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Horizontal Effect: Internal Market and Human Rights – a Short Comment on Cases, Materials and Text on European Law and Private Law

As law clerk of the Constitutional Court of Hungary, I have found the book entitled *Cases, Materials and Text on European Law and Private Law*[1] very inspiring for at least two reasons. The first one can be labelled as 'institutional': the Constitutional Court faces the very same challenges today which are the key expressions of the book.[2] (I) Furthermore, the second reason is a more 'dogmatic' aspect, namely the nature and accordingly the relationship between the fundamental freedoms of the European internal market on the one hand, and human rights on the other hand. (II) In addition, this paper aims to present how the Constitutional Court of Hungary dealt with a similar issue.

I.

When someone thinks about European law, they generally refer to public law questions. The engine of strengthening the European legal order has been the Court of Justice of the European Union which has developed many important concepts, such as supremacy,[3] direct effect,[4] the vertical direct effect of directives[5] and the concept of indirect effect.[6] However, even if public European law might have a huge influence on private relations, the novelty of this book

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1 Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon).

2 '– If an individual may rely on a rule (including a general principle) of EU law in order to assert a subjective right against another individual, the rule is conceived as producing 'direct horizontal effect.'
– If an individual may, as against another individual, rely on a rule (including a general principle) of EU law in order to have a national statutory provision or administrative practice reviewed for its compatibility with EU law, that rule is conceived as having 'indirect horizontal effect' Arthur Hartkamp, 'Introduction. Effects of EU Law on Relationships between Individuals' in Hartkamp, Sieburgh, Devroe (n 1) 18.

3 Case C-6/64 *Costa v ENEL* [1964] ECR. 585.

4 Case C-26/62 *Van Gend en Loos NV v Nederlandse Administratie der Belastingen* [1963] ECR. 1.

5 Case C-9/90 *Francovich v Italy* [1991] ECR I-5357, Case C-14/83 *Van Colson vs Land Nordrhein Westfalen* [1984] ECR 1891.

6 Case C-105/03 *Pupino* [2005] E.C.R. I-5309.

is that it focuses purely on private relationships and proves the importance of the EU law corpus in this sphere.

Coming to the field of constitutional law, one might think analogically to the nature of human rights. The classical view of them states that they can solely be interpreted vertically, between the State and the individual.[7] Nevertheless, if we take a glance at the (not that) recent development of human rights law, we may discover similar 'horizontal effect' issues – maybe under some other labels, such as third-party effect or *Drittwirkung*[8] – as those raised in the book.

And, in the field of constitutional law, not only the issue of direct horizontal effect might appear but also its indirect counterpart, the so-called 'harmonious interpretation' or the claim of interpretation conform to EU law appears similarly in the reasonings of the decisions of the constitutional courts, namely the requirement of interpretation conform to the constitution which is formulated toward the ordinary courts.[9] The latter question brings us further to the enforcement of the EU law and of the constitutional law, which can be detected solely through the examination of follow-up cases from various countries, which are also presented in this book.[10]

Both forms of horizontal effect have come into focus in Hungary, especially after the entry into force of the new Fundamental Law of Hungary and the new Act on the Constitutional Court. The reform regarding the competences of the Constitutional Court shifted the powers of the Court toward the individual protection of human rights. The new provisions ruled out the so-called *actio popularis* procedure and kept a more limited scope for abstract judicial review. Instead, constitutional complaint procedures became the main competences of the Court, which brings closer the Constitutional Court of Hungary to its Spanish and German counterparts. These procedures are complaints against the legal provisions applied in a judicial decision, complaints against legal norms which are directly applicable and, last but not least, complaints against judicial decisions. The last type of complaint is called, just like in Germany, the 'real' or 'genuine' constitutional complaint and it is the most relevant complaint regarding the topic of horizontal effect. This procedure enables persons or organisations affected by judicial decisions to submit a constitutional complaint to the Constitutional Court if the decision made regarding the merits of the case or another decision terminating the judicial proceedings violates their rights laid down in the

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7 Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 I.CON 79–98, 79.

8 Renáta Uitz, 'Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Not? – An Introduction' in András Sajó, Renáta Uitz (eds), *The Constitution in Private Relations* (Eleven 2005, Utrecht, 1–20).

9 This is expressly formulated in the Fundamental Law of Hungary, Article 28.

10 In contrast, this field of research has not produced many articles in the field of constitutional law up to now. See: Lawrence Baum, 'The Implementation of United State Supreme Court Decision' in Ralf Rogowski, Joachim Wieland (eds), *Constitutional Courts in Comparison* (Berghahn 2002, New York – Oxford, 219–238); Thomas Gawron, Ralf Rogowski, 'Implementation of German Federal Constitutional Court Decisions' in Ralf Rogowski, Joachim Wieland (eds), *Constitutional Courts in Comparison* (Berghahn 2002, New York – Oxford, 239–256).

Fundamental Law. This means that even a lawsuit between private parties might end up at the Constitutional Court, which will ultimately decide the case through human rights law argumentation, even if it is not willing to acknowledge *expressis verbis* the horizontal effect of human rights.

Until now, none of the judgments of the Constitutional Court of Hungary has mentioned expressly the concept of the horizontal effect of human rights but it has appeared in the wording of concurring and dissenting opinions.[11] Nevertheless, many cases where the Court had to face the issue of applying human rights between private parties can be mentioned.[12] As typical examples, we can mention cases on defamation and the enforcement of freedom of speech[13] or cases on the freedom of assembly, where the Court detected its collision with the right to privacy.[14] The reason for this phenomena is quite clear: as regards the different human rights, the State does not only have a so-called 'negative' obligation to refrain from infringing the citizens' fundamental rights, but also a 'positive' obligation to safeguard the exercise of those rights, both towards the State and other citizens. This can be achieved through law-making but this might be the task of the ordinary courts as well, when they are interpreting the law in the light of the constitution. The latter type of indirect horizontal effect has been appraised in a recent decision as the duty of the ordinary courts to reconcile or to balance the human rights positions of the private parties.[15]

II.

Creating the internal market with the free movement of goods, people, services and capital is one of the biggest achievements of the European Union. Nevertheless, all results have their problematic concerns and such an aspect has come up, namely the possible conflict between the four basic freedoms and the human rights of European citizens. Or, to put it another way, even if the EU has been created for economic reasons, the question is how human rights can be protected in its larger and larger legal order.[16] Accordingly, besides the so-called institutional and sociological democratic deficit[17] a human rights deficit has also come into existence.[18]

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[11] Concurring opinion of Tamás Sulyok in Decision no. 34/2014 CC and Decision no. 5/2016 CC; Dissenting opinion of László Kiss in Decision no. 3046/2016 CC; and see also Dissenting opinion of Béla Pokol who rejects the horizontal effect of human rights in Decision no. 3/2015 CC.

[12] As regards the earlier Hungarian approach, see: Gábor Halmai, 'The Third Party Effect in Hungarian Constitutional Adjudication' in Sajó, Uitz (n 8) 104–114.

[13] Decision no. 13/2014 CC, Decision no. 5/2015 CC.

[14] Decision no. 13/2016 CC, Decision no. 14/2016 CC.

[15] Decision no. 3192/2017 CC.

[16] Harmathy Attila, 'Az EU tagállamok közös alkotmányos hagyományai és a nemzeti polgári jog' in Sajó András (ed), *Alkotmányosság a magánjogban* (Complex 2006, Budapest, 17–41) 27.

[17] Győri Enikő, *A nemzeti parlamentek szerepe az európai integrációban,* (PhD-értekezés, Budapest 1999). <http://phd.lib.uni-corvinus.hu/112/> 34–52.

[18] Chronowski Nóra, Zeller Judit, 'Luxemburg – Strasbourg – alapjogvédelem' (2006) 6 (5) Európai Jog 14–23, 14.

The question already emerged before realizing the unified market and the Court of Justice of the European Union (CJEU) solved the issue with the invention of the concept of human rights as general principles of EU law and later as 'constitutional traditions common to the Member States'.[19] As regards the case law the Nold,[20] the Hauer[21] and the International Handelsgesellschaft[22] decisions have to be outlined, the last of which led to the famous Solange decisions in Germany. Finally, the concept entered into the wording of the Lisbon Treaty as well, together with a reference to the European Convention of Human Rights,[23] and the Charter of Fundamental Rights has also entered into force.[24]

As regards the free movement of goods, people, services and capital, the Treaty contains the declaration of the freedoms and also a couple of exemptions. For example, Article 28 TFEU rules the free movement of goods, while Article 36 enables the justification of prohibitions or restrictions on the grounds of public morality, public policy, public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property. Similarly, Article 45 declares the free movement of workers, together with the exemption of public services, while paragraph (3) enables limitations justified on grounds of public policy, public security or public health.

Nevertheless, if one steps a bit closer to the case law of the CJEU the picture is not as simple. On the one hand, the CJEU (with the help of the test of proportionality) examines from case to case on whether to accept the references to the exemptions of the Treaty. On the other hand, the usage of the test of proportionality has been introduced as well for other limitations named as 'mandatory requirements,' which are not listed in the Treaty.[25] As

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[19] Fekete Balázs, 'Jogösszehasonlítás az Európai Bíróság gyakorlatában' in Paksy Máté (ed), *Európai jog és jogfilozófia* (Szent István Társulat 2008, Budapest) 365–371; Paul Craig, Gráinne de Búrca, *EU law: Text, cases and materials* (Oxford University Press 2008, Oxford) 381–383, 386–389; Josephine Steiner, Lorna Woods, Christian Twigg-Flesner, *EU law* (Oxford University Press 2008, Oxford – New York) 117–118.

[20] Case C-4/73 *J. Nold v Commission* [1974] ECR 491.

[21] Case C-44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

[22] Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

[23] Article 6 paragraph (3) TEU.

[24] *'Contrary to the prevailing opinion in a number of Member States regarding provisions of national Constitutions, it is clear that provisions of the Charter may have direct horizontal effect. This is true in particular for Article 15(2) of the Charter, which repeats three fundamental freedoms (freedoms of movement, establishment and services) that have been accorded such effect by the CJ, and for Articles 16 (freedom to conduct a business) and 17 (right to property), which in recent cases seem to have been recognised as grounds on which a claim or a defence in litigation between private parties may be based. It may be equally true for other provisions. In this respect, there would seem to be no difference between the Charter and those general provisions of EU law that have been transposed into Charter provisions.'* Hartkamp, Sieburgh, Devroe (n 1) 13.

[25] The concept of 'mandatory requirements' has been developed in the *Cassis de Dijon* case where the CJ mentioned as examples the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the protection of consumers. See: Case C-120/78 *Rewe-Zentral* (Cassis de Dijon) [1979] ECR 649. Later, the list has been broadened with other elements such as the protection of the environment (Case C-302/86 *Commission v Denmark* [1988] ECR.460.), road safety (Case C-54/05 *Commission v Finland* [2007] ECR I-2473), press diversity (Case C-368/95 *Familiapress* [1997] ECR I-3689) and so on.

a consequence, the restriction of the fundamental freedoms is possible in two different categories, those provided as exemptions in the wording of the Treaty, and the ones that were accepted as justified limitations in the case law of the CJEU.

The question now is what happens if fundamental freedoms 'meet' in a case with human rights. Theoretically, three different outcomes can exist. First of all, the human right might go hand in hand with the fundamental freedom and they strengthen each other (Type1). Second, it might be possible that the human right could serve as a ground limiting the fundamental freedom, and so a fundamental right might become a 'mandatory requirement', or an 'overriding reason relating to the public interest' (Type2). And finally, the CJEU could try to balance between them without giving priority to either of them (Type3). Lately, the Court had to face similar cases many times, which led to various judgments. The aim of this chapter is to present the different outcomes of these horizontal issues.

There are examples of all three theoretical outcomes. A case where fundamental freedoms and human rights are in line with each other would be the Carpenter case.[26] Mrs. Carpenter was originally from the Republic of the Philippines and she was the spouse of a United Kingdom national who ran a business selling advertising space in medical and scientific periodicals in other Member States too. The Secretary of State decided to make a deportation order against her because she had overstayed her original leave to enter. Mrs. Carpenter appealed against the decision, arguing that her husband's business required him to travel around other Member States and he could do so more easily as she was looking after his children from his first marriage. The CJEU pointed out that the Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty, and stated that the separation of Mr. and Mrs. Carpenter by her deportation would be detrimental to their family life and to the conditions under which Mr. Carpenter exercised his fundamental freedom to provide services as well. Therefore, the CJ concluded that 'Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.'

In other cases, human rights serve as grounds for the justification of restricting fundamental freedoms. This would be the case of Schmidberger.[27] Schmidberger ran a trucking company and claimed damages for losses caused by an environmental protest group who had prevented the company from taking goods to Austria by lorry, as the group carried out a 30-hour-long anti-traffic protest blocking a major motorway in Austria. The CJEU delineated the case from the 'Spanish Strawberries' case:[28] 'By comparison with the

[26] Case C-60/00 *Carpenter* [2002] ECR I-06279.
[27] Case C-112/00 *Schmidberger* [2003] ECR I-5659.
[28] Case C-265/95 *Commission v France* [1997] ECR I-6959.

points of fact referred to by the Court at paragraphs 38 to 53 of the judgment in Commission v France, cited above, it should be noted, first, that the demonstration at issue in the main proceedings took place following a request for authorisation presented on the basis of national law and after the competent authorities had decided not to ban it. Second, because of the presence of demonstrators on the Brenner motorway, traffic by road was obstructed on a single route, on a single occasion and during a period of almost 30 hours. Furthermore, the obstacle to the free movement of goods resulting from that demonstration was limited by comparison with both the geographic scale and the intrinsic seriousness of the disruption caused in the case giving rise to the judgment in Commission v France, cited above.' [29] As a result, the CJEU accepted the temporary restriction of the fundamental freedom on the grounds of freedom of assembly.

In addition in a few cases, the CJEU recognised the importance of human rights but tried to establish a fair balance between them and the fundamental freedoms. An example would be the Viking case[30] where the principle of proportionality was employed to reconcile the freedom of establishment and trade unions' collective right to strike. Viking Line, a Finnish shipping company, gave notice to the Finnish Seamen's Union of its intention to reflag its ferry called Rosella by registering it in Estonia in order to be able to enter into a new collective agreement with a trade union established in that State and to employ an Estonian crew, whose wages were lower than those paid in Finland. Following this, the International Transport Workers' Federation asked its members to refrain from entering into negotiations with Viking Line, while the Finnish Seamen's Union announced its intention to strike, demanding that Viking Line continue to comply with Finnish employment law and not lay off the crew. The CJ acknowledged that 'the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions.' [31] However, '[t]hat restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.' [32]

As it can be seen, there is no uniform solution to the relationship structure of fundamental freedoms and human rights and it seems that the CJEU solves these legal issues on a case by case basis, in which the test of proportionality will continue to be the rule to follow.

Such a 'meeting' between fundamental freedoms of the internal market and human rights might arise also before the Constitutional Court of Hungary. However, it should be noted

[29] Case C-112/00 *Schmidberger* [2003] ECR I-5659, paras 83–84.
[30] Case C-438/05 *Viking Line* [2007] ECR I-10779. A connecting case is: Case C-341/05 *Laval* [2007] ECR I-11767.
[31] Para 44.
[32] Para 90.

that the Constitutional Court generally refrains from applying EU law and therefore different techniques can be detected as the Court circumvents the real EU law-related issues.[33]

However, as an example of a Type1 correlation the case of university student scholarships can be cited.[34] A government decree claimed that those students who received at least a partial waiver of their tuition fee must work in Hungary for twice the duration of the length of the scholarship within twenty years of obtaining their diplomas, otherwise the students had to pay back the sum of the scholarship. The Constitutional Court detected the EU law relevance of the case[35] but disregarded it and applied a formalistic solution: the Court annulled the decree because such an issue should have been regulated in an Act of Parliament. While this solution – the usage of formal analysis as a first step – is compatible with the case law of the Constitutional Court, it is unclear why EU law relevance[36] was even mentioned, if it remained at only a decorative level.

Nevertheless, new cases might occur also in the future, where fundamental freedoms 'meet' human rights. At this point a new decision of the Constitutional Court[37] has to be emphasised, which interpreted Article E) paragraph (2) of the Fundamental Law of Hungary and which states that the Constitutional Court may examine – upon a relevant petition – in the course of exercising its competences – whether the joint exercise of powers under Article E) (2) of the Fundamental Law would violate human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country's historical constitution.[38] The judgment itself does not say anything about the potential legal consequences;[39] however, it emphasises several times the importance of constitutional dialogue, which might mean that the Constitutional Court would solve emerging similar legal issues by initiating a preliminary ruling procedure, as other Constitutional Courts in Europe have done so far.[40]

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33 Vincze Attila, 'Odahull az eszme és a valóság közé az árnyék' (2014) 3 MTA Law Working Papers 4. Vincze shows that the Constitutional Court takes into consideration the EU law only when it does not have any impact on the final decision.

34 Decision no. 32/2012 CC.

35 Paras [41]-[44].

36 Láncos Petra Lea, 'A kötelező hallgatói szerződések értékelése az uniós jog szemszögéből' (2011) 39 Pazmany Law Working Papers.

37 Decision no. 22/2016 CC.

38 The decision received many criticism: Chronowski Nóra, Vincze Attila, 'Önazonosság és európai integráció – az Alkotmánybíróság az identitáskeresés útján' (2017) 72 Jogtudományi Közlöny 117–132; Drinóczi Tímea, 'A 22/2016. (XII. 5.) AB határozat: mit (nem) tartalmaz, és mi következik belőle. Az identitásvizsgálat és az ultra vires közös hatáskörgyakorlás összehasonlító elemzésben' (2017) 1 MTA Law Working Papers; Kéri Veronika, Pozsár-Szentmiklósy Zoltán, 'Az Alkotmánybíróság határozata az Alaptörvény E) cikkének értelmezéséről' (2017) 8 JEMA 5–15.

39 Drinóczi (n 38) 12, 18.

40 Sulyok Tamás, Orbán Endre, 'Az európai alkotmányos tér és az alkotmányos párbeszéd forgatókönyve' in Chronowski Nóra, Pozsár-Szentmiklósy Zoltán, Smuk Péter, Szabó Zsolt (eds), *A szabadságszerető embernek. Liber Amicorum István Kukorelli* (Gondolat 2017, Budapest, 116–125) 122.