

PRIVATE LAW AND THE INTERNAL MARKET

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Direct Horizontal Effect of the Treaty
Provisions on Free Movement

Roel VAN LEUKEN



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

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PREFACE

Private law and private law relationships are increasingly influenced by the law of the European Union. Sometimes, the consequences are foreseeable, for instance because EU law provides expressly that violation of its rules shall produce a specific private law effect. Well-known examples are the nullity provided for by Article 101(2) TFEU for agreements that prevent, restrict or distort competition within the internal market, and the Union's obligation under Article 340 TFEU, in the case of non-contractual liability, to make good any damage in accordance with the general principles common to the laws of the Member States.

More surprising are the consequences that are generated when the Court of Justice interprets provisions of EU law ostensibly addressed to the Member States, as creating, modifying or extinguishing rights and obligations in legal relationships between individuals (direct horizontal effect). Starting in 1974 the Court has used cases submitted to it as an opportunity to express its views on the possible direct horizontal effect of the TFEU provisions pertaining to the functioning of the internal market, known as the fundamental freedoms (or free movement provisions): Articles 34 and 35 TFEU (free movement of goods), Article 45 TFEU (free movement of workers), Article 49 TFEU (freedom of establishment), Article 56 TFEU (freedom to provide and receive services) and Article 63 TFEU (free movement of capital).

This book was triggered by the fact that the Court of Justice has interpreted a number of free movement provisions of primary EU law as having direct influence on private law relationships. It seeks out the links between the Court's rulings on the issue and examines, by analysing them against the background of the various mechanisms used by EU law to influence national private law, whether the approach taken by the Court to one free movement provision can be predictive for other free movement provisions and if so, to what extent. The research thus gives a clear picture of the possible reach of the influence of the free movement provisions on private law relationships. The attention to the impact which accepting direct horizontal effect has on the kind of justifications that must be available to individuals as a defence to alleged infringement of a free movement provision is a direct corollary of this research.

This book was translated from the original Dutch by Lou Punt-Heyning.

Nijmegen, 31 December 2016

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LIST OF ABBREVIATIONS

AA	Ars Aequi
Art	Article(s)
AG	Advocate-General
BGB	Bürgerliches Gesetzbuch
BW	Burgerlijk Wetboek
CDE	Cahiers de Droit Européen
CEH	Contemporary European History
CJ	Court of Justice
CJEL	Columbia Journal of European Law
CLJ	Cambridge Law Journal
CMLR	Common Market Law Review
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Review
diss	dissertation
EBLR	European Business Law Review
EC	Treaty establishing the European Community
ECHR	European Convention on Human Rights/European Court on Human Rights
EEC	European Economic Community
EHRLR	European Human Rights Law Review
ELR	European Law Review
ERPL	European Review of Private Law
EU	European Union
FordhamIntlJ	Fordham International Law Journal
GC	General Court
GLJ	German Law Journal
HR	Hoge Raad (Supreme Court of the Netherlands)
ILJ	Industrial Law Journal
JTDE	Journal des Tribunaux – Droit Européen
OJLS	Oxford Journal of Legal Studies
MJ	Maastricht Journal of European and Comparative Law
Mw	Mededingingswet (Competitive Trading Act, the Netherlands)
MvV	Maandblad voor vermogensrecht
NJ	Nederlandse Jurisprudentie

NtEr	Nederlands tijdschrift voor Europees recht
NVwZ	Neue Zeitschrift für Verwaltungsrecht
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RMC	Revue du Marché Commun
RMUE	Revue du Marché Unique Européen
RMThemis	Rechtsgeleerd Magazijn Themis
RTDE	Revue Trimestrielle de droit Européen
RvdW	Rechtspraak van de Week
SEW	Tijdschrift voor Europees en economisch recht
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
TvPr	Tijdschrift voor privaatrecht
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht