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HORIZONTAL DIRECT EFFECT OF THE TREATY FREEDOMS

Diplomová práca

Vedúci diplomovej práce: JUDr. Tereza Kunertová, LL.M., Ph.D.

Katedra európskeho práva

Dátum vypracovania práce (uzavretia rukopisu): 11. apríla 2016

CHARLES UNIVERSITY IN PRAGUE

FACULTY OF LAW

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Master's Degree Diploma Thesis

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Date: 11 April 2016

Pod'akovanie

Na tomto mieste by som chcela v prvom rade poďakovať JUDr. Tereze Kunertové, LL.M., Ph.D. za jej podnetné pripomienky, námety k úvahám, rady a ústretovosť. Finálnu podobu tejto práce ovplyvnila jazyková korektúra, za ktorú ďakujem Alice Christine O'Connell, LL.M..

Acknowledgements

I would like to thank first and foremost JUDr. Tereza Kunertová, LL.M., Ph.D. for her constructive review, ideas for reflection, advice and flexibility. The final version of this thesis is influenced by the critical proof-read of Alice Christina O'Connell, LL.M. for which I would like to express my appreciation.

Prehlásenie

Prehlasujem, že predloženú diplomovú prácu som vypracovala samostatne a že všetky použité zdroje boli riadne uvedené. Ďalej prehlasujem, že táto práca nebola využitá k získaniu iného alebo rovnakého titulu.

V Prahe dňa 11. apríla 2016

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List of Abbreviations

Art.	Article
CJEU	Court of Justice of the European Union
Court	Court of Justice of the European Union
ECSC	European Coal and Steel Community
EEC	European Economic Community
ETUC	European Trade Union Confederation
EU	European Union
FIFA	Fédération Internationale de Football Association
FSU	Finish Seamen's Union
IGC	Irish Goods Council
ITF	International Transport Workers' Federation
TAT	Transitforum Austria Tirol
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Treaty	Treaty on the Functioning of the European Union
UEFA	Union of European Football Associations
UK	United Kingdom
Union	European Union

1. Preface

1.1 Topical introduction and relevance

The followers of European public affairs or the world news in general could hardly miss the passionate exchange of arguments between the German Chancellor Angela Merkel and the British Prime Minister David Cameron in November 2014 on the scope of the free movement in the European Union. Whereas David Cameron is consistently trying to limit the immigration of the European Union (hereafter also referred to as the “EU” or the “Union”) citizens to United Kingdom (hereafter also referred to as the “UK”) through altering the free movement rules, Angela Merkel firmly advocated the free movement when she let herself be heard that she would rather see the UK leave the European Union than compromise this founding principle of the European integration.¹

The free movement and the creation of the common market lay at the foundation of the European Union. The economic benefits stemming therefrom are often used in advocating for deeper integration in other areas of European policy. But first and foremost, they are used as a tool for furthering the integration through the removal of obstacles to trade between the Member States. However, the far-reaching interpretation of the internal market does not only lead to the single market without restrictions on the free movement but also triggers the legal basis for further harmonisation in various areas. The broader it is, the more national regulations fall within the concept of the internal market and thus the scrutiny of the Court of Justice of the European Union (hereafter also referred to as the “CJEU” or the “Court”) and also the more harmonisation measures can be introduced at the European level.

Hence, the aspects of the European integration are very complex and significantly intertwined. Moreover, it is specific to any other international integration. On the one hand, it comprises the explicit transfer of sovereignty from Member States to European institutions through the international treaties such as the Treaty of Rome or the Treaty of Lisbon. As the Treaty provisions are the result of Member States' statesmanlike

¹ EU migrants. Merkel v Cameron retrieved from <http://www.bbc.com/news/world-europe-29878283> on 16 March 2015

compromise, they are rather concise and their mere wording itself does not trigger much debate.

On the other hand, over a period of more than fifty years the CJEU has established its role as a pivotal driving force of the European integration. It is the principles used in the interpretation of the Treaty freedoms, such as the non-discrimination principle or the market access approach, developed through the Court's law-making process which have given these provisions the meaning they enjoy nowadays. For instance, in 2012 16 % of the cases completed before the CJEU were related to the free movement law.² The analysis in this dissertation therefore focuses mainly on the fundamental case law developed by the Court in the area of internal market.

When it comes to the reasoning of the Court in a number of free movement judgments, I agree with the opinion Professor Shuibhne presented in her recent publication *The Coherence of EU Free Movement Law* that it might sometimes appear as if the rationale behind the integration process stimulated by the CJEU was “because the Court say so”.³ Consequently, the deeper integration introduced in such a manner does not seem to keep all the Member States satisfied as demonstrated by the aforementioned clash between the United Kingdom's and Germany's leaders. As suggested by Professor Shuibhne, in order to secure the support for further integration, not only economic but also political and monetary one, the interpretation rules developed by the Court must be supported by a sufficient degree of legitimacy.⁴

This legitimacy stems from a number of values and principles that have been central to European unification and European legal culture in general. Professor Van den Bogaert in his contribution in Professor Barnard's publication *The Law of the Single European Market* puts forward a number of these.⁵

Firstly, it is the balance within the shared competence between the EU and its Member States under Art. 4 (2) of the Treaty on the functioning of the European Union

² 2012 Annual Report of the Court of Justice retrieved from http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf on 16 March 2015

³ N.N. SHUIBHNE, *The Coherence of EU Free Movement Law*, 1st ed. (2013), pp. 16

⁴ *Ibid.*, pp. 15

⁵ S. VAN DEN BOGAERT, *Horizontality: The Court Attacks?* in C. BARNARD, J. SCOTT, *The Law of the Single European Market*, 1st ed. (2002), pp. 139-143

(hereafter also referred to as the “TFEU” or the “Treaty”). With regard to this separation of regulatory competences and the general scheme of the Treaty, the four freedoms would be addressed solely to Member States, whereas the only Treaty rules applicable to the private parties' conduct would be the competition ones.

However, as will be demonstrated throughout this dissertation, it is nowadays generally accepted among (not only) European legal scholars, particularly in relation to the case law developed in the area of the free movement of workers that this statement does not hold completely true anymore. The Court increasingly extends its competence into the private law sphere of the free movement. The first limb of my research question is therefore as follows: *To what extent has the CJEU advanced the European market integration through the development of the principle of horizontal direct effect of the Treaty freedoms?*

Secondly, a consistent interpretation of European law and legal certainty of all stakeholders in the integration process is, in my opinion, important in order to maintain the aforementioned legitimacy and the support for the European Union. The second limb of my research thus deals with the following question: *To what degree has there been a convergence achieved with regard to the Treaty freedoms? Or in other words, under what circumstances can each of the four freedoms be deemed to have horizontal direct effect?*

Thirdly, as the European integration does not take place within an economic and regulatory vacuum, its popular support largely affects the manner of and also the sole continuance of this project. As the Member States' government representatives first and foremost seek re-election, their standpoints and statements on European future have to, at least to certain extent, reflect the majority public opinion. This can be very well demonstrated on the United Kingdom versus Germany free movement debate mentioned in the beginning of this section. Consequently, in order to make a solid case for European integration, the CJEU cannot to any significant extent interfere with the shared values that affect the Europeans' everyday life. Accordingly, in light of the strive for a closer, not only economic, but also political unity and the lack of motivation of Member States therein, a German philosopher Jürgen Habermas argues that it is more

than obvious that sole economic calculations are insufficient in order to achieve the desired objectives of the European integration.⁶

The question of the importance of a shared solidarity based on the idea of the European way of life and Europe as a specific model of a society was first put forward by Friedrich August von Hayek in his pre-war essay *The Economic Conditions of Interstate Federalism*. He demonstrated the issues surrounding the form of solidarity that is based on a shared nationality by asking: Is it likely that a French peasant will be more willing to pay more for his fertilizer to help the British chemical industry?⁷ In my opinion, this question has outgrown his pre-war perspective of European integration which is briefly mentioned in Section 2.1.

In that regard, it is important to mention particularly the shared legal concepts that have long been a basis for interaction between Europeans such as freedom of contract, which is recognized as a central principle of contract law.⁸ Some mention also the legacy of European perspectives of class and gender reflected in the long history of the labour rights, collective bargaining and trade unions in Europe.⁹ The analysis of horizontal direct effect of Treaty freedoms therefore deals on a subsidiary basis with the approach of the CJEU towards the shared European values in the light of the interpretation of the Treaty freedoms and the interplay between the two.

These questions have generated much academic debate throughout Europe, the aforementioned publications of Professor Shuibhne and Professor Barnard, naturally, not being only two of many. Nevertheless, the same cannot yet be said about the Czech legal literature. By addressing the topic of horizontal direct effect of Treaty freedoms, I therefore seek to foster the discourse in this respect. Additionally, in more practical terms, this dissertation may serve as a springboard in advising private entities as to what extent they can still rely on the assumption that they are only obliged to comply with the European competition rules (and not the free movement rules) when conducting business in the internal market.

⁶ J. HABERMAS, *Why Europe Needs a Constitution* in R. ROGOWSKI, C. TURNER, *The Shape of the New Europe*, 1st ed. (2006), pp. 28

⁷ F. A. VON HAYEK, *Individualism and Economic Order*, 1st ed. (1948), pp. 263

⁸ C. MAK, *Fundamental Rights in European Contract Law*, 1st ed. (2008), pp. 17

⁹ G. THERBORN, *Europe's Break with Itself* in F. CERUTTI, E. RUDOPH, *A Soul for Europe: On the Political and Cultural Identity of the Europeans* (2001) Vol. 2 *An Essay Collection*, pp. 85-88

Since this dissertation might from time to time appear as being too critical towards the free movement case law developed by the Court, I would like to conclude these introductory remarks by a disclaimer, borrowing a couple of words from Professor Shuibhne. As most of the cases before the CJEU are not legally problematic, the critique always focuses on a very few decisions. Further, this critique is not for the antipathy towards the Court in general. On the contrary, “*we also tend to question the institutions in which we have faith- but not from the existential suspicion; instead, from the hope that they can simply be stronger and do even better*”.¹⁰

¹⁰ N.N. SHUIBHNE, *The Coherence of EU Free Movement Law*, 1st ed. (2013), Preface

1.2 Structural overview

The core of this dissertation revolves around the four Treaty freedoms- the free movement of goods under Arts. 34 and 35 TFEU, the free movement of workers under Art. 45 TFEU, the freedom of establishment under Art. 49 TFEU, the free movement of services under Art. 56 and 57 TFEU and the free movement of capital under Art. 63 TFEU respectively. These provisions were introduced as a part of the market integration project commenced by the Treaty of Rome.

Accordingly, Chapter 2 briefly addresses the historical, political and societal considerations that lead to the conclusion of this Treaty. It next deals with the stages of market integration starting with a free trade area, through customs union towards the common market, describing both their general economic background and the specifics related to Europe.

Since the Treaty provisions on the free movement are based on the principle of negative integration¹¹, the analysis in Chapter 2 mainly focuses on the process of removing barriers to trade, while briefly describing also the second approach towards the attainment of a common market- the positive integration. Lastly, this chapter examines the contemporary considerations influencing the European unification.

Subsequently, Chapter 3 deals with both substantial and institutional principles of the European market integration. As mentioned earlier, since the CJEU is increasingly seen as a driving force of the European integration, the analysis focuses especially on to the development of these principles through its case law. While analysing the substantive principles of market integration, this chapter demonstrates the shift from a narrower cornerstone of the four freedoms' interpretation- the principle non-discrimination towards broadening their substantive scope through the market access approach. The latter concept, being far more intrusive into national regulatory autonomy and altering the balance of power significantly in favour the European Union¹², is subject to a rather extensive critique which is herein also addressed.

¹¹ C. BARNARD, *The Substantive Law of the EU*, 4th ed. (2013), pp. 10

¹² *Ibid.*, pp. 20-25

Chapter 3 further briefly describes how the provisions of European law, including those providing for the free movement, were given precedence over the provisions of national law, even over the national constitutions, and thus pushing the unification even further under the doctrine of primacy.

The development of the notion of direct effect of the Treaty provisions is analysed thoroughly starting with the judgement of the CJEU in *van Gend en Loos*¹³, followed by loosening the conditions established therein while addressing the concepts of vertical and horizontal direct effect in general.

As stated beforehand, the provisions on the free movement, which are the foundation of a common market envisaged already in the Treaty of Rome, were first and foremost addressed to the Member States. However, as the realisation of an integrated market is a continuous project¹⁴, questions have arisen as to whether the provisions on the four freedoms can be directly applied to the relationship between an individual and a private entity.

Consequently, Chapter 4 of this dissertation analyses the Court's landmark judgments in every area of the free movement starting with the free movement of workers where one can distinguish between two "types" of horizontal direct effect –limited horizontal direct effect developed by the in judgements *Walrave and Koch*¹⁵ and *Bosman*¹⁶, and full horizontal direct effect introduced by the judgement in *Angonese*¹⁷.

Subsequently, the following section deals with the horizontal direct effect of the provisions on the freedom of establishment as interpreted by the Court in *Viking*¹⁸ and on the free movement of services through analysis the CJEU's judgement in *Laval*¹⁹

¹³ Judgement in *van Gend en Loos*, C-26/62, ECLI:EU:C:1963:1

¹⁴ C. BARNARD, *The Substantive Law of the EU*, 4th ed. (2013), pp. 12

¹⁵ Judgement in *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, C-36/74, EU:C:1974:140

¹⁶ Judgement in *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463

¹⁷ Judgement in *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, C-281/98, EU:C:2000:296

¹⁸ Judgement in *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772

¹⁹ Judgement in *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:809

with an emphasis on the debate about the clash between the free movement and trade union rights which both judgements generated.

The next section of Chapter 4 addresses the potential horizontal direct effect of the provisions on the free movement of goods through analysing the judgements in *Dansk Supermarked*²⁰ and *Fra.bo*²¹ which have both fostered an academic discourse as to whether Art. 34 TFEU can be deemed to have horizontal direct effect at all.

Since the Court did not yet have an opportunity to expressly rule on the horizontal direct effect of the free movement of capital, the relevant section aims to at least outline the main scholarly arguments in favour and against the horizontal direct effect of these provisions.

The conclusion of Chapter 4 then deals specifically with the limits that the contemporary notion of the Treaty freedoms imposes on the contractual freedom of private entities. Consequently, this chapter also examines the relevance of the classical public private distinction between the free movement provisions creating obligations for Member States and the competition rules being applicable to non-State actors and the possible convergence between the two sets of rules.

As demonstrated in this Preface, over the years the EU has become more than a mere integrated market, striving not only for economic but also for a political unity. As there is a significant degree of interdependence between the two factors²², in answering the two aforementioned research questions Chapter 5 also touches upon this question of interdependence.

²⁰ Judgement in *Dansk Supermarked A/S v A/S Imerco*, C 58/80, EU:C:1981:17

²¹ Judgement in *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) - Technisch-Wissenschaftlicher Verein*, C-171/11, EU:C:2012:453

²² B. BALASSA, *The Theory of Economic Integration*, 1st ed. (1962), pp.7

2. Market Integration within the European Union

2.1 Historical, philosophical and political background of European integration

The notion of European integration dates back to the 14th century when Pierre Dubois, inspired by the idea of united Christendom, called for a unification of European states in forming a European Confederation to be ruled by European Council. However, the clear contours of European unity started to take shape only soon after the First World War. The speech delivered on 5th September 1929 to League of Nations Assembly in Geneva by the French foreign minister Aristide Briand proposing the creation of the European Union within the framework of the League of Nations, induced politicians to start to give serious considerations to this concept.²³

The main driving forces behind the political discussions were an ambition to attain peace in Europe and economic reasons stemming from Adam Smith's famous treatise *An Inquiry into the Nature and Causes of the Wealth of Nations*. According to his theory, the free trade within a wide enough market would enable specialization which would lead to a comparative advantage. The theory of comparative advantage was then fully developed by David Ricardo when he, using the example of United Kingdom and Portugal producing cloth and wine, demonstrated that specialization leads to greater productivity and the most efficient use of world-wide resources.²⁴

These arguments were taken up by a German liberal politician Friedrich Naumann, who contended that European nation states were no longer large enough to effectively compete in the world markets on their own.²⁵ Further, according to a pre-war essay *The Economic Conditions of Interstate Federalism* by Friedrich August von Hayek, the greater prosperity resulting from a common economic regime would make Europe more powerful and less vulnerable to external attack. He argued that such establishment would allow for the free movement of men and capital between the states of a united

²³ A. M. EL-AGRAA, *The European Union Economics and Policies*, 9th ed. (2011), pp. 19

²⁴ C. BARNARD, *The Substantive Law of the EU*, 4th ed. (2013), pp. 3-6

²⁵ A. M. EL-AGRAA, *The European Union Economics and Policies*, 9th ed. (2011), pp. 20

federation. In the single market created therein, the prices of goods would only vary based on the costs of transport.²⁶

Already Hayek had foreseen that the creation of the common market in the aforementioned sense would require the European nation states to transfer their regulatory authority to a supranational level. He assumed that European integration would firstly be achieved at the political level and that a strong federal government would afterwards create a single market through centralizing all policies that might interfere with it.²⁷ The introduction of a strong European political unity would possibly help to overcome the lack of the form of solidarity that is based on a shared nationality.

The actual process of European integration was set in motion after the Second World War motivated by the war prevention considerations and the control over a recovering post-fascist German economy in the sectors of coal, iron and steel as the basic materials of any military effort. Pursuant to the Schuman Plan elaborated by Jean Monnet, the customs duties, import quota restrictions and similar impediments on trade would be removed, leading to the creation of a common market in the aforementioned materials and thus to a sectorial economic integration. Consequently, the Treaty of Paris, valid for fifty years and establishing the European Coal and Steel Community (hereafter also referred to as the “ECSC”) was signed in April 1951 and came into force in January 1952.²⁸

The endeavours for European unity were continued by Jean Monnet's proposal of the European Defence Community which sought to organise the defence on a supranational level and was accompanied by a draft on European Political Community.²⁹ These ideas were in line with Hayek's view of European integration in which the political unity precedes the economic one.

However, even though the idea was supported by most of the countries concerned, the French National Assembly was reluctant to transfer such a significant extent of sovereignty to Europe and therefore rejected the proposal in August 1954.

²⁶ F. A. VON HAYEK, *Individualism and Economic Order*, 1st ed. (1948), pp. 258- 260

²⁷ F.W.SCHARPF, *The asymmetry of European integration* (2010) *Socio-Economic Review*, Issue 8, pp. 212

²⁸ A. M. EL-AGRAA, *The European Union Economics and Policies*, 9th ed. (2011), pp. 22

²⁹ *Ibid.*

The refusal automatically led to the plan for a political unity, of which it was the institutional corollary, being abandoned.³⁰

Nevertheless, the supporters of European integration refused to give up without a fight. Realising the unwillingness of nation states to delegate a substantial part of their sovereignty, particularly in the area of defence and security, to a supranational body, the Ministers of Foreign Affairs of the ECSC suggested that further steps towards European unity should first of all be taken in the field of economy.³¹

The integration would therefore be brought about in the order reversed from the one proposed by Hayek by firstly setting up a common European market, free from all customs duties and all quantitative restrictions. According to the Ministers' proposal such a market had to be established by stages.³² This step-by-step approach was certainly less intimidating for European nation states preoccupied with their sovereignty than a strong defence and political union. Thus, the underpinning idea behind the Treaty of Rome establishing the European Economic Community (hereafter also referred to as the “**EEC**”) which entered into force on 1st January 1958 was that more and more countries would gradually become integrated through the free movement of goods, services, capital and people between them.³³

³⁰ The Failure of the European Defence Community retrieved from http://www.cvce.eu/obj/the_failure_of_the_european_defence_community_edc-en-38ec6c23-d27f-436e-86fc-5801d776ec20.html on 21 February 2015

³¹ Resolution adopted by the Ministers of Foreign Affairs of the Member States of the E.C.S.C. at their meeting at Messina (June 1 to 3 1955) retrieved from http://www.cvce.eu/obj/resolution_adopted_by_the_foreign_ministers_of_the_ecsc_member_states_messina_1_to_3_june_1955-en-d1086bae-0c13-4a00-8608-73c75ce54fad.html on 21 February 2015

³² Ibid.

³³ J. HABERMAS, *Why Europe Needs a Constitution* in R. ROGOWSKI, C.TURNER, *The Shape of the New Europe*, 1st ed. (2006), pp. 27

2.2 From Free Trade Area to the Common Market

In general, economic integration may be defined as a creation of the most desirable structure of international economy, removal of the artificial barriers to its optimal functioning and deliberate introduction of all the desirable components of co-ordination or unification.³⁴ It comprises a centralization of economic policy of a number of countries at a supranational level which may take various forms, an agreement on a lasting basis limiting the use of national economic instruments and the creation of a supranational authority being the stronger ones.³⁵

The integration can be distinguished into a general integration and a sectorial integration. The latter entails successive integration of various industrial sectors. Supporters of this approach advocate that limited commitments with reasonably clear consequences are more acceptable to national governments. It can therefore be beneficial if political considerations hamper across-the-board integration, as was the case before the establishment of the ECSC. Consequently, an integration of one industry might encourage unification on a larger scale. For instance, the ECSC contributed to the development and integration of partaking industries and thus to the establishment of the common market.³⁶

The general integration comprises coordination in the entire field of economic activity and may be envisaged in various forms whereby none of these stages is a necessary pre-condition for an establishment of another.³⁷ Firstly, a free-trade area is characterised by the removal of intra-trade restrictions between the participating countries while maintaining the individual tariffs and the freedom to determine their own commercial policies towards third countries.³⁸ Nevertheless, even without unification in the field of external regulations, the removal of trade barriers is considered to increase the interdependence of national economies and thus to necessitate further coordination of economic policies.³⁹

³⁴ J. TINBERGEN, *International Economic Integration*, 2nd ed. (1965), pp. 57

³⁵ *Ibid.*, pp. 67

³⁶ B. BALASSA, *The Theory of Economic Integration*, 1st ed. (1962), pp. 15-17

³⁷ C. BARNARD, *The Substantive Law of the EU*, 4th ed. (2013), pp. 8

³⁸ B. BALASSA, *The Theory of Economic Integration*, 1st ed. (1962), pp. 69

³⁹ *Ibid.*, pp. 78

A customs union is, from the economic point of view, deemed to be superior to free trade area because of the lesser extent of the deflection of production and investment and the lower additional administrative costs it entails.⁴⁰ It encompasses both a free internal trade between the partner countries and common tariffs and other regulations as regards the trade with nonparticipating countries.

The suppression of discrimination between the goods produced in partner countries then leads to positive consumption effects and savings in terms of expenses and time required in order to comply with customs formalities and in a state's fiscal apparatus in general.⁴¹ The positive consumption effects in the EEC are often demonstrated by the example of the automobile industry where the establishment of a uniform tariff against foreign countries was deemed to reduce the share of British and American exports on the market.⁴²

Whereas a free-trade area and a customs union are based solely on the free movement of goods, a common market comprises also free movement of production factors- labour and capital.⁴³ Generally, the formation of a common market is likely to contribute to the efficiency of production and the reduction of differences in factor prices. Furthermore, the migration occurring within such market has a trade-creating effect in that immigrants tend to buy a number commodities from their country of origin and in turn introduce new goods therein. Moreover, integration fosters the exchange of technical skills and experience and the migration of capital to the less developed countries.⁴⁴

Following the sectorial integration under the ECSC, taking into account the aforementioned economic considerations and the benefits of a customs union over a mere free trade area, the countries of the EEC opted for the establishment of the former type of integration. However, the long-term objective, as enshrined in Art. 2 of the Treaty of Rome, was the creation of a common market which continues to lay at the foundations of the European Union project.⁴⁵

⁴⁰ Ibid., pp. 74

⁴¹ Ibid., pp. 60-65

⁴² Ibid., pp. 34

⁴³ C. BARNARD, *The Substantive Law of the EU*, 4th ed. (2013), pp. 9

⁴⁴ B. BALASSA, *The Theory of Economic Integration*, 1st ed. (1962), pp. 84

⁴⁵ C. BARNARD, *The Substantive Law of the EU*, 4th ed. (2013), pp. 10

For this purpose, Art. 3 (a), (c) of the Treaty of Rome stipulated that the EEC shall eliminate the restrictions on the import and export of goods as well as abolish the obstacles to freedom of movement for persons, services and capital.

The aforementioned benefits of the market integration starting with positive consumption effects and abolition of administrative costs for businesses when entering new markets through the trade-creating effect of migration to movement of capital across the integrated market to less developed countries, serve as an incentive for newly acceding Union states, as well as for the original Member States in the EU enlargement process. This is because they create a balance of benefits on both sides in exchange for the part of national sovereignty and *inter alia* social security and other benefits the participating states are either expected to give up in favour of the supranational authorities or to share with other Member States.

However, this theoretically economically balanced model faced considerable difficulties when it had to be applied in practice after the EU 2004 enlargement. Hence, this matter will be further discussed in Section 4.2 while analysing *Viking* and *Laval* judgments, concerning the freedom of establishment and the free movement of services respectively, which both appeared before the Court as a result of the clash between benefits the newly acceding states wished to acquire and the original Member States were determined to maintain.

2.3 Negative integration- removing barriers to trade

The aforementioned free movement provisions rely on the principle of negative integration.⁴⁶ This principle was first introduced by a Dutch economist Jan Tinbergen⁴⁷ as the reduction of impediments to trade between the participating countries comprising of the reduction of import duties and the expansion of quotas. Drawing upon the theory of comparative advantage, Tinbergen contended that elimination of such obstacles will lead to a better division of labour.⁴⁸

However, such integration may be accountable for significantly altering the industrial pattern in the sense that some sectors will have to decrease while others will have to increase their production. This might entail the retraining of workers and additional investments stemming from the replacement of, for instance, capital goods by other types of goods. The advance of integration therefore has to be guided not only by national sovereignty considerations but also by the economic ones. Consequently, each integration process has its optimum speed for which the sum of the losses on the current production and the additional costs of reorientation are at a minimum.⁴⁹

Thus, in the case of the EEC Art. 8 (1) of the Treaty of Rome stipulated that a common market shall be established in a transitional period of 12 years which was divided into three stages. It was possible to extend the duration of these stages under a number of circumstances provided that the transitional period does not exceed 15 years from the date when the Treaty came into force as enshrined in Art. 8 (6) of the Treaty of Rome.

The aim of the provisions on Treaty freedoms was set out in *Gaston Schul*⁵⁰, in which the Court ruled that their objective is to eliminate all impediments on the Community trade leading to the creation of a genuine single market and to bring about the conditions as similar to a domestic market as possible.⁵¹

However, the economic recession following the oil price shocks in 1970s and the changing structure of the world market, in particular the emergence of Japanese and

⁴⁶ Ibid.

⁴⁷ A. M. EL-AGRAA, *The European Union Economics and Policies*, 9th ed. (2011), pp. 2

⁴⁸ J. TINBERGEN, *International Economic Integration*, 2nd ed. (1965), pp. 77

⁴⁹ Ibid.

⁵⁰ Judgement in *Gaston Schul*, C-15/81, EU:C:1982:135

⁵¹ Ibid., para. 33

South Asian economies, caused the Member States of the EEC to try first and foremost to protect their own economies, and they were thus unwilling to agree to a deeper integration.⁵² Hence, two years after the lapse of the uttermost transitional period, it was more than obvious that there was a rather long way to go in terms of establishing the common European market.

Consequently, the Commission in its White Paper on completing the internal market set out almost 300 measures pertaining to the removal of physical, technical and fiscal barriers to trade with the view of completing the common market.⁵³ It recognized that this aim relies in the first place on the free movement provisions as laid down in the Treaty.

As the creation of the single market is a continuous economic project, the aforementioned economic considerations remain valid even nowadays as there exist impediments to the free movement that need to be addressed at the EU level. As will be demonstrated throughout this dissertation, they are now not only created by Member States but also by private entities, for instance language skills required by an Italian bank in *Angonese* which could only have been certified by one particular diploma issued in the province where the bank had its seat. As will be discussed further in Section 4.1.2, this requirement made it more difficult for prospective employees from other EU Member States to even apply for a job in this bank and hence amounted to an impediment in the sense of negative integration.

Similarly, the concept of transitional period enshrined in the Treaty of Rome was also used after the accession of a large number of new Member States to the EU in 2004. The transitional measures introduced in 2004 with respect to the free movement of workers were intended to address *inter alia* the influx of labour force from the former Eastern Bloc to the original Member States.⁵⁴ However, as in the case of EEC, also after the 2004 accession, the implemented measures did not bring the desired effect. As a result of private entities trying to circumvent these measures, their actions triggered

⁵² A. M. EL-AGRAA, *The European Union Economics and Policies*, 9th ed. (2011), pp. 102

⁵³ White Paper from the Commission to the European Council COM (85) 310 final, 1985, para. 10, 16

⁵⁴ R. KRÁL et al., *Volný pohyb pracovníků v EU v kontextu skončení přechodných opatření*, 1st ed. (2012), pp. 58

other Treaty freedoms, namely the freedom of establishment in *Viking* and the free movement of services in *Laval* which will both be addressed in Chapter 4.

Nevertheless, already in the early days of the European Union, the Commission also acknowledged that the removal of barriers to trade is not in itself sufficient and that the introduction of common standards is equally important in order to attain the desired objective.⁵⁵ The following section therefore briefly deals with a counterpart of negative integration – harmonisation measures.

⁵⁵ *Ibid.*, para. 66

2.4 Positive integration – harmonisation

Although the market liberalisation surrounding the common market rhetoric predominantly implies the above discussed negative integration, in reality the integration process is much more complex.⁵⁶ The seemingly hierarchical arrangement of the stages of integration suggests that the positive integration is superior to the negative one.

However, the Treaty of Rome did not normatively distinguish between the two. Hence, the common market was to be achieved likewise by the extensive harmonisation of national economic policies, regulation at a supranational level and other measures of positive integration.⁵⁷

As the integration generally implies some sacrifices in terms of national sovereignty, participating countries tend to safeguard it against the future erosion by calling for the sovereignty-related harmonisation measures to be consented to unanimously.⁵⁸ Accordingly, a unanimous agreement in the Council was required under the Treaty of Rome in order to pass any harmonisation measure. Since most of the issues were politically sensitive, the progress of the positive integration was extremely slow.

For instance, even a definition of chocolate was subject to disputes because in the United Kingdom the amount of added non-cocoa fat was considerably higher than in the remaining European countries. The new regulations were introduced by Member States faster than the existing ones were harmonised. Thus, any reduction of technical barriers between the participating states proved impossible causing the segmentation of the EEC market into domestic ones.⁵⁹

In order to achieve a genuine completion of the common market, there was a need for a new approach in this regard. Consequently, the Single European Act agreed upon in 1986 introduced a new harmonisation basis which set forth a qualified majority voting

⁵⁶ A. M. EL-AGRAA, *The European Union Economics and Policies*, 9th ed. (2011), pp. 111-112

⁵⁷ G. MAJONE, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?*, 1st ed. (2014), pp. 92-93

⁵⁸ A. MORAVCSIK, *Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community (1991)* International Organization, Issue 1, pp.26

⁵⁹ A. M. EL-AGRAA, *The European Union Economics and Policies*, 9th ed. (2011), pp. 102-103

for the approximation of regulations seeking to attain the establishment of internal market which is now enshrined in Art. 114 (1) TFEU.

2.5 The completion of the Single Market

Furthermore, Art. 7a of the amended Treaty set forth a period for a progressive establishment of the single market to expire on 31st December 1992. Pursuant to that provision, the internal market comprised an area without internal frontiers in which the free movement of goods, persons, services and capital should have been ensured. After the lapse of this deadline, in the case regarding the free movement of persons, Mr. Wijsenbeek tried to rely on Art. 7a and 8a of the EEC Treaty claiming that the Dutch legislation requiring him to present the passport when travelling from and to Member States only was contrary to the Community law.

However, the Court ruled that, the setting of the deadline did not create an automatic legal effect. The Treaty provisions could not have been interpreted, absent any harmonisation on the Community level, as requiring the Member States to abolish any controls of persons at internal borders from 1st January 1993 onwards.⁶⁰ Consequently, the deadline has been removed from the provision and the remaining content pertaining to the concept of the internal market is now enshrined in Art. 26 (2) TFEU.

As emphasized in the *Single Market Act II*⁶¹ published at the 20th anniversary of the deadline for the completion of the single market, its development is a continuous project. Hence, even after the Lisbon Treaty, Art. 3 (3) TEU stipulates that the EU shall establish an internal market.

The success of European market integration endeavours depends on whether the single market rules including the provisions on the free movement are applied efficiently and in a predictable and reliable manner. Moreover, a deeper integration requires a continuous political support from all the actors.⁶²

Political scientists argue that economic integration creates a pressure towards a political union in order to ensure accountability of these actors. This results in a gradual reduction of power of national governments in favour of supranational European institutions such as the Commission and the Parliament. Thus, Art. 4 (1) TFEU

⁶⁰ Judgement in *Florus Ariël Wijsenbeek*, C-378/97, EU:C:1999:439

⁶¹ Communication from the Commission, Single Market Act II – Together for the new growth, COM(2012) 573 final

⁶² *Ibid.*, pp. 5-7

stipulates that the Union shall share competence with the Member States in the areas where it does not have exclusive competence pursuant to Art. 3 TFEU or a supportive and coordinative role under Art. 6 TFEU. Naturally, the aforementioned spill-over, in theory, only goes as far as Member States allow, since it requires a positive action on their part.⁶³

However, the European unification entails a specific feature which distinguishes it from the classical economic integration described above. In that sense, it is not only influenced by balancing the sovereignty considerations of Member States on the one hand and the power of supranational institutions on the other. In order to help to bring the common market about, the CJEU has created an alliance between itself and private parties through the doctrines of supremacy and direct effect both of which are addressed in the following chapter. Consequently, the principles underpinning the Treaty freedoms developed in its case law are to be translated into national courts' enforcement of European Union law.⁶⁴

As the express provisions on the free movement enshrined in the Treaty are rather concise, the principles developed by the Court are of crucial importance with respect to their interpretation.⁶⁵ The analysis in this dissertation therefore focuses mainly on the Court's landmark free movement case law.

Generally, the CJEU is deemed to have a tendency towards a legal reasoning that would enhance further European integration.⁶⁶ The next chapter seeks to analyse the manner in which the underpinning principles of the common market has been altered in line with such approach.

One of the debates regarding the interpretation of the Treaty freedoms builds on the aforementioned demand for efficient and predictable application of the free movement rules. Accordingly, some legal scholars stress that there is a need for more clarity and a greater convergence between these rules.⁶⁷ For instance, former Advocate

⁶³ C. BARNARD, *The Substantive Law of the EU*, 4th ed. (2013), pp. 13-15

⁶⁴ *Ibid.*, pp. 16-17

⁶⁵ N.N. SHUIBHNE, *The Coherence of EU Free Movement Law*, 1st ed. (2013), pp. 2

⁶⁶ M. BOBEK, *The Court of Justice of the European Union* in A. ARNULL, D. CHALMERS, *The Oxford Handbook of European Union Law* 1st ed. (2015), pp. 153-177

⁶⁷ C. BARNARD, *The Substantive Law of the EU*, 4th ed. (2013), pp. 24

General Poirares Maduro in his Opinion in *Alfa Vita*⁶⁸ argues that the application of different approaches with regard to various free movement provisions creates significant difficulties in terms of consistency in the Court's case law.⁶⁹

In my opinion, the political support necessary for further European integration can only be maintained through consistent application of similar principles to the Treaty freedoms with the view of enhancing reliability in their interpretation and legal certainty of all stakeholders. Consequently, while analysing the principles underpinning the free movement provisions in Chapter 3 and their personal scope in Chapter 4, I focus *inter alia* on the question to what extent has a convergence been achieved in this regard.

⁶⁸ Advocate General Opinion in *Joined cases Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon*, C-158/04 and C-159/04, EU:C:2006:212

⁶⁹ *Ibid.*, para. 33

3. Principles of Market Integration

The previous chapter firstly addressed the historical and political background of European integration and its benefits for national economies as well as limitations that needed and in my opinion still need to be taken into account in this respect. As mentioned above, since the establishment of an internal market is an ongoing project, these considerations affect also the contemporary notion of the free movement. They will therefore be reflected in the analysis throughout this dissertation.

The Treaty freedoms are first and foremost based on the principle of negative integration addressed in Section 2.3 and reflected in the corresponding Treaty provisions. However, the principles underpinning the free movement are not only enshrined in the Treaty but also, to a large extent, contained in the Court's case law. In the following chapters, I therefore mainly focus on the judgements of the CJEU in which the free movement provisions are interpreted.

One can distinguish between various categories of the free movement principles which stem particularly from the distinction between material and personal scope of the Treaty freedoms. Firstly, the material scope of the Treaty freedoms pertains to the measure or activity against which a particular claim is aimed and can be translated into substantive principles of non-discrimination and market access.⁷⁰ Both of them are analysed in the following two sections.

Secondly, the personal scope of the Treaty freedoms focuses on the actor involved in a free movement dispute.⁷¹ It shall be noted at the outset that pursuant to the principle of primacy, the Treaty provisions prevail over national legislation. Moreover, the principle of direct effect entails direct enforceability of individuals' Treaty-based rights before national courts.

As mentioned in the Preface, traditionally the free movement provisions were deemed to apply to Member States only. However, in recent years the Court has introduced an interpretation which seems to imply that at least some of these provisions can be applied directly also in a national dispute between private entities. The last two sections of this

⁷⁰ N.N. SHUIBHNE, *The Coherence of EU Free Movement Law*, 1st ed. (2013), pp. 64

⁷¹ *Ibid.*, pp. 66

chapter address the aforementioned institutional principles respectively as both of them are prerequisites for direct application of the free movement provisions in private disputes at all.

3.1 Substantive Principles

3.1.1 Non-discrimination

Under the principle of negative integration, analysed in Section 2.3, which is one of the cornerstones of the Treaty freedoms, Member States retain their autonomy to regulate matters related to the free movement provisions subject to the limitations set forth therein. In the early days of the EEC, these provisions were interpreted first and foremost in the light of the principle of non-discrimination.⁷²

It can be translated into the principle of equal treatment under which goods and the production factors which are similarly situated cannot be subject to direct or indirect discrimination.⁷³ The distinction between the two started to arise already during the EEC transitional period. It can be found in Directive 70/50/EEC⁷⁴ issued by the Commission. Apart from Art. 2 of this Directive which provided for the list of prohibited directly discriminatory quantitative restrictions on the free movement of goods and measures with equivalent effect, Art. 3 sought to regulate indistinctly applicable rules to some extent.⁷⁵

For instance, as regards the free movement of goods, imposing the legal requirements pertaining to the inspection of imported milk products and cereals before them being allowed on the Member State's market, whereas not subjecting domestic goods to such conditions, constitutes a directly discriminatory measure.⁷⁶ Hence, the national rules liable for a distinctive and generally, also less favourable treatment on the basis of the country of origin fall within the principle of non-discrimination. However, should the measures which formally afford the equal treatment but otherwise discriminate between goods or production factors from different Member States remain in force

⁷² Ibid., p. 17

⁷³ C. BARNARD, Balance of Competence Report: Single Market, commissioned by the United Kingdom Department for Business, Innovation & Skills, Review of the Balance of Competences between the United Kingdom and the European Union (2013) retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227069/2901084_SingleMarket_acc.pdf on 5 March 2015

⁷⁴ Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty [1970] OJ L013/29

⁷⁵ P. CRAIG, G. DE BÚRCA, EU Law Text, Cases and Materials, 5th ed. (2011), pp. 639

⁷⁶ Judgement in *Firma Denkavit Futtermittel GmbH*, C-251/78, EU:C:1979:252

merely because they not do so directly, the promotion of free trade between European countries would be significantly hampered.

Therefore, the CJEU ruled in *Dassonville*⁷⁷ that it is not only directly discriminatory measures that are prohibited under the free movement provisions. In this case, the criminal proceedings were initiated against the wholesalers under Belgian law which required certain products to obtain a designation of origin before being marketed in Belgium. They intended to further sell Scotch whisky imported from France where no such regulations existed. Although this regulation was not directly discriminatory, the CJEU nevertheless held that it fell under the scope of the Treaty freedoms. The relevant test applicable to Member States' trading rules had become whether they are “*capable of hindering, directly, or indirectly, actually or potentially, intra-Community trade*”.⁷⁸

The scope of the measures capable of being caught by the Treaty limitations continued to expand in *Cassis de Dijon*.⁷⁹ The German regulations pertaining to the marketing of alcohol products with certain alcohol content applied outwardly to domestic and imported products alike. However, in reality they disadvantaged foreign goods in the sense that they were required to comply with the rules of their country of origin as well as the host state and thus had to bear a double burden. According to the principle of mutual recognition introduced by the CJEU in this case, in the European internal market, there should be no valid reason precluding goods lawfully produced in one Member State from being marketed in any other. The national measures contradicting this principle would fall under the substantive scope of the Treaty freedoms.⁸⁰

The broad scope of the free movement provisions developed in the aforementioned case law potentially brought the “*entire spectrum*” of national regulations that affected the European trade in some way under the scrutiny of compliance with the Treaty freedoms.⁸¹ Consequently, the European traders took advantage of such broad

⁷⁷ Judgement in *Procureur du Roi v Benoît and Gustave Dassonville*, C-8/74, EU:C:1974:82

⁷⁸ *Ibid.*, para. 5

⁷⁹ Judgement in *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, C-120/78, EU:C:1979:42

⁸⁰ *Ibid.*, para. 14-15

⁸¹ M. P. MADURO, *We The Court: The European Court of Justice and the European Economic Constitution*, 2nd ed. (1998), pp. 27

interpretation leading to increased attacks aimed at national regulations which merely restricted their commercial freedoms.⁸²

In response to this increased judicial challenge of Member States' laws, the CJEU introduced a distinction between the rules regulating characteristics of goods such as designation, size and weight and the selling arrangements with the view of limiting the broad interpretation of the Treaty freedoms. In *Keck and Mithouard* the Court held that the latter did not fall within the scope of the free movement provisions as long as they applied indiscriminately to domestic and foreign products. As a consequence, a French rule prohibiting the resale of products in an unchanged state at prices lower than their actual ones escaped the Court's scrutiny.⁸³

Nonetheless, the clear-cut distinction is not self-evident in the Court's free movement case law. According to the reasoning in *Familiapress*⁸⁴, certain selling arrangements actually affect the product itself and by virtue of that, fall within the scope of the Treaty. Hence, Austrian legislation preventing publishers from including prize competitions in their magazines restricted free movement of goods insofar as these competitions constituted an integral part of the magazine in question.⁸⁵

Consequently, the endeavours for effective market integration and the aforementioned Court's pro-integration bias project into the scrutiny of measures which not only formally legally speaking but also, and more importantly, in reality jeopardise this continuous project. As the European Union is characterised by an ample legal diversity between the national legal orders, even the interpretation of the Treaty freedoms based on the principle of non-discrimination as developed by the CJEU is liable to grant a considerably broad scope to these freedoms.⁸⁶

However, there are some measures which do not fit even into this wide span. With regard to the analysis of the principle of non-discrimination, the situations where

⁸² Judgement in *Keck and Mithouard*, C-267/91, EU:C:1993:905, para. 14

⁸³ *Ibid.*, para. 16

⁸⁴ Judgement in *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH / Bauer Verlag*, C-368/95, EU:C:1997:325

⁸⁵ *Ibid.*, para. 10

⁸⁶ N.J. DE BOER, *Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms?* (2013) *Utrecht Law Review*, Issue 1, pp. 160

Member States' treatment of their own nationals as compared to foreigners is less favourable and thus gives rise to reverse discrimination, is worth mentioning.

This type of discrimination is not prohibited under the European Union law. It arises in the context of the Treaty freedoms *inter alia* as a consequence of firstly, the application of the aforementioned principle of mutual recognition especially in the area of the free movement of goods.⁸⁷ It can be demonstrated on an example of Italian pasta manufacturers in *3 Glocken*⁸⁸ which, in order to have an access to the Italian pasta market, had to comply with stricter national requirements than producers from other Member States.

Secondly, the inapplicability of the provisions on the free movement of persons to purely internal situations is likewise liable for reverse discrimination. That is the case where, in the situations which lack cross border element, nationals of a Member State cannot take advantage of more favourable Treaty rules. One of the alternatives as to how to eliminate this type of discrimination is narrowing down the extent of purely internal situations and extending the definition of the Union ones. The corresponding tendency can be observed, for instance, in the Court's judgement in *Angonese* where, through broadening the scope of the Union situations, the CJEU is also partially broadening the scope of applicability of the Treaty freedoms as such.⁸⁹ The manner in which the expansion is brought about in this particular case is more specifically dealt with in Section 4.1.2.

Nevertheless, it is questionable to what extent can this tendency be supported by legitimate arguments. Naturally, as discussed in Section 2.5, market integration entails a gradual reduction of powers of national governments. On the other hand, the competences of the EU are generally limited to situations with cross border element whereas situations which lack such element fall outside the scope of the Treaty. I agree with Professor Spaventa's opinion (also discussed below) expressed in relation to the

⁸⁷ R. KRÁL, Reverse Discrimination in Community Law Context in J. YOUNG, J. PŘIBÁŇ, A. KERNER, EU law and national legal systems. 1st ed. (2005), pp. 111-112

⁸⁸ Judgement in *3 Glocken and others*, C-407/85, EU:C:1988:401

⁸⁹ R. KRÁL, Reverse Discrimination in Community Law Context in J. YOUNG, J. PŘIBÁŇ, A. KERNER, EU law and national legal systems. 1st ed. (2005), pp. 115-116

Court's ruling in *Gebhard*⁹⁰ in that in purely internal situations the economic actors should not be able to contest the measures emanating from their only regulators under which there are no barriers created for participants coming from other Member States.⁹¹

Moreover, under Art. 5 (2) of the Treaty on the European Union (hereafter also referred to as the "TEU"), competences not conferred upon the Union shall remain with the Member States. Thus, it would be rather cumbersome to justify the Court's scrutiny of the measures which do not seek to hamper the free movement of market participants coming from the outside of the Member States' national market but rather regulate the situation inside that market (naturally, that is the case insofar as that particular segment of the market is not harmonised under Art. 114 (1) TFEU).

Nonetheless, as demonstrated above, since the principle of non-discrimination does not cover all the situations that might possibly arise in the European market, the Court, in order to ensure free movement of goods and production factors and effective market integration stemming therefrom, increasingly adopts an approach based on market access. This concept goes far beyond ensuring the equality of opportunity for Member States' traders. Furthermore, it significantly alters the balance of power between the national governments and the European Union in favour of the latter and is often considerably criticised on these grounds. The aforementioned issues are analysed in the following section.

⁹⁰ Judgement in *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, C-55/94, EU:C:1995:411

⁹¹ E. SPAVENTA, *From Gebhard to Carpenter: Towards a (non-)economic European constitution* (2004) *Common Market Law Review*, Issue 3, pp. 758-761

3.1.2 Market access approach and its critique

One of the main advantages of the principle of non-discrimination analysed above is that, being an expression of the well-recognized principle of equal treatment, it is based on solid and reasonable legal attributes which make its application in practice rather straightforward.⁹²

However, it insufficiently reflects the ultimate objective of the free movement provisions that is first and foremost to grant the economic operators a genuine opportunity to exercise their economic activity. This goal necessitates not only the elimination of directly or indirectly discriminatory measures but also those which affect the access to market in general. As a result, the barriers resulting from a mere existence of regulatory standards regardless of whether they are liable for different treatment based on the country of origin need to be addressed as well. Thus, the only substantive principle which accommodates the corresponding developments is the market access theory.⁹³

With respect to this approach the Court ruled in *Gebhard*, one of its landmark market access cases, that even non-discriminatory rules can constitute an obstacle to the freedom of establishment. Mr. Gebhard, a German national authorised to practice as *Rechtsanwalt* and a member of Stuttgart bar conducted his legal profession entirely in his country of residence, Italy, using the title *avvocato* and never received criticism in relation to his activities. He taxed his income entirely in Italy. The Milan Bar Council initiated proceedings against him on grounds of using the title *avvocato* which according to it contravened with the applicable regulations. Subsequently, the Council prohibited Mr. Gebhard from using the title and ordered a suspension from pursuing his professional activity.

On the basis of these facts the Court ruled that first of all, the nationals of other Member States, such as Mr. Gebhard, who intend to exercise their right of establishment under the Treaty must be subject to similar conditions as the nationals of the country where

⁹² N.N. SHUIBHNE, *The Coherence of EU Free Movement Law*, 1st ed. (2013), pp. 236

⁹³ E. SPAVENTA, *From Gebhard to Carpenter: Towards a (non-)economic European constitution* (2004) *Common Market Law Review*, Issue 3, pp. 747

the establishment is being effected.⁹⁴ However, that does not mean that Member States may ignore the knowledge and qualifications acquired in other Member States solely because of the failure to certify them with a particular diploma required in order to pursue a certain professional activity. Conversely, the relevant authorities must take into account the equivalence of diplomas and if necessary compare the knowledge certified therein to the one required by national rules.⁹⁵

Professor Spaventa argues that not only were the rules challenged in *Gebhard* non-discriminatory but they also lacked any cross-border aspect since the litigant was established in Italy subject solely to Italian rules. Consequently, if the economic actor is able to question its main, and perhaps the only, regulator even though its rules do not create a barrier to cross-border activity, the Court, according to her, is creating a “*definitional deficiency*” when it fails to provide an indication of which rules should not constitute a barrier to market access.⁹⁶

In my opinion, Professor Spaventa’s argumentation could be to some extent applied to also *Angonese* regarding the means of certification of a language requirement in that case. The requirement of a particular certificate, which could only be obtained in Italian province of Bolzano, in order to apply for a position in Italian bank seated therein affected the access to market both for prospective employees from other Member States as well as for Mr. Angonese, an Italian national who brought the lawsuit against the bank. Even though the case will be addressed in greater detail with respect to horizontal direct effect of the free movement of workers in Section 4.1.2. of this dissertation, it shall be noted that the Court’s conclusion that the relevant provisions apply to private entities as well as to Member States enhanced Professor Spaventa’s aforementioned question: Which rules emanating from which entities should not fall under the scope of the Treaty?

In addition to the interpretation of cross-border aspects of situations and the related applicability of the Treaty rules, there arise questions regarding the delimitation of the substantive scope of the Treaty freedoms. Such concerns had been raised in *Laval*, a

⁹⁴ Ibid., para. 32

⁹⁵ Ibid., para. 38

⁹⁶ E. SPAVENTA, From Gebhard to Carpenter: Towards a (non-)economic European constitution (2004) Common Market Law Review, Issue 3, pp. 758-761

case concerning Latvian company's freedom to provide services in Sweden restricted by trade unions' collective action which is dealt with in more detail in Section 4.2.2. of this dissertation. With regard to the substantial scope of that freedom, Advocate General Mengozzi noted in his Opinion that it is apparent from the Court's case law that the delimitation between indirect discrimination, a restriction, a deterrent and a barrier to free movement is far from being clear, having a potential detrimental effect on operators' legal certainty.⁹⁷

However, the CJEU had failed to clarify the demarcation line between the aforementioned concepts in this case. It ruled that insofar as the terms of a particular collective agreement are “*liable to make it less attractive, or more difficult*” to exercise the freedom of movement of services they constitute a restriction of that freedom.⁹⁸

This finding has been questioned on a number of grounds, *inter alia* as to whether it implies that service providers from newly acceded Member States are allowed to challenge more strict labour rules of other Member State where they wish to provide services solely because these rules make it more difficult for them to benefit from their cheaper labour costs. Consequently, a mere difference between home- and host-country's labour regulations could be liable to constitute a restriction to free movement, which is labelled by Professor Barnard as an “*intuitive*” approach.⁹⁹

Despite the apparent deficiencies of this concept, the Court nevertheless continues to use it a cornerstone of its contemporary free movement case law. In a number of cases, it demonstrated the link between the impact of a particular regulation on a behaviour of consumers and the market access approach. In *Commission v. Italy (trailers)*¹⁰⁰, the prohibition on motorbikes towing trailers constituted a restriction on the free movement of goods by virtue of its considerable influence of consumers' behaviour. The reduction

⁹⁷ Advocate General Opinion in *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:291, para. 228

⁹⁸ Judgement in *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:809, para. 99

⁹⁹ C. BARNARD, *The Substantive Law of the EU*, 4th ed. (2013), pp. 21-22

¹⁰⁰ Judgement in *Commission of the European Communities v Italian Republic*, C-110/05, EU:C:2009:66

in demand of the product is according to the CJEU sufficient to restrict its access to the market.¹⁰¹

Similarly, the consumers were aware of the restrictions on the use of personal watercraft on waters other than the ones designated in the national regulation subject to scrutiny in *Mickelson and Roos*¹⁰². As a result, they had a lesser interest in buying those products and hence the measures in question were held to hinder the access to the relevant market.¹⁰³

In *Commission v. Italy (motor insurance)*¹⁰⁴, the undertakings offering insurance on the Italian market were on the grounds of the regulation applicable therein obliged to accept every potential consumer and to provide a coverage for a third-party motor vehicle liability insurance. The Court noted that this obligation would lead to “*significant additional costs for such undertakings*” in terms of organization and investment resulting in the only logical step for them being to set higher prices for their products. As such a raise would considerably affect the behaviour of consumers and reduce these undertakings' ability to effectively compete on the relevant market, the Court ruled that it constituted a restriction to market access.¹⁰⁵

This line of case law demonstrates that consumers' attitude towards adjustments introduced on the basis of national regulations constitutes an important indication as regards the extent to which such rules restrict access to intra-Union market. However, the similarity of the in-depth analysis as regards the various aspects of consumers' behaviour and of the notion of effective competition to the analysis applied in European competition law is rather astonishing. In this respect, the overlap between these two areas of European law is more specifically addressed in Section 4.6.

Nevertheless, one might not help but think that the Court's analysis as to which measures actually affect the aforementioned situations and in turn also access to the market and to what extent they do so is also rather instinctive which does not help too much when it comes to enhancing legal certainty of operators in the market.

¹⁰¹ Ibid., paras. 35-37, 56

¹⁰² Judgement in *Åklagaren v Percy Mickelsson and Joakim Roos*, C-142/05, EU:C:2009:336

¹⁰³ Ibid., para. 28

¹⁰⁴ Judgement in *Commission of the European Communities v Italian Republic*, C-518/06, EU:C:2009:270

¹⁰⁵ Ibid., paras. 68-70

The extent to which the passing on the costs generated by a certain measures to the consumers occurs, the consumers' willingness to pay and the consequences which vary from one economic operator to another, largely depend on the particular facts of the case. Consequently, it can be argued that every measure that limits the commercial freedom of traders to certain extent also affects their access to the market.¹⁰⁶

Professor Snell argues that this ambiguity of the term provides merely a “*sophisticated-sounding garb that conceals decisions based on intuition*”.¹⁰⁷ He compares this situation to what happened before the Court's ruling in *Keck and Mithouard* when the traders used the broad substantive scope of the free movement provisions developed in *Dassonville* and *Cassis de Dijon* to contest the regulations that merely restricted their commercial freedom.¹⁰⁸ Indeed, the *pre-Keck* situation tends to be described as a series of inconsistent judgements resulting from unclear scope of “*the Dassonville test*” perceived by its critiques as unrestricted expansion of negative integration resulting in the call for setting the limits to such broad interpretation.¹⁰⁹

Hence, one can hardly avoid noticing the similarities between the two tests. I agree with Professor Snell that the broad substantive scope of the Treaty freedoms under the market access test resembles the broad interpretation granted to these provisions by the Court in *Dassonville* and *Cassis de Dijon*. However, whereas the situation in 1970s when these two judgements were delivered was accompanied by Member States' protectionism (caused by emergence of Japanese and South Asian economies) and reluctance to agree on deeper integration, the situation nowadays differs significantly from the early stages of the establishment of the internal market. Thus, it is also more difficult to formulate a legitimate argument in favour of such broad *Dassonville / Cassis de Dijon* – style of interpretation of Treaty freedoms.

Even if the situation would be similar to *pre- Dassonville / Cassis de Dijon*, this interpretation was in the end confined by the limits introduced by the Court in *Keck and Mithouard*. It is therefore arguable that the broad market access test which is nowadays

¹⁰⁶ J. SNELL, The Notion of Market Access- A Concept or a Slogan? (2010) Common Market Law Review, Issue 2, pp. 467

¹⁰⁷ Ibid., pp. 469

¹⁰⁸ Ibid., p. 470

¹⁰⁹ N.N. SHUIBHNE, The Coherence of EU Free Movement Law, 1st ed. (2013), pp. 212-213

favoured by the Court could ultimately lead to putting limits thereto by introducing a similar barrier as in *Keck and Mithouard*.

However, given the Court's judgement in *Familiapress* discussed in Section 3.1.1, one can question whether there could be a limitation test introduced that would offer more legal certainty than the distinction between the selling arrangements and the measures pertaining to the product itself. In this respect, some legal scholars advocate in favour of the introduction of *de minimis test* into the area of the Treaty freedoms which will be further analysed in Section 4.6 of this dissertation.

Further to the issue of barriers of the broad interpretation of the Treaty freedoms, in my opinion the Union should focus more on how the underpinning principles of market integration can be reconciled with the principle of conferral enshrined in Art. 5 (2) TEU. Under this principle the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the corresponding objectives whereas the rest of the competences shall remain with the Member States.

However, when one analyses the principles currently applicable to for instance the free movement of workers it seems rather uncertain which competences in fact remain with the Member States. On a substantive level, the interpretation of Art. 45 TFEU is governed by (similarly as the other Treaty freedoms) market access test the broad scope of which is increasingly criticised. As a consequence, the amount of the measures not falling under the scope of the Treaty is decreasing gradually.

On a personal level, as will be analysed further in Section 4.2.1 of this dissertation, Art. 45 TFEU on the free movement of workers applies not only to Member States but also to private entities, including individual undertakings, for instance banking institutions such as the one in *Angonese*. Under one of the models of the interpretation of the principle of primacy of EU law, the trigger model, which will be further explained in Section 3.2.1, the direct effect of the EU law provision is a decisive criterion for the determination whether the provision of EU law can prevail over a conflicting national regulation. Hence, the private regulation conflicting with the horizontally directly effective Treaty provision will not stand against the latter.

Consequently, a broad interpretation given to the Treaty freedoms under the Court's market access test combined with their far-reaching personal scope effectuated by the notion of horizontal direct effect and the trigger model results in an imbalance between the actions which remain within the competences of the Member States and those which are deemed to be the Union's competence. It can be argued that the Court's interpretation techniques described above significantly tilt the scales in favour of the Union competence.

In order to solve some of the aforementioned dilemmas, namely those pertaining to the broad scope of market access test, Professor Shuibhne proposes a different principle of interpretation of free movement provisions which, according to her, is similarly like the market access test, met also by non-discriminatory impediments to free movement but on the other hand diminishes the focus on the market and economic data-based analysis in the free movement case law. She suggests the shift towards the actual exercise of the free movement rights, the central question being whether the "*access to freedom to trade transnationally is restricted*".¹¹⁰

Nevertheless, this suggestion has not yet been followed by the Court. Even though there is arguably a convergence in terms of using the market access approach as the relevant principle with regard to the interpretation of the Treaty freedoms, the clarity is, in my opinion, not so significant when it comes to the content of the notion itself. This ambiguity opens up a space for the interpretation of the free movement provisions according to the "*principle of freedom to engage in commercial activity*".¹¹¹ The reluctance of the Court to give the Treaty freedoms such interpretation has been highlighted, for instance, by Advocate General Poiares Maduro in his Opinion in *Carbonati Apuani* in which he suggested that a new approach should be taken with regard to the interpretation of these provisions.¹¹²

When consequently proposing to focus more on the access to the European market in his Opinion in *Alfa Vita* in order to combat *inter alia* the uncertainty of economic

¹¹⁰ Ibid., pp. 241

¹¹¹ Advocate General Opinion in *Carbonati Apuani Srl v Comune di Carrara*, C-72/03, EU:C:2004:296, para. 49

¹¹² Ibid., para. 49-50

operators and the inconsistency of the Court's case law¹¹³, he perhaps never imagined that the interpretation of the Treaty freedoms developed by the CJEU under the market access approach will be similarly problematic particularly because of its vagueness and unclear boundaries.

Thus, the free movement rulings of the Court based on this principle offer a rather powerful ammunition to Euro-sceptic national political parties and interest groups as well as to the opponents of deeper European integration in general and are increasingly challenged on the aforementioned grounds.¹¹⁴ This situation directly contradicts with the Court's and generally the European Union's endeavours for both further economic and also political European integration.

Furthermore, as the Court develops a line of case law under which not only Member States but also private entities could potentially be subjected to the free movement provisions, which are nowadays given such broad substantive interpretation, the aforementioned concerns could multiply. Hence, while analysing the horizontal direct effect of Treaty freedoms, I find the distinction between the principles of non-discrimination and market access relevant because their application in private disputes determines the extent to which the EU interferes with private parties' autonomy.

¹¹³ Advocate General Opinion in *Joined cases Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon*, C-158/04 and C-159/04, EU:C:2006:212, paras. 30-45

¹¹⁴ J. SNELL, *The Notion of Market Access- A Concept or a Slogan?* (2010) *Common Market Law Review*, Issue 2, pp. 469-470

3.2 Institutional Principles

3.2.1 Primacy

The principle of primacy of EU law, in literature often referred to also as the principle of supremacy of EU law¹¹⁵, is a fundamental principle of European law which interferes with the elements of national sovereignty in the sense that provided there is a conflict between the law of the European Union and the law of its Member States, the former prevails. It has been established by the Court's case law more than fifty years ago and even today is not yet embodied in the positive law.¹¹⁶

The explicit expression of the principle was foreseen under Art. I-6 of the proposal of the Treaty establishing a constitution for Europe. However, the constitution not being agreed upon by Member States, there continues to be no mention of the principle in the primary law. Nevertheless, according to the Opinion of the Council Legal Service of 22 June 2007, this situation shall in no way preclude the existence of the principle of primacy of EU law stemming from the case law which is mentioned therein.¹¹⁷

Firstly, in *Costa v E.N.E.L.*¹¹⁸ concerning the question of conformity of Italian law on nationalizing an undertaking for production and distribution of electricity with the relevant provisions of the Treaty, the Court ruled that such provisions would be “*quite meaningless*” if Member States could override their wording by adopting contradictory national legislation. Hence, Member States having limited their sovereignty in favour of the Union legal system with “*special and original nature*” cannot basically nullify its effects by a prevailing domestic regulation “*however framed*”.¹¹⁹

In its subsequent case law, the CJEU has further expanded on the essence of this principle. In *Internationale Handelsgesellschaft*¹²⁰ the company subjected to an export licence system under which the failure to use the licence implied the loss of a pre-paid

¹¹⁵ V. TRSTENJAK, National Sovereignty and the Principle of Primacy in EU Law and Their Importance for the Member States (2013) Beijing Law Review, Issue 2, pp. 72

¹¹⁶ *Ibid.*, pp. 71-72

¹¹⁷ Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260), 17th declaration annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon

¹¹⁸ Judgement in *Flaminio Costa v E.N.E.L.*, C-6/64, EU:C:1964:66

¹¹⁹ *Ibid.*

¹²⁰ Judgement in *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-11/70, EU:C:1970:114

deposit claimed that such regulation violated its fundamental right to economic liberty guaranteed by the German constitution. The Court established that the provisions of European law prevail even over national constitutions guaranteeing such fundamental rights as the one in dispute.¹²¹ The legal nature of Member States' legislation is therefore of no relevance to the application of the principle of primacy of EU law and EU law is thus at the top of the hierarchy of legal norms.¹²²

Furthermore, the temporal questions are equally immaterial in this respect as explicitly confirmed by the CJEU in *Simmenthal*.¹²³ The case concerned a fee for public health inspection upon an import of beef from France to Italy pursuant to Italian regulation of 1970. As this measure was contrary to European regulation of 1968, the Court dealt with the question whether the fact that national law was passed subsequent to European legislation and not declared unconstitutional by Italian Constitutional Court is of any importance.

The answer to both questions, according to the Court's reasoning, has to be “No.”. It ruled that entry into force of European legislation renders automatically inapplicable all conflicting national measures and the subsequent valid adoption of such is precluded to the extent that they would be incompatible with Union law. These consequences occur regardless of the formal setting aside of national legislation.¹²⁴

Hence, under the above-mentioned case law, the principle of primacy of EU law disregards the questions pertaining to the legal force and the date of adoption of national measures. Nonetheless, some legal scholars argue that its application can only be invoked before the domestic courts if the relevant provision of Union law satisfies the threshold criteria for enjoying direct effect.¹²⁵

Generally, there are two academic theories explaining the relationship between the doctrines of primacy and direct effect – the primacy model and the trigger model. Under the primacy model, which seemed to dominate the CJEU's case law more than two decades ago, the principle of primacy itself can produce exclusionary effects in that it is

¹²¹ *Ibid.*, para. 3

¹²² J. ONDŘEJKOVÁ, *Princip přednosti evropského práva v teorii a soudní praxi*, 1st ed. (2012), pp. 39

¹²³ Judgement in *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, C-106/77, EU:C:1978:49

¹²⁴ *Ibid.*, para. 17-18

¹²⁵ M. DOUGAN, *When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy* (2007) *Common Market Law Review*, Issue 4, pp. 934-937

capable of setting aside a conflicting national measure. The doctrine of direct effect is then deemed to have substitutionary effects by virtue of creating rights and obligations stemming from directly effective Union law that did not exist under the set-aside national regulation.¹²⁶

On the other hand, according to the trigger model, which the Court seems to increasingly favour in recent years, it is firstly required to establish whether a particular European regulation is directly effective. Only such measure is capable of creating a conflict of laws between European and national law. This clash is subsequently resolved through the application of the principle of primacy by giving precedence to the directly effective European rule.¹²⁷ Thus under the trigger model, the fulfilment of the criteria for direct effect, which are looked into in detail in the following section, is a necessary precondition for the application of the principle of primacy.

Consequently, the (non-)existence of direct effect of a specific provision of the Treaty could have a decisive effect on the final legal outcome of private entities' dispute. For instance, pursuant to the trigger model without one of the Treaty freedoms being capable of producing horizontal direct effect and thereby being recognized by the domestic courts in such a dispute, the relevant provision would in itself be unable to take precedence over conflicting national rule and thus affect the legal rights and obligations of the parties to the proceedings.¹²⁸ Conversely, if a particular free movement provision is deemed to have horizontal direct effect, a regulation emanating from a private entity would be set aside through the combination of doctrines of primacy and direct effect.

Hence, in particular with regard to the Court's tendency to favour the trigger approach to the principle of primacy of EU law, the question of horizontal direct effect of the Treaty freedoms becomes crucial for the determination of legal consequences of the free movement provisions on private parties' legal relationships. The ability to predict the content of such relationships is an obvious corollary of legal certainty, which, as argued in Preface of this dissertation, is pivotal in legitimizing further European integration.

¹²⁶ Ibid.

¹²⁷ Ibid., pp. 947-948

¹²⁸ Ibid., pp. 935

Thus, the Court being the integration's accelerant, its role is to ensure that there are clear implications with regard to the horizontal direct effect of the Treaty freedoms.

Generally, in order to enjoy direct effect, the Treaty provisions must fulfil a number of preconditions which are mentioned in the following section. Moreover, the section focuses, more broadly, on the notions of vertical and horizontal direct effect and corresponding differences in their application.

It shall be noted that there have been divergent conclusions drawn up in this respect depending on the specific nature of the legal instrument of European law. Notwithstanding their importance for the exercise of rights granted by Union law, since the research question regards the Treaty freedoms as part of primary law, it goes beyond the scope of this dissertation to thoroughly examine direct effect of the legal acts of the Union under Art. 288 TFEU, especially of directives, which triggers complex academic debates.

3.2.2 Direct Effect

In general, international integration, either economic or any other, comprises a number of characteristics *inter alia* that it is binding only inter-governmentally and cannot be directly enforced by nationals before domestic courts.¹²⁹ Moreover, even in case of self-executing provisions of international treaties, which are immediately effective without the need to enact ancillary legislation, it is for the domestic court before which they are invoked to decide on the matter.¹³⁰

Could the European Union's founding Member States, whose gradual integration was, as demonstrated in the preceding chapter (especially in Section 2.1), accompanied by a notable unwillingness to delegate their national sovereignty to a supranational level, have reasonably expected that the Treaty establishing the EEC would go far beyond that? According to the CJEU's reasoning in *van Gend en Loos*, they probably should have because the Treaty “constitutes a new legal order of international law”.¹³¹

The case concerned a Dutch company importing chemicals from Germany to the Netherlands where it was charged with an import duty that had been increased since the entry into force of the Treaty of Rome. The company from Utrecht contended that the measure contradicted Art. 30 TFEU. The Dutch administrative tribunal having final jurisdiction *in casu* asked the Court whether this Treaty provision can constitute a basis for claims to individual rights which the tribunal must protect, thus whether it is directly applicable in the Union's Member States.

Generally, one of the most common approaches to treaty interpretation used in order to ascertain the meaning of an international treaty's provision is the recourse to the intention of the parties. It is often accompanied by a number of supplementary means, for instance *travaux préparatoires* of a particular treaty.¹³² However, the non-existence of the official record of negotiation of the EEC Treaty made it rather difficult for the intervening Dutch, Belgian and German governments to substantiate their claims. The strong interventions made on their behalf in *van Gend en Loos* suggested that they

¹²⁹ P. CRAIG, G. DE BÚRCA, *EU Law Text, Cases and Materials*, 5th ed. (2011), pp. 181

¹³⁰ B. DE WITTE, *The Continuous Significance of Van Gend en Loos* in M.P. MADURO, L. AZOULAI (eds.), *The Past and Future of EU Law*, 1st ed. (2010), pp. 10

¹³¹ Judgement in *van Gend en Loos*, C-26/62, ECLI:EU:C:1963:1

¹³² M. N. SHAW, *International Law*, 7th ed. (2014), pp. 676-678

perceived the Treaty of Rome as a standard international treaty and direct enforceability of its provisions by individuals before national courts went beyond the expectations they assumed when agreeing thereto.¹³³

However, the Court in its ruling did not recognise the arguments of more than, at the time, half of existing Member States as to what might have possibly been their intentions in this respect. It rather took a wider perspective emphasising the object and purpose of the Treaty.

With regard to the Preamble, the main objective of the Treaty of Rome being the establishment of a common market, which is of direct concern not only to Member States but also to its nationals, the latter are called upon to actively cooperate in its functioning. Accordingly, citizens should be vigilant in protection of their rights conferred upon them by the new European legal order. Provided that a particular Treaty provision, containing a clear and unconditional prohibition addressed to Member States that is not qualified by any reservation, creates such individual rights, domestic courts must protect them by recognising their direct effect.¹³⁴

This teleological approach has been largely criticised in international law as encouraging judicial law-making.¹³⁵ Nevertheless, that is not surprising given the Court's involvement in the interpretation of the rather concise Treaty provisions in general. *Van Gend den Loos* serves as an eloquent example of the CJEU's “*teleological methodology*” in that the Court is apt to interpret the Treaty provisions and potential gaps therein as to further European integration.¹³⁶

The strong opposition of intervening Member States in *van Gen den Loos* in the end did not create much obstacles for the Court. Professor de Witte notes that the governments had never tried to contest the Court's ruling on the matters they disagreed with perhaps because they regarded direct effect as “*lawyer's business*”.¹³⁷ This approach seems to resemble rather a political apathy than support. Nevertheless, this limited extent of

¹³³ P. CRAIG, G. DE BÚRCA, *EU Law Text, Cases and Materials*, 5th ed. (2011), pp. 185

¹³⁴ Judgement in *van Gend en Loos*, C-26/62, ECLI:EU:C:1963:1

¹³⁵ M. N. SHAW, *International Law*, 7th ed. (2014), pp. 676

¹³⁶ P. CRAIG, G. DE BÚRCA, *EU Law Text, Cases and Materials*, 5th ed. (2011), pp. 185

¹³⁷ B. DE WITTE, *The Continuous Significance of Van Gend en Loos* in M.P. MADURO, L. AZOULAI (eds.), *The Past and Future of EU Law*, 1st ed. (2010), pp. 12

government's interest conformed the Court since it allowed it to develop the notion of direct effect even further.

Accordingly, direct effect had become a useful tool for advancing European integration shortly before and upon the lapse of the transitional period for the establishment of a common market in late 1960s and early 1970s. As described in Section 2.3, most Member States were at the time concerned with protecting their national markets from recent developments in the world economy and were not particularly enthusiastic about putting the common market in place.

Consequently, the Court began to extend the direct effect to more Treaty provisions concerning common market, especially the Treaty freedoms. In *Spa Salgoil*¹³⁸, the Court ruled that regardless of Member States' discretion to derogate from Art. 34 TFEU in cases set forth by Art. 36 TFEU, the provision guaranteeing the free movement of goods had direct effect. It reached a similar conclusion with respect to the free movement of workers in *Van Duyn*¹³⁹ while interpreting the right guaranteed under Art. 45 (1), (2) TFEU and the exception therefrom under Art. 45 (3) TFEU.

Gradually, all the four Treaty freedoms acquired vertical direct effect in that they could have been, and naturally still can, be relied upon by individuals against Member States. It were then the European traders and business enterprises which enabled the CJEU to develop and broaden the scope of the free movement law through *inter alia* *Dassonville* and *Cassis de Dijon* despite the significant reluctance of Member States to legislate at the Union level.

As a consequence of increasing attacks to their legislation, national governments had basically no other choice but to adapt their regulatory framework accordingly, even at times when a single Member State could have prevented the adoption of any harmonisation measure at EU level because of the requirement of a unanimous agreement in the Council. Thus, the Court found its way of dealing with lack of support for further integration and overcoming national sovereignty considerations by making it a “*lawyer's business*” pertaining to, at that time only vertical, direct effect creating obligations for Member States. Moreover, a number of the Treaty provisions are

¹³⁸ Judgement in *SpA Salgoil v Italian Ministry of Foreign Trade, Rome*, C-13/68, EU:C:1968:54

¹³⁹ Judgement in *Yvonne van Duyn v Home Office*, C-41/74, EU:C:1974:133

deemed to be liable also for imposing obligations on individuals, hence having horizontal direct effect.¹⁴⁰

Traditionally, the Treaty freedoms were deemed to be addressed solely to Member State and not to private individuals which were primarily subjected to the Treaty rules on competition. Consequently, upon fulfilment of conditions for direct effect individuals were able to invoke European competition rules against their addressees, hence the provisions on competition could have effect on the domestic dispute between private parties. However, under this traditional distinction, the free movement provision could have been directly invoked only against Member States as their sole addressees, in other words they were granted vertical but not horizontal direct effect.¹⁴¹

Nevertheless, under the doctrine of indirect horizontal effect stemming from the requirement of consistent interpretation of European law, in the absence of direct effect the domestic courts must interpret national law in line with the Treaty and secondary legislation. In other words, the national regulation has to be interpreted in light of the wording and the purpose of the Union legislation to the fullest extent possible in order to achieve the objective envisaged in the respective Union legal norm.¹⁴² This principle enables national courts to ensure the full effectiveness of the Union law when deciding disputes before them.¹⁴³

Thus, the Treaty provisions could, to certain extent, create obligations for individuals regardless of the horizontal direct effect. This approach was for long applied for instance in intellectual property disputes between private parties in which the legislation must have been applied in conformity with provisions on the free movement of goods.¹⁴⁴ The legal consequences of indirect horizontal effect in private entities' intellectual property disputes is addressed in greater detail while analysing the Court's judgement in *Dansk Supermarked* in Section 4.3.1..

¹⁴⁰ P. CRAIG, G. DE BÚRCA, *EU Law Text, Cases and Materials*, 5th ed. (2011), pp. 189

¹⁴¹ S. PRECHAL, S. DE VRIES, *Seamless web of judicial protection in the internal market?* (2009) *European Law Review*, Issue 1, pp. 13

¹⁴² M. TOMÁŠEK, V. TÝČ et al., *Právo Evropské unie*, 1st ed. (2013), pp. 74

¹⁴³ Judgement in *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, C-282/10, EU:C:2012:33, para. 24

¹⁴⁴ S. PRECHAL, S. DE VRIES, *Seamless web of judicial protection in the internal market?* (2009) *European Law Review*, Issue 1, pp. 19

However, the doctrine of indirect horizontal effect does not add much to the legal certainty of private entities in the European internal market. The effects of European law on national regulations and consequently the outcome of the whole dispute are made largely dependent on national substantive law, legislative style and legal interpretation techniques. Hence, in Member States with limited interpretation powers of domestic courts, the effect of the Union law on the particular case will also be rather limited whereas in other Member States claims against individuals might blossom with a result of easier potential imposition of obligations upon them.¹⁴⁵

With respect to the aforementioned interpretational ambiguity and the related risks, Judge Prechal and Professor de Vries argue that direct obligations for private entities under the Treaty create more legal certainty than duties generated by indirect interpretation.¹⁴⁶

In recent years, apart from the competition regulation which still continues to frame the conduct of private actors, the Court has developed a line of case law through which it imposed obligations on individuals under the provisions on the Treaty freedoms. However, unlike *van Gen den Loos* which led to twenty-six annotations only in the year of its publication¹⁴⁷, the emergence of horizontal direct effect of the Treaty freedoms has started to be apparent in small steps, in rather rare cases and it “*did not seem to imply important changes at once*”.¹⁴⁸

Despite the aforementioned assertions as to the greater legal certainty that direct effect of Treaty provisions is supposed to create, there continue to be questions surrounding horizontal direct effect of the Treaty freedoms that still need to be addressed in this respect if the free movement provisions are to actually create more legal certainty for the stakeholders involved. Those questions relate in particular to the degree of coherence that the Court has achieved with respect to the interpretation of each of the Treaty freedoms and whether, at least some of, the free movement provisions can be also

¹⁴⁵ S. ROBIN-OLIVIER, The evolution of direct effect in the EU: Stocktaking, problems, projections (2014) *International Journal of Constitutional Law*, Issue 1, pp. 181

¹⁴⁶ S. PRECHAL, S. DE VRIES, Seamless web of judicial protection in the internal market? (2009) *European Law Review*, Issue 1, pp. 21

¹⁴⁷ B. DE WITTE, The Continuous Significance of Van Gend en Loos in M.P. MADURO, L. AZOULAI (eds.), *The Past and Future of EU Law*, 1st ed. (2010), pp. 9

¹⁴⁸ S. ROBIN-OLIVIER, The evolution of direct effect in the EU: Stocktaking, problems, projections (2014) *International Journal of Constitutional Law*, Issue 1, pp. 176

invoked against private persons acting on an individual basis.¹⁴⁹ Accordingly, the following chapter looks into each of the four freedoms separately and analyses to what extent their horizontal direct effect has been brought about in the Court's landmark free movement case law.

Moreover, some argue that the unpredictability of the obligations under the Treaty can have detrimental effects on private entities, especially those that fulfil particular social or economic objectives. The potential legal uncertainty can even jeopardise their existence or prevent them from certain actions which might for instance be socially useful.¹⁵⁰

Hence, the next chapter also deals with the question to what degree has there been legal certainty achieved, particularly on the part of private actors the legal relationships of which are affected by the CJEU's recent free movement cases. When it comes to preventing private entities from socially useful actions, I wish to draw the attention to Section 4.2., in which the impact of potential horizontal direct effect of the freedom of establishment introduced in *Viking* and of the free movement of services in line with *Laval* on the trade unions' actions is addressed.

Furthermore, imposing obligations on individuals under the Treaty is a significantly more sensitive area than the recognition of their rights. Member States' nationals are, exactly as encouraged by the ruling in *van Gen den Loos*, more vigilant to protect their individual rights and hence also more conscious about their intrusion. In this respect, in a dispute involving solely private parties, there are entities more vigilant of their rights on both sides.

After *van Gen den Loos* it was not so difficult for the Court to further develop the notion of direct effect as Member States regarded this matter as a “*lawyers' business*”. However, as will be demonstrated in the following chapter, there can be a considerable number of different rights of one private party to a dispute on the one side of the “*weighing scale*” that need to be balanced against the free movement rights of the other private entity.

¹⁴⁹ S. PRECHAL, S. DE VRIES, Seamless web of judicial protection in the internal market? (2009) *European Law Review*, Issue 1, pp. 15

¹⁵⁰ S. ROBIN-OLIVIER, The evolution of direct effect in the EU: Stocktaking, problems, projections (2014) *International Journal of Constitutional Law*, Issue 1, pp. 178

In my opinion, it might therefore be more difficult for the Court to get away with furthering European internal market against the affected parties' will solely because of their eventual political apathy and “*lawyers' business*” approach than it was in *van Gen den Loos*.

Consequently, the requirement of continuous political support for integration emphasized in *Single Market Act II* mentioned in Section 2.5 of this dissertation has with respect to the development of the concept of horizontal direct effect of Treaty freedoms become more important than before. The following sections thereby look on a subsidiary basis into the question of whether the analysed cases have maintained, or even generated, enough support for European internal market from private actors.

4. The Horizontal Direct Effect of Treaty freedoms

4.1 The free movement of workers

4.1.1 Limited horizontal direct effect – *Walrave and Koch; Bosman*

Only a few days after the Court recognized direct effect of Art. 45 TFEU on the free movement of workers in *Van Duyn*, it delivered its judgement in *Walrave and Koch*¹⁵¹ in which the CJEU for the first time dealt with the question to what extent the aforementioned provision can be invoked directly in dispute between private parties.

In this case, two Dutch nationals Bruno Walrave and Noppie Koch, who were believed to be one of the best pacemakers and wished to participate at world championships in medium distance cycle races, sought to bring an action against International Cycling Union, a private body governing worldwide cycling and responsible for supervising national associations' organisation of competitions. Pursuant to the rule introduced in 1973 by International Cycling Union, the pacemakers, who determined the speed to be maintained in the race by the stayers cycling in the lee of their motorcycles, were only allowed to participate with the stayers of the same nationality. The applicants contended that such rule contradicted their free movement rights under the Treaty of Rome.

Subsequently, the Court ruled that the prohibition of discrimination on grounds of nationality “*does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services*”.¹⁵² It offered three arguments to substantiate this ruling.

Firstly, the attainment of the objectives pertaining to the free movement of persons and services would according to the CJEU “*be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law*”.¹⁵³ Professor Van den Bogaert labelled this argument as “*the effet utile*

¹⁵¹ Judgement in *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, C-36/74, EU:C:1974:140

¹⁵² *Ibid.*, para. 17

¹⁵³ *Ibid.*, para. 18

argument".¹⁵⁴ The full effectiveness of the Union law and meaningful application of its cornerstone principles are undoubtedly one of the main driving forces not only behind horizontal direct effect but also more generally in the Court's internal market case law. As mentioned above, already in *Costa v E.N.E.L.* the CJEU had expressed concerns that allowing Member States to adopt legislation contrary to the Treaties would significantly undermine their obligations set forth therein. Consequently, to maintain in force a contradicting regulation, even the rule emanating from a private regulatory body, would be liable for precisely alike detrimental effects.

Moreover, in *Dassonville* a similar approach to the promotion of free market between European countries led to the broadening of the notion of measures falling within the scope of Art. 34 TFEU. The measures which did not directly discriminate against the traders from other Member States and formally afforded them equal treatment were nevertheless caught by the provision on free movement of goods because they otherwise discriminated between products and thus hampered free movement.

In line with these arguments the Court therefore could not have drawn an artificial distinction between measures of public authorities, which often adopt rules governing the conduct of a private profession at national level, and private associations solely on grounds of their legal personality provided that the effects of their regulation would actually have identical impact on free movement of workers and services. In fact, it is usually the private entities such as sport governing bodies that regulate the employment opportunities and prospects and hence also the free movement of private individuals such as athletes.¹⁵⁵

Accordingly, in its "*uniform application argument*"¹⁵⁶, the Court reasoned that "*working conditions in the various Member States are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts*

¹⁵⁴ S. VAN DEN BOGAERT, *Horizontality: The Court Attacks?* in C. BARNARD, J. SCOTT, *The Law of the Single European Market*, 1st ed. (2002), pp. 125

¹⁵⁵ R. PARRISH, *Case C-36/74 Walrave and Koch* [1974] ECR 1405 in J. ANDERSON, *Leading Cases in Sports Law*, 1st ed. (2013), pp. 52-53

¹⁵⁶ S. VAN DEN BOGAERT, *Horizontality: The Court Attacks?* in C. BARNARD, J. SCOTT, *The Law of the Single European Market*, 1st ed. (2002), pp. 125

*concluded or adopted by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application”.*¹⁵⁷

Furthermore, according to “*the general wording argument*”¹⁵⁸ Art. 45 TFEU did not distinguish the source of restrictions to free movement to be abolished and “*the abolition of any discrimination based on nationality as regards gainful employment, extends likewise to agreements and rules which do not emanate from public authorities*”.¹⁵⁹

Nonetheless, it shall be noted that sport exhibits certain specific characteristics as opposed to a regular gainful employment, in particular regarding shaping an identity and bringing people together as recognised by the European Council.¹⁶⁰ In my opinion, this sporting identity is frequently, especially in the world championships as was the case in *Walrave and Koch*, related to a particular country or nation and based on the motives such as national pride, which might serve as a counterbalance to the prohibition of discrimination on grounds of nationality.

As mentioned above in the reference to Hayek's deliberations on the possible course of European unification, successful integration entails a form of solidarity based on shared nationality, or at a higher level, a political unity. Neither of these were established at the time of the discussed judgement and they still are not today. Despite the long journey that the European integration project has gone through until now and the aims towards developing the European dimension in sport as enshrined in Art. 165 (2) TFEU, it is quite unimaginable that there would be for instance a European Union football team participating at world championships.

Even though in this particular case the national identity considerations did not suffice to remove the rules of International Cycling Union from the ambit of the Treaty freedoms,

¹⁵⁷ Judgement in *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, C-36/74, EU:C:1974:140, para. 19

¹⁵⁸ S. VAN DEN BOGAERT, *Horizontality: The Court Attacks?* in C. BARNARD, J. SCOTT, *The Law of the Single European Market*, 1st ed. (2002), pp. 125

¹⁵⁹ Judgement in *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, C-36/74, EU:C:1974:140, paras. 20-21

¹⁶⁰ European Council, *Declaration of the European Council on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies* (2000) Nice

the Union institutions maintain a rather cautious attitude towards sporting rules. The corresponding arguments will be discussed further in this chapter.

Moreover, a special standing of nationality-related sporting regulation was recognised for instance by Advocate General Cosmas in his Opinion in *Deliège*¹⁶¹ in which he argued that the specific interests of a national team can in certain cases constitute an overriding reason of public interest and hence justify a restriction on the freedom of movement.¹⁶² The question of justification will be slightly reflected upon in further analysis of the judgement in *Bosman*¹⁶³ and more specifically in Section 4.5.

Notwithstanding its importance for the development of doctrine of horizontal direct effect, the Court's judgement in *Walrave and Koch* was not ultimately as ground-breaking as it might have first seemed. Advocate General Warner in his Opinion suggested that the relevant provisions on the free movement of workers and services are binding upon everyone because their wording is in general terms.¹⁶⁴ However, the Court did not go so far and in *Walrave and Koch* only subjected rules “*aimed at collectively regulating gainful employment and services*” to the limitations set forth in the Treaty.

Hence, at the time it was only private organisations such as International Cycling Union with a quasi-governmental status acting as an ultimate regulator in the relevant field of competence and performing state-like functions, that fell within the scope of the Treaty freedoms.¹⁶⁵ Moreover, the case regarded measures that were obviously discriminatory on grounds of nationality. Although the applicability of the Treaty to the aforementioned category of rules was confirmed by the CJEU in *Donà v Mantero*¹⁶⁶, Italian Football Federation *in casu* manifested similar characteristics as International

¹⁶¹ Advocate General Opinion in *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée*, C-51/96 and C-191/97, EU:C:1999:147

¹⁶² *Ibid.*, para. 84

¹⁶³ Judgement in *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463

¹⁶⁴ Advocate General Opinion in *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, C-36/74, EU:C:1974:111

¹⁶⁵ S. VAN DEN BOGAERT, *Horizontality: The Court Attacks?* in C. BARNARD, J. SCOTT, *The Law of the Single European Market*, 1st ed. (2002), pp. 127

¹⁶⁶ Judgement in *Gaetano Donà v Mario Mantero*, C-13/76, EU:C:1976:115, para. 17

Cycling Union in *Walrave and Koch*, thus the horizontal reach of the freedom of movement of workers was at the time rather limited.¹⁶⁷

Furthermore, after the Court delivered its judgement in *Walrave and Koch*, International Cycling Union threatened to withdraw the event in which the pacemakers wished to participate from the world championships schedule, and the litigants thereby eventually decided to withdraw their claim instead.¹⁶⁸ More generally, sporting organisations were reluctant to accept the applicability of European law and even if they from time to time complied with the Court's judgements, they did so only to as minimum extent as possible.¹⁶⁹

Consequently, not only was the horizontal direct effect of Art. 45 TFEU limited but also the private regulatory bodies which fell within its ambit had in fact significant influence on the athletes' exercise of their free movement and their rights in general. Accordingly, the inability of football players to actually exercise their freedom of contract and move between various football clubs and thus also between Member States was subject to dispute in *Bosman*.¹⁷⁰

Jean-Marc Bosman, a Belgian professional football player was employed by a Belgian first division club RC Liège. Upon the expiry of his contract, the club made him a new offer pursuant to which his pay would be significantly reduced to a minimum permitted by a Belgian football association. As Mr. Bosman had no interest in such offer, he made contact with a French second division football club US Dunkerque.

However, there were several rules emanating from a worldwide football association commonly known as FIFA and its European confederation UEFA, which national football federations and their member clubs are bound to respect, and that thus had to be complied with in the first place. Firstly, a change of club affiliation of a particular player was subject to a transfer fee payable by the “buying” club to the “selling” club and the issue of a transfer certificate by the former national association acknowledging

¹⁶⁷ S. VAN DEN BOGAERT, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, 1st ed. (2005), pp. 25

¹⁶⁸ S. WEATHERILL, *Bosman Changed Everything: The Rise of EC Sports Law* in M.P. MADURO, L. AZOULAI (eds.), *The Past and Future of EU Law*, 1st ed. (2010), pp. 480

¹⁶⁹ S. VAN DEN BOGAERT, *Bosman: The Genesis of European Sports Law* in M.P. MADURO, L. AZOULAI (eds.), *The Past and Future of EU Law*, 1st ed. (2010), pp. 489

¹⁷⁰ S. WEATHERILL, *Bosman Changed Everything: The Rise of EC Sports Law* in M.P. MADURO, L. AZOULAI (eds.), *The Past and Future of EU Law*, 1st ed. (2010), pp. 481

the payment. Secondly, national football associations introduced nationality clauses pursuant to which the number of foreign players that could have been recruited or fielded in the match was limited.

As RC Liège hampered the issuance of the required transfer certificate, Mr. Bosman's contract with US Dunkerque did not take effect. Subsequently, he brought an action against his former Belgian employer and challenged the compatibility of the aforementioned set of rules with the Treaty provisions on the free movement of workers.

The journey to the judgement in this case was for Mr. Bosman paved with a lack of support from his peers, a struggle to find a new employer, general pressure and blackmail by football associations to settle out of court and their “*legal manoeuvres*” to frustrate the proceedings before the courts.¹⁷¹

Nevertheless, thanks to the applicant's persistent attitude, the Court had an opportunity to expand on its interpretation of horizontal direct effect of the free movement of workers.¹⁷² At the outset it confirmed the applicability of Art. 45 TFEU to any regulation “*aimed at regulating gainful employment in a collective manner*”, citing to the relevant reasoning in *Walrave and Koch* to support its conclusions.¹⁷³

In order to prevent the case from falling under the Court's scrutiny, the defendants argued that the contested rules were a necessary corollary of their freedom of association under Art. 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the autonomy they enjoyed under national law. Even though the Court recognised these principles, it subsequently stated that the relevant rules are not necessary to enjoy the freedom of association and thus could not preclude the application of the Treaty.¹⁷⁴ In other words, sporting associations can rely

¹⁷¹ S. VAN DEN BOGAERT, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, 1st ed. (2005), pp. 174

¹⁷² Furthermore, Mr. Bosman was after almost eight years since he initiated the proceedings awarded a compensation of approximately EUR 400,000.

¹⁷³ Judgement in *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463, paras. 82-87

¹⁷⁴ *Ibid.*, paras. 79-80

on their freedom of association so long as it is, upon the clash of the two, brought into harmony with their members' freedom of movement.¹⁷⁵

It shall be noted, however, that the Court should undertake a very careful balancing exercise in this respect. The two major football associations FIFA and UEFA remain extremely influential and rather autonomous in the organisation of football competitions and related activities. As the football is still an extremely popular game and, as mentioned above, a useful tool in terms of bringing people around the whole Europe together, it has a potential significant impact on the on-going European integration process.¹⁷⁶ Professor de Vries draws an interesting comparison between the Roman “panem et circenses” as an emperors' strategy for gaining political support and the influence of football on European citizens' well-being in this respect.¹⁷⁷

The Union institutions therefore adopt a cautious approach towards interference with football and generally sporting associations' autonomy and regulations in that they usually render a principle-based judgement and leave the definitive resolution of the issue to the relevant private organisations.¹⁷⁸ The importance of their support for European integration is acknowledged in Art. 165 (3) TFEU pursuant to which the Union and its Member States shall foster cooperation with competent international organisations in the field of sport. Thereby, the provision might potentially be of a great significance in terms of balancing sport considerations and internal market principles.¹⁷⁹

More importantly, in *Bosman* the Court also broadened the substantive scope of the free movement of workers in that for the first time genuinely non-discriminatory measures of private entities were brought under its scrutiny.¹⁸⁰ According to the CJEU, since the relevant transfer rules, even though applicable equally to national and international transfers, “*directly affect players' access to the employment market in other Member*

¹⁷⁵ S. VAN DEN BOGAERT, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, 1st ed. (2005), pp. 20

¹⁷⁶ *Ibid.*, pp. 189-191

¹⁷⁷ S. DE VRIES, *Sport, TV and IP rights: Premier League and Karen Murphy* (2013) *Common Market Law Review*, Issue 2, pp. 591

¹⁷⁸ S. VAN DEN BOGAERT, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, 1st ed. (2005), pp. 194

¹⁷⁹ S. DE VRIES, *Sport, TV and IP rights: Premier League and Karen Murphy* (2013) *Common Market Law Review*, Issue 2, pp. 604

¹⁸⁰ S. VAN DEN BOGAERT, *Bosman: The Genesis of European Sports Law* in in M.P. MADURO, L. AZOULAI (eds.), *The Past and Future of EU Law*, 1st ed. (2010), pp. 491

States and are thus capable of impeding freedom of movement for workers”, they were prohibited under Art. 45 TFEU.¹⁸¹

Consequently, the provisions of the free movement of workers could have been invoked against private associations collectively regulating employment not only with respect to evidently discriminatory measures but also non-discriminatory regulation which merely affected access to labour market of another Member State.

Nonetheless, there are certain barriers set out under EU law beyond which even the rather broad market access test cannot reach. Naturally, in order for the free movement provisions to apply at all, the circumstances of the case need to have a connection with the situations envisaged under the European law and thus individuals cannot rely on Art. 45 TFEU if the contested regulation merely excludes them from their own home country’s territory.¹⁸²

Further, in order for the national rules to fall within the scope of the Treaty, they need to have “*actual effects on market actors*” in that their application cannot be “*dependent on a future and hypothetical event*”.¹⁸³ This approach was confirmed by the CJEU in its ruling in *Graf*¹⁸⁴ wherein Art. 45 TFEU was held to prohibit only national legislation that actually restricted nationals' access to labour market in another Member State.¹⁸⁵ On the other hand, if the effects of the measure are “*too uncertain and indirect*”,¹⁸⁶ the regulation cannot be regarded as a breach of Art. 45 TFEU.

The effects of opening up Union employment markets were marginally touched upon by the Court already in *Bosman*. It states that it naturally entails reducing the chances of employment in a national's Member States. On the other hand, it offers new job opportunities in other Member States.¹⁸⁷ These consequences only became more apparent with the subsequent expansion of the doctrine of horizontal direct effect of the

¹⁸¹ Judgement in *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463, paras. 103-104

¹⁸² P. CRAIG, G. DE BÚRCA, *EU Law Text, Cases and Materials*, 5th ed. (2011), pp. 732

¹⁸³ *Ibid.*

¹⁸⁴ Judgement in *Volker Graf v Filzmoser Maschinenbau GmbH*, C-190/98, EU:C:2000:49

¹⁸⁵ *Ibid.*, paras. 22-26

¹⁸⁶ *Ibid.*, para. 25

¹⁸⁷ Judgement in *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463, para. 134

free movement of workers provisions and the accession of new Member States in 2004 which are looked into in the following Sections 4.1.2 and 4.2.

Moreover, in its judgement the Court also addressed the question to what extent private entities subjected to the Treaty free movement rules can rely on justifications of the breach of the Treaty by stating that “*there is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health*”.¹⁸⁸ For instance, the aforementioned freedom of association that is peculiar for sporting associations and should be to certain extent preserved with respect to its importance for European integration could according to Advocate General Lenz possibly constitute an imperative requirement in the general interest and thus justify a restriction on free movement of workers insofar as it represents “*interest of the association which is of paramount importance*”.¹⁸⁹

With regard to the fact that according to *Bosman* and the preceding case law it were merely the rules regulating employment in a collective manner that fell within the scope of the Treaty, this statement encompassed wider range of private measures than it strictly had to at the time.¹⁹⁰ Nevertheless, this reasoning of the CJEU suggests that if private individuals, and not only collective regulators, can rely on justifications, the rules introduced by them have to be caught by the Treaty in the first place.

The Court arrived at precisely this conclusion in its subsequent case law starting with the judgement in *Angonese*¹⁹¹ which is analysed in the following Section 4.2.1 with an emphasis on its impact on private employers' legal standing, employment relationships in general and their specifics for the internal market regulation as compared to other Treaty freedoms. The consequences of expanding the Union employment markets for the European integration and its support from Member States are also looked into therein.

¹⁸⁸ *Ibid.*, para. 86

¹⁸⁹ Advocate General Opinion in *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:293, para. 216

¹⁹⁰ S. VAN DEN BOGAERT, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, 1st ed. (2005), pp. 27

¹⁹¹ Judgement in *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, C-281/98, EU:C:2000:296

4.1.2 Full horizontal direct effect – *Angonese* and beyond

Already more than twenty-five years before the Court's judgement in *Angonese*, Advocate General Warner in his abovementioned Opinion in *Walrave and Koch* contended that the provisions on free movement of workers are binding upon everyone. However, the Court did not follow his advice at the time. After the judgements in *Walrave and Koch* and *Bosman*, it was only apparent that under certain specific circumstances that is to say when private organisations act as ultimate regulators in the relevant sector, Art. 45 TFEU is horizontally directly effective, but it was not clear whether the same effect can be invoked also in “*purely horizontal situations*”¹⁹² involving two private individuals. As Advocate General Fennelly pointed out in his Opinion, it might even seem surprising that the Court has until *Angonese* not had occasion to comment on the relationship between “*employment conditions specified by individual undertakings*”¹⁹³ and EU free movement law.

The CJEU dealt with this question in the proceedings that arose after Roman Angonese applied for a position in a private banking undertaking Cassa di Risparmio in the province of Bolzano in Italy. Under Art. 19 of the National Collective Agreement for Savings Banks of 1994, the banks in Italy had a margin of discretion with respect to the selection criteria of their prospective employees. In line with this provision, Cassa di Risparmio decided that in order to enter the competition for the post, applicants had to possess a certificate of bilingualism in Italian and German issued by authorities in the province of Bolzano after an examination that took place four times annually only in the examination centre in the province.¹⁹⁴

Mr. Angonese, as an Italian national residing in Bolzano whose mother tongue was German was perfectly bilingual but he was not in the possession of the required specific certificate. As a consequence, the bank informed him that he could not be admitted to the competition because of a failure to fulfil this particular condition. Although Mr.

¹⁹² T. KUNERTOVÁ, Pojem pracovníka v evropském právu, Disertační práce, Univerzita Karlova, Právnická fakulta (2014) from <https://is.cuni.cz/webapps/zzp/detail/101362/> retrieved on 30 November 2014, pp. 11

¹⁹³ Advocate General Opinion in *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, C- 281/98, EU:C:1999:583, para. 41

¹⁹⁴ R. LANE, N.N. SHUIBHNE, Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, Judgement of 6 June 2000, not yet reported (2000) *Common Market Law Review*, Issue 5, pp. 1238

Angonese acknowledged that the requirement of bilingualism in general is a legitimate selection criterion, he complained in the lawsuit he brought against Cassa di Risparmio that to evidence such skills solely by means of one particular diploma infringes the principle of free movement of workers under Art. 45 TFEU.¹⁹⁵

It shall be noted at the outset that Mr. Angonese was an Italian national residing in Italy who filed a lawsuit against an Italian private employer, thus against his own Member State. The case law of the CJEU with respect to the application of Art. 45 TFEU to wholly internal situations with no connection to circumstances envisaged by Union law has been consistent throughout the years in that in such situations, the Treaty provisions bear no relevance.¹⁹⁶ Accordingly, Advocate General Fennelly stated in his Opinion that the case did not have sufficient connection to EU law to trigger the application of the Treaty.¹⁹⁷ The same concerns were expressed by the Commission during the hearing.¹⁹⁸

However, the Court dealt with this issue rather briefly by stating that it was “*far from clear*”¹⁹⁹ that the interpretation of the Treaty the national court sought had “*no relation to the actual facts of the case or to the subject matter of the main action*”.²⁰⁰ Moreover, as Mr. Angonese studied in Austria between 1993 and 1997 before applying for the position in Bolzano, Art. 45 TFEU could arguably be applied in this case.

It is generally accepted that when a worker has been employed or resided in another Member State, he is entitled to subsequently claim rights stemming from the free movement provisions even against his own Member State. These situations can arise upon the application of social security or tax regulations when a national is returning to work in his Member State.²⁰¹

On the other hand, Professor Shuibhne and Doctor Lane question the extent of the Union element in this case. When Mr. Angonese commenced his studies in Vienna in

¹⁹⁵ Judgement in *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, C-281/98, EU:C:2000:296, para. 12

¹⁹⁶ Judgement in *The Queen v Vera Ann Saunders*, C-175/78, EU:C:1979:88, paras. 11-12

¹⁹⁷ Advocate General Opinion in *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, C- 281/98, EU:C:1999:583, paras. 36-37

¹⁹⁸ R. LANE, N.N. SHUIBHNE, Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, Judgement of 6 June 2000, not yet reported (2000) *Common Market Law Review*, Issue 5, pp. 1242

¹⁹⁹ Judgement in *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, C-281/98, EU:C:2000:296, para. 19

²⁰⁰ *Ibid.*

²⁰¹ P. CRAIG, G. DE BÚRCA, *EU Law Text, Cases and Materials*, 5th ed. (2011), pp. 732-733

1993, Austria was not a Member State of the EU yet, as it only acceded in 1995. Thus, it could not “*have been his original intention*” to exercise the free movement rights and “*prior to 1995 this could generate no Community²⁰² element*”.²⁰³

In light of these facts, they point out that apart from the above cited paragraph the Court did not make clear which wholly internal situations are still saved from the application of the Treaty and which of them are not anymore. Hence, the judgement has been criticised for being “*uncomfortably vague and incomplete*”²⁰⁴ as the limits of European Union law drawn by it, and in general by the Court, “*appear to be more and more arbitrary by comparison*”.²⁰⁵

Nonetheless, it shall be noted that disregard the time-frame, there has been a connecting link between the individual and another Member State due to Mr. Angonese’s studies in Vienna. On the contrary, in the purely internal situations lacking such connection to another Member State, “*the national workers cannot claim rights in their own Member State which workers who are nationals of other Member States could claim there*”.²⁰⁶

The application of this rule thus gives rise to reverse discrimination which is liable for less favourable treatment of Member States’ own nationals as compared to other European citizens. Accordingly, in *Angonese* not only the nationals of other Member States were at a disadvantage as compared to residents of Bolzano but also Italians resident in other provinces. Due to reverse discrimination the latter could not invoke the free movement provisions in order to improve their situation.

As pointed out in Section 3.3.1 of this dissertation, reverse discrimination can be eliminated *inter alia* through narrowing down the extent of purely internal situations and broadening the scope of Union ones. However, in doing so the CJEU should be rather cautious and transparent, especially in cases involving politically sensitive issues

²⁰² After the entry into force of the Treaty of Lisbon one would rather say Union.

²⁰³ R. LANE, N.N. SHUIBHNE, Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, Judgement of 6 June 2000, not yet reported (2000) *Common Market Law Review*, Issue 5, pp. 1243

²⁰⁴ *Ibid.*, pp. 1242

²⁰⁵ *Ibid.*, pp. 1245

²⁰⁶ P. CRAIG, G. DE BÚRCA, *EU Law Text, Cases and Materials*, 5th ed. (2011), pp. 732

such as language given that “*the Court's assessment of domestic language policy is frequently perceived as an unwarranted intrusion*”.²⁰⁷

Notwithstanding the significance of the concept of purely internal situations triggered by this case, the considerable added value of *Angonese* is seen as the Court's confirmation that not only can Art. 45 TFEU be invoked against collective regulators, thus has what is referred to as “*limited horizontal effect*”²⁰⁸ but it can also apply in a purely private individuals' dispute and therefore has “*full horizontal effect*”.²⁰⁹

In addressing the question of horizontal direct effect of Art. 45 TFEU, the Court engaged in the exactly same legal analysis as it did in *Walrave and Koch*²¹⁰, stating the reasons thoroughly discussed in the previous section and labelled as the general wording argument²¹¹, the effet utile argument²¹² and the uniform application argument²¹³ to support its ruling. However, in *Angonese* the Court combined these arguments with the conclusions it reached in *Defrenne*²¹⁴, where it dealt with the question of horizontal direct effect of Art. 157 TFEU on equal pay for male and female workers.

According to the CJEU, even though certain Treaty provisions are formally addressed to Member States, that fact does not prevent individuals from relying on those provisions.²¹⁵ Furthermore, in the context of mandatory Treaty provisions, “*the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as contracts between individuals*”.²¹⁶ As Art. 45 TFEU

²⁰⁷ *Ibid.*, pp. 1246; Nevertheless, it goes beyond the scope of this dissertation to discuss this matter further.

²⁰⁸ M. DE MOL, *The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-discrimination: (Unbridled) Expansionism of EU Law?*, (2011) *Maastricht Journal of European and Comparative Law*, Issue 1-2, pp. 115

²⁰⁹ *Ibid.*, p. 114

²¹⁰ S. VAN DEN BOGAERT, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, 1st ed. (2005), pp. 27

²¹¹ Judgement in *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, C-281/98, EU:C:2000:296, para. 30

²¹² *Ibid.*, para. 32

²¹³ *Ibid.*, para. 33

²¹⁴ Judgement in *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, C-43/75, EU:C:1976:56

²¹⁵ *Ibid.*, para. 31

²¹⁶ *Ibid.*, para. 39

“is designed to ensure that there is no discrimination on the labour market”²¹⁷, the same considerations should be applicable with respect to this provision.²¹⁸

Consequently the Court ruled that “the prohibition on discrimination on grounds of nationality laid down in”²¹⁹ Art. 45 TFEU applies to purely private entities as well. Although the regulation that gave the Italian bank the right to impose particular selection criteria was drawn up by a collective regulatory body, the adherence to this regulation was not obligatory and thus Cassa di Risparmio acted within its own margin of discretion when basically embracing discrimination by imposing the requirement of certificate of bilingualism.²²⁰ Hence, since the Court's judgement in *Angonese*, legal academia accepts that Art. 45 TFEU is horizontally directly effective.²²¹

However, as the measures adopted by private Italian employer were held to constitute indirect discrimination on grounds of nationality²²², the question still remained, even after *Angonese*, whether Art. 45 TFEU can be applied similarly also in “purely horizontal situations” that concern a non-discriminatory measure, in other words whether market access test can be employed in a dispute concerning Art. 45 TFEU between two private entities.

Since this judgement, several legal instruments have been brought into “play” of the free movement by other European institutions that the Court. In 2004, the European Parliament and the Council adopted Directive 2004/38/EC²²³ laying down the conditions of the free movement of Union citizens and emphasizing the prohibition of discrimination on grounds of nationality.²²⁴ Moreover, Regulation (EU) No.

²¹⁷ Judgement in *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, C-281/98, EU:C:2000:296, para. 35

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*, para. 36

²²⁰ R. LANE, N.N. SHUIBHNE, Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, Judgement of 6 June 2000, not yet reported (2000) *Common Market Law Review*, Issue 5, pp. 1243 - 1244

²²¹ S. VAN DEN BOGAERT, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, 1st ed. (2005), pp. 28

²²² R. LANE, N.N. SHUIBHNE, Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, Judgement of 6 June 2000, not yet reported (2000) *Common Market Law Review*, Issue 5, pp. 1239

²²³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77

²²⁴ *Ibid.*, Consideration 20

492/2011²²⁵ lays down specific areas where discrimination of workers on grounds of nationality is prohibited, for instance access to employment, working conditions, social and tax advantages and membership in trade unions. It shall be noted that both of these instruments address merely discriminatory measures of Member States.

On the other hand, Directive 2014/54/EU²²⁶, which aims to facilitate the uniform application and enforcement of free movement rights conferred by Art. 45 TFEU and Regulation No. 492/2011 targets both discriminatory measures and unjustified restrictions or obstacles to free movement.²²⁷ The aforementioned legislation might be applicable in certain disputes next to Art. 45 TFEU. Thus, it can also affect their outcomes and potentially trigger a noteworthy question of horizontal direct effect of directives.

In *Erny*²²⁸, Mr. Erny, a French cross-border worker brought a lawsuit against his German employer, Daimler AG due to the double taxation methods used by this private entity with respect to the taxation of Mr. Erny's income in France. The Court confirmed the full horizontal direct effect of Art. 45 TFEU by stating that “*the prohibition of discrimination laid down in that provision applies not only to the actions of public authorities, but also to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals*”.²²⁹

However, as this case again dealt only with a discriminatory measure, legal scholars are still waiting for an answer as to whether Art. 45 TFEU can be applied in a horizontal dispute that involves a non-discriminatory restriction on free movement. Until now, as Professor Barnard has pointed out, the conclusions regarding full horizontal direct effect of Art. 45 TFEU are only explicitly true with respect to discriminatory treatment of private employers as was the case in *Angonese* and *Erny*.²³⁰ Given the controversial

²²⁵ Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1

²²⁶ Directive 2014/54/EUR of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L 128/8; to be transposed by Member States until 21 May 2016

²²⁷ *Ibid.*, Consideration 12

²²⁸ Judgement in *Georges Erny v Daimler AG — Werk Wörth*, C-172/11, EU:C:2012:399

²²⁹ *Ibid.*, para. 36

²³⁰ C. BARNARD, Balance of Competence Report: Single Market, commissioned by the United Kingdom Department for Business, Innovation & Skills, Review of the Balance of Competences between the United Kingdom and the European Union (2013) retrieved from

reactions the market access approach dealt with in Section 3.1.2 generates when applied merely to Member States' measures, to employ this test also with respect to private entities that have traditionally not even been envisaged as addressees of the free movement provisions would, in my opinion, be too substantial of an intrusion upon national autonomy.

In addition, the horizontal direct effect of Art. 45 TFEU triggers a question as to what extent the private entities can rely on justifications of the restrictions on the free movement. The measures which conflict with the prohibition on direct discrimination can only be justified by the reasons set forth in the Treaty, in relation to the free movement of workers namely public policy, public security and public health. As will be further discussed in Section 4.5 of this dissertation, the possibilities of private entities to rely on these justifications seem, despite the Court's assurance in *Bosman* that there is nothing to preclude them from doing so, rather limited.

Nevertheless, the recognition of the full horizontal direct effect of the provisions on the free movement of workers accentuates their specific position within the four freedoms.²³¹ As will be thoroughly discussed in the following sections, whereas the issue of horizontal direct effect of other Treaty freedoms is to a large extent unresolved, it can be concluded without any doubt that Art. 45 TFEU applies to Member States, collective regulators as well as genuinely private individuals.

Advocate General Poiares Maduro in his Opinion in *Viking*²³² clarified what distinguishes the free movement of workers from other freedoms by stating that “workers cannot change their professional qualifications or obtain alternative employment as easily as traders can alter their products or find alternative ways of marketing them”.²³³

Hence, regardless of whether the discriminatory treatment such as the one in *Angonese* emanates from a Member State or from a private banking undertaking, the workers

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227069/2901084_SingleMarket_acc.pdf on 5 March 2015

²³¹ T. KUNERTOVIÁ, *Pojem pracovníka v evropském právu*, Disertační práce, Univerzita Karlova, Právnická fakulta (2014) retrieved from <https://is.cuni.cz/webapps/zzp/detail/101362/> on 30 November 2014, pp. 12

²³² Advocate General Opinion in *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:292

²³³ *Ibid.*, para. 47

experience similar considerable difficulties when adopting to one or to another and thus both measures are equally “*harmful to the functioning of the common market*”.²³⁴

Consequently, the horizontal direct effect of Art. 45 TFEU certainly generates an additional shield of protection for Union migrant workers. However, while the private employers throughout the Union must comply with the free movement law standards when it comes to migrant workers, they are not obliged to do so when it comes to their own nationals. Already in 2000 when the judgement in *Angonese* was delivered, Doctor Lane and Professor Shuibhne forecasted that in the political climate at the time particularly in the United Kingdom but also elsewhere in the European Union, the judgement could be interpreted as “*yet another blatant intrusion into the preserve of national regulation*”.²³⁵

As can be observed from the discussions on the scope and limits of the free movement surrounding the question of the hypothetical departure of the UK from the EU, the political climate has not changed much since 2000. On the contrary, with the accession of new Member States in May 2004, the clash between the free movement and the concept of national solidarity became even more apparent.

Regardless of the countless economic benefits the European integration generated all together, the position of the side of the political spectrum calling for the limitation of the free movement in the EU demonstrates that there is a lack of the kind of solidarity that is based on the shared nationality which, as discussed in the Preface to this dissertation, was already foreseen by Hayek.

His question as to whether it is likely that a French peasant will be more willing to pay more for his fertilizer to help the British chemical industry can nowadays be translated into a very current and topical question whether it is likely that Finish (or British) nationals will forgo their employment and social security at the expense of Estonian (or Polish) migrant workers.

After the 2004 accession of the states which before 1989 belonged to so called “Eastern Bloc”, there was a transitional period during which certain limits to the free movement

²³⁴ Ibid.

²³⁵ R. LANE, N.N. SHUIBHNE, Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, Judgement of 6 June 2000, not yet reported (2000) *Common Market Law Review*, Issue 5, pp. 1244

of workers coming from newly acceded Member States applied. However, these limits did not apply to other Treaty freedoms like the freedom to provide services or the right of establishment. Hence, the employers from those states used the other Treaty freedoms in order to circumvent the transitional limits imposed on the free movement of workers by using either the institute of posted workers or through establishing a subsidiary in another Member State.²³⁶

Thus, such practices not only highlighted the aforementioned clash between economic benefits and national solidarity even more but also brought forward an issue of social dumping. As the migrant workers coming from newly acceded Member States were generally willing to work under considerably worse conditions and for lower remuneration, they created pressure on the national workers and in the labour market in general which was in turn countered by strikes and blockades of national trade unions.²³⁷

Since these trade union activities, naturally, hampered the free movement of the employers which desired to offer services or establish themselves in another Member State (and circumvent the limits to free movement of workers during the transitional period), there were questions brought before the CJEU asking to clarify the extent to which trade unions are bound by the provisions on the free movement.

Accordingly, in the judgements that will be analysed in the following section, the Court ruled on the applicability of Treaty freedoms, in particular Art. 56 TFEU on the free movement of services and Art. 49 TFEU on the right of establishment to non-Member-State actors and thus on the horizontal direct effect of these provisions.

²³⁶ R. KRÁL et al., *Volný pohyb pracovníků v EU v kontextu skončení přechodných opatření*, 1st ed. (2012), pp. 58

²³⁷ *Ibid.*, pp. 59

4.2 Collective agreements concerning employment and trade unions

4.2.1 The freedom of establishment – *Viking*

As discussed above, the accession of new Member States to the EU in 2004 created a number of challenges for the functioning of European internal market, especially for the free movement of workers. As Professor Barnard notes, one of the reasons for the then acceding states to surrender their sovereignty which some of them only managed to regain in early 1990s was that they gained access to western markets in return and they could thus make use of their “*comparative advantage – cheaper labour – thereby improving the prosperity of the new Member States*”.²³⁸ In order to prevent a massive flow of migrant workers from Eastern-European markets, the majority of the original Member States imposed transitional limits on the free movement of workers. Quite surprisingly, the United Kingdom which is now calling for a limitation of the free movement of workers did not do so at the time.²³⁹

Since these rules applied only to individual natural persons but did not affect legal entities, the transitional restrictions could be easily avoided. Firstly, it was possible for the employers from the new Member States to offer services in the old Member States using their home countries’ cheap labour force. Secondly, the employers from the old Member States could re-establish themselves or establish a subsidiary in one of the new Member States and employ workers (at least formally) there.²⁴⁰

The use of the latter option gave rise to a dispute between a large ferry operator incorporated under Finnish law, Viking Line ABP (hereafter also referred to as “**Viking**”) and International Transport Workers’ Federation (hereafter also referred to as the “**ITF**”) and its affiliated Finish trade union Finish Seamen’s Union (hereafter also referred to as the “**FSU**”). Viking operated several routes, including a loss-making route from Helsinki to Tallinn which was operated by a vessel *Rosella*. The crew of *Rosella* were together with around 10,000 other seamen members of FSU.

²³⁸ C. BARNARD, *Viking and Laval: An Introduction* (2008) Cambridge Yearbook of European Legal Studies, pp. 464

²³⁹ *Ibid.*, pp. 463

²⁴⁰ C. BARNARD, *Social dumping or dumping socialism?* (2008), *The Cambridge Law Journal*, Issue 2, pp. 262

The main reason that *Rosella* was running at a loss was that it had to comply with ITF's "Flag of Convenience" policy. Under the policy, there had to be a genuine link between the vessel and its operator and only the trade unions from the state of the flag of the vessel were entitled to conclude collective agreements regarding that vessel. Since Viking was a company incorporated under Finnish law and *Rosella* was operating under the Finnish flag, Viking could only enter into collective agreement with Finnish trade unions. As a consequence, Viking had to pay *Rosella*'s crew wages adhering to Finnish standards. However, the same route was also operated by Estonian vessels whose owners only had to comply with lower Estonian employment standards and could therefore afford a substantially cheaper crew. Logically, Viking was not able to effectively face such competition and therefore announced in October 2003 its intention to reflag *Rosella* by registering it in Estonia through its subsidiary ÖU Viking Line Eesti.²⁴¹

Viking's proposal was not welcomed with opened arms neither at ITF's nor at FSU's side because they were aware that the main reason for reflagging was to enable Viking to reduce its labour force costs.²⁴² In order to prevent Viking from doing so ITF sent out a circular to all its affiliated trade unions asking them not to enter into collective agreement negotiations with Viking or its Estonian subsidiary. Moreover, FSU gave notice of a planned strike action.

The dispute took a wholly new turn when Estonia acceded to the European Union in May 2004. In August 2004, Viking brought a lawsuit before the High Court of England and Wales against ITF and FSU contending that their collective actions infringed its right of establishment under Art. 49 TFEU. The High Court ruled that the trade unions' action indeed constituted a restriction on the freedom of establishment. Subsequently, ITF and FSU appealed the decision to the Court of Appeal which stayed the proceedings and referred a number of questions to the CJEU.

²⁴¹ Judgement in *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and ÖU Viking Line Eesti*, C-438/05, EU:C:2007:772, para. 9

²⁴² *Ibid.*, para. 18

Firstly, the CJEU dealt with a question whether collective action falls outside the scope of the Treaty by analogy with the Court's reasoning in *Albany*²⁴³ in which the CJEU addressed a potential breach of EU competition rules. The interplay between EU free movement rules and competition law will be dealt with more specifically in Section 4.6 of this dissertation. However, it shall be noted the Court denied the applicability of the conclusions formulated in *Albany* to the circumstances of *Viking*.

The second question of the Court of Appeal as to whether Art. 49 TFEU has horizontal direct effect and can therefore be relied on against a trade union or an association of trade unions will be analysed thoroughly in this section. Whereas, as will be demonstrated later in this section, the CJEU itself approached the issue in a rather conventional manner, Advocate General Poiares Maduro's opinion is rather more controversial, Professor Barnard called it even "*provocative*".²⁴⁴

At the outset, Advocate General Poiares Maduro outlined the traditional distinction between the EU free movement rules addressed primarily to Member States and EU competition rules intended to regulate the market behaviour of private entities which has been discussed also in Section 3.2.2 of this dissertation. However, he emphasized that "*this does not validate the argument a contrario that the Treaty precludes horizontal effect of the provisions on freedom of movement*".²⁴⁵

Advocate General argued that a private action that does not fall within the scope of the competition rules could likely hinder the objectives of the internal market and it would therefore be incorrect to automatically exclude application of the free movement rules in such cases.²⁴⁶ In order to support this view he refers to the free movement of goods cases *Spanish strawberries*²⁴⁷ in which French producers of strawberries took a collective action in order to prevent imports of fresh fruit from Spain and

²⁴³ Judgement in *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, EU:C:1999:430

²⁴⁴ C. BARNARD, *Viking and Laval: An Introduction* (2008) Cambridge Yearbook of European Legal Studies, pp. 470

²⁴⁵ Advocate General Opinion in *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:292, para. 35

²⁴⁶ *Ibid.*, para. 37

²⁴⁷ Judgement in *Commission of the European Communities v French Republic*, C-265/95, EU:C:1997:595

*Schmidberger*²⁴⁸ which followed after an environmental protest group initiated a blockade of a major Austrian motorway.

However, as Professor Sir Dashwood notes, the two aforementioned cases are not a suitable support for an argument in favour of horizontal direct effect of free movement rules because in both of those cases, the claim was not brought against the private initiators of a collective action (or a blockade) but rather against Member States which failed to exercise their functions and prevent the hindrance of the free movement. On the contrary, according to him, it does not seem plausible that any actions against individual protesters in these cases would be successful on the basis of horizontal direct effect of the Treaty freedoms. On the other hand, Professor Sir Dashwood contends that it is nowadays generally accepted that in certain disputes between private parties, the EU free movement rules can be applied directly. The question, however, lies in drawing a borderline between the cases in which it can be done and in which it cannot.²⁴⁹

In his Opinion, Advocate General Poiras Maduro has formulated a noteworthy general theory on how to identify the cases in which the Treaty freedoms could be given horizontal direct effect. He demonstrates the functioning of his theory on an example of “*an individual shopkeeper who refuses to purchase goods from other Member States*”.²⁵⁰ Because there are plenty of other shopkeepers on the market, the supplier from another Member State will still be able to sell his goods through other means. The refusal to purchase foreign goods might even have detrimental effects on the shopkeeper as his competitors might then be able to offer a larger choice to their customers which serves as a sufficient deterrent from such behaviour. “*Thus, the market will ‘take care of it’. In those circumstances, there is no ground for Community law to intervene.*”²⁵¹

However, in a number of cases even private entities “*wield enough influence successfully to prevent others from enjoying their rights to freedom of movement*”.²⁵²

²⁴⁸ Judgement in *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, C-112/00, EU:C:2003:333

²⁴⁹ A. DASHWOOD, *Viking and Laval: Issues of Horizontal Direct Effect* (2008) Cambridge Yearbook of European Legal Studies, pp. 532-533

²⁵⁰ Advocate General Opinion in *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:292, para. 42

²⁵¹ *Ibid.*

²⁵² *Ibid.*

According to Advocate General Poiares Maduro, it is precisely these cases in which the Treaty freedoms should be given horizontal direct effect. For instance, the regulations of sporting associations “*are effectively binding for nearly everyone who wishes to exercise that activity*”²⁵³ and thus they have a “*commanding influence*”²⁵⁴ on the free movement within the area that they regulate. In order to ensure a proper functioning of internal market, the restrictive behaviour of such influential private entities must, according to Advocate General Poiares Maduro, be caught by the free movement rules.

Nevertheless, Advocate General Poiares Maduro also addresses the issue of a clash between the horizontal direct effect of the Treaty freedoms and the exercise of private autonomy which will be further analysed in Section 4.5 of this dissertation. He assured that accepting his proposal would not mean an end to private parties’ autonomy as there is no need for the Court to apply the same standards to private actors as to Member States. “*The Court may apply different levels of scrutiny, depending on the source and seriousness of the impediment to the exercise of the right to freedom of movement, and on the force and validity of competing claims of private autonomy.*”²⁵⁵

I agree with Professor Barnard’s remark that this conclusion “*opened up a further can of worms*”.²⁵⁶ She identifies two main problems, namely the uncertainty as to when the Treaty provisions apply and when they do not and also as to what is the standard of scrutiny in each particular case. Under such circumstances, legal certainty which, as explained in Preface to this dissertation, is pivotal for successful European integration would be seriously jeopardised. Instead, such a vague concept of horizontal direct effect would provide the Court with more “ammunition” for furthering its flexible interpretation of Treaty freedoms²⁵⁷, also discussed in Section 3.2.1 of this dissertation in relation to the substantive scope of the Treaty freedoms.

It shall be noted, however, that there can be, in my opinion, certain similarities drawn between the “shopkeeper example” introduced by Advocate General Poiares Maduro and an interpretation of the notion of dominance under the Treaty rules on competition

²⁵³ Ibid., para. 45

²⁵⁴ Ibid.

²⁵⁵ Ibid., para. 49

²⁵⁶ C. BARNARD, *Viking and Laval: An Introduction* (2008) Cambridge Yearbook of European Legal Studies, pp. 472

²⁵⁷ Ibid.

which has been defined in *Hoffmann-La Roche*²⁵⁸ as “the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers”.²⁵⁹ The adverse practices such as unfair purchase or selling prices or unfair trading conditions only violate European competition law, namely Art. 102 TFEU when they originate from an undertaking which holds a dominant position on the relevant market. If an undertaking with only a marginal position on the market attempted to introduce for instance unfair trading conditions, the customers would have a number of alternative choices where to obtain the goods desired. The attempt to introduce such unfair terms would rather likely initiate the outflow of customers to the undertaking’s competitors and therefore deter the exploitative behaviour. As Advocate General Poiares Maduro put it in his Opinion in *Viking*, “the market will ‘take care of it’”²⁶⁰ and there is therefore no need for the EU competition law to intervene.

On the contrary, when dominant undertakings behave abusively on the market, the customers do not have enough alternative means of obtaining the goods or there is not a sufficient amount of competitors that would deter the undertaking in question from abusing their position in the market. Thus, “the market will *not* (*emphasis added*) ‘take care of it’” and the European law has to step in in order to ensure effective functioning of the internal market.

The concept of dominance as interpreted in *Hoffmann-La Roche* seems to work adequately in the context of European competition rules. A similar concept applies under the Advocate General Poiares Maduro’s “shopkeeper example” explained above. In cases in which a private entities restricting the freedom of movement within the internal market do not have enough influence on the market and there are plenty of alternative means how to exercise the Treaty freedom in question, “the market will ‘take care of it’” and consequently there is no need for European law to step in through acknowledging the horizontal direct effect of Treaty freedoms.

On the contrary, if the private party restricting the freedom of movement has “the power to behave to an appreciable extent independently of those wishing to exercise the

²⁵⁸ Judgement in *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, Case 85/76, EU:C:1979:36

²⁵⁹ *Ibid.*, para. 38

²⁶⁰ Advocate General Opinion in *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:292, para. 42

freedom of movement”, the European law should, according to my understanding of Advocate General Poiares Maduro’s Opinion, regulate such behaviour. Given the aforementioned, in my opinion, an analogy with the notion of dominance under EU competition law could therefore at least under certain circumstance assist in identifying the cases in which the Treaty freedoms should be given horizontal direct effect.²⁶¹ The similarities between the Treaty freedoms and the EU rules on competition are further addressed in a separate Section 4.6 which focuses (rather than on the concept of dominance briefly discussed above) on the potential use of *de minimis* test in the area of the free movement.

In his Opinion Advocate General Poiares Maduro concluded that the private action which “*by virtue of its general effect on the holders of rights to freedom of movement, is capable of restricting them from exercising those rights, by raising an obstacle that they cannot reasonably circumvent*” has to fall within the scope of the Treaty.²⁶² In light of “*the practical effect of the coordinated actions*” taken by the FSU and the ITF on Viking’s freedom of establishment, Advocate General contended that “*the actions of the FSU and the ITF are capable of effectively restricting the exercise of the right to freedom of establishment of an undertaking such as Viking*”.²⁶³ Consequently, Advocate General Poiares Maduro advised the Court to rule that Art. 49 TFEU has horizontal direct effect in the proceedings in question.²⁶⁴

The Court did not adopt or even deal with the controversial proposal of Advocate General Poiares Maduro. It rather repeated its *effet utile* argument from judgements *Walrave and Koch*, *Bosman* and *Angonese* stating that not to apply the Treaty freedoms to private organisations would compromise the objective of the creation of the internal market. ITF argued that the conclusions deriving from the aforementioned case law are only true with respect to organisations with quasi-governmental status performing

²⁶¹ Further, the CJEU has in its case law developed a number of presumptions of dominance pertaining to particular market shares of undertakings accused of abusing their dominant position. For instance in *AKZO*, the Court stated that “very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation where there is a market share of 50% such as that found to exist in this case.” (Judgement in *AKZO Chemie BV v Commission of the European Communities*, C-62/86, EU:C:1991:286, para. 60)

²⁶² Advocate General Opinion in *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:292, para. 48

²⁶³ *Ibid.*, para. 55

²⁶⁴ *Ibid.*, para. 56

quasi-state functions.²⁶⁵ However, the Court made it clear that “*there is no indication in that case-law that could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers*”.²⁶⁶ It pointed out that in exercising their “*autonomous power*”²⁶⁷ guaranteed by the right to take collective action, “*trade unions participate in the drawing up of agreements seeking to regulate paid work collectively*”.²⁶⁸

Hence, following the Court’s judgement, Art. 49 TFEU can be invoked directly against trade unions by any other party complaining of an infringement of their free movement rights but it is not apparent which particular collective action is caught by this ruling and which is not. As Professor Barnard notes, massive strikes of individuals protesting against social dumping have certain collective dimension even if their action is not officially supported by trade unions.²⁶⁹ This collective dimension was also addressed in another landmark case *Laval* regarding Swedish trade unions protesting against a Latvian company which is analysed in the following section.

²⁶⁵ The wording being similar to how Professor Van den Bogaert described situation with respect to the horizontal direct effect of the Treaty freedoms after *Walrave and Koch* (see Section 4.1.1, pp. 49).

²⁶⁶ Judgement in *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772, para. 65

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*; The notion “*regulate paid work collectively*” was used by the Court in its aforementioned judgements on the horizontal direct effect of Art. 45 TFEU in *Angonese*, para. 39 and *Erny*, para. 36.

²⁶⁹ C. BARNARD, *Viking and Laval: An Introduction* (2008) Cambridge Yearbook of European Legal Studies, pp. 473

4.2.2 The free movement of services – *Laval*

In *Laval* a Swedish construction workers trade union Svenska Byggnadsarbetareförbundet (hereafter also referred to as “**Byggnads**”) and its local branch protested against another circumvention of the transitional restrictions on the free movement of workers after the accession of new Member States in 2004.

Laval un Partneri Ltd (hereafter also referred to as “**Laval**”), a company incorporated under Latvian law won a government contract for the renovation of school premises in Stockoholm suburbs Vaxholm. Laval posted, through a Swedish company L&P Baltic Bygg AB whose entire share capital was owned by Laval, 35 workers to its building sites.²⁷⁰ The posted Latvian workers earned around 40% less than comparable Swedish workers.²⁷¹

Laval was a party to a Latvian collective agreement with the Latvian construction workers trade union, to which several of Laval’s workers were associated (whereas none of them were members of Byggnads). However, Byggnads wished that Laval concluded a collective agreement with Swedish trade unions so that it would be bound to apply the Swedish employment standards.

Under Swedish law, the national collective agreement covers a range of matters but the exact pay was to be negotiated with the local branches of trade unions on a case-to-case basis. The local branch of Byggnads demanded that Laval paid its workers approximately EUR 16 per hour.²⁷² If Laval accepted such terms, it would lose its comparative advantage as opposed to Swedish construction companies, substantially cheaper labour force. The negotiations between Laval, Byggnads and its local branch were not successful. Subsequently, the trade unions initiated a collective action which resulted in a blockade of building site in Vaxholm preventing delivery of goods and

²⁷⁰ Judgement in *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:809, para. 27

²⁷¹ C. BARNARD, Social dumping or dumping socialism? (2008), *The Cambridge Law Journal*, Issue 2, pp. 263

²⁷² Judgement in *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:809, para. 30

vehicles from entering the site.²⁷³ Laval's difficulties in completing the project escalated even more as Swedish electricians' trade union initiated a sympathy action and prevented its members from providing services to Laval. In the end, Laval was not able to carry out its services in Sweden anymore and the municipality of Vaxholm terminated its contract with Laval's Swedish subsidiary which went bankrupt only a few weeks afterwards.²⁷⁴

Laval brought an action against trade unions before Swedish court complaining of the infringement of its freedom to provide services under Art. 56 TFEU and asking the national court *inter alia* to declare their action unlawful and order Byggnads and its local branch to compensate it for the losses suffered.²⁷⁵ It shall be noted that the dispute also involved interpretation of Directive 96/71/EC²⁷⁶ which sets for minimal standards of protection for workers posted to work in another Member State.

The Court was again, similarly as in *Viking*, asked to rule on a question whether one of the Treaty freedoms – in this case the freedom to provide services can be directly applicable in a horizontal dispute between a company and trade unions. Advocate General Mengozzi, unlike Advocate General Poiares Maduro in *Viking*, approached the issue of horizontal direct effect in a more traditional manner. He extended the *effet utile* argument formulated by the CJEU in *Walrave and Koch* while stating that the abolition of the “*obstacles to the free movement of services would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or bodies which do not come under public law*”.²⁷⁷

²⁷³ *Ibid.*, para. 34

²⁷⁴ *Ibid.*, para. 38

²⁷⁵ A.C.L. DAVIES, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ* (2008) *Industrial Law Journal*, Issue 2, pp. 127

²⁷⁶ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/ 1

²⁷⁷ Advocate General Opinion in *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:291, para. 156

The Court followed exactly the same line of argumentation in its judgement.²⁷⁸ It added that a right of trade unions to take collective action and thereby force undertakings from other Member States to conclude collective agreements under unfavourable terms is liable to “*make it less attractive, or more difficult*”²⁷⁹ for these undertakings to exercise their right to provide services throughout the European Union.

Even though the Court ruled while citing various international human rights treaties that the right to take collective action constituted a fundamental right, it at the same time emphasized that it might be subject to certain restrictions and must in any event comply with the principle of proportionality.²⁸⁰ The collective action aimed at the protection of workers from social dumping (which according to the Court might under certain circumstances constitute an overriding reason of public interest) must therefore, as the CJEU explained in *Viking*, “*suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective*”.²⁸¹

This analysis has been criticised by the General Secretary of European Trade Union Confederation (hereafter also referred to as the “**ETUC**”) John Monks as “*a licence for social dumping*” and preventing trade unions around the European Union from taking effective measures to improve situation on the labour market in their countries because any successful trade union action would be automatically challenged by private companies as a disproportionate restriction of their freedom of movement. According to ETUC, social rights shall take precedence over the Treaty freedoms and not vice versa as it appeared from *Viking* and *Laval*.²⁸²

As an answer to the Court’s alleged favouring of the free movement rules over the right to take collective action, trade unions soon proved the CJEU’s argument that the effective trade union action is liable for making it less attractive or more difficult to

²⁷⁸ Judgement in *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:809, para. 98

²⁷⁹ *Ibid.*, para. 99

²⁸⁰ *Ibid.*, para. 90-94

²⁸¹ Judgement in *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772, para. 90

²⁸² C. BARNARD, *Viking and Laval: An Introduction* (2008) Cambridge Yearbook of European Legal Studies, pp. 487

exercise the freedom of movement soon to be correct even in a bigger scale. The campaign of Technical Engineering and Electrical Union before the Irish referendum on the Treaty of Lisbon urging its 45,000 members to vote against it²⁸³ resulted in repercussions for the European integration project as a whole when Ireland voted “No.”²⁸⁴

The reaction of trade unions to *Viking* and *Laval* demonstrates that despite the contentions of the CJEU as to the limits of the right to take collective action, trade unions are determined to protect their employment standards. Accordingly, trade unions in the United Kingdom also threatened to vote for the UK to leave the European Union if David Cameron weakens the workers’ rights during the course of his negotiations with the EU representatives.²⁸⁵

In the light of the considerable influence that trade unions possess due to their members, Advocate General Mengozzi in his Opinion mentioned an interesting distinguishing feature between trade unions, which although not being Member States nor professional organisations like in *Walrave and Koch* or *Bosman* are according to the Court subjected to the same level of scrutiny as Member States when it comes to the Treaty freedoms, and other private entities. He contended that “*private persons whose action has a collective effect on the labour market and the cross-border provision of services*” like Swedish trade unions in *Laval* should be subjected to the same level of scrutiny like Member States.²⁸⁶

It shall be noted, however, that the collective effect of the actions taken by trade unions depends primarily on the means they choose to employ in a particular case. For instance, a leafleting campaign is substantially less effective than a blockade of a building site and thus in many cases not even able to hamper employers’ access to the market of another Member State. The more restrictive of the employers’ Treaty

²⁸³ Ibid.

²⁸⁴ As a German newspaper Der Spiegel reported, the Irish vote put the EU in “chaos”. The article retrieved from <http://www.spiegel.de/international/europe/lisbon-treaty-in-tatters-eu-in-chaos-after-ireland-s-no-vote-a-559730.html> on 26 September 2015

²⁸⁵ Trade union members could vote for UK to leave European Union retrieved from <http://www.theguardian.com/politics/2015/sep/15/trade-union-uk-european-union-tuc-referendum> on 26 September 2015

²⁸⁶ Advocate General Opinion in *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:291, para. 238

freedoms the trade union action will be, the harder it will be to justify such action under the EU free movement rules.²⁸⁷

Hence, in the case of trade unions, also the criterion of being able to collectively regulate the provision of services largely depends on the effectivity of the collective action in each particular case. In *Laval*, the blockade of the building site by trade unions eventually caused that Laval's Swedish subsidiary became insolvent which strengthened the analogy with regulatory bodies in *Walrave and Koch* and *Bosman*.²⁸⁸

However, whereby in the case of professional regulatory bodies in the latter cases, Member States delegate to them exclusive control over a pursuit of certain activity, trade unions only exercise such control indirectly through the bargaining power they enjoy and the right to take collective action to support their negotiating position.²⁸⁹

In my opinion, the more the actions of trade unions resemble the control of regulatory bodies, the less likely they are to comply with the proportionality principle. Consequently, in such situations there would not be a lot of room to manoeuvre left to justify the restriction on the free movement for trade unions whose actions would be deemed to fall within the scope of horizontal direct effect of the Treaty freedoms.

Additionally, it is not only trade unions whose action can have collective effect on the free movement within the internal market. For instance, a boycott of a coalition of consumers concerned with human rights or animal testing of cosmetics against a corporation wishing to enter the UK market and not having a favourable record in this respect might have similar detrimental effects on its ability to exercise its freedom of movement.²⁹⁰

Consequently, the collective character of an action and its effect and thus also the possibility to draw analogy between such action and non-governmental regulatory bodies largely depends on the facts of each particular case. It therefore does not contribute to legal certainty of non-governmental bodies which are not officially vested

²⁸⁷ A.C.L. DAVIES, One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ (2008) *Industrial Law Journal*, Issue 2, pp. 142-143

²⁸⁸ *Ibid.*, 136-137

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

with regulatory powers but their action might still fall within the personal scope of the Treaty freedoms.

An alternative approach discussed by Professor Barnard is that the Treaty freedoms should apply to the actions of private entities when they exercise regulatory tasks typically performed by a state, for instance setting a minimum wage on a national basis but not to actions which could not be carried out by governmental authorities such as a boycott in order to support their position in negotiations on a higher wage than is the minimum standard laid down by the law.²⁹¹ The question however remains whether such regulatory activities exercised by private parties would also have to be at least indirectly connected to a state, for instance delegated, initiated or funded by a state.

In any event, according to a number of legal scholars there is an increasing need to formulate a uniform test with respect to the horizontal direct effect that would encompass all Treaty freedoms in order to provide certainty in this field of law. The demands for coherent interpretation of the free movement rule are backed *inter alia* by an argument that they are envisaged to attain the same objective, which is an internal market integration.²⁹² As discussed above in Section 2.5 of this dissertation, also Advocate General Poiares Maduro in his Opinion in *Alfa Vita* points out that application of different standards depending on the particular Treaty freedom does not add much to the consistency of the Court's case law.

The above analysis of the CJEU's case law in the area of the free movement of workers under Art. 45 TFEU, the freedom of establishment under Art. 49 TFEU and the free movement of services under Art. 56 TFEU demonstrates that a similar line of argumentation is followed when it comes to applying the aforementioned rules to actions of private entities which influence the free movement in a collective manner. The following section looks in to whether the same standard of scrutiny is applied by the Court to the free movement of goods under Art. 34 TFEU.

²⁹¹ C. BARNARD, *Viking and Laval: An Introduction* (2008) Cambridge Yearbook of European Legal Studies, pp. 473; It shall be noted that in cases in which the individuals cannot be held liable for the infringement of the free movement provisions, Member States can still be responsible for their failure to prevent these individuals from obstructing the free movement. This approach will be further discussed in Section 4.3.1 of this dissertation.

²⁹² C. KRENN, *A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods* (2012) *Common Market Law Review*, Issue 1, pp. 183 - 184

4.3 The free movement of goods

4.3.1 Indirect horizontal effect – *Dansk Supermarked and beyond*

Under the traditional distinction between the Treaty freedoms and competition rules mentioned in Section 3.2.2 of this dissertation, the sole addressees of the former were intended to be Member States whereas the latter were supposed to govern the conduct of private parties. Since the Court’s judgement in *Dassonville* in which the Court ruled that Art. 34 TFEU applies to “*all trading rules enacted by Member States*”²⁹³, this traditional distinction was accepted (at least) with respect to the free movement of goods.²⁹⁴

However, in the early 1980s in *Dansk Supermarked*²⁹⁵, the Court cast a doubt on such interpretation of Art. 34 TFEU. A/S Imerco (hereafter also referred to as “**Imerco**”), a Danish grouping of hardware merchants ordered a limited edition of china from a manufacturer established in the UK James Broadhurst & Sons Ltd (hereafter also referred to as “**Broadhurst**”) in order to celebrate its 50th anniversary. The china was supposed to be decorated with Danish castles and an inscription “Imerco Fiftieth Anniversary” whereas Imerco prescribed rigid quality standards in its manufacture.

As a consequence, approximately 1 000 lots could not have been accepted because they did not comply with these stringent standards. Imerico and Broadhurst therefore agreed that the latter would be able to sell these lots upon condition that they would not be marketed in Scandinavian countries. Nevertheless, a re-seller which obtained china in the United Kingdom afterwards sold it to Dansk Supermarked, an undertaking established in Denmark which subsequently offered the lots on sale in its supermarkets.

Imerico then brought an action against Dansk Supermarked. The court of first instance ruled that the conduct of Dansk Supermarked was in breach of the Danish law in that they were contrary to *inter alia* the approved marketing usage. Danks Supermarked appealed from the judgement to the Danish Supreme Court claiming that the application

²⁹³ Judgement in *Procureur du Roi v Benoît and Gustave Dassonville*, C-8/74, EU:C:1974:82, para. 5

²⁹⁴ S. DE VRIES, R. VAN MASTRIGT, *The Horizontal Direct Effect of the Four Freedoms: From a Hodgepodge of Cases to a Seamless Web of Judicial Protection in the EU Single Market* in U. BERNITZ, X. GROUSSOT, F. SCHULYOK, *General principles of EU law and European private law*, 1st ed. (2013), pp. 261

²⁹⁵ Judgement in *Dansk Supermarked A/S v A/S Imerco*, Case 58/80, EU:C:1981:17

of provisions relied on by the court of first instance is precluded by the EEC Treaty, among other the free movement rules. The Danish Supreme Court stayed the proceedings and referred a preliminary question to the CJEU asking whether the application of national regulation of copyright, trademark and marketing was precluded by the EEC Treaty. The Court reformulated the question as to whether the Treaty freedoms prevented an undertaking from employing the aforementioned set of rules with the view of hampering goods lawfully placed on the market in one Member State from being marketed in another Member State.

The Court explained that an exclusive intellectual property right provided for by the national legislation is exhausted once the product benefiting from the corresponding protection is lawfully introduced in another Member State by or with the consent of the proprietor of that intellectual property right.²⁹⁶ Consequently, national authorities affording protection to the holder of copyright or trademark after such exclusive right has been exhausted in a manner similar to the facts of *Dansk Supermarked* would act contrary to Art. 34 TFEU.

More importantly, in connection with the agreement between Imerico and Broadhurst on the prohibition of marketing of china with Imerico inscription in Scandinavian countries, the Court ruled that “*it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods*”.²⁹⁷ This reasoning triggered an academic discourse and was interpreted by many authors as the Court’s confirmation that the application of the rules on the free movement of goods is not only limited to the Member States but is also capable of having horizontal direct effect.²⁹⁸

It shall be noted that the binding nature of Art. 34 TFEU on the relationships between private parties has only been acknowledged in the Court’s ruling in *Dansk Supermarked*.²⁹⁹ Moreover, another argument against the horizontal direct effect of the rules on the free movement of goods is the specific nature of intellectual property rights.

²⁹⁶ Ibid., para. 11

²⁹⁷ Ibid., para. 17

²⁹⁸ S. VAN DEN BOGAERT, *Horizontality: The Court Attacks?* in C. BARNARD, J. SCOTT, *The Law of the Single European Market*, 1st ed. (2002), pp. 130

²⁹⁹ P. OLIVER, S. ENCHELMAIER, *Free Movement of Goods: Recent Developments in the Case Law* (2007) *Common Market Law Review*, Issue 3, pp. 661

As explained above, they are intended to confer on their proprietors exclusive rights. For instance, in case of patents, the holder of the right is given protection by law in that he can be the first one to introduce a patented product on the market and enjoy economic benefits stemming therefrom. Nevertheless, provided that the holder of a patent exercises this right, he cannot claim any more rights in this respect, for instance he cannot attempt to prevent an import of a product to the Member State where he is established as was the case in *Dansk Supermarked*. Hence if the proprietor of intellectual property right wishes to exercise additional rights in the manner described above, there is an impression that it is this private entity's action which hampers trade between Member States.³⁰⁰

However, some legal scholars argue that in fact it is the national law of a particular Member State and not the intellectual property right holder's exercise of this right that is "*the source of the restriction*".³⁰¹ The reasoning behind it is that the proprietor of an intellectual property right cannot himself determine either the content or the extent of his right but merely triggers the application of a statutory provision which affords him protection in this respect.³⁰² Furthermore, in the absence of national legislation, the intellectual property rights would not even exist.³⁰³

Shortly after *Dansk Supermarked* the Court expressly denied the possibility of applying Art. 34 TFEU in a horizontal dispute in *Vereniging van Vlaamse Reisbureaus*³⁰⁴, a case concerning a grant of rebates which was contrary to the rules for commercial practices of travel agents laid down by national legislation. The Court ruled that as the rules on the free movement of goods "*concern only public measures and not the conduct of undertakings, it is only the compatibility with those articles of national provisions of the kind at issue in the main proceedings that need be examined*".³⁰⁵ Following *Vereniging*

³⁰⁰ P. C. DE SOUSA, Horizontal Expressions of Vertical Desires: Horizontal Effect and the Scope of the EU Fundamental Freedoms (2013) Cambridge Journal of International and Comparative Law, Issue 3, pp. 484 - 485

³⁰¹ C. KRENN, A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods (2012) Common Market Law Review, Issue 1, pp. 180 - 181

³⁰² Ibid.

³⁰³ P. OLIVER, S. ENCHELMAIER, Free Movement of Goods: Recent Developments in the Case Law (2007) Common Market Law Review, Issue 3, pp. 662

³⁰⁴ Judgement in *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, Case 311/85, EU:C:1987:418

³⁰⁵ Ibid., para. 30

van Vlaamse Reisbureaus the Court confined itself to examining whether national rules comply with Art. 34 TFEU also in the context of intellectual property disputes.³⁰⁶

Consequently, under this principle of indirect horizontal effect also analysed in Section 3.2.2 of this dissertation, in order to comply with EU law, the national courts must apply the Member States' legislation in line with the free movement rules. However, as discussed earlier, this approach does not add much to the legal certainty of stakeholders in the integrated internal market as the effect of the Union law on their for instance intellectual property dispute would significantly depend on the wording of national substantive law and interpretation techniques used by the national judiciary.

In light of the above mentioned, as Professor Barnard notes, removing barriers to trade is not sufficient in order to achieve successful integration of the single market. Especially in cases where different standards of scrutiny apply depending on the Member States in which one wishes to pursue his free movement rights, there arises a need for single harmonised standards and thus for the application of Art. 114 TFEU.³⁰⁷

Such approach to combating legal uncertainty can be also found in the field of intellectual property law. The private entities can nowadays decide to protect their rights on the European level under the Council Regulation No. 207/2009 of 26 February 2009 on the Community trade mark and Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs before the Office for Harmonization on the Internal Market. Additionally, the agreement between Member States to install a Unified Patent Court is currently being ratified. The regulation harmonising the protection of patents³⁰⁸ will also apply from the date of entry into force of the aforementioned agreement.

In *Sapod Audic*³⁰⁹, a dispute arose between a company organising systems of waste disposal and recovery Eco-Emballages SA and a French manufacturer of poultry packaged in plastic wrappings Sapod Audic. The dispute concerned the rules which

³⁰⁶ C. KRENN, A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods (2012) *Common Market Law Review*, Issue 1, pp. 181

³⁰⁷ C. BARNARD, *The Substantive Law of the EU*, 4th ed. (2013), pp. 14

³⁰⁸ Regulation (EU) No. 1275/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection [2012] OJ L 201/1

³⁰⁹ Judgement in *Sapod Audic v Eco-Emballages SA*, C-159/00, EU:C:2002:343

required importers of household products from other Member States to use packaging meeting certain technical requirements, subscribe to an approved system for packaging waste recovery and evidence the fulfilment of those obligations by way of a logo affixed to the packaging. The parties concluded a contract under which non-exclusive licence to use the required logo was granted to Sapod Audic. The Court ruled that “*a contractual provision cannot be regarded as a barrier to trade for the purposes of Article 30 of the Treaty*”³¹⁰ since it was not imposed by a Member State but agreed between individuals”.³¹¹ Thus, the Court made it clear, citing back to its reasoning in *Dassonville* (which is also mentioned above) that Art. 34 TFEU could not apply in a horizontal dispute between private entities whose legal relationship is based on contract.

One of the arguments against the horizontal direct effect of the free movement of goods is based on an assertion that individual persons acting as consumers on the relevant market who prefer to buy for instance their national products over the imported ones should not fear the risk of being sued by an importer of a product based on the free movement rules.³¹²

The situation described above resembles the facts of the case in *Buy Irish*³¹³ in which the Court formulated a different set of criteria to be taken into account when assessing private entities’ liability for the hindrance of the free movement of goods. In this case the Irish government launched a three-year programme in order to promote purchase of Irish products with the “Guaranteed Irish” symbol.

Subsequently, there was a massive media campaign launched by the Irish Goods Council (hereafter also referred to as the “**IGC**”), a company limited by guarantee incorporated under the sponsorship of a government a few months after the programme had been launched, whereas the Irish government had a right to appoint a number of the IGC’s members and had borne a considerable proportion of the IGC’s costs.³¹⁴ The advertising campaign went on further even after the lapse of the three-year period of the duration of the programme. There was an extensive advertising of Irish products on TV

³¹⁰ Nowadays Art. 34 TFEU

³¹¹ Judgement in *Sapod Audic v Eco-Emballages SA*, C-159/00, EU:C:2002:343, para. 74

³¹² L. W. GORMLEY, Private Parties and the Free Movement of Goods: Responsible, Irresponsible or a Lack of Principles? (2015) *Fordham International Law Journal*, Issue 4, pp. 998

³¹³ Judgement in *Commission of the European Communities v Ireland*, Case 249/81, EU:C:1982:402

³¹⁴ *Ibid.*, para. 5, 10, 15

and in the press.³¹⁵ Subsequently, the Commission brought an action against Ireland on the grounds that the measures introduced under the “Buy Irish” campaign constituted measures having effect equivalent to the quantitative restrictions on imports and the actions of IGC were attributable to the Member State.

The Court noted at the outset that “*the campaign cannot be likened to advertising by private or public undertakings, or by a group of undertakings, to encourage people to buy goods produced by those undertakings*”.³¹⁶ The decisive point *in casu* was according to the CJEU that the promotion campaign and related advertising could not have been “*divorced from its origin*” meaning the Irish government which introduced the campaign and assisted in its execution.³¹⁷ Hence, the Irish government was held to fail to fulfil its obligations stemming from the free movement of goods rules.

Accordingly, the Court’s judgement has been interpreted as indicating that the criterion with respect to the application of Art. 34 TFEU is whether the actions of an entity which is not itself a governmental authority are “*State initiated, managed by State appointees, largely State-funded*”.³¹⁸ It shall be noted that the “Buy Irish” programme still exists and it was merely separated from the Irish government through establishing an independent non-profit company.³¹⁹

The question however remains: Is the effect of the “Buy Irish” campaign on the free movement of goods any different solely because it is now separated from a state? In my opinion it is not and to make such a distinction in this respect is not entirely in line with the Court’s *effet utile* argument as will be discussed below.

Accordingly, individuals when acting collectively, even when their actions are not initiated, funded or managed by a state, can have considerable influence on the exercise of the free movement of goods. Similarly as in *Viking* or *Laval* a well organised protest action of a group of individuals or a boycott can be liable for making it less attractive or more difficult to exercise the free movement in the EU.

³¹⁵ Ibid., para. 7

³¹⁶ Ibid., para. 23

³¹⁷ Ibid., para. 26 - 27

³¹⁸ L. W. GORMLEY, Private Parties and the Free Movement of Goods: Responsible, Irresponsible or a Lack of Principles? (2015) Fordham International Law Journal, Issue 4, pp. 997

³¹⁹ Ibid.

This was the case in for instance *Spanish strawberries* wherein French farmers protested against the imports of fruit and vegetables from other Member States. The violent acts of the individuals *in casu* comprised *inter alia* the destruction of the loads of lorries transporting agricultural products to France, violence against their drivers, threats against French supermarkets selling products from other Member States, and the damaging of such goods when on display in shops.³²⁰

It can be well argued that the aforementioned acts are even graver than blocking of a building site in *Laval* but the Court did take the same approach as regards the horizontal direct effect in respect of a Treaty freedom in question. In *Spanish strawberries* the Court held that France was accountable for failure to prevent these private individuals from obstructing the free movement of goods through their violent acts.

According to the Court, Member States did not only have to “*abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also...to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory*”.³²¹

The Court adopted a similar approach in *Schmidberger* concerning an almost 30-hour protest of Transitforum Austria Tirol (hereafter also referred to as the “**TAT**”), an Austrian association for the protection of biosphere in the Alpine region, on the Brenner motorway, a major transit route between northern Europe and northern Italy.³²² The environmental association gave notice of the protest to local government authorities and the issue received a lot of attention in media which advised motorists to avoid the route.³²³

The subsequent blockade of the motorway resulted in an immobilisation of heavy goods vehicles therein, including among others, those of a German undertaking Schmidberger transporting timber and steel from Italy to Germany. Even though the demonstration was carried out by individuals with the backing of an environmental organisation,

³²⁰Judgement in *Commission of the European Communities v French Republic*, C-265/95, EU:C:1997:595, para. 3

³²¹ *Ibid.*, para. 32

³²² P. C. DE SOUSA, *Horizontal Expressions of Vertical Desires: Horizontal Effect and the Scope of the EU Fundamental Freedoms* (2013) *Cambridge Journal of International and Comparative Law*, Issue 3, pp. 485

³²³ Judgement in *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, C-112/00, EU:C:2003:333, para. 10 - 12

Schmidberger brought an action against Austria. It argued that it was the failure of Austrian authorities to ban the blockade and prevent the motorway from being closed down which constituted a restriction of the free movement of goods.³²⁴

In its ruling on the responsibility of Austria for the actions of individuals blocking the motorway, the Court took a similar approach as in *Spanish strawberries*³²⁵, thus reviewing the possible liability of Member States for the restriction on free movement of goods and for the failure to regulate the actions of private entities in their territory.³²⁶ Even though the Court adopted a similar test, it concluded that in the circumstances of *Schmidberger*, the restrictions on the trade were proportionate in light of the objectives pursued *in casu* and thus no liability on the part of Austria arose.³²⁷

In my opinion, hypothetically, if this dispute would have arisen following the Court's rulings in *Viking* and *Laval*, one could also consider whether there is a difference between individual trade union members blocking a building site under the auspices of a trade union and protesters blocking a motorway being backed by an environmental organisation.

Should the action have been brought against TAT, the Court's *effet utile* argument from the free movement of workers, services and freedom of establishment case law³²⁸ discussed in Sections 4.1 and 4.2 could imply a similar conclusion in that the obstacles created by TAT cannot neutralise the creation of the internal market and therefore also have to fall under the personal scope of the Treaty freedoms.

Nevertheless, since the action was (similarly as in *Spanish strawberries*) brought against a Member State on the basis of "*public inaction*"³²⁹ and the dispute did not involve a private entity the issues pertaining to the horizontal direct effect of the free

³²⁴ Ibid., para. 16

³²⁵ Ibid., para. 64

³²⁶ P. C. DE SOUSA, Horizontal Expressions of Vertical Desires: Horizontal Effect and the Scope of the EU Fundamental Freedoms (2013) Cambridge Journal of International and Comparative Law, Issue3, pp. 486

³²⁷ Judgement in *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, C-112/00, EU:C:2003:333, para. 93-95

³²⁸ Starting with *Walrave and Koch* wherein the Court stated that the attainment of the objectives of the free movement would "*be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law*" (para. 18)

³²⁹ A. DASHWOOD, *Viking and Laval: Issues of Horizontal Direct Effect* (2008) Cambridge Yearbook of European Legal Studies, pp. 532

movement of goods could not even have been addressed by the CJEU as under Art. 267 TFEU the national court does not have jurisdiction to ask hypothetical questions.

Hence, the state of the art in respect of horizontal direct effect of free movement goods in the beginning of the second decade of this century was that Art. 34 TFEU only imposed obligations on private parties insofar as their actions could have been attributable to a state as was the case in *Buy Irish*.³³⁰ On contrary, the full horizontal direct effect of Art. 45 TFEU on the free movement of workers was accepted in *Angonese* and Art. 49 TFEU and Art. 56 TFEU on the freedom of establishment and the free movement of services respectively have been applied in a dispute involving private entities not connected with a state (but having collective influence on the market) such as in *Viking* or *Laval*.

This distinction was (and as will be discussed below most probably still is) entirely not in line with claims for the uniform application of the Treaty freedoms. In this respect, some legal scholars have called the contrast between the free movement of goods and the other freedoms “*manifest*” and provoking “*the enquiry as to whether such distinction is justified*”.³³¹ In 2012, the Court had an opportunity to bring more clarity into the issues of horizontal direct effect of Art. 34 TFEU in *Fra.bo*.³³² The questions as to whether it succeeded in doing so will be discussed in the following section.

³³⁰ P. OLIVER, S. ENCHELMAIER, Free Movement of Goods: Recent Developments in the Case Law (2007) Common Market Law Review, Issue 3, pp. 663

³³¹ C. KRENN, A Missing Piece in the Horizontal Effect “Jigsaw”: Horizontal Direct Effect and the Free Movement of Goods (2012) Common Market Law Review, Issue 1, pp. 183

³³² Judgement in *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) - Technisch-Wissenschaftlicher Verein*, C-171/11, EU:C:2012:453

4.3.2 The power to regulate – *Fra.bo*

In *Fra.bo* an Italian manufacturer of copper fittings used to connect gas or water pipes with sealing rings which make them watertight *Fra.bo* SpA (hereafter also referred to as “**Fra.bo**”) brought a lawsuit against a German association of gas and water providers DVGW³³³, a non-profit organisation governed by private law and not financed by governmental authorities. Under German law, in order to offer the copper fittings on the German market, manufacturers had to possess a certification of compliance with certain technical requirements. The products certified by DVGW were deemed to comply with the relevant standards.³³⁴

Although there were also other means to obtain the certification for copper fittings, the alternative procedures were rather burdensome so in reality DVGW offered the only plausible option of acquiring the required certificate.³³⁵ At first DVGW granted the certificate to *Fra.bo* for a period of five years but shortly before the lapse of that period, it cancelled the *Fra.bo*’s certificate on grounds that the undertaking’s copper fittings did not conform to the new tests for copper fittings introduced by DVGW.³³⁶

In its action *Fra.bo* contended that the cancellation of the certificate (and the refusal to grant a new one) by DVGW significantly restricted its access to the relevant market and was thus in breach of the Treaty rules on the free movement of goods. DVGW’s defence subsisted primarily in a claim stating that since it is an entity governed by private law, it could not be bound by Art. 34 TFEU. According to DVGW, this provision only triggered the actions of Germany in adopting the legislation which required the manufacturers to possess the certificate in question.³³⁷

It shall be noted at the outset that the Court’s ruling is based solely on the arguments deriving from the particular circumstances of this case and that the CJEU did not explicitly mention the horizontal direct effect in its judgement even once.³³⁸ Firstly, the

³³³ An abbreviation of German Deutsche Vereinigung des Gas- und Wasserfaches eV;

³³⁴ Judgement in *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) - Technisch-Wissenschaftlicher Verein*, C-171/11, EU:C:2012:453, paras. 3 – 7, 27

³³⁵ *Ibid.*, para. 28 - 29

³³⁶ *Ibid.*, para. 9-12

³³⁷ *Ibid.*, para. 13-14

³³⁸ S. DE VRIES, R. VAN MASTRIGT, The Horizontal Direct Effect of the Four Freedoms: From a Hodgepodge of Cases to a Seamless Web of Judicial Protection in the EU Single Market in U.

Court explained that the fact the manufacturer established in one Member State is discouraged from importing his goods to another Member State constitutes a restriction. It further acknowledged that DVGW was virtually the only entity providing the required certification for copper fittings. The German association's influence was reinforced by the fact that in practice all German customers purchased copper fittings certified by DVGW. The Court thereby ruled that *"the lack of certification by the DVGW places a considerable restriction on the marketing of the products concerned on the German market"*.³³⁹

It followed that *"it is clear that a body such as the DVGW, by virtue of its authority to certify the products, in reality holds the power to regulate the entry into the German market of products such as the copper fittings at issue in the main proceedings"* and the standardization activities of DVGW thereby fell within the scope of Art. 34 TFEU.³⁴⁰

It is however less clear how to interpret the Court's judgement in the bigger scheme of the question of the horizontal direct effect of the free movement of goods. On the one hand, Professor Gormley argues that even though formally DVGW was not acting as a government authority, the power of a state has been effectively delegated to it and that *"functionally it had become an extension or instrument of the State"*.³⁴¹ He further contends that there is nothing in the ruling that would suggest the application of Art. 34 TFEU in a situation different from the circumstances of this case.³⁴²

On the other hand, Advocate General Trstenjak in her Opinion took a more general approach and suggested that in order to justify the horizontal direct effect of Art. 34 TFEU, the Court's reasoning in cases concerning Art. 45 TFEU, Art. 49 TFEU and Art. 56 TFEU can be applied *"per analogiam"*.³⁴³ She argues that insofar as the horizontal direct effect of the latter provisions is substantiated with *"a reference to the effects of those collective rules"*, it would hardly be possible to argue that the measures with such

BERNITZ, X. GROUSSOT, F. SCHULYOK, General principles of EU law and European private law, 1st ed. (2013), pp. 262

³³⁹ Judgement in *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) - Technisch-Wissenschaftlicher Verein*, C-171/11, EU:C:2012:453, para. 30

³⁴⁰ *Ibid.*, para. 31 - 32

³⁴¹ L. W. GORMLEY, Private Parties and the Free Movement of Goods: Responsible, Irresponsible or a Lack of Principles? (2015) Fordham International Law Journal, Issue 4, pp. 1002

³⁴² *Ibid.*

³⁴³ Advocate General Opinion in *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) - Technisch-Wissenschaftlicher Verein*, C-171/11, EU:C:2012:176, para. 43

collective effect concerning the free movement of goods or capital have to be categorically excluded from the scope of the Treaty solely because they emanate from private entities.³⁴⁴

Advocate General recalls the Court's reasoning repeated in *Walrave and Koch*, *Bosman* and *Angonese* on the free movement of workers, in *Viking* on the freedom of establishment and in *Laval* on the free movement of services wherein the Court consistently held that “*the abolition, as between Member States, of obstacles to the freedom of movement and the freedom to provide services 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*”.³⁴⁵

Consequently, provided that this *effet utile* argument would have been applied to the activities of DVGW, or alternatively, its application at least expressly denied, the CJEU would bring greater clarity to the issue of the horizontal direct effect of Treaty freedoms. However, given the “*careful approach of the Court*” the exact implications of the ruling for private entities remain unclear.³⁴⁶

Taking into account the political reality in the United Kingdom prevailing at the time of the delivery of the judgement, one can only speculate as to whether there is any relationship between the Court's “*careful approach*” to the issue of horizontal direct effect in *Fra.bo* and the calls of certain members of the United Kingdom's Conservative party for locks on the transfer of sovereignty of the EU and criticism of, according to these politicians, “*free-standing and self-serving ECJ*”³⁴⁷ *doctrinal creations*”.³⁴⁸

³⁴⁴ *Ibid.*, para. 44

³⁴⁵ *Ibid.*, para. 46

³⁴⁶ S. DE VRIES, R. VAN MASTRIGT, The Horizontal Direct Effect of the Four Freedoms: From a Hodgepodge of Cases to a Seamless Web of Judicial Protection in the EU Single Market in U. BERNITZ, X. GROUSSOT, F. SCHULYOK, General principles of EU law and European private law, 1st ed. (2013), pp. 263

³⁴⁷ An abbreviation of the European Court of Justice, nowadays the official name of the institution is the Court of Justice of the European Union, usually abbreviated as the “CJEU”;

³⁴⁸ J.E.K. MURKENS, The European Union Act 2011: a failed statute (2012) *Tijdschrift voor Constitutioneel Recht*, Issue 4, pp. 400-401 retrieved from http://www.tvcr.nl/basis.aspx?Lid=2&Lit=VIEW&Query=TVCRU_Editions.Id=13 on 14 November 2015

Focusing on the legal context, *Fra.bo* does undoubtedly not constitute the recognition of the horizontal direct effect of Art. 34 TFEU by CJEU. Nevertheless, it is in any event beneficial that the judgement triggered the academic discourse in this respect again.

4.4 The free movement of capital

Different from the Treaty freedoms discussed above, there is no landmark case of the CJEU in which the horizontal direct effect of the free movement of capital under Art. 63 TFEU would be touched upon, not even to the extent to which it was in *Fra.bo*. The reason behind it is presumably that the development of this Treaty freedom occurred in a manner different than the provisions on the free movement analysed in the preceding sections.

In *Casati*³⁴⁹ there were criminal proceedings initiated against an Italian national after he attempted to transport certain sums of Italian and German currency to Germany without declaring it. At that time, the exportation of currency was subject to prior authorisation. Consequently, Mr. Casati complained that such legislation is not in line with the rules on the free movement of capital. However, the Court denied the provisions on the free movement of capital vertical direct effect stating that it is necessary to ensure the free movement of capital only “to the extent necessary to ensure the proper functioning of the Common Market”³⁵⁰ and that a contrary ruling would undermine the economic and monetary policy of Member States.³⁵¹

It shall be noted that the Court ruled on the non-existence of vertical direct effect of the provisions on the free movement in *Casati* at the time when the vertical direct effect of Art. 34 TFEU on the free movement of goods and Art. 45 TFEU on the free movement of workers had already been recognised in *Spa Salgoil* and *Van Duyn* respectively (the recognition of which was already discussed in Section 3.2.2). Thus, the advancement in respect of the vertical direct effect of these Treaty freedoms can be compared to a double track.

In shall be noted that in its subsequent case law represented by *inter alia Luisi and Carbone*³⁵² the Court also emphasized the difference between the free movement of capital and the free movement of payments. The main criterion in determining this difference is the purpose of the transfer. Whereas the corresponding reason behind the

³⁴⁹ Judgement in *Criminal proceedings against Guerrino Casati*, Case 203/80, EU:C:1981:261

³⁵⁰ *Ibid.*, para. 10

³⁵¹ *Ibid.*, para. 9

³⁵² Judgement in *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro*, Joined cases 286/82 and 26/83, EU:C:1984:35

free movement of capital is an investment in another Member State, the payments are transferred in order to fulfil an obligation of a transferor.³⁵³

Further liberalisation of the free movement of capital was brought about by Directive 88/361³⁵⁴ which set out a list of operations falling thereunder. The Court even nowadays derives the scope of the definition of capital from its wording whereby it recognises that *inter alia* acquisition of shares for the purposes of portfolio investments, investments into, administration and sale of real property or granting credit on a commercial basis triggers the free movement of capital.³⁵⁵

Since the attainment of the free movement of capital was a precondition for Member States to enter the first stage of monetary union which commenced on 1 July 1990 when Directive 88/361 became effective, the development of the Court's case law in this area substantially aligned with the development of European economic and monetary union.³⁵⁶ Subsequently, the Treaty of Maastricht revised the wording of Art. 63 TFEU, which now provides for the free movement of capital and the prohibition of restrictions thereto. In *Sanz de Lera*³⁵⁷ the Court eventually held that Art. 63 TFEU "*laid down a clear and unconditional prohibition for which no implementing measure was required*" and thus the provision could have been invoked against the Member State concerned.³⁵⁸

Given this postponed development, the case law on the horizontal direct effect of Art. 63 TFEU did not yet reach a stage whereby it would be possible to demonstrate its (non-) existence on a particular interpretation of this provision by the CJEU. The analysis in this section will thus focus on the arguments against and in favour of the horizontal direct effect discussed among the academia.

Firstly, Professor Barnard argues that on the basis of the Court's ruling in *Commission v. Germany (Volkswagen)*³⁵⁹ that Art. 63 TFEU is not horizontally directly effective.

³⁵³ M. TOMÁŠEK, V. TÝČ et al., *Právo Evropské unie*, 1st ed. (2013), pp. 240

³⁵⁴ Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1988] OJ L 178/5

³⁵⁵ C. BARNARD, *The Substantive Law of the EU*, 4th ed. (2013), pp. 583

³⁵⁶ *Ibid.*, para. 581, 612 - 614

³⁵⁷ Judgement in *Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu*, Joined cases C-163/94, C-165/94 and C-250/94, ECLI:EU:C:1995:451

³⁵⁸ P. CRAIG, G. DE BÚRCA, *EU Law Text, Cases and Materials*, 5th ed. (2011), pp. 694

³⁵⁹ Judgement in *Commission of the European Communities v Federal Republic of Germany*, C-112/05, EU:C:2007:623

The Commission contended that Volkswagen Law³⁶⁰ setting forth specific rules applicable in respect of shareholders' rights in Volkswagen, namely the limitation on the voting rights that could be acquired by each shareholder and the requirement of higher than the statutory majority in order to pass a resolution of the general meeting in Volkswagen as well as Germany's and Saxony's right to appoint members of the supervisory board of that company constituted a restriction on the free movement of capital.³⁶¹

Germany argued that because these rules stemmed from an agreement between workers and trade unions dated 1959 whereby these private entities agreed to waive their ownership claims over the company in return for the protection against any controlling shareholder, there was no restriction on the free movement of capital within the meaning of the Court's case law.³⁶² The Court ruled that the fact that this agreement between private entities had become the subject of Volkswagen Law sufficed in order "*for it to be considered as a national measure for the purposes of the free movement of capital*".³⁶³

Consequently, Professor Barnard contends that if the Court deemed Art. 63 TFEU to be horizontally directly effective, it could have simply rejected Germany's argument regarding the private nature of the agreement on this basis. Hence, the CJEU's reasoning shows "*some support*"³⁶⁴ for the conclusion that the rules on the free movement of capital are not horizontally directly effective.

On the other hand, Professor Schepel argues in favour of the horizontal direct effect of Art. 63 TFEU, as in his opinion it is, at least in a long term, a logical consequence of the CJEU's reasoning is so called "Golden share" cases.³⁶⁵ The term "Golden share" cases refers to cases wherein privilege rights such as the right to appoint the members of the company's board of directors or veto rights in respect of the general meeting resolution

³⁶⁰ In German Gesetz über die Überführung der Anteilsrechte an der Volkswagenwerk Gesellschaft mit beschränkter Haftung in private Hand

³⁶¹ Ibid., para. 9

³⁶² Ibid., para. 22

³⁶³ Ibid., para. 26

³⁶⁴ C. BARNARD, *The Substantive Law of the EU*, 4th ed. (2013), pp. 586

³⁶⁵ H. SCHEPEL, *Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law* (2012) *European Law Journal*, Issue 2, pp. 192

are attached to the state's shareholding in the companies in newly privatised sectors, for instance energy.³⁶⁶

Professor Schepel bases his conclusions on the Court's interpretation of the notion of the restriction on the free movement of capital in the "Golden share" case *Commission v. Portugal (EDP)*.³⁶⁷ Upon the privatisation of a Portuguese electricity distributor Electricidade de Portugal SA (hereafter also referred to as the "**EDP**") Portugal, even though it only held a minority shareholding, retained veto rights in respect of the resolutions of EDP's general meeting and under certain circumstances the right to appoint the company's director. Subsequently, the Commission accused Portugal of failure to abide by the rules on the free movement of capital because of its advantageous position as EDP's shareholder.³⁶⁸

While assessing whether such shareholders' rights composition constitutes a restriction on the free movement of capital the Court reasoned that the fact that investors from other Member States "*could not be involved in the management and control*" to the extent proportionate to their shareholding "*is liable to discourage*" these investors "*from making direct investments*" in the newly privatised companies.³⁶⁹

In addition, insofar as the state's right of veto is liable to block an important decision of the general meeting resulting in the decrease of the value of the company's shares "*and thus reduce the attractiveness of an investment in such shares*", investors are discouraged from making an investment in such company and the free movement of capital is thereby hampered.³⁷⁰

Professor Schepel argues that in line with the Court's interpretation of Art 63 TFEU it is not only a shareholder structure disproportionately favouring a state that might hamper the free movement of capital but also any inequality among shareholders in terms of control they are able to assert in a company other than the one stemming from their

³⁶⁶ C. BARNARD, *The Substantive Law of the EU*, 4th ed. (2013), pp. 589

³⁶⁷ Judgement in *European Commission v Portuguese Republic*, C-543/08, EU:C:2010:669

³⁶⁸ *Ibid.*, paras. 14 - 18

³⁶⁹ *Ibid.*, para. 56

³⁷⁰ *Ibid.*, para. 57

contribution in the company's shareholding, for instance "*differentiation between classes of shares*".³⁷¹

Accordingly, insofar as the company's shareholders' rights substance differs significantly from the standards set forth in corporate law, the restrictions on the free movement of capital "*can and will arise*" irrespective of whether this composition favours a state or any other shareholder.³⁷²

He further notes that even though the Court did not have the opportunity to decide on the horizontal direct effect of Art. 63 TFEU, with the view to the European corporate tradition wherein the aforementioned privilege rights attached to the shares are not uncommon provisions of the articles of association or shareholders' agreements, it is only a matter of time until the Court will have to expressly address the issue of the horizontal direct effect of the free movement of capital.

Taking into account the CJEU's argument in favour the horizontal direct effect of the other Treaty freedoms subsisting in *effet utile* of the internal market law, one can rather hardly imagine a plausible explanation as to why a particular measure should fall within the scope of the Treaty if it pertains to the state's shareholding and at the same time escape the Court's scrutiny in case of a private shareholder.

However, it shall be noted that the possible recognition of the horizontal direct effect of Art. 63 TFEU would undoubtedly face political resistance, and in particular resistance on the part of private shareholders, similarly as when the Commission attempted to legislate on the rule "*one share, one vote*" or in the case of Directive 2004/25 on Takeover Bids³⁷³ which had to be to a large extent modified to an opt-in regime in order to be adopted.³⁷⁴

Further, for instance the differentiation between classes of shares which Professor Schepel describes as a potential source of the restriction on the free movement of capital

³⁷¹ H. SCHEPEL, *Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law* (2012) *European Law Journal*, Issue 2, pp. 193

³⁷² *Ibid.*

³⁷³ Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2004] OJ L 142/12

³⁷⁴ H. SCHEPEL, *Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law* (2012) *European Law Journal*, Issue 2, pp. 195

is not an uncommon phenomenon in European corporate reality. In 2013 5.2% of European private companies have adopted an employee share ownership scheme. The European Commission's study shows that the likelihood of adopting such incentive scheme raises with the size of the company and that the highest rate of the employee share ownership is among companies in financial intermediation, real estate and wholesale and retail trade.³⁷⁵

The core of these employee incentive schemes lies in the management's participation on the financial results of the company offering the scheme for instance through the means of dividends paid on shares owned by the members of the management. In this regard, it is not uncommon to distinguish between the non-voting shares owned by the employees whose decision-making in respect of the company takes place already at the management level and the voting shares of the remaining shareholders controlling the company's activities through the resolutions passed at the general meeting. Such mechanisms are envisaged for instance by the legislation in Latvia and Lithuania.³⁷⁶

Provided that the above differentiation between the voting and non-voting classes of shares falls under the definition of the restriction on the free movement of capital as the reading of Professor Schepel's views might suggest, the recognition of the horizontal direct effect of Art. 63 TFEU would have far-reaching detrimental effects on private shareholders' autonomy in setting up the governance mechanisms within their companies. As the rejection of the Commission's attempts to legislate in this area shows, there is not much support for such interference.

Further, additional questions arise in relation to the delimitation between the free movement of capital or payments and other Treaty freedoms. For instance, various aspects of cross-border payments pertain either to the free movement of capital and payments or to the free movement of services. Whereas the question of the admissibility of the payment under the national foreign exchange regulation relates to the former, the issue of discrimination on the basis of bank charges triggers the latter.³⁷⁷

³⁷⁵ European Commission DG MARKT, *The Promotion of Employee Ownership and Participation* (2014), pp. 30 retrieved from http://ec.europa.eu/internal_market/company/docs/modern/141028-study-for-dg-markt_en.pdf on 6 December 2015

³⁷⁶ *Ibid.*, pp. 113

³⁷⁷ M. TOMÁŠEK, V. TÝČ et al., *Právo Evropské unie*, 1st ed. (2013), pp. 240

In light of the differentiation between the classes of shares discussed above, the demarcation between the free movement of capital and the freedom of establishment in cases involving investments in a shareholding is worth mentioning. For instance in *Burda*³⁷⁸ the Court ruled that because the shareholding concerned enabled its holders to exert “*definite influence over the decisions of that company*”, the provisions on the freedom of establishment and not those on the free movement of capital applied.³⁷⁹

Accordingly, cases involving the acquisition of a controlling shareholding in a company and the measures reducing the attractiveness of such acquisition emanating from a private entity able to exert collective influence on the relevant market could fall within the scope of the freedom of establishment. Hence, under certain circumstances the doctrine of horizontal direct effect of Art. 49 TFEU could influence the outcome of the dispute.

Consequently, one can argue that Art. 63 TFEU should also be held horizontally directly effective at least under the same conditions as the provisions on the freedom of establishment. This conclusion can be supported by the necessity to ensure uniform application of the rules in cases pertaining to the investments into shares regardless of whether such investments lead to the acquisition of a controlling shareholding or not.

More generally, the acceptance of horizontal direct effect of the Treaty freedoms is likely to restrict not only private parties’ autonomy in respect of corporate governance but also their contractual autonomy in a broader sense. The limitations on the private entities autonomy potentially brought about by the horizontal direct effect of the Treaty freedoms will thus be analysed in the following section.

³⁷⁸ Judgement in *Finanzamt Hamburg-Am Tierpark v Burda GmbH*, C-284/06, EU:C:2008:365

³⁷⁹ *Ibid.*, para. 72 - 73

4.5 The horizontal direct effect and the private entities' autonomy

In the nowadays liberalised market, the free movement within the EU increasingly takes place on the basis of interaction between private entities either on contractual or on a different basis. It could therefore have been expected that the Court would sooner or later be asked to rule on its corresponding effect on the Treaty freedoms and whether the relevant provisions of the Treaty preclude such interaction which violates them as it did in the cases analysed above.

However, the position that under certain circumstances (as described above) private action falls within the scope of the Treaty, in other words that the Treaty freedoms have horizontal direct effect, does not only have implications for the internal market but also for the private entities concerned, in particular for the ability to exercise their legal autonomy. It should be stated at the outset that subjecting private parties to an additional set of rules which they had not been obliged to comply with before, meaning subjecting them both to competition law and the free movement rules, narrows down the field in which they are able to exercise their private autonomy.

This section of this dissertation will focus on two issues linked to this further infringement on the private autonomy. Firstly, it will deal with the question how the Court's different approach to the horizontal direct effect of the free movement of goods and the free movement of services conflicts with the private entities' legal certainty. Secondly, it will address the possible justifications available to private parties in cases wherein their action is held to fall within the scope of the Treaty.

With respect to the free movement of services, the CJEU ruled in *Laval* that insofar as the private entities' action in question has a collective character, Art. 56 TFEU is horizontally directly effective. On the other hand, the Court expressly denies the applicability of Art. 34 TFEU on the free movement of goods to contracts between individuals in *Sapod Audic* and subsequently did not address the issue of horizontal direct effect of this provision in *Fra.bo* at all.

Professor Verbruggen argues that this “*judge-made distinction*”³⁸⁰ does not reflect the model of the business relationships in modern economies which infringes legal certainty and also uniformity of the application of the EU law.³⁸¹ This distinction does not even reflect the Court’s understanding of certain business transactions analysed in its previous case law.³⁸²

In *De Agostini & TV-Shop*³⁸³ the CJEU ruled that the Swedish ban on the advertising aimed at children and misleading advertising pertaining for instance to the effectiveness of the product or its effect on the environment fell both within the scope of Art. 34 TFEU on the free movement of goods and Art. 56 TFEU on the free movement of services. The reasoning behind it was that such prohibition affects the free movement of the products advertised and on the possibility for the advertisers established in the state where such ban is effective to advertise and broadcasters to broadcast the advertising in question.³⁸⁴

In certain markets one can observe a trend of linking together products and services through for instance providing additional services such as installation to the goods offered or through offering services in a form comparable to goods as for instance in telecommunication sector where business offer pre-made packages of services which can be subsequently tailored by their customers.³⁸⁵

Professor Verbruggen demonstrates that the restrictions on the free movement thus do not have to stem only from legal regulation as was the case in *De Agostini & TV-Shop* but also from an arrangement that relies on the collective power of private entities. He describes the systems used in Europe to regulate advertising which usually involves application of code of conduct drawn up by private entities and is enforced through the associated media which are able to effectively prevent the advertiser which violates the

³⁸⁰ P. VERBRUGGEN, *The Impact of Primary EU Law on Private Relationships: Horizontal Direct Effect under the Free Movement of Goods and Services* (2014) *European Review of Private Law*, Issue 2, pp. 203

³⁸¹ *Ibid.*

³⁸² *Ibid.*, pp. 212-213

³⁸³ Judgement in *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*, Joined cases C-34/95, C-35/95 and C-36/95, EU:C:1997:344

³⁸⁴ *Ibid.*, para. 44 and 50

³⁸⁵ P. VERBRUGGEN, *The Impact of Primary EU Law on Private Relationships: Horizontal Direct Effect under the Free Movement of Goods and Services* (2014) *European Review of Private Law*, Issue 2, pp. 201

code of conduct from accessing the market. In this case, if this advertiser whose access to the market was prevented sought compensation from the private entities involved in the system, it can be assumed that the CJEU would be asked to address the existence of the restriction on the free-movement. Consequently, in line with the conclusions in *De Agostini & TV-Shop*, both Art. 34 TFEU and Art. 56 TFEU should be applied simultaneously.³⁸⁶

However, whereas both aforementioned provisions apply to the Member States under any circumstances, the same cannot be said about their application to private parties. The Court ruled in *Laval* that activities of collective regulatory nature fall within the scope of Art. 56 TFEU. Hence, Professor Verbruggen contends that if the Court ruled that the regulation of advertising drawn up by private entities and supported by media constitutes a restriction on the free movement of services, the simultaneous application of Art. 34 TFEU would require that the same conclusion applies also with respect to the free movement of goods. “Accordingly, the Court would grant horizontal direct effect to the Treaty provisions on the freedom of goods.”³⁸⁷

The recognition of the horizontal direct effect of the free movement of goods would inarguably contribute to the uniformity of the Treaty freedoms and private entities’ legal certainty. On the other hand, when Member States are held to restrict the free movement, they can justify their actions by the derogations provided for in the Treaty or “overriding reasons in the public interest”³⁸⁸ whereas the scope of the possible manoeuvre field in this respect is rather unclear when it comes to private entities.³⁸⁹

Accordingly, as only the measures that are not directly discriminatory could be justified by the overriding reasons in the public interest, the private entities held to restrict the free movement by a genuinely discriminatory measure could only justify it under the

³⁸⁶ *Ibid.*, pp. 215

³⁸⁷ *Ibid.*

³⁸⁸ Judgement in *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, C-55/94, EU:C:1995:411, para. 37

³⁸⁹ H. SCHEPEL, Who’s afraid of the total market? On the horizontal application of the free movement provisions in EU law in I. LIANOS, O. ODUDU, *Regulating Trade in Services in the EU and the WTO Trust, Distrust and Economic Integration* 1st ed. (2012), pp. 313 - 315

reasons provided for in the Treaty, for instance with respect to the right of establishment, public policy, public security and public health.³⁹⁰

Even though the Court ruled in *Bosman* that “*there is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health*”³⁹¹, as Professor Schepel points out there can easily arise situations in which the private parties could seek to apply a discriminatory criterion not falling under the concepts listed above in choosing their contractual partner.³⁹²

Moreover, the CJEU confines the possible justifications of the restriction on the free movement to situations which do not relate to “*the private pursuit of economic advantage*”.³⁹³ However, one can hardly imagine a more apposite criterion than that of pursuing economic interests when it comes to the conduct of private entities on the market. Even the underlying issue in *Laval*, namely the protection of Swedish labour market from social dumping caused by the influx of cheaper labour force from post-communist Eastern European countries can be translated into the protection of Swedish workers against “*price competition*”. Hence, it seems necessary that the recognition of the horizontal direct effect entails also the adjustment of the concept of justifications in relation to private action which could according to Professor Schepel cause a lot of legal uncertainty.³⁹⁴

Nevertheless, while discussing the horizontal direct effect of the Treaty freedoms one should not forget that the primary source of obligations for private entities under the Treaty remains competition law, in particular Art. 101 TFEU (cartel prohibition) and Art. 102 TFEU (abuse of dominance). The next section therefore focuses on the

³⁹⁰ Ibid., pp. 314

³⁹¹ Judgement in *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463, para. 86

³⁹² H. SCHEPEL, Who’s afraid of the total market? On the horizontal application of the free movement provisions in EU law in I. LIANOS, O. ODUDU, *Regulating Trade in Services in the EU and the WTO Trust, Distrust and Economic Integration* 1st ed. (2012), pp. 314

³⁹³ H. SCHEPEL, Freedom of Contract in Free Movement Law: Balancing Rights and Principles in *European Public and Private Law* (2013) *European Review of Private Law*, Issue 5-6, pp. 1216

³⁹⁴ H. SCHEPEL, Who’s afraid of the total market? On the horizontal application of the free movement provisions in EU law in I. LIANOS, O. ODUDU, *Regulating Trade in Services in the EU and the WTO Trust, Distrust and Economic Integration* 1st ed. (2012), pp. 314 – 315; Even though the issue of justifications of the restrictions on the free movement is an inevitable element of the Treaty rules on the free movement, it goes beyond the scope of this dissertation to analyse this matter further.

interplay between both set of rules and the potential use of concepts of EU competition law in defining the scope of the horizontal direct effect of the Treaty freedoms.

4.6 The interplay between the Treaty freedoms and EU competition law

As already discussed in Section 3.2.2 of this dissertation, traditionally the free movement rules were deemed to create obligations for Member States in line with the Court's judgement in *Dassonville* that the rules on the free movement of goods apply to measures “*enacted by Member States*”.³⁹⁵ On the other hand, the competition rules were intended to regulate the conduct of undertakings. The notion of undertaking is defined as encompassing “*every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*”.³⁹⁶

Hence, the free movement rules prohibited trade barriers resulting from the State regulation and not market behaviour whereas the competition rules were aimed at regulating the economic activity and did not apply to national legislation. However, in the end of the twentieth century, as a consequence of market liberalisation and privatisation, the functions which were previously reserved to government authorities started to be performed by private entities and states began to participate in certain economic activities like regular market players.³⁹⁷

Consequently, after the market liberalisation, one of the possible lines of argumentation in order to sustain the distinction between the EU competition rules and the Treaty freedoms could be that the former govern “*market participation*” whereas the latter apply to “*market regulation*”.³⁹⁸ Professor Schepel mentions a slightly different distinction formulated by the Court when defining the notion of under taking in *Höfner* between “*economic activities*” and “*activities falling within the exercise of public powers*”.³⁹⁹

However, whereby the divergence introduced by both aforementioned criteria is in line with the Court's reasoning of the application of the Treaty freedoms to private entities

³⁹⁵ Judgement in *Procureur du Roi v Benoît and Gustave Dassonville*, C-8/74, EU:C:1974:82, para. 5

³⁹⁶ Judgement in *Klaus Höfner and Fritz Elser v Macrotron GmbH*, C-41/90, EU:C:1991:161, para. 21

³⁹⁷ O. ODUDU, The public/private distinction in EU Internal Market Law (2010) *Revue trimestrielle de droit europeen*, Issue 4, pp. 827 - 829

³⁹⁸ *Ibid.*, pp. 834

³⁹⁹ H. SCHEPEL, Who's afraid of the total market? On the horizontal application of the free movement provisions in EU law in I. LIANOS, O. ODUDU, *Regulating Trade in Services in the EU and the WTO Trust, Distrust and Economic Integration* 1st ed. (2012), pp. 305

in *Walrave and Koch* and *Bosman* wherein it ruled that the application of the Treaty freedoms should be extended from the government regulation to the “rules of any other any other nature aimed at regulating in a collective manner gainful employment”⁴⁰⁰, it does, in my opinion, not explain why private entities were subjected to the Treaty rules on free movement in *Viking* or *Laval*.

In *Viking*, even though the CJEU pointed out that the collective action which was the source of the restriction on the free movement in this case is “*inextricably linked to the collective agreement*” which to certain extent regulates the employment conditions, it at the same time denied that the Treaty freedoms could be applied only to “*quasi-public organisations or to associations exercising a regulatory task*”.⁴⁰¹

Some legal scholars interpret this judgement as the Court’s shift in defining the boundaries of the horizontal direct effect from purely regulatory power criterion to also embrace factual power, or in other words, the ability to hinder the free movement on the internal market.⁴⁰² Consequently, one of the possible criteria which would encompass the phenomena of horizontal direct effect as interpreted by the Court so far would be, as Professor Schepel points out⁴⁰³, the criterion introduced by Advocate General Poiares Maduro already analysed in Section 4.2.1 of this dissertation, namely the ability to “*prevent others from enjoying their rights to freedom of movement*”.⁴⁰⁴

Further, in order to reconcile the Court’s case law on the horizontal direct effect of the Treaty freedoms which is, especially when it comes to the comparison between the free movement of goods and other Treaty freedoms rather inconsistent, a part of the legal academia suggests that one could also find a suitable criterion to this end within the

⁴⁰⁰ Judgement in *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, C-36/74, EU:C:1974:140, para. 17; Similarly, Judgement in *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463, para. 82

⁴⁰¹ Judgement in *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772, para. 36 and 64 respectively

⁴⁰² C. KRENN, A Missing Piece in the Horizontal Effect “Jigsaw”: Horizontal Direct Effect and the Free Movement of Goods (2012) *Common Market Law Review*, Issue 1, pp. 202; H. SCHEPEL, Who’s afraid of the total market? On the horizontal application of the free movement provisions in EU law in I. LIANOS, O. ODUDU, *Regulating Trade in Services in the EU and the WTO Trust, Distrust and Economic Integration* 1st ed. (2012), pp. 307

⁴⁰³ *Ibid.*

⁴⁰⁴ Advocate General Opinion in *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:292, para. 42

concepts used in the EU competition law (as already demonstrated on the concept of dominance in Section 4.2.1), more specifically a *de minimis test*.⁴⁰⁵ This test, which is based on the intensity of the distortion of the competition on the internal market, allows for more efficient control of the business conduct capable of effectively restricting competition while leaving the economic activities with marginal effects behind.

Firstly, Art. 101 (1) TFEU *inter alia* prohibits undertakings from entering into agreements which may affect the trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. However, the Commission states in its *De Minimis Notice*⁴⁰⁶ that it does not consider the agreements between undertakings the aggregate market share of which is below certain thresholds to appreciably restrict competition and will thus not institute proceedings in cases falling within the scope of *De Minimis Notice*.⁴⁰⁷

Further, Art. 107 (1) TFEU stipulates that aid granted by Member States or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market. As a rule, State aid falling within the scope of this provision has to be notified to the Commission under Art. 108 (3) TFEU. There are exceptions from this rule set out in the Commission's legislation *inter alia* in the *De Minimis Regulation*⁴⁰⁸ under which aid below EUR 200,000 (or in some cases EUR 100,000) granted to a single undertaking over the period of three years shall be deemed not to meet the criteria of Art. 107 TFEU and therefore does not have to be notified to the Commission.⁴⁰⁹

⁴⁰⁵ J. HOJNIK, De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market? (2013) European Journal of Legal Studies, Issue 1; C. KRENN, A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods (2012) Common Market Law Review, Issue 1, pp. 210 - 212

⁴⁰⁶ Communication from the Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ 2014/C 291/01

⁴⁰⁷ *Ibid.*, para. 5 and 8; It shall be noted that this does not apply to the hard-core restriction which have as their object the restriction of competition, such as for instance fixing purchase or selling prices or other trading conditions, limiting production or market sharing.

⁴⁰⁸ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid [2013] OJ L 352/1

⁴⁰⁹ *Ibid.*, Art. 3

On contrary, the CJEU explicitly and consistently rules out the application of *de minimis test* in the area of the Treaty freedoms. For instance in its judgement in *Bluhme*⁴¹⁰ concerning Danish legislation prohibiting the import of certain bee species to a small island Læsø in order to protect Læsø brown bee, the Court rejected the argument that the rules on free movement should not be applied because the measure only concerned 0.3 % of the Danish territory (Læsø island is more than four times smaller than Venice).⁴¹¹

The critics of the application of *de minimis test* to the Treaty freedoms contend, in analogy to the assessment of the entities' market shares in order to determine whether their actions fall within or outside the scope of Art. 101 (1) TFEU, that it would not be feasible to perform such extensive market investigations in order to determine the breach of the rules on the free movement.⁴¹²

On the other hand, some legal scholars suggest that there can be other ways of conducting *de minimis test* with respect to the Treaty freedoms. Advocate General Jacobs in his Opinion in *Leclerc-Siplec*⁴¹³ highlighted as the relevant factor for the determination of the breach of Art. 34 TFEU that “*the restriction, actual or potential, on access to the market must be substantial*”.⁴¹⁴ Hence, the Treaty freedoms' *de minimis test* should not subsist in measuring the quantitative effects of the restriction through market shares but rather ascertaining the qualitative effects of such restriction on the free movement.⁴¹⁵

Accordingly, the Treaty freedoms' *de minimis test* should subsist in ascertaining whether the effect of a particular measure on the access to the market is substantial, for instance as the Court did in *Commission v. Italy (trailers)* already discussed in Section 3.1.2 of this dissertation. In this case the CJEU took into account *inter alia* the

⁴¹⁰ Judgement in *Criminal proceedings against Ditlev Bluhme*, C-67/97, EU:C:1998:584

⁴¹¹ *Ibid.*, para. 20

⁴¹² J. HOJNIK, De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market? (2013) *European Journal of Legal Studies*, Issue 1, pp. 38

⁴¹³ Advocate General Opinion in *Société d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA*, C-412/93, EU:C:1994:393

⁴¹⁴ *Ibid.*, para. 44

⁴¹⁵ J. HOJNIK, De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market? (2013) *European Journal of Legal Studies*, Issue 1, pp. 37; C. KRENN, A Missing Piece in the Horizontal Effect “Jigsaw”: Horizontal Direct Effect and the Free Movement of Goods (2012) *Common Market Law Review*, pp. 211 - 212

“considerable influence on the behaviour of consumers”.⁴¹⁶ Krenn suggests that the fundamental criterion in this respect should be to weigh the alternative means of entering the market as demonstrated by Advocate General Poiares Maduro on the example of individual refusing to purchase goods coming from other Member States in his Opinion in *Viking*. In relation to the horizontal direct effect of the Treaty freedoms, the recognition of a *de minimis test* would help to clarify which private entities’ conduct could be scrutinized under the Treaty and thus facilitate greater legal certainty of all the stakeholders and uniformity in the application of the Treaty freedoms.

At the same time, the recognition of horizontal direct effect of all Treaty freedoms while acknowledging *de minimis test* in the area of the free movement would not unreasonably interfere with the private parties’ autonomy. Given the ample alternatives to market goods on the internal market, “most private measures would not be caught by Art. 34 TFEU”⁴¹⁷ while measures like the private regulation in *Fra.bo* wherein DVGW was deemed to actually hold the power “to regulate the entry into the German market of products”⁴¹⁸ could be scrutinized under the Treaty without beating about the bush as the Court, in my opinion, actually did in *Fra.bo*.

Further, as pointed out by Advocate General Poiares Maduro in *Viking* and already analysed in Section 4.1.2 of this dissertation because “workers cannot change their professional qualifications or obtain alternative employment as easily as traders can alter their products or find alternative ways of marketing them”⁴¹⁹, the threshold of considerable effects on the access of persons to the market under the Treaty freedoms’ *de minimis test* would be significantly lower than in case of goods.

I agree with Professor Hojnik that this lower-threshold horizontal direct effect of the rules on the free movement of persons and higher-threshold horizontal direct effect of Art. 34 TFEU would, at least to certain extent, correspond to the manner in which the CJEU has approached the issue of the horizontal direct effect in reality and align the

⁴¹⁶ Judgement in *Commission of the European Communities v Italian Republic*, C-110/05, EU:C:2009:66, para. 56

⁴¹⁷ J. HOJNIK, *De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market?* (2013) *European Journal of Legal Studies*, Issue 1, pp. 39

⁴¹⁸ Judgement in *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) - Technisch-Wissenschaftlicher Verein*, C-171/11, EU:C:2012:453, para. 31 - 32

⁴¹⁹ Advocate General Opinion in *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:292, para. 47

effects given to the rules on the free movement of goods and capital with the Court's case law on the other Treaty freedoms.⁴²⁰

Moreover, the benefits of the *de minimis test* are not exhausted with bringing more clarity into the issue of horizontal direct effect of the Treaty freedoms. As argued by Professors Snell and Shuibhne and discussed in Section 3.2.1 of this dissertation the broad substantive market access test resembles "*the Dassonville test*" which was criticized for bringing about the series of inconsistent judgements of the CJEU and for the unrestricted expansion of integration whereas this critique was accompanied with calls for putting limits to such integration.⁴²¹

As pointed out earlier, one can hardly avoid noticing the similarities with *pre-Keck* situation which already proved to be a false step during the 1980s and early 1990s which then had to be reconciled by the Court in *Keck and Mithouard*. The introduction of *de minimis* rule into the area of the Treaty freedoms could help to overcome this situation. The focus on measures which are above the *de minimis* threshold would facilitate greater focus on substantial threats to the market integration and thus also allow for more effective control in this respect.⁴²²

Moreover, given that *Brexit*⁴²³ has made it to the short list of notable words for the year 2015 according to Oxford Dictionaries⁴²⁴ while the alleged negative effects of the free movement on the UK's economy and the desire to regain national control over related matters nowadays controlled at the EU level are often cited as the main reasons in

⁴²⁰ J. HOJNIK, De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market? (2013) European Journal of Legal Studies, Issue 1, pp. 44

⁴²¹ J. SNELL, The Notion of Market Access- A Concept or a Slogan? (2010) Common Market Law Review, Issue 2, pp. 467 – 470; N.N. SHUIBHNE, The Coherence of EU Free Movement Law, 1st ed. (2013), pp. 212 - 213

⁴²² J. HOJNIK, De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market? (2013) European Journal of Legal Studies, Issue 1, pp. 40; Indeed, in my opinion the resources, both financial and human used in the cases which concern territories smaller than Venice like *Bluhme* could have found a better place in the EU. It shall be however borne in mind that to apply *de minimis test* to the measures that are directly discriminatory is not appropriate and there should in any event remain a self-standing test in this respect. Thus, I agree with Professor Hojnik that directly discriminatory measures should be scrutinized under the Treaty even if their effect is only slight.

⁴²³ A term for the potential or hypothetical departure of the UK from the EU.

⁴²⁴ Oxford Dictionaries Word of the Year 2015: the shortlist retrieved on 13 March 2016 from <http://blog.oxforddictionaries.com/2015/11/word-of-the-year-2015-shortlist/>

favour of *Brexit*⁴²⁵, in order to prevent Euroscepticism from succeeding, the EU institutions should look for a way to balance the free movement with the national autonomy.

As pointed out in Section 2.1 of this dissertation, the EU lacks the kind of solidarity which is based on a shared nationality. Therefore even though the Member States significantly benefited from the establishment of the internal market, this economic liberalisation also resulted in substantial losses in terms of national regulatory autonomy. Hence, it was only a matter of time until these losses coupled with the Court's tendency to favour reasoning which furthers European integration⁴²⁶ would lead to calls for limitations of the EU market integration which nowadays materialize in potential *Brexit*.

Professor Perišin argues that “*the times have changed since Dassonville and Cassis de Dijon, as it is no longer necessary for the freedoms to be so broad to cover all obstacles to trade*” and that the Court's tendency to review the measures “*only remotely connected to the internal market would present an unnecessary burden for national regulatory autonomy*” which further endangers “*the legitimacy of the EU*”.⁴²⁷

On contrary, the *de minimis test* enables the EU to maintain a reasonable degree of market integration as it focuses on the significant threats thereto while at the same time allowing for decentralization on the internal market and fostering autonomy of national regulatory and judicial authorities and thereby also democratic decision-making.⁴²⁸

It can be well argued that the introduction and subsequent interpretation of the Treaty freedoms *de minimis test* by the CJEU would again result in an unclear scope of this term as was the case for instance with market access test. Nevertheless, I tend to agree with Professor Hojnik's conclusion that it would also be “*the least worrisome*” contribution of the CJEU to the national autonomy whereas any other Member States'

⁴²⁵ C. BARNARD, Law in Focus: What would Brexit mean for free movement? retrieved on 13 March 2016 from <http://www.law.cam.ac.uk/press/news/2015/08/law-focus-what-would-brexit-mean-free-movement-catherine-barnard/3141>

⁴²⁶ M. BOBEK, The Court of Justice of the European Union in A. ARNULL, D. CHALMERS, The Oxford Handbook of European Union Law 1st ed. (2015), pp. 153-177

⁴²⁷ J. HOJNIK, De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market? (2013) European Journal of Legal Studies, Issue 1, pp. 42

⁴²⁸ Ibid., pp. 41 - 43

desires to increase their autonomy would have “*much greater consequences for the effectiveness of the internal market*”.⁴²⁹

However, as stated above, it is undisputed that so far there is in fact no place for the *de minimis test* in the Court’s free movement case law and thus not only a lack of self-restraint when it comes to furthering internal market integration but also a lack of clear-cut criteria for the application of the Treaty freedoms to private entities. The following section thus seeks to summarize what is the actual state of art with respect to the horizontal direct effect of the Treaty freedoms while concurrently answering both research questions presented in the Preface of this dissertation.

⁴²⁹ J. HOJNIK, De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market? (2013) European Journal of Legal Studies, Issue 1, pp. 45

5. Conclusion

The statement of Angela Merkel from November 2014 that she would rather see the UK out of the EU than compromise the free movement in the EU was one of the reasons which encouraged me to analyse the reach of free movement rules, more specifically the horizontal direct effect of the Treaty freedoms, in this dissertation. At the time perhaps no one would have expected that the probably not so conscious remark about the UK leaving the EU would materialize to such extent that on 23 June 2016 the British citizens will decide on whether they are better off inside or outside the EU, or in other words with or without the free movement.⁴³⁰

Although I tried to reflect the contemporary political issues surrounding the free movement throughout this dissertation to some extent, the questions which I focused on stem mainly from the broader topic of the legitimacy of market integration which is according to Professor Shuibhne pivotal for the support for any type of integration.⁴³¹ I have chosen to work in particular with the concept of separation of regulatory competences between the EU and the Member States and related separation between the Treaty provisions' addressees, namely the Member States and the private entities.

I therefore formulated the first limb of my research question as follows: *To what extent has the CJEU advanced the European market integration through the development of the principle of horizontal direct effect of the Treaty freedoms?* The starting point after the establishment of the EEC was that the sole addressees of the Treaty freedoms are the Member States whereas the Treaty rules on competition only apply to private entities.⁴³² However, as the market liberalised and certain tasks originally belonging to the preserve of the state were gradually transferred to private organisations and hence those organisations were able to adopt measures with the similar reach as those that could have before emanated only from the states.

Consequently, in order to ensure the *effet utile* of the free movement rules, it followed that the CJEU had to advance the European market integration in the sense that it under

⁴³⁰ The UK's EU referendum: All you need to know retrieved from <http://www.bbc.com/news/uk-politics-32810887> on March 13, 2016

⁴³¹ N.N. SHUIBHNE, *The Coherence of EU Free Movement Law*, 1st ed. (2013), pp. 15

⁴³² S. PRECHAL, S. DE VRIES, *Seamless web of judicial protection in the internal market?* (2009) *European Law Review*, Issue 1, pp. 13

certain circumstances (further described below) applies to private entities as well because as first ruled in *Walrave and Koch* and then repeated *inter alia* in *Bosman*, *Angonese*, *Viking* and *Laval* the abolition of the obstacles to the free movement “*would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law*”.⁴³³

Thus, the increasing liberalisation of the European internal market necessitated the shift from the Member States – private entities dichotomy to a more functional approach which disregards the legal nature of the entity when applying the Treaty freedoms and/or the EU competition rules but rather on whether the entity concerned in the particular factual situation being assessed is engaged in “*market participation*” or “*market regulation*”⁴³⁴ or alternatively whether that entity pursues “*economic activities*” and “*activities falling within the exercise of public powers*”.⁴³⁵

As will be mentioned below whereas the exact definition of which private entities are subjected to the Treaty freedoms has not been definitively settled yet, it is undoubted that the answer to the first limb of my research question must be: *The CJEU has advanced the European market integration through the development of the principle of horizontal direct effect of the Treaty freedoms so that the obstacles to the free movement emanating from entities other than the Member States could also be scrutinized under the Treaty. In order to ensure the effet utile of the free movement, the CJEU has consistently interpreted the Treaty freedoms in a manner that these provisions do not only encompass Member States as traditionally believed but also a wider spectrum of addressees, thus also certain private entities. The Court did so in order to align the*

⁴³³ Judgement in *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, C-36/74, EU:C:1974:140, para. 18; Judgement in *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463, para. 83; Judgement in *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, C-281/98, EU:C:2000:296, para. 32; Judgement in *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772, para. 57; Judgement in *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:809, para. 98

⁴³⁴ O. ODUDU, *The public/private distinction in EU Internal Market Law* (2010) *Revue trimestrielle de droit européen*, Issue 4, pp. 834

⁴³⁵ H. SCHEPEL, *Who’s afraid of the total market? On the horizontal application of the free movement provisions in EU law* in I. LIANOS, O. ODUDU, *Regulating Trade in Services in the EU and the WTO Trust, Distrust and Economic Integration* 1st ed. (2012), pp. 305

applicability of the Treaty freedoms with the function exercised by each entity in a particular situation on the internal market.

Nevertheless, even though the CJEU's reasoning behind the advancing of the idea of the horizontal direct effect of the Treaty freedoms has been consistent, the different tests which the Court adopted throughout the years in order to determine which freedom in what circumstances creates obligations for private parties vary considerably.

Accordingly, this divergence leads me to the second limb of my research question: *To what degree has there been a convergence achieved with regard to the Treaty freedoms? Or in other words, under what circumstances can each of the four freedoms be deemed to have horizontal direct effect?* I would like to answer to this question by firstly setting out the circumstances under which the Treaty freedoms are deemed to have horizontal direct effect which will subsequently also implicitly answer the first part of this question.

There can be “*three different levels of horizontality*”⁴³⁶ distinguished within the Court's case law (starting from the highest level of recognition): the recognition of full horizontal direct effect, the focus on collective impact of the regulation and the focus on the link between the Member State and private entity (suggesting denial of the horizontal direct effect of the Treaty freedoms).⁴³⁷

The full horizontal direct effect which has been recognized by the Court in *Angonese* entails that Art. 45 TFEU on the free movement of workers creates obligations for private individuals, for instance private banking undertakings, which are obliged to abide by the principle of non-discrimination enshrined in this provision.⁴³⁸ This ruling was subsequently confirmed in *inter alia Erny*.⁴³⁹

However, in both cases Art. 45 TFEU applied only to a discriminatory measure thus it still remains open whether this provision can be applied in horizontal situations which involve merely non-discriminatory measure. Nevertheless, as the free movement of workers is the only Treaty freedom in respect of which the full horizontal direct effect is

⁴³⁶ N.N. SHUIBHNE, *The Coherence of EU Free Movement Law*, 1st ed. (2013), pp. 102

⁴³⁷ *Ibid.*

⁴³⁸ Judgement in *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, C-281/98, EU:C:2000:296, para. 36

⁴³⁹ Judgement in *Georges Erny v Daimler AG — Werk Wörth*, C-172/11, EU:C:2012:399, para. 36

recognized (at least when it comes to discriminatory measures), “*the reach of the free movement law extends furthest for the protection of workers*”.⁴⁴⁰

This difference between the free movement of workers and other Treaty freedoms is in line with the reasoning of Advocate General Poiares Maduro in *Viking* that Art. 45 TFEU has a special position within the free movement law because the workers are not able to change their qualifications as swiftly as the manufacturers or distributors can change their product characteristics or marketing strategies.⁴⁴¹

The Court introduced the criterion of *the collective nature of the measure* hindering the free movement in *Walrave and Koch* which involved a private entity setting forth conditions for the exercise of cycling at international level. The criterion of “*regulating in a collective manner gainful employment and provision of services*”⁴⁴² in order to determine whether a private entity can be subjected to the obligations stemming from the rules of the free movement of workers or services was confirmed in *Bosman* which involved measures enacted by football associations.⁴⁴³

The application of this criterion has been subsequently extended also to the trade union action in *Viking* and *Laval*.⁴⁴⁴ Even though the link between blockades and demonstrations and the collective regulations of employment can be arguably deemed as rather blurry⁴⁴⁵, the focus on the collective nature of the measure in order to determine the horizontal direct effect of the rules on the free movement of workers or services has nevertheless been the “*longest established, most comprehensively and consistently reasoned, and most widely applied across the span of free movement law*”.⁴⁴⁶ The collective nature of the measure is the decisive criterion for the

⁴⁴⁰ Ibid., pp. 100

⁴⁴¹ Advocate General Opinion in *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:292, para. 47

⁴⁴² Judgement in *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, C-36/74, EU:C:1974:140, para. 17

⁴⁴³ Judgement in *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463, para. 82

⁴⁴⁴ N.N. SHUIBHNE, *The Coherence of EU Free Movement Law*, 1st ed. (2013), pp. 103

⁴⁴⁵ H. SCHEPEL, *Who’s afraid of the total market? On the horizontal application of the free movement provisions in EU law* in I. LIANOS, O. ODUDU, *Regulating Trade in Services in the EU and the WTO Trust, Distrust and Economic Integration* (2012) 1st ed., pp. 307

⁴⁴⁶ N.N. SHUIBHNE, *The Coherence of EU Free Movement Law*, 1st ed. (2013), pp. 103

determination of the horizontal direct effect of Art. 49 TFEU on the freedom of establishment and Art. 56 TFEU on the free movement of services.

In its case law on the free movement of goods, the Court has focus on establishing *the link between the Member States and a private entity* rather than on formulation of the criteria for the horizontal direct effect of Art. 34 TFEU. This link can subsist in that the actions taken by the private entity are “*State initiated, managed by State appointees, largely State funded*”⁴⁴⁷ as in *Buy Irish* or the Member State is held responsible for ensuring that the “*fundamental freedom is respected in their territory*”⁴⁴⁸ as in *Spanish strawberries* or *Schmidberger*.

Nonetheless, as in all of three aforementioned cases the claim was brought against the Member States and not against the private entity from which the restriction on the free movement originated⁴⁴⁹, they do not offer any suitable criteria for the recognition of the horizontal direct effect. On contrary, when the Court had the opportunity to rule on the issue of the horizontal direct effect of Art. 34 TFEU in *Fra.bo* (and potentially also formulate the criteria for its recognition), it did not expressly address the issue at all.

It is argued by Professor Shuibhne that *Fra.bo* brings more coherence into “*the horizontality of free movement law in one sense, since it finally infuses a basic threshold of collective regulation into goods as well*”.⁴⁵⁰ However, as the Court did not cite its reasoning from the aforementioned case law representing *the collective nature of the measure* stream of horizontality, I rather agree with Professor de Vries that this judgement can at most represent a careful step towards the recognition of the horizontal direct effect of Art. 34 TFEU.⁴⁵¹

As the CJEU did not yet have an opportunity to rule on the horizontal direct effect of the free movement of capital under Art. 63 TFEU, it is uncertain what the Court’s

⁴⁴⁷ L. W. GORMLEY, Private Parties and the Free Movement of Goods: Responsible, Irresponsible or a Lack of Principles? (2015) Fordham International Law Journal, Issue 4, pp. 997

⁴⁴⁸ Judgement in *Commission of the European Communities v French Republic*, C-265/95, EU:C:1997:595, para. 32

⁴⁴⁹ A. DASHWOOD, Viking and Laval: Issues of Horizontal Direct Effect (2008) Cambridge Yearbook of European Legal Studies, pp. 532 - 533

⁴⁵⁰ N.N. SHUIBHNE, The Coherence of EU Free Movement Law, 1st ed. (2013), pp. 107

⁴⁵¹ S. DE VRIES, R. VAN MASTRIGT, The Horizontal Direct Effect of the Four Freedoms: From a Hodgepodge of Cases to a Seamless Web of Judicial Protection in the EU Single Market in U. BERNITZ, X. GROUSSOT, F. SCHULYOK, General principles of EU law and European private law, 1st ed. (2013), pp. 263

position in this respect is. As outlined in Section 4.4 of this dissertation, there can be arguments put forward both in favor and against the horizontal direct effect of the free movement of capital.

Consequently, given that there are at least three different self-standing levels (and thus also criteria) of the horizontal direct effect of the Treaty freedoms, the answer to the second limb of my research question must be that *the level of the convergence in this respect is rather low and the horizontal direct effect of the Treaty freedoms is characterized rather by divergence than convergence.*

As extensively discussed in the previous Section 4.6 of this dissertation, some legal scholars argue that one of the ways how to reconcile the divergent approaches to the horizontal direct effect of the Treaty freedoms would be the introduction of the *de minimis test* in the free movement law.⁴⁵² Even though the introduction of this criterion could entail similar difficulties in the interpretation of this notion as we have already seen in respect to the market access test, it could on the other hand offer a uniform threshold for the scrutiny of private conduct under the rules on the free movement and thus also enhance legal certainty.

Moreover, it can be argued that the reasons as to the Court's careful approach to the horizontal direct effect of Art. 34 TFEU in *Fra.bo* after Advocate General Trstenjak advocated for the express recognition of horizontal direct effect of this provision *in casu* relate to the Court's attempt of self-restraint after the increasing calls for return of the competences and decision-making powers back to the Member States.

For instance in his Opinion in *Kostas Konstantinides*, Advocate General Cruz Villalón argued that the fact that the national legislative framework "*is the result of corporate self-regulation adopted by a professional body in no way precludes the application of the provisions of the Treaty relating to the fundamental freedoms*"⁴⁵³ while supporting his reasoning by the Court's judgements in *inter alia Walrave and Koch, Bosman*,

⁴⁵² J. HOJNIK, De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market? (2013) European Journal of Legal Studies, Issue 1; C. KRENN, A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods (2012) Common Market Law Review, pp. 197 - 214

⁴⁵³ Advocate General Opinion in *Kostas Konstantinides*, C-475/11, EU:C:2013:51, para. 37

Angonese and *Viking*. He subsequently concluded that the contested measure constituted a restriction on the free movement of services under Art. 56 TFEU.

On the contrary, the Court decided to leave it to the national court to determine whether there exists such restriction on the free movement.⁴⁵⁴ This approach is rather unusual given the Court's general tendency to favour the reasoning that would enhance further European integration (as described in Section 2.5). One can only speculate whether there is a relation between the Court's recent self-restraint and calls for limitations on the free movement and the return of the greater proportion of the decision-making power to the Member States.

As already pointed out above, the introduction of the Treaty freedoms' *de minimis* rule would increase national autonomy in a sophisticated way at the times when more and more stakeholders are calling for the return of the regulatory powers from the EU level back to the national governments. One can only speculate whether these voices will be even stronger whatever the result of the UK vote on *Brexit* is. In the end, the furthering of the market integration in the EU and thus also the horizontal direct effect of the Treaty freedoms is and will be to a considerable extent dependent on the careful balancing between the Union and the individual Member States because the EU lacks the kind of solidarity based on the shared nationality which as discussed in Section 2.1 of this dissertation is indispensable for successful integration.

One can only speculate what would be the face of the EU nowadays if the political unity preceded the economic one as suggested by Hayek, if the French National Assembly did not vote against the European Political Community. Nevertheless, even though I am supporter of the UK staying within the EU, let me finish with the quote from the Mayor of London Boris Johnsons', one of the supporters of *Brexit*, book: "*Events aren't like billiard balls, with one obviously propelling the next – and even billiards can be deceptive*".⁴⁵⁵ So instead of focusing on what ifs of the European integration process, I would like to, at the risk of sounding slightly too pathetic, wish the European Union a lot of success in coping with the challenges that the free movement and the integration in general will undoubtedly bring in the upcoming years.

⁴⁵⁴ Judgement in *Kostas Konstantinides*, C-475/11, EU:C:2013:542, para. 53

⁴⁵⁵ B. JOHNSON, *The Churchill Factor: How One Man Made History*, 1st ed. (2015), pp. 24

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7. Abstracts

1. Abstract in English language

The statement of Angela Merkel from November 2014 that she would rather see the UK out of the EU than compromise the free movement in the EU (which as at the date of the submission of this dissertation materialized in potential *Brexit*) was one of the reasons which encouraged the author to analyse the reach of free movement rules, more specifically the horizontal direct effect of the Treaty freedoms, in this dissertation.

The author focuses on the issues stemming mainly from the broader topic of the legitimacy of market integration which the author translated into the concept of separation of the regulatory competences between the EU and the Member States and related separation between the Treaty provisions' addressees, namely the Member States and the private entities.

This dissertation focuses on the following research question: *To what extent has the CJEU advanced the European market integration through the development of the principle of horizontal direct effect of the Treaty freedoms?* The starting point after the establishment of the EEC was that the sole addressees of the Treaty freedoms were the Member States whereas the Treaty rules on competition only applied to private entities. However, as is demonstrated throughout this dissertation, it is nowadays generally accepted that this statement does not hold completely true anymore.

Further, a consistent interpretation of European law and legal certainty is, in the author's opinion, important in order to maintain the aforementioned legitimacy and the support for the European Union. The second limb of this research thus deals with the following question: *To what degree has there been a convergence achieved with regard to the Treaty freedoms? Or in other words, under what circumstances can each of the four freedoms be deemed to have horizontal direct effect?* As discussed in this dissertation, there are at least three different self-standing levels (and thus also criteria) of the horizontal direct effect of the Treaty freedoms. This dissertation therefore ultimately proposes a potential alternative as to the unified criterion in this respect by drawing a comparison with the EU competition law.

2. Abstract in Slovak language

Vyjadrenie Angely Merkelovej z novembra 2014, že by radšej videla EU bez Veľkej Británie ako kompromitovala voľný pohyb v EU (ktoré sa nakoniec do dňa uzavretia rukopisu tejto práce zhmotnilo v potenciálne vystúpenie Veľkej Británie z EU) bolo jedným z motívov, ktoré primäli autorku k tomu, aby vo svojej práci analyzovala dosah pravidiel upravujúcich voľný pohyb, konkrétne horizontálny priamy účinok slobôd voľného pohybu.

Autorka sa v práci zameriava na otázky vyplývajúce zo širšej problematiky legitimacy integrácie európskeho trhu, ktoré premietla do konceptu rozdelenia legislatívnych (a širšie povedané regulačných) právomocí medzi EU a členskými štátmi a z toho vyplývajúceho rozdelenia medzi adresátmi jednotlivých ustanovení Zmluvy, teda členskými štátmi a súkromnými subjektmi.

Táto práca sa teda zaoberá nasledujúcou otázkou: *Do akej miery sa podarilo SDEU rozšíriť európsku integráciu prostredníctvom rozvinutia princípu horizontálneho priameho účinku slobôd voľného pohybu?* Podľa tradičného vnímania prevládajúceho po založení Európskeho hospodárskeho spoločenstva boli jedinými adresátmi ustanovení upravujúcich voľný pohyb v rámci EU členské štáty a súkromným osobám mohli vznikáť povinnosti len na podklade európskeho súťažného práva. Avšak ako vyplýva z analýzy obsiahnutej v tejto práci, je dnes už všeobecne akceptované, že toto tvrdenie nie je úplne pravdivé.

Ďalej, konzistentná interpretácia európskeho práva a právna istota je podľa názoru autorky dôležitá pre zachovanie vyššie uvedenej legitimacy a podpory pre Európsku úniu. Druhá časť tohto výskumu sa preto zaoberá nasledujúcou otázkou: *Do akej miery sa doteraz podarilo dosiahnuť konvergenciu v rámci interpretácie voľného pohybu v EU? Alebo inými slovami, za akých podmienok môžu mať tzv. štyri slobody horizontálny priamy účinok?* Ako je preukázané v tejto práci existujú aspoň tri rôzne úrovne (a teda aj kritériá) horizontálneho priameho účinku slobôd voľného pohybu. Táto práca preto nakoniec na podklade porovnania s európskym súťažným právom predostiera návrh potenciálnej alternatívy čo sa týka jednotného kritéria pre posudzovanie horizontálneho priameho účinku slobôd voľného pohybu.

8. Thesis in Slovak language

1. Úvod

Téma voľného pohybu v rámci Európskej únie (ďalej tiež len „EU“), ktorý je jedným z jej základných kameňov, získala v posledných mesiacoch na relevancii vďaka diskusiám ohľadne odchodu Veľkej Británie z EU. Za viac ako päťdesiat rokov európskej integrácie sa podarilo Súdnemu dvoru Európskej únie (ďalej tiež len „SDEU“ alebo „**Súdny dvor**“) prostredníctvom svojej judikatúry vybudovať širokú interpretáciu tzv. štyroch⁴⁵⁶ slobôd pohybu teda voľného pohybu pracovníkov, práva usadiť sa, voľného pohybu služieb, kapitálu a tovaru. Napríklad v roku 2012 sa viac ako 16% prípadov ukončených pred SDEU týkalo práve voľného pohybu v EU.

Aj keď európska integrácia a voľný pohyb so sebou bez pochyby prinášajú nespočetné množstvo ekonomických výhod, ktoré motivujú členské štáty k tomu, aby sa vzdávali svojej národnej suverenity za účelom ich získania, žiadna integrácia nemôže mať dostatok podpory pokiaľ nie je vnímaná ako legitímna. Na podklade publikácii profesora Van den Bogaerta a profesorky Barnard som sa rozhodla na legitimitu nazerať prostredníctvom niekoľkých princípov, resp. hodnôt.

V prvom rade ide o rozdelenie kompetencií medzi Európsku úniu a členské štáty. Na to nadväzuje štruktúra Zmluvy o fungovaní EU (ďalej tiež len „ZFEU“ alebo „**Zmluva**“) a určenie adresátov jednotlivých ustanovení Zmluvy. Podľa tradičného vnímania boli adresátmi ustanovení upravujúcich voľný pohyb v rámci EU len členské štáty a súkromným osobám, konkrétne podnikateľom na európskom trhu, mohli vznikáť povinnosti len na podklade európskeho súťažného práva.

Avšak, ako vyplýva z tejto práce, toto tradičné rozdelenie už nie je naďalej vnímané ako určujúce pokiaľ ide o adresátov tzv. štyroch slobôd, najmä v oblasti voľného pohybu pracovníkov. To znamená ďalšie prehĺbenie zásahu Európskej únie do suverenity nielen národných štátov ale aj súkromných osôb. Teda, prvá časť otázky tejto práce znie: *Do akej miery sa podarilo SDEU rozšíriť európsku integráciu prostredníctvom rozvinutia princípu horizontálneho priameho účinku slobôd voľného pohybu?*

⁴⁵⁶ Aj keď v skutočnosti sú základom voľného pohybu ustanovenia upravujúce päť samostatných konceptov.

K udržaniu vyššie zmienenej legitimacy, ktorá je ťažiskom podpory integrácie, je podľa môjho názoru dôležité zabezpečiť konzistentnú interpretáciu predmetných ustanovení (a európskeho práva všeobecne) a z toho vyplývajúcu právnu istotu všetkých aktérov. Druhá časť otázky tejto práce preto znie nasledovne: *Do akej miery sa doteraz podarilo dosiahnuť konvergenciu v rámci interpretácie voľného pohybu v EU? Alebo inými slovami, za akých podmienok môžu mať tzv. štyri slobody horizontálny priamy účinok?*

2. Integrácia trhu v rámci Európskej únie

Filozoficko-ekonomické východisko európskej integrácie spočíva v teórií komparatívnej výhody formulovanej Adamom Smithom a Davidom Ricardom podľa ktorej špecializácia jednotlivých ekonomických aktérov vedie k väčšej produktivite a efektívnejšiemu využívaniu dostupných zdrojov. Na túto teóriu nadviazal okrem iného Friedrich August von Hayek vo svojej predvojnovnej eseji, kde formuloval názor, že väčšia prosperita prameniaca zo spoločného ekonomického režimu učiní Európu mocnejšou a menej zraniteľnou voči externému útoku.

Z ekonomického hľadiska má odbúranie diskriminácie voči tovaru a ďalším výrobným faktorom pochádzajúcim z iných krajín patriacich do rovnakého integračného zoskupenia pozitívny vplyv na spotrebu a zníženie výdavkov spojených napríklad s dodržiavaním colných predpisov. Ďalej, ekonomická integrácia pomáha znižovať cenové rozdiely výrobných faktorov v jednotlivých členských krajinách. Integrácia taktiež podporuje výmenu (nielen) technických zručností medzi členskými štátmi a pohyb kapitálu za účelom investícií do menej vyspelých krajín. Práve tieto vyššie zmienené výhody sú motiváciou pre participujúce (a prístupujúce) štáty, aby sa výmenou za ne vzdali časti svojej národnej suverenity.

Integrácia európskeho trhu je založená na princípe negatívnej integrácie, ktorý spočíva v eliminácii prekážok voľného obchodu medzi členskými krajinami a teda okrem iného znížení dovozných ciel a eliminácií kvót. V súlade s rozhodnutím SDEU v prípade *Gaston Schul* je primárnym cieľom európskej integrácie práve eliminácia všetkých prekážok voľného obchodu v rámci EU a následné vytvorenie vnútorného trhu, ktorý sa v čo najväčšej možnej miere bude podobať národnému trhu. Okrem negatívnej integrácie je potrebné zmieniť aj pozitívnu integráciu, ktorá spočíva v prijímaní harmonizačných opatrení na európskej úrovni na základe článku 114 Zmluvy.

Lehota pre vytvorenie vnútorného európskeho trhu bola pôvodne stanovená na koniec roku 1992, avšak vzhľadom k tomu, že tento proces je nepretržitý, článok 3 ods. 3 Zmluvy o Európskej únii doteraz stanoví, že Únia vytvára vnútorný trh. Integrácia národných trhov (a štátov) je založená predovšetkým na prenose suverenity od členských štátov smerom k nadnárodným autoritám. Pre Európsku úniu je okrem toho na rozdiel od ostatných nadnárodných integračných zoskupení špecifická angažovanosť Súdneho dvora, ktorý formuláciou princípov vnútorného trhu vo svojej judikatúre pomáha integráciu prehlbovať. Súdny dvor je však mnohokrát kritizovaný, napríklad bývalým generálnym advokátom Poiares Madurom v prípade *Alfa Vita*, pre svoju nedôslednú a nekonzistentnú interpretáciu ustanovení upravujúcich voľný pohyb v rámci EU. Vyššie zmienená (ne)konzistentnosť je predmetom analýzy v kapitolách 3 a 4, ktoré postupne rozoberajú substantívny, inštitucionálny a personálny rozmer slobôd voľného pohybu práve na podklade rozsudkov SDEU.

3. Princípy integrácie európskeho trhu

3.1 Substantívne princípy – zákaz diskriminácie a kritérium prístupu na trh

V začiatkoch európskej integrácie bol základným východiskom pre interpretáciu voľného pohybu v rámci EU zákaz diskriminácie, ktorý je možno podradiť pod princíp rovného zachádzania. Napríklad požiadavka spočívajúca v absolvovaní špeciálnych testov predtým než je tovar pochádzajúci z iného členského štátu pripustený na národný trh, pričom domáce produkty obdobné testy absolvovať nemusia, je považované za priamo diskriminačné opatrenie. Všeobecne, národná legislatíva stanovujúca rozdielne, menej výhodné podmienky pre hodnoty pochádzajúce z iných členských štátov je vnímaná ako porušenie zákazu diskriminácie.

Súdny dvor však okrem zákazu priamej diskriminácie v prípade *Dassonville* formuloval ďalšie opatrenia, ktoré sú v rozpore s ustanoveniami zaručujúcimi voľný pohyb v rámci EU. Relevantným testom pre posúdenie súladu s týmito ustanoveniami sa stala otázka, či dané opatrenie je spôsobilé (*voľný preklad do slovenského jazyka*) „priamo alebo nepriamo, skutočne alebo potenciálne zabraňovať obchodu v rámci Spoločenstva“.⁴⁵⁷

Okrem toho, aby zahraničný tovar nebol znevýhodňovaný tým, že musí pri uvedení na národný aj zahraničný trh splňovať požiadavky svojho domovského štátu a zároveň

⁴⁵⁷ Rozsudok vo veci *Procureur du Roi v Benoît and Gustave Dassonville*, C-8/74, EU:C:1974:82, para. 5

štátu importu a tak znášať dvojité bremeno, formuloval SDEU v prípade *Cassis de Dijon* princíp vzájomného uznávania. Táto široká interpretácia bola Súdny dvorom následne limitovaná v prípade *Keck a Mithouard*.

Počnúc prípadom *Gebhard* sa Súdny dvor zameril pri posudzovaní súladu s ustanoveniami zaručujúcimi voľný pohyb taktiež na nediskriminačné opatrenia, ktoré predstavujú prekážku jeho výkonu. Rozhodujúcim kritériom sa v poslednom období v judikatúre SDEU stalo posúdenie, či konkrétne opatrenie môže „znižit' príťažlivosť, alebo dokonca sťažit'“⁴⁵⁸ výkon voľného pohybu. Mnohí akademici kritizujú Súdny dvor pre neschopnosť jasne formulovať pri používaní kritéria prístupu na trhu podmienky, za splnenia ktorých predstavuje posudzované opatrenie prekážku voľného pohybu. V tomto smere prirovnáva profesor Snell súčasnú situáciu k obdobiu po vynesení rozsudkov v prípadoch *Dassonville* a *Cassis de Dijon*, ktorých široký substantívny záber musel byť nakoniec limitovaný rozsudkom vo veci *Keck a Mithouard*.

3.2 Inštitucionálne princípy – princíp prednosti a priamy účinok

Podľa princípu prednosti európskeho práva je v prípade konfliktu medzi ustanoveniami európskeho práva a národného práva daná prednosť právu európskemu, a to bez ohľadu na právnu silu a dátum prijatia národného opatrenia. Podľa jedného z dvoch prístupov k princípu prednosti – „modelu spúšťaču“ je pre možnosť uplatnenia tohto princípu v prvom rade potrebné, aby predmetné ustanovenie európskeho práva bolo schopné vyvolať priamy účinok. Len takéto ustanovenie je schopné vyvolať konflikt medzi európskym a národným právom, ktorý je následne vyriešený prostredníctvom aplikácie princípu prednosti.

Kritéria priameho účinku primárnych pravidiel európskeho práva formuloval Súdny dvor prvýkrát v prípade *van Gend en Loos*. Ustanovenie Zmluvy, v ktorom je formulovaný jasný a nepodmienený zákaz adresovaný členskému štátu a navyše neobsahuje žiadnu výnimku je spôsobilé vytvoriť priamy účinok v právnych vzťahoch medzi členskými štátmi a jednotlivcami, ktorým národné súdy následne musia

⁴⁵⁸ Rozsudok vo veci *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:809, para. 99

v prípadnom spore zaručiť zodpovedajúce práva vyplývajúce z tohto ustanovenia. V tomto prípade hovoríme o vertikálnom priamom účinku.

Okrem vertikálneho priameho účinku existuje v európskom práve aj horizontálny priamy účinok, na základe ktorého je možné určité ustanovenia Zmluvy aplikovať priamo na právne vzťahy medzi dvoma súkromnými subjektmi. Podľa tradičného rozlíšenia adresátov ustanovení zaručujúcich voľný pohyb boli tieto ustanovenia schopné vyvolať vertikálny priamy účinok avšak nie horizontálny priamy účinok.

Dôvodom tohto záveru bolo, že členské štáty boli vnímané ako jediný adresát povinností formulovaných v daných ustanoveniach Zmluvy. Toto klasické rozdelenie sa však vývojom judikatúry Súdneho dvora prispôsobilo faktickému fungovaniu postupne sa liberalizujúceho európskeho trhu. Táto zmena, a zodpovedajúce rozšírenie okruhu adresátov slobôd voľného pohybu, je predmetom analýzy v kapitole 4 tejto práce.

4. Horizontálny priamy účinok slobôd voľného pohybu

4.1 Voľný pohyb pracovníkov

Prvým prípadom, v ktorom Súdny dvor uznal, že za určitých podmienok je článok 45 Zmluvy upravujúci voľný pohyb pracovníkov možné aplikovať aj na iné subjekty ako na členské štáty samotné je *Walrave a Koch*. V tomto prípade SDEU uzavrel, že pravidlá formulované Medzinárodnou cyklistickou úniou, súkromným subjektom, ktorý reguloval účasť v medzinárodnej cyklistike, rovnako ako aj akékoľvek pravidlo zamerané na (voľný preklad do slovenského jazyka) „regulovanie zárobkovej činnosti alebo poskytovanie služieb kolektívnym spôsobom“⁴⁵⁹, musia byť spôsobilé posúdenia čo sa týka súladu s vyššie zmieneným ustanovením Zmluvy.

K podporeniu tohto záveru formuloval Súdny dvor tri argumenty spočívajúce na zásade *effet utile* (voľný preklad do slovenského jazyka: *efektivita alebo účinnosť*) európskeho práva (nakoľko tento argument bol neskôr prenesený i do rozhodnutí týkajúcich sa iných slobôd pohybu, citáciu argumentu uvádzam nižšie), zásade jednotnej aplikácie ustanovení Zmluvy a všeobecnej formulácii predmetného ustanovenia.

⁴⁵⁹ Rozsudok vo veci *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, C-36/74, EU:C:1974:140, para. 17

V prípade *Bosman* týkajúceho sa pravidiel pre prestup do iného futbalového klubu formulovanými UEFA Súdny dvor potvrdil, že nielen diskriminačné opatrenia, ale rovnako aj (voľný preklad do slovenského jazyka) „opatrenia, ktoré priamo ovplyvňujú prístup hráčov na pracovný trh v inom členskom štáte“ prameniace od súkromných subjektov kolektívne regulujúcich tento prístup spadajú pod doktrínu horizontálneho priameho účinku.⁴⁶⁰

K ďalšiemu rozšíreniu horizontálneho priameho účinku slobôd voľného pohybu došlo v prípade *Angonese*, kedy sa Súdny dvor odchýlil od kritéria kolektívneho charakteru regulácie prístupu na trh a dovodil, že súkromná banková inštitúcia má povinnosť rešpektovať zákaz diskriminácie formulovaný v článku 45 Zmluvy. Súdny dvor tak priznal článku 45 ZFEU úplný horizontálny priamy účinok. Je však vhodné podotknúť, že tento účinok je zatiaľ s istotou možné dovodiť len v prípade opatrení, ktoré sú v rozpore so zákazom diskriminácie a nie opatrení, ktoré „len“ vytvárajú prekážky prístupu na trh.

Bývalý generálny advokát Poiares Maduro v tomto ohľade podotkol na rozdiel medzi voľným pohybom pracovníkov a ostatnými slobodami vo svojom stanovisku v prípade *Viking*, a síce, že „pracovníci nemôžu zmeniť svoju odbornú kvalifikáciu alebo získať náhradné zamestnanie tak jednoducho ako obchodníci, ktorí môžu meniť svoje výrobky alebo nájsť náhradné spôsoby, ako ich uviesť na trh“.⁴⁶¹

4.2 Kolektívne zmluvy upravujúce zamestnanie a odborové organizácie

Po pristúpení nových členských štátov do Európskej únie v roku 2004 väčšina členských štátov uplatňovala voči novo pristupujúcim krajinám prechodné opatrenia limitujúce možnosť plne využívať výhody vyplývajúce z voľného pohybu pracovníkov. Preto sa niektoré subjekty snažili tieto prechodné opatrenia obchádzať využitím svojich práv prameniáciach z iných ustanovení zaručujúcich voľný pohyb.

Prípady *Viking* týkajúci sa práva usadiť sa podľa článku 49 Zmluvy a prípad *Laval*, kde predmetom sporu bol voľný pohyb služieb podľa článku 56 Zmluvy sú práve

⁴⁶⁰ Rozsudok vo veci *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463, para. 103 - 104

⁴⁶¹ Stanovisko generálneho advokáta vo veci *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:292, para. 47

dôsledkom vyššie uvedenej situácie. Zatiaľ čo spôsob a argumenty, na základe ktorých Súdny dvor rozšíril horizontálny priamy účinok aj do sféry týchto dvoch ustanovení upravujúcich voľný pohyb podstatne kopíruje prípady *Walrave a Koch* a *Bosman*, názor bývalého generálneho advokáta Poiares Madura je časťou akademickej obce vnímaný ako najprovokatívnejší komponent oboch zmienovaných prípadov.

Vo svojom stanovisku v prípade *Viking* bývalý generálny advokát Poiares Maduro predostrel návrh kritéria, podľa ktorého by bolo možné určiť, či sa konkrétne ustanovenie Zmluvy upravujúce voľný pohyb má aplikovať aj na súkromný subjekt alebo nie. Podľa neho preto, aby súkromné subjekty mohli prostredníctvom horizontálneho priameho účinku byť adresátmi povinností vyplývajúcich z predmetných ustanovení musia mať tieto subjekty okrem iného „dostatočný vplyv, aby dokázali zabrániť iným využívať svoje práva voľného pohybu“.⁴⁶² Ako vyplýva z tejto práce, akademici, ktorí volajú po formulácii jednotného kritéria pre horizontálny priamy účinok všetkých slobôd voľného pohybu často odkazujú v tejto súvislosti práve na vyššie popísané kritérium.

4.3 Voľný pohyb tovaru

Diskusiu ohľadne horizontálneho priameho účinku článku 34 Zmluvy vyvolal prvýkrát prípad *Dansk Supermarked* týkajúci sa porušenia práv duševného vlastníctva jednej zo strán sporu. Súdny dvor však v nasledujúcej judikatúre ujasnil, že toto ustanovenie nie je možné aplikovať na súkromné subjekty. Naopak, v prípadoch *Buy Irish*, *Schmidberger* a *Spanish strawberries* sa SDEU sústredil na preukázanie vzťahu medzi súkromným subjektom a členským štátom, založeného na finančnej, prípadne inštitucionálnej podpore zo strany členského štátu alebo zodpovednosti členského štátu za vlastnú neschopnosť zabrániť vytvoreniu prekážky súkromnou entitou, a na základe toho dovodil zodpovednosť členského štátu.

V nedávnom prípade *Fra.bo*, v ktorom bolo predmetom sporu opatrenie pochádzajúce od súkromnoprávnej neziskovej organizácie sa Súdnemu dvoru naskytila príležitosť formulovať kritériá pre uplatnenie horizontálneho priameho účinku článku 34 Zmluvy. Hoci na túto možnosť upozornila vo svojom stanovisku aj generálna advokátka

⁴⁶² Stanovisko generálneho advokáta vo veci *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:292, para. 42

Trstenjak, Súdny dvor sa vo svojom rozhodnutí sústredil výlučne na konkrétne okolnosti daného prípadu, na základe ktorých dovodil, že v tomto prípade a na túto konkrétnu súkromnú organizáciu musí článok 34 Zmluvy dopadať. Nie je možné však toto rozhodnutie vnímať ako uznanie horizontálneho priameho účinku vo sfére voľného pohybu tovaru.

4.4 Voľný pohyb kapitálu

Vzhľadom k tomu, že sa pred Súdny dvor doposiaľ nedostal spor, v ktorom by mal možnosť posúdiť horizontalitu článku 63 Zmluvy upravujúceho voľný pohyb kapitálu, analyzujem v tejto časti argumenty za a proti horizontálnemu účinku formulované predstaviteľmi oboch prúdov.

4.5 Horizontálny priamy účinok a autonómia súkromných subjektov

V prvom rade táto kapitola analyzuje dôsledky plynúce zo skutočnosti, že na súčasných liberalizovaných trhoch dochádza čoraz častejšie k prepájaniu služieb s produktmi a naopak. V dôsledku tohto prepojenia by v zodpovedajúcich prípadoch uznanie horizontálneho priameho účinku v oblasti voľného pohybu služieb (ktoré je za určitých vyššie popísaných podmienok akceptovateľné) viedlo k nutnosti uznať aj horizontálny priamy účinok ustanovení upravujúcich voľný pohyb tovaru. Takéto uznanie by nepochybne malo pozitívny prínos čo sa týka právnej istoty súkromných subjektov.

Na druhej strane, súkromné subjekty nemajú na rozdiel od členských štátov tak široký priestor pre obhájenie nimi vytvorených prekážok voľného pohybu. V prvom rade, priamo diskriminačné opatrenia môžu byť obhájené len na základe dôvodov špecifikovaných priamo v Zmluve, teda napríklad v prípade voľného pohybu pracovníkov, verejným poriadkom, verejnou bezpečnosťou a ochranou verejného zdravia. Argumentácia týmito dôvodmi zo strany súkromného subjektu je jednoznačne ťažšie predstaviteľná ako zo strany členského štátu (ak je vôbec predstaviteľná).

Ďalej, pre to, aby mohla byť prekážka obhájitelná či už na základe dôvodov vyplývajúcich zo Zmluvy alebo z judikatúry Súdneho dvora, nemôže sledovať súkromný účel dosiahnutia ekonomickej výhody. Vzhľadom k tomu, že ekonomické výhody sú primárnym cieľom činnosti súkromných subjektov je i súlad s touto podmienkou ťažko predstaviteľný. Preto existujú názory, že by uznanie horizontálneho

priameho účinku ustanovení upravujúcich voľný pohyb v rámci Európskej únie malo so sebou priniest' aj zodpovedajúcu modifikáciu na úrovni obhájitelných dôvodov prekážok voľného pohybu.

4.6 Súhra medzi slobodami voľného pohybu a európskym súťažným právom

V tejto kapitole sa zameriavam na potenciálne využitie *de minimis* testu používaného vo vzťahu k zákazu kartelov a prípustnosti verejnej podpory v európskom súťažnom práve v oblasti voľného pohybu v rámci EU. Uznatie *de minimis* testu ako relevantného kritéria v druhej menovanej oblasti by poskytlo jednotný posudzovací rámec pre uznanie horizontálneho priameho účinku ustanovení upravujúcich tzv. štyri slobody a zároveň by umožnilo sa sústrediť na závažné prekážky voľného pohybu v rámci EU. Ďalej by koncentrácia na takéto prekážky umožnila návrat časti suverenity na národnú úroveň, čo by mohlo mať pozitívny dopad na súčasné vnímanie legitimacy Európskej únie.

5. Záver

Vzhľadom k postupnej liberalizácii európskeho trhu a z toho vyplývajúceho rozdelenia úloh medzi verejnými a súkromnými aktérmi a postupnému presunu kompetencií zo štátu na súkromné subjekty sa stali súkromné subjekty schopnými prijímať opatrenia vytvárajúce obdobné prekážky voľného pohybu v rámci EU aké mohli pôvodne pochádzať len od verejných inštitúcií.

Preto aby bola zachovaná zásada *effet utile* (voľný preklad do slovenského jazyka: *efektivita alebo účinnosť*) európskeho práva, opatrenia vytvárajúce prekážky voľného pohybu pochádzajúce od súkromných osôb musia byť spôsobilé posúdenia čo sa týka súladu s relevantnými ustanoveniami európskeho práva. Zodpovedajúce dôvody formuloval SDEU prvýkrát v prípade *Walrave a Koch* a potvrdil okrem iného v prípadoch *Bosman*, *Angonese*, *Viking* a *Laval* nasledovne: „...dosiahnutie cieľa, a to odstránenie prekážok voľného pohybu osôb a slobodného poskytovania služieb medzi členskými štátmi by bolo ohrozené, ak by zrušenie prekážok štátneho pôvodu mohlo byť

*neutralizované prostredníctvom prekážok spojených s výkonom právnej autonómie zväzov a organizácií, ktoré nie sú subjektmi verejného práva.*⁴⁶³

Odpoveď na prvú časť otázky, ktorú som sformulovala v úvode preto musí znieť: *Súdny dvor Európskej únie rozšíril európsku integráciu prostredníctvom interpretácie princípu horizontálneho priameho účinku slobôd voľného pohybu tak, že opatrenia pochádzajúce od iných subjektov ako sú členské štáty EU môžu podliehať posúdeniu ich súladu so Zmluvou. SDEU konzistentne interpretoval tieto ustanovenia spôsobom, z ktorého vyplýva, že ich adresátmi sú nielen členské štáty, ale za určitých podmienok aj súkromné subjekty a to preto, aby ich interpretácia zodpovedala úlohe ktorú ten ktorý subjekt vykonáva na trhu v danej situácii.*

Napriek tomu, že zdôvodnenie SDEU vo vyššie zmienených prípadoch je konzistentné, Súdny dvor v rôznych doposiaľ posudzovaných prípadoch formuloval odlišné podmienky, na základe ktorých následne posudzoval, či v danom prípade môžu byť ustanovenia upravujúce niektorú zo slobôd pohybu aplikované na súkromný subjekt a vytvárať pre neho povinnosti.

V rámci týchto kritérií môžeme rozlišovať tri rôzne úrovne horizontálneho priameho účinku a to uznanie úplného horizontálneho priameho účinku, zameranie sa na kolektívny charakter určitého opatrenia a zameranie sa na prepojenie medzi členským štátom a súkromným subjektom (a teda v poslednom prípade odmietnutie horizontálneho priameho účinku).

Úplný horizontálny priamy účinok uznal SDEU v prípade *Angonese* (a potvrdil okrem iného v prípade *Erny*), v ktorom interpretoval článok 45 ZFEU týkajúci sa voľného pohybu pracovníkov. V tomto prípade Súdny dvor uznal, že súkromné osoby, vrátane jednotlivcov, sú povinné dodržiavať princíp zákazu diskriminácie, ktorý je premietnutý do tohto ustanovenia. Avšak SDEU doteraz nepotvrdil, do akej miery sa tento záver

⁴⁶³ Rozsudok vo veci *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, C-36/74, EU:C:1974:140, para. 18; Rozsudok vo veci *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, C-415/93, EU:C:1995:463, para. 83; Rozsudok vo veci *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, C-281/98, EU:C:2000:296, para. 32; Judgement in *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, EU:C:2007:772, para. 57; Rozsudok vo veci *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, EU:C:2007:809, para. 98

vzťahuje aj na prekážky voľného pohybu osôb, ktoré nemajú diskriminačný charakter. Bez ohľadu na to, najširšiu interpretáciu horizontálneho priameho účinku slobôd voľného pohybu formuloval zatiaľ SDEU práve vo vzťahu k voľnému pohybu pracovníkov.

Ďalším (alternatívnym a nie kumulatívnym) kritériom pre uznanie horizontálneho priameho účinku tzv. štyroch slobôd je kolektívny charakter posudzovaného opatrenia vytvárajúceho prekážku voľného pohybu v rámci EU. Toto kritérium formuloval SDEU prvýkrát v prípade *Walrave a Koch* ako (*voľný preklad do slovenského jazyka*) „regulovanie zárobkovej činnosti alebo poskytovanie služieb kolektívnym spôsobom“⁴⁶⁴ a postupne uplatňoval v prípadoch *Bosman*, *Viking* a *Laval* čím sa toto kritérium stalo najdlhšie a najkonzistentnejšie používaným pre rôzne slobody pohybu. Doteraz SDEU toto kritérium používa pri posudzovaní horizontálneho priameho účinku článkov 49 a 56 Zmluvy.

V judikatúre vzťahujúcej sa k voľnému pohybu tovaru môžeme rozlíšiť líniu prípadov, v ktorej sa Súdny dvor pri posudzovaní horizontálneho priameho účinku článku 34 Zmluvy sústreďuje, miesto formulovania jasných kritérií pre aplikáciu tohto ustanovenia na súkromné subjekty, na zistenie vzťahu medzi členským štátom EU a daným súkromným subjektom. SDEU tento vzťah odvodzuje buď na základe poverenia, riadenia alebo sponzorovania štátom ako v prípade *Buy Irish* alebo na základe zodpovednosti štátu za vlastnú neschopnosť zabrániť súkromným entitám vo vytvorení prekážok voľného pohybu ako v prípadoch *Schmidberger* a *Spanish strawberries*.

Vzhľadom k tomu, že vo vyššie zmienených prípadoch týkajúcich sa voľného pohybu tovaru boli podané žaloby proti členským štátom samotným a nie súkromným entitám, ktoré boli *de facto* zdrojom prekážok voľného pohybu, nie je možné tieto prípady vziať v úvahu pri formulácii kritérií pre horizontálny priamy účinok článku 34 ZFEU.

Podľa profesorky Shuibhne je nedávny rozsudok vo veci *Fra.bo* možné do istej miery interpretovať ako formuláciu podmienok pre uznanie horizontálneho priameho účinku

⁴⁶⁴ Rozsudok vo veci *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, C-36/74, EU:C:1974:140, para. 17

ustanovení týkajících sa voľného pohybu tovaru, osobne sa však prikláňam k názoru profesora de Vries, podľa ktorého tento prípad môže byť vnímaný maximálne ako opatrný krok smerom k uznaniu horizontálneho priameho účinku v týchto prípadoch. Pre úplnosť, z dôvodu absencie príslušnej judikatúry SDEU nie je možné formulovať jasný záver ohľadne horizontálneho priameho účinku článku 63 Zmluvy upravujúceho voľný pohyb kapitálu.

Teda, odpoveď na druhú časť mojej výskumnej otázky musí znieť tak, že *čo sa týka konzistentnej interpretácie horizontálneho priameho účinku slobôd voľného pohybu, vyznačuje sa táto skôr divergenciou než konvergenciou*. V nadväznosti na to mnohí akademici volajú po formulácii jasnejších kritérií pre aplikáciu tzv. štyroch slobôd na opatrenie pochádzajúce od súkromných subjektov, pričom niektorí z nich navrhujú pre tento účel použiť kritérium známe z európskeho súťažného práva ako *de minimis* test.

Aplikácia kritéria *de minimis* by okrem toho umožnila európskym inštitúciám sústrediť sa na závažné prekážky voľného pohybu v rámci EU a zároveň znížila mieru zasahovania do národnej suverenity v prípadoch, kedy je to vzhľadom k nedôležitosti danej prekážky vnímané ako nelegitímne a nadbytočné. To by najmä s ohľadom na to, že posilňovanie ekonomickej integrácie musí byť vždy vyvažované politickou a všeobecne spoločenskou podporou (a táto podpora stráca momentálne na intenzite práve kvôli volaniu po návrate suverenity členskými štátom) mohlo byť prospešné a vziať aspoň čiastočne vietor z plachiet euroskeptickým zoskupeniam, ktoré budú proti integrácii brojiť zrejme čoraz hlasnejšie bez ohľadu na výsledok nadchádzajúceho referenda o zotrvaní Veľkej Británie v EU.

Keywords: Treaty freedoms, horizontal direct effect, free movement in the European Union, Angonese, Viking, Laval, Fra.bo, de minimis test

Kľúčové slová: slobody voľného pohybu, horizontálny priamy účinok, voľný pohyb v Európskej únii, Angonese, Viking, Laval, Fra.bo, de minimis test