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RIGHTS WITHOUT DUTIES? REFLECTIONS ON THE STATE OF LIABILITY LAW IN THE MULTILEVEL GOVERNANCE SYSTEM OF THE COMMUNITY: IS THERE A NEED FOR A MORE COHERENT APPROACH IN EUROPEAN PRIVATE LAW?

Norbert Reich

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

Rights without Duties? Reflections on the State of Liability Law in the Multilevel Governance System of the Community: Is There a Need for a More Coherent Approach in European Private Law?

NORBERT REICH

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Abstract

The paper argues that some general Community standards for “horizontal liability” among private parties can be established already now. The basic requirement is a “sufficiently serious”, not necessarily negligent violation of an EU (including always EC) law provision intending to protect private parties, in particular under the free movement, non-discrimination, and investor protection rules. Remedies for compensation (injunctions were discussed only in passing) must be found under national law, but this must obey to the principles of *effectiveness* and *equivalence* which may be summarised as the principle of “*adequate protection*”. The existing national remedies must eventually be reshaped and “upgraded” if they do not meet EU standards. This will lead to a “*hybridisation of remedies*” which could be shown in the basic requirements of “sufficiently serious breach”, causation, amount of compensation, and adequate procedures.

Keywords

Subjective rights under EU law – liability rules – horizontal liability –violation of free movement by “collective regulations” of private parties – infringement of non-discrimination and investor protection provisions – causation – compensation – principles of effectiveness and equivalence – procedural autonomy

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"Rights shall be exercised and duties performed in good faith[1]*."*

"This right or claim of an individual however is merely the obligation of the other individual or individual …… If one designates as 'right' the relationship of one individual toward whom another individual is obligated to a certain behaviour, then this right is merely a reflection of this obligation...[2]*"*

"The withering away of the categories of bourgeois law, will … mean the withering away of law altogether, that is to say the disappearance of the juridical factor from social relations[3]*."*

"One thing can be noticed considering the – more or less successful – European projects concerning liability law: so far European liability law is lacking even more coherence than our national laws and to some degree recognisable structure; at the moment one cannot even talk about a torso. A sustainable concept for future development is also missing[4]*."*

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1 Article 1 of the Latvian Civil Code of 1937, 1992.

2 H. Kelsen, 127.

3 E. Pashukanis, 61; about his "withering away theory" which was strongly criticised in the Soviet Union see Reich, Sozialismus 194-201.

4 P. Widmer, cited in Koziol/Schulze, 601.

1. EU Law – Emergence of a Theory of Autonomous Subjective Rights

1.1. Some Theoretical Reflections on the Function of the Law of Civil Liability in an EU Context

Our reflection on the missing "torso" of a law of civil liability in the EU according to the aforementioned quotation of P. Widmer, despite the logical relationship between rights and obligations on which Kelsen insists, can be put into the paradox of "rights without duties". Why only rights? Let us read again the seminal *Van Gend and Loos* judgment where the ECJ held:[5]

> "...the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit in limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer rights upon them which become part of their legal heritage".

In this excerpt, duties and obligations of private parties are mentioned only in passing; the emphasis is on the genesis of *genuine Community rights* via the theory of direct effect. The ECJ, in its seminal *Francovich* case, put the burden of guaranteeing the fulfillment of these rights by corresponding obligations on Member states, if private parties could not be held liable despite Community law requirements. This is even the case, as we know from *Commission v. France* as clarified in *Schmidberger* under fundamental rights perspectives,[6] if these rights have been violated by private action.

The theoretical discussion in private law is contentious. Let us refer to two diametrically opposed examples. One is written into Art. 1 of the Latvian Civil Code, enacted in 1937 under the influence of Roman/German law, and re-enacted after independence in 1991.[7] Rights and duties should correspond to each other. Both must be executed in good faith. Rights cannot subsist without duties. A completely opposite view had been taken by the Soviet socialist author Pashukanis in his above cited work on "Law and Marxism", first published in 1924, but later severely criticized. Rights and corresponding obligations, especially under liability rules, arise out of the exchange relations of "commodity owners" (*Warenbesitzer).* Once capitalist-bourgeois exchange relations are abolished in socialism, private law and its balanced system of rights and duties will vanish. Law is substituted by a system of "vertical distribution" of goods. This is the famous "withering away-theory" of private law – a theory itself abolished in the later developments of Soviet socialism.

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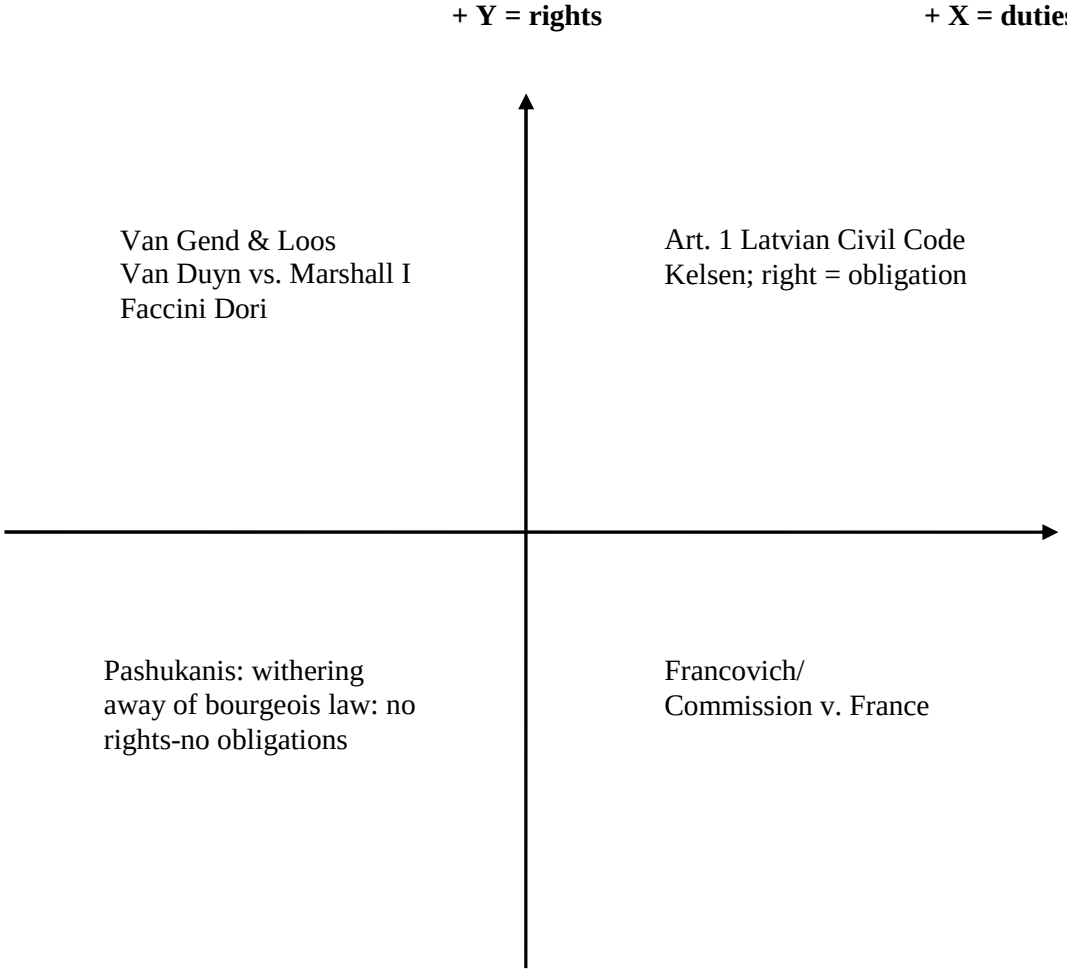
5 Case 26/62 *Van Gend en Loos v Nederlandse Administratie van Belastingen [*1963] ECR 1: with regard to "vertical direct effect" of directives see in a similar spirit case 41/74 *Van Duyn v Home Office* [1974] ECR 1337.

6 Case C 6 +9/90 *Francovich v Italy* [1991] ECR I-5357 at paras 33-35; C-265/95 *Commision v. France* [1997] ECR I-6959; *C-112/00 Eugen Schmidberger v Austria*, [2003] ECR I-5659.

7 Reich, in F. Cafaggi (ed), 271; M. Tulibacka, 2009.

The different positions mentioned so far are extremes. They are supposed to sharpen and focus our analysis. We will put them on a graph to demonstrate their place in the theory of private law, where the X graph refers to duties; Y to rights.



The graph is supposed to illustrate the relationship between rights and duties based on ideal-types:

+X/+Y (equal distribution between rights and duties) = Art. 1 Latvian Civil Code

--X/+Y (rights but no duties against private persons) = direct effect according to Van Gend & Loos

+X/--Y (only duties but no rights vis-à-vis private persons) = Francovich liability

--X/--Y (no rights no duties – withering away of private law relations) = Pashukanis

What is the position of EC liability law in this context? How is the balance of rights and duties to be understood under EC law? Just recently, a comprehensive study with different contributions edited by Koziol/Schulze[8] sheds light on the many facets of an emerging, albeit incoherent, EU law of civil liability. The most obvious development has happened in the field of "vertical liability", first by the Community itself for wrongs done in the exercise of its functions under Art. 288 (2) EC, referring with regard to non-contractual liability to the "general principles common to the law of Member states", coupled with an exclusive jurisdiction of EU courts in Art. 235. As a sort of *second stage* the ECJ in the afore-mentioned *Francovich* case developed state liability for breaches of EC committed by Member states which will be discussed later.

The main thrust of this paper and the brief theoretical overview can be found in insisting on the emergence of a "*third stage*", namely *horizontal liability of private persons* (natural and legal persons) within the scope of application of EC law, even if not expressly written into the EU statute books. This is both a theoretical and a legal-political task. The starting point of this development finds its locus in some cases, referred to later, even though little precedent has been developed. This will be put in a broader context of a theory of "*EU subjective rights followed up by obligations*", as defined by liability rules based on tort or, to a lesser extent, contract, against the traditional "rights without duties approach" in a narrow one-sided "vertical" understanding of EU law (section 2). However, the ECJ case-law on state liability will give important orientation on how this liability as a *minimum standard* also in "horizontal relations" should be defined in applying general principles of EC law (3). This process will refer to the so-called *procedural autonomy* of Member states which puts requirements on the shaping of remedies but also sets certain limits to horizontal liability in EU law (4). The practical importance of this concept will be tested among relevant areas of EC law, namely *free movement, non-discrimination*, and *investor protection*. Competition law cases will only be mentioned in passing (1.3).

1.2. What Do Mr. Bosman, Ms. Coleman and Mr. Kronhofer Have in Common?

A good introduction to our topic is a short reference to three ECJ cases which concerned "horizontal" liability rules under different EC law provisions, namely restrictions to free movement of workers pursuant to by-laws of private associations, individuals fighting disability discrimination and harassment by private parties coming under EC law, and jurisdiction rules for claims arising out of inadequate warnings against risky investment schemes.

Mr. Bosman was a professional football player who wanted to move from the Belgian club Liège to the French club Lille in 1991[9]. At the time of the litigation this was made nearly impossible by the nationality and transfer rules imposed by the European football association, UEFA, on its national member associations, which had to make these rules part of the contract between a club and the player desirous of transfer. Since the transferring and the receiving club could not agree on the transfer conditions (including payment of fees for the transferral) Mr Bosman was effectively prevented from taking the job as player in Lille. He complained before a Belgian court for compensation consisting in loss of income and chance. The questions referred by the Belgian Cour d'Appell de Liège was whether Mr. Bosman had a right to oppose the refusal of his transfer by challenging the nationality and transfer rules as a discrimination respectively restriction of his rights as a worker under the free movement rules of Art. 39 EC (than 48 EEC). The European Court of Justice (ECJ) condemned the transfer and

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8 Supra note 4 with interesting contributions by, among others, Antoniolli; Durant; Howells; Magnus; Oliphandt; Wissink; Koziol/Schulze.

9 Case C-415/93 *ASBL v Bosman* [1995] ECR I-4921 paras 83-84; for follow-up cases see C-51/96 + C-191/97 *Chr. Deliège v Ligue francophone de judo et disciplines associées ASBL* [2000] ECR I-2549 ; C-176/96 *Jyri Letonen and Castors Canada Dry Namur-Braine ASBL v FRBSB* [2000] ECR I-2681; see the interesting comment of Th. Wilhelmsson, in Krämer/Micklitz/Tonner (eds.), 177.

nationality rules and insisted that Mr. Bosman's right to free movement be protected against "collective regulations" by sporting associations. The ECJ did not decide about compensation, a matter left to the national court. However, as the result of this protracted litigation, the case was settled. Under UEFA pressure, the Belgian Football Association paid to Mr. Bosman 16 mio BEF (about 400.000 euro) in compensation in 1999. Unfortunately we do not have a judgment which tells us the basis of this claim under both EC and under national law.

The second case concerned Ms. Coleman, who worked as clerk in Attridge law offices in London.[10] When she gave birth to a handicapped child, she continued work at the office but by a number of incidents felt unfairly treated and harassed because of this tragic fact. Finally, she left the office and complained before an English labour court of disability discrimination under a theory of "constructive dismissal". The English court, which deliberately did not go into the delicate and controversial facts made a reference to the ECJ under the Framework Directive 2000/78/EC[11] – combating different forms of discrimination, including on grounds of disability – and wanted to know whether the directive also applied to "discrimination by association". In a very strong opinion of 31st January 2008, AG Poiares Maduro invoked fundamental rights protection of Ms. Coleman and responded positively to the question of the English court; his opinion was more or less adopted by the Court. The parties settled the case – we do not have any information about the conditions, but it can be assumed that Ms. Coleman received pecuniary compensation.

The third case was brought under the then Brussels Convention (now Brussels Regulation No. 44/2001)[12] concerning loss arising out of a speculative investment scheme where the Austrian plaintiff, Mr. Kronhofer,[13] complained of not having been adequately warned of its risks by the defendants domiciled in Germany who persuaded him, by telephone, to enter into a call option contract relating to shares. As a result, Mr. Kronhofer transferred a total amount of USD 82 500 in November and December 1997 to an investment account with Protectas, an investment company in Germany – in the meantime in bankruptcy – which was then used to subscribe for highly speculative call options on the London Stock Exchange. The transaction in question resulted in the loss of part of the sum transferred and Mr. Kronhofer was repaid only part of the capital invested by him. The Court was not asked to decide on the substance of the matter but only on whether jurisdiction could be established in Austria as the "place where the harmful event occurred" under Art. 5 (3) of the Brussels Convention/Regulation. The ECJ denied jurisdiction of Austrian courts under Art. 5(3) because this term "cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere" (para 19). As a consequence, the action would have to be brought in Germany according to the general rule of actor sequitur forum rei (Art. 2).

What do these very different cases have in common? Since EU law developed (and still develops) by precedent and can well be called a "case-law" system, I want to take them as the starting point of my reflections because all three of them concern rights of natural persons under EC law which, under the litigation to which I have made reference were violated not by state action or omission as in the seminal and well known Commission v. France and Schmidberger cases, but by other private parties. The Court, in none of the three cases which concerned liability claims under national law with reference to different aspects of EC law, was asked to decide on remedies like compensation and/or injunctive relief itself. Does EU law require Member states to provide for civil remedies against the

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10 C-303/06 *S. Coleman v Attridge Law et al* [2008] ECR I-(17.7.2008); comment Waddington, 665.

11 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303 of 2.12.2000, 16.

12 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, 1.

13 C-168/02 *Kronhofer and Marianne Meier et al*. [2004] ECR I-6009.

defendants to make good (or to prevent the damage) done to the plaintiffs? Primary law does not even mention the problem of remedies. Secondary law like directive 2000/78 is not directly concerned with civil law remedies like compensation, but only requires Member states effectively to combat discrimination, which may not help Ms. Coleman. In Kronhofer, the relevant liability rules would have to determined by national law under conflict rules as no substantive EC law existed than that could have been violated by the missing warnings. Does German or Austrian law apply? In the meantime the national law transposing Dir. 2002/65 on the distance marketing of financial services[14] would be applicable; the substance of the case would have to be decided today under its Art. 2 Nr: 2 (c) requiring warnings about risky financial products like in this case without as usual in secondary EC law providing for remedies in cases of breach. Must national law provide for a remedy of compensation from the investment company which did not warn about the risks of the product? What about a group action of many plaintiffs from different EC countries before the competent German court hearing this and similar cases? Do we have to rethink the system of remedies under EC law?

1.3. From State Obligations to Rights of Individuals

In the understanding of many EU lawyers, including this author[15], one of the great achievements of EU law and in particular the early case-law of the ECJ was to turn Member state obligations regarding free movement, consumer protection, and non-discrimination with regard to nationality and gender into subjective rights of individuals, whether natural persons or undertakings. This is an important step forward from the traditional international law understanding of rights which may be made to depend on reciprocity – a theory expressly set aside by the ECJ.[16] The achievement was labelled "direct effect of EC law" with many differentiations and qualifications which will not be discussed here. Member state courts had the special task under EU law to function as "European courts" and to guarantee the enforcement of these rights by Member states. Despite enjoying so-called "procedural autonomy" to which I will turn later (4), they had to make sure under the "effectiveness" and "equivalence" principles that rights guaranteed under EU law did not simply remain "paper rules" but could be used both in litigation and in relations with administrative agencies and other state institutions. The concept of "state" was deliberately widened by the ECJ.[17]

The relationship of these "great principles" of EC law, namely the transformation of objective provisions into subjective rights, parallels a development which happened in many states in the 19th century, thus constitutionalising the position of the individual in a liberal system of "government of laws" (Rechtsstaat) based on the protection of fundamental rights. However, this left a substantial "gap" in legal theory and practice, namely the integration of these rights into private law relations. Traditional legal theory did not regard this as a problem because in the area of private law the principle of party autonomy would allow an efficient allocation of resources and a fair distribution of opportunities and income, corrected against abuses by rules on civil liability[18]. EU law did not as such guarantee private autonomy, but in its broad approach to fundamental freedoms referred to Member state law expressly or at least implicitly guaranteeing autonomy as part of a basically liberal concept of market economy.[19]

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[14] Directive 2002/65/EC of the EP and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services…, OJ L 271, 9.10.2002, 16.

[15] Reich, in Academy of European Law (ed.), 157-236.

[16] Case 186/87 *Cowan v Trésor public* [1989] ECR 195.

[17] For details see Craig/de Burca, 282-287 referring to a "broad concept of the state" at 284.

[18] For a comparative overview see Brüggemeier, 2006.

[19] Reich, 268 ff.; for a traditional concept of private autonomy see now Basedow, 901.

The only exception to this liberal approach to law and subjective rights remained competition law. But in reality it was not an exception but a confirmation of this understanding of the relationship between the individual and the state: Competition law is concerned with relations among private persons (exceptionally also state bodies) exercising an "economic activity" as "undertakings" in the market.[20] As such, they enjoy economic freedoms and autonomy, but should not violate this freedom by either collectively restraining competition (Art. 85 EEC/81 EC), or by unilaterally abusing their dominant position (Art. 86 EEC/82 EC). Competition law which expressly imposes obligations on private parties, in contrast to the free movement rules, thus confirms the "state oriented" theory of subjective rights. This state of affairs is accentuated because enforcement of the EC competition rules usually takes place through administrative agencies, as confirmed by Reg. (EC) No. 1/2003.[21] "Horizontal" liability of undertakings violating the competition rules against competitors, third parties and consumers is developing under the "Courage"[22] and "Manfredi"[23] cases and has been subject to Commission Green[24] and White[25] papers not to be discussed here. However, private enforcement of the competition rules is still in its infancy without really changing the "public law approach" to enforcement of competition law – quite in contrast to US antitrust law.[26]

The "vertical one-sidedness" of a theory of subjective rights in the EU is confirmed in the case-law of the ECJ concerning the absence of "horizontal direct effect" of directives under Art. 249 (3) EC, even if they are sufficiently specific and unconditional concerning the distribution of rights and duties among private parties. The case-law is well-known and need not be repeated here. The ECJ did not so much argue from an effect utile theory of subjective rights as in other fields of EC law, but from a more constitutional, rather formal argument insisting that under EC law, obligations could be imposed on private parties only by using the technique of regulations under Art. 249 (2) EC[27], not by directives, which are mainly directed at states. It is well known that the ECJ, as a follow-up to this general approach, devised a number of "secondary remedies" which come close to horizontal direct effect but do not expressly overrule its theoretical starting point.[28]

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[20] For a definition see case C-41/09 *Höfner* [1991] ECR I-1979 para 21; for a recent case see C-350/07 *Kattner v. Maschinenbau- und Metall-Berufsgensosenschaft* [2009] ECR I-(5.3.2009).

[21] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1.

[22] Case C-453/99 *Courage v Crehan* [2001] ECR I-6297.

[23] Case C-295/04 *Vicenzo Manfredi et al v Lloyd Adriati Assicurazionie SpA et al* [2006] ECR I-6619.

[24] COM (2005) 672 with an Annex containing the Commission Staff Working Paper.

[25] See EC-Commission White paper on "Damages actions for breach of the EC antitrust rules", COM (2008) 165 final of 2 April 2008.

[26] Bulst, 2006. Review Reich, 266.

[27] Case C-152/85 *Marshall v Southhampton and Southwest Health Authority*, [1986] ECR 723 (*Marshall I);* C-91/92 *Paola Faccini Dori v Recreb* [1994] ECR I-3325 paras 23-24. Regulations have recently become popular in the field of transport law and supported by the ECJ, see case C-344/04 *The Queen ex parte IATA & ELFA v Department of Transport* [2006] ECR I-403 concerning Reg. (EC) No. 261/2004. For an overview of the development see Karsten, 333.

[28] See the controversial case C-144/04 *Mangold v Helm* [2005] ECR I-9981 and the critique by AG Mazak in case C-411/05 *Palacios v Cortefil* [2007] ECR I-8531. Most recently case C-212/04 *K. Adeneler v. ELOG* [2006] ECR I-6057 para 110 with a broad concept of directive conforming interpretation including a duty to "teleological restriction" of opposing Member state law; for an overview see Prechal, 255-261; v. Danwitz, 697; Dashwood, 81; Reich, in Cafaggi/Micklitz, 2009, forthcoming; Röthel, 34, concerning (mostly negative) legal effects of directives before their date of implementation, correctly insisting that the dividing lines between "interpretation" and "direct effect" are "fluid" (fließend) at p. 45. See the recent judgment of the German Bundesgerichtshof (BGH) of 26.11.2008, EuZW 2009, 155, using the theory of "directive conforming interpretation" for a "Rechtsfortbildung" by way of a "teleological reduction" of the scope of application of non-conforming national law, thus implementing the judgment of the ECJ, case C-404/06 *Quelle v Bundesverband der Verbraucherzentralen*, [2008] ECR I-2685.

This case-law provides the link to our topic: the imbalance between rights and obligations seems to be a fundamental one, written into the legal structure of Community law. It originates from the multilevel system of governance of the EU itself: In the area of free movement, non-discrimination, and investor (consumer) protection, subjective rights are created centrally, whether by primary law on free movement, or secondary law of directives. These rules remain, however, incomplete before being translated into obligations of private parties by Member state law. State legislation will be the decisive connecting factor transposing EC derived subjective rights into obligations of the "other side" in a relationship determined by private law, which insofar does not follow Kelsen's "pure theory of law". Without such a connecting factor, the rights as promised by EU law remain black letter rules and can only be vertically enforced on the "state track" via the concept of state liability, but not horizontally against those who are supposed to be bound by the provisions themselves. Member state courts may be required to interpret their national law in harmony with EC law as far as possible; they are not required to apply their laws contra-legem. As "Community" courts they should do everything possible to enforce EC law in full, both with respect to rights and obligations, but this obligation is difficult to implement on a Community scale, unless the rules on state liability for "manifest breaches" by courts of Member states can be invoked.[29]

The following observations will be concerned with the question of whether this traditional approach to an EU specific theory of subjective rights, which remain "naked" without state intervention is still justified or should be supplemented by a different reading trying to put into conformity rights and obligations – instead of the individualistic approach to "rights without duties"!

1.4. "Godfather State" as Guarantor of EU Granted Subjective Rights?

The prevalence of state action in creating and enforcing subjective rights via obligations of private parties as the other side in a relationship governed by contract or tort law can at first glance be based on an argumentum e contrario based on Art. 10 EC: It puts very specific obligations on Member states (including their courts of law), which have a positive and a negative side:

- to ensure and facilitate fulfilment of the tasks and objectives of the Community;
- to "abstain from any measure which could jeopardise the attainment of the objectives of the Treaty".

A rich seam of ECJ case-law exists, which puts these obligations into practice and has been able to create a dense legal regime that for many observers transforms seemingly sovereign Member states into mere agents of the Community with particular regard to the defence of EC imposed subjective rights.[30] A similar duty does not exist with regard to private persons, unless they come into the scope of application of the competition rules. Private persons enjoy in the very wording of Art. 10 EC only rights and no obligations. An apparent exception can be found in Art. 17 (2) EC on citizenship whereby citizens of the Union "shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby". This suggests a symmetry between rights and duties, but a closer look at EC law will demonstrate that duties remain a "moral virtue", as J. Shaw has rightly stated[31]. I have labelled the EU citizen "king" enjoying a broad spectrum of subjective rights, which are not matched by an equally impressive set of duties.[32]

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29 Case C-224/01 *Gerhard Köbler v Republic of Austria* [2003] ECR I-10239; C-173/03 *Traghetti* [2006] ECR I-5617.

30 For a recent account see Temple Lang, in Bernitz et al (eds.), 75 at 89-92.

31 J. Shaw, in Academy of European Law (ed.), 237 at 344.

32 Understanding supra note 19 at p. 347.

This state of legal concepts creates a paradox: the liberal deregulation and privatisation movement as undertaken by the EU has been quite successful in reducing state functions and in opening public services, traditionally provided by state institutions, to private competition.[33] It has however not been able to transfer with similar success the obligations flowing out of these services to private actors. Insofar as this transfer is effected by directives imposing so called "universal service" and non-discrimination obligations on the new market players,[34] they are entitled directly to rely on the rights conferred upon them "against" the state, while the corresponding obligations, which are "part of the deal" originate only through specific legislation or regulation. There seems to be an imbalance in the distribution of rights and obligations: rights originate in themselves, as far as their "vertical", state orientation is concerned; obligations need a much different and longer track before becoming effective.

This one-sided structure of EC law can be shown to exist in many other areas, including the free movement provisions as understood in the traditional reading of EC law: if subjective rights are restricted by state action, the theory of direct effect allows a "fast track" in their enforcement without having to wait for state legislation or implementation. Courts of Member states take over the role of enforcing EC specific rights without needing a 'detour' of legislative approval. If similar restrictions are imposed by private parties, rights will remain "naked" and cannot be enforced "horizontally", unless there is a duty on the state to intervene, or the competition rules apply.[35]

This paper attempts to re-establish the symmetry between rights and obligations, which has been somewhat lost by the "vertical" structure of EC law, both in the primary law of free movement, and secondary law of directives. There are indeed signs in legal practice and theory showing that a need to rewrite the structure of EC law is felt, but without leading to results which could be called convincing. The most promising area in this respect is the – still infant and incoherent – law of civil liability in the EU, which had been developed as a remedy on its own right in the law of vertical state liability by the ECJ[36] and will be taken as a conceptual and practical starting point for extending some of its basic findings also to "horizontal liability".

2. Why Not Make Private Parties Directly Responsible under EU Law?

2.1. "Again Mr. Bosman"

The afore-mentioned Bosman case was based on the "horizontal direct effect" of Art. 39 EC (then Art. 48 EEC)**.** This concept had been developed in earlier cases against "collective regulations" by private associations[37] and summarized in the later Angonese case[38] arguing

> "that the abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law".

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33 For a critical account of this movement see Damjanovic/de Witte, EUI Working Papers Law 2008/34.

34 See Micklitz, in Collected Courses of the Academy of European Law 2008, forthcoming.

35 See *case Commission v France* supra note 6; for limits see *Schmidberger* supra note 6.

36 For an overview with a comparative analysis of German, French, UK and US-American law see G. Brüggemeier, supra note 18, 164-175. The concept of "state" is a broad one, see case C-424/97 *Haim* [2000] ECR I-5123.

37 Case 36/74 *Walrave v Union Cycliste internationale* [1974] ECR 1405.

38 C-281/98 *R. Angonese v Casa di Risparmio de Bolzano* [2000] ECR I-4139 para 32; a detailed supporting analysis has been given by Cherednychenko, 23 at 37-30; a critical analysis by Körber, at 675-682.

In an obiter dictum, the ECJ in the Wouters case[39] extended it to the freedom of establishment and to the provision of services, after having denied a violation of the competition rules. The controversial Laval/Viking cases[40] have extended this case-law also to social action aiming at the conclusion of a collective agreement.

None of these cases was concerned with compensation in the instance of breaches by private associations of the EC fundamental freedoms, namely Art. 39, 43 and 49 EC. Neither did the tribunals deem it necessary to look closer into the parallel applicability of the competition rules to restrictions imposed by private associations for which the Cour d'Appell de Liège in its reference in the Bosman case had expressly asked and which the ECJ has dismissed as irrelevant.

It should however be remembered that AG Lenz, in his lengthy opinion of 20th of November 1995, discussed and justified the applicability of both the free movement and competition rules, and came to the conclusion that they could be applied in parallel (para 253). Under the recent case-law of the ECJ concerning compensation for anti-trust injuries, a claim of Mr. Bosman under Art. 81 would be governed by EC law, while it is not sure how an eventual claim for breach of Art. 39 EC would be treated under EC law despite its "horizontal direct effect", at least against regulations by private associations. Is it completely left to the discretion of Member state law, or is a jus commune Europeum emerging? It should be remembered that the litigation was only concerned with the transfer and nationality rules of professional football. The field of "amateur football is thus not included", as AG Lenz rightly observed (para 60). However, restrictive transfer rules for an amateur who receives sponsorship support or who wants to become a professional, or nationality clauses may also exist in regulations concerning amateur sports. Will they trigger similar principles to Bosman?

2.2. Ubi Ius –Iibi Remedium: "Double Hybridisation" of Remedies

The theory of direct effect requires Member state law effectively to protect rights which individuals have acquired under EC law. The main principles, which the Court has developed in the absence of specific rules are those of "effectiveness" and "equivalence".[41] Member state law enjoys a certain margin of discretion, but this discretion is restricted within the overall objective of the Community to provide for effective remedies in case of breaches. In the words of the former AG van Gerven, "adequate (not minimum) judicial protection (is) needed".[42] I will take this statement as a starting point for further reflections.

Pursuant to this concept, the task of the legal scholar and the court handling the case on liability between private parties is therefore a threefold one:

First, to find out the rules of applicable Member state law.

Second, to evaluate these rules under EC law principles in order to ensure that minimum respectively adequate standards are achieved.

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39 C-309/99 *J.C.J. Wouters et al/Algemene Raad von de Nederlandse Ordre van Advocaaten* [2002] ECR I-1577 para 120; for a discussion see Körber at 682-683 opting for a prevelance of the application of the competition rules over the horizontal direct effect of fundamental freedoms, at 759-775.

40 C-341/05 *Laval un partneri v Bygnadds*, [2007] ECR I-11787; C-438/05 *International Transport Workers Federation (ITW) and Finnish Seaman's Union (FSU) v. Viking Line* [2007] ECR I-10779; I will not go into details of the controversies.

41 For a recent restatement, see the *Manfredi* case, supra note 23 at para 92; concerning questions of standing and injunctive relief now case C-432/05 *Unibet v Justiekanslern* [2007] ECR I-2271 para 72; for a comprehensive treatment see Tridimas, at 423-427; a critical approach has been taken by Lindholm, 98-152, referring to the "European doctrine"; see my review in Liber amicorum Brüggemeier, at 381.

42 See his seminal paper 501 at 529; Micklitz/Reich/Rott, 2009, 7.12-7.14. A somewhat different approach has been developed by Eilmannsberger, 1199 focussing particularly on remedies.

Third, eventually to correct the applicable Member state law under the principles of priority and direct effect of EC law.

This may well have the result that existing remedies under national law must be reshaped or that even new remedies are required[43]. The task has to be completed on the one hand within the afore-mentioned Community law framework giving "rights" to citizens, and on the other within the principle of "procedural autonomy" (details at section 4) – an autonomy which allows Member states to determine the competent courts and proceedings, but which again must meet the standards of effectiveness and equivalence. The result will be, as I have argued, a *hybridisation* of remedies,[44] which on the one hand are based on national law as basis for a claim on compensation ("Anspruchsgrundlage"), but this national law is reshaped under EC law influence. German, French, English and related laws offer their different approaches to liability in cases of breaches of statutory duties as "Anspruchsgrundlage"[45]. Thereby, compensation claims usually originate in *tort*, not in contract law because the injury complained of has been caused by illegal behaviour under the applicable free movement, non-discrimination or investor protection rules. Those entities – private associations (*Bosman),* law-firms (*Coleman*), or undertakings and their agents (*Kronhofer*) – having caused the injury should be liable whether or not a contract existed with the injured party.

The reference to tort instead of contract law holds true also in cases where Member state law provides for compensation under a *culpa contrahendo* approach, as in German law in cases of refusing to enter into or continue a contract because of a prohibited discriminatory element as in *Coleman*, or of incorrect or missing relevant information or risk warning as in investor protection cases as in *Kronhofer*. EC law tends to classify these cases under tort law provisions, or comes close to a theory of "contort" avoiding a clear distinction between contractual and tort liability because both are mandatory. As will be known, both under Art. 5 (3) of the Brussels Regulation 44/2001[46] and Art. 11 of the Rome II-Regulation on non-contractual obligations 864/2007[47] claims out of *culpa in contrahendo* are part of tort, not of contract law.[48] In the broad wording of the Court this seems to apply to all claims where there is "no obligation freely assumed by one party towards another"[49] like in the German case-law concerning obligations arising out of pre- or post-contractual relations. All in all, "hybridisation" concerns both the basics of a claim, and its concrete legal and procedural content. This can be called a "double hybridisation of remedies".

2.3. Preliminary Evaluation – Is a Community Standard Needed?

While the disparities of national laws on compensation must be respected, there still is a need for a common EC standard for breaches of Community law which seems to be emerging. There is some practice with regard to competition law, but surprisingly none with regard to injuries due to a violation of horizontally applicable EC provisions on free movement. But this does not exclude an analysis of existing law under the "hybridisation approach" which tries to combine solutions under national law with requirements of effective and equivalent protection under EC law. To develop such a standard, I

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43 See case C-97/91 *Oleficio Borelli SpA v Commission*, [1992] I-6313 para 13; see also *Unibet* supra note 41 at para 37.

44 Reich, 2007, 705.

45 Reich supra note 44 at p. 709.

46 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, 1.

47 Regulation (EC) No. 864/2007 of the EP and the Council of 11 July 2007 on the law applicable to non-contractual obligations (*Rome II*), OJ L 199, 31.7.2997, 1.

48 See case C-334/00 *Fonderie Officiene Meccaniche Tacconi and HWS* [2002] ECR I-7353, even though concerned with business relations.

49 Para 23.

will follow *AG van Gerven* in his seminal opinion in *Banks*.[50] He pleads for uniform conditions of liability in respect of breaches of directly applicable Community law which are "based on the Community legal order itself". Even though the case-law will have to evolve significantly, "it is already possible to glean a number of principles from the case-law, especially the judgments concerning the non-contractual liability of the Community under Art. [288 (2) EC]…" These are, in his opinion "the existence of damage, a causal link between the damage claimed and the conduct alleged against the institution, and the illegality of such conduct….".

Later case-law of the ECJ has refined these criteria. Even though the ECJ judgment in *Banks* did not follow the opinion of AG van Gerven because of rejecting the concept of direct effect for the competition rules of the Treaty on ECSC, it pronounces a principle which later in *Courage* and *Manfredi* have been taken over to competition matters and which, in my opinion, must be understood as an important step to a general concept of "horizontal liability" for breaches of Community law. The following lines will explain this concept in more detail and pay particular attention to the afore-mentioned "double hybridisation" of remedies.

3. A "Sufficiently Serious Breach" of a Duty under EC Law Causing Damage

3.1. The Starting Point

The criteria of "sufficiently serious breach" was first developed as a condition of liability of Community institutions under Art. 288 (2) EC[51] and, in Brasserie[52], was adopted explicitly to justify and at the same time limit the extent of state liability for breaches of Community law. There is yet no precedent to apply this condition also to "horizontal liability" in free movement matters as in the Bosman case, or in matters regulated by secondary law not explicitly containing civil law remedies, but it seems that this could and should be a uniform standard to be applied Community law-wide whenever matters of compensation for violations of EC provisions intending to give rights to individuals is before national courts.[53] As said before, this is meant to be a minimum standard based on a system of adequate protection and equal rights insofar as EC law is applicable to the position of the injured. Citizens should not be discriminated against by applying to them different standards of legal protection.[54] National law will always be the starting point and define the cause of action and the legal basis of the claim (Anspruchsgrundlage); Community law defines the rights which give rise to remedies in case of violation and steps for when these minimum, or, in the words of van Gerven, adequate requirements are not met.

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50 Case 128/92 [1994] ECR I-1209 paras 45, 49; see also v. Gerven, at 481-482; Reich, supra note 19 at 334-335. The Commission Staff Working Paper annexed to COM [2006] 672 at paras 31-44 points to a number of still existing differences and difficulties for actions in compensation of antitrust injuries in Member state law, in particular with regard to procedural questions without making any specific proposals for reform.

51 Case C-352/98P *Bergadern* [2000] ECR I-5291: no requirement of breach of a "superior rule of law"; for its importance see van Gerven, in Liber amicorum Brüggemeier, 29 at p. 36.

52 Joined cases C-46 + 48/93 *Brasserie de Pêcheur and Factortame* [1996] ECR I-1029.

53 Is transfer to breaches by an individual is advocated by C. v. Dam, at para 1805-1; for a different opinion see Tridimas, supra note 41 at 544 arguing that the requirement of "sufficiently serious breach" originates from the "sovereign nature of the State and serves public interest purposes". In my understanding of the case-law of the Court, this criteria is meant to exclude any notion of "fault" or "negligence" in a subjective way, but not to limit liability only to "serious violations" of EC law; see the German translation: "hinreichend qualifiziert", the French "une violation suffisamment caracterisée du droit communautaire".

54 For such a broad "positive" understanding of the non-discrimination principle see Micklitz/Reich/Rott supra note 42 at para 7.14.

The condition of "sufficiently serious breach" is not based on fault or negligence, which has been the traditional standard in tort law, but on the violation of a duty under EC law, which however must meet a certain threshold; in the end to be defined by the Court on a case-by-case basis. A negligent violation may be regarded as evidence of a "sufficiently serious breach", but on the other hand "reparation ….cannot …depend upon a condition based on any concept of fault"[55]. Similar principles had been developed in sex-discrimination cases.[56] If (secondary) EC law presents uncertainties which can only be settled by case-law of the ECJ, this uncertainty cannot be borne by the defendant in a tort action.[57] Once this clarification has been given the breach will always be "manifest" and therefore sufficiently serious, as the ECJ has ruled in Köbler[58] with regard to liability of highest courts for breaches of EC law.

3.2. The Correlation between Rights and Obligations

Later case-law on state liability, in particular since *Brasserie* and *Peter Paul*[59] has specified that not every breach of Community law entitles the potential victim to compensation, but only in the case that such rule intended to *confer rights onto the individual*. Or, to put it in other words: the obligation under EC law, which was breached by the tortfeasor must exist towards the victim, not only to the public at large. To some extent, EC law takes over a modified German *Schutznorm-* or *Normzwecktheorie*[60] which, however, is interpreted in a strictly objective sense depending on the need for protection and not the subjective intention of the tortfeasor.[61] This is justified by the very principle of *ubi ius – ibi remedium*[62], turned upside down: if the individual does not have a right under Community law, then he cannot claim compensation: "Where there is no right there is no remedy!"

3.3. Causation

3.3.1. The unclear case-law of the ECJ in cases of Community respectively state liability

The Court has, from its early case-law pertaining to Art. 288 (2) EC onwards, always insisted that there must be a causal link between the breach and the injury leading to damages; this is written into the Treaty text itself. However, the Court has used different formula to describe this causal link, and the exact requirements of causation are somewhat in doubt[63]. The leading case is still *Roquettes frères*[64] where the Court said that the burden of proof and the "causal connexion" for concrete damages is put upon the plaintiff; mere statistical evidence or a claim of nominal damages is not

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55 *Brasserie* at para 79.

56 Case 177/88 *Dekker* [1990] I-3951*;* C-180/95 *Draempaehl* [1997] I-2195.

57 See case C-392/93 *R v HM Treasury ex parte British Telecom* [1996] ECR I-1631; joined cases C-283/94 et al *Denkavit* [1996] ECR I-5063.

58 Case C-224/01 [2001] I-10239 para 56, confirmed by case C-173/03 *Traghetti* [2006] ECR I-5177.

59 C-222/02 *Peter Paul et al v Federal Republic of Germany* [2004] ECR I-9425.

60 See van Gerven et al., 306; Eilmannsberger, supra note 42, 1241-1244, criticising the ECJ for its resistance to employ this approach which in my opinion is not correct.

61 Brüggemeier, supra note 18, 536-540.

62 Eilmannsberger, supra note 42, 1236-1240 suggests the formula "ubi remedium, ibi ius" and correctly insists on the prior existence of an obligation under EC law.

63 For a recent overview see Bitterich, 12-39; for an earlier appraisal see further Toth, in Heukels/McDonnell (eds.) 179, at 186, where it is specified that the cause should not be too remote and not too broad and unspecific, and that an intervening cause may be positive or negative: at 193 ff.

64 26/74 [1976] ECR 677 para 23.

sufficient evidence. The Court did however not pronounce itself on the questions of how strong the causal link must be; Member state law is quite different on that point. In the later *Dumortier Frères* case[65] the Court wrote:

> "…However, it is sufficient to state that even if it were assumed that the abolition of the refunds exacerbated the difficulties encountered by those applicants, those difficulties would not be a sufficiently *direct* (italics NR) consequence of the misconduct of the Council…. Art. 215 of the EEC Treaty (now Art. 288, NR) … cannot be relied on to deduce an obligation to make good every harmful consequence, even a remote one, of unlawful legislation."

In her opinion in *Fresh Marine* Co[66], AG Stix Hackl insisted that Community liability requires that there is a causal link between conduct and damage only if the damage is a "sufficiently direct consequence". This rather cautious approach to causation was used in cases where compensation was denied to so-called "secondary victims", namely family members because the tortfeasor's act was held to have "only" infringed the bodily integrity of the primary victim[67].

The later case-law concerned state liability under the *Francovich* doctrine where merely a causal link was mentioned without any qualification.[68] This was somewhat modified in *Brasserie*[69] where a *direct* causal link was required; it was left to Member state law to determine this causal link. In *Manfredi*,[70] the Court repeated the requirement of causation as an element of a claim in compensation under the competition rules, but without the qualification of a "direct" causal link: "It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC" (paras 60-61).

This position of Community law was explained in some more detail in state liability cases. In *Brinkman*,[71] the Court denied a direct causal link between the breach (consisting in an insufficient implementation of a directive) and the damage because of lack of clarity and precision of EC legislation. It must however be questioned whether this really constituted a question of causation or rather one of a "sufficiently serious breach". In *Rechberger*,[72] the Court was somewhat more explicit concerning the extent of liability under the package holiday directive which is limited to the reimbursement of money paid over and to repatriation in case of bankruptcy of the tour operator. In the case before the ECJ, the package offer was made at particularly favourable terms – which were later declared to be unfair – to attract subscribers to an Austrian newspaper. This caused the organiser logistical and financial difficulties which led it to apply, on 4 July 1995, for bankruptcy proceedings to be initiated against it. The Austrian state which had not correctly implemented Art. 7 of Dir. 90/317/EEC[73] claimed *inter alia* unforeseeable circumstances and lack of causation to avoid state liability under the *Brasserie* doctrine. The ECJ has however argued differently:

> "In those circumstances, the Member State's liability for breach of Article 7 of the Directive (90/314) cannot be precluded by imprudent conduct on the part of the travel organiser or by the occurrence of exceptional and unforeseeable events. Such circumstances, in as much as they would not have presented an obstacle to the refund of money paid over or the repatriation of consumers if

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65 Joined cases 64/76 et al [1979] ECR 3091 para 21.

66 Case C-472/00P [2003] ECR I-7541 para 56.

67 Koziol/Schulze supra note 3, 605.

68 Para 37.

69 Supra note 52 at paras 51/65; critique van Gerven supra note 42, 512.

70 Supra note 23.

71 Case C-319/96 *Brinkmann Tabakfabriken v Skatteministerie* [1998] ECJ I-5255 at para 29; comments Bitterich, supra note, 63 at 34.

72 Case C-140/97 [1999] ECR I-3499; Bitterich, 35.

73 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L 158/59.

> the guarantee system had been implemented in accordance with Article 7 of the Directive, are not such as to preclude the existence of a direct causal link" (paras 75-76).

Magnus/Wurmnest[74] argue that the Court has established an autonomous Community concept of causation. This is necessary, in their view, to create uniform standards of civil liability in the EU. Nevertheless, German authors refer to the German law of causation which is characterised by the so-called "*Adäquanztheorie*" which also seems to be used in French law (*causalité adequate*)[75]; English courts prefer the concept of "remoteness".[76] I would agree with Magnus/Wurmnest that the concept of causation as a requirement of compensation for breaches of "horizontally" effective provisions of EC law must be interpreted uniformly, at least as a minimum standard. Victims should be treated alike as much as possible whenever their rights under EC law are at stake. The Court seems to be somewhat more cautious when it held in *Manfredi*:

> "In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed" (para 64).

This does not exclude that Community law will restrict claims if there is not a sufficiently "direct" link between breach and injury. Therefore national courts have a rather flexible standard for determining liability. In the end, it will remain a question of fact and not so much the law.

3.3.2. Causation as a problem of "horizontal liability"

In a recently published paper Busani and Infantino[77] have argued that Member state courts (and courts from other jurisdictions) use a concept of "flexible causation" as an instrument to determine the extent of liability and to exclude incidents from compensation which in their view should not be compensated. A similar development can be foreseen also for the concept of causation used in liability cases both with regard to state liability under the *Francovich* doctrine and horizontal liability as suggested here by referring to *Bosman.* This is particularly true with respect to the "directness" of causation to which the ECJ referred in *Brasserie*. *Bosman* seemed to present no problem, because the transfer and nationality clauses of the European and Belgian football associations, imposed on the Liège club which Mr. Bosman wanted to leave, directly restricted his right to free movement and discriminated against him based on his nationality. In *Coleman,* the harassment by partners and employees of the defendant law office directly caused harm to her ability to work and continue gainful employment which forced her to quit the job. In *Kronhofer,* the absence of a "direct" chain of causation concerning the damage of the plaintiff led to a denial of the jurisdiction rule of Art. 5 (3) of the Brussels Convention/Regulation concerning the "place where the harmful event occurred". Since most jurisdictions regard causation as a matter of fact it will be nearly impossible to develop coherent standards under EC law.

What is sometimes hidden behind this discussion are value elements, which enter the judges' decision to establish or deny causation in cases before them. Legal theory therefore has tried to develop more coherent criteria depending on the protective scope of a norm like in German law, the degree of culpability of the tortfeasor, the contribution of the victim, and similar elements.[78] Since in our theory of "double hybridisation", EC law with regard to the basis and the conditions of a claim can only

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74 Casebook at 225; similar Bitterich, at 18 discussing the term "sufficiently direct causal link" which goes beyond the mere "condition sine qua non"-formula and contains an element of evaluation and policy decision.

75 Schweitzer/Hummer, cited by Magnus/Wurmnest, 226; Bitterich, 19; Dalloz, Art. 1382, para 88.

76 Markesinis/Deakin, at 191-201; Smith/Woods, 925.

77 Liber amicorum Brüggemeier, 145 (148).

78 Brüggemeier, supra note 18, 535-544.

determine certain minimum standards without allowing a "complete harmonisation", this state of the law will have to be accepted, even if it will lead to different results in claims originating from nearly identical injuries.

3.4. Amount of Compensation

3.4.1. The principle of full compensation for "pure economic loss"

In Brasserie,[79] the Court insisted on the principle of full compensation including "pure" economic loss. It has also made clear that interest must be paid[80]. Member states may however require that the injured party be reasonably diligent in limiting the extent of the loss or damage, otherwise it may risk a loss or reduction of his claim.[81]

In Manfredi,[82] these principles were taken over for claims under the competition rules:

> "it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest. Total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible…. As to the payment of interest, the Court pointed out ….that an award made in accordance with the applicable national rules constitutes an essential component of compensation" (paras 95-97).

On the other hand, EC law does not require punitive damages like in US antitrust law; this is a matter for the legislator. This case-law, which can also be used in our context again confirms the theory of "hybridisation": national law is the starting point for calculating compensation. Claims under EC law should be treated similarly to claims under national law. But if under this threshold national law does not allow adequate compensation, it eventually must be "upgraded" by EU law, in particular to cover full economic loss including interest. It is however not clear how far "loss of chance" is accepted as a head of damage by all Member States.[83] In cases like Bosman, the point of reference would be the difference between the actual pay received and the "market value" of a football player in a similar position. This must of course be determined by the national court.

3.4.2. Non-material damages – (no) general requirement under EC law?

There is, as yet, no ECJ case-law on whether compensation for non-material damage could be regarded as part of EC law, nor is there a general principle emerging in this direction. Some cases concerning Community liability under Art. 288 (2) EC seem to go in this direction.[84]

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79 Supra note at 52 para 87.

80 See also case C-271/91 *Marshall II* [1993] ECR I-4367 at para 32.

81 At para 84; Tridimas supra note 43 at p 458; Bitterich supra note 63 at pp. 30-31.

82 Supra note 23.

83 See v. Gerven et al, 111 ff., 200 ff., 224 ff.

84 C-343/87 *Culin* (1980) ECR I-225; R-59/92 *Caronna* (1993) ECR II-1129; concerning accident cases see 169/83 and 136/84 *Leussink* (1986) ECR 2801.

However, the standards for the amount of compensation differ widely between Member states, and within EC law itself. While the new IP directive 2004/48/EC[85] expressly includes moral prejudice in "appropriate cases" as a head of damage, this is completely left to the discretion of Member states in the case of product liability under Art. 9 (2) of the Product liability directive 85/374/EEC[86], even though it seems to be covered by most of them now. Non-discrimination law seems to develop a specific remedy of its own which cannot be discussed in detail here.[87]

4. Procedural Autonomy vs. Effective Remedies

4.1. "Procedural Autonomy" of Member States and Its Limitations

Under the existing system of distribution of competences, it is up to Member states to determine the competent courts for treating injury claims, and to design the appropriate procedures, as restated in *Manfredi*.[88] This competence is usually defined as "procedural autonomy of Member states"[89], based on such cases as *Van Schijndel*.[90] But this autonomy is not absolute, as the Court has said in a different context in *Peterbroek*.[91] It is limited by the afore-mentioned general principles of *effectiveness* and *equivalence*: national procedural law must not render the remedy virtually impossible or excessively difficult; it must provide for the same protection of Community rights as for similar rights under national law. This, in my opinion, has developed into a procedural principle of EC law, restated in Art. 47 of the Charter of Fundamental Rights of the European Union (EUCh), to be integrated into EU law by the Lisbon Reform Treaty:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal … Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."

An approximation of this is repeated in Art. 19 (1) of the consolidated version of the Lisbon EU Treaty. In its Unibet judgment[92], the Court insisted that

> "the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Art.6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and which has been reaffirmed by Art. 47 of the Charter" (para 37).

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85 Directive 2004/48/EC of the EP and the Council of 29 April on the enforcement of intellectual property rights OJ L 157, 30.4.2004, 45; corrigendum L 195, 2.6.2004, 16.

86 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products L 210, 7.8.1985, 9.

87 Reich, in Liber amicorum G. Alpa, 860.

88 Supra note 23.

89 Kakouris, 1389; v. Gerven, supra note 42, 502 referring to "procedural competence" of Member states; Reich, at 241-243; Lindholm, supra note 41, 100-102, listing 4 exceptions, including the principles of "equivalence" and "effectiveness"; Reich, in Liber amicorum Mikelenas, forthcoming.

90 C-430 + 431/93 [1995] ECR I-4705.

91 C-312/93 [1995] ECR I-4599.

92 ECJ, 13.3.2007, case C-432/05, *Unibet vs Justiekansler* [2007] ECR I-2271 para 37.

But this is not a one sided fundamental right because, as the Court rightly held in Promusicae[93],

> "…(there is a) need to reconcile the requirements of the protection of different fundamental rights, namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other" (para 65).

As a consequence of this constitutional context, van Gerven therefore proposes moving beyond the "minimum effectiveness test"; instead, he suggests an "adequacy test" whereby national law must not prevent "the remedy from being sufficiently adequate".[94] Given the need for uniform protection "as far as possible", the adequacy test should be preferred to the minimum protection test[95]. This is to some extent confirmed in Unibet by insisting that national law must allow for "interim relief necessary to ensure those rights are respected" (para 72). The conditions must be laid down by national law. Such relief will be able to render rules on liability more efficient, as has been explained by AG Poiares Maduro and the ECJ in Feryn, a case concerning discrimination based on ethnical grounds[96].The ECJ allowed Member states a broad discretion concerning remedies:

> "They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings" (para 39)

As a general rule, it is the task of the national court to provide for "adequate" and, this should be added, "balanced protection", e.g., by avoiding overtly strict rules on evidence.[97] It is of course difficult to measure the exact threshold of this requirement since the laws on evidence of the Member states differ considerably. On the other hand, the principle of "equivalence" should always be respected: if Member state law has developed certain procedural rules making it easier for the plaintiff to prove the injury (e.g., the res ipsa liquitur principle, prima facie-rules[98], use of experts etc.), then they must also be applied in proceedings concerning violations of EC law. Directives may lay down certain remedial and procedural requirements, like the Directive 2004/48/EC on the enforcement of intellectual property rights.

4.2. Conflict Provisions

Since cases on horizontal liability are concerned with actions arising out of tort, delict or quasi-delict, Art. 5 (3) of the Brussels Regulation 44/2001 will determine the competent court, thereby allowing forum shopping between the court of the business place of the tortfeasor, or the court where the injury occurred, e.g., in our case the domicile of Mr. Bosman when the injury occurred.[99] Where the consequences of the illegal action are only remote as in Kronhofer, Art. 5 (3) will not be applicable.

With regard to applicable law, the Rome II Regulation No. 864/2007[100] refers to the "lex loci damni" as a general rule. In Kronhofer, this would be the place where the "damage occurs", that is Austria, not Germany. As a consequence, jurisdiction and applicable law may fall apart – a somewhat strange consequence, especially in the case of multiple violations. It is therefore suggested that the law of the

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93 Case C-275/06 *Promusicae v Telefonica* [2008] ECR I-271; comment Groussot, 1744 at 1760.

94 Supra note 42, 533.

95 Micklitz/Reich/Rott, supra note 42, 7.8.

96 Case C-54/07 *CGKR v Firma Feryn NV*, (2008) ECR I-(10.7.2008).

97 Micklitz, 268-327 concerning discrimination cases; Bulst supra note 28, 269-271 concerning horizontal liability in competition cases.

98 Brüggemeier supra note 18, 617-618.

99 Micklitz/Reich/Rott, supra note 42, 7.22.

100 Supra note 47.

forum be applied, namely the business seat of the defendant company – which would be Germany. Art. 4 (3) of Rome II contains a "closer connection rule", especially where there has been a pre-existing contractual relationship between the parties to which probably German law would be applicable under Rome I-principles[101]. Since, as we try to demonstrate, the general concepts of liability are in a process of approximation by judge-made law, this rule should not cause too many distortions of competition in the internal market.

4.3. The Problem of Time-Limits and Prescription Periods

EC law, with the exception of claims for Community liability, does not regulate prescription periods. This is therefore a matter of applicable Member state law, but it must respect the principles of effectiveness and equivalence. In *Palmisani*,[102] the Court insisted that the fixing of limitation periods is a matter for Member states, but they must not be so short as to preclude effective protection. In *Cofidis*,[103] the ECJ declared a two year time limit for bringing claims under the unfair contract terms directive as being incompatible with EC law. This principle was crucial in *Manfredi* against Italian rules on prescription:

> "A national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended. In such a situation, where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action" (paras 78-79).

Questions of limitation periods and time limits have played a great role in EC law, in particular in claims for restitution of illegally charged taxes, levies and fees.[104] The case law is less than clear and difficult to transfer to claims of compensation which usually are covered by separate Member state regimes of tort law. The case law does not impose a certain minimum time limit or prescription period on claims, but takes a close look at the specific circumstances of the case, as Micklitz correctly points out.[105] Both aspects of effective protection of the individual on the one hand and of legal certainty on the other play a role in balancing the national rules on prescription periods[106].

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[101] Regulation (EC) No. 593/2008 of the EP and the Council of 17 June 2008 on the law applicable to contractual obligations *("Rome I"*), OJ L 176, 4.7.2008, 6.

[102] C-261/95 *Palmisani v Istituto nazionale della previdenza sociale* [1997] ECR I-2791.

[103] Case C-473/00 *Cofidis v Jean Louis Fredout*, [2002] ECR I-10875 para 35.

[104] For an excellent overview, see Micklitz, 2005, 536. See also Eilmannsberger supra note 42 at 1220 criticising the "basically friendly treatment of time-limits by the Court".

[105] At 541.

[106] See the recent case C-445/06 *Danske Slagterier v Bundesrepublik Deutschland* [2009] ECR I-(24.3.2009) para 32: a three year period is regarded as reasonable; also opinion of AG Terstenjak of 2.4.2009 in case C-69/08 *RaffaeloVisciano v INPS* concerning claims for employment compensation due to the bankruptcy of the employer.

5. Conclusion: The Need for a Symmetry between Rights and Obligations

5.1. The Proposals of the DCFR and Its Relationship to Existing EC Law: Something to Learn?

Book VI of the Draft Common frame of Reference[107] contains model rules of a European tort law. It does not refer to the existing system of an EC tort law as developed by Court practice[108]. However some proposals are worth to be considered in the context of a more coherent EC liability system, eg Art. VI.-2:101 (1) on the "legally relevant damage" which includes "the loss or injury result(ing) from a violation of an interest worthy of legal protection", here under EC/EU law. Art. VI.-2:208 concerns "loss upon unlawful impairment of business", including "loss caused to a consumer as a result of unfair competition is also legally relevant damage if Community or national law so provides". Art. VI.-3:204, 5:401 (3) take over the EC *acquis* on product liability.
With regard to causation where EC law is deficient, the DCFR has special rules on multiple tortfeasors in Art. VI.-4:102 and alternative causes in Art. VI.-4:103 which are worth consideration. If several persons are liable for the same legally relevant damage, they are liable solidarily, Art. VI.-6:105.

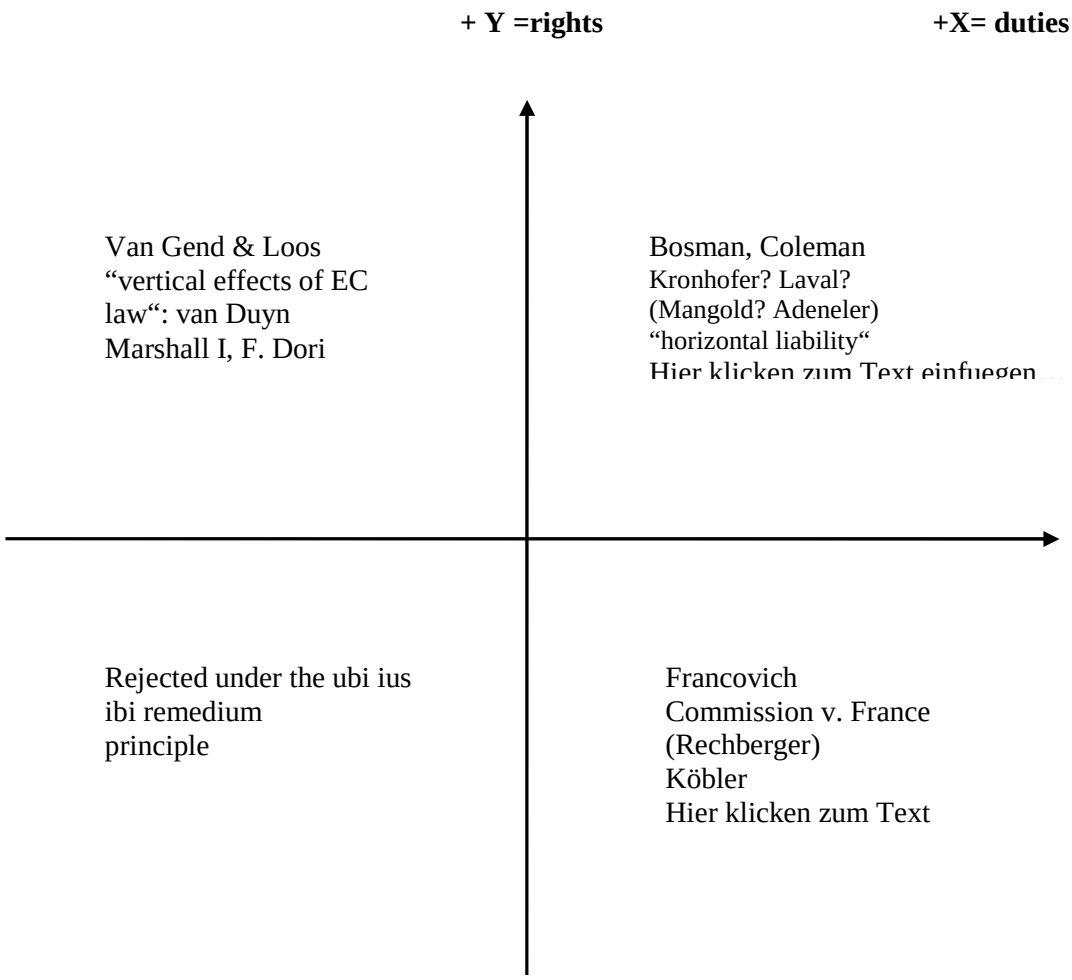
5.2. From a "Torso" to a Coherent Concept of Liability for Violations of EC Law?

The paper has tried to show that not only with regard to "vertical liability" for breaches of EC law either by Community institutions under Art. 288 (2) EC or by Member states under the *Francovich*-doctrine, but also for "horizontal liability" among private parties some general Community standards can be established already now. The basic requirement is a "sufficiently serious", not necessarily negligent violation of a EU law provision intending to protect private parties, in particular under the free movement, non-discrimination, and investor protection rules. Remedies for compensation (injunctions were discussed only in passing) must be found under national law, but this must obey to the principles of effectiveness and equivalence which may be summarised as the principle of "*adequate protection*". The existing national remedies must eventually be reshaped and "upgraded" if they do not meet EU standards. This will lead to a *"hybridisation of remedies"* which could be shown in the basic requirements of "sufficiently serious breach", causation, amount of compensation, and adequate procedures. Obviously a great number of important theoretical and practical questions must still be settled. Even if EU law must respect the diversity of Member state laws, it should still develop adequate, effective and equivalent common standards on compensation of EU citizens if their rights protected under Community law have been illegally violated by private parties. This is the only possibility to avoid a "withering away" of obligations under an extended subjective rights theory.

[107] Study Group on a European Civil Code, Draft Common Frame of Reference (DCFR) – Interim Outline Edition, 2008 (DCRF). For an evaluation see the contributions to Schulze (ed.), 2008. The outline edition of 2009 has not changed the above mentioned principles and model rules.

[108] Pinkel, at p. 31; critique Eidenmüller et al, 539-541: "Öffnung der Schleusentore im Haftungsrecht – opening of floodgates in liability law".

The discussion here could be summarised by modifying the graph as follows:



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