittelbare Drittwirkung der Grundfreiheiten* (Baden-Baden 1997).

<sup>7</sup> *Bosman*, in *ibid.*

<sup>8</sup> *Walrave* (n 6 above).

<sup>9</sup> *Angonesse* (n 6 above).

<sup>10</sup> Case C-265/95 *Commission v France* [1997] ECR I-6959.

<sup>11</sup> Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republic of Austria* [2003] ECR I-5659.

<sup>12</sup> See P Oliver, *Free movement of goods in the EEC* (2<sup>nd</sup> ed, London 1988), 52; G R Milner-Moore, 'The Accountability of private parties under the free movement of goods principle', Jean Monnet Working Paper 9/95, available at <<http://centers.law.nyu.edu/jeanmonnet/papers/95/9509ind.html>>.

of persons.<sup>13</sup> Cases like *Schmidberger* or *Commission v France*, concerning a conflict between the fundamental right to freedom of speech and assembly and the freedom of movement of goods, could have also served as examples of horizontal effect of fundamental rights. Another feature of the ECJ's approach to horizontal effect is the fact that it never actually uses the term 'horizontal effect'.

The Community law cases concerning horizontal effect of fundamental freedoms before *Viking Line* could be divided into three groups: (1) *Bosman*-like cases where organisations with power to issue generally binding rules (e.g. sporting organisations) adopt rules restricting freedom of movement, (2) *Commission v France* or *Schmidberger*-like cases where fundamental rights conflict with common market fundamental freedoms and horizontal effect is an indirect effect through state protective duties, (3) *Angonesse*-like cases concerning prohibition of discrimination in private relationships.

### ***1.1. Horizontal effect after Viking Line***

This paper examines in greater detail the more recent Community case dealing with the question of horizontal effect – *Viking Line*.<sup>14</sup> The opinion of Advocate General (AG) Poiares Maduro in this case is one of the most explicit proclamations of horizontal effect in the EU law so far. The ECJ confirmed its previous case law and held that Article 43 TEC was capable of conferring rights on private persons which might be relied upon against another private person. Although the referring court explicitly asked about Article 43 TEC having direct horizontal effect,<sup>15</sup> the ECJ did not actually use the term.

*Viking Line* has been much discussed in the legal scholarship, mostly together with other landmark judgments in *Laval*<sup>16</sup> and *Rüffert*,<sup>17</sup> both concerning the Posting Workers Directive (PWD).<sup>18</sup> Social policy implications of *Viking Line* attracted considerable attention in the legal

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<sup>13</sup> N Ferreira, J Krzeminska-Vamvaka, T Russo, Horizontal Effect of Fundamental Rights and Freedoms in the European Union Law, in: G Bruegemeier, A Colombi Ciacchi, G Comandè *Fundamental Rights and Private Law in the European Union* (Cambridge University Press 2010, forthcoming).

<sup>14</sup> Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

<sup>15</sup> *Ibid*, para 27.

<sup>16</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

<sup>17</sup> Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008], the judgment of 3 April 2008, (<<http://curia.europa.eu>>).

<sup>18</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 1997 L 18, p. 1.

scholarship.<sup>19</sup> Commentators discuss the impact of common market fundamental freedoms on social policy and collective action by trade unions. This paper does not intend to cover this aspect of the case. Its focus is on the horizontal effect of fundamental rights and freedoms in the EU law. Although in *Laval* the ECJ remarked on the horizontal effect of CMFFs, the case was concerned more with PWD and the question of horizontal effect was rather marginal.<sup>20</sup> *Viking Line* was in that sense a truly horizontal effect case.

The theory of horizontal effect has been particularly developed in Germany. There has been much temptation in the legal scholarship to apply this German theory to the EU fundamental rights and common market fundamental freedoms. This paper argues that the German theory should not necessarily be transposed to the EU law. Certainly, it should not share its restraints and limitations,<sup>21</sup> especially in view of the fact that the horizontal effect of seems to be possible in most European countries.<sup>22</sup> Not all countries followed the German example and

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<sup>19</sup> See some of the submissions in C Barnard (ed.), ““Viking” and “Laval”: Workshop papers from 1 February 2008”, Cambridge Yearbook of European Legal Studies 2007/2008 (2008); ACL Davies, ‘The Right to Strike Versus Freedom of Establishment in EC Law: The Battle Commences’, 35 Industrial Law Journal (2006) 75; A Hinarejos, ‘Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms’, 8 Human Rights Law Review (2008) 714; N Reich, ‘Free Movement v. Social Rights in an Enlarged Union - the *Laval* and *Viking* Cases before the ECJ’, 9 German Law Journal No. 2 (2008), available at <<http://www.germanlawjournal.com>>; Ch Joerges and F Rödl, ‘On De formalization in European Politics and Formalism in European Jurisprudence in Response to the “Social Deficit” of the European Integration Project, Reflections after the Judgments of the ECJ in *Viking* and *Laval*’, 4 Hanse Law Review (2008) 3, available at <<http://www.hanselawreview.org>>; G Orlandini, ‘Right to Strike, Transnational Collective Action and European Law: Time to Move On?’, Jean Monnet Working Paper 8/07, available at <<http://www.jeanmonnetprogram.org>>; T Blanke, ‘Observations on the Opinions of Advocates General Maduro and Mengozzi delivered on 23 May 2007 in the *Viking* and *Laval* cases’, 3 Transfer (2007) 497; R Zahn, ‘The *Viking* and *Laval* Cases in the Context of European Enlargement’, 3 Web Journal of Current Legal Issues (2008), available at <<http://webjcli.ncl.ac.uk>>.

<sup>20</sup> In *Laval* a trade union prevented a Latvian company from providing services in Sweden. The ECJ held that Article 49 TEC and Article 3 PWD were to be interpreted as precluding a trade union, in a MS whose laws regulate the terms and conditions of employment covering the matters referred to in Article 3 PWD, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade of sites, to force a service provider established in another MS to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement whose terms lay down more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 PWD. The PWD and Article 49 TEC have been mentioned together (see *Laval*, n 16 above). *Rüffert* is not a horizontal effect case. National law was scrutinized for conformity with EC law (PWD interpreted in light of Article 49 TEC). Here, a Polish company was prevented from providing services in Germany. The ECJ held that the PWD, interpreted in the light of Article 49 TEC, precluded MSs from adopting measures requiring that contractors can be designated for public works only if they agree in writing to pay their employees at least the remuneration prescribed by the collective agreement in force at the place where the services would be performed (see *Rüffert*, n 17 above).

<sup>21</sup> The analysis of the German *Drittwirkung* theory builds on the material published in J Krzeminska-Vamvaka, *Freedom of Commercial Speech in Europe* (Hamburg 2008).

<sup>22</sup> Bruegemeier, Colombi Ciacchi, Comande (n 13 above); A Ciacchi The Constitutionalization of European Contract Law: Judicial Convergence and Social Justice, 2 European Review of Contract Law (2006) 167.

formalised their approach to horizontal effect. Some did, but most are more relaxed or spontaneous in the application of fundamental rights to private law relationships.

The *first* thesis of this paper is that horizontal effect guarantees *effective protection* of fundamental rights and freedoms. Given the importance of fundamental rights for individuals and democratic society as well as their rank in modern legal systems, the focus should be on their effective protection. Horizontal effect should thus be admissible whenever such effective protection of fundamental rights calls for it.

*Secondly*, an interrelated thesis is the *exceptionality* of horizontal effect. It should be viewed as an exceptional tool of protection of fundamental rights, necessary only if there are no appropriate statutory means of protection. Because constitutional rights and freedoms are at the core of the legal system, there should be a presumption that private law adequately protects them. This presumption can be refuted only *exceptionally*. The presumption and its refutability only in exceptional circumstances guarantee the separation of powers between legislature and judiciary.<sup>23</sup>

*Thirdly*, in a particular legal system direct and indirect horizontal effect are not mutually exclusive but *complementary*. Their application depends on the circumstances of a particular case. Indirect effect will be applied when statutes incorporate general clauses or indefinite terms and thus need to be interpreted in conformity with fundamental rights. When there are no statutory means of protection, claims have to be based directly on the constitution (direct effect). In a particular case the simultaneous application of indirect and direct effect will not be possible, but in a legal system as such they will complement each other as means of fundamental rights protection. Alternative proposition would be to give up the distinction altogether and speak just of horizontal effect or of balancing rights. It will be demonstrated below that the distinction between indirect and direct effect can be sometimes blurred.

The discussion will begin with the presentation of the facts which gave rise to the *Viking Line* case. The national (German and Polish) theories will be presented before the discussion will turn to the legal underpinnings of horizontal effect in the EU law.

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<sup>23</sup> J Krzeminska-Vamvaka and P O'Callaghan, Mapping out a Right of Privacy in Tort Law, in: Bruegemeier, Colombi Ciacchi, Comande, in *ibid*.

## ***1.2. What happened on the waters between Tallinn and Helsinki?***

A Finish vessel operator (Viking Line) wished to change its place of establishment to Estonia. It operated on the route between Tallinn and Helsinki and wanted to benefit from lower wages in Estonia and thus improve its competitive position towards Estonian vessels operating on the same route. Finish and international trade unions opposed the re-flagging or alternatively demanded that in the event of re-flagging the Finish labour conditions should apply to the crew. The main policies of the International Transport Workers' Federation (ITF) were to improve the working conditions of seafarers and to establish a genuine link between the flag of the ship and the nationality of the owner (the so-called 'flag of convenience policy'<sup>24</sup>). As a consequence of the latter policy only the trade unions established in the country of beneficial ownership of a particular vessel have the right to conclude collective agreements concerning the crew of that vessel. This policy is enforced by calls for boycott and strike actions. Viking Line settled the dispute in Finland because of the threat of strike action, but the vessel 'Rosella' continued to operate at a loss. Finally, therefore, it instituted proceedings before the Commercial Court in London (where the ITF had its seat) seeking declaratory and injunctive relief which would require trade unions not to interfere with its re-flagging and thus its freedom of establishment. The court granted injunction upon an undertaking given by Viking Line that no employees would be made redundant as a result of re-flagging. The trade unions appealed and the Court of Appeal referred questions for preliminary ruling to the ECJ. From the perspective of the discussion in this paper the most important question was whether Article 43 TEC had "*horizontal effect so as to confer rights on a private undertaking which may be relied on against (...) a trade union or association of trade unions in respect of collective action by that union or association of unions.*"<sup>25</sup>

The ECJ held that (1) a collective action by a trade union against an undertaking falls within the scope of Article 43 TEC, that (2) Article 43 TEC confers rights on private undertakings which may be relied on against a trade union, and finally that (3) a collective action such as that pursued by Viking Line constitutes a restriction on the freedom of establishment within the meaning of Article 43 TEC which can however be justified by an overriding reason of public interest, such as the protection of workers, provided that the restriction is suitable to

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<sup>24</sup> According to ITF a vessel is registered under flag of convenience "*where the beneficial ownership and control of the vessel is found to lie in a State other than a State of the flag*"; *Viking Line* (n 14 above), para 8.

<sup>25</sup> Opinion AG *Viking Line* (n 14 above), para 14.

achieve the objective pursued and does not go beyond what is necessary to achieve that objective.

## II. GERMANY

### *II.1. Horizontal effect and its direct and indirect types in Germany*

*Drittwirkung* (horizontal effect) means that fundamental rights have effect on relationships between private individuals.<sup>26</sup> Horizontal effect is different from the impact of fundamental rights on private law. The latter concept is obviously much broader. Not every violation of fundamental right by a norm of private law is a case of horizontal effect.<sup>27</sup>

Canaris distinguishes three aspects: impact on (1) the legislator, (2) the courts, and (3) individuals. First (1) aspect is the impact of fundamental rights on private law statutes (private law legislator is bound by constitutional rights), second (2) is the impact of fundamental rights on the application and interpretation of law by civil courts, and third (3) the impact of fundamental rights on private individuals.<sup>28</sup> It is one of the problems of the German *Drittwirkung* theory that those three aspects are not clearly distinguished and discussed all together.<sup>29</sup> In this article horizontal effect means that the constitutional provisions concerning fundamental rights bind private individuals.

The German legal doctrine distinguishes direct and indirect horizontal effect. Indirect horizontal effect (*mittelbare Drittwirkung*) means that fundamental rights have an impact on the interpretation of general clauses and equivocal terms in private law.<sup>30</sup> Direct horizontal effect (*unmittelbare Drittwirkung*) means that fundamental rights have an immediate limiting impact on the actions of private parties.<sup>31</sup> Direct effect was established by the German Federal Labour Court in a case concerning prohibition of political speech at a workplace. The Court held that:

“A number of significant basic constitutional rights are meant not only as guarantees of freedom vis-à-vis state authority but also as organising principles for the entire society, which to an extent to be determined from the nature of each right have immediate significance (direct (*unmittelbare*

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<sup>26</sup> Ch Starck, *Das Bonner Grundgesetz. Kommentar* (München 1999) 166.

<sup>27</sup> A Bleckmann, *Staatsrecht II. Die Grundrechte* (4<sup>th</sup> edn, Köln 1997) 221.

<sup>28</sup> CW Canaris, *Grundrechte und Privatrecht, Eine Zwischenbilanz* (Berlin, New York 1999).

<sup>29</sup> Ch Starck, Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court, in: D Friedmann and D Barak-Erez, *Human Rights in Private Law* (Oxford Portland Oregon 2001) 97; Starck, (n 26 above), 166.

<sup>30</sup> Starck, in *ibid*, 166; the notion of equivocal norms refers to the German *auslegungsbedürftige Normen*, i.e. norms, whose equivocal wording requires judicial interpretation.

<sup>31</sup> DP Curie, *The Constitution of the Federal Republic of Germany* (Chicago 1994) 183.

*Bedeutung*) – addition JKV) for the legal relations of citizens with one another... The basic right to free expression of opinion (...) would be rendered (largely) ineffective (...) if (...) individuals and others with economic and social power (...) were in a position by virtue of that power to restrict this right at will...<sup>32</sup>

Under the theory of direct horizontal effect fundamental rights do not require any transformation into the system of private law. They become independent causes of action as claims or defences based directly on the provisions of the constitution.<sup>33</sup> If a violation is established, private law has to provide for its consequences, like damages, invalidity or injunctive relief.<sup>34</sup>

The notion of indirect horizontal effect was developed in the landmark *Lüth* judgment, in which the Federal Constitutional Court held that fundamental rights formed an objective system of values with bearing upon all areas of law (it is a so-called emanation (*Ausstrahlung*) of fundamental rights on private law).<sup>35</sup> Eric Lüth, the press director of the city of Hamburg, called for a boycott of a new movie by Veit Harlan “*Unsterbliche Geliebte*”. Veit Harlan was a former director of Nazi films, prosecuted for making an anti-Semitic movie “*Jud Süß*”, under the Nazi propaganda minister Josef Göbbels.<sup>36</sup> The district court in Hamburg (as confirmed by the Court of Appeal) required Eric Lüth to stop his call for boycott. He lodged a constitutional complaint and the Federal Constitutional Court held that the district court did not sufficiently consider the impact of the complainant’s right to freedom of speech on private law.

Under the theory of indirect effect the claim or defence is based on a civil law provision whose interpretation will be influenced by the fundamental rights enshrined in the constitution. Under the *Lüth* judgment, the courts have to consider the impact of fundamental rights on private law.<sup>37</sup> The Federal Constitutional Court merely controls whether the lower courts considered this

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<sup>32</sup> BAGE 1, 185 (192-94), translation from Curie, in *ibid*, 182; other cases include BAGE 1, 258 (equal pay for men and women), BAGE 4, 274 – Zölibatsklausel (a female employee was obligated to quit job after getting married).

<sup>33</sup> Canaris (n 28 above), 34; Bleckmann (n 27 above), 230.

<sup>34</sup> Bleckmann, in *ibid*, 230.

<sup>35</sup> BVerfGE 7, 198.

<sup>36</sup> BVerfGE 7, 198 (201); PE Quint, ‘Free Speech and Private Law in German Constitutional Theory’, 48 *Maryland Law Review* 253 (1989).

<sup>37</sup> D Grimm, ‘Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts’, *Neue Juristische Wochenschrift (NJW)* 1995, 1701; the indirect effect has also been analyzed with regard to the impact of fundamental rights on private law or legislator enacting legislation in the field of private law. Canaris demonstrates that private law norms can restrict fundamental rights just as much as public law norms. He refers to the hierarchy of norms within the legal system and the principle of supremacy of the Constitution. Against this background Canaris

impact and correctly established the scope of fundamental rights.<sup>38</sup> The competences of the Constitutional Court have to be defined in a flexible manner. It has to be able to interfere depending on the circumstances of a particular case, most notably depending on the gravity of the fundamental right violation. In other words: the graver the violation of a fundamental right by a civil court judgment, the more intensive the constitutional scrutiny of the justification for interference.<sup>39</sup> The constitutional protection of freedom of expression cannot be set aside through a misinterpretation and misapplication of private law. This would contravene the principle of supremacy of the constitution.<sup>40</sup>

Since *Lüth* the concept of fundamental rights having an indirect effect on private law has been rather well established. It seems therefore that the problem with horizontal effect in Germany does not so much concern the impact of fundamental rights on private relationships but the form of this impact. A feature of the German discussion is that many commentators claim that a specific form of horizontal effect is the only right one. This paper claims that both forms (including also indirect horizontal effect through state protective duties) are complementary. The fact that a specific form prevails in a particular system is a matter of decision on how to construct legal problems. This decision might have historical grounds or depend on the available choice of causes of action. Already Alexy recognised that all different forms were equivalent. He constructed a three-level model of horizontal effect encompassing all three forms: first level (1) of state obligations, second (2) level of rights against the state (judiciary), and third (3) one of relations between individuals.<sup>41</sup>

## ***II.2. Public-private divide – origins of Drittwirkung***

The public-private divide has attracted much dispute among legal scholars and the debate on the definition or constitutive elements of private law even much so. This paper cannot cover this broad territory. The horizontal effect of fundamental rights in private law is by definition a showcase for the complexity of the interrelation between private and public law. Or – examined

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rejects the concept of indirect effect. He states that the constitutional provisions concerning fundamental rights directly bind the legislator enacting legislation in the field of private law (see Canaris (n 28 above), 12-3 and 19-20). Indeed, the review of conformity of private law with fundamental rights does not require a medium of another private law norm. The concepts of direct or indirect horizontal effect are misplaced in the discussion on the constitutionality of private law norms.

<sup>38</sup> BVerfGE 7, 198 (206 et seq.); BVerfGE 60, 234 (239); BVerfGE 61, 1 (6).

<sup>39</sup> BVerfGE 54, 129 (135); BVerfGE 61, 1 (6).

<sup>40</sup> BVerfGE 60, 234.

<sup>41</sup> R Alexy, *Theorie der Grundrechte* (Frankfurt am Main 1994) 484 et seq.

from a different perspective – it is a showcase for the thesis that the distinction line between public and private law can sometimes be very blurred. In Germany the historical perception of private law is the key to understand the theory of *Drittwirkung*. The developments of the German legal doctrine in the 19<sup>th</sup> and the first half of the 20<sup>th</sup> century, characterised by the strict separation of private and public law, influenced the extent to which individuals were deemed to be bound by fundamental rights.<sup>42</sup>

As some authors point out, the development of constitutional law was not affected by a revolutionary proclamation of human rights – like the French of 1789 or American of 1791. Instead, the focus was on the internal structure of the German federation. The 1919 *Weimarer Reichsverfassung* (Weimarer Constitution) incorporated fundamental rights but as declaratory proclamations with no legal binding force.<sup>43</sup> These constitutional developments were accompanied by changes in the field of private law. The influential scholarly trends (F.C. von Savigny) would implement the principal elements of Kantian philosophy and led to the establishment of private law based on the concept of private autonomy and substantive personal rights. Those rights delineated the sphere in which individuals shaped their relationships autonomously from the state. Influenced by the nineteenth century libertarian *laissez-faire* theories, the civil lawyers perceived private law as ‘immune’ from any state influence. Its primary objective was to regulate the relationships between individuals by securing a sphere of freedom from any state intervention.<sup>44</sup> The 1896 German Civil Code (*Bürgerliche Gesetzbuch*, BGB) is sometimes regarded as the substitute of a constitution of the *Kaiserreich*.<sup>45</sup> Private law systematically developed its independence from public law. The first German democratic constitution – the Weimarer Constitution – did not have any impact on private law. There was no constitutional review of law. Consequently, laws could not be reviewed for conformity with fundamental rights.<sup>46</sup>

All that changed with the 1949 Constitution. It incorporated a catalogue of binding fundamental rights and founded the Federal Constitutional Court with a competence to adjudicate the constitutionality of laws. Yet, the perception of private law as independent and

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<sup>42</sup> G Brüggemeier, ‘Horizontal Effects of Fundamental Rights, A Critical View on the German Cathedral and Beyond’ (based on a draft version provided by the author).

<sup>43</sup> *Ibid*, 3-4.

<sup>44</sup> Quint (n 36 above), 255.

<sup>45</sup> Brüggemeier (n 42 above), 4.

<sup>46</sup> *Ibid*, 4.

separate from public law (an island in the system of law so-to-say) marked all subsequent discussions on the horizontal effect of fundamental rights:

“The mystique of the Civil Code as a coherent and valuable body of doctrine that should generally be maintained intact and basically separate from public law has had a persistent life in German legal culture.”<sup>47</sup>

### ***II.3. Main *Drittwirkung* arguments in Germany***

The German *Drittwirkung* theory evolves around few main arguments. Article 1 (3) of the German Constitution (*Grundgesetz*, GG) provides that “[t]he following basic rights shall bind the legislature, the executive and judiciary as directly enforceable rights”. According to Canaris the literal meaning of this provision leaves no doubt that the notion ‘legislature’ refers to the legislation in the field of private law.<sup>48</sup> Nevertheless, it was Article 1 (3) GG that originally cast doubt on the applicability of fundamental rights to private law relations. Diederichsen referred in that regard to historical developments at the time of the adoption of the 1949 Constitution and pointed out that Article 1 (3) GG simply departed from the Weimarer Constitution under which the fundamental rights were declaratory proclamations (*Programmsätze*). Under the new 1949 Bonn Constitution the fundamental rights acquired the status of directly applicable law.<sup>49</sup> This is a so-called historical argument against *Drittwirkung*. It is argued that the fathers of the Constitution perceived fundamental rights in the traditional sense as limitations upon the power of the state with no bearing on private law.<sup>50</sup> The historical argument against *Drittwirkung* has been also rebutted by Canaris. Strangely, however, the rebuttal referred solely to the legislative action in the field of private law. According to Canaris, despite the fact that the main emphasis of Article 1 (3) GG might have been on state action, fundamental rights have bearing upon private law and bind legislator in the entirety of its legislative function, i.e. also when it enacts legislation in the field of private law.<sup>51</sup>

The understanding of rights or their functions might evolve and change over time. Indeed, in the traditional understanding fundamental rights were seen as guarantees against the power of

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<sup>47</sup> Quint (n 36 above), 256.

<sup>48</sup> Canaris (n 28 above), 11.

<sup>49</sup> Diederichsen, in Ch Starck (ed), *Rangordnung der Gesetze* (Göttingen 1995) 48.

<sup>50</sup> B Pieroth, B Schlink, *Grundrechte. Staatsrecht II* (Heidelberg 2004) 44 after H v. Mangoldt, *Grundrechte im Entwurf des Grundgesetzes* (Anlage zum stenographischen Bericht der 9. Sitzung des Parlamentarischen Rates am 6.5.1949) 6.

<sup>51</sup> Canaris (n 28 above), 11 et seq.

the state. However, this traditional understanding cannot be an obstacle to the recognition of horizontal effect, when the threats to fundamental rights come as well from private bodies. Indeed, many commentators reject the historical argument and stress the necessity to provide effective protection against modern-day threats.<sup>52</sup>

The historical argument against *Drittwirkung* is often invoked together with the textual argument according to which horizontal effect is admissible only if it can be inferred from a clear wording of the constitutional provision. In the German Constitution only Article 9 (the right to association) states explicitly that it applies to relations between private individuals.<sup>53</sup> On that basis it is sometimes argued that only this right is applicable to relations between private individuals. Such a conclusion seems rather unfounded. The fact that the Constitution explicitly provides for a horizontal effect of one right does not necessarily mean that it categorically excludes the horizontal effect of other rights. Not all human rights provisions of the German Constitution explicitly refer to the state as the addressee of the obligation to protect a particular right and even if they do, it is not indicative of the horizontal effect of those provisions which do not contain such an indication. At least it cannot be a conclusive argument since a number of provisions define the substance of the right without stating explicitly that the rights are guarantees against state intervention. Rather, their focus is on the very substance of the right and its importance for the individual so that any violation – by private or public body – shall be condemned.<sup>54</sup>

A way to overcome these doctrinal problems might be to distinguish negative and positive obligations to protect fundamental rights. Under this theory, developed in Poland for example (see below), individuals are under negative obligation to respect fundamental rights, i.e. obligation not to interfere with the rights of others, whereas the state is under both negative and positive obligation to respect and protect, i.e. obligation not to interfere but also to undertake positive measures to guarantee fundamental rights.

Further, the structural differences between rights are not sufficiently considered in the discussion on the third party applicability of those rights. The attempts to find a universal

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<sup>52</sup> See the summarising analysis of Bleckmann (n 27 above), 9 et seq.

<sup>53</sup> Article 9 (3): “the right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and for all professions. Agreements which restrict or seek to impair this right are null and void, measures directed to this end are illegal. Measures taken pursuant to Articles 12a, 35 II & III, 87a IV, or 91 may not be directed against industrial conflicts engaged in by associations to safeguard and improve working and economic conditions in the sense of the first sentence of this paragraph.”

<sup>54</sup> See Bleckmann (n 27 above), 229.

solution applicable across the board to all basic rights led to a disproportionate focus on general constitutional principles and mechanisms. What is missing is a more concentrated effort to establish which rights can entail horizontal effect. The above mentioned judgment of the Federal Labour Court is one example of such reasoning.<sup>55</sup> There, the Federal Labour Court argued that *not all but a number* of fundamental rights entailed a direct effect in relations between individuals.<sup>56</sup> This reasoning was developed by Nipperdey, who claimed that no universal or general solution could be found to the problem of horizontal effect. Rather, the content and the function of a particular right should be investigated.<sup>57</sup>

#### ***II.4. Indirect effect and judges as guardians of fundamental rights***

The horizontal effect is sometimes viewed as judges' obligation to apply fundamental rights when they adjudicate in private law matters. This concept is commonly referred to in the discussions on horizontal effect of Human Rights Act in the UK.<sup>58</sup> According to Article 1 (3) GG the fundamental rights directly bind the judiciary. Canaris claims that the judgments should be treated as legal norms and reviewed for conformity with the Constitution.<sup>59</sup> This is the basis for his proposition to (partially) substitute the theory of horizontal effect by the traditional functions of fundamental rights as prohibitions of interference (*Eingriffsverbote*).<sup>60</sup> The constitutional review has to establish whether a judgment of a lower court violates the prohibition to interfere with the fundamental right. This is one aspect of Canaris' theory of horizontal effect. Another one is state protective duties (see below). He claims that due to the fact that in private law relationships both parties might be entitled to fundamental rights, the constitutional review of private law norms has to involve an inquiry into whether the private law norm (1) does not excessively limit the fundamental right of one individual and (2) establishes a sufficient level of protection of the fundamental right of the other individual.<sup>61</sup> Schwabe illustrates the role of

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<sup>55</sup> BAGE 1, 185.

<sup>56</sup> *Ibid*, 193.

<sup>57</sup> Starck (n 26 above), 167, referring to HC Niepperdey.

<sup>58</sup> See P Plowden, K Kerrigan, *Advocacy and human rights: using the Convention in courts and tribunals* (London 2004) 214 et seq; B Markesinis, 'Privacy, freedom of expression and the horizontal effect of the Human Rights Bill' 115 *Law Quarterly Review* (1999) 47 et seq; N Bamforth, 'The Application of Human Rights Act to Public Authorities' 58 *Cambridge Law Journal* (1999) 159 et seq.; B Dickson, Horizontal Application of Human Rights Law, in: A Hegarty, S Leonard, *Human Rights: An Agenda for the 21<sup>st</sup> Century* (London 1999) 59 et seq.

<sup>59</sup> Canaris (n 28 above), 26.

<sup>60</sup> *Ibid*, 27 et seq., 37.

<sup>61</sup> *Ibid*, 20-1.

fundamental rights in private law in a similar way.<sup>62</sup> He states that the civil law norms delineate the legal spheres of individuals. On the basis of private law norms, party A has the right to interfere with the legally protected sphere of party B. The civil law norms, which constitute the basis of rights or entitlements of A and B, are a concretisation of fundamental rights. Therefore, the balancing of private law rights of A and B has to be compatible with the balancing of the corresponding fundamental rights. If the delineation of the legal spheres has been carried out in an unconstitutional manner, the fundamental rights will serve as defences against interference (*Abwehrrechte*).<sup>63</sup>

One limitation of this reasoning is what happens if the judgment of the lower court is not reviewed at a higher instance. Another limitation – acknowledged by Canaris himself – are those violations which result neither from a legal norm nor from a court judgment but directly from an action of another individual.<sup>64</sup> Canaris tries to overcome this limitation by recourse to state protective duties (see below). Finally, the reasoning confuses procedural guarantees of enforcing rights with the substantive determination of their scope of protection. Bleckmann points out that the violation of a fundamental right by an individual is substantially different from a violation by a judge who misapplies or misinterprets the law.<sup>65</sup> The horizontal effect of fundamental rights determines – in the substantive sense – the scope of protection of a given right. It is defined by establishing the range of allowable restrictions. The rights and freedoms of others constitute one of the limits to the exercise of individual rights and freedoms. Yet, to make the scope of protection of a right dependant upon actual litigation is rather misguided. It would mean that the same right is offered different protection depending on whether a legal action is taken. The fact that courts are obligated to consider fundamental rights in the course of application and interpretation of law is a procedural guarantee – a way in which fundamental rights are enforced. The fact that judges themselves are bound by fundamental rights means that in exercising their function of interpreting and applying the law they have to ensure its conformity with constitutional rights. Horizontal effect has to be therefore based on the principle of supremacy of the Constitution and the presence of a judge is not as such decisive for determining the scope of the right. The scope of the right cannot depend on whether a legal action is taken and the judge –

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<sup>62</sup> J Schwabe, *Die sogenannte Drittwirkung der Grundrechte* (München 1971) 56 et seq.

<sup>63</sup> *Ibid*, 57-8.

<sup>64</sup> Canaris (n 28 above), 37.

<sup>65</sup> Bleckmann (n 27 above), 222.

bound by fundamental rights – can define that scope. The scope of the right cannot depend on whether the parties are in or outside of the courtroom. Neither can it depend on the instance at which parties decide to stop their argument.

The theories developed by Canaris or Alexy work well for those cases which have been reviewed (at least) in the second instance. Rights against judiciary (*Rechte gegen Rechtsprechung*), i.e. rights against the state,<sup>66</sup> can be spelled out once the judge has acted. But what about the initiation of the proceeding? A case can hardly be brought against the court as defendant.

### ***II.5. Indirect effect through state protective duties***

The concept of state protective duties and judge's obligation to consider fundamental rights in the application and interpretation of civil law are strongly interlinked. In many aspects it would be the same thing (Alexy's theory that rights against judiciary equal rights against the state) except for cases where state is a defendant, i.e. the state is held liable for violation of fundamental right committed by a private person (see e.g. *Schmidberger*<sup>67</sup> below). It was argued above that the concept of horizontal effect as judge's obligation to consider fundamental rights has its drawbacks. It will be argued below, mostly on the basis of the Opinion of Advocate General Poiares Maduro in *Viking Line*<sup>68</sup> that the horizontal effect through state protective duties is a matter of choice of available causes of action. It means that the underlying balancing of fundamental rights will be the same regardless of whether the legal construction will take the form of direct, indirect effect or indirect effect through state protective duties. In those systems where there is no available cause to bring a legal action against an individual for violation of a particular fundamental right, an action against the state might be the only option. In the following the discussion will first turn to the concept of indirect effect through state protective duties as developed in the German legal theory. The other issues will be discussed later in the analysis of horizontal effect in the EU law.

The novelty of this proposition, when it was first advanced by Canaris, was to extend the concept of state duties to protect fundamental rights, normally applicable in public law, to

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<sup>66</sup> Alexy (n 41 above), 490.

<sup>67</sup> *Schmidberger* (n 11 above).

<sup>68</sup> *Viking Line* (n 14 above).

relations governed by private law. It means that the state has a duty to act in order to protect fundamental rights when the violation has its source in private conduct.

The theory draws on Jellinek's distinction of functions of fundamental rights: *status negativus* (fundamental rights as defences against the power of the state), *status positivus* (fundamental rights as entitlements to state action, encompassing also state protective duties), and *status activus* (fundamental rights as participatory rights, e.g. right to vote).<sup>69</sup> In the traditional understanding, the function of fundamental rights as defences (*Abwehrrechte*) is a flipside of their function as prohibitions of interference (*Eingriffsverbote*) and depends on whether we look at fundamental rights from the perspective of an individual or the state. Another distinction is between fundamental rights as prohibitions of interference (*Eingriffsverbote*) or commands of protection (*Schutzgebote*). The prohibition of interference means that the state has a negative obligation not to interfere with fundamental rights. Under the theory of state protective duties, the state has a positive obligation to ensure the protection of fundamental rights. The German constitutional law theory works with the concept of *Übermassverbot*. It means that it has to be established whether the governmental interference with fundamental rights is not excessive. By contrast, the concept of *Untermassverbot* seeks to establish a line below which there is not enough protection.

The Constitutional Court developed the concept of state protective duties as a complimentary one to indirect effect. Examples are the *Handelsvertreter* or *Bürgerschaft* cases,<sup>70</sup> in which the Constitutional Court invalidated private contracts for breach of fundamental rights of one of the parties. In the *Handelsvertreter* case the Constitutional Court invalidated a non-competition clause because it breached the right to professional activity (Article 12 GG). In the *Bürgerschaft* case, a suretyship contract covered an amount exceeding considerably the financial incomes of the person acting as a surety. The contract was invalidated because it violated that person's right to private autonomy and the development of their personality (Article 2 (1) GG). Although the Constitutional Court was reviewing a civil court judgment the cases are said to be different from those where judges act as guardians of fundamental rights (see above). The civil courts merely execute contracts, therefore, it is not their decision but the contract itself, i.e. the action of a private individual, that restricts the fundamental right.<sup>71</sup>

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<sup>69</sup> Starck (n 26 above), 108 et seq.

<sup>70</sup> BVerfGE 81, 242 – *Handelsvertreter*; BVerfGE 89, 214 – *Bürgerschaftsverträge*.

<sup>71</sup> Canaris (n 28 above), 37.

In the *Handelsvertreter* the Court stated that:

“the limitation of professional activity did not originate primarily in state action. Much more had the complainant himself agreed to a specific contractual obligation. This kind of legal commitment limits the professional mobility but constitutes at the same time an exercise of individual freedom.”<sup>72</sup>

Careful and undecided wording of this passage (‘primarily’, ‘much more’) indicates that the Court itself has problems defining and de-lineating different forms of horizontal effect. Especially that that same judgment speaks again, like the *Bürgschaft* judgment, of the obligation of the civil courts to give due account to fundamental rights in the application and interpretation of civil law.

### III. POLAND

Poland does not have an overly theoretical approach to horizontal effect. Nevertheless, ever since the new 1997 Constitution was adopted and introduced the principle of direct applicability of the Constitution, the issue of horizontal effect has been occasionally discussed.<sup>73</sup> The term ‘horizontal effect’ has been used by the Constitutional Court on one occasion only in a case which actually concerned a challenge to the constitutionality of law (the Court remarked *obiter* on the horizontal dimension of human rights guarantees). There are three main features of the Polish approach to horizontal effect.

*Firstly*, one reason why the issue of horizontal effect has not played a more prominent role in the discussions on the human rights guarantees in Poland is that after 1989, when the communist regime collapsed, the main focus was on the vertical human rights guarantees as against the power of the state. But at the same time the atrocities of communist regime were in such stark contrast to the guarantees that existed “on paper” that they strongly influenced the legal thinking and underscored the need for *effective* protection of fundamental rights. Applied to

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<sup>72</sup> BVerfGE 81, 242 – *Handelsvertreter*, online access < <http://www.servat.unibe.ch/dfr/bv081242.html>>. Although it is commonly classified as such, the *Handelsvertreter* case is not really a horizontal effect but rather a constitutional review case. The Constitutional Court invalidated relevant laws and not their interpretation by the civil courts.

<sup>73</sup> P Bachmat, ‘Uwagi na temat horyzontalnego oddziaływania Europejskiej Konwencji Praw Człowieka’, *Państwo i Prawo* (PiP) 2002, Nr 8, s. 79–91; K Wojtyczek, ‘Horyzontalny wymiar praw człowieka zagwarantowanych w Konstytucji’, *Kwartalnik Prawa Prywatnego* (KPP) 1999, Nr 2, s. 405–14; J Limbach, ‘Promieniowanie Konstytucji na prawo prywatne’, *KPP* 1999, Nr 3, s. 405–14; A Łabno-Jabłońska, ‘Ograniczenia wolności i praw człowieka na podstawie art. 31 Konstytucji III RP’, in B Banaszak and A Preisner, *Prawa i wolności obywatelskie w Konstytucji RP* (Warszawa 2002) 693; B Banaszak, *Prawo Konstytucyjne* (3<sup>rd</sup> edn, Warszawa 2004).

horizontal effect, it means that if there is such strong focus on effective protection the matter of form (direct, indirect effect) becomes secondary.

*Secondly*, the issue of horizontal effect is strongly linked to the principle of direct applicability of constitutional provisions as guaranteed by Article 8 of the Polish Constitution. Again in contrast to what the constitution had been under the communist regime – a mere declaratory proclamations with no legal binding force – the fathers of the new 1997 Constitution made sure that it was perceived and became a “living instrument”, an effective guarantor of rights. At the same time the process of constitutionalization of law has began,<sup>74</sup> and Poland ended up developing a rather flexible approach to horizontal effect.

*Thirdly*, the focus of the Polish horizontal effect theory will be on the types of obligations which correlate to particular fundamental rights. Like that the position of the state towards an individual in terms of its human rights obligations differs from that of an individual. Individuals are said to be under negative obligation not to interfere with the rights of others, whereas the state has both negative but also positive obligation to undertake positive measures in order to guarantee fundamental rights.

### ***III.1. Legal transformation in Poland and horizontal effect***

The Polish Constitution, just as its German counterpart, does not yield a definitive answer as to whether fundamental rights entail horizontal effect. Article 8 of the Polish Constitution states that the Constitution should be the supreme law of the land and that its provisions apply directly. This principle of direct applicability was one of the most prominent changes introduced after the collapse of the communist regime. It underscored the importance of the Constitution as a “living instrument”. There has been much discussion in the legal scholarship on what were the practical implications of that principle.<sup>75</sup> Were ordinary courts empowered to set aside statutory provisions which they considered unconstitutional or was it the exclusive competence of the Constitutional Court? The latter option prevailed in the light of Article 188 of the Polish Constitution which states that the Constitutional Court has the competence to adjudicate, *inter*

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<sup>74</sup> M Safjan, ‘Refleksje wokół konstytucyjnych uwarunkowań rozwoju ochrony dóbr osobistych’, KPP 2002, Nr 1, s. 223; M Safjan, ‘Konstytucjonalizacja różnych gałęzi prawa’, Rzeczpospolita 17/04/2000.

<sup>75</sup> See B Nita, ‘Bezpośrednie stosowanie konstytucji a rola sądów w ochronie konstytucyjności prawa’, PiP 2001, nr 4, s. 37; J Limbach, ‘Promieniowanie Konstytucji na prawo prywatne’, KPP 1999, Nr 3, s. 405–14; S Wronkowska, ‘W sprawie bezpośredniego stosowania Konstytucji’, PiP 2001, Nr 9, s. 3; see also Z Czaczejko-Sochacki, ‘Bezpośrednie stosowanie Konstytucji’, Rzeczpospolita 23/01/1995; P Tuleja, *Stosowanie Konstytucji w świetle zasady jej nadrzędności* (Kraków 2003) 197 et seq.

*alia*, the conformity of statutes and international treaties with the Constitution. In case of doubts lower courts can refer a question to the Constitutional Court (Article 193 of the Polish Constitution).

Another, equally prominent transformation, was the changed attitude towards international law. The communist regime, like any totalitarian regime, jealously guarded its sphere of power from any outside influences as those might have called into question its legitimacy and viability. The international law was thus binding only upon the state on the international forum. For obvious reasons especially the human rights treaties were deprived of any practical effect and domestic law could not have been reviewed for conformity with international law. Between 1989 and 1997 the status of international law in Poland was rather unclear due to the lack of constitutional regulation.<sup>76</sup> The 1997 Constitution changed much in that regard.<sup>77</sup> It introduced the principle of direct applicability of international treaties and defined the rank of different types of treaties in the domestic hierarchy of legal acts. Strong commitment to honour international obligations had a profound impact on the standard of protection of fundamental rights. Due to the fact that this branch of law was underdeveloped the courts referred commonly to international human rights treaties, most notably the ECHR, when adjudicating Polish human rights cases. The position of ECHR as a main source of reference had an impact on the general attitude towards fundamental rights guarantees in particular by stressing the need for *effective* protection.

Both legal transformations – the direct applicability of the Constitution and of the international treaties – as well as the emphasis on the *effective* protection of fundamental rights, had impact on the Polish attitude towards horizontal effect which became rather flexible.

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<sup>76</sup> The 1952 Constitution remained partially in force and was complemented by the so-called 1989 Small Constitution (Act on mutual relations between the legislative and executive power of the Republic of Poland and on local administration). Neither of them regulated the status of international treaties in domestic law.

<sup>77</sup> See for more detailed account of the status of international law in Poland: A Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* (Warszawa 2006), M Masternak Kubiak, *Przestrzeganie prawa międzynarodowego w świetle Konstytucji Rzeczypospolitej Polskiej* (Krakow 2003), M Brzezinski, L Garlicki, 'Judicial review in Post-communist Poland: the Emergence of a Rechtsstaat?' 13 *Stanford Journal of International Law* 15 (1995), Krzeminska-Vamvaka (n 21 above) 228 et seq.

### ***III.2. Positive and negative obligations***

There are some doctrinal fears commonly associated with horizontal effect, like the development of a parallel judge-made system of civil law or violation of private autonomy by attempts to hold individuals to the same standards as the state.

As already mentioned, the Polish horizontal effect theory distinguished positive and negative obligations to respect and protect fundamental rights. Individuals are under negative obligation to protect fundamental rights, i.e. obligation not to interfere with the rights of others, whereas the state is under both negative and positive obligation, i.e. obligation not to interfere but also to undertake positive measures to guarantee fundamental rights.

This distinction has been based on a comparison of Articles 30 and 31 (2) of the Polish Constitution. The former states that “[e]veryone shall respect the freedoms and rights of others”, whereas the latter that “[t]he respect and protection [of the person’s dignity] shall be the obligation of public authorities”. While the first sentence suggests that individuals are as a matter of rule bound by constitutional provisions on fundamental rights and freedoms, the second sentence points to the state as the guarantor of those rights and freedoms. The distinction between positive and negative obligations has been based on a different wording: respect and protect. The former is said to encompass negative obligation, the latter – positive one.<sup>78</sup> An important proviso to the theory of positive and negative obligations is that only those constitutional provisions whose wording is sufficiently clear and precise can impose obligations on individuals. The constitutions typically contain a number of provisions which are general in nature. For the sake of legal certainty only those provisions which are clear and unambiguous can place obligations upon individuals.<sup>79</sup>

The approach of differentiating positive and negative obligations is a distinguishing feature of the Polish horizontal effect theory as compared to its German counterpart.

### ***III.3. Horizontal effect and constitutional review of laws – margin of appreciation granted to courts***

Another way of defining the boundaries of horizontal effect is to look at the scope of margin of appreciation granted to the ordinary courts. This is how horizontal effect can be

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<sup>78</sup> Wojtyczek (n 73 above) 410.

<sup>79</sup> Krzeminska-Vamvaka (n 21 above), 157-8.

distinguished from challenges to the constitutionality of law. In the constitutional review fundamental rights serve as signposts against which constitutionality of law is judged. Constitutional review cases are not – as a matter of principle – horizontal effect cases. Horizontal effect cases are typically cases adjudicated by civil courts, in which fundamental rights serve either as a direct basis of a civil law claim (direct horizontal effect) or as guidelines considered in the application and interpretation of law (most notably of general clauses or equivocal terms – indirect horizontal effect). The review of constitutionality might concern legal acts which ‘provoke’ conflicts of fundamental rights. Yet, the constitutional review presupposes that the law is already in place, i.e. the legislator balanced the conflicting rights and decided how the scale tips. The role of constitutional court is to review the legislator’s value choice. There is no horizontal effect in such a case, since the civil court has no ‘margin of appreciation’, no discretion in balancing the conflicting rights, i.e. it applies law as it stands or – shall the Constitutional Court decide it is unconstitutional – follows the decision of the Constitutional Court.<sup>80</sup>

From that perspective horizontal effect is about a margin of discretion enjoyed by civil courts in balancing the fundamental rights. Such a margin of discretion is typically built into general clauses or equivocal terms. Normally, the use a general clause or equivocal term means that the legislator did not take a decision on the scope of fundamental rights and left it to the civil courts to decide on the case-by-case basis. Yet, depending on the system of constitutional review in a particular country, sometimes cases adjudicated by the Constitutional Court will be horizontal effect cases. This is the case in Germany, for example, where the constitutional complaint can be lodged against a judgment of a civil court. In such a case the Constitutional Court does not review the constitutionality of law but its interpretation by the civil court. The law remains intact but the Constitutional Court corrects its interpretation if the civil court did not sufficiently consider fundamental rights.<sup>81</sup>

In Poland, for example, it is not formally possible to lodge a constitutional complaint against a court judgment. However, the Polish Constitutional Court would sometimes issue so-called interpretative judgments. One of the most prominent cases of recent years was a judgment concerning state liability. The Constitutional Court upheld the provision of Article 417 of the

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<sup>80</sup> Ibid, 155-6.

<sup>81</sup> Ibid 156.

Polish Civil Code striking down its interpretation as established by the civil courts whereby the fault of the state agent confirmed in criminal or disciplinary proceedings was a condition for state liability.<sup>82</sup>

Interestingly, the lack of a possibility to challenge a court judgment without challenging the legal basis upon which it was issued, i.e. the lack of possibility to challenge the judicial interpretation of law, became an issue before the ECtHR. In *Szott-Medynska v Poland* the ECtHR held that the Polish model of constitutional complaint was characterised by a limitation as to its scope in that it could only be lodged against a statutory provision and not against a judgment or administrative decision. Because an erroneous application or interpretation of law could not be challenged as such, the ECtHR held that the Polish model of constitutional complaint could only be regarded as an effective remedy within the meaning of Article 35 (1) ECHR with regard to challenges where the alleged violation of the Convention resulted from the application of an unconstitutional provision of national legislation.<sup>83</sup> In 2004 the Polish Civil Code and the Civil Procedure Code were amended and included the possibility to claim compensation for illegal judgment or administrative decision.<sup>84</sup>

The system is still new and there has been much discussion with regard to its functioning.<sup>85</sup> For the analysis in this paper it is important because it demonstrates a very crucial aspect of the effective protection of fundamental rights in their horizontal dimension. It will be demonstrated below in the discussion on horizontal effect in the EU law that sometimes the

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<sup>82</sup> Judgment SK 18/00 of the Constitutional Court of 4 December 2001, available at <<http://www.trybunal.gov.pl>>.

<sup>83</sup> Application no. 47414/99 by Dorota Szott-Medynska and others against Poland; see also Application no. 2428/05 by Andrzej Wypych against Poland; Application no. 8812/02 by Zbigniew Pachla against Poland; all available at <<http://www.echr.coe.int/echr>>.

<sup>84</sup> Compensation can be claimed from the state on the basis of a separate complaint to establish illegality of a final judgment (Article 417<sup>1</sup> of the Civil Code and 424<sup>1-12</sup> of the Civil Procedure Code). But see also the judgment of the Constitutional Tribunal SK 77/06 of 1 April 2008 concerning the condition of finality of a judgment subject to complaint. See also M Safjan, K J Matuszyk, *Odpowiedzialność odszkodowawcza władzy publicznej* (Warszawa 2009).

<sup>85</sup> See for example: T Ereciński, Skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia, in A Nowicka (Red.) *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu* (Poznań 2005) s. 1010; Ł Błaszczak, 'Dwie nowe skargi, Rzeczpospolita z 31 stycznia 2005'; T Zembrzuski, 'Skarga o stwierdzenie niezgodności z prawem pełnomocnego orzeczenia jako instrument dochodzenia od skarbu państwa naprawienia szkody wyrządzonej wydaniem orzeczenia sądowego w postępowaniu cywilnym', *Studia Juridica XLVII/2007*, s. 307; P Judek, 'Skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia – wybrane aspekty prawne', *Monitor Prawniczy* 2006, nr 19, s. 1027; J Gudowski, 'Węzłowe problemy skargi o stwierdzenie niezgodności z prawem prawomocnego orzeczenia', *Przegląd Sądowy* 2006, nr 1, s. 3; P Pogonowski, 'Skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia w postępowaniu cywilnym. Problemy podstawowe', cz. 1, *Rejent* 2005, nr 10, s. 22; W Sanetra, 'Uwagi o skardze o stwierdzenie 16 niezgodności z prawem prawomocnego orzeczenia – ze szczególnym uwzględnieniem spraw z zakresu prawa pracy', *Przegląd Sądowy* 2005, nr 9, s. 3.

controversy surrounding horizontal effect is actually a matter of choice or accessibility of specific types of legal actions.

## IV. EU LAW

### *IV.1. Horizontal effect in the ECJ's case law*

Horizontal effect is not a novelty in the EU law. The term as such is not commonly used, though. It has never been used by the ECJ which determines whether private parties are bound by the TEC (now TFEU) provisions concerning common market fundamental freedoms or how to balance conflicting fundamental rights and CMFFs.

Many of the landmark horizontal effect cases concerned rules of sporting associations. In *Bosman*<sup>86</sup> the ECJ invalidated two kinds of rules laid down by football organisations. On the one hand it held that Article 48 TEC precluded the application of transfer rules under which a footballer who was a national of one MSs could not, on the expiry of his contract with a club, be employed by a club of another MS unless the latter club had paid to the former a transfer fee. Further, the ECJ invalidated rules whereby football clubs could field only a limited number of players who were nationals of other MSs. In *Lethonen*<sup>87</sup> the Court invalidated the rules of basketball associations whereby a basketball club could not field players from other MSs, if they were transferred after a specified date – earlier than the date which applied to transfers of players from certain non-member countries. *Walrave*<sup>88</sup> concerned a rule of international cycling union that pacemaker and stayer should be of the same nationality.

By invalidating the rules of sporting organisations the ECJ established a horizontal effect of the freedom of movement of persons. The nature of entities involved (sporting associations laying down rules of general application) made it difficult to draw any general conclusions on the admissibility of horizontal effect in the EU law.<sup>89</sup> It has been argued, therefore, that the horizontal effect of freedom of movement of workers understood as prohibition to impose restrictions was limited and applied only to non-governmental regulatory bodies.<sup>90</sup> Review for conformity with EU law would be then similar to the review of law enacted by state authorities.<sup>91</sup>

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<sup>86</sup> *Bosman* (n 6 above).

<sup>87</sup> *Lethonen* (n 6 above).

<sup>88</sup> *Walrave* (n 6 above).

<sup>89</sup> See for more details Ferreira, Krzeminska-Vamvaka, Russo (n 13 above).

<sup>90</sup> Term used by A Dashwood, 'Viking and Laval: Issues of horizontal direct effect', in Barnard (n 19 above), 527.

<sup>91</sup> J B Cruz, 'Free movement and private autonomy' 24 *European Law Review* (1999) 603 et seq, in particular 618.

Differently, the horizontal effect of freedom of movement of persons understood as prohibition to discriminate has been well established and remained undisputed. *Angonese*<sup>92</sup> is the main example here. The ECJ held that Article 39 TEC precluded employers from requiring that candidates for a job provided evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a MS.

Cases like *Schmidberger* or *Commission v France* are different because they concerned state liability for actions of private individuals. Nevertheless, the underlying relation between private individuals and the conflict between fundamental right to freedom of speech and the freedom of movement of goods were crucial to classify those cases as horizontal effect cases (indirect horizontal effect through state protective duties). *Schmidberger* is the first case in which the ECJ spoke of balancing the fundamental rights and common market fundamental freedoms.<sup>93</sup>

*Viking Line* brings some changes, most notably concerning the alleged special status of quasi-legislative organisations. In most part it confirms the settled case law but the controversy relates to the applicability of common market fundamental freedoms to collective action and the balancing of the right to strike and freedom of establishment. The opinion of the AG goes much further on the concept of horizontal effect in the EU law.

#### ***IV.2. Applicability of the TFEU (ex TEC) provisions on fundamental freedoms to collective action***

The defendants in *Viking Line* – the trade unions (ITF) – as well as the governments of Denmark and Sweden claimed that collective action fell outside the scope of Article 43 TEC. They submitted that the right of association, the right to strike and to impose lock-outs fell outside the scope of Article 43 TEC because of the lack of Community (now EU) competence to regulate those matters as per Article 137 (5) TEC or, alternatively, due to the fact that they were fundamental rights.<sup>94</sup> The ECJ acknowledged MSs' competence, pointed out, however, that according to settled case law the exercise of competence exclusive to MSs must nevertheless comply with Community (now EU) law.<sup>95</sup> In relation to the applicability of fundamental rights to

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<sup>92</sup> *Angonese* (n 6 above).

<sup>93</sup> Another “pioneer” was *Omega (Omega Spielhallen- und Automatenaufstellung-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, ECJ Case C-36/02 [2005] 1 CMLR 5); See also: J Krzeminska, Free Speech Meets Free Movement. Impact of Fundamental Rights on Internal Market Law, ZERP Diskussionspapier 3/2005.

<sup>94</sup> *Viking Line* (n 14 above), para 39 and 42.

<sup>95</sup> Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, para 29.

the TEC provisions on fundamental freedoms, the ECJ referred to a newer line of case-law recognizing that the exercise of fundamental rights did not fall outside the scope of the TEC provisions on fundamental freedoms and that the fundamental rights and common market fundamental freedoms had to be reconciled.<sup>96</sup>

Also the AG referred to judgments in *Schmidberger*<sup>97</sup> and *Omega*<sup>98</sup> and pointed out that social policy provisions could and should be reconciled with those on freedom of movement.<sup>99</sup> The AG elaborated that neither the freedom of movement nor the right to associate nor the right to strike were absolute and nothing in the Treaty suggested that the social policy objectives took precedence over those pertaining to the proper functioning of the common market. The AG concluded that restrictions on freedom of movement based on social policy objectives did not render the provisions on freedom of movement inapplicable.<sup>100</sup>

#### ***IV.3. Fundamental rights as a source of horizontally enforceable obligations***

Another argument put forward by the trade unions in *Viking Line* was that Article 43 TEC did not impose obligations on them because it concerned public measures and that they were private legal persons with no regulatory powers. *Viking Line*, on the other hand, submitted that it had to be allowed to rely on Article 43 TEC because the trade unions had an actual capacity to interfere with its rights to freedom of movement.<sup>101</sup>

The ECJ was very clear and straightforward in that regard and held by reference to the established line of case law that the TEC provisions on fundamental freedoms were a source of horizontally enforceable rights and obligations, i.e. they imposed obligations on individuals which other individuals could enforce. The Court repeated the so-called *effet utile* argument in favour of such interpretation stressing that it would run counter to the objectives of the common market if public obstacles to fundamental freedoms could be replaced by private ones.<sup>102</sup> Further, the ECJ referred to the so-called textual argument and stated that also those TEC provisions

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<sup>96</sup> *Viking Line* (n 14 above), para 43-7.

<sup>97</sup> *Schmidberger* (n 11 above).

<sup>98</sup> *Omega* (n 93 above).

<sup>99</sup> AG Opinion *Viking Line* (n 14 above), para 23-4.

<sup>100</sup> *Ibid*, para 23.

<sup>101</sup> *Ibid*, para 29.

<sup>102</sup> *Viking Line* (n 14 above), para 57.

which were formally addressed to MSs could confer rights on individuals who had an interest in compliance with the obligations thus laid down.<sup>103</sup>

Also for the AG the question of horizontal effect was the question of whether the TEC provisions on fundamental freedoms could impose obligations on private parties.<sup>104</sup> Those obligations are a flip side of the individual rights. A similar approach to horizontal effect has been developed in Poland where the constitutional theory distinguished positive and negative obligations. It has been suggested that a similar distinction could be applied in the EU law.<sup>105</sup>

#### ***IV.4. Quasi-public organisations and horizontal effect after Viking Line***

One of the most important statements in *Viking Line* was that the horizontal enforceability of fundamental freedoms was not only limited to quasi-public organisations exercising regulatory powers.<sup>106</sup> The Court stated that “*there is no indication in that case law (Walrave, Bosman etc. – addition JKV) that could validly support that view*”.<sup>107</sup> Such an explicit statement is important because it suggests an end to the distinction between categories of individuals that could be subject to TEC obligations concerning fundamental freedoms. Like that the horizontal enforceability of fundamental freedoms is generalised as applicable across the board to all private bodies regardless of their status or competences. The focus is rather on the ability of private body to effectively impose restrictions. In any case the distinction concerned horizontal effect of fundamental freedoms understood as prohibitions to impose restrictions because the horizontal effect of fundamental freedoms understood as prohibitions to discriminate was already firmly established and undisputed.

*Viking Line* is also different from cases concerning rules of sporting associations.<sup>108</sup> It is a boycott case. Trade unions are of course organizations regulating paid labour collectively but in *Viking Line* their primary goal was to prevent the relocation of a company (and not to impose rules on a specific sector of business). In cases like *Bosman*, *Lethonen* or *Walrave*, the ECJ was scrutinizing the rules of sporting organizations for conformity with common market fundamental freedoms. In that sense those rules were treated as if they were state rules subject to review for

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<sup>103</sup> Ibid, para 58.

<sup>104</sup> AG Opinion *Viking Line* (n 14 above), para 31 et seq.

<sup>105</sup> Ferreira, Krzeminska-Vamvaka, Russo (n 13 above).

<sup>106</sup> *Viking Line* (n 14 above), para 64.

<sup>107</sup> Ibid, para 65.

<sup>108</sup> See for example views presented by Davies (n 19 above), 137.

conformity with European law. Because of the power of those organizations to enact generally applicable rules the scrutiny process basically resembles the process applied to rules enacted by state authorities. Although this aspect was present in *Viking Line* (the ECJ looked at the ITF rules on flags of convenience), the main focus of the case was a head on balancing of the right to strike and the freedom of establishment.

#### ***IV.5. Horizontal effect of freedom of movement of goods after Viking Line***

The ECJ reinforced its conclusions on horizontal effect of fundamental freedoms by reference to two cases concerning a conflict between the right to freedom of speech and the freedom of movement of goods: *Commission v France* and *Schmidberger*.<sup>109</sup> As much as *Schmidberger* is a relatively new case (decided after *Walrave*, *Bosman*, *Angonese* etc.), *Commission v France* preceded all those cases and such reference has never been made. So much that there was a firm view among legal scholars that freedom of movement of goods, unlike the freedom of movement of persons or services, was not horizontally effective. This was due to the fact that the type of restrictions that could be imposed on freedom of movement of goods could by their nature only result from a state action. *Schmidberger* and *Commission v France* were however classified as horizontal effect cases (indirect effect through state protective duties). ECJ's statement in *Viking Line* sheds some new light on the problem and although the Court was not as explicit as the AG in that regard it does seem to follow a similar line namely that those cases are also horizontal effect cases. The fact that the state is a defendant is just a matter of a choice of legal action. It is the underlying relation between individuals that really matters (see below).

These conclusions would be in line with propositions put forward in the legal scholarship that the provisions on freedom of movement of goods could be horizontally enforceable under specific conditions. Milner-Moore claimed that neither the text nor the context of the TEC provisions on freedom of movement of goods was conclusive to assume that only states were the addressees of the relevant obligations.<sup>110</sup> Also the ECJ was not completely silent on this question. In *Dansk Supermarked*, it remarked *obiter* on contracts between individuals running counter to the TEC provisions on freedom of movement of goods:

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<sup>109</sup> *Viking Line* (n 14 above), para 62.

<sup>110</sup> Milner-Moore (n 12 above), available at <<http://centers.law.nyu.edu/jeanmonnet/papers/95/9509ind.html>>.

“It must furthermore be remarked that it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods. It follows that an agreement involving a prohibition on the importation into a member state of goods lawfully marketed in another member state may not be relied upon or taken into consideration in order to classify the marketing of such goods as an improper or unfair commercial practice.”<sup>111</sup>

Although the Court’s statement can be read as an explicit confirmation of horizontal effect of freedom of movement of goods, the case was not really a horizontal effect case. Dansk Supermarked was prevented from selling a special edition of China service produced on the basis of a contract between the Danish company Imerco and a British producer. The contract prohibited parallel imports of substandard pieces to Scandinavian countries. As rightly pointed out by Preedy, Dansk Supermarked was not a party to the contract and the case was a classical review of Danish laws on marketing, copyright and trademarks on the basis of which Danish courts issued injunction prohibiting Dansk Supermarked from selling China services.<sup>112</sup>

Of course, in *Viking Line*, the ECJ has neither acknowledged nor firmly established horizontal effect of the freedom of movement of goods. Certainly a reference to *Commission v France* is just a remote hint. Any further development will depend on what cases are brought before the Court and how are the issues presented to it. Nevertheless, hints, even if remote, suggest that the ECJ might recognise the horizontal enforceability of the Treaty provisions on freedom of movement of goods in cases different than state liability cases. In any case, a much bigger challenge before the ECJ, relating to all freedoms, is to define the limits to horizontal effect (see below).

#### ***IV.6. Balancing the freedom of establishment and the right to strike***

In *Viking Line* the ECJ acknowledged that collective action by trade unions constituted a restriction on freedom of establishment of Viking Line. As per *Schmidberger*, the right to take collective action – as a fundamental right – was considered to be a legitimate interest justifying a restriction of a fundamental freedom. The Court also added that the protection of workers was an overriding reason of public interest justifying a restriction of a fundamental freedom.<sup>113</sup>

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<sup>111</sup> Case 58/80 *Dansk Supermarked v Imerco* [1981] ECR 181, para 17.

<sup>112</sup> Preedy (n 6 above), 27-8.

<sup>113</sup> *Viking Line* (n 14 above), para 77.

The ECJ stated that the common market was not only an area in which the obstacles to the free movement of goods, persons, capital and services were abolished but that the Community (now EU) pursued in parallel other goals. Article 2 TEC listed Community's tasks which constituted a mix of economic and social goals (*inter alia* high level of employment and social protection). As the Court put it "*the Community has not only an economic but also a social purpose*".<sup>114</sup> This is the reason why common market fundamental freedoms have to be balanced against the social policy objectives.<sup>115</sup>

The objective of protecting the rights of workers would not justify the restriction on fundamental freedom if the jobs or conditions of employment were not jeopardised or under serious threat. The ECJ left it for the referring court to establish.<sup>116</sup> The second step for the national court would be to verify whether the collective action was indeed suitable to achieve the objective pursued and did not go beyond what was necessary to achieve that objective.<sup>117</sup> Whereas the ECJ stated that collective action as such might be a way of protecting workers' rights it would have to be established whether trade unions exhausted other means at their disposal (less restrictive of freedom of establishment).<sup>118</sup> The Court pointed out that the policy of opposing the re-flagging of a vessel to a state other than that of nationality of a beneficial owner could not be objectively justified as such. Further, in reply to the claim that the purpose of this policy was also to protect the workers, the ECJ pointed out that the solidarity command applied regardless of whether the relocation might have had adverse effects on the working conditions (e.g. relocation to a country with higher standards).<sup>119</sup>

Similarly the AG recognised the trade unions' right to take collective action protecting the workers in one MS from the effects of relocation to another one. He concluded that Article 43 TEC did not prevent such action. In that regard the national courts should ensure that intra-Community (now EU) relocations were not treated less favourably than relocations within national borders.<sup>120</sup> Further, however, the AG concentrated more on the effects of collective action on the common market. He argued that the coordinated policy of collective action by a trade union or association of trade unions was prohibited under Article 43 TEC if by restricting

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<sup>114</sup> Ibid, para 79.

<sup>115</sup> Ibid, para 79.

<sup>116</sup> Ibid, para 81-3.

<sup>117</sup> Ibid, para 84.

<sup>118</sup> Ibid, para 86-7.

<sup>119</sup> Ibid, para 88-9.

<sup>120</sup> AG Opinion *Viking Line* (n 14 above), para 65.

the right to freedom of establishment it had the effect of partitioning the labour market and impeding the hiring of workers from one MS in order to protect those in another one.<sup>121</sup>

It seems therefore that in the AG's opinion the admissibility of collective action should depend on whether the undertaking has the possibility to exercise their right despite the objections raised by the trade unions and that the trade unions in different countries enjoy the freedom to decide whether to support a particular action. In *Viking Line* the AG noted that the policy of coordinated collective action could be abused in a discriminatory manner if all national trade unions were obligated to support the action. This would partition the market in the sense of giving a particular trade union the power to impose its conditions by eliminating the right of other unions to freely choose whether to participate in the collective action. Any national trade union could like that effectively obstruct the re-location if it so wanted.<sup>122</sup>

#### ***IV.7. Calls for boycott as a possible restriction of freedom of movement***

In *Viking Line* the threat of strike obstructed the right to freedom of establishment. It is a boycott case similar to boycotts directed against services or products from other EU countries. The basic legal framework to assess those cases will be the same: head on balancing of the fundamental right with the common market fundamental freedom. The outcome of the balancing process will depend on the extent of justifiable restrictions.

There are quite a few horizontal effect cases concerning calls for boycott in Germany. The German courts tried to work out a framework to evaluate the allowable restrictions on freedom of speech, when it conflicted with commercial interests. A call for boycott comes within the realm of protection of freedom of speech in Article 5 GG, although the issue was not uncontroversial among legal scholars.<sup>123</sup> Cases like *Photokina*,<sup>124</sup> *Denkzettel-Aktion*<sup>125</sup> or *Blinkfür*<sup>126</sup> set the limits and requirements of constitutional protection of calls for boycott. Two questions will determine whether protection should be afforded: (1) does a call for boycott contribute to a debate on issues of public concern (public debate test is a general test applied

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<sup>121</sup> Ibid, para 62 et seq.

<sup>122</sup> Ibid, para 71-2.

<sup>123</sup> For further analysis see Krzeminska-Vamvaka (n 21 above), 193 et seq.

<sup>124</sup> BGH, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 1983, 467 – Photokina.

<sup>125</sup> BGH, GRUR 1980, 242 – Denkzettel-Aktion.

<sup>126</sup> BVerfGE 25, 256 – Blinkfür.

across the board to all freedom of speech cases<sup>127</sup>) and (2) is it suited to constrain the addressees' freedom to decide. Both the person to whom the call is directed as well as the one who is boycotted have to be able to act freely. Boycotts exerting commercial pressure will not be permitted. The main example here is the *Blinkfür* case. *Blinkfür* was a small weekly newspaper advertising East German radio and TV programs. Powerful Springer publishing house sent a circular to its dealers and distributors instructing them not to sell papers or magazines which would advertise East German programmes. Springer threatened to bar them from selling its newspapers, should they decide not to comply.<sup>128</sup> The Federal Constitutional Court held that by exerting commercial pressure Springer deprived the addressees of its call for boycott of their freedom to decide freely. A call for boycott – the Court held – which advanced competitive objectives merited no protection under Article 5 GG, if it went beyond the intellectual struggle of opinions and used means which practically deprived its addressees of the possibility to decide freely whether or not to follow the call. The Constitutional Court held that the call for boycott came within the ambit of Article 5 GG if it was an expression of opinion and constituted a contribution to a public debate on issues of public concern.<sup>129</sup> There is a distinguishing line between the *Blinkfür*- and *Lüth*-like boycott. The constitutional protection covers boycotts which persuade by using intellectual arguments and attempt to influence the audience without limiting its ability to draw conclusions freely and in the absence of economic pressure.<sup>130</sup>

In the context of the EU law, one could therefore imagine a case in which an influential company in one MS calls for boycott of products or services from another MS. If it exerts commercial pressure, i.e. has an actual power of forcing other companies to follow thereby limiting their freedom to decide, such a call would fall outside the realm of freedom of expression. Further, if the addressees of the call preserve their freedom to decide whether to follow or not, the person against whom the boycott is directed would also preserve the ability to continue their business (in our example the foreign supplies would carry on). This, as it seems, would fit within the reasoning of the AG in *Viking Line* (freedom of trade unions to join collective action). Sanctioning of the call for boycott will depend on whether the person calling

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<sup>127</sup> See BVerfGE 7, 198 – Lüth.

<sup>128</sup> BVerfGE 25, 256; for English translation of the judgment see DP Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> edn, London 1997), 372; online access <<http://www.oefre.unibe.ch/law/dfr/bv025256.html>>.

<sup>129</sup> BVerfGE 25, 256, available at <<http://www.oefre.unibe.ch/law/dfr/bv025256.html>>.

<sup>130</sup> Ibid, available at <<http://www.oefre.unibe.ch/law/dfr/bv025256.html>>.

for boycott has an actual capacity to obstruct the free flow of goods and services across the borders. If, despite the call, the flow of goods and services remains possible, the call would come within the realm of freedom of speech and would trump the fundamental freedom in the process of balancing. Similar standards can be applied to the freedom of assembly and association.

Some authors classify strike as actual (as opposed to legal) act (*tatsaechliches Handeln*). The same group of acts includes also calls for boycott or assemblies blocking the free flow of goods or services. Those authors differentiate between legal and actual restrictions of fundamental freedoms (by analogy also: *de facto* and *de jure* violations of fundamental rights). Legal restrictions presuppose that private individuals set generally binding or contractual norms which are a source of restrictions.<sup>131</sup> Following this reasoning *Viking Line* would be the first case in which actual restriction by a private individual concerned a freedom other than the freedom of movement of goods. However, the distinction between actual and legal actions does not seem convincing. Indeed, in *Schmidberger* and *Commission v France* the individuals created actual barriers to market access. But they did so exercising their rights (in both cases the right to freedom of expression and assembly). Strike or call for boycott will also qualify as exercise of fundamental rights forcing thereby, like in *Viking Line*, a head on balancing with fundamental freedoms.

#### ***IV.8. Freedom of movement and competition rules***

The opponents of the horizontal effect of common market fundamental freedoms point out that such construction is not necessary in view of the fact that the Treaty provides for rules which tackle private obstacles to intra-EU trade. What is meant by that are competition rules. In *Viking Line* AG Poiares Maduro mentions the relation between CMFFs and competition rules.<sup>132</sup> He points out that both sets of rules play a crucial role in achieving the free movement of goods, services, persons and capital under conditions of fair competition (purpose set out in Article 3 TEC).<sup>133</sup> The AG admits that the main paradigm of a case under freedom of movement provisions is a case against a MS (vertical effect), whereas competition rules have horizontal effect. This, however, does not validate an argument that the TEC precludes horizontal effect of

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<sup>131</sup> Preedy (n 6 above), 193 et seq.

<sup>132</sup> AG Opinion *Viking Line* (n 14 above), para 34.

<sup>133</sup> *Ibid*, para 32.

freedom of movement provisions.<sup>134</sup> Indeed, competition rules target one type of private impediment to free and fair flow of goods and services, whereas freedom of movement provisions a different type. It is also possible to consider competition rules as *lex specialis* to the freedom of movement law.

#### ***IV.9. Rationale behind horizontal effect of fundamental freedoms in the EU case law***

In the EU law there are three main rationales behind horizontal effect.<sup>135</sup> The main one is the *effet utile* rationale. It came to the forefront of the ECJ's and AG's reasoning in the *Viking Line* case, but it has been applied in numerous cases before. According to this rationale the Treaty provisions concerning fundamental freedoms place obligations on private individuals because they are in a position to impede the exercise of fundamental freedoms and thereby obstruct the effective functioning of the common market. Some authors have argued against the principle of effectiveness and pointed out that only the MSs and not private individuals should be under obligation to guarantee fundamental freedoms and the effective functioning of the common market. The main rationale behind this argument is that individuals should not be subject to obligations which are too vague placing thereby onerous burden on them (Treaty provisions like the provisions of national constitutions are by definition general and have to be concretised in secondary legislation). However, according to the well-established line of case law the Treaty provisions which are sufficiently clear and unconditional and do not require any implementation measures are directly effective.<sup>136</sup> Further, the distinction between positive and negative obligations might also help overcome the concerns about placing onerous burden on individuals as they would be mostly bound by an obligation not to interfere with the common market fundamental freedoms of other individuals.

The second rationale is the text of the Treaty provisions on fundamental freedoms. They do not specify *who* has the obligation to guarantee these freedoms. This open wording suggests that not only MSs but also private individuals are bound. Another argument against horizontal effect of fundamental freedoms relates to the fact that some restrictions upon fundamental freedoms can be based on public policy grounds which cannot be pursued by private individuals.

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<sup>134</sup> Ibid, para 34.

<sup>135</sup> For an in-depth analysis see Ferreira, Krzeminska-Vamvaka, Russo (n 13 above).

<sup>136</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

In *Bosman*, for example, UEFA claimed that horizontal effect of fundamental freedoms would make relevant Treaty provisions more restrictive in relation to individuals than in relation to MSs which alone can apply limitations based on grounds of public policy, public security and health.<sup>137</sup> The ECJ did not accept this view and held that

"[t]here 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."<sup>138</sup>

The third rationale is the uniformity of application of EU law. It means that obstacles to fundamental freedoms are removed uniformly in all Member States regardless of whether they originate in public or private conduct (the same obstacle might be of different nature (public or private) in two different MSs).

In *Viking Line* both the ECJ and the AG opted for the *effet utile* justification. The ECJ simply referred to its previous case law. The AG was a bit more elaborative by sketching the main legal elements of the common market. He started from emphasising the commonalities between the rules on freedom of movement and competition. Both sets of rules protect market participants by empowering them to “*challenge certain impediments to opportunity to compete on equal terms in the common market*”.<sup>139</sup> As a matter of principle those two sets of rules tackle two kinds of impediments to the achievement of a functioning common market: those originating in state action and those coming from private undertakings. As a matter of rule, therefore, the competition rules are applicable horizontally while the freedom of movement provisions – vertically.<sup>140</sup> In the AG’s opinion, however, this basic assumption of the common market does not validate an argument that TEC precludes the horizontal effect of fundamental freedoms. He puts it this way:

“On the contrary, such horizontal effect would follow logically from the Treaty where it would be necessary in order to enable market participants throughout the Community to have equal opportunities to gain access to any part of the common market.”<sup>141</sup>

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<sup>137</sup> *Bosman* (n 6 above), para 85.

<sup>138</sup> *Ibid*, para 86.

<sup>139</sup> AG Opinion *Viking Line* (n 14 above), para 33; see also AG Opinion *Marks & Spencer* (n 95 above), paras 37 - 40.

<sup>140</sup> AG Opinion *Viking Line*, in *ibid*, paras 34-5.

<sup>141</sup> *Ibid*, para 35.

#### ***IV.10. Direct and indirect effect in the EU law***

Direct horizontal effect means that the cause of action is based directly on the Treaty provisions concerning fundamental freedoms. Indirect effect, on the other hand, means that the European fundamental rights and/or common market fundamental freedoms influence the application and/or interpretation of the implementing EU or national legislation in disputes between private individuals. In the case of indirect effect not every instance of Treaty-conform interpretation will constitute horizontal effect. As mentioned above there has to be a distinction between regular review of constitutionality and cases in which the legislation leaves the courts (European or national acting as European) a margin of appreciation to balance the conflicting rights. A ‘regular’ review of constitutionality would take place when the implementing EU legislation would have to be invalidated. In the case of indirect horizontal effect the law (implementing EU or national legislation) remains intact (see above).

Further, the AG Poiares Maduro in *Viking Line* mentioned two alternative forms of horizontal effect. One is state protective duty, another – judges’ obligation to consider fundamental rights when they adjudicate in private law matters.<sup>142</sup> Both these forms have been mentioned above in the analysis of the German horizontal effect theory, including their drawbacks. However, the proposition of the AG is rather an alternative for those systems which would feel more ‘comfortable’ with such a construction instead of plainly recognising the horizontal effect of fundamental rights or freedoms.

In *Viking Line* the AG made a very important statement with regard to the distinction between different forms of horizontal effect. He stated that “*with regard to the demarcation of the respective spheres of rights, indirect horizontal effect may differ from direct horizontal effect in form; however, there is no difference in substance.*”<sup>143</sup> He draws a distinction line between the formal matter of choice of legal action and substantive matter of horizontal effect. The details of his position will be discussed below and although it concerns EU law, the arguments are valid for any discussion on horizontal effect of national constitutional rights.

For example, similar arguments were put forward by Kumm with regard to the horizontal effect of German constitutional rights. He claims that direct and indirect effect are merely

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<sup>142</sup> Ibid, para 39.

<sup>143</sup> Ibid, para 40.

alternative but substantively equivalent constructions of legal problems. He puts it in the following way:

“The practical difference between indirect and direct effect (...) is negligible. It concerns merely the formal construction of the legal issue and has no implications whatsoever for questions relating to substantive outcomes or institutional competence. Not only is private law in Germany already fully constitutionalized. If, in a surprise move, the constitutional legislator were to amend the Constitution and explicitly determine that constitutional rights are also applicable to the relationship between individuals, *it would change practically nothing.*”<sup>144</sup>

Kumm’s proposition means that both forms of horizontal effect are interchangeable in the substantive sense, i.e. in the sense of delimiting the spheres of individual rights. Direct and indirect effect are constructions of a legal problem. They do not as such predefine the outcome of the underlying process of balancing rights. Much will of course depend on the attitude of a particular legal system towards the issue of horizontal effect. If, let’s say, only an indirect effect were admissible, similar outcomes of balancing fundamental rights could be expected if that same system allowed only for direct effect, or both forms for that matter. It is the balancing that matters and not the formal framework within which it is conducted.

The thesis of this paper is that direct and indirect effect should be seen as complementary means of protection of fundamental rights. The indirect effect would be applicable if there were statutory measures for protection of fundamental rights (but incorporating general clauses and/or indefinite terms). In the case of no statutory measures the parties could have recourse to direct effect. Of course a system might have a preference for an indirect effect (because it seems less invasive for “separatist” civil lawyers) and prefer for the parties to always introduce their fundamental rights claims through the medium of general clauses. Legal systems should not, however, have an either/or approach to direct and indirect effect. Even if there is a preference for indirect effect or it is simply more common (which is most probably the case given the broad coverage of civil law and its general clauses) there should always be a possibility to base a claim directly on constitutional provisions. This option should be open to parties, if necessary, i.e. if there are no statutory measures that could guarantee the protection of their fundamental rights.

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<sup>144</sup> M Kumm, ‘Who’s Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’, 7 German Law Journal No. 4 (1 April 2006), available at <[http://www.germanlawjournal.com/pdf/Vol07No04/PDF\\_Vol\\_07\\_No\\_04\\_341-370\\_Articles%20Kumm.pdf](http://www.germanlawjournal.com/pdf/Vol07No04/PDF_Vol_07_No_04_341-370_Articles%20Kumm.pdf)> 352.

#### *IV.11. National remedies and horizontal effect case*

EU law does not foresee EU procedures or remedies for private violations of common market fundamental freedoms. Prospective plaintiffs need to turn to national law under the principle of national procedural autonomy. This principle, whereby the MSs are instructed to determine procedures and remedies to guarantee rights granted under EU law, was developed early on by the ECJ. The requirements of equivalence, practical possibility, proportionality, adequacy and effective protection were imposed on national measures in order to ensure the observance of EU law.<sup>145</sup>

The question of remedies for private violations of EU law is not an easy one. One area where the subject has been problematic is competition law.<sup>146</sup> The question of national remedies for private violations of common market fundamental freedoms has not been much explored. Comparative analysis of national remedies available in case of private violation of CMFFs has been recently provided by Reich (Germany, France and England).<sup>147</sup> Reich considered national provisions that could be used if the *Bosman* case were tried in those three jurisdictions. Hence, in Germany § 823(2) of the German Civil Code (BGB) would be applicable (compensation for pure economic loss for negligent breaches of legal norms for protection of individuals). In England the breach of statutory duty could be used and in France Article 1382 of the Civil Code.<sup>148</sup>

The mosaic of national remedies has implications for the general conclusion on the horizontal effect of CMFFs and also fundamental rights in the EU law. Given the differences in the legal systems of MSs and differences in approaches to horizontal effect, the same EU law case might be classified as direct or indirect effect in two different MSs. On the other hand, the admissibility of horizontal effect in the EU law and its enforceability in the MSs under the theory of procedural autonomy, might affect the situation in those countries that were reluctant to recognise horizontal effect in their systems.

Remedies add to the complexity of distinction between direct and indirect effect. On the face of it the distinction based on the existence or absence of statutory measures of protection seems to be clear-cut. Direct effect means that the constitutional rights are direct causes of

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<sup>145</sup> P Craig, G de Burca, *EU Law. Text, Cases, and Materials* (4<sup>th</sup> edn, Oxford 2008) 306 et seq.

<sup>146</sup> N Reich, 'The "Courage" doctrine: Encouraging or discouraging compensation for antitrust injuries?', 42 *Common Market Law Review* (CMLR) (2005) 35.

<sup>147</sup> N Reich, 'Horizontal liability in EC Law: Hybridization of remedies for compensation in case of breaches of EC rights', 44 *CMLR* (2007) 705.

<sup>148</sup> *Ibid*, 709-12.

action. A person can go to court and say e.g.: “Person X violated my fundamental right Y as guaranteed in the Constitution.” Indirect effect, on the other hand, means that plaintiffs have to use an existing private-law cause of action which will then be interpreted in line with fundamental rights. However, on a closer look the classification may become problematic depending on the nature of private law provisions involved in a specific case. Private law, and especially its general clauses, has normally a broad coverage. An indirect effect means, ideally, that a specific private law provision is used for balancing of interests at stake and a separate provision for determining remedies for such violation (e.g. unfair competition law, example of the *Benetton* cases<sup>149</sup>). The distinction becomes less clear-cut when analysed on the basis of cases where the German Federal Constitutional Court established indirect effect and the German Federal Labour Court established direct effect. Considering differences between contract and tort law, still, the classification as direct or indirect effect seems arbitrary. The provision of private law which was indirectly affected by the constitutional right in the *Lüth* judgment (BVerfGE) was Article 826 BGB providing that “*a person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage*”<sup>150</sup>. The construction of legal problem in those cases in which the Federal Labour Court established direct effect is not much different. The BAG held that the prohibition to marry stipulated in the employment contract violated Articles 6 (1), 1 and 2 GG and was thus declared void pursuant to Article 134 BGB (“*a legal transaction which violates statutory prohibition is void, unless a contrary intention appears from the statute*”<sup>151</sup>).<sup>152</sup>

Civil law provides remedies for the violation of fundamental right. If we consider the use of the provision of civil law providing for remedies as the civil law medium through which fundamental rights are introduced into the civil law then every horizontal effect case will be the case of indirect effect. Once again, if it is the underlying process of balancing fundamental rights that is crucial, it should not really matter if the formal construction to conduct the process of balancing is called direct or indirect effect.

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<sup>149</sup> See for example one of the judgments of the German Federal Supreme Court in *Benetton* cases – BGHZ 149, 247 – using §§ 1 (general clause) and 13 (damages and injunction) of the 1909 Unfair Competition Law.

<sup>150</sup> Translation from SL Goren, *The German Civil Code* (Colorado 1994).

<sup>151</sup> Translation from: *Ibid.*

<sup>152</sup> BAGE 4, 274 – *Zölibatsklausel*; the particularity of this employment contract was that its main purpose was to train nursing personnel and thus the employees were supposed to live at the premises of a training facility for a period of two years.

#### ***IV.12. Choice of legal action and the theory of horizontal effect***

As mentioned above, it has been a rather firm view among commentators that the freedom of movement of goods did not entail horizontal effect because only state authorities could enact provisions restricting that freedom. *Schmidberger* and *Commission v France*, both concerning freedom of movement of goods, fit into this view as both cases were state liability cases. Austria and France were to be held liable for actions of individuals. In that sense it was a form of indirect horizontal effect through state protective duties. The state failed to adequately protect individual's freedom of movement rights from restrictive action of another individual. As stated above the ECJ in *Viking Line* seems to change this common view and the AG Poiares Maduro adds his substantial share to that.

On a closer look it seems indeed that it is more the choice of legal action rather than the actual situation that gave rise to the legal dispute that forces a classification as direct or indirect effect (indirect effect through state protective duties). Both in *Schmidberger* and *Commission v France* it does not seem unthinkable that the legal action could have been brought against demonstrators (in *Commission v France* not by the Commission but by the Spanish farmers against the French ones and in *Schmidberger* against Transitforum Austria Tirol). In such a case the arguments of the courts (the national court or the ECJ if the reference for preliminary ruling was made) concerning the freedom of movement and freedom of expression and assembly would have been exactly the same. The cases were brought against the state because in both of them state was involved by action or inaction (in *Schmidberger* the authorities authorised the demonstration and in *Commission v France* they failed to stop destruction). On the other hand, if in *Commission v France* we did not have a destructive illegal action but a peaceful demonstration, the outcome of the case and indeed its legal classification might have been different. It has been also pointed out by the AG Poiares Maduro that theoretically *Viking Line* could have been a case brought against Finnish authorities for failure to protect Viking Line's rights against the action of trade unions.<sup>153</sup>

In *Viking Line* AG Poiares Maduro refers to the judgment in *Defrenne*<sup>154</sup> in which the ECJ established the horizontal effect of Article 141 TEC although constructed as a duty of

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<sup>153</sup> AG Opinion *Viking Line* (n 14 above), para 40.

<sup>154</sup> Case 43/75 *Defrenne* [1976] ECR 455, paras 35-37 and 40: "the principle of equal pay contained in Article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards these types of discrimination arising directly from

courts.<sup>155</sup> Whether the horizontal effect is established through state protective duties, as a duty of the courts or in the litigation between private parties does not change the substance of the situation which gives rise to a particular dispute. As stated above, to limit the understanding of horizontal effect to state protective duties or duties of the court only, confuses the procedural guarantees of enforcing rights with the substantive determination of their scope of protection.<sup>156</sup> The conclusion that direct and indirect effect are a difference of form and not a difference of substance is not undermined by the fact that some MSs do not allow a constitutional provision to be relied upon by individuals as an independent cause of action in civil proceedings.<sup>157</sup> The type of legal action is a procedural matter not a matter of substance and scope of rights and freedoms at issue.

#### ***IV.13. Exceptionality of horizontal effect***

The thesis on complementarity of indirect and direct effect is strongly linked with the thesis on its exceptionality. It will be necessary in absence of statutory protection measures (direct horizontal effect) or with regard to cases where legislator left to courts a margin of appreciation in the form of general clauses and equivocal terms (indirect horizontal effect). The following example should illustrate the point. One of the leading horizontal effect cases in Germany concerned the application of the right to freedom of expression (freedom to receive information; Article 5 GG) to rent contract.<sup>158</sup> Tenant's wish to install a parabolic antenna in the rented flat was denied by the landlord and then by the civil courts. The Constitutional Court held that to be unconstitutional because it violated tenant's right to receive information. The Court pointed out that the interest of foreigners living in Germany to receive programs from their homeland had to be considered in the balancing of tenant's and landlord's rights. A similar case

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legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public".

<sup>155</sup> AG Opinion *Viking Line* (n 14 above), para 40.

<sup>156</sup> It seems therefore unfounded to claim that state protective duties are better suited than direct horizontal effect to balance fundamental rights (or fundamental rights and freedoms in the EU law context). The process of balancing underlying will be the same. See O Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: a Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (München 2007) 220. It is not quite clear why state protective duties are better suited to balance fundamental rights and freedoms in the EU law, except for a statement that direct horizontal effect presupposes that one of the colliding values (a fundamental right or a fundamental freedom) serves as a starting point and the other as a limitation.

<sup>157</sup> AG Opinion *Viking Line* (n 14 above), para 39.

<sup>158</sup> BVerfGE 90, 2 – Parabolantenne I.

in Poland could have had the same solution but the legal construction applied to balance the colliding interests would have been different. Pursuant to Article 684 of the Polish Civil Code tenant has the right to install in the rented flat electricity, gas, phone, radio and other similar appliances unless it contravenes existing rules or endangers the safety of the building. It is commonly agreed that this article encompasses appliances to receive not only radio but also TV programs. In Poland therefore, the legislator balanced the interests of tenants and landlords. In Germany the same outcome was reached by means of horizontal effect of fundamental rights.

#### ***IV.14. Exceptionality of horizontal effect and impulses for the development of substantive law***

Another good example demonstrating the exceptionality of horizontal effect are the developments concerning emotional advertising in Germany. The category covers advertisements which promote goods by using environmental or social themes.<sup>159</sup> Originally, civil courts developed a very strict approach to this type of advertising. The main rationale was that appeals to compassion or sympathy lacked objectivity and thus distorted competition. They distracted consumers' attention from essential elements which should normally guide their purchasing decision (e.g. price, quality).<sup>160</sup> In the *Tier- und Artenschutz* case a producer of synthetic fur advertised its apparel as animal-friendly fashion for people with morals. The Appellate Court in München held that reference to social or environmental issues was neither vital nor indispensable to advertise the product. The Constitutional Court reversed the judgment holding that the advertiser's right to freedom of expression was not sufficiently considered.<sup>161</sup> Other examples of emotional advertising include a ban of advertisement of sunglasses indicating company's support for an organisation for protection of endangered species,<sup>162</sup> or a ban of beer advertisement indicating that certain amount of money earned from the sale of beer would be

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<sup>159</sup> BVerfGE, NJW 2002, 1187; H Köhler and H Piper, *Gesetz gegen den unlauteren Wettbewerb* (München 2002), Section 1, para 336 et seq.; A Baumbach and W Hefermehl, *Wettbewerbsrecht. Gesetz gegen den unlauteren Wettbewerb* (23<sup>rd</sup> edn, München 2003), Section 1, para 185 et seq.

<sup>160</sup> See for example H Hartwig, "H.I.V. POSITIVE II" – zugleich Abschied vom Verbot "gefühlbetonter Werbung"?, *Wettbewerb in Recht und Praxis* (WRP) 2003, 583; H Schulte-Nölke, CW Busch, and KA Hawxwell, 'National Report: Germany', in R Schulze and H Schulte-Nölke, *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, available at: [http://ec.europa.eu/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/green\\_pap\\_comm/studies/unfair\\_practices\\_en.pdf](http://ec.europa.eu/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/unfair_practices_en.pdf), 19.

<sup>161</sup> BVerfGE, NJW 2002, 1187, available at [http://www.bundesverfassungsgericht.de/entscheidungen/rk20020206\\_1bvr095290.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20020206_1bvr095290.html).

<sup>162</sup> OLG Stuttgart, WRP 1996, 628 – Aktionsgemeinschaft Artenschutz.

devoted to the safekeeping of the African rainforest.<sup>163</sup> But the most controversial case of emotional advertising was the *Benetton* case. It caused a long dispute between two German highest courts: the Federal Constitutional Court and the Federal Court of Justice. In 1995 the Federal Court of Justice banned three advertising campaigns – *HIV Positive I* (posters presenting parts of human body with stamps “HIV Positive”), *Kinderarbeit* (child labour) and *Ölverschmutzte Ente* (oil-polluted duck) holding that they contravened good morals as laid down in the general clause of Section 1 1909 Unfair Competition Law (UCL).<sup>164</sup> The Court held that Benetton exploited consumers’ compassion and sympathy. In 2000, the Federal Constitutional Court reversed the judgment holding that it violated Benetton’s right to freedom of speech because the Court of Justice failed to consider different possible meanings of the message.<sup>165</sup> In 2001, the Federal Court of Justice again banned the *HIV Positive* campaign.<sup>166</sup> This time it ruled that the only decisive meaning of the message was the commercial exploitation of the pain of AIDS patients. The Federal Constitutional Court once more reversed this judgment in 2002 on the grounds that it contravened freedom of speech.<sup>167</sup> After the Benetton saga in 2005 the Federal Court of Justice reversed the judgments of lower courts in *Tier- und Artenschutz* case and held that advertisements which link the promotion of goods with reference to advertiser’s support for social or environmental initiatives were not as such contrary to good commercial practices.<sup>168</sup> Subsequently, in 2006, it also quashed the judgments of lower courts in the rainforest case.<sup>169</sup> Interestingly, the German approach to emotional advertising (different from the approach in other MSs) has been regarded as potential barrier to trade in the EU.<sup>170</sup>

All the cases are examples of a process of constitutionalization of unfair competition law. Courts considered the impact of freedom of speech on general clauses of unfair competition law (it was at the same time a process of recognition of commercial speech in Germany<sup>171</sup>). The constitutionalization of unfair competition law led to the recognition of certain interests, which in

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<sup>163</sup> Procedures before lower courts described in BGH, I ZR 33/04, available at <<http://www.Lexetius.com/2006,3552>>, paras 17-9 – rainforest case.

<sup>164</sup> BGH, GRUR 1995, 598 – Ölverschmutzte Ente; BGH, GRUR 1995, 595 – Kinderarbeit; BGH, GRUR 1995, 600 – HIV Positive I.

<sup>165</sup> BVerfGE, GRUR 2001, 170 = BVerfGE 102, 347 – Benetton Werbung I.

<sup>166</sup> BGH, NJW 2002, 1200 – H.I.V.-Positive II.

<sup>167</sup> BVerfGE, WRP 2003, 633 – Benetton Werbung II.

<sup>168</sup> BGH, Urt. v. 22.9.2005, I ZR 55/02, available at <http://www.bundsgerichtshof.de> - Artenschutz.

<sup>169</sup> BGH, I ZR 33/04, available at <<http://www.Lexetius.com/2006,3552>>.

<sup>170</sup> Schulte-Nölke, Busch, and Hawxwell, ‘National Report: Germany’, in Schulze and Schulte-Nölke (n 160 above), 19-20.

<sup>171</sup> For further analysis see Krzeminska-Vamvaka (n 21 above), 140 et seq.

turn influenced the application and interpretation of law. From this perspective constitutionalization can be seen as a process which provides valuable impulses for the development of substantive law. Given the dynamics of social and economic developments, the constitutional principles and values may offer protection to certain interests which have (not yet) been recognised by substantive law. In that sense constitutionalization of law can be regarded as a complementary instrument ensuring the principle of supremacy of the constitution. Legislator resorts to general clauses if confronted with unforeseeable variety of possible situations.<sup>172</sup> Sometimes only the general clause, leaving to courts a certain margin of appreciation, can capture the variety and dynamics of commercial competition.<sup>173</sup>

Certain categories of unfair competition acts are firmly established by the legislator, which means that the colliding rights and interests have been balanced. In order to challenge the result of that balancing the party concerned has to challenge the constitutionality of law. The Constitutional Court will then re-evaluate the legislator's balancing decision. In other cases legislator leaves the courts a certain margin of appreciation to balance colliding interests (by means of general clauses, equivocal or indefinite terms). Fundamental rights have therefore a twofold function in unfair competition law: negative and positive. The negative function means that judge-made categories of unfair competition acts can be verified for conformity with fundamental rights.<sup>174</sup> In their positive function fundamental rights contribute to the development or concretisation of those categories, which can be codified when laws are amended or overhauled.

The judge-made categories of unfair competition acts facilitate the application of general clauses.<sup>175</sup> According to the Federal Constitutional Court the categories do not contravene constitutional norms if they rightly accommodate conflicting constitutional interests. The courts balance relevant interests in an abstract manner when they form a new category.<sup>176</sup> Within this definitional form of balancing, *ad hoc* balancing on a case-by-case basis takes place in relation to

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<sup>172</sup> HJ Ahrens, 'Die Bentton-Rechtsprechung des BVerfGE und die UWG-Fachgerichtsbarkeit', Juristen Zeitung (JZ) 2004, 765.

<sup>173</sup> Ibid, 765.

<sup>174</sup> In that sense see: A Ohly, 'Das neue UWG – Mehr Freiheit für den Wettbewerb?', GRUR 2004, 893.

<sup>175</sup> HJ Ahrens, 'Die Bentton-Rechtsprechung des BVerfGE und die UWG-Fachgerichtsbarkeit', JZ 2004, 767.

<sup>176</sup> Ibid, 767.

those categories which rely upon vague, ambiguous or value notions as their application is not clearly predetermined.<sup>177</sup>

Consequently, if a civil court judgment implicates the right to freedom of expression, Article 5 GG requires that civil courts consider this fundamental right in the course of interpretation and application of law. Freedom of expression can be limited by general statutes and unfair competition law constitutes such general statute in the sense of Article 5 (2) GG. General laws are to be applied and interpreted in a manner in which their limiting effect upon fundamental rights is limited by those very rights.<sup>178</sup> Fundamental rights serve therefore as limitation to their own limitation (*Wechselwirkung* theory). This means that general clauses of UCL which limit the freedom of speech have to be scrutinised for their conformity with the very right they purport to limit. In principle this exercise is conducted by ordinary courts. Only when the scope of fundamental rights has been erroneously determined or the courts failed to consider fundamental rights at all, will the Constitutional Court intervene.<sup>179</sup> The reference to the fundamental right cannot be a lip service. It is important that the ordinary courts correctly determine its scope of protection.<sup>180</sup>

#### ***IV.15. The boundaries of horizontal effect***

The opponents of the horizontal effect fear that it could potentially set aside national law. It is principally a rephrase of the German argument that horizontal effect could set aside civil law and create a parallel system of judge-made constitutional private law. This would not only contravene the principle of legal certainty but also violate Article 74 (1) GG according to which private law has to be regulated in a statute.<sup>181</sup> Leading to an excess of judicial law making it could potentially disturb the separation of powers between legislature and judiciary. Consequently, the opponents of horizontal effect feel that the independence and immunity of private law from any fundamental rights influences should be safeguarded.

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<sup>177</sup> BVerfGE 102, 347 (364).; BVerfGE, available at [http://www.bundesverfassungsgericht.de/entscheidungen/rk20020206\\_1bvr095290.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20020206_1bvr095290.html)>, para 24.

<sup>178</sup> BVerfGE 7, 198 (206); BVerfGE 61, 1 (10); BVerfGE, GRUR 2001, 1058 (1959); BVerfGE 102, 347 (362).

<sup>179</sup> BVerfGE, GRUR 2001, 1058 (1959); BVerfGE 102, 347 (362).

<sup>180</sup> BVerfGE 7, 198 (206 et seq).

<sup>181</sup> Bleckmann (n 27 above), 236.

However, as rightly stated by AG Poiares Maduro in *Viking Line* “the rules on freedom of movement cannot always be brought into play in proceedings against a private individual.”<sup>182</sup>

He defined the boundaries of horizontal effect in the following manner:

“The provisions on freedom of movement apply to private action that, by virtue of its general effect on the holders of rights of freedom of movement, is capable of restricting them from exercising those rights, by raising an obstacle that they cannot reasonably circumvent (emphasis added).”

This means that the obligation to respect common market freedoms as imposed on private individuals will depend on the ability of the perpetrator to obstruct the functioning of the common market. To use the example of AG Poiares Maduro, an individual shopkeeper who refuses to purchase goods from another MSs is not in a position to obstruct the functioning of the common market because suppliers will still be able to market their products through other channels.<sup>183</sup>

What constitutes an obstacle which cannot be reasonably circumvented has to be established on a case-by-case basis. The test was criticised by some. Dashwood provides a general criticism that “it is difficult to imagine that such a test would facilitate the task of parties or national courts in the future”.<sup>184</sup> More detailed assessment has been provided by Reich who seems to favour the proportionality test applied by the ECJ rather than market partitioning test suggested by the AG.<sup>185</sup> Most notably, Reich points out that Rosella could still operate on the same route (only at less profit than expected).<sup>186</sup>

Further, the AG's test is not exactly a pure market partitioning test. As demonstrated above, it concentrates a lot on the unions’ freedom in the country of relocation to follow the collective action initiated by the union in the country of origin. In that sense it looks at the case as boycott case, where the addressee of the call for boycott should have the freedom to decide whether or not to follow the call. Further, the test seems to introduce something like a *de minimis* principle in freedom of movement law.

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<sup>182</sup> AG Opinion *Viking Line* (n 14 above), para 41.

<sup>183</sup> Ibid, para 42.

<sup>184</sup> Dashwood (n 90 above), 534.

<sup>185</sup> Reich (n 19 above), 153.

<sup>186</sup> Ibid, 154. Reich claims that the partitioning effects may be purely accidental and an unavoidable consequence of a social action if there is desire for it to be effective. He concludes that Viking cannot expect protection against social actions to impede re-flagging, unless this action is in itself disproportionate, like in *Commission v France*. The action in *Viking Line* is in his opinion not disproportionate.

But indeed the "not possible to be reasonably circumvented" test is rather difficult to apply. What if the individual shopkeeper from the AG's example is the only one in the radius of 50 miles? What if these are 20 or 30 miles but the mobility in the area is particularly difficult? Where should we draw a line of what can or cannot be reasonably circumvented? However, the ECJ's "employment jeopardised or under serious threat" test also lacks precision. Are jobs "jeopardised or under serious threat" if the seamen and women face a salary reduction of 30%? What about 20%? Don't the unions have to right to protect workers not just when employment is jeopardised or under serious threat but according to *their own* understanding of the need for protection? Milner-Moore suggested that a possible filter in the market partitioning test could be the qualification of *artificial partitioning* spelled out in intellectual property and competition cases, where the potential for profit is the ground for the decision to partition the markets.<sup>187</sup> For rational discrimination Milner-Moore suggests a sufficiently proximate objection test (a refusal of consignment of fish from state X because of disagreement with that state's foreign policy or laws on beef processing would not be considered proximate, whereas a disagreement with fish practices by majority of producers in state X would be legitimate). Rational discrimination permits private parties to use economic means to express displeasure. It is a response to demands of private autonomy which requires that reasoned objection to products or services is possible.<sup>188</sup> It is thinkable that many of the competition law standards could be applied *mutis mutandis* to horizontal freedom of movement cases.

#### ***IV.16. Effet utile as rationale for horizontal effect of fundamental rights?***

So far the discussion concentrated on the CMFFs. The justification of horizontal effect based on market efficiency criteria may work well for fundamental freedoms. But can the common market *effet utile* argument be applied to fundamental rights in the context of EU law?

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<sup>187</sup> Milner-Moore (n 12 above), available at <<http://centers.law.nyu.edu/jeanmonnet/papers/95/9509ind.html>>; in IP cases see: Case 119/75 *Terrapin v Terranova* [1976] E.C.R. 1039, para 7; Case 3/78 *Centrafarm v American Home Products Corporation* [1978] E.C.R. 1823, para 21; Case 102/77 *Hoffman-La Roche v Centrafarm* [1978] E.C.R. 1139, para 14; in competition cases see: C 25-26/84 *Ford-Werke AG v Commission* [1985] ECR 2725, para 46.

<sup>188</sup> Milner-Moore, in *ibid*, available at <<http://centers.law.nyu.edu/jeanmonnet/papers/95/9509ind.html>>. An important proviso is that consumer choices would be excluded. It is not clear how to treat consumers' associations but due to their ability to artificially partition the common market it would be thinkable to include them.

The principle of effectiveness is an established principle of interpretation of international law.<sup>189</sup> It presupposes a dynamic approach to interpretation which is particularly evident in the context of human rights treaties like the ECHR.<sup>190</sup> In *Soering v UK* the ECtHR held that:

“[t]he object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.”<sup>191</sup>

Similar statements can be found in *Artico v Italy*: “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”<sup>192</sup> The ECtHR adopted a teleological, purpose-oriented approach to interpretation. A vacuum with regard to liability for human rights violations originating in private conduct would therefore contradict the principle of effectiveness.

The horizontal effect of Convention rights has been debated in the past. The case law (especially on Article 8 ECHR concerning the right to private and family life) demonstrates that the ECtHR extended the scope of Convention rights to relations between private individuals. In two judgments in 1979 the ECtHR held that

"Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life."<sup>193</sup>

The same statements were repeated in the later case of *X and Y v the Netherlands* (most commonly quoted as a horizontal effect case under the ECHR) with an important addition referring to relations between individuals:

"These obligations (positive obligations inherent in an effective respect for private or family life – JKV) may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."<sup>194</sup>

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<sup>189</sup> M N Shaw, *International Law* (5<sup>th</sup> edn, Cambridge 2003), 842-4.

<sup>190</sup> *Ibid*, 843.

<sup>191</sup> *Soering v UK*, Application no. 14038/88, available at <<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>>, para 87.

<sup>192</sup> *Artico v Italy*, Application no. 6694/74, available at <<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>>, para 33.

<sup>193</sup> *Airey v Ireland*, Application no. 6289/73, available at <<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>>, para 32; *Marckx v Belgium*, Application no. 6833/74, available at <<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>>, para 31.

<sup>194</sup> *X and Y v the Netherlands*, Application no. 8978/80, available at <<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>>, para 23.

It is true that most of the cases refer to state positive obligations.<sup>195</sup> However, this is due to the type of proceedings before the ECtHR (only state can be a defendant). What is important is that the ECtHR acknowledged the horizontal effect of Convention rights. As demonstrated in the above quote, the underlying reason to acknowledge the horizontal effect seems to be the principle of effectiveness ("*there may be positive obligations inherent in an effective respect for private or family life*").

Horizontal effect of the Convention rights can be more visible in national law in countries where proceedings for violation of fundamental rights can be brought against another individual. Maybe it is possible to bring an action on the basis of constitutional right and corresponding Convention right? Another possibility is indirect horizontal effect of Convention rights in the form of obligation to interpret national law in conformity with the Convention rights.<sup>196</sup>

Based on the fact that the standards of protection developed under the ECHR are transposed to the EU legal order, the principle of effectiveness can apply to the protection of fundamental rights in the EU law and can thus justify the horizontal effect of those rights.

It could be argued of course that the ECHR and the EU differ in that the former is an instrument designed specifically to protect human rights whereas the latter is an organisation fostering economic co-operation and market integration. Indeed, originally human rights considerations were not built into the concept of the European economic integration. Only later, due mainly to the judicial activism of the ECJ, did the fundamental rights become an inherent part of the EU legal order.<sup>197</sup> There is no doubt nowadays that they do occupy a prominent role in the system of EU law. Further, the common market goes beyond the mere abolition of obstacles to the free movement of goods, services, capital and labour. As the ECJ put it in *Viking Line* "*the Community has not only an economic but also a social purpose*".<sup>198</sup> The question of

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<sup>195</sup> For a more in depth analysis of the ECtHR's case law see D Spielmann, *The European Convention on Human Rights. The European Court of Human Rights*, in: D Oliver, J Fedtke, *Human Rights and the Private Sphere: a comparative study* (New York 2007) 427 et seq; A Clapham, *Human Rights in the Private Sphere* (Oxford 1996).

<sup>196</sup> See for example *Pla and Puncernau v Andorra*, Application no. 69498/0, available at <<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>>, para 46 and discussion on the indirect horizontal effect of ECHR rights in Spielmann, in *ibid*, 437 et seq.

<sup>197</sup> There is an abundance of scholarship on human rights protection in the EU. See for example: P Alston, *The EU and Human Rights* (Oxford 2000); JHH Weiler, JS Nicolas, 'Taking Rights Seriously': The European Court and its Fundamental Rights Jurisprudence, 1 CMLR (1995) 51; JHH Weiler, P Alston, 'An "ever closer union" in need of a human rights policy: the European Union and human rights', Jean Monnet Working Paper 01/99, available at <<http://centers.law.nyu.edu/jeanmonnet/papers/99/990101.html>>;

<sup>198</sup> *Viking Line* (n 14 above), para 79.

whether the principle of effectiveness could be applied as justification for the admissibility of horizontal effect of fundamental rights in the context of EU law touches therefore upon an old question of the inherent and constitutive elements of the common market. What does the achievement of the common market entail? To what extent non-market or non-economic values find their place in the European project? How non-market should the common market be?

The commitment to the protection of fundamental rights in the EU law has been expressed on numerous occasions by the ECJ but also by other institutions. Fundamental rights are one of the organising principles of the EU legal order. It can thus be argued that it is the commitment of this legal order to ensure that those rights are effectively protected regardless of whether the source of their violation is private or public conduct. Fundamental rights are obviously not a policy in the sense of energy, environment or consumer policy. It is not the purpose of the EU to put forward proposals for the harmonisation of, let's say, the right to freedom of expression in all MSs. Fundamental rights are signposts against which the legality of EU law is reviewed. Further, there is a spontaneous convergence of standards of fundamental rights protection between MSs and more importantly the common understanding between MSs that fundamental rights are at the core of the EU legal order. Many of the EU instruments which are "market oriented", i.e. are harmonisation tools serving the objective of deepened market integration, will also impact on the standards of fundamental rights protection (data protection impacts on the right to privacy, media control through competition rules impacts on the freedom of speech and right to information).

#### ***IV.17. Horizontal effect and private autonomy***

Private autonomy expresses an idea that “*individuals may do things and act on reasons that public authorities may not act upon*”.<sup>199</sup> It is one of the fears expressed by opponents of horizontal effect that it would endanger private autonomy. This is because horizontal effect is about balancing colliding fundamental rights of individuals (or in the EU context of fundamental rights and CMFFs) and the relation between individuals differs from vertical state – individual relation because the state is not a fundamental right holder. However, as the AG put it in *Viking*

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<sup>199</sup> Kumm (n 144 above), 362.

*Line*, the horizontal effect of freedom of movement does not mean the end of private autonomy. Nor does it mean that individuals are held to exactly the same standards as state authorities.<sup>200</sup>

In Germany, commentators like Dürig or Hesse supported the concept of indirect effect and claimed that direct effect would overly restrict private autonomy, as guaranteed in Article 1 (1) and 2 (1) GG.<sup>201</sup> Private autonomy means that a person can decide to contractually limit their fundamental rights. It can also be invoked against the contractual partner as a defence against the binding effect of fundamental rights on them.<sup>202</sup> Hesse emphasised that a fundamental right of one person is always a correlate of a fundamental right of another person and those two rights have to be balanced. Due to this necessity to balance the rights on a case-by-case basis, the principle of legal certainty would be endangered in the relations governed by private law. Consequently, it is primarily the task of the legislator to ensure that fundamental rights are guaranteed in private law. The courts cannot arbitrarily alter the value judgments of the legislator. They have to ensure that fundamental rights have impact on private law only in cases in which the legislator uses equivocal terms or general clauses.<sup>203</sup> Kumm rebuts this argument as unpersuasive by rightly stating that simply in the process of balancing and determining the scope of rights the private autonomy of other party has to be taken into consideration.<sup>204</sup> AG Poiares Maduro in *Viking Line* sets the boundaries of horizontal effect of fundamental freedoms in the following manner:

“The provisions on freedom of movement do not replace domestic law as relevant normative framework for the assessment of conflicts between private actors. Instead, Member States are free to regulate private conduct as long as they respect the boundaries set by Community law.”<sup>205</sup>

This statement demonstrates the exceptionality of horizontal effect. MSs are awarded a degree of discretion to ensure the respect of fundamental freedoms and to prevent obstacles originating in private conduct. This degree of freedom means that national law is applied in a manner consistent with provisions on freedom of movement. EU law prevails over national law inconsistent with it. Only if there is no remedy available, i.e. domestic law does not provide for a

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<sup>200</sup> AG Opinion *Viking Line* (n 14 above), para 49.

<sup>201</sup> G Dürig, ‘Grundrechte und Zivilrechtsprechung’, in: Maunz, Theodor (Ed.) *Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung – Festschrift zum 75. Geburtstag von Hans Nawiasky* (München 1956) 157.

<sup>202</sup> *Ibid*, 157.

<sup>203</sup> K Hesse, *Verfassungsrecht und Privatrecht* (Heidelberg 1988) para 351 et seq.

<sup>204</sup> *Ibid*, 362.

<sup>205</sup> AG Opinion *Viking Line* (n 14 above), para 51.

cause of action to challenge breach of freedom of movement, can the claim be based directly on the relevant Treaty provisions.<sup>206</sup>

The exceptionality of horizontal effect means that it should be viewed as exceptional tool of protection of common market freedoms, necessary in the absence of EU or national implementing means of protection. Paraphrasing the above mentioned argument: because the fundamental freedoms are at the core of the EU legal system there should be a presumption that the EU and national implementing law adequately protect those freedoms. This presumption can be refuted only exceptionally if an individual can demonstrate that their EU rights are not adequately protected.<sup>207</sup> Like that the national law is not simply set aside and there is no excess of judicial law making.

Also, it has to be noted that restrictions of private autonomy feature modern developments in some areas of civil law. Private autonomy is unquestionably the leading and most prominent principle of private law. Private individuals are still free to choose whether, with whom and on what terms they wish to contract. But at the same time modern legal systems have come to the conclusion that absolute and unlimited autonomy is an unattainable ideal and in its purest form conflicts with another fundamental principle, that of equality (the concept of equality encompassing not only formal but also factual inequality of market participants).<sup>208</sup> There is therefore an apparent paradox in civil law. On the one hand it treats private autonomy as its founding and most basic principle and on the other hand introduces limitations which are designed to achieve other fundamental principles. Consumer law is one such example where legislator (national and European) strive for substantive (factual) equality, which they try to achieve by protecting the weaker party – consumer – in its relations with professional market operators.<sup>209</sup> Safjan puts it this way:

“The paradox is that the private autonomy (which in law is an expression of freedom) while being the most fundamental and appreciated principle in the modern systems of private law, is at the same time subject to far-reaching restrictions in the name of that same freedom. The spread of freedom (...) is coupled with a process of incredible regulation and limitation. (...) The more freedom there is, the more common or

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<sup>206</sup> Ibid, para 53.

<sup>207</sup> Krzeminska-Vamvaka, O’Callaghan (n 23 above).

<sup>208</sup> M Safjan, *Wyzwania dla państwa i prawa* (Warszawa-Krakow 2007) 107.

<sup>209</sup> Ibid, 108. See also E Letowska, *Europejskie prawo umow konsumenckich* (Warszawa 2004), M Bednarek, *Wzorce umow w prawie polskim* (Warszawa 2005).

“global” it becomes, the more necessary the balancing of conflicting interests and values, also globally. This calls for state interference and in consequence for a limitation of private autonomy.”<sup>210</sup>

The limitations to private autonomy are therefore not unusual in the context of private law. The mere possibility to limit private autonomy should therefore not be considered unusual in the context of horizontal effect of fundamental rights. Schwabe rightly points out that when fundamental rights are implicated the relations between the state and the individual are also very complex. Even if the state cannot invoke its own fundamental rights against the individual, it can raise the public interest arguments.<sup>211</sup> One could also add the distinction between positive and negative obligations as a possible counter-argument to those who fear that direct horizontal effect would impose unclear obligations and thus onerous burden upon individuals. Last but not least, the commonly understated exceptionality of horizontal effect means that horizontal effect is necessary in the absence of statutory protection measures or with regard to cases where legislator left to courts a margin of appreciation in the form of general clauses or equivocal terms. Such exceptionality considerably limits the danger of placing onerous burden upon individuals.

## V. CONCLUSIONS

Twofold developments contribute to the increase of horizontal effect cases in the European law. On the one hand, an ever-growing intensification of cross-border activities within the EU multiplies the situations of potential conflicts. On the other hand, prospective plaintiffs are more and more aware of their rights under European law and willing to enforce them before national courts.

From the point of view of the ECJ cases concerning horizontal applicability do not seem to cause much controversy. Luxembourg and Karlsruhe differ in that regard. Although the ECJ has never actually used the term ‘horizontal effect’,<sup>212</sup> it held on many occasions that individuals are bound by the Treaty provisions on fundamental freedoms and that individuals can rely on those provisions as against other individuals. The horizontal effect theory is a continuation of a well-established theory of direct applicability of Treaty provisions.

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<sup>210</sup> Safjan (n 208 above), 107, translation JKV.

<sup>211</sup> Schwabe (n 62 above), 83.

<sup>212</sup> One reason for this terminological omission could be to avoid the ‘burden’ associated with this term in some MS, in particular in Germany.

Can we expect any groundbreaking judgments on horizontal effect in the future? Not likely on questions of principle. The ECJ seems to be quite clear that obstacles to free movement originating in private action cause as much damage to the common market as do the state actions. There might be some further discussions on limits of horizontal effect.

In *Viking Line* the ECJ repeated the *effect utile* rationale and maintained its position expressed in settled case law. One very important statement is the clarification that there is no distinction between quasi-legislative bodies and other private persons. This means that horizontal effect applies to all private bodies regardless of their status or competences and that it applies to common market fundamental freedoms understood as prohibitions of discrimination and prohibitions of restrictions. The opinion of AG goes further, the most prominent conclusion being that direct and indirect effect are equal constructions of a legal problem, a matter of form not substance. Questions of form and construction of legal problems are specific to specific legal orders and depend on their traditions and availability of causes of action. They are secondary to the underlying conflict of fundamental rights and freedoms. Horizontal effect is principally about balancing, head on balancing of fundamental rights (or in the EU law context: head on balancing of fundamental rights and common market fundamental freedoms).

A slightly different question is the horizontal effect of fundamental rights. However, as a matter of principle, the approach applied to fundamental freedoms can be applied *mutis mutandis* to fundamental rights. In fact it was already applied in all those cases where there was a head on balancing of fundamental rights and fundamental freedoms. There would be no changes of principle but it remains to be seen what will be the test to filter the cases of private impediments to fundamental rights and freedoms in order to preserve private autonomy.

Horizontal effect is an *exceptional* tool ensuring *effective* protection of fundamental rights and freedoms. In order to preserve the separation of powers between legislature and judiciary it will be necessary only in the absence of sufficient statutory protection or in cases where courts enjoy a margin of appreciation granted in the form of general clauses, equivocal or indefinite terms.