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Mak, C.

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UNCHART(ER)ED TERRITORY
EU FUNDAMENTAL RIGHTS AND NATIONAL PRIVATE LAW

Chantal Mak

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Unchart(er)ed territory EU fundamental rights and national private law

Chantal Mak

c.mak@uva.nl

Centre for the Study of European Contract Law
Universiteit van Amsterdam
P.O. Box 1030
1000 BA Amsterdam
The Netherlands

Unchart(er)ed territory

EU fundamental rights and national private law

Chantal Mak*

Abstract: How do fundamental rights recognised at EU level affect legal relationships under the national private laws of EU Member States? How and to what extent should such EU fundamental rights be integrated in legal reasoning under European private law? Taking its cue from four recent CJEU judgments, this paper focuses on the application of the Charter to cases concerning the application of Directives and Regulations and analyses the specific problems arising in this context. The analysis makes clear that the Charter provides judges with a means to strengthen fundamental rights protection in the EU legal order. At the same time, however, the risks related to a further-reaching constitutionalisation of European private law should not be underestimated, in particular insofar as social rights might be subordinated to economic interests falling within the scope of the Charter's provisions regarding freedom of contract.

Key words: EU Charter of fundamental rights, European private law, judicial method, proportionality, balancing, freedom of contract

1 Introduction

What implications do fundamental rights originating at EU level have for legal relationships governed by national private laws of the Member States? The question is gaining importance in light of the binding status that the Charter of Fundamental Rights of the EU (EUCFR)¹ obtained with the coming into force of the Lisbon Treaty in December 2009 and the increasing number of references to Charter rights in the case law of the Court of Justice of the European Union (CJEU). The subject is of particular relevance given the fact that in European private law, comprising EU measures and national private laws, an established conceptual framework is as yet lacking regarding, inter alia, the application of fundamental rights to questions of private law that are (partly) governed by EU Directives and Regulations (at stake in e.g. CJEU *Test-Achats*, *Prigge*, *Deutsches Weintor* and *Sky Österreich*).² Is the application of Charter rights likely to bring the debate a step forward?

* Associate professor, Centre for the Study of European Contract Law, University of Amsterdam, the Netherlands.

¹ Charter of Fundamental Rights of the European Union, OJ 30 March 2010, C 83/389. Article 6(1) TEU determines that: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.'

² A discussion of these cases follows in section 3 below.

This contribution will address two interrelated questions: First of all, how do fundamental rights recognised at EU level affect legal relationships under the national private laws of EU Member States? In the second place, how and to what extent should such EU fundamental rights be integrated in legal reasoning under European private law? Since the impact of the EU Charter on private law is far from being fully explored, the analysis of these questions is likely to raise new questions rather than provide final answers. Moreover, the Charter's impact may occur in many different constellations, for example when applying EU freedoms to horizontal relationships (e.g. CJEU *Viking*³ and *Laval*⁴) or when interpreting and applying measures of secondary EU law (most importantly Directives). Therefore, the aim is not to give a comprehensive overview of the field, but rather to sketch the conceptual legal framework within which the developments may be placed. Taking its cue from some relatively recent CJEU judgments, the paper focuses on the application of the Charter to cases concerning the application of Directives and Regulations and analyses the specific problems arising in this context. It then seeks to draw some more general conclusions from this analysis and formulates an agenda for further research. Accordingly, the paper is structured as follows: First, the conceptual matrix within which the Charter may apply to questions of private law is outlined (section 2). Subsequently, four relatively recent judgments from the CJEU are described and placed within this template (section 3). On the basis of a further analysis of the method of judicial reasoning applied in these cases, the conceptual matrix will then be rethought (section 4). Finally, some conclusions will be drawn (section 5).

2 The conceptual matrix

Questions concerning the application of the EUCFR to legal relationships between private parties find themselves at the crossroads of several doctrinal debates: In the first place, they address the compatibility of fundamental rights discourse and private law (section 2.1).⁵ In this context, the possible consequences of a further constitutionalisation of the basic principle of freedom of contract need to be assessed (2.2). Furthermore, the Charter's origins in EU law necessitate an exploration of the multi-level nature of the European legal order and, in relation to that, the intensity of effects of European rights on legal relationships governed by national private laws (2.3).⁶ The application of the EU Charter of Fundamental Rights to private law then conceptually may be placed at the intersection of these debates (2.4).

2.1 Fundamental rights and private law

Are human rights or fundamental rights compatible with private law? For the moment, let us consider this dilemma while leaving aside the normative question of whether fundamental

³ Case C-438/05, *ITF and Finnish Seamen's Union v. Viking Line*, CJEU 11 December 2007, [2007] ECR I-10779.

⁴ Case C-341/05, *Laval*, CJEU 18 December 2007, [2007] ECR I-11767.

⁵ For a recent discussion of this topic, see H. Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law', LSE Law, Society and Economy Working Papers 7/2012.

⁶ A.S. Hartkamp, *European and National Private Law* (Deventer: Kluwer, 2012).

rights should matter to private-legal relationships. The technical insertion of fundamental rights argumentation in private law cases requires judges to develop a methodology for balancing the interests and values protected by such rights against other rights and public policy. This implies that a method has to be articulated for establishing the weight of certain rights in specific cases.

The first point follows from the fact that fundamental rights slightly change their nature when they enter private-legal relationships. In the relationship between citizens and public authorities, in which these rights have originally been recognised, they protect individuals against excessive State interference with their lives. Therefore, fundamental rights normally define a strict scope within which the State may not intervene, unless clearly defined goals of public interest justify such intrusions. The right to respect for privacy may for instance be limited by law for reasons of public health, safety or morals or for the protection of the reputation or rights of others (cf. Article 8(2) ECHR). In case an individual invokes this right against another person, however, it is not unlikely that the latter will equally seek to rely on a fundamental right. A well-known example from the body of case law on fundamental rights application in private law concerns journalists publishing photographs or information concerning celebrities.⁷ In these cases, the subjects of the photos or information normally wish to have their privacy respected, whereas the journalist making public the pictures or data counters that he or she is allowed to do so in light of freedom of expression. In other words, in private law it is not unusual for both parties involved in a dispute to rely on fundamental rights. Judges dealing with these types of cases will have to adapt their application of fundamental rights accordingly.

Hugh Collins submits that in this context attention has to be paid to, first of all, the translation of values and rights from public to private law and, secondly, the extent to which fundamental rights may become alienable or derogable in private legal relationships.⁸ He suggests that a ‘double proportionality test’ might provide guidance to courts here. Such a test implies that ‘the case for interference with the separate rights of each party needs to be assessed separately according to a test of proportionality’.⁹ A judge would consider the fundamental rights of both parties to a private legal dispute and their possible, proportionate restrictions. This simultaneous analysis of both parties’ rights should then result in an ultimate balance of the rights involved, according to their specific weight in the case at hand. This type of test is not unknown in European case law on the topic, insofar as the European Court of Human Rights in its judgment in the case of *Von Hannover v. Germany* explicitly considered that two rights that are both protected under the ECHR (in this case: freedom of expression v. protection of privacy) as a matter of principle deserve equal respect and should be given equal weight in a balancing exercise.¹⁰ It should, thus, not matter whether a dispute arises following

⁷ For an overview of ECtHR case law on the topic, see R. Clayton and H. Tomlinson, *Privacy and Freedom of Expression* (Oxford: Oxford University Press 2010).

⁸ Cf. Collins 2012, p. 13.

⁹ Collins 2012, p. 31.

¹⁰ *Von Hannover v. Germany* (No. 2), ECtHR (Grand Chamber) 7 February 2012, nos. 40660/08 and 60641/08. On proportionality, see also M. den Houdijker, *Afweging van grondrechten in een veellagig rechtssysteem. De*

a claim on the basis of a journalist's freedom of expression or rather from a person's claim to have their privacy respected.¹¹

Still, the doubt arises whether, in the first place, this line of reasoning fully explains the differences between the application of fundamental rights in the public and in the private sphere and, secondly, whether it can be generalised to encompass the operation of all fundamental rights relevant to private law in all European legal systems, both on the national and on the European level.

First, this explanation mostly seems valid insofar as one accepts that private law distinguishes itself from public law by focusing on the protection of economic interests in interprivate relationships, rather than providing a means to prevent and fight abuse of power.¹² Without challenging this general functional distinction between public and private law, it may be submitted that private law on many occasions has effects that surpass the mere balancing of economic interests. Rules of private law can have (re)distributive effects on the division of wealth among private parties, in particular where they seek to redress imbalances in bargaining power and thus protect weaker contracting parties. As such, these rules of private law express a certain idea of social justice, which characterises the legal system to which they pertain. Arguably, the application of fundamental rights to private law brings out in the open this legal-political background and clarifies the range of policy choices available to legislature and judiciary.¹³

Secondly, then, the intensity of effects of fundamental rights in private law is likely to depend on the type of right involved and the context in which it is applied. Since conceptions of social justice vary across legal systems in Europe,¹⁴ the application of fundamental rights might differ from one system to another. In fact, the case law of various EU Member States shows that only few legal systems have unequivocally adhered to a theory of either direct or indirect application of fundamental rights to private legal disputes.¹⁵ Direct application would imply that fundamental rights are applied to private legal relationships in the same way as they are to State-citizen relationships, whereas indirect application requires the mediation of private law, for instance through the imposition of positive obligations on public authorities (legislature, judiciary) or through the interpretation of rules of private law in light of fundamental rights. While the German highest courts have explicitly adopted the indirect effect doctrine,¹⁶ other legal systems in Europe show a more differentiated approach or do not

toepassing van het proportionaliteitsbeginsel in strikte zin door het EHRM en het HvJ EU (Nijmegen: WLP, 2012), p. 630 ff.

¹¹ On the ECtHR's apparent bias towards the right on the basis of which a claim is presented, see Gerards case note to *Von Hannover t. Duitsland* (nr. 2), ECtHR (Grand Chamber) 7 February 2012, nos. 40660/08 and 60641/08, *EHRC* 2012/72, case notes by R. de Lange and J.H. Gerards.

¹² Collins 2012, p. 12.

¹³ C. Mak, *Fundamental Rights in European Contract Law* (Alphen a/d Rijn: Kluwer Law International, 2008).

¹⁴ H.-W. Micklitz, 'Introduction', in: *The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar Publishing, 2011), p. 3-57.

¹⁵ G. Brüggemeier, G. Comandé and A. Colombi Ciacchi (eds), *Fundamental Rights and Private Law in the European Union. I. A Comparative Overview* (Cambridge: Cambridge University Press, 2010).

¹⁶ *BVerfGE* 7, 198 (*Lüth*); P. Beckmann, A. Colombi Ciacchi, N. Ferreira, C. Moulin-Doos, P. O'Callaghan, T. Russo and J. Turney, 'National Reports: Germany', in Brüggemeier, Comandé and Colombi Ciacchi 2010, p. 269-271.

take an explicit stand.¹⁷ It, thus, seems difficult to draw general conclusions as to the extent to which specific fundamental rights should be reshaped in order to find meaningful application in private legal disputes across Europe.

The idea of alienability of fundamental rights in private law raises similar questions. Referring to Ronald Dworkin's conceptualisation of 'rights as trumps',¹⁸ Collins submits that

'in public law, rights are clubs to defend oneself against the abuse of power, with clubs having been accorded trumping power by the constitution or bill of rights, whereas in private law rights are diamonds to be traded with others or discarded by choice'.¹⁹

Whereas a citizen cannot waive his or her fundamental rights in relation to the State, private autonomy and freedom of contract leave private parties considerable leeway to contract out of fundamental rights protection. Collins names the possibility of relinquishing the enjoyment of property through a contract. Other examples include the (partial) waiver of free choice of profession in a non-competition clause that forbids an employee to work for a competing company for a certain period after termination of the employment contract, and the possibility for a surrogate mother to consent to the use of her body for carrying a child for another person or couple. The controversy related to the latter example²⁰ underlines the fact that it is not an easy task to determine the boundaries of contractual freedom in regard to fundamental rights.²¹ Again, legal systems in Europe may show pronounced differences on certain topics.

2.2 *The consequences of constitutionalisation*

A particular dilemma is presented by the recognition of one of the fundamental principles of contract law itself as a constitutional right, i.e. the 'constitutionalisation' of freedom of contract. While all European legal systems take this principle as a starting point, it is much rarer for freedom of contract to be granted full constitutional protection. In countries such as Germany and Italy, the national Constitution safeguards freedom of contract to some extent. German courts have interpreted the right to free development of one's personality (Article 2 *Grundgesetz*) as including protection of private autonomy, while Italian case law similarly refers to the freedom to conduct a business (Article 41 *Costituzione*). Furthermore, the French Constitutional Court, the *Conseil constitutionnel* has recognised freedom of contract's constitutional status, including it in the sphere of application of Article 4 of the *Déclaration des droits de l'homme*.²² Finally, the CJEU, which initially acknowledged freedom of contract

¹⁷ C. Mak, 'Harmonising effects of fundamental rights in European contract law', *Erasmus Law Review* 2007, p. 62-67.

¹⁸ R.M. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

¹⁹ Collins 2012, p. 14.

²⁰ M. Fabre-Magnan, *La gestation pour autrui* (Paris: Fayard, 2013).

²¹ Cf. Collins 2012, p. 35-36.

²² *Cons. const.* 13 January 2000, *JCP* 2001.I.261, no. 17; R. Cabrillac, *Droit européen comparé des contrats* (Paris: L.G.D.J. 2012), p. 31; L. Maurin, *Contrat et droits fondamentaux* (Paris: L.G.D.J., 2013), p. 107-135.

as a principle of civil law,²³ in recent case law included this principle in the scope of Article 16 of the EUCFR (freedom to conduct a business).²⁴

The consequences of this constitutionalisation of freedom of contract might be far-reaching, in particular if European rights conflict with national ones. Although judges in civil cases consider contractual freedom not to be absolute and for that reason weigh it against other interests, framing it as a constitutional right is likely to affect the manner in which a balance is struck. Moreover, the multi-level nature of European contract law implies that different conceptions of the constitutional interpretation and application of a right to freedom of contract have to be reconciled.

First, constitutionalising freedom of contract places a private law principle in a public law context. As Collins observes, rights in public law often seek to prevent infringements of parties' freedom (negative liberty), whereas in private law the emphasis is on the creation of a legal space for the development of private initiatives (positive freedom).²⁵ Consequently, judicial reasoning on a constitutional right to freedom of contract might focus on preventing interference with party autonomy, while neglecting the need to positively contribute to the development of a sphere within which parties can enter into the transactions they wish, e.g. by making available certain contracting options. As such, it might disregard private-legal values, e.g. the legitimacy of limits to fundamental rights that are grounded in freedom of contract itself. In European contract law, understood as the compound of contract law rules deriving from EU and national laws, this is not an unlikely scenario. EU law does not make a principled distinction between public and private law, which means that the application of fundamental rights on EU level may remain limited to the safeguarding of negative liberty. Private-legal values, in particular positive freedom, may receive less protection than in a 'classical' balance of contracting parties' interests.

Second, giving constitutional status to freedom of contract means that this principle will attain a status equal to that of other fundamental rights. Where fundamental rights are often considered to have a strong (rhetorical) power over other, private-legal interests, the constitutionalisation of freedom of contract puts the latter on equal footing with the former. Freedom of contract, thus, itself becomes one of the 'diamonds to be traded'²⁶ against other rights. In European contract law, a danger of this approach is that economic interests might attain a strong emphasis at the expense of social rights. This may cause tensions among EU law and national laws. The controversy surrounding the aforementioned *Viking* and *Laval* judgments underscores the point. The manner in which the CJEU elaborated the horizontal effects of the EU rights to freedom of establishment and free movement of services came close to granting these rights a fundamental, constitutional status under EU law. As a result, restrictions posed by social rights of workers, in particular the right to strike, were included in a balancing process. The EU freedoms, thus, became primary points of reference, with

²³ Case C-277/05 *Société thermale d'Eugénie-les-Bains v. Ministère de l'Économie des Finances et de l'Industrie*, CJEU 8 July 2007, [2007] ECR I-6415

²⁴ Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, CJEU 22 January 2013, para. 42, on which see further section 3.4 below.

²⁵ Collins 2012, p. 42-43.

²⁶ Collins 2012, p. 14.

national social rights functioning as possible justifications for limitations on the pursuit of those freedoms. This approach is at odds with many national laws, in which a strong right to strike and take collective action is the starting point and restrictions in light of companies' interests are the exception to the rule. Consequently, two regimes emerge: one for purely national situations, in which the right to strike in principle prevails, and a second regime for cross-border cases, in which market interests may outweigh the social rights. Including freedom of contract within the scope of protection offered by Article 16 EUCFR poses a risk of further erosion of social values and rights. The economic ambitions of the project of European integration are further entrenched and, thus, limit the space available to social rights.²⁷

2.3 EU law and national private laws

Paradoxically, although references to fundamental rights argumentation in private law appear to further increase the complexity of legal discourse, this type of reasoning continues to gain importance not only in EU Member States but also in the case law of the CJEU. In order to understand the mechanisms at work, it is therefore necessary to take into account the particular dimension added by European law. The question is how the 'Europeanisation' of private law affects the solution of disputes governed not only by national private law but also by rules deriving from the European level.

In this context, a distinction is regularly made between vertical and horizontal effects of EU law on national private laws. A vertical effect implies that a rule of EU law imposes a duty on a Member State, for instance the duty to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' under Article 19 TEU. A horizontal effect, on the other hand, occurs when a rule of EU law affects a legal relationship between non-State actors.

Horizontal effects can further be distinguished according to the manner in which they enter the private-legal relationship, directly or indirectly.²⁸ A direct horizontal effect occurs when EU law itself determines the validity, substance or interpretation of a legal relationship among private parties. Article 101 TEU provides a clear example of such an effect, insofar as it holds void agreements that infringe EU competition law. An indirect effect, on the other hand, concerns the more diffuse impact of EU law on horizontal relations, e.g. through the interpretation of rules of national private law in light of EU law, through the imposition of

²⁷ Daniela Caruso observes that *Viking* effectively justifies regressive distribution of wealth in the EU: 'No one on the left of the political spectrum would ever object to the idea of redistributing some wealth from healthier economies to the periphery of the Union. What was – and continues to be – upsetting is the fact that the particular redistribution enabled by decisions of the *Viking* type moves wealth away from the workers of State A to the worse-off nationals of State B, and at the same time allows the employers of State A to stay in profitable business. In so far as, within State A, employers as a class are better off than workers, the type of redistribution enabled by *Viking* is starkly regressive. *Viking*'s deregulatory effects, seemingly virtuous on distributive grounds, fail the realist test in a multi-state context.' D. Caruso, 'The Baby and the Bath Water: The American Critique of European Contract Law', *American Journal of Comparative Law* 2013 (forthcoming), also available as Boston University School of Law Public Law Research Paper No. 12-43 on <http://ssrn.com/abstract=2135179> (last consulted on 15 April 2013).

²⁸ Hartkamp 2012, nos. 12-21.

positive obligations on Member States or through the review of the legality of measures of private law in light of EU law.

The type of effect has theoretical implications for the method of judicial reasoning applied to specific cases. A directly applicable provision of EU law does in principle not require the judge to look into national law, whereas a provision of EU law that indirectly influences horizontal relationships requires a judge to consider possible entrances in national law and the balance to be struck between EU and national goals of private law.

2.4 The Charter at the crossroads

The application of the EUCFR to cases that on the level of the Member States fall within the scope of private law poses questions concerning the Charter's place within the legal order made up of the compound of rules of private law originating from EU law and national laws. In light of the doctrinal debates discussed above, the EUCFR's (potential) effects in this field may be conceptualised in three ways. These can be distinguished as follows:

(a) Direct and indirect effects of Charter rights in private law.

In the first place, as in national legal systems, fundamental rights laid down in the Charter may affect private legal relationships either directly, by changing the legal obligations of parties towards one another, or indirectly, by influencing the interpretation and application of rules of private law to the legal relationship concerned.

(b) The Charter's influence on direct and indirect effects of EU law in national private law.

In the second place, the Charter may have an impact on cases in which rules of EU law (e.g. those included in a Regulation or Directive) have either direct or indirect horizontal effects in national private law, i.e. where these rules affect the validity, substance or interpretation of private legal relations or where they operate through rules of national private law. In these cases, the EUCFR may affect the interpretation and application of measures of secondary EU law, in particular through the preliminary reference procedure.

(c) Charter provisions as fundamental rights and rules of EU law: what judicial method?

In the third place, since the Charter *itself* is an instrument of EU law, its application may not only be classified in terms of direct and indirect effects of fundamental rights in private law (category a), but also in terms of direct or indirect effects of rights deriving from EU law (category b). In specific cases, the question then arises which technique of application should prevail. Do judges have to apply a method of balancing fundamental rights and other interests? Or do they have to focus on the effective enforcement of EU law on the national level? Sometimes the outcomes of these two methods will coincide,²⁹ sometimes they will not. For the latter cases, a choice between the two perspectives needs to be made.

²⁹ In particular, this rings true to the extent that EU law protects the rights laid down in the European Convention on Human Rights (ECHR) and, thus, seeks to provide for a harmonious safeguarding of the rights concerned on the different levels of the European legal order.

In summary of the above, it seems that more work needs to be done on the elaboration of the conceptual matrix concerning the application of fundamental rights in European contract law. In this context, in particular the judicial method of insertion of fundamental rights deserves attention. Hugh Collins has suggested that a ‘double proportionality test’, in which the rights of both parties to a conflict are evenly balanced, may provide the best framework. In order to assess the adequacy of this test to guide the insertion of fundamental rights argumentation in private law, attention needs to be paid to the effects of this approach. How do fundamental rights affect the outcomes of private legal disputes and can they further the goals pursued through private law? This is of particular importance in the European context, where the interaction of rules of private law on multiple levels may result in clashing EU and national rights in specific cases. The question is whether the analytical framework developed for the integration of fundamental rights in private law on the national level can be meaningfully translated to the application of the Charter in order to provide methodological guidance for the solution of private-legal disputes. In particular, the significance of the European dimension requires attention. In the following, four recent CJEU cases in which the Charter was applied will be analysed for the purpose of formulating a tentative answer to this question.

3 Four cases

Given the fact that the Charter only obtained binding legal status with the coming into force of the Lisbon Treaty in 2009, the number of CJEU judgments referring to it is still relatively low. Nevertheless, at least four examples of recent cases can be found, which highlight different aspects of the Charter’s application on the crossroads of private law and EU law: *Test-Achats* (section 3.1), *Prigge* (3.2), *Deutsches Weintor* (3.3) and *Sky Österreich* (3.4).

3.1 Review of a Directive against a fundamental right: *Test-Achats*

The *Test-Achats* case³⁰ concerned the transposition in Belgian law of Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Consumer organisation *Test-Achats* brought an action before the Belgian Constitutional Court for annulment of the implementation law on the ground that this law was contrary to the principle of equality between men and women. This claim was based on the fact that the Belgian legislature had made use of the possibility offered by Article 5(2) of the Directive ‘to permit proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data’. Consequently, during the proceedings the question arose whether the Directive *itself* was in compliance with the principle of non-discrimination. This question was referred to the CJEU for a preliminary ruling.

³⁰ Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL and others v. Conseil des ministres*, CJEU 1 March 2011, [2011] ECR I-00773.

The Court came to the conclusion that, indeed, Article 5(2) of the Directive had to be held invalid in light of the principle of equal treatment for men and women. It based its decision on the consideration that this provision permits the derogation from equal treatment to persist indefinitely.³¹ This would ‘work against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113’.³² Moreover, it would be incompatible with Articles 21 and 23 of the Charter of Fundamental Rights,³³ which determine that any discrimination based on sex is prohibited and that equality between men and women must be ensured in all areas.

The method of judicial reasoning followed by the CJEU in this case consisted of, in a first step, setting out what the right to equal treatment required, i.e. ‘that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified’.³⁴ Secondly, the Court added that ‘the comparability of situations must be assessed in the light of the subject-matter and purpose of the EU measure which makes the distinction in question’.³⁵ Considering the ideas laid out in the recitals to the Directive, the Court then found that ‘Directive 2004/113 is based on the premiss that, for the purposes of applying the principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable’.³⁶ Accordingly, a provision that enabled Member States to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits could not be upheld in light of the fundamental right to non-discrimination of men and women. This method, thus, focuses on the teleological interpretation of a measure of EU law (in this case Directive 2004/113) in light of a fundamental right (non-discrimination). The implications of the preliminary ruling for national laws follow from the result of this review.

In the conceptual matrix outlined in the previous section, the judgment may be understood as involving:

(a) an indirect effect of the fundamental right of non-discrimination on insurance contracts laid down in Articles 21 and 23 EUCFR, viz. through the invalidation on the basis of this right of Article 5(2) of the Directive as of 21 December 2012, which implied that national laws had to be adapted so as not to allow different premiums in insurance contracts for men and women after that date. The Charter right to non-discrimination affected private legal relationships through the assessment and invalidation of a rule of EU law. In this sense, it resembles the application of fundamental rights in national private laws, e.g. through the annulment of a rule of private law infringing a constitutional right.

(b) an indirect horizontal effect of EU Directive 2004/113 on insurance contracts under national laws, insofar as the invalidity of Article 5(2) of the Directive would affect national insurance laws and, thus, change the legal framework for concluding valid contracts.

³¹ CJEU *Test-Achats*, para. 31.

³² CJEU *Test-Achats*, para. 32.

³³ CJEU *Test-Achats*, para. 32.

³⁴ CJEU *Test-Achats*, para. 28.

³⁵ CJEU *Test-Achats*, para. 29.

³⁶ CJEU *Test-Achats*, para. 30.

Importantly, in private legal disputes contracting parties cannot rely on the foreseen amendment of the national legal framework for insurance contracts, but have to wait for its actual implementation.

(c) an indirect horizontal effect (in the sense of the effects comprised in category b, viz. the impact of EU law on national private laws) of Articles 21 and 23 EUCFR as rules of EU law. The Charter's provisions on non-discrimination will affect contractual relationships through the amendment of national insurance laws. The interpretation of a Directive expressing the principle of non-discrimination triggered this effect, as it in its turn impacts on national laws. The effect given to fundamental Charter rights, thus, followed a methodology that is, on the one hand, based on a theory of indirect effects of fundamental rights in private law (category a). On the other hand, however, the status of EUCFR rights as rules of EU law transformed the assessment in a two-level test, i.e. first, evaluating the validity of Article 5(2) of Directive 2004/113 and, secondly, requiring the amendment of national implementation laws. Whereas the results of the second step would by definition have to coincide with those of an indirect application of the right to non-discrimination in private legal disputes (i.e. similar to purely national disputes), the insertion of the first step of the test raises the question whether the idea of social justice expressed in EU law, as reflected in the Directive, might ultimately determine the balance struck among different interests. An indication of such a particular colour added by Union law may be read in *Test-Achats* insofar as the CJEU explicitly bases its reasoning on the consideration of the Directives objectives, observing that:

'Directive 2004/113 is based on the premiss that, for the purposes of applying the principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.'³⁷

In regard to this judgment, finally, it may be noted that following the approach taken in *Test-Achats* the Charter's effects will only become apparent in case law succeeding the adaptation of national laws. However, the judgment does not seem to preclude contracting parties' reliance on the general principle of non-discrimination that was acknowledged to underlie EU Directives in earlier case law, notably the CJEU's rulings in *Mangold* and *Küçükdeveci*.³⁸

3.2 Review of a collective agreement in light of a fundamental right: *Prigge*

Mr Prigge, Mr Fromm and Mr Lambach had worked for many years as pilots with the German airway company Lufthansa. Pursuant to a clause in the collective labour agreement governing their employment contracts, their contracts were terminated upon them reaching the age of 60. In the legal procedure concerning their objections against the termination of the

³⁷ CJEU *Test-Achats*, para. 30.

³⁸ C. Sieburgh, 'Het Unierechtelijk beginsel van gelijkheid en zijn werking in het burgerlijk recht', *WPNR* 6901 (2011), p. 798-809, referring to case C-144/04, *Werner Mangold v Rüdiger Helm*, CJEU 22 November 2005, [2005] ECR I-9981 and case C-555/07, *Seda Küçükdeveci v. Swedex*, CJEU 19 January 2010, [2010] ECR I-00365. For an overview of the many reactions to the first judgment, see M. Dougan, 'In Defence of Mangold?', in: A. Arnall, C. Barnard, M. Dougan and E. Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing, Oxford 2011), 219-244.

employment contracts, the preliminary question was raised whether the age limit laid down in the collective agreement might be precluded by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and the law implementing this Directive in Germany.

The CJEU considered that the pilots were indeed treated in a less favourable manner than younger colleagues only on the basis of their age.³⁹ In this context, it emphasised that the application of the Directive must take into account the principle of non-discrimination on the ground of age as recognised in the case law of the CJEU (*Mangold* and *Küçükdeveci*) and incorporated in Article 21 of the Charter. It then went on to test the relevant provision of the collective agreement against Articles 2(5), 4(1) and 6(1) of the Directive. According to Article 2(5), the Directive is ‘without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others’. The termination of the pilots’ contracts at reaching age 60 could not qualify as ‘necessary for public security’ in the sense of this provision, since national and international legislation fixed that age limit at 65.⁴⁰ Given the fact that these legislative measures considered it safe for pilots to fly till the age of 65, moreover, an age limit of 60 imposed a disproportionate requirement on the pilots under Article 4(1) of the Directive.⁴¹ Finally, air traffic safety does not fall within the scope of legitimate social aims that under Article 6(1) justify difference of treatment on grounds of age.⁴²

The method of judicial reasoning employed in this case, thus, consisted of the application of the three provisions of the Directive invoked by the referring national court to the age limit included in the collective agreement. The fundamental right of non-discrimination on the ground of age, laid down in Article 21 of the Charter, only played a role indirectly, as a principle underlying the provisions of the Directive.⁴³

Conceptually, the judgment may be read as comprising:

(a) an indirect effect of the Charter right to non-discrimination on grounds of age on employment contracts. Read in light of the fundamental right concerned, the provisions of the Directive precluded the age limit of 60 years foreseen by the collective agreement. An amendment of the collective agreement entailed the nullity of employment contracts establishing a mandatory retirement age of pilots at the age of 60.

(b) an indirect effect of Directive 2000/78/EC on the employment contracts between the pilots and the airline, insofar as the interpretation of the Directive as precluding the age limit affects these contracts.

(c) an indirect horizontal effect of Article 21 EUCFR as a rule of EU law, since it inspired the interpretation and application of the relevant provisions of the Directive that in their turn affected the pilots’ employment contracts. Similar to *Test-Achats*, the nature of European private law implied that the effect of the Charter right was shaped in two

³⁹ Case C-447/09, *Prigge, Fromm and Lambach v. Deutsche Lufthansa*, CJEU 13 September 2011, nyr, para. 44.

⁴⁰ CJEU *Prigge*, para. 64.

⁴¹ CJEU *Prigge*, para. 75-76.

⁴² CJEU *Prigge*, para. 82.

⁴³ Cf. CJEU *Mangold* and *Küçükdeveci*.

consecutive steps, located on two levels. First, the Directive was read in light of the right to non-discrimination on the European level. Subsequently, the implications for the collective agreement and contracts falling within its scope had to be determined in German law. In regard to judicial method, the European nature of Charter rights, thus, once more enabled the insertion of European values and objectives in the process of (indirectly) applying fundamental rights to rules of private law. The emphasis on EU objectives in *Prigge* is visible in the CJEU's emphasis on the European right to non-discrimination. Interestingly, however, the Court resorted to measures of national and international law to give substance to the right in question:

‘In fixing at 60 the age-limit from which airline pilots falling within Collective Agreement No 5a are considered as no longer possessing the physical capabilities to carry out their occupational activity, while national and international legislation authorise the carrying out of that activity, under certain conditions, until the age of 65, the social partners imposed on those pilots a disproportionate requirement within the meaning of Article 4(1) of the Directive.’⁴⁴

The ‘Europeanisation’ of the application of fundamental rights to private legal disputes does, therefore, not necessarily imply that the CJEU will exclusively refer to EU law in order to determine the intensity of the effect of the Charter on the outcome of the disputes. Where sources of national and international law inspire the application of a Charter right, the outcome of a case is likely to correspond to the solution a judge under that national law would have found.

3.3 Review of a Regulation in the balance between fundamental rights: Deutsches Weintor

Deutsches Weintor, a wine-growers’ cooperative established in the German *Land* Rhineland-Palatinate, marketed a wine as ‘easily digestible’, emphasising its ‘gentle acidity’.⁴⁵ The supervising authority objected against this indication, since it would amount to a health claim, which type of claim was not permitted for alcoholic beverages under Regulation 1924/2006. In the administrative proceedings ensuing from *Deutsches Weintor*’s claim to be allowed to use the description ‘easily digestible’ in its labelling, the German Administrative Court (Bundesverwaltungsgericht) raised the question if a prohibition was in line with, among other things, the fundamental rights of the freedom to choose an occupation and the freedom to conduct a business (Articles 15 and 16 EUCFR, respectively).

After having established that the indication ‘easily digestible’ did indeed qualify as a health claim in the sense of the Regulation,⁴⁶ the Court took up the question regarding the compatibility with Article 6(1) TEU of the categorical prohibition to use such a claim. Since

⁴⁴ CJEU *Prigge*, para. 75. The predominance of EU values and objectives may be explained on the basis of the primacy of EU law, apparent in para. 46 of the Court’s judgment: ‘It should be noted that the fact that the national legislation, in this case, according to the national court, Article 14(1) of the TzBfG, may authorise, for an objective reason, a collective agreement to provide for the automatic termination of employment contracts at a specified age does not dispense with the requirement that the collective agreement at issue must be in accordance with EU law and, more particularly, the Directive.’

⁴⁵ Case C-544/10, *Deutsches Weintor v. Land Rheinland-Pfalz*, CJEU 6 September 2012, nyr.

⁴⁶ CJEU *Deutsches Weintor*, para. 41.

Article 6(1) TEU determines that the rights, freedoms and principles set out in the Charter have the same legal value as the Treaties, non-compliance with a Charter right would imply the need for a change of the relevant legislation, in this case probably even of Regulation 1924/2006 itself. The Court emphasised that in this case not only the rights mentioned by the referring court concerning the freedom of profession and the freedom to conduct a business (Articles 15 and 16 EUCFR) were of importance. Article 35 EUCFR was equally significant, insofar as it required that a high level of human health protection be ensured in the definition and implementation of all the European Union's policies and activities.⁴⁷ Accordingly, the Court held that its assessment of the prohibition to make a claim regarding the 'easy digestibility' of wine had to strike a fair balance between the rights at stake.⁴⁸ In line with earlier case law, measures restricting the advertising of alcoholic beverages in order to combat alcohol abuse were considered to reflect public health concerns and as such formed 'an objective of general interest justifying, where appropriate, a restriction of a fundamental freedom'.⁴⁹ The EU legislature thus was entitled to prohibit such claims as the one at issue in *Deutsches Weintor*, since '[b]y highlighting only the easy digestion of the wine concerned, the claim at issue is likely to encourage its consumption and, ultimately, to increase the risks for consumers' health inherent in the immoderate consumption of any alcoholic beverage'.⁵⁰ The freedom to choose an occupation and to conduct a business, furthermore, were not absolute rights, but had to be considered in light of their social function.⁵¹ Therefore, restrictions could be imposed on the exercise of these freedoms, 'provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights'.⁵² In the present case, according to the CJEU, the substance of the freedoms laid down in Articles 15 and 16 EUCFR was not affected by the Regulation, since it did not prohibit the production and marketing of alcoholic beverages, but merely sought to control, in a proportionate manner, the associated labelling and advertising. The prohibition of the health claim at issue did, thus, not infringe Article 6(1) TEU.⁵³

The CJEU's method in this case resembles Collins's double proportionality test.⁵⁴ It first explored the implications of Article 35 EUCFR (health protection) for the validity of the restriction on labelling. It then did the same for Articles 15 and 16 EUCFR (freedom to choose an occupation and freedom to conduct a business). The judgment resulted from the balancing of the relevant rights and their restrictions. Still, the proportionality test was mostly aimed at Articles 15 and 16, which means that it was not of a fully 'double' nature.

⁴⁷ CJEU *Deutsches Weintor*, para. 45.

⁴⁸ CJEU *Deutsches Weintor*, para. 47, referring to Case C-275/06 *Promusicae*, [2008] ECR I-271, para. 65 and 66.

⁴⁹ CJEU *Deutsches Weintor*, para. 49.

⁵⁰ CJEU *Deutsches Weintor*, para. 52-53.

⁵¹ CJEU *Deutsches Weintor*, para. 54.

⁵² CJEU *Deutsches Weintor*, para. 54.

⁵³ CJEU *Deutsches Weintor*, para. 55-60. In the same sense, Advocate-General Mazák's opinion in this case, para. 64-75.

⁵⁴ See section 2.1 above.

Although the consequences of the CJEU's decision in *Deutsches Weintor* may in the first place be sought in criminal law, the judgment may also be read as potentially involving the following effects in private law within the conceptual framework outlined in section 2:

(a) an indirect effect of the fundamental rights of Articles 15, 16 and 35 EUCFR on the contractual relationships between Deutsches Weintor and its customers, since the review of Regulation 1924/2006 against these rights implies that the former may no longer market its wine to the latter by indicating the 'easy digestibility' of the wine.

(b) either a direct or an indirect horizontal effect of EU law on private legal relationships, resulting from the application of the Regulation. First, a competitor might bring a claim against Deutsches Weintor regarding its non-compliance with the Regulation.⁵⁵ Furthermore, the CJEU's ruling in principle permits customers to directly appeal to the relevant provisions of the Regulation to assess the legitimacy of the producer providing information on health-related characteristics of the product in the pre-contractual stage.

(c) an indirect horizontal effect of the Charter as part of EU law, since its provisions will have an effect on private legal relationships to the extent that the review of the Regulation against the relevant Charter rights has implications for private law. A Regulation may in principle be directly invoked in private legal disputes. Yet, the engagement of fundamental rights in cases of the *Deutsches Weintor* type does not follow from the Regulation itself, but takes place in the process of interpretation of the relevant provisions of this measure. Consequently, as in the two previously discussed cases, the applicability of a measure of secondary EU law implied an indirect effect of fundamental rights laid down in the EUCFR. This effect was coloured by European interests insofar as EU consumer policy determines what health claims were allowed:

'As is apparent from a reading of recital 1 in conjunction with recital 10 in the preamble to Regulation No 1924/2006, it is established that, by indicating a nutritional, physiological or any other health advantage over similar products, claims promoting the foods on which they appear guide the choices made by consumers. Those choices directly influence the total selected intake of individual nutrients or other substances, thereby warranting the restrictions imposed by that regulation in relation to the use of those claims.'⁵⁶

As becomes clear from recital 2 to Regulation 1924/2006, furthermore, EU policy in this field is heavily influenced by market goals:

'Differences between national provisions relating to such claims may impede the free movement of foods and create unequal conditions of competition. They thus have a direct impact on the functioning of the internal market. It is therefore necessary to adopt Community rules on the use of nutrition and health claims on foods.'

It seems, therefore, that the CJEU's approach in *Deutsches Weintor* subjects Charter rights to the objectives of European economic integration. While the consequences of this approach

⁵⁵ Cf. case C-253/00, *Muñoz*, CJEU 17 September 2002, [2002] ECR I-7289; Hartkamp 2012, nos. 72 and 197.

⁵⁶ CJEU *Deutsches Weintor*, para. 37.

may be mitigated insofar as national consumer protection policies achieve similar results, the fact remains that this type of judicial reasoning opens the door for a stronger emphasis on EU market-oriented rights, possibly at the expense of other, social rights.⁵⁷

3.4 Review of a Directive in the balance between fundamental rights: Sky Österreich

This case⁵⁸ concerned the transmission rights of several Europa League matches for which Sky Österreich had paid licence and production costs. In accordance with the EU Directive on Audiovisual Media Services, the Austrian regulatory authority in the field of communications had decided that Sky had to grant the Austrian public broadcasting service ORF the right to transmit short news reports on Europa League matches involving Austrian teams. On the basis of Article 15(6) of the Directive it was established that ORF would only have to pay compensation for the costs of access to the satellite channel, which in this case equalled zero. Sky was of the opinion that this result was unfair, in particular insofar as Article 15(6) would systematically put exclusive right holders at a disadvantage. The dispute then reached the Austrian Federal Communications Tribunal, which raised a preliminary question regarding the compliance of the Directive with fundamental rights, in particular the freedom to conduct a business and the right of ownership (Articles 16 and 17 of the EU Charter of Fundamental Rights (EUCFR) and Article 1 of the First Protocol to the European Convention on Human Rights (ECHR)).

The CJEU's consideration of this question did not disclose any factors that could affect the validity of Article 15(6) of the Audiovisual Media Services Directive.⁵⁹ According to the Court, Sky's rights under the EU Charter of Fundamental Rights did not preclude the compensation that holders of exclusive broadcasting rights may seek from other channels for short news reports from being limited to technical costs. As regards the right to protection of property, the Court was of the opinion that Sky could not rely on this right in the present case. Although exclusive contractual broadcasting rights have asset value, 'when Sky acquired those rights by means of a contract (in August 2009), EU law already provided for the right to make short news reports, while limiting the amount of compensation to the additional costs directly incurred in providing access to the signal'.⁶⁰ Following its earlier case law, furthermore, the Court held that the freedom to conduct a business, on which Sky sought to rely, 'is not absolute, but must be viewed in relation to its social function'.⁶¹ In the present case, restrictions on the freedom to conduct a business were justified in light of the public interest, in particular the fundamental freedom to receive information and the promotion of media pluralism. According to the Court, the contested legislation struck a fair balance between the rights and freedoms at issue.

⁵⁷ Compare section 2.2 above.

⁵⁸ Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, CJEU 22 January 2013, nyr.

⁵⁹ CJEU *Sky Österreich*, para. 68.

⁶⁰ CJEU *Sky Österreich*, para. 39-40.

⁶¹ CJEU *Sky Österreich*, para. 45, referring to Joined Cases C-184/02 and C-223/02 *Spain and Finland v Parliament and Council* [2004] ECR I-7789, paragraphs 51 and 52, and Case C-544/10 *Deutsches Weintor* [2012] ECR I-0000, paragraph 54)

The method of judicial reasoning followed in this case again recalls the double proportionality test, although it is not fully applied. On the one hand, the CJEU considered the role of the freedom to conduct a business and its restrictions in light of the public interest. On the other hand, it relied on the fundamental freedom to receive information and the promotion of media pluralism, without taking into account the possible limitations of these rights. While the first part of this balancing exercise, thus, complies with the double proportionality test, the second part lacks a further assessment of the proportionate nature of possible restrictions on the freedom to receive information that may be justified on the basis of the freedom to conduct a business.

Within the conceptual matrix, this judgment may be considered to feature:

(a) an indirect effect of the fundamental right to enjoyment of property and the freedom to conduct a business on the contractual relationship between Sky Österreich and the Austrian public broadcasting corporation ORF, through the assessment of Article 15(6) of the Audiovisual Media Directive. The CJEU's interpretation of the Directive as allowing ORF to use Sky's broadcasting signal to transmit summaries of important football matches without paying compensation established the limits to Sky's exclusive rights.

(b) an indirect horizontal effect of EU law on the contractual relationship, to the extent that the assessment of Article 15(6) of the Directive had implications for the contractual obligations of the parties (i.e. whether or not a compensation for the transmission rights could be stipulated).

(c) an indirect horizontal effect of the EUCFR as a measure of EU law, given that the balance struck among the relevant Charter rights determined the validity of the provision of the Directive, which in turn affected the substance of the contract between the broadcasting corporations. As in the previously discussed cases, the indirect effect of a fundamental right took the shape of a two-step test, in which the relevant provision of a Directive was interpreted in light of the fundamental rights at stake and the outcome of this assessment affected national private law and as such the contracts concluded under that law. An EU dimension was, thus, added to the indirect effect of fundamental rights in private law. Interestingly, in the case of *Sky Österreich* EU objectives gave the balance struck a distinctly different shade in comparison to national assessments of the same case. The German and Austrian Constitutional Courts had both held that the granting of a right to make short news reports free of charge constituted an infringement of fundamental rights.⁶² While the CJEU did not explicitly examine the significance of these judgments in relation to its own assessment, Advocate General Bot noted the following:⁶³

'79. The approaches adopted by the Bundesverfassungsgericht and by the Verfassungsgerichtshof do not seem to me automatically transferable to the review of the validity of Article 15(6) of the Directive in the light of Articles 16 and 17 of the Charter. First, I have already explained the reasons why my assessment follows closely the way Article 15 of

⁶² CJEU *Sky Österreich*, para. 23.

⁶³ Opinion of Advocate-General Bot in Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, CJEU 22 January 2013, nyr, para. 79-80.

the Directive is structured and with particular reference to the conditions and limits determining the right to short news reports and delimiting its scope.

80. Secondly, I would recall that fundamental rights within the Union must be protected within the framework of its structure and objectives. It follows that the weighing of the different fundamental rights at stake does not necessarily call for the same response at national or EU level. In the present case, I consider, for the reasons set out above, that the requirements relating to the completion of the internal market and to the emergence of a single information area militated in favour of the adoption by the EU legislature of a compromise between the granting of a free right to short extracts and the financial participation by secondary broadcasters to the costs of acquisition of exclusive transmission rights.’

4 Chartering European private law

In the previous section, four cases in which the CJEU integrated Charter rights in its handling of questions of private law were placed within the conceptual framework set out in section 2. The conceptualisation of the role of the Charter resulted in the identification of simultaneous effects of EU law and fundamental rights on the solution of private-legal problems governed by rules deriving from EU law and national law. A closer analysis of these effects may clarify to what extent models of fundamental rights integration in private-legal reasoning can be meaningfully applied to the EU level (section 4.1). Moreover, it indicates which questions may arise in future case law concerning the application of the Charter in European private law (4.2).

4.1 Judicial method between private law, EU law and fundamental rights

The four case examples demonstrate that the integration of EU law, fundamental rights and EU fundamental rights in disputes governed by national private laws increase the level of complexity of judicial reasoning.⁶⁴ Not only do courts have to take into account the either direct or indirect effects of EU law on national private laws, and the either direct or indirect effects of fundamental rights on horizontal legal relationships. They also have to consider how the EU Charter of Fundamental Rights, as a measure combining these two dimensions, can and should be integrated in their solution of private-legal disputes.

The four cases involved three examples of indirect horizontal effects of Directives and one example of a potential direct horizontal effect of a Regulation.⁶⁵ Given the fact that the CJEU has not recognised any direct horizontal effect of Directives, it is not surprising to find that the three selected CJEU judgments that concerned Directives (*Test-Achats*, *Prigge* and *Sky Österreich*) all gave indirect effect to those measures. Since a Regulation, on the other

⁶⁴ In a similar vein, the President of the Dutch Supreme Court, Geert Corstens, recently raised alarm over the heavy workload of judges in the Netherlands, observing that the problem was partly due to the increasing complexity of cases in light of the impact of EU law and fundamental rights. G. Corstens, ‘Staan er ongelukken te gebeuren in onze rechtszalen?’, *NRC Handelsblad* 4 February 2013, p. 14-15.

⁶⁵ See section 3.

hand, can be directly invoked in horizontal relations, the direct application of the Regulation in the fourth case (*Deutsches Weintor*) is also relatively easily explained.

From a fundamental rights perspective, the case examples, furthermore, seem to be no less complex than cases involving only national law. To the extent that they involve the assessment of rules of EU law in light of Charter rights, they address the question whether fundamental rights can be translated to the private-legal context and are alienable or derogable.⁶⁶ Accordingly, the CJEU's view on these matters should influence the approach taken to fundamental rights review of provisions of Directives and Regulations.

Yet, as concerns judicial method, the case examples show certain differences of the CJEU's approach with national judgments. These predominantly concern the manner in which courts relate fundamental rights to private legal disputes and the goals they take into account. The reference for a preliminary ruling to the CJEU inserts a second step in the application of fundamental rights in civil procedures. Where a national case of this type would involve the interpretation of a provision in the Civil Code or other relevant private legal rule, the applicability of a Directive or Regulation implies that a court first has to interpret such a measure of secondary EU law before considering the relevant rules under national law. Goals of EU policy may, thus, colour or even prevail over national ideas of social justice.⁶⁷

Could a 'double proportionality test', as proposed by Collins offer a framework for making more explicit the interests at stake and balancing them in an adequate manner? Although this type of balancing exercise is not uncommon in fundamental rights case law,⁶⁸ it can only partly be traced in the four CJEU judgments. This may be explained on the basis of the types of cases. *Test-Achats* concerned the rather abstract review of a provision of a Directive against a fundamental right and, accordingly, entailed the application of the fundamental right in question (non-discrimination) to the relevant provision. In *Prigge*, the referring German court enumerated certain specific provisions of the relevant Directive and, thus, invited the CJEU to assess the application of these provisions to the collective agreements concerning the pilots' employment conditions. The CJEU's reference to the Charter could, therefore, remain limited to the observation that the right to non-discrimination underpinned the provisions of the Directive. *Deutsches Weintor* and *Sky Österreich*, on the other hand, required the Court to consider the balance struck between relevant fundamental rights as reflected in the provisions of the Regulation and Directive at stake. For that reason, these two cases lent themselves to a balancing process in the form of a 'double proportionality test'. Still, it should be added that in the two examples, the test was not fully performed as such, but considered the restrictions to some fundamental rights in more detail than those to others. Also in light of possible undesirable side-effects of the constitutionalisation of certain private legal principles,⁶⁹ one may doubt the ability of a double proportionality test to fully resolve the puzzle of how to insert fundamental rights in private legal reasoning.

⁶⁶ Compare Collins 2012, discussed in section 2.1.

⁶⁷ E.g. CJEU *Sky Österreich*, section 3.4 above.

⁶⁸ *Von Hannover t. Duitland (nr. 2)*, ECtHR (Grand Chamber) 7 February 2012, nos. 40660/08 and 60641/08, *EHRC* 2012/72, case notes by R. de Lange and J.H. Gerards.

⁶⁹ Section 2.2 above.

Nevertheless, an analysis of case law in terms of proportionality makes clear that more detailed judicial guidance is called for.⁷⁰

The case examples, furthermore, demonstrate how the multi-level system of private law within which the Charter is applied affects the manner in which the CJEU handles fundamental rights argumentation in specific cases. The structure of EU law sometimes (such as *Test-Achats*) results in a type of fundamental rights review that consists of the assessment of EU or national legislative measures, i.e. a type of review similar to constitutional review procedures available in certain Member States. In other cases (such as *Prigge*), a measure of EU law reflecting a certain fundamental right functions as a touchstone for review of national measures. This method recalls the CJEU's *Mangold* and *Kücükdeveci* judgments, in which the relationship between Directive 2000/78/EC and the principle of non-discrimination on grounds of age was at stake. Finally, in a third type of cases (including *Deutsches Weintor* and *Sky Österreich*) fundamental rights review brings into play opposing fundamental rights and requires the Court to strike a balance, taking into account the interests of the affected parties. This latter type of review resembles the balancing of fundamental rights in national legal systems and in the case law of the European Court of Human Rights (ECtHR). As yet, it is not always clear which method may apply to which factual constellation and how to make sure those different methods are in accordance with each other.⁷¹

Briefly summarising, when considering the separate conceptual strands, the four cases do not appear to offer many new insights into the impact of EU law on national private laws or the influence of fundamental rights on private-legal matters. Their relevance for the present analysis becomes visible when the two strands are *combined*: The fact that the Charter is a measure of EU law in combination with the fact that it incorporates fundamental rights raise new questions as to how EU fundamental rights can and should affect private-legal relationships under the laws of the Member States. This implies that the conceptual matrix set out in section 2 needs to be reassessed.

4.2 *The conceptual matrix rethought*

Given the multi-level nature of private law in Europe, the application of the EUCFR to matters of a private-legal nature is likely to raise more preliminary questions in future case law. In particular, these might address the possibility of direct horizontal effect of Charter rights, the method of judicial reasoning adopted by the CJEU, the relationship of the CJEU and national constitutional courts, and the consequences of the transformation of some general principles of EU law into binding Charter rights.

As regards the first point, cases such as the four examples discussed here will probably not inspire direct horizontal effects of the rights laid down in the EUCFR.⁷² The

⁷⁰ Compare Den Houdijker 2012.

⁷¹ See e.g. Sieburgh 2012 on the application of the principle of non-discrimination as a general principle of EU law.

⁷² Other types of cases, such as those involving the effects of the EU Treaties on private-legal relationships, might offer more possibilities for direct effects. Some authors have suggested that the CJEU might eventually accord direct horizontal effect to (part of) the Charter rights, just as it has done for (part of) the free movement

reason for this is that the preliminary questions brought to the CJEU concern the review of Directives and Regulations or, as in *Prigge*, the review of national legislation or collective agreements. The Court's judgments in these types of cases usually do not – nor do they have to – look into the manner in which their outcomes will be integrated into national laws.⁷³ Preliminary rulings concerning the application of the Charter to private-legal cases governed by Regulations and Directives will, thus, most likely only directly consider the implications of EUCFR rights for the interpretation and application of these instruments. National courts will then have to assess the implications of the judgments in national law, e.g. in regard to the validity of contracts falling within the scope of a Regulation or a law implementing a Directive. In such national procedures, the distinction between direct and indirect effects of fundamental rights becomes relevant again insofar as a national legal system takes into account this distinction.

Notwithstanding the focus on indirect effects in the EU context, moreover, the inclusion of certain private legal principles in the scope of the Charter, most importantly the extension of Article 16 EUCFR's protection to freedom of contract, introduce a possibility for private parties to directly invoke this right in case of a possible infringement by another private party. The CJEU's considerations on measures of secondary EU law might, thus, spill over into cases concerning the application of primary EU law.

Secondly, the CJEU will have to determine its position in respect to the case law of the ECtHR. The relation between the two Courts is a complex one, insofar as the ECtHR has some means, even if limited ones, to review the compliance of the CJEU's Rules of Procedure (ECtHR *Kokkelvisserij*)⁷⁴ and to hold Member States liable for the breach of Convention rights by EU institutions (ECtHR *Bosphorus*)⁷⁵. It is as yet unclear if and how this relationship might change in light of the imminent accession of the EU to the ECHR, which has been made possible by the amendment of Article 6 TEU in the Lisbon Treaty. The draft agreement that by now has been reached regarding the conditions for accession aims at making sure that it is tailored to the EU's autonomy as far as possible.⁷⁶ The two Courts, moreover, maintain a harmonious relationship, in which both seek to ensure consistency of fundamental rights protection in their overlapping domains.⁷⁷ The CJEU is, therefore, likely

provisions. See Hartkamp 2012, no. 147, referring to Barents, *Het Verdrag van Lissabon: Achtergronden en commentaar* (Deventer: Kluwer, 2008), p. 549.

⁷³ Compare Hartkamp 2012, no. 147.

⁷⁴ ECtHR 20 January 2009, no. 13645/05 (*Kokkelvisserij*).

⁷⁵ ECtHR 30 June 2005, no. 45036/98 (*Bosphorus*).

⁷⁶ CDDH-UE, 'Draft agreement on the accession of the European Union to the European Convention on Human Rights', CDDH-UE(2011)16, 19 July 2011, available on http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents_en.asp (last consulted on 13 March 2013).

⁷⁷ Van de Heyning and Lawson, 'The EU as a party to the European Convention of Human Rights. EU law and the European Court of Justice case law as inspiration and challenge to the European Court of Human Rights jurisprudence', in: P. Popelier, C. Van de Heyning and P. Van Nuffel (eds), *Human rights protection in the European legal order: The interaction between the European and the national courts* (Cambridge/Antwerp/Portland: Intersentia 2011), at 37-39 and 49-56; Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*', *Common Market Law Review* (2006), at 640-652.

to continue taking into account the manner in which the Strasbourg Court has interpreted and applied certain fundamental rights.⁷⁸

Thirdly, the question arises how to handle different outcomes of the CJEU's balancing of fundamental rights in comparison to decisions of national courts. On this matter, Advocate General Bot in his opinion in *Sky Österreich* observed that the Court was not impeded from deviating from national judgments.⁷⁹ This view seems compatible with the idea that EU law does not necessarily reflect the same conception of social justice as the laws of the Member States.⁸⁰ Still, it does not indicate how such different outcomes of balancing fundamental rights on the EU and national levels may be reconciled. If the CJEU indeed strikes a different balance than national courts, as in the *Sky Österreich* case, this could result in the creation of different regimes for similar legal disputes, depending on whether the disputes fall within the sphere of national law or are (partly) governed by EU law. The examples of *Viking* and *Laval* show that such implications of European judgments may meet serious criticism on the Member State level.⁸¹

Finally, the transformation of some general principles of EU law into fundamental rights under the Charter raises the question how this change will affect future case law. From a technical point of view, the EUCFR is in principle not meant to extend the competences of EU institutions under the Treaties.⁸² Yet, it is not excluded that the Court's fundamental rights reasoning on the basis of the Charter may alter the impact of its judgments on national private law. For example, it has been submitted that Art. 47 EUCFR, which safeguards the right to adequate judicial remedies, may lie at the basis of a European law on remedies.⁸³ It could provide a more coherent methodological framework than the one provided till now by the principles of equivalence and effectiveness.⁸⁴

In light of these particular concerns, a conceptual matrix for the 'Chartering' of European private law should consider the implications of the fact that the EUCFR engages the debate on fundamental rights and private law as well as that on EU law and national private law. In the context of the present analysis, these concern, especially, the insertion of EU objectives and values in the indirect application of Charter rights to private legal disputes falling within the scope of measures of secondary EU law. The conceptual framework needs

⁷⁸ Cf. also A-G Bot's opinion in *Sky Österreich*, para. 74: 'The approach chosen by the EU legislature also seems to accord with the case law developed by the European Court of Human Rights with regard to Article 1(2) of Additional Protocol No 1 to the ECHR.'

⁷⁹ See section 3.4 above.

⁸⁰ See also section 2.1 above.

⁸¹ Section 2.1 above, with further references.

⁸² Art. 6(1) TEU, which stipulates that '[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties'.

⁸³ H.-W. Micklitz, 'The ECJ Between the Individual Citizen and the Member States – A Plea for a Judge-Made European Law on Remedies', in: H.-W. Micklitz and B. De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Antwerp: Intersentia 2012), at 349-400; N. Reich, 'The Principle of Effectiveness and EU Contract Law', presentation at the SECOLA conference 'Principles and Specific Rules in European Contract Law', Messina 1 June 2012.

⁸⁴ C. Mak, 'Rights and Remedies. Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters', in: H.-W. Micklitz (ed.), *Collected Courses EUI Summer School 'The Constitutionalization of European Private Law'*, Oxford: Oxford University Press 2013 (forthcoming), available on <http://ssrn.com/abstract=2126551>

to go beyond traditional distinctions between direct and indirect effects, in order to understand the impact of specific types of fundamental rights review on horizontal relations under national laws. In particular, it should take into account the different conceptions of social justice reflected in EU law and the laws of the Member States, given the fact that rules of private law deriving from different legal orders not rarely pursue deviating social and economic goals. Only on the basis of a better understanding of the implications of EU law for the application of fundamental rights to private legal disputes, will it be possible to fine-tune methods of judicial reasoning.

5 Conclusion

To what extent should fundamental rights laid down in the now-binding EU Charter of Fundamental Rights be taken into account in the judicial assessment of private-legal disputes in the EU? Since EU law itself does not make a principled distinction between public and private law, it is hardly surprising that Charter rights extend to CJEU cases that are governed by rules of private law on the national level. The charting and analysis of a number of these cases, however, shows that the conceptual framework for judicial reasoning needs elaboration.

The Charter is placed at the crossroads of a debate on the compatibility of fundamental rights and private law, on the one hand, and the influence of EU law on national private laws, on the other hand. When considering the application of Charter rights to private-legal disputes governed by secondary EU legislation, the resulting picture is one of a complex constellation of mostly indirect effects among these different spheres. A close analysis of case law may serve to indicate which type of legal reasoning provides an adequate method for which type of constellation.

In this context, the interaction between the CJEU, the ECtHR and national courts in this field draws attention. In the cases analysed here, which involved the interpretation and application of EU Directives and a Regulation, the Court focussed on the implications of Charter rights for these EU instruments. Different national assessments of the desirable balance of fundamental rights remained underexposed (*Sky Österreich*), as did the sometimes far-reaching consequences of a judgment for the private laws of all Member States and the legal relationships existing under those laws (*Test-Achats*). Further research into the national dimension of the application of Charter rights to private-legal disputes is called for.

Finally, the analysis once more underlines the ‘social justice deficit’ in European private law: The application of Charter rights in the four case examples stresses the goals and objectives of EU measures (Directives and Regulations), while paying little attention to the conceptions of social justice underlying balances of rights struck at the national level. The ‘constitutionalisation’ of certain general principles of EU law through their transformation into Charter rights is, thus, not without danger. It might provide EU institutions with a new means of legitimising balances of rights and freedoms that are not shared in Member States. On the other hand, the fact that the EUCFR includes many social rights raises some hope that

these may counteract the negative social impact of market freedoms.⁸⁵ The Charter might, thus, give the social justice debate in European private law a more constructive turn.

⁸⁵ D. Caruso, 'The "Justice Deficit" Debate in EU Private Law: New Directions', *Boston University School of Law Working Paper* No. 12-42, p. 4-5, available on <http://ssrn.com/abstract=2135111> (last consulted on 13 March 2013).