The European Economic Constitution, Freedom of Contract and the DCFR

Jacobien W. Rutgers*

Abstract: In the literature on European Contract Law and German contract law, a number of authors claim that the free movement of goods (Article 28 EC), services (Article 49 EC), capital (Article 56 EC) and persons (Article 39 EC) guarantee party autonomy and freedom of contract. In this paper, the opposite will be argued. It is submitted that 'freedom of contract is taken for granted' within the European Union. However, it is also generally accepted that there are restraints to freedom of contract to protect societal interests, as for instance protection of weaker parties, the environment and the capital market. Thus, the real question concerns the balance between on the one hand, freedom of contract and, on the other, restrictions to freedom of contract.

The issue whether freedom of contract is a constitutionally protected right within the European Union is relevant, since if freedom of contract is taken as point of departure '… collective interests [are put] to the background'.

In order to show that the free movements do not guarantee freedom of contract, first, the origin of the claim that the free movements guarantee party autonomy will be explored and will be placed against a historical background. Then, it will be discussed to what extent the Treaty provisions reflect the idea that the free movements guarantee freedom of contract and whether it can be inferred from the ECJ case law.

Résumé : Dans la littérature sur le droit européen des contrats et le droit allemand des contrats, un certain nombre d'auteurs clament que la liberté de circulation des marchandises (article 28 du traité), des services (article 49), des capitaux (article 56) et des personnes (article 39) garantit l'autonomie des parties et la liberté contractuelle. Dans cet article, il sera soutenu l'inverse. Il semble que la liberté contractuelle soit tenue pour acquise au sein de l'union européenne. Néanmoins, il est également généralement admis que des limites peuvent être posées à la liberté contractuelle pour défendre des intérêts sociétaux, comme par exemple la protection des parties faibles, l'environnement, ou encore le marché de capitaux. Ainsi, la question réelle concerne l'équilibre entre, d'une part, la liberté contractuelle et, d'autre part, les restrictions à cette liberté.

La question de savoir si la liberté contractuelle est un droit constitutionnellement protégé au sein de l'union européenne est pertinente, dans la mesure où, si la liberté contractuelle est prise comme point de départ, les intérêts collectifs sont mis à l'arrière-plan.

A fin de montrer que les libertés de mouvement ne garantissent pas la liberté contractuelle, nous explorerons les origines de cette affirmation selon laquelle les libertés de mouvement garantiraient l'autonomie des parties, et nous la confronterons notamment aux antécédents

* This paper was presented during the Secola conference in Barcelona (2008). I would like to thank the participants and Ruth Sefton-Green for their comments on an earlier draft. The usual disclaimer applies.

historiques. Nous discuterons ensuite du point de savoir jusqu'à quelle limite les dispositions du traité reflètent cette idée selon laquelle les libres circulations garantissent la liberté contractuelle et si cette dernière peut être induite de la jurisprudence de la Cour européenne de Justice.

Kurzfassung: In der Literatur über Europäisches und Deutsches Vertragsrecht, geht eine Zahl von Verfassern davon aus, dass durch freien Güterverkehr (Art. 28 EC), Dienstleistungs- (Art. 49 EC), Kapital- (Art. 56 EC) und Personenverkehrsfreiheit (Art. 39) die Parteiautonomie und Vertragsfreiheit garantiert werden. In dieser Abhandlung wird das Gegenteilige dargelegt werden. Es wird aufgezeigt, dass innerhalb der Europäischen Union die ‚Vertragsfreiheit als selbstverständlich angesehen wird'. Dennoch ist üblicherweise anerkannt, dass Schranken für die Vertragsfreiheit existieren, um soziale Ziele zu schützen, wie zum Beispiel der Schutz der schwächeren Vertragsparteien, der Schutz der Umwelt und des Kapitalmarktes. Demnach beschäftigt sich die tatsächliche Frage mit dem Gleichgewicht zwischen der Vertragsfreiheit auf der einen Seite und der Beschränkungen der Vertragsfreiheit auf der anderen Seite.

Die Streitfrage ist, ob die Vertragsfreiheit ein durch die Verfassung geschütztes Recht innerhalb der Europäischen Union ist, da ja, falls die Vertragsfreiheit als ein Abweichungspunkt interpretiert wird, die ‚Interessen der Gemeinschaft in den Hintergrund [gebracht werden]'.

Um aufzuzeigen, dass der freie Verkehr eine Vertragsfreiheit nicht garantiert, wird zunächst der Ursprung des Autonomieanspruches der Partei, die sich auf den freien Verkehr beruft, erforscht und gegen den historischen Hintergrund abgegrenzt. Dann wird dargelegt, inwieweit die Bestimmungen des Übereinkommens die Idee reflektiert, dass die Vertragsfreiheit den freien Verkehr garantieren kann, und ob sie sich aus dem Präzedenzrecht ableiten lässt.

I. Introduction

As is well-known the EC-Treaty provides for the free movement of goods (Article 28), services (Article 49), capital (Article 56) and persons (Article 39). In the literature on European Contract Law and German contract law, a number of authors claim that the free movements, as laid down in the Treaty, guarantee party autonomy and freedom of contract.[1] In this

1 S. Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 *Common Market Law Review* 269, 277 seq; S. Grundmann, 'The Concept of the Private Law Society: After 50 Years of European and European Business Law' (2008) *European Review of Private Law* 553, at 560 seq; B. Lurger, *Vertragliche Solidarität* (Baden-Baden: Nomos Verlagsgesellschaft, 1998) 95; B. Lurger, *Grundfragen der Vereinheitlichung des Vertragsrecht in der Europäischen Union* (Wien, New York: Springer, 2002) 277; B. Lurger, 'The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe', in T. Wilhelmsson / E. Paunio / A. Pohjolainen (eds), *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 177, 186; E.-J. Mestmäcker, *Recht und Ökonomisches Gesetz*, (Baden-Baden: Nomos Verlagsgesellschaft, 1978) 25;

paper, the opposite will be argued. That is to say: the free movements of goods, services, capital and persons do not guarantee freedom of contract. It is submitted that 'freedom of contract is taken for granted' within the European Union.[2] However, it is also generally accepted that there are restraints to freedom of contract in order to protect societal interests, as for instance protection of weaker parties, the environment and the capital market. Thus, the real question concerns the balance between on the one hand, freedom of contract and, on the other, restrictions to freedom of contract.

The answer to this question will be different, when the point of departure is the guarantee of freedom of contract. In addition, there also other consequences. First, the order of discussion will be different; freedom of contract is the starting point of the debate and restrictions must be justified. In most instances, restrictions of freedom of contract concern protection of weaker parties or public policy or other societal interests. For instance, gambling contracts are not regarded as desirable in society and are consequently illegal.[3] In other words, if the free movements guarantee party autonomy, they 'put the collective interests to the background'.[4]

Another implication concerns the division of competences between the Member States and the European Union. If the free movements guarantee freedom of contract, it would imply that the Member States are not allowed to provide legislative measures that restrict freedom of contract, unless they are justified within the logic of the EC-Treaty. However, I will not deal with this issue, since I did that elsewhere.

P.O. Mülbert, 'Privatrecht, die EG-Grundfreiheiten und der Binnenmarkt' (1995) 159 *Zeitschrift für das gesamte Handelsrecht (ZHR)* 2, 8; P.-C. Müller-Graff, 'Basic Freedoms – Extending Party Autonomy across Borders', in S. Grundmann / W. Kerber / S. Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (Berlin / New York: Walter de Gruyter, 2001) 133, 135; O. Remien, *Zwingendes Vertragsrecht und Grundfreiheiten des EG-Vertrages* (Tübingen: Mohr Siebeck, 2003) 178 seq; P. Schlechtriem / M. Schmidt-Kessel, *Schuldrecht Allgemeiner Teil* (6th ed, Tübingen: Mohr Siebeck, 2005) nr 50; R. Schulze, 'Precontractual Duties and Conclusion of Contract in European Law' (2005) 6 *European Review of Private law* 841, 845; P. von Wilmowsky, 'EG Freiheiten und Vertragsrecht' (1996) *JuristenZeitung* 590, 593; P. von Wilmowsky, *Europäisches Kreditsicherungsrecht* (Tübingen: Mohr Siebeck, 1996) 35 seq.

2 Quote taken from N. Jansen / R. Zimmermann, 'Restating the *Acquis communautaire?* A Critical Examination of the "Principles of the Existing EC Contract Law"' 71 (2008) *The Modern Law Review* 505, 518.

3 T. Koopmans, 'Vrijheden in beweging, voordracht gehouden aan de rijksuniversiteit te Gent op 5 maart 1976', in *Juridisch stippelwerk* (Deventer: Kluwer, 1991) 37, 55.

4 D. Chalmers et al, *European Union Law* (Cambridge: Cambridge University Press, 2006) 663.

In order to substantiate my argument, first, the origin of the claim that the free movements guarantee party autonomy will be explored and will be placed against a historical background. Then, it will be discussed to what extent the Treaty provisions reflect the idea that the free movements guarantee freedom of contract and whether it can be inferred from the ECJ case law.

II. An European Economic Order or Constitution

The idea that the fundamental freedoms guarantee party autonomy originates from the idea that the EC Treaty constitutes an economic constitution, which is characterized by the free movements of goods, services, persons and capital, undistorted competition and the non-discrimination principle.[5] The writings referred to in the introduction are all from German or Austrian authors. This is not surprising, since the concept of the economic constitution, the *Marktwirtschaftsverfassung*,[6] was developed in Germany as a reaction to the economic situation in the Weimar Republic and the Nazi-regime and is part of the ordo-liberal ideas,[7] according to which the economic order is principally a private law society.[8] This implies that freedom of contract prevails in the market where the transactions take place. According to the ordo-liberal school of thought, the market must be controlled by the state in a very restricted way. This takes place by means of a constitution which grants economic rights to individuals, that cannot by trumped by politically defined group interests, for instance consumer interests or the interests of small and medium sized businesses.[9] Thus, the constitution protects economic

5 Grundmann (2008), n 1 above, 560; C. Joerges, 'On the Legitimacy of Europeanising Private Law: Considerations on a Law of Justi(ce)-fication (*Justum Facere)* for the EU Multi-Level System', in A. Hartkamp et al (eds), *Towards a European Civil Code* (Nijmegen: Ars Aequi Libri/Kluwer Law International, 2004) 159, 161; C. Joerges, 'What is left of the European Economic Constitution? A melancholic eulogy' (2005) 30 *European Law Review* 461, 470; Mestmäcker, n 1 above, 25. Cf M.E. Streit / W. Mussler, 'The Economic Constitution of the European Community: From "Rome" to "Maastricht"' (1995) 1 *European Law Journal* 5–30.

6 About the notion of the *Marktwirtschaftsverfassung* see: F. Rittner, *Wirtschaftsrecht* (Heidelberg: C.F. Müller Juristischer Verlag, 1987) 25 seq.

7 D.J. Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the New Europea' (1994) 42 *The American Journal of Comparative Law* 25, 27; Joerges (2004), n 5 above, 161; C. Joerges / F. Rödl, '"Social Market Economy" as Europe's Social Model?', *EUI Working Paper Law* No. 2004/8, 12 seq; W. Sauter, 'The Economic Constitution of the European Union' (1998) 4 *Columbia Journal of European Law* 27, 29, 46.

8 Mestmäcker, n 1 above, 29; Rittner, n 6 above, 5 seq.

9 Sauter, n 7 above, 48. Cf Remien, n 1 above, 24 seq.

rights and freedoms in a way similar to the classical political fundamental rights and freedoms.[10]

However, in Germany this theory remained a theory, since it was not adopted by the German constitutional law world.[11] Moreover, political practise was different as well. The idea of an ordo-liberal economic order was not imposed on the Germany economy; it was often lost in the bargaining democracy as Joerges demonstrated.[12] Thus, the ordo-liberal theory did not, in fact, become an economic order in Germany. Instead the social market economy was created.[13] This notion was coined by Müller-Armack and Erhard was its most important advocate in the political arena.[14] Its supporters agreed on the majority of issues of economic policy with the ordo-liberals. The difference is that, in addition, the benefits of the market had be distributed equitably in society.[15]

The next question is whether the economic order of European Economic Community (EEC) which was established in 1957, was an ordo-liberal economic order or a private law society or, differently put, whether the founding fathers of the EEC intended to create a private law society. Particularly in Germany it has been argued that this was the case. The most important authors in this respect are von der Groeben, Mestmäcker.[16] These authors consider the EEC an ordo-liberal enterprise, since in their view market-mechanism is the main instrument to establish the common market.[17] Further, the free movements are one of the instruments to guarantee individual economic freedom by setting aside its restrictions, as well as the non-discrimination principle.[18] State interventions were further restricted by rules on state aid and abuse of private economic power was prevented by the rules on compe-

10 Sauter, n 7 above, 48. Cf Gerber, n 7 above, 36 seq, 42; Lurger (2002), n 1 above, 225.

11 Joerges (2004), n 5 above, 161; Joerges (2005), n 5 above, 468; Joerges / Rödl, n 7 above, 5; Sauter, n 7 above, 48, 49.

12 Joerges (2005), n 5 above, 469.

13 About the social market economy see: C. Watrin, 'Germany's Social Market Economy', in A. Kilmarnock (ed), *The Social Market and the State* (London: the Social Market Foundation, 1999) 89. Cf M. Mazover, *Dark Continent, Europe's twentieth century* (New York: Vintage Books, 1998) 297.

14 Gerber, n 7 above, 32, 60 seq; Joerges / Rödl, n 7 above, 14.

15 Gerber, n 7 above, 32; Joerges / Rödl, n 7 above, 14 seq; Remien, n 1 above, 24 seq.

16 Joerges (2005), n 5 above, 471; Sauter, n 7 above, 49 n 77; B. Lurger, 'The Future of European Contract Law between Freedom of Contract, Social Justice, and Market Rationality' (2005) 1 *European Review of Contract Law* 442, 452.

17 Sauter, n 7 above. See also Streit / Mussler, n 5 above, 14 seq. Cf Joerges (2005), n 5 above, 470 seq.

18 Sauter, n 7 above, 50.

tition law.[19] Other issues, such as agricultural policy were considered to be just mistakes.[20]

In the next section it will be explored whether the founding Member States really had the intention to create an ordo-liberal economic order within the EEC.

III. A Historical Perspective

At the moment of the EEC's creation in 1957, the picture of its economic order was not as clear as it is perceived by certain authors nowadays.[21] To begin with, in 1957, the six founding Member States, Germany, France, Italy and the Benelux Countries had different economic orders. France and Italy favoured a more interventionist approach to the economy, whereas in Germany the emphasis was on the market economy.[22] The Benelux countries held a position somewhere in between.[23] Secondly, there were political differences of opinion concerning the EEC in each Member State.[24] In the German government there were strong differences of opinion between the Prime Minister Adenauer, on the one hand, and Erhard, the minister for economic affairs, on the other, who was a strong advocate of free trade and very sceptical about the EEC.[25] He favoured a looser free trade association.[26]

19 Sauter, n 7 above, 49.

20 Joerges (2005), n 5 above, 470; Sauter, n 7 above, 51.

21 See in this respect: H.J. Küsters, 'Jean Monnet and the European Union: Idea and Reality of the Integration Process', in G. Majone et al (eds), *Jean Monnet et l'Europe d'aujourd'hui* (Baden-Baden: Nomos Verlagsgesellschaft, 1989) 45. See with respect to the Schuman Plan: W. von Simson, 'Reflections on Jean Monnet's Skilfull Handling of Member States and People during the First Years of the Community', in Majone et al (eds), this note above, 29.

22 Küsters, n 21 above, 53; Sauter, n 7 above, 49; P. VerLoren van Themaat, 'Die Aufgabenverteilung zwischen dem Gesetzgeber und dem Europäischen Gerichtshof bei der Gestaltung der Wirtschaftsverfassung der Europäischen Gemeinschaften', in E.-J. Mestmäcker / H. Möller / H.-P. Schwarz (eds), *Eine Ordnungspolitik für Europa, Festschrift für Hans von der Groeben* (Baden-Baden: Nomos Verlagsgesellschaft, 1987) 425, 426.

23 Sauter, n 7 above.

24 For disagreement in the Dutch government about the European integration between the prime minister and others: J. van Merrienboer, *Mansholt* (Amsterdam: Boom, 2006) 187, 221.

25 T. Judt, *Postwar, A History of Europe Since 1945* (London: The Penguin Press, 2005) 304; see also *De Europese dagboeken van Max Kohnstamm, Augustus 1953 – September 1957*, bezorgd door M. Segers (Amsterdam: Boom, 2008) 121, 123, 196 seq.

26 Judt, n 25 above, 305.

Then, at the time, the EEC was seen as a first step towards a political and defence Community.[27] Consequently, many issues were not provided for in the 1957 Treaty.[28] For instance, Koopmans, a former ECJ Judge, writes that the Treaty did not provide any rules concerning the substance of the legal order. It was up to the ECJ to reveal this order, since this was missing in the Treaty.[29]

To sum up, these accounts do not justify the conclusion that the founding Member States intended the economic order of the European Economic Community to be an ordo-liberal one nor that the free movements guarantee freedom of contract consequently.

IV. The Treaties

Often the EC-Treaty and the 1957 Treaty establishing the EEC are presented as the documents which include an ordo-liberal economic order. Hereafter, it will be discussed to what extent it follows from the Treaties and its provisions that they include such an economic order.

Already from the 1960 s onwards, there has been a discussion concerning the EEC's underlying economic order. A group of Benelux authors, and also the Italian Pescatore, come to the conclusion that the economic order is a mixed one, which they inter alia base on the 1957 Treaty provisions.[30] For instance, former ECJ Advocate General VerLoren van Themaat infers this from Articles 2 and 3 of the 1957 EEC-Treaty, that provide the EEC's tools and aims, which are, amongst other things, the creation and good functioning of the internal market, which is characterized by both unfettered competition on the one hand and intervention in the economy by regulation on the other hand.[31] Principles such as equality and solidarity and agricultural policy were seen as the expression of the interventionist side of the EEC. In addition Article 225 (now Article 295 EC) played an important role in that respect. According to that provision, it is a matter of the Member States to regulate their systems of property law. This rule was introduced so that France and

27 T. Koopmans, 'The Birth of European Law at the CrossRoads of Legal Traditions' (1991) 39 *The American Journal of Comparative Law* 493. Cf Judt, n 25 above, 302.

28 Koopmans, n 27 above, 493.

29 Koopmans, n 27 above, 495; Cf Judt, n 25 above, 302.

30 Cf Sauter, n 7 above, 49; P. VerLoren van Themaat, 'Het econonomisch grondslagenrecht van de Europese Gemeenschappen', in *Liber Amicorum Josse Wildemars Mertens* (Antwerpen: Kluwer Rechtswetenschappen / Zwolle: W.E.J. Tjeenk Willink, 1982) 355, 363 seq; VerLoren van Themaat, n 22 above, 425–443.

31 VerLoren van Themaat, n 30 above, 363 seq.

Italy could not be forced to denationalize their industries.[32] In other words, nationalization of industry was possible.

As is well-known, the 1957 Treaty was modified many times, for instance by the Single European Act of 1987, The Treaty on the European Union (also known as the Treaty of Maastricht of 1993), the Treaty of Amsterdam in 1997, the Treaty of Nice. Those changes are considered by for instance Sauter, Joerges and Streit and Mussler to assess whether the ordo-liberal economic order is the basis of the Community's economic order.[33] They all come to the conclusion that this is not the case. For instance, the Single European Act introduced Article 100a, (now Article 95 EC) which provided for the adoption of legislative measures by a qualified majority in the Council.[34] Moreover Article 100b (now Article 95(3) EC) includes a high level of consumer, health and safety, and environmental protection. The former provided for more intervention in the economy and the latter provides for protection of collective interests.[35] In the Treaty of Maastricht, the principle of subsidiarity is introduced, which in the view of the ordo-liberals undermines Community competences.[36] Further, in the Treaty of Amsterdam, social and employment policies were moved to the core of the Treaty.[37]

From the above, it can be inferred that on the basis of the provisions of the different Treaties it cannot be concluded that the ordo-liberal economic order is the basis of the European economic order. Consequently, it cannot be deduced from the Treaties that the European Community is a private law society nor that the fundamental freedoms guarantee freedom of contract. The next matter to be considered is whether it can be inferred from the ECJ case law that the free movements guarantee party autonomy.

V. The ECJ Case Law

First, a few general remarks will be made concerning the case law with respect to the fundamental freedoms in order to answer the question whether it follows from the ECJ's case law that the free movements guarantee freedom of contract. As stated before, the free movement of goods, services, persons and capital are enshrined in the EC Treaty and these provisions are ad-

32 Sauter, n 7 above; VerLoren van Themaat, n 30 above, 365 seq.
33 Sauter, n 7 above, 51 seq. Cf Gerber, n 7 above, 75 seq.
34 Sauter, n 7 above, 52, 53; Streit / Mussler, n 5 above, 19 seq.
35 Joerges (2005), n 5 above, 474; Streit / Mussler, n 5 above, 19 seq.
36 Sauter, n 7 above, 55. Cf Streit / Mussler, n 5 above, 21 seq; it is submitted that they focus on other aspects of the Maastricht Treaty.
37 Sauter, n 7 above, 56.

dressed to the Member States. In the context of this paper only the vertical effect of the free movements is relevant.

The aim of the free movements is to open up national markets, so that a common market or internal market will be established.[38] In order to do so, all national measures that are an obstacle to trade must be set aside, unless they pass the justification test.[39] The first landmark case in this respect is *Dassonville*, pursuant to which all national rules 'which are capable of hindering directly or indirectly, potentially or actually intra-Community trade' cannot be applied, provided that they are not justified on the basis of the grounds which are included in the EC-Treaty.[40] As a result, national rules that either openly or covertly discriminate between national and imported products are considered to be an obstacle to trade between the Member States.[41]

In *Cassis de Dijon*, the category of rules that obstruct trade, was enlarged to measures that do not discriminate either covertly or openly.[42] In the absence of harmonization, disparity of national legislation resulted in an infringement of the free movement of goods, provided that the national legislation had not been justified. However, to counteract the enlargement of rules that could be set aside, the ECJ also created a new non-exhaustive category of justification grounds. As a consequence of *Cassis de Dijon*, the ECJ was flooded with cases in which rules that did not concern cross-border trade, were challenged, since they allegedly were an obstacle to inter-Community trade.

To reverse this development, the ECJ rendered its decision in *Keck* and *Mithouard*, in which the Court discerned between selling arrangements and product requirements.[43] Rules concerning the former concern the time and place of a sale, whereas rules concerning the latter involve issues such as the quality of products and quantity of ingredients in products. This distinction was aimed at clarifying the existing case law at the time. It is the question whether the ECJ managed to do so, since many national courts

38 See the opinion of Advocate General Poiares Maduro in case 158/04 and 159/04 *Alfa Vita Vassilopoulos AE* v *Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon*, and *Carrefour-Marinopoulos AE* v *Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon* [2006] ECR I-8135 (ECJ).

39 S. Weatherill, 'Recent Developments in the law governing the free movements of goods in the EC's internal market' (2006) 2 *European Review of Contract Law* 90, 91.

40 Case 8/74 *Procureur de Roi* v *Benoît and Gustave Dassonville* [1974] ECR 837 (ECJ).

41 C. Barnard, *The Substantive Law of the EU, The Four Freedoms* (Oxford: Oxford University Press, 2007) 97; P. Craig / G. de Búrca, *EU Law, Text, Cases and Materials* (Oxford: Oxford University Press, 2008) 669 seq.

42 Case 120/78 *Cassis de Dijon* [1979] ECR 649 (ECJ). Cf Craig / de Búrca, n 41 above, 677 seq.

43 Case 268/91 *Keck* and *Mithouard* [1993] ECR I-6097 (ECJ). Craig / de Búrca, n 41 above, 685.

asked preliminary questions concerning this distinction, since it has been rather difficult to apply in practise.[44]

Also within the literature, the *Keck* test has met considerable criticism.[45] One of the criticisms is that often a national rule does not fit easily into either of these categories. Roth refers to rules of private law in this respect and argues that they do not fall in either category; the access to market test should be applied instead.[46] Criticism has also come from the Court's Advocate Generals.[47] Different Advocate Generals proposed alternative tests.[48] For instance, in his opinion in *Alfa Vita*, Advocate General Poiares Maduro, suggests a uniform approach for the four movements, which he bases on an analysis of the post-Keck case law.[49] His starting point is that the aim of the free movements is to open up national markets, rather than an absolute right to economic or commercial freedom. A side effect may be the liberalisation of national economies. Thus, from the general case law with respect to the free movements it cannot be inferred that they guarantee freedom of contract. Rather it could be argued that on the basis of the case law their aim is to open up markets. The next issue which arises, is whether this also can be concluded on the basis of cases in which the ECJ had to deal with contract law in particular.

There are not that many cases in which the ECJ had to address whether national rules of contract law are contrary to the free movements. The most well-known cases are *Alsthom Atlantique*[50] and *CMC Motorradcenter.*[51] In *Alsthom Atlantique* the preliminary question concerned the French rule on hidden defects (Article 1643 of the French Civil Code), according to which the manufacturer is liable for hidden defects even he is not aware of

44 See the opinion of Advocate General Poiares Maduro in: Cases 158/04 and 159/04, n 38 above.

45 S. Weatherill, 'Some Thoughts on how to Clarify the Clarification' (1996) 33 *Common Market Law Review* 885–906. See for an overview of the criticism: Craig / de Búrca, n 41 above, 692 seq; cf Chalmers et al, n 4 above, 686.

46 P. Oliver / W.-H. Roth, 'The Internal Market and the Four Freedoms' (2004) 41 *Common Market Law Review* 407, 414.

47 See the opinion of Advocate General Jacobs in: Case 412/93 *Société d'Importation Edouard Leclerc-Siplec* v *TF 1 Publicité SA and M6 Publicité SA* [1995] ECR I-179 (ECJ), para 41 of the opinion.

48 See for instance: Advocate General Jacobs in Case 412/93, n 47 above; Advocate General Geelhoed in Case 239–02 *Douwe Egberts NV* v *Westrom Pharma NV and others*, ECJ 15 July 2004.

49 Case 158/04 and 159/04, n 38 above.

50 Case 339/89 *Alsthom Altantique* v *Compagnie de construction mécanique Sulzer SA* [1991] ECR I-107 (ECJ).

51 Case 93/92 *CMC Motorradcenter GmbH* v *P. Baskiciogullari* [1993] ECR I-5009 (ECJ).

them, unless it is stipulated in the contract that he is not.[52] According to French case law, there is an irrebutable presumption that the seller is aware of any hidden defects in the sold goods, unless the contract is concluded with a party that operates in the same branch. The Court had to answer whether this rule developed by the French courts was contrary to the free movement of exported goods (now Article 29 EC) in a dispute between two French parties before a French court. The ECJ came to the conclusion that it did not, since the French rule applied without any distinction to all relationships governed by that rule. Moreover, it did not have as its aim the regulation of export nor favouring domestic products or the domestic market.

In *CMC-Motorradcenter*, a lady who lived in Germany had ordered a Yamaha moped in Germany from a German dealer, who was not an official Yamaha dealer.[53] Part of the contract was a guarantee that all official Yahama dealers would repair her moped when something went wrong. However, in Germany they did not, in fact, do so when the moped had been obtained from a non-official dealer. Her seller had omitted to inform her of that practise. She refused to take the moped and the seller sued her for damages. The preliminary question posed to the ECJ was whether the German rule of *culpa in contrahendo,* which required the seller to inform the buyer of the official Yahama dealers' practise not to repair mopeds bought from non-official dealers, was contrary to the free movements. The ECJ held that the German rule of contract law applied without any distinction to all relationships governed by German law. Moreover, the aim of the rules is not to regulate trade. Then, it drew the conclusion that the alleged restrictive effect was too uncertain and too indirect to constitute a hindrance to trade.

A similarity between these two cases is that a mandatory rule of national contract law was challenged in both instances. Moreover, the ECJ held that these rules did not obstruct trade between the Member States and consequently were not contrary to the free movements. When these two rulings are considered in the light of the question whether the free movements guarantee freedom of contract, the answer is negative. First, the Court does not consider a rule of mandatory contract law contrary to the free movements. From this, it cannot be inferred that the free movements guarantee freedom of contract, it is rather the opposite. Moreover, it implies that in purely national situations, it belongs to the realm of the Member States to provide rules of contract law.

52 See also: Remien, n 1 above, 182.
53 See also: Remien, n 1 above, 182.

However, when *Omega Spielhallen*[54] is taken into account, one could argue that the free movements guarantee freedom of contract. It is submitted that this case started off as an administrative law case and this decision is well-known, since fundamental human rights were at stake. However, it may also shed some light on the relation between freedom of contract and the free movement of services. Omega Spielhallen, a German company, had concluded a contract with an English company for the supply of gear in order to run a laser game business, in which people could pretend to kill each other with laser pistols, in Bonn (Germany). In England the game was allowed, however, the Bonn police authorities forbid it, since it was against public policy and in particular in conflict with human dignity, a fundamental right that is protected by Article 1(1) of the German *Grundgesetz* (Basic Law). The issue which the European Court of Justice had to tackle was whether the game's prohibition was contrary to the free movement of services, since the equipment was provided by an English company which had entered into a contract with Omega Spielhallen. The ECJ held that even if there had not been a franchise or a supply contract at the moment the order of prohibition was issued, it is clear that this order 'is capable of restricting the future development of contractual relations between the two parties.'[55] However, the ECJ held that the right of human dignity was a justification which could trump the free movement of services even though the game was permitted in England.

A similar situation occurred in *Dynamic Medien Vertriebs GmbH* v *Avides Media.*[56] Avides Media, a company incorporated under German law, had imported Japanese cartoons, called Animes, in DVD or Video cassette format from the UK, where it was categorised by the British Board of Film Classification as 'suitable only for 15 years and over'. Avides sold them in Germany by mail order via the internet and an electronic trading platform. In Germany the cartoons were not examined in accordance with German law in particular the *Jugendschutzgesetz* (Law on the protection of young persons). A competitor of Avides, *Dynamic Medien*, also a company incorporated under German law, started interim proceedings against Avides and asked the court for an order to stop the sale by mail order, since it was not in compliance with the German law concerning the protection of young persons. The German courts in first instance and in appeal granted this order. In the proceedings on merits, the *Landgericht* Koblenz asked preliminary questions, inter

54 Case 36/02 *Omega Spielhalle- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609 (ECJ). Note by T. Ackermann, (2005) 42 *Common Market Law Review* 1107–1120.

55 Case 36/02, n 54 above, para 21.

56 Case 244/06 *Dynamic Medien Vertriebs GmbH* v *Avides Media AG*, ECJ 14 February 2008 (nyr) (ECJ).

alia whether the German law on the protection of younger persons was not contrary to the free movement of goods. The ECJ, first, held that the facts of this case did not fall within the scope of Directive 2000/31/EC on electronic commerce,[57] since 'Article 2(h)(ii) does not govern the requirements applicable to goods as such.' Consequently, the rules of German law had to be considered in the light of the Articles 28 and 30 EC. It had, inter alia, to be established whether the rule of German law was a selling arrangement within the meaning of *Keck* and therefore fell outside the scope of the free movement of goods. After repeating the Dassonville–formula and a lengthy discussion of the distinction between product requirements and selling arrangements, the Court came to the conclusion that the German law at stake does not fall within the category of selling arrangements within the meaning of Keck, since 'Such rules are liable to make the importation of image storage media from a Member State other than … Germany more difficult and more expensive, with the result that they may dissuade some interested parties from marketing such image storage media in the latter Member State.'[58] The ECJ also confirmed that the protection of the child is a legitimate interest to allow an infringement of the free movement of goods. *Omega Spielhallen* en *Avides Media* can be explained in the light of the principle of mutual recognition as developed in *Cassis de Dijon.* When a good or a service is lawfully produced in one Member State, it must be able to travel freely to another Member State. That was what at stake in these two cases. In both cases the German market was closed due to German measures. Since as explained above, the aim of the free movements is to open up markets, it follows that these measures obstruct trade between the Member States and must be, consequently, set aside.

In short, from the ECJ case law concerning it does not follow that the free movements guarantee freedom of contract. Their aim is rather to open up national markets.

VI. Conclusion

In this paper it was argued that the free movements as included in the EC-Treaty do not guarantee freedom of contract as is often claimed by, in particular, German and Austrian authors. It was, first, argued on the basis of historical facts that neither the founding fathers of the European Economic Community nor the 1957 Treaty on the European Economic Community

57 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), *OJEC* 2000 L 178/1.

58 Case 244/06, n 56 above, consideration 31.

was intended to create an ordo-liberal economic order. Subsequently, very briefly the changes to the 1957 Treaty were discussed to demonstrate that also the Maastricht, Amsterdam and Nice Treaty do not purport to an ordo-liberal economic order. Finally, it was also concluded that this claim does not follow from the ECJ case law. This all results in the conclusion that the European economic constitution does not require freedom of contract as an absolute starting point for future legislative measures of the European Union in the area of contract law, rather it allows for a balance between freedom of contract on the one hand and other societal or welfare interests on the other.