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Freedom of Contract in Free Movement Law: Balancing Rights and Principles in European Public and Private Law

HARM SCHEPEL*

Abstract: The right to free movement embodies both the power to interfere with contractual freedom and contractual freedom itself. Neither is absolute, and the realization of either needs justification in situations of conflict in light of the impact it has on the realization of the other. Where free movement rights embody fundamental rights capable of interfering with economic freedom - most notably, the prohibition of nationality discrimination - this constitutionalized private law will find its countervailing force in the ability of private parties to call upon the constitutional protection of their private autonomy - in privatized constitutional law. Where free movement rights embody economic freedoms, this privatized constitutional law will find its countervailing force in the ability of private interfering parties to call upon collective values laid down in fundamental rights and general principles of law - in constitutionalized private law. This settlement sacrifices both the doctrine of the supremacy of European Union law and the hierarchy of norms in its traditional constitutional understanding to an exercise in balancing rights and principles.

Résumé: Le droit de la libre circulation contient à la fois le pouvoir de s'immiscer dans le domaine de la liberté contractuelle et la liberté contractuelle elle-même. Aucun des deux n'est absolu et la réalisation de l'un doit être justifiée dans des situations de conflit à la lumière de l'impact qu'il a sur la réalisation de l'autre. Là où les droits de la libre circulation contiennent des droits fondamentaux pouvant s'immiscer dans la liberté économique – le plus évident étant l'interdiction de discrimination basée sur la nationalité – ce droit privé constitutionnalisé va trouver sa force compensatoire dans la possibilité pour les parties privées de faire appel à la protection constitutionnelle de leur autonomie privée – en droit constitutionnel privatisé. Là où les droits de la libre circulation contiennent des libertés économiques, ce droit constitutionnel privatisé va trouver sa force compensatoire dans la possibilité pour les parties privées intervenantes de faire appel à des valeurs collectives fixées dans les droits fondamentaux et les principes généraux du droit – en droit privé constitutionnalisé. Ce règlement sacrifie à la fois la doctrine de la primauté du droit de l'Union européenne et la hiérarchie des normes dans son sens constitutionnel traditionnel pour tenter d'équilibrer les droits et les principes.

Zusammenfassung: Das Recht auf Freizügigkeit drückt sich sowohl in der Möglichkeit der Begrenzung der Vertragsfreiheit als auch dem Schutz der Vertragsfreiheit selbst aus. Keiner der beiden Aspekte ist absolut und beide müssen bei Interessenskollisionen im Licht des Einflusses jeweils des einen auf den anderen gerechtfertigt werden. Soweit sich das Recht auf Freizügigkeit in Grundrechten

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verkörpert, die wirtschaftliche Freiheiten beschränken können – insbesondere im Rahmen des Verbots der Diskriminierung nach ethnischer Herkunft – findet dieses verfassungsrechtlich ausgestaltete Privatrecht ein ausgleichendes Gegengewicht in der Möglichkeit privater Parteien sich auf den Schutz der Privatrechtsautonomie – im insoweit die privatrechtlichen Belange berücksichtigenden Verfassungsrecht – zu berufen. Soweit das Recht auf Freizügigkeit wirtschaftliche Freiheiten formt, findet dieses "privatisierte Verfassungsrecht" wiederum seinen Ausgleich in der Möglichkeit privatrechtlich hiergegen vorgehender Parteien, sich auf allgemeingültige Werte zu berufen, die sich in grundsätzlichen Rechten und allgemeinen Prinzipien des Rechts widerspiegeln – "verfassungsrechtlichem Privatrecht". Diese Ausgleichsstruktur verpflichtet sowohl den Grundsatz des Vorrangs des Unionssrechts als auch die Normenhierarchie in seinem traditionellen verfassungsrechtlichen Verständnis, eine Ausbalancierung der Rechte und Grundsätze zu verfolgen.

1. Introduction

General debates on the relationship between private law and constitutional law tend to anchor themselves on two opposite views. One promises – or threatens – the 'total constitution', the imposition of public law values on private legal relations to the detriment of private autonomy.[1] Let us call this the 'constitutionalization of private law'. Another promises – or threatens – the 'return of the private law society' by casting contractual freedom and party autonomy in constitutional stone, protecting these values against the socializing tendencies of public law.[2] Let us call this the 'privatization of constitutional law'. These two concepts embody opposing views of the proper relationship between public law and private law. They can also be seen as prescribing the normatively superior outcomes of specific conflicts dealt with *within* each body of law. These two questions are easily conflated. Where, for example, the freedom to choose contractual partners collides with norms of non-discrimination, the classification of the issue as a private law matter or a public law matter is often seen to presage the judicial resolution of the clash.

The argument of this article is that these two archetypical views are best seen not as alternatives, but as necessary complements. With Alexy, the constitutional protection of interference with private autonomy and the constitutional protection of private autonomy itself are questions of equal rank. The doctrine of horizontal effect of constitutional norms by itself has nothing much to say about the classification or even the outcome of conflicts: it merely turns them into collisions of different values that need to be balanced against each other.[3]

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1 See M. KUMM, 'Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', 7. *GLJ* (*German Law Journal*) 2006, p. 341.

2 See, e.g., E-J. MESTMÄCKER, 'Die Wiederkehr der Bürgerlichen Gesellschaft und ihres Rechts', 10. *Rechtshistorisches Journal* 1991, p. 177.

3 R. ALEXY, *Theorie der Grundrechte*, Nomos, Baden-Baden 1985, p. 491.

This, it is argued, holds true especially for the doctrine of the horizontal effect of the free movement provisions in European Union law. The right to free movement embodies both the power to interfere with contractual freedom and contractual freedom itself. Neither is absolute, and the realization of either needs justification in situations of conflict in light of the impact it has on the realization of the other. Where free movement rights embody fundamental rights capable of interfering with economic freedom – most notably, the prohibition of nationality discrimination – this constitutionalized private law will find its countervailing force in the ability of private parties to call upon the constitutional protection of their private autonomy – in privatized constitutional law. Where free movement rights embody economic freedoms, this privatized constitutional law will find its countervailing force in the ability of private interfering parties to call upon collective values laid down in fundamental rights and general principles of law – in constitutionalized private law. This settlement sacrifices both the doctrine of the supremacy of European Union law and the hierarchy of norms in its traditional constitutional understanding to an exercise in balancing rights and principles.

Section 3 will deal with the most common situation of horizontal direct effect, one where the restriction of free movement rights consists of contractual preferences being interfered with by private parties, and with the ways such a restriction may be justified. Section 4 discusses whether and how the exercise of contractual freedom itself can be considered a 'restriction' of free movement rights – and the possibilities of justifying such restrictions. Section 5 analyses the conceptual and normative difficulties in 'balancing' these rights and principles under European public law. Section 6 briefly explores the possibilities of doing the same under European private law. Section 7 concludes. The article is premised on the idea that the free movement provisions actually do apply horizontally. Section 2 will briefly defend the plausibility of that position.

2. Horizontal Effect of the Free Movement Provisions

According to the traditional and still dominant position, all instances of horizontal direct effect are but carefully circumscribed exceptions to the general rule that free movement law binds only the Member States. Yet, in light of recent developments, this position is simply not tenable anymore.[4] The law as it stands, it is submitted, is well summed up by Advocate General Maduro's conclusion in *Viking*, that 'the rules on free movement apply directly to any private action that is capable of effectively restricting others from exercising their right of freedom of

4 H. SCHEPEL, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law', 17. *ELJ* (*European Law Journal*) 2012, p. 177.

movement'.[5] This assessment is not based on any clear positive statement of the Court of Justice but on the fact that all attempts to circumscribe these 'exceptions' have been fatally undermined by the Court.

The 'exception' doctrine lists three main sources of limitation of horizontal direct effect. First, it is limited to the free movement of persons, the freedom to provide services, and the freedom of establishment. After *Fra.bo*, however, even the free movement of goods, that bastion of the Court's resistance,[6] has fallen to horizontal direct effect.[7] The second strand of limitation sets up the Court's frequent references to 'collective regulation' as an autonomous institutional threshold test under the personal scope of free movement law. The idea here is that holding such bodies as sports federations and bar associations liable under free movement law works according to a theory of functional equivalence to state action – and is hence really better described as 'extended vertical direct effect'.[8] In *Viking*, however, this institutional theory fell by the wayside when the Court explicitly declined an interpretation of its own case law to the effect that free movement law applied only to quasi-public organizations or to associations exercising a regulatory task and having quasi-legislative powers.[9] The personal scope of the free movement provisions has thus collapsed into their material scope: the only question now is whether private parties have the power to restrict effectively the exercise of free movement rights – whatever the nature of that power, legislative, economic, or even physical.

The third theory of limitation is, for present purposes, the most important. It seeks to isolate a fundamental right to non-discrimination from the wider 'restriction'-reading of the free movement provisions and to establish that direct horizontal effect is limited to that norm. The prohibition of any measure that makes the exercise of free movement 'less attractive' would, hence, be applied only to Member States. That theory, too, fails to stand up to scrutiny, in part because it depends for its plausibility on the first two theories of limitation: the 'fundamental rights twist' is built on the idea that horizontal effect is limited to restrictions on the free movement of people – not of goods and capital.[10] It also depends on the 'institutional' theory, since the only way to reconcile *Bosman* with the exception doctrine is to stress that, although the Court explicitly denied any discrimination on the ground of nationality on the part of UEFA and applied a

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5 Advocate General Maduro, Opinion of 23 May 2007, C-438/05 *Viking*, para. 43.

6 See, e.g., C. KRENN, 'A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods', 49. *CMLR* (*Common Market Law Review*) 2012, p. 177.

7 ECJ 12 Jul. 2012, C-171/11 *Fra.bo*.

8 C. BARNARD, *The Substantive Law of the EU: The Four Freedoms,* OUP, Oxford 2004, p. 262.

9 ECJ 11 Dec. 2007, C-438/05 *Viking*, paras 64-65.

10 S. PRECHAL & S. A. DE VRIES, 'A Seamless Web of Judicial Protection in the Internal Market?', 34. *European Law Review* 2009, p. 5, at 16–18.

market access test, the Court did so against a quasi-public body.[11] More importantly yet, the theory depends on the assumption that the prohibition of discrimination can be separated coherently from the wider norm guaranteeing economic freedom and given a higher constitutional status.[12] To say that 'the principle of non-discrimination is in fact transformed into a fundamental right to protect individual personality and human dignity', as De Vries does, is fine. It becomes problematic where he couples this statement to the thesis that the principle of non-discrimination has 'transcended the economic dimension of the free movement rules':[13] in *Jean Neu*, after all, the Court held the 'freedom to choose whom to do business with' to be 'specific expression' of the freedom to pursue a trade or profession which forms part of the general principles of European Union law.[14]

3. Free Movement Law as Freedom of Contract

Free movement law, some say, serves 'to extend party autonomy across borders'.[15] Whether the free movement provisions indeed guarantee freedom of contract is not the issue here,[16] but it is clear that the Court is quick to classify restrictions of freedom of contract as restrictions on free movement in need of justification.[17] Cases where the Court has applied the free movement provisions horizontally almost invariably deal with instances of private interference with contractual preferences. If this interference amounts to a restriction of free movement rights, it will have to be justified on some public interest ground under the Court's proportionality test. For private parties, this is only really feasible if the theories of limitation hold. If private parties are held to 'discriminate', they will have to rely on the Court's assurance in *Bosman*[18] that individuals are free to rely on grounds of public policy, public security, or public health. This will generally be a very difficult task, but if the norm of non-discrimination is held to

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11 ECJ 15 Dec. 1995, C-415/93 *Bosman*, para. 103.

12 A recent attempt to do just that is N. J. DE BOER, 'Fundamental Rights and the EU Internal Market: Just How Fundamental Are the EU Treaty Freedoms?', 9. *Utrecht L Rev* (*Utrecht Law Review*) 2013, p. 148.

13 S. A. DE VRIES, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', 9. *Utrecht L Rev* 2013, p. 169, at 176.

14 ECJ 10 Jul. 1991, Joined Cases C-90 and C-91/90, *Jean Neu*, para. 13. *Cf.* ECJ 7 Feb. 1985, C-240/83 *ABDHU*, para. 9.

15 S. GRUNDMANN, 'Information, Party Autonomy and Economic Agents in European Contract Law', 39. *CMLR* 2002, p. 269, at 270.

16 See J.W. RUTGERS, 'The European Economic Constitution, Freedom of Contract and the DCFR', 5. *ERCL* (*European Review of Contract Law*) 2009, p. 95.

17 See especially ECJ 28 Apr. 2009, C-518/06, *Commission* v. *Italy*.

18 ECJ 15 Dec. 1995, C-415/93 *Bosman*, para. 86.

be a fundamental right radiating into private law relationships, it seems only coherent to make it next to impossible to conjure up acceptable derogations.

Where private parties are held to impede 'market access', as in *Bosman* itself, they can rely on the open-ended list of 'general interest' justifications conceived of by the Court. The Court has been quite liberal in this regard,[19] and as long as the institutional theory of limitation holds, there seems nothing much to object to: from quasi-public associations with quasi-legislative powers exercising regulatory functions, one is entitled to expect measures that further the general interest. The main issue here seems to be the awkward relationship between the free movement regime and competition law. In *Fra.bo*,[20] for example, the measure at issue taken by the private standardization and certification body DVGW was to impose a requirement for copper fittings to withstand a test of immersion in boiling water for 3,000 hours. This standard did what all technical standards do: exclude certain products from the market. The test could not be justified on health grounds: its only rationale was to weed out less durable products from the market. Under the competition rules, Article 101(3) TFEU provides a sensible checklist to analyse whether the benefits of such a measure outweigh the costs to individual producers.[21] Under the free movement of goods, the argument that consumers will benefit in the long run from a restriction on interstate trade sounds like heresy.

If, however, the institutional theory fails, a real problem arises with these public interest grounds: what can be expected from 'regulatory' bodies cannot be expected from all private parties with the power to restrict free movement rights. The Court draws the line at reasons of an 'economic nature' and will not, hence, entertain the possibility of restrictions being justified on reasons related to the private pursuit of economic advantage.[22] The way out here is to turn the private pursuit of economic advantage into a 'general principle of law' and introduce a

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19 Thus, for example, in *Wouters* it accepted the need to ensure the 'proper practice' of the legal profession. ECJ, 19 Feb. 2002, C-309/99 *Wouters*, para. 107. In *Olympique Lyonnais*, it held the 'objective of encouraging the recruitment and training of young players' to have sufficient weight to justify restrictions. ECJ, 16 Mar. 2010, C-325/08 *Olympique Lyonnais*, para. 39.

20 ECJ 12 Jul. 2012, C-171/11 *Fra.bo*.

21 According to that provision, anticompetitive agreements, decisions, and concerted practices may escape the prohibition of Art. 101(1) TFEU if they contribute to improving the production or distribution of goods or to technical or economic progress, if they allow a fair share of these resulting benefits to consumers, if they don't impose restrictions that are not indispensable to the attainment of these objectives, and if they do not eliminate competition in respect of a substantial part of the products in question.

22 See, e.g., ECJ, 13 Sep. 2007, C-260/04, *Commission* v. *Italy*, para. 35. It is here that private lawyers get seriously worried about the intrusion of EU public law into private legal relations. See, e.g., A.S. HARTKAMP, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law', 18. *ERPL* 2010, p. 527.

balancing test of rights and freedoms. This, arguably, is exactly what the Court has done. It starts, strangely enough, with *Schmidberger*, the poster child judgment of the doctrine of *indirect* horizontal effect. That case dealt with a demonstration blocking entrance to the Brenner tunnel in protest of heavy traffic rolling through the Alps, damaging public health and the environment. In a dispute between the demonstrators and the transport companies suffering damages, both the environment and public health could well have constituted legitimate objectives in the public interest, but the case was brought against the Austrian authorities for failure to take action to clear the tunnel. Account had to be taken, thus, only of actions and omissions imputable to the Member State.[23] Here, the Court accepted that the public authorities, in their decision not to ban the demonstration, 'were inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly' and that the respect for fundamental rights constitutes a legitimate interest which, in principle, justifies a restriction of obligations under the free movement of goods.[24] The issues involved were then framed as 'the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty', which is to be done in a test weighing the interests involved having regard to all the circumstances of the case in order to determine 'whether a fair balance was struck between those interests'.[25]

On the face of it, it seems problematic to extend this 'balancing test' to horizontal relations. The *Schmidberger* test reviews whether a Member State has struck a 'fair balance' between the interests of different groups of citizens exercising their competing rights against that Member State – itself not a bearer of rights. In horizontal situations, the test requires that the Court itself strikes a fair balance between the competing interests of different groups of citizens exercising rights against each other. In *Viking* and *Laval*, however, the Court did just that, framing its task under the justification regime as striking a balance between the interests of businesses exercising their economic rights and the interests of trade unions exercising their right to take collective action.[26] The privatization of constitutional law finds, then, a countervailing force in the constitutionalization of private law.

For private parties pursuing their own economic interests, there still doesn't seem to be much greater comfort in the protection of fundamental rights than there is in the pursuit of acknowledged public interest objectives. What, for

23 ECJ 12 Jun. 2003, C-112/00 *Eugen Schmidberger*, paras 66 and 67.

24 *Ibid.*, paras 69 and 74.

25 *Ibid.*, para. 81.

26 ECJ 11 Dec. 2007, C-438/05 *Viking* and ECJ 11 Dec. 2007, C-341/05 *Laval*.

example, Advocate General Trstenjak had in mind in *Fra.bo* is far from self-evident on the facts of the case:

> DVGW might, furthermore, refer to its private-law nature and rely on the protection of the fundamental rights guaranteed in the Charter of Fundamental Rights, such as the freedom to conduct a business guaranteed in Article 16 of the Charter of Fundamental Rights, and endeavour to demonstrate a collision between the free movement of goods and one or more fundamental rights, between which a fair balance would have to be struck in application of the principle of proportionality.[27]

It is hard enough to see a private standards body successfully justify its activities by reference to the ultimate overall benefit to consumers of having 'better' products on the market; to see it justify its activities by reference to a fundamental right to conduct 'the business' of collective regulation would be harder still. But beyond the particular facts in *Fra.bo*, the idea seems clear enough: the idea would be to include freedom of contract and private autonomy in the category of 'legitimate interests' capable of justifying restrictions of free movement rights and to expand, in this way, the justification regime under the free movement provisions to involve the balancing of competing claims of party autonomy in the guise of, on one side, an economic freedom and, on the other, a fundamental right.

4. Free Movement Law as Fundamental Rights Law

The constellation of rights and freedoms that truly triggers outrage and fear of the intrusion of free movement law on party autonomy is the much rarer instance where the exercise of – not the interference with – freedom of contract is held to fall foul of the prohibitions under free movement law.[28] It has actually happened very rarely, and the Court is obviously uncomfortable with the idea. This is most evident under the free movement of goods: in *Dansk Supermarked*, the Court famously held 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'.[29] In *Sapod Audic*, however, the Court held, equally famously, that an obligation arising out of a private contract 'cannot be

27 Advocate General Trstenjak, Opinion of 12 Mar. 2012, C-171/11 *Fra.bo,* para. 56.

28 See, e.g., R. STREINZ & S. LEIBLE, 'Die unmittelbare Drittwirkung der Grundfreiheiten' (2000) 15. *Europäische Zeitschrift für Wirtschaftsrecht* 2000, p. 459, and M. SAFJAN & P. MIKLASZEWICZ, 'Horizontal Effect of the General Principles of EU Law in the Sphere of Private Law', 18. *ERPL* 2010*,* p. 475.

29 ECJ 22 Jan. 1981, C-58/80 *Dansk Supermarked*, para. 17.

considered a barrier to trade for the purpose of Article [34 TFEU] since it was not imposed by a Member State but agreed between individuals'.[30]

Where free movement law has intruded upon the exercise of freedom of contract, the theories of 'limitation' have been mobilized. In *Haug-Audrion*, the Court analysed private insurance contracts under a substantive test of discrimination and held them to be objectively justified.[31] The case has been explained away by Davies as a 'conventional case about public measures' where the Court out of convenience disposed of the matter on the straightforward analysis of the justification regime rather than dwell on the more complicated, but logically prior, issue of deciding whether the contract at issue could be considered to fall under the free movement provisions at all.[32] In *Ferlini,* the Court made the sweeping statement that the prohibition of discrimination applies to any group or organization that 'exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty'.[33] But that case, too, has been explained away by categorizing the private party at issue – a consortium of hospitals – as having 'essentially a public function and public status'.[34] And the Court itself tries very hard to avoid confronting the issue. In its judgment in *Karen Murphy*, it held that the prohibition to use foreign decoders in the United Kingdom to enable football games to be watched at lower subscription fees than those charged by British broadcasters to be an infringement of Article 56 TFEU. The Premier League's system of exclusive territorial licensing, however, was, naturally, contractual. The Court came up with this:

> It is true that the actual origin of the obstacle to the reception of such services is to be found in the contracts concluded between the broadcasters and their customers, which in turn reflect the territorial restriction clauses included in contracts concluded between those broadcasters and the holders of intellectual property rights. However, as the legislation confers legal protection on those restrictions and requires them to be complied with on pain of civil-law and pecuniary sanctions, it itself restricts the freedom to provide services.[35]

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30 ECJ 6 Jun. 2002, C-159/00 *Sapod Audic*, para. 74.

31 ECJ 13 Dec. 1984, C-251/83 *Haug-Adrion*.

32 G. DAVIES, 'Freedom of Movement, Horizontal Effect, and Freedom of Contract', 20. *ERPL* 2012, p. 805, at 816.

33 ECJ, 3 Oct. 2000, C-411/98 *Angelo Ferlini*, para. 50.

34 G. DAVIES, 'Freedom of Movement, Horizontal Effect, and Freedom of Contract', 20. *ERPL* 2012, p. 805, at 815.

35 ECJ, 4 Oct. 2011, Joined Cases C-403/08 and C-429/08 *FA Premier League and Karen Murphy*, para. 88. See, e.g., J. NOGAREDE, 'Levelling the (Football) Field: Should Individuals Play by Free Movement Rules?', *Legal Issues of Economic Integration* 2012, p. 381.

This is paper thin. The legislation at issue does two things. It makes the 'dishonest' reception of broadcast programmes 'with the intent to avoid payment' an offence, subject to a fine. And it protects rights holders on content which is broadcast through encrypted signals against producers, importers, and retailers of decoders capable of decoding such signals.[36] Beyond the fairly straightforward point that it enforces the contracts entered into by the Premier League, it is hard to see anything objectionable in the legislation as such. The Court, implicitly, admits as much later where it considers that the system cannot be justified. First, under the heading of the protection of intellectual property rights, the Court considers that the prices charged go beyond what is necessary to ensure 'appropriate remuneration' for right holders.[37] Second, it held that the system went beyond what was necessary to encourage attendance of football stadiums, since a simple contractual prohibition of broadcast during closed periods would be as effective towards that objective and would have a far less adverse effect on the fundamental freedoms.[38] It is, frankly, hard to see how the Court can reconcile the theory that the restriction itself is legislative with the theory that revisions of contracts between private parties could render that restriction lawful.

Be of that what may, there seems no getting around *Angonese* and *Raccanelli* where the employment practices of single undertakings were held to infringe the prohibition of discrimination on the ground of nationality under the free movement of workers.[39] To be sure, Davies argues that these judgments do not curtail freedom of contract since employers are, almost universally, restricted severely in their contractual freedom anyway.[40] But if all contractual relations where the weaker party is protected by law are excluded from the concept of contractual freedom, he succeeds not so much in making a case for the very limited impact of free movement law on contractual freedom as he succeeds in stripping down the notion of contractual freedom itself to its nineteenth century mythical core.[41]

Discriminatory contractual relations are, of course, impossible to justify as necessary for the attainment of 'public policy, public security and public health' or for overriding reasons in the public interest. And so it is here that Advocate General Trstenjak's suggestion in *Fra.bo*, to balance the fundamental right 'to

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36 *Ibid.*, paras 28–29.

37 *Ibid.*, para. 116.

38 *Ibid.,* para. 134.

39 ECJ, 6 Jun. 2000, C-281/98 *Angonese* and ECJ 17 Jul. 2008, C-94/07 *Raccanelli*.

40 G. DAVIES, *ERPL* 2012, p. 805, at 821.

41 See, e.g., A. COLOMBI CIACCHI, 'Party Autonomy as a Fundamental Right in the European Union', 6. *ERCL* 2010, p. 303. Another question entirely is the meaning of 'autonomy' in EU Law. See S. WEATHERILL, 'The Elusive Character of Private Autonomy in EU Law', in D. Leczykiewicz & S. Weatherill (eds), *The Involvement of EU law in Private Law Relationships*, Oxford, Hart 2013, p. 9.

conduct a business' with rights derived from the free movement provisions, starts to reveal its significance. As mentioned above, the Court has held in *Jean Neu* that 'the freedom to choose whom to do business with' is a 'specific expression' of 'the freedom to pursue a trade or profession, which forms part of the general principles of Community law'.[42] In this way, freedom of contract and party autonomy re-appear in the guise of a fundamental right, the protection of which is a legitimate aim capable of justifying restrictions on the free movement provisions in their role as protecting fundamental rights.[43] The constitutionalization of private law, then, finds a countervailing force in the privatization of constitutional law.

5. Balancing in Free Movement Law

The justification regime under free movement law is not obviously the most appropriate place to engage in finding a 'fair balance' between competing rights of individuals. As a conflict principle, the proportionality test under free movement law unilaterally analyses the compatibility of Member State measures with EU law under a hierarchy of norms in light of the supremacy of EU law. This inevitably leads to a strict rule-exception relationship, where any justification for infringements of the free movement provisions will be construed very narrowly. True enough, as mentioned above, the Court has accompanied the expansion of its interpretation of what constitutes a 'restriction' with catholic generosity in what it will accept as 'overriding reasons in the public interest'.[44] But that generosity has been paid for with intrusive analysis under the 'necessity' prong of the proportionality test. Such a system doesn't seem particularly well suited for the protection of fundamental rights. [45] But it could well be argued that the test is being transformed in the context of fundamental rights.

The starting point, here, must be what the Court has *not* done, at least not until *Viking* and *Laval*: classify the protection of fundamental rights under the rubric of 'public policy' and proceed as if nothing very peculiar had occurred.[46] Instead, it has moved to get around the hierarchical rule-exception problem by avoiding any suggestion that the conflict is properly categorized as one between the exigencies of internal market law and national constitutional arrangements.

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42 ECJ, 10 Jul. 1991, Joined Cases C-90/90 and C-91/90 *Jean Neu*, para. 13.

43 See, e.g., A.S. HARTKAMP, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law', 18. *ERPL* 2010, p. 527, at 548 ('freedom of contract must be viewed on equal footing with a fundamental right').

44 See above, n. 19.

45 See generally, e.g., J. MORIJN, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: *Schmidberger* and *Omega* in the Light of the European Constitution', 12. *ELJ* 2006, p. 15.

46 This to the chagrin of P. OLIVER & W-H. ROTH, 'The Internal Market and the Four Freedoms', 41. *CMLR* 2004, p. 407, at 439.

This is perhaps clearest in *Omega*, where the Court went out of its way to emphasize that the 'respect for human dignity' is a general principle of law in the EU legal order, going so far as to consider 'immaterial' the principle's 'particular status' in Germany 'as an independent fundamental right'.[47] The point here would be that, by integrating the protection of fundamental rights as general principles of law into the European legal order itself, the Court liberates the proportionality test from the burden of the doctrine of supremacy of Union law over the law of Member States. At this juncture, however, the opposite problem arises: when understood as an integral part of Union law, fundamental rights almost naturally fit into the traditional constitutional understanding and would seem to assume a superior hierarchical position than 'mere' free movement rights, however much the Court insists on calling them 'fundamental freedoms'.

Advocate General Trstenjak's suggestion in *Fra.bo* seems, again, a good starting point to consider attempts to get out of the conundrum. What she did there was to extend to horizontal situations the 'double proportionality test' developed in her Opinion in *Commission* v. *Germany*. The basic move is to deny any hierarchy at all between fundamental rights and 'fundamental freedoms', a position she grounds on a 'broad convergence' between the two both in terms of structure and of content, which, in turn, she grounds on the view that the substantial guarantees inherent in free movement rights can be formulated in terms of fundamental rights protecting economic activity. She then arrives at the conclusion that 'the realization of a fundamental freedom constitutes a legitimate objective which may limit a fundamental right', as a necessary complement to the Court's holding that the realization of a fundamental right constitutes a legitimate objective which may restrict a fundamental freedom. Resolution lies in the application of a 'double' proportionality test whereby both the restriction of free movement rights *and* the restriction of fundamental rights are legitimate as long as they pass the proportionality test:

> A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom. [48]

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47 ECJ, 14 Oct. 2004, C-36/02 *Omega*, para. 34. At the same time, it stringently denied that principles capable of justifying a restriction of economic activity need be carried by common 'moral, religious and cultural considerations' common to Member States. *Ibid.*, para. 37.

48 Advocate General Trstenjak, Opinion of 14 Apr. 2010 in C-271/08 *Commission* v. *Germany*, para. 190.

The Advocate General claimed that this idea was 'central' to *Schmidberger*,[49] but that is overstating the case significantly. There, the Court stated categorically that measures that are incompatible with the observance of human rights 'are not acceptable in the Community'.[50] This implies a stance where the exercise of free movement rights would be strictly limited by their compatibility with fundamental rights. True, the Court engaged in a 'double proportionality' test of sorts, subjecting both the limitation of the free movement of goods and the limitation of the freedom of expression to the test. But in the latter case, this was clearly a function of the status of freedom of expression as a 'qualified right' under Article 10 ECHR itself, not the consequence of the 'equal ranking' of fundamental rights with fundamental freedoms.[51]

Perhaps the Court was wary of the consequences of its own dramatic statement of the supremacy of fundamental rights. In *Viking* and *Laval*, in any event, the Court refused a 'fundamental rights' reading of the justification regime. In the space of just three paragraphs in *Viking*, the Court drags constitutionally protected rights of trade unions for the purpose of protecting workers down to, first, 'a legitimate interest' capable of justifying restrictions and, second, a 'policy objective' to be balanced against 'the rights' under the free movement provisions.[52]

The 'balancing' of rights and freedoms in free movement law seems, hence, caught between the doctrine of supremacy on the one hand and the constitutional status of fundamental rights within the European legal order on the other. But, arguably, the sharp edges of human rights discourse are rounding off a little in horizontal situations.[53] Whatever the doctrinal niceties and differences, *Schmidberger* and *Viking* both come close to treating constitutional rights as principles and principles as, in Alexy's effective if inelegant phrase, 'optimization requirements' to be balanced against the 'optimization requirements' of competing rights-as-principles.[54] The Court's refuge in the 'general principles of law' in *Mangold* and *Kücükdeveci* may point in the same direction.[55] We should, after all, now be 'slow to exclude'[56] and 'cannot rule out in principle'[57] the

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49 *Ibid.*, para. 195.

50 ECJ, 12 Jun. 2003, C-112/00 *Eugen Schmidberger*, para. 73.

51 *Ibid.*, paras 79 and 80.

52 ECJ, 11 Dec. 2007, C-438/05 *Viking*, paras 77–79.

53 On the need to adapt human rights discourse to private law contexts, see H. COLLINS, 'Utility and Rights in Common Law Reasoning: Rebalancing Private Law through Constitutionalization', 30. *Dalhousie Law Review* 2007, p. 1, and H. COLLINS, 'On the (In)Compatibility of Human Rights Discourse and Private Law', *LSE Law, Society and Economy Working Paper* 7/2012.

54 R. ALEXY, 'Constitutional Rights, Balancing, and Rationality', 16. *Ratio Juris* 2003, p. 131.

55 See ECJ, 22 Nov. 2005, C-144/04, *Mangold* and ECJ, 19 Jan. 2010, C-555/07 *Kücükdeveci*. See, e.g., E. MUIR, 'Of Ages In- and Edges Of- EU Law', 48. *CMLR* 2011, p. 39.

56 Advocate General Sharpston, Opinion of 22 May 2008 in C-427/06 *Bartsch*, para. 85.

prospect of the horizontal application of general principles of law,[58] principles that have 'constitutional status'.[59] When viewed in conjunction with the Court's sudden discovery of 'general principles of civil law',[60] a picture emerges of a normative universe both thickened and flattened where almost any right and every principle can find expression and protection, to be weighed against almost any other right and principle in a double test of proportionality.

In any event, the 'balancing' taking place under horizontally effective free movement law cannot really be usefully described as balancing 'fundamental rights' against 'fundamental freedoms'. Where free movement rights embody economic freedoms, this privatized constitutional law will find its countervailing force in the ability of private interfering parties to call upon collective values laid down in fundamental rights and general principles of law – in constitutionalized private law. Where free movement rights embody fundamental rights capable of interfering with economic freedom, this constitutionalized private law will find its countervailing force in the ability of private parties to call upon the constitutional protection of their private autonomy – in privatized constitutional law. The horizontal direct effect of the free movement provisions, in short, in no way 'solves' the conflict between 'liberal' and 'social' values in the EU's 'highly competitive social market economy': it merely moves that debate to higher levels of complexity and leaves the value judgment necessary to weigh and balance values in specific cases of conflict to courts.

6. Balancing in Private Law

The question then poses itself: shouldn't this balancing take place within private law? This is not (just) a matter of convenience or efficiency in dealing with litigation strategies of parties who may well be able to frame almost any conceivable claim touching upon free movement law as private law claims. Starting with the canonical decision of the German Constitutional Court in *Lüth*,[61] the idea that has developed is rather to use the conceptual core and

57 Advocate General Trstenjak, Opinion of 8 Sep. 2011 in C-282/10 *Dominguez*, judgment of 24 Jan. 2012, para. 26.

58 The Court, it must be said, doesn't seem to feel any great urgency to clarify matters. For an assessment of post- *Kücükdeveci* case law, see L. PECH, 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez*', 49. *CMLR* 2012, p. 1841.

59 ECJ, 15 Oct. 2009, C-101/08 *Audiolux*, para. 63.

60 See, e.g., ECJ 10 Apr. 2008, C-412/06 *Hamilton*. See, e.g., S. WEATHERILL, 'The "Principles of Civil Law" as a Basis for Interpreting the Legislative *Acquis*', 6. *ERCL* 2010, p. 74, and M.W. HESSELINK, 'The General Principles of Civil Law: Their Nature, Roles and Legitimacy', in D. Leczykiewicz & S. Weatherill (eds), *The Involvement of EU Law in Private Law Relationships*, Oxford, Hart 2013, p. 131.

61 BVerfG 15 Jan. 1958, *BVerfGE* 7, 198.

modes of reasoning of private law itself as a limiting device to mediate the impact of constitutional norms between and among private parties.[62] Its champion in European law is Advocate General Maduro and his Opinion in *Viking*. He had to start from afar. In *Commission* v. *France*, the Court had to deal with the reticence of French public authorities to take action against French farmers blocking the transit of Spanish strawberries at the border. Here, the Court launched its doctrine of 'indirect horizontal effect' by holding that Article 34 TFEU 'also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State'.[63] By famously reading the concept of EU loyalty into the free movement of goods, the Court derived a duty on the part of Member States 'to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory'. It then gave France some leeway in deciding the appropriate levels of violence to be used:

> In the latter context, the Member States, which retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security, unquestionably enjoy a margin of discretion in determining what measures are most appropriate to eliminate barriers to the importation of products in a given situation.[64]

This 'margin of discretion', it bears mentioning, is a conflict principle to deal with the clash of the Union's competences in matters concerning the internal market with the exclusive competences of the Member States in employing their monopoly of violence. In *Schmidberger*, the Court recalled this 'margin of discretion' in an altogether different context: as a principle to deal with the conflict between two competing rights recognized under European Union law.[65] Maduro derives from this a general principle of deference, according to which 'the provisions on freedom of movement do not always provide a specific solution for each case, but merely set certain boundaries within which a conflict between two private parties may be resolved'.[66] He then continues:

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62 See O. GERSTENBERG, 'Private Law and the New European Constitutional Settlement', 10. *ELJ* 2004, p. 766, at 773. He is quick to dismiss the idea, though, pointing out that 'you cannot have it both ways – both constitutional supremacy and the idea that the impact of the constitution on private law is contingent on private law itself as a self-sufficient, self-programming Archimedean set of legal norms and methods of reasoning'. *Ibid.*, p. 774.

63 ECJ, 9 Dec. 1997, C-265/95 *Commission* v. *France*, para. 30.

64 *Ibid.*, para. 33.

65 ECJ, 12 Jun. 2003, C-112/00 *Eugen Schmidberger*, paras 81–82.

66 Advocate General Maduro, Opinion of 23 May 2007 in C-438/05 *Viking*, para. 50.

> [E]ven in cases that fall within their scope, the provisions on freedom of movement do not replace domestic law as the 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.
>
> That degree of freedom for the Member States has procedural implications. Although the rules of civil procedure vary among national legal systems, it is a common feature that the parties to the proceedings have the primary responsibility for framing the contents and the ambit of their dispute. If these parties were to be allowed to bring legal proceedings before a national court merely by reference to the applicable Treaty rules of freedom of movement, the risk would arise that the national rules which applied would be left out of consideration. In order to prevent that from happening, Member States may require, in conformity with the principle of procedural autonomy, that proceedings against a private party on account of a contravention of the right to freedom of movement, be brought within the national legal framework, pursuant to a domestic cause of action- for instance tort or breach of contract.[67]

With this accomplished, Maduro is in a position to reassure his audience that the application of free movement law to private parties does not spell the end of their private autonomy and does not mean that they will be held to 'exactly the same standards' as state authorities. Rather, courts can apply 'different levels of scrutiny, depending on the source and seriousness of the impediment to the exercise of the right to free movement, and on the force and validity of competing claims of private autonomy'.[68]

Private law as 'a branch of applied EU Law'?[69] Not quite. In Maduro's scheme, private law balancing takes place in a circumscribed space within 'the boundaries set by Community law'. As an example of a situation where EU law leaves 'little or no leeway', he cites *Angonese*, concerning, as he puts it, 'manifest discrimination without the slightest hint of a reasonable cause'.[70] This, I would think, radically underestimates the extent to which these boundaries are incorporated into the structures of European private law itself. For example, and admittedly to the great chagrin of its liberal critics,[71] the Draft Common Frame of

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67 *Ibid.*, paras 51-52.

68 *Ibid.*, para. 49.

69 This paraphrases Matthias Kumm's famous classification of private law in Germany as 'a branch of applied constitutional law'. M. KUMM, 'Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', 7. *GLJ* 2006, p. 341, at 359.

70 Advocate General Maduro, Opinion of 23 May 2007 in C-438/05 *Viking*, fn. 59.

71 See, e.g., H. EIDENMÜLLER, 'Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR', 5. *ERCL* 2009, p. 110, at 121.

Reference contains general rules on non-discrimination,[72] on top of the general stipulation that its rules are to be read 'in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws'.[73] Moreover, it declares void contracts that infringe 'a principle recognized as fundamental in the laws of the Member States of the European Union', at least where nullity is 'required to give effect to that principle'.[74] By the same token, Maduro may well overestimate – or even romanticize – the extent to which a 'pure' libertarian core of private law still exists that will automatically come to the rescue of the individualistic value of party autonomy in the face of the collective values of intrusive public law. In summary, again, the imperative is not so much – as Maduro appears to assume – one of carving out some limited space for private law 'within the boundaries' set by public law for it to assert its values of contractual freedom and private autonomy, but one of turning the concept and modes of reasoning of private law itself into a mechanism where those boundaries can be sensibly drawn, and a 'fair balance' between competing claims struck. If, as Hesselink puts it, European private law (or, at least, the Common European Sales Law) is to become 'a common European model for how to behave in the Internal Market, a model for just conduct among European citizens', or even a European *constitution civile*, this is the least we should expect.[75]

The Interim Outline edition of the DCFR contained an open-ended list of 15 'core aims and values' of private law and a note to the effect that these aims 'can never be pursued in a pure and rigid way'. Rather, 'the underlying values of a private law system can only be discerned and described by explaining how such fundamental aims are balanced in the individual model rules'.[76] A savage critique from authoritative liberal German private lawyers lambasted the effort for two reasons: a failure to separate those values 'genuinely associated with private law' from such things as solidarity and social responsibility, and the total absence of 'conflict rules' to determine when a particular value prevails and provide reasons relevant to this assessment.[77] The Outline edition addressed the first critique to

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72 C. VON BAR *et al.* (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, Outline Edition, Munich, Sellier 2009, Book II, Ch. 2.

73 *Ibid.*, Art. I-2:102(2).

74 *Ibid.*, Art. II-7:301.

75 M.W. HESSELINK, 'The Case for a Common European Sales Law in an Age of Rising Nationalism', 8. *ERCL* 2012, p. 342, at 359 and 361.

76 C. VON BAR *et al.* (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, Interim Outline Edition, Munich, Sellier 2008, Introduction, para. 23.

77 H. EIDENMÜLLER *et al.*, 'The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems', 28. *Oxford Journal of Legal Studies* 2008, p. 659, at 672.

the outrage of more socially minded legal scholars[78] and limited the list of 'underlying principles' to freedom, security, justice and efficiency. It stayed clear of providing 'conflict rules', however, and maintained its stance towards 'balancing'. To the mind of Duncan Kennedy, this open adoption of balancing as the 'the basic framework for analysis and evaluation of private law rules' may well mark a 'historic turning point' for European private law theory, merging into the more general debate in administrative, constitutional, and European Union law where proportionality is both omnipresent and highly controversial.[79]

7. Conclusion

Kennedy sees a single evolving template for proportionality analysis in public and private law, involving three questions: '(a) Have the parties acted within or been injured with respect to their legally protected powers or rights? (b) Has the injuror acted in a way that avoids unnecessary injury to the victims' legally protected interest? (c) If so, is the injury acceptable given the relative importance of the rights or powers asserted by the injuror and the victim?'[80] As a mechanism with which to balance both privatized constitutional law and constitutionalized private law, this is perfectly sensible. It helps to frame questions thrown up by the constitutional protection of private autonomy and the private law protection of personal dignity. It does little, though, to provide answers to these questions.

In *Bendix Autolite*, Justice Scalia famously rejected the balancing approach to Commerce Clause cases on the grounds that, in weighing state interests and the interests of traders against each other, 'the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy'.[81] Much less famously, but barely three lines on, he goes on describing the balancing approach to determine how far the needs of the state can intrude upon the liberties of the individual as 'of the essence of the courts' function as the 'non-political branch'.[82] When, as in European Union law, traders' interests have been elevated to the status of 'individual liberties' that can be defended against other private parties, such neat divisions are of little use. Nor will they help where, as in European law, 'individual liberties' can be defended horizontally

78 See M.W. HESSELINK, 'If You Don't Like Our Principles We Have Others – On Core Values and Underlying Principles in European Private Law: A Critical Discussion of the New "Principles" Section in the Draft CFR', in R. Brownsword *et al.* (eds), *The Foundations of European Private Law*, Hart, Oxford 2011, p. 59.

79 D. KENNEDY, 'A Transnational Geneology of Proportionality in Private Law', in R. Brownsword *et al.* (eds), *The Foundations of European Private Law*, Hart, Oxford 2011, p. 185, at 187.

80 *Ibid.*, p. 218.

81 US Supreme Court 17 Jun. 1988, *Bendix Autolite*, 486 US 888, 898 (Scalia, J., concurring).

82 *Ibid.*

against intrusions by private traders. And so courts will have to delve in and ultimately determine the 'relative importance' of incommensurable interests.[83]

This 'balancing' comes at a cost both to European Union Law and to European private law. It inevitably undermines the hierarchy of norms by casting any and all rights and principles into 'optimization requirements' of *a priori* indistinguishable normative strength. It also undermines legal certainty, uniformity of application, and the effectiveness of internal market law. But this is how we live in a 'highly competitive social market economy'.

83 See A. BARAK, 'On Society, Law, and Judging', 47. *Tulsa Law Review* 2011, p. 297, at 310 (Balancing requires a 'common denominator', which is 'the social importance of conflicting principles at the point of conflict.'). As Habermas famously formulated his critique: 'Werte müssen von Fall zu Fall mit anderen Werten in eine transitive Ordnung gebracht werden. Weil dafür rationale Maßstäbe fehlen, vollzieht sich die Abwägung entweder willkürlich oder unreflektiert nach eingewöhnten Standards und Rangordnungen.' J. HABERMAS, *Faktizität und Geltung*, Suhrkamp, Frankfurt am Main 1992, pp. 315-316.

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Index

An annual index will be published in issue No. 6 of each volume.