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A MISSING PIECE IN THE HORIZONTAL EFFECT "JIGSAW": HORIZONTAL DIRECT EFFECT AND THE FREE MOVEMENT OF GOODS

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1. Introduction

What do the Finnish Seamen's Union, the football association UEFA, the German Max Planck Society and a bank in the Italian city of Bolzano have in common? They all share a legal destiny: to have been direct addressees of EU fundamental freedoms. The principles established in their cases[1] before the Court of Justice of the European Union have been essential components of the Court's answer to what has been called a "gigantic conundrum"[2] in EU law: the question of whether private actors are directly bound by the EU Treaty provisions on free movement.

Such cases and their ilk – particularly the Court's argumentation employed therein – have provoked stark, critical reactions and controversy.[3] However "shaky"[4] or "incomplete"[5] the Court's argumentative edifice may be, it has certainly been established that fundamental freedoms can directly bind private actors and it is today settled that the principle commonly called "horizontal direct effect"[6] has become a legal reality in EU law.[7] While certain details may

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1. Case C-438/05, *Viking Line*, [2007] ECR I-10779 (*Finnish Seamen's Union*); Case C-415/93, *Bosman*, [1995] ECR I-4921 (*UEFA*); Case C-94/07, *Raccanelli*, [2008] ECR I-5939 (*Max Planck Society*); Case C-281/98, *Angonese*, [2000] ECR I-4139 (*a bank in Bolzano*).

2. Cf. Baquero Cruz, *Between Competition and Free Movement. The Economic Constitutional Law of the European Community* (Hart, 2002), p. 92.

3. Cf. e.g. Körber, "Innerstaatliche Anwendung und Drittwirkung der Grundfreiheiten?", 35 EuR (2000), 947; discussing *Angonese*, cited *supra* note 1.

4. Lane and Nic Shuibhne, case note on *Angonese*, 37 CML Rev. (2000), 1244.

5. Van den Bogaert, "Horizontality: The Court attacks?" in Barnard (Ed.), *The Law of the Single European Market. Unpacking the Premises* (Hart, 2002), p. 143.

6. The term "horizontal direct effect" as employed here refers to the direct application of Treaty provisions to the conduct of private actors. In the English language literature, this term is now commonly used. Critical of this trend is Baquero Cruz, op. cit. *supra* note 2, 106 et seq., who believes that the notion should not be used as it interferes with a related discussion in regard to the vertical/horizontal effect of EU directives. The Court has not, to date, employed this term but rather chosen to circumscribe the problem by stating that a provision is capable of

still demand further specification, the decades of discussion on the existence of this concept in EU law and its justification can be viewed as a historic part of EU construction.

In reality, this position could be maintained, were it not for the basic and fundamental question still awaiting an answer: why has horizontal direct effect not become a legal reality for all fundamental freedoms? The free movement of workers, the free movement of services[8] and the freedom of establishment[9] have all been horizontally directly applied to the conduct of private actors; and so have other fundamental provisions of the Treaties, namely Articles 18[10] and 157[11] TFEU. A legitimate, yet unattended enquiry remains – why such treatment cannot be discerned for the so-called "pacemaker"[12] for the other freedoms, the free movement of goods.[13]

The purpose of this article is to seek some answers to a number of key outstanding questions. Notably, what role does horizontal direct effect play currently and what role can and should it play in the free movement of goods?[14] Sound reflection on these queries is not only an essential piece in the "jigsaw puzzle" of the Court's horizontal direct effect theory but can provide the whole doctrine of horizontal direct effect with a stronger conceptual basis

conferring rights on a private actor which may be relied on against another private actor (*Viking*, cited *supra* note 1, para 66) or that a fundamental freedom applies to a private actor (*Raccanelli*, cited *supra* note 1, para 46) or to a certain conduct of a private actor (*Bosman*, cited *supra* note 1, para 87).

7. Cf. Roth, "Privatautonomie und die Grundfreiheiten des EG-Vertrags", in Beuthien et al. (Eds.), *Perspektiven des Privatrechts am Anfang des 21. Jahrhunderts. Festschrift für Dieter Medicus* (Heymann, 2009), p. 403; Van den Bogaert, op. cit. *supra* note 5, 134.

8. For Arts. 45 and 56 TFEU Case 36/74, *Walrave and Koch*, [1974] ECR 1405.

9. *Viking*, cited *supra* note 1.

10. Case C-411/98, *Ferlini*, [2000] ECR I-8081.

11. Case 43/75, *Defrenne II*, [1976] ECR 455.

12. Cf. Steindorff, "Gemeinsamer Markt als Binnenmarkt", 150 ZHR (1986), 692.

13. The free movement of capital and the freedom of payments (Art. 63 TFEU) have so far not played a role in the discussion of horizontal direct effect, neither in the case law nor in the literature; cf. Körber, *Grundfreiheiten und Privatrecht* (Mohr Siebeck, 2004), p. 712. However, it should be noted that the structural affiliations of Art. 63 to Art. 34 – both deal with the movement of objects and not persons – could allow a careful transfer of the conclusions of this article to the parallel problem in the field of free movement of capital.

14. Although this discussion on horizontal effect centres on Art. 34 TFEU, it should be noted that the free movement of goods also includes the prohibition of customs duties and charges having equivalent effect (Art. 30 TFEU). Of interest in this regard is Case C-16/94, *Dubois*, [1995] ECR I-2421, where the Court held that Art. 30 TFEU also applies to charges arising from agreements between undertakings on the basis that they resulted from France's failure to fulfil its obligations under the Treaty.

that would respond to one of its main critiques – its lack of coherence and argumentative clarity.[15]

To that end, this article will be structured as follows. Section 2 will discuss the Court's case law on the horizontal direct effect of Article 34 TFEU. Sections 3 and 4 will consider whether the Court's differential treatment of the fundamental freedoms in regard to horizontal direct effect is coherent in the sense that its rejection of horizontal direct effect for Article 34 TFEU is legally justified. This necessarily demands a discussion of the nature of the fundamental freedoms, their convergence or divergence and the way they insert themselves into the system of Treaties and the genesis of EU law (section 3). A closer examination of the arguments the Court employed to establish horizontal direct effect for Articles 45, 49 and 56 TFEU will also be engaged in (section 4). The synopsis of the search for dogmatic differences between the freedoms and the lessons drawn from these cases will essentially equip us with two basic conclusions. On the one hand, there are differences between the freedoms, however, on the other, these are not such as to make the attribution of horizontal direct effect to Article 34 TFEU impossible. Building on these conclusions, we will propose a concept of horizontal direct effect for the free movement of goods (section 5) and sketch out its concrete application (section 6).

2. Glimpses of horizontal direct effect and recent clarity

In its recent case law, the Court has rejected the concept of horizontal direct effect for the free movement of goods. However, in earlier cases in the field of intellectual property rights (IPRs) and the related field of rules against unfair competition this rejection was not as clear. Given the complexity of these fields of law a close examination of the relevant case law would be a lengthy endeavour beyond the scope of this article. Furthermore, these cases are largely limited to their historical value given that the Court has overturned them in its subsequent case law. We will hence just briefly refer to them, then turning swiftly to the Court's recent case law on Article 34 TFEU and horizontal direct effect.

15. Cf. Lane and Nic Shuibhne, op. cit. *supra* note 4 and Van den Bogaert, op. cit. *supra* note 5.

2.1. *The early case law: Glimpses of horizontal direct effect*

From *Deutsche Grammophon*,[16] a case dating back to 1971, up to the mid-1980s the Court delivered a number of judgments that, at least, created doubts as to the addressees of Article 34 TFEU.[17] This incoherence – whether throughout the same case or across cases – has caused confusion, irritation and contradicting perceptions in the literature regarding the addressees of Article 34 TFEU – the Court referred to national courts,[18] to national legislatures[19] but also to private parties. The Court stated on several occasions that it would scrutinize the "exercise" of IPRs by its holder for its compliance with Article 34 TFEU.[20] This necessarily emphasized the role of the private IPR holder, proposing that it was the private initiative that did not only trigger the application of Article 34 TFEU but was also to be understood as constituting the measure within the meaning of Article 34 TFEU.[21] The confusing use of the term "exercise" was linked to the adoption of a doctrine the Court had originally developed in the field of competition law. There, the Court distinguished between the existence and the exercise of IPRs, confining itself – in a spirit of self-constraint – to check whether the exercise of IPRs, and not national IPR legislation, was in conformity with EU law.

From the beginning, commentaries have been split in their understanding of the pertinence of these cases to the question of horizontal direct effect. The proponents of horizontal direct effect point to the clear wording the Court resorted to,[22] the most prominent example being *Dansk Supermarked*.[23] Others are sceptical, arguing that the national law in question and not the IPR

16. Case 78/70, *Deutsche Grammophon*, [1971] ECR 487.

17. For two excellent overviews see Körber, op. cit. *supra* note 13, 695 et seq. and Snell, "Private parties and the free movement of goods and services", in Andenas and Roth (Eds.), *Services and Free Movement in EU Law* (OUP, 2002), 213 et seq.

18. Case 434/85, *Allen and Hanburys Ltd*, [1988] ECR 1245, para 23.

19. Joined Cases 55 & 57/80, *Musik-Vertrieb Membran*, [1981] ECR 147, para 27 and Case 19/84, *Pharmon BV* v. *Hoechst AG*, [1985] ECR 2281, para 22.

20. Case 15/74, *Centrafarm* v. *Sterling Drug*, [1974] ECR 1147, para 15.

21. Cf. Snell, op. cit. *supra* note 17, 214 et seq. and White, "In search of the limits of Article 30 of the EEC Treaty", 26 CML Rev. (1989), 269.

22. See e.g. Pescatore, "Public and private aspects of European Communities competition law", 10 *Fordham International Law Journal* (1987), 381; Waelbroeck, "Les rapports entre les règles sur la libre circulation des marchandises et les règles de concurrence applicables aux entreprises dans la CEE", in Capotorti et al. (Eds.), *Du droit international au droit de l'intégration. Liber amicorum Pierre Pescatore* (Nomos, 1987), pp. 782 et seq.

23. Case 58/80, *Dansk Supermarked*, [1981] ECR 181. The Court held that 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" (para 17). This statement was never taken up by the Court again, although the Judge-Rapporteur of this case, Pierre Pescatore, emphatically argued in a subsequent article that this statement should be understood as an expression of EU law's quality as an *ordre public*, which also has to be observed by private

holder's exercise of her right was the source of the restriction.[24] The law empowered the IPR holder, who could not autonomously influence the content of this right, but could simply trigger its application. Apart from two contrary examples,[25] this argument helps to conceptualize the Court's confusing language, particularly if one considers that the Court stopped referring to IPR holders as soon as it abandoned the "existence-exercise" dichotomy in free movement law.[26] Once the Court had opted not to rely on this often criticized[27] distinction it confined itself to check whether Article 34 TFEU precludes the application of national IPR legislation.[28]

2.2. *The recent case law: Rejecting horizontal direct effect*

The Court has not only departed from its ambiguous IPR case law but has explicitly rejected horizontal direct effect for Article 34 TFEU on several occasions. *Sapod Audic*,[29] is referred to as the clearest example of this.[30] The

parties and renders contracts null and void if they contravene Union law; cf. Pescatore, "Aspects judiciaires de l'acquis communautaire", 17 RTDE (1981), 630.

24. Cf. in this sense Ganten, *Die Drittwirkung der Grundfreiheiten* (Duncker und Humblot, 2000), pp. 43 et seq.; Snell, op. cit. *supra* note 17, 215; Grabitz, "Recht auf Zugang zum Markt nach dem EWG-Vertrag", in Stödter and Thieme (Eds.), *Hamburg, Deutschland, Europa. Beiträge zum deutschen und europäischen Verfassungs-, Verwaltungs- und Wirtschaftsrecht. Festschrift für Hans Peter Ipsen* (Mohr, 1977), p. 659. For a similar argument employed by the Court cf. recently Joined Cases C-403 & 429/08, *Football Association Premier League Ltd*, judgment of 4 Oct. 2011, nyr, para 88.

25. The view that perceives the national law as the source of the restriction found its limits in two cases, Case 119/75, *Terrapin*, [1976] ECR 1039 and Case 3/78, *Centrafarm* v. *American Home Products*, [1978] ECR 1823, where the Court further developed and refined its case law on Art. 34 TFEU and IPRs. It introduced a "subjective test", adding a condition which the conduct of the IPR holder must fulfil in order not to infringe Art. 34 TFEU: it must not be discriminatory or driven by the intention to partition the markets. The account taken of the subjective intention of the right holder suggests that it is not the legislation that is the measure targeted by the Court's rulings. This clearly suggests a horizontal direct application of Art. 34 TFEU. Cf. Jaensch, *Die unmittelbare Drittwirkung der Grundfreiheiten. Untersuchung der Verpflichtung von Privatpersonen durch Art. 30, 48, 52, 59, 73b EGV* (Nomos, 1997), p. 56; MacGowan and Quinn, "Could Article 30 impose obligations on individuals?", 12 EL Rev. (1987), 173; Banks and Marenco, "Intellectual property and the Community rules on free movement: Discrimination unearthed", 15 EL Rev. (1990), 227; for a different opinion, see Körber, op. cit. *supra* note 13, 697. However, this "subjective test" did not reappear in the Court's case law.

26. Cf. Snell, *Goods and Services in EC Law. A Study of the Relationship between the Freedoms* (OUP, 2002), p. 134; Körber, op. cit. *supra* note 13, 703 et seq.

27. Cf. Korah, "Dividing the common market through national industrial property rights", 35 MLR (1972), 636; Joliet, "Patented Articles and free movement of goods within the EEC", 28 *Current Legal Problems* (1975), 23.

28. As in Case 402/85, *Basset*, [1987] ECR 1747; Case C-9/93, *IHT*, [1994] ECR I-2789, para 34; and Joined Cases C-267 & 268/95, *Merck II*, [1996] ECR I-6285, para 56.

29. Case C-159/00, *Sapod Audic*, [2002] ECR I-5031.

Court held that "a contractual provision cannot be regarded as a barrier to trade for the purposes of Article [34 TFEU] since it was not imposed by a Member State but agreed between individuals".[31]

In several other judgments the Court insisted on a rigorous distinction between the addressees of competition and free movement law.[32] This settled line of case law clearly indicates that the Court generally rejects horizontal direct effect for Article 34 TFEU.[33] In *Van de Haar*, for example, the Court stated that Article 101 TFEU is "addressed to undertakings and associations of undertakings" while Article 34 TFEU seeks to "eliminate measures taken by Member States which might in any way impede such free movement".[34] The clear contrast which the Court sees between Article 34 TFEU and competition law, in these cases, suggests that it considers the latter as the systematic counterpart of Article 34 TFEU for private actors.[35]

3. The coherence of the Court's jurisprudence – A uniform or differentiating approach to horizontal direct effect?

The case law on horizontal direct effect for Article 34 TFEU stands in clear opposition to the Court's acceptance of such an application of Articles 45, 49 and 56 TFEU (hereinafter referred to as the "free movement of persons"). Evidently, one should avoid the pitfall of lumping together all freedoms that involve the free movement of persons, as open questions remain with regard to their inter-relation, notably whether all three freedoms follow the free movement of workers in applying to discriminatory *and* non-discriminatory

30. Cf. Löwisch, *Die horizontale Direktwirkung der Europäischen Grundfreiheiten* (Nomos, 2009), p. 51.

31. *Sapod Audic*, cited *supra* note 29, para 74.

32. Case 65/86, *Bayer*, [1988] ECR 5249; Joined Cases 177 & 178/82, *Van de Haar*, [1984] ECR 1797; Case 311/85, *Vlaamse Reisbureaus*, [1987] ECR 3801.

33. Cf. to that extent, e.g. Ganten, op. cit. *supra* note 24, 39; Körber, op. cit. *supra* note 13, 705 et seq.; Jaensch, op. cit. *supra* note 25, 64; Löwisch, op. cit. *supra* note 30, 38 et seq.; Van den Bogaert, op. cit. *supra* note 5, 131 et seq.

34. *Van de Haar*, cited *supra* note 32, para 11 et seq.

35. On the conditions for the (cumulative) application of competition and free movement law cf. section 5.3.1 *infra*. It is interesting to note that the Court has never emphasized the strict line between the scope of application of competition and free movement law in regard to other fundamental freedoms. Admittedly, differences exist between the freedoms. For instance, the applicability of competition law is limited in the field of labour law; cf. Case C-67/96, *Albany*, [1999] ECR I-5751. This may help to some extent explain the reluctance of the Court to attribute horizontal direct effect to Art. 34 TFEU (in this sense Snell, op. cit. *supra* note 17, 232). However, these differences cannot justify a rejection of horizontal direct effect for Art. 34 TFEU given that competition law can fundamentally be conceptualized as a counterpart to all freedoms – for the regulation of private conduct.

barriers[36] and to all private persons, from self-regulating bodies to individuals.[37] However, in relation to the principle question whether these freedoms are horizontally directly applicable – if at all – the contrast to the free movement of goods is manifest and provokes the enquiry as to whether such a distinction is justified and the legal basis on which it might be grounded, given the conceptual affinity and parallels between the fundamental freedoms. The Court has not explained itself. Consequently, as a point of departure for our enquiry, it is helpful to trace and evaluate the argument often voiced in academia when discussing the Court's approach to horizontal direct effect for the fundamental freedoms: the claim for a uniform approach, relying on the idea that, in general, the freedoms should be interpreted in a similar manner.[38]

3.1. *The convergence of the fundamental freedoms and the claim for a uniform approach*

Despite the textual and conceptual differences that are evident from the Treaties between the fundamental freedoms, the Court has aimed at a gradual convergence of interpretation and a common test for all of them from the early days of European integration.[39] The rationale behind this approach was that they all serve the same goal: the establishment of an internal market.[40] The gradual convergence of the fundamental freedoms in the case law of the Court is not only described as a legal reality[41] but also supported and, with slight variations, postulated as a normative claim.[42] Baquero Cruz, for instance,

36. Cf. on this point Preedy, *Die Bindung Privater and die europäischen Grundfreiheiten. Zur sogenannten Drittwirkung im Europarecht* (Duncker & Humblot, 2005), p. 58 and recently Karayigit, "The horizontal effect of the free movement provisions", 18 MJ (2011), 311 et seq.

37. Cf. on this point the discussion and suggestions by Prechal and De Vries, "Seamless web of judicial protection in the internal market?", 34 EL Rev. (2009), 15 et seq. and Lengauer, *Drittwirkung von Grundfreiheiten: Ein Beitrag zum Konzept des Normadressaten im Gemeinschaftsrecht* (Springer, 2011), p. 409 et seq.

38. Cf. e.g. Hintersteininger, "Die Drittwirkung der Warenverkehrsbestimmungen des EGV", in Köck (Ed.), *Rechtsfragen an der Jahrtausendwende. Akten des 22. Österreichischen Völkerrechtstages* (Linde, 1998), p. 120; for further examples cf. *infra* note 46.

39. Cf. Poiares Maduro, *We the Court* (Hart, 1998), p. 101; Gormley, "Silver threads among the gold… 50 years of the free movement of goods", 31 *Fordham International Law Journal* (2008), 1687–1690.

40. Cf. Snell and Andenas, "Exploring the outer limits: Restrictions on the free movement of goods and services", in Andenas and Roth op. cit. *supra* note 17, p. 78.

41. Cf. Poiares Maduro, op. cit. *supra* note 39, 101; see also Steinberg, "Zur Konvergenz der Grundfreiheiten auf der Tatbestands- und Rechtfertigungsebene", 29 *Europäische Grundrechte Zeitschrift* (2002), 13; Baquero Cruz, op. cit. *supra* note 2, 92.

42. Cf. e.g. Jarass, "Elemente einer Dogmatik der Grundfreiheiten", 30 EuR (1995), 202; Jarass reemphasizes his claim several years later: a unified approach to the fundamental freedoms could "[reduce] the complexity and [facilitate] their application". Jarass, "A unified approach to the fundamental freedoms", in Andenas and Roth op. cit. *supra* note 17, p. 141.

argues that a single test for all freedoms would "provide certainty and uniformity in the field of free movement".[43] Others emphasize the clarity in legal reasoning that would avoid future inconsistencies[44] or that a coherent and unified system would make the rules easier to understand and thereby contribute to the respect for the law.[45] Consequently, the conceptual canvas that proponents of the horizontal direct application of fundamental freedoms to private actors commonly sketch their ideas on is that of a uniform test for all freedoms.[46]

Doubts nevertheless remain as to whether such an approach is justified.[47] The fact for the Court – an authentic interpreter of the Treaties – to set in place a differentiated regime in its case law cannot be disregarded. Such differentiation can, of course, be criticized and refuted but this requires, first and foremost, contextualized comprehension of the Court's chosen reasoning. In this sense, Poiares Maduro proposed to consider the Court's strategic role and choices.[48] Whilst a lawyer should not turn a blind eye to the ECJ's institutional position and its political role, such an approach does not seem to be well-suited to building legal argument. There should be principled, *legal* reasons why the Court treats the fundamental freedoms differently. These differences could be found by going to the core of the claim for convergence – the idea that all fundamental freedoms serve to the same extent, and primarily, the establishment of the internal market – and assessing its validity in the present state of EU law.

3.2. *Upgrading the free movement of citizens*

It is common knowledge that the Union has transformed in the last decades, committing itself to non-economic objectives and striving to treat the Member States nationals *qua* EU citizens and not merely *qua* economic actors.[49] Putting the EU citizen at the centre of all EU policies has become a *leitmotiv* of EU discourse, shaping legal reality as a consequence. It would be rather surprising if, in this setting, the fundamental freedoms carved out an isolated

43. Baquero Cruz, op. cit. *supra* note 2, 96.

44. Cf. Enchelmaier, "The ECJ's recent case law on the free movement of goods: Movement in all sorts of directions", 26 YEL (2007), 147.

45. Cf. Snell and Andenas, op. cit. *supra* note 40, 79.

46. Cf. Hintersteininger, op. cit. *supra* note 38, 120; Ganten, op. cit. *supra* note 24; Körber, op. cit. *supra* note 13.

47. These doubts are seldom expressed. For a rare example see Van den Bogaert, op. cit. *supra* note 5, 150.

48. Cf. Poiares Maduro, "Harmony and dissonance in free movement", in Andenas and Roth op. cit. *supra* note 17, pp. 51 et seq.

49. Cf. on the stages of this process Oliver and Enchelmaier, "Free movement of goods: Recent developments in the case law", 44 CML Rev. (2007), 666 et seq.

existence as the kernel of the European economic constitution, remaining untouched. Rather, it is suggested, the general developments in the aims and nature of the Union impact free movement law and lead the Court to treat it from a more holistic perspective.[50]

What might be interesting for our purposes is the enquiry into whether the fundamental freedoms have been affected differently by these developments. Certainly, the basic function of all fundamental freedoms, their key role as instruments of market integration, remains pertinent. Moreover, all fundamental freedoms remain "fundamental Community provisions"[51] and subjective rights of the individual.[52] However, scholarly literature has spotted a general trend in the case law[53] to interpret the free movement of persons more extensively, especially in cases where the protection of the individual is the central concern.[54] Indeed, this centring of the focus on the "citizen" can be said to have affected and weakened the original purpose of the free movement of persons as tools of market integration, aligning them to the purpose of other free movement concepts such as European Citizenship, which arguably has an autonomous and non-instrumental purpose.[55]

It should be stressed from the outset that such an approach does not seek to suggest that there is a neat dividing-line between the free movement of persons on the one hand and the other fundamental freedoms on the other hand.

50. Cf. Tryfonidou, "Further steps on the road to convergence among the market freedoms", 35 EL Rev. (2010), 39.

51. Case C-49/89, *Corsica Ferries France*, [1989] ECR 4441, para 8 and Case C-212/06, *Government of the French Community and Walloon Government*, [2008] ECR I-1683, para 52.

52. For the free movement of goods cf. the recent Opinion by A.G. Trstenjak in Case C-445/06, *Danske Slagterier*, [2009] ECR I-2119, paras. 75–78, who denotes it an "individual public law right".

53. Cf. with many examples Snell, "And then there were two: Products and citizens in Community Law", in Tridimas and Nebbia (Eds.), *EU Law for the Twenty-First Century: Rethinking the New Legal Order.vol. II* (Hart, 2004), p. 49; cf. also Oliver and Roth, "The internal market and the four freedoms", 41 CML Rev. (2004), 411 et seq.

54. It is interesting to note that the Draft Treaty establishing a Constitution for Europe provided for a change in the traditional order of the legal definition of the internal market. The definition in the Constitution would have mirrored the traditional definition of Art. 14(2) EC with the sole difference that goods were shifted from first to third position; cf. Art. III-130(2), O.J. 2004, C 310/474. The Lisbon Treaty did not adopt this symbolic rearrangement and transposed Art. 14(2) EC identically to what is now Art. 26(2) TFEU. The significance of such decisions should certainly not be exaggerated but they at least suggest an ongoing debate about a potential hierarchical order between the fundamental freedoms.

55. Cf. the Opinion by A.G. Cosmas in Case C-378/97, *Wijsenbeek* [1999] ECR I-6207, para 84; who argues that citizenship has established a "right, in the true meaning of the word, which exists with a view to the autonomous pursuit of a goal, to the benefit of the holder of that right and not to the benefit of the Community and the attainment of its objectives". and the Opinion by A.G. Sharpston in Case C-34/09, *Ruiz Zambrano*, judgment of 8 March 2011, nyr, paras. 67 et seq.

Internal fault-lines do exist. The notion of the "free movement of citizens", i.e. an application of Articles 45, 49 and 56 TFEU to cases where the individual citizen is moving, could prove helpful in tracing this line. How neatly such a line could be drawn and in what state this would leave the other freedoms remains to be seen.[56] With this in mind two areas of EU law should be scrutinized for their inter-relationship with and their effect on free movement law: fundamental rights and Union citizenship.

3.2.1. *Fundamental freedoms as fundamental rights*

From the moment where the Court interpreted fundamental freedoms as subjective rights of the individual[57] a discussion on the relationship between fundamental freedoms and fundamental rights evolved. At its centre was the quest to understand the differences between the two and to investigate whether the Court's interpretation has turned them into largely overlapping or even identical concepts. There was and still is a significant debate on this issue.[58] Indeed, the Court has not made much of an effort to keep the two conceptually apart.[59] In fact, the line between the concept of fundamental freedoms and the concept of fundamental rights seems to be somewhat blurred.[60] They are often mentioned in the same breath and seem sometimes to be even treated as mutually interchangeable.[61] However, this general assertion does not apply to the same extent to all fundamental freedoms.

56. Cf. the conclusions in section 3.3. *infra*.

57. Case 26/62, *Van Gend en Loos*, [1963] ECR 1.

58. Consider, e.g., Bleckmann, "Die Freiheiten des Marktes als Grundrechte", in Bieber and Nickel (Eds.), *Das Europa der zweiten Generation – Gedächtnisschrift für Christoph Sasse. vol. II* (Engel, 1981), pp. 666 et seq., who argues that the two are basically identical; Frenz, "Grundfreiheiten und Grundrechte", 37 EuR (2002), 606, who sees important overlaps and a close cohesion between the fields; cf. also for a different opinion Von Bogdandy, "Grundrechtsgemeinschaft als Integrationsziel", 56 JZ (2001), 165 et seq., who argues that a central difference between the two lies in the fact that the ECJ bases its decisions only on the fundamental freedoms if there is no applicable secondary legislation. The European legislator can hence derogate from a Court decision by introducing secondary legislation; this is not possible in regard to fundamental rights.

59. Cf. Rengeling and Szczekalla, *Grundrechte in der Europäischen Union. Charta der Grundrechte und Allgemeine Rechtsgrundsätze* (Heymanns, 2004), No. 140; who attribute to the Court in this regard a certain dogmatic sangfroid ("eine grundlegende dogmatische Unaufgeregtheit"); more critical are Craig and De Búrca who point to the dangers of mixing up the two concepts as this makes it possible to "[hide] behind the rhetorical force of the language of rights, while in reality merely advancing the commercial goals of the common market"., Craig and De Búrca, *EU Law: Text, Cases and Materials*, 4th ed. (OUP, 2007), p. 419.

60. Cf. Pache, "§ 4 Begriff, Geltungsgrund und Rang der Grundrechte der EU", in Heselhaus and Nowak (Eds.), *Handbuch der Europäischen Grundrechte* (Beck, 2006), p. 142, No. 39.

61. Rengeling and Szczekalla, op. cit. *supra* note 59, No. 140.

When persons move from one EU Member State to another, relying on a fundamental freedom under the Treaties, the exercise of a fundamental freedom and the protection of their fundamental rights are closely intertwined. An individual's economic freedom to choose the State where she wants to work in the EU is linked to her right to privacy and to family life.[62] This is most evident for the free movement of workers. In this case, the Court regards this fundamental freedom as being at the same time a fundamental right.[63] In *Forcheri* it held that "the right to free movement… constitutes a fundamental right of workers and their families".[64] In *Bosman* Advocate General Lenz argued that the free movement of workers was at the same time a fundamental right,[65] the Court later adopting his approach in the judgment.[66] Comparable statements by the Court that link or even unify specific fundamental rights and fundamental freedoms can, albeit less frequently, also be found for the freedom of establishment and the freedom to provide services.[67] It cannot be derived from the Court's case law that the free movement of goods enjoys the same "double-status",[68] although there are certainly also links to fundamental rights such as the freedom to conduct a business.[69]

The Charter of Fundamental Rights[70] has confirmed and further accentuated the Court's case law. Article 15(2) of the Charter stipulates that every citizen of the Union has "the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State". The Member States have thus included the free movement of workers, the freedom to provide services and the freedom of establishment in the Charter.[71] Yet it is far from clear how this explicit inclusion of some fundamental freedoms, but not others, should be understood and what its legal

62. Cf. Oliver and Roth, op. cit. *supra* note 53, 408.

63. This is also broadly accepted in the literature. Cf. e.g. Von Bogdandy, op. cit. *supra* note 58, 165 et seq.; Rengeling and Szczekalla, op. cit. *supra* note 59, No. 140, with further references.

64. Case 152/82, *Forcheri*, [1983] ECR 2323, para 11; cf. also Case 222/86, *Heylens* [1987] ECR 4097, para 14: "free access to employment is a fundamental right".

65. Opinion by A.G. Lenz, *Bosman*, cited *supra* note 1, para 203.

66. *Bosman*, cited *supra* note 1, para 129: "the fundamental right of free access to employment which the Treaty confers individually on each worker".

67. Cf. Pache, op. cit. *supra* note 60, No. 39; for the freedom to provide services cf. Rengeling and Szczekalla, op. cit. *supra* note 59, No. 140.

68. Cf. Oliver and Roth, op. cit. *supra* note 53, 408.

69. Art. 16 of the Charter; cf. also Frenz, op. cit. *supra* note 58, 607.

70. Charter of Fundamental Rights of the European Union, O.J. 2010, C 83/402.

71. Cf. the Explanations Relating to the Charter, prepared by the Bureau of the Convention (11 Oct. 2000); available at <www.europarl.europa.eu/charter/pdf/04473_en.pdf>; cf. also Bernsdorff, "Artikel 15", in Meyer (Ed.), *Charta der Grundrechte der Europäischen Union*, 3rd ed. (Nomos, 2011), p. 282, No. 20.

implications are.[72] The general understanding is that Articles 45, 49 and 56 TFEU are specific rights to engage in work for market citizens and therefore *leges speciales* in relation to the general fundamental right to engage in work.[73] This view embraces the accentuation and intensification of the legal quality of these fundamental freedoms, enshrined in Article 15(2) of the Charter[74] and could even suggest an independent role and development of these freedoms.[75]

To be clear, this inclusion in the Charter does not *per se* suggest that the free movement of persons should enjoy horizontal direct effect. Quite the opposite seems to be true.[76] How the apparent hostility of the Charter towards attributing horizontal direct effect to the rights enshrined therein can be reconciled with the acceptance of horizontal direct effect for manifestations of the same rights outside the Charter, either as general principles of law[77] or as Treaty provisions such as in the case of fundamental freedoms, is yet to become clear. On the one hand, a uniform interpretation of fundamental rights in EU law would be most welcome in light of the unity of the EU legal order.[78] Moreover, this interpretation should be guided by the symbolic importance

72. In this sense Jarass, *Charta der Grundrechte der Europäischen Union. Kommentar* (Beck, 2010), pp. 162 et seq.

73. Cf. Ruffert, "Art. 15 GRCh", in Calliess and Ruffert (Eds.), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, 4th ed. (Beck, 2011), No. 26 et seq.; eine "besondere Berufsfreiheit der Marktbürger"; for a similar use of the term cf. Pernice, *Grundrechtsgehalte im Europäischen Gemeinschaftsrecht* (Nomos, 1979), p. 174; Rengeling, "Die wirtschaftsbezogenen Grundrechte in der Europäischen Grundrechtecharta", 119 DVBL (2004), 457; Bernsdorff, op. cit. *supra* note 71, No. 20. For a different opinion, see Jarass, op. cit. *supra* note 72, 162 et seq.

74. Cf. Nowak, "§ 30, Berufsfreiheit und das Recht zu arbeiten", in Heselhaus and Nowak (Eds.), *Handbuch der Europäischen Grundrechte* (Beck, 2006), p. 824, No. 34.

75. Cf. Grabenwarter, "Auf dem Weg in die Grundrechtsgemeinschaft?", 31 EuGRZ (2004), 568.

76. Opinion by A.G. Trstenjak of 8 Sept. 2011 in Case C-282/10, *Dominguez*, pending, paras. 80–83 who argues that Art. 51(1) of the Charter unequivocally states that the Charter is only binding on the Union and the Member States when implementing Union law, thereby excluding individuals as potential addressees. Cf. also Kokott and Sobotta, "The Charter of Fundamental Rights of the European Union after Lisbon", EUI-Working Paper, AEL 2010/6, p. 14. The point could even be made that the twofold development of, one the one hand, applying the free movement of persons horizontally directly to the conduct of private actors and, on the other hand, approximating the same fundamental freedoms to fundamental rights implies the silent entrance of the concept of horizontal direct effect of fundamental *rights* in EU law through the backdoor.

77. Cf. the Opinion by A.G. Trstenjak in *Dominguez*, cited *supra* note 76, paras. 127–132.

78. Cf. in that sense the Opinion by A.G. Kokott of 8 Sept. 2011 in Case C-17/10, *Toshiba*, pending, paras. 111–124, especially para 117; who argues that the principle *ne bis in idem* enshrined in Art. 50 of the Charter and Art. 54 of the Convention implementing the Schengen Agreement must be applied uniformly throughout the EU legal order. In the same sense the Opinion by A.G. Sharpston in Case C-467/04, *Gasparini e.a.*, [2006] ECR I-9199, paras. 101–103.

assigned to the Charter in light of its increased legitimacy compared to fundamental rights developed in the Court's case law. On the other hand, it would be rather surprising if, under the influence of the Charter, the Court were to unwind its case law on horizontal direct effect. The resolution of this tension is a separate – but manifestly important – discussion. The crucial point here is that the Charter's provisions underline the importance of the individual's right to free movement, which would necessarily suggest that Article 34 TFEU is not encompassed by the "upgrading" that the free movement of citizens has enjoyed, both, through the case law of the Court and also – very explicitly – by the Member States in the Charter.

3.2.2. *The influence of citizenship on the free movement of persons*

With the introduction of Union citizenship by the Treaty of Maastricht, a new kind of free movement provision was introduced. What is now Article 21 TFEU provides essentially for the right of EU citizens to reside and move freely within the Union. The dynamic case law that evolved from this concept had an impact in many fields, but also on the classic free movement of persons. Advocate General Colomer has described this as a process where Articles 45, 49 and 56 TFEU have "gradually become entwined" with Article 21 TFEU.[79] The free movement of persons is, according to him, re-interpreted by the Court under the influence of citizenship such as to put the individual at the centre.[80] This leads to cases[81] where Articles 45, 49 or 56 TFEU are interpreted more extensively because these norms are interpreted in the light of Union citizenship.[82] This assertion also finds support in the literature where it is asserted that Union citizenship has lifted the free movement of persons to a new level, adding a constitutional layer to those traditional market freedoms that involve it.[83] Skouris speaks in that sense of a development that leads to an

79. Opinion by A.G. Colomer in Case C-228/07, *Petersen*, [2008] ECR I-6989, para 22.

80. Opinion by A.G. Colomer, op. cit. *supra* note 79, paras. 27 et seq. Cf. also Spaventa, "From Gebhard to Carpenter: Towards a (non-)economic European constitution", 41 CML Rev. (2004), 768 et seq.

81. The A.G. cites explicitly Cases C-85/96, *Martínez Sala*, [1998] ECR I-2691; C-413/99, *Baumbast and R*, [2002] ECR I-7091 and C-60/00, *Carpenter*, [2002] ECR I-6279.

82. Nic Shuibhne also links *Carpenter* to the "undercurrent" of Union citizenship, cf. Nic Shuibhne, "The outer limits of EU citizenship: Displacing economic free movement rights?", in Barnard and Odudu (Eds.), *The Outer Limits of European Union Law* (Hart, 2009), pp. 173 et seq.; in the same sense Oliver and Enchelmaier, op. cit. *supra* note 49, 659.

83. Cf. White, *Workers, Establishment and Services in the European Union* (OUP, 2004); Gormley, op. cit. *supra* note 39, 1688. Some scholars contrast this impact with current treatment of the free movement of goods. Oliver and Enchelmaier, e.g., state: "In any case, citizenship of the Union has no bearing on the free movement of goods". Oliver and Enchelmaier, op. cit. *supra* note 49, 660.

overarching concept of the free movement of persons that is independent of economic concerns and to which Union citizenship has significantly contributed in recent time.[84]

It is here not suggested that citizenship has absolutely no impact on the free movement of goods.[85] Likewise and more importantly, the bearing of citizenship on the free movement persons is not always effective with the same intensity. In cases where Article 56 TFEU applies and where only the service and not the service provider moves or in cases where business entities and not individuals rely on their freedom of establishment, the more extensive interpretation in the light of Union citizenship is not perceivable to the same extent.[86] As nic Shuibhne puts it: citizenship takes the traditional freedoms "somewhere else in some (human) cases, – *but* – this means leaving behind quite deliberately the 'non-human' business of establishment and goods and services as something else…".[87]

3.3. *Interim conclusions and implications for the question of horizontal direct effect*

There is one principal conclusion that can be drawn from the foregoing investigation into the aims and structure of the fundamental freedoms for our discussion. The idea that the fundamental freedoms must be interpreted in a uniform manner because they all serve the establishment of an internal market – which is the *ratio* of the claim for convergence – is in this simplistic form not valid. While the basic function of all fundamental freedoms, as tools of market integration, persists, Articles 45, 49 and 56 TFEU have gained additional dimensions, when they are applied to cases where the individual citizen moves, whereas Article 34 TFEU largely retains its original functional status. This also means that to the extent that the former can be conceptualized as fundamental rights, their aims and *modus operandi* change, being exercised by

84. Cf. Skouris, "Das Verhältnis von Grundfreiheiten und Grundrechten im europäischen Gemeinschaftsrecht", 59 *Die Öffentliche Verwaltung* (2006), 90.

85. Cf. e.g. the Opinion by A.G. Poiares Maduro in Joined Cases C-158 & 159/04*, Alfa Vita Vassilopoulos*, [2006] ECR I-8135, para 51, where the A.G. argues: "[A] harmonization of the systems of free movement seems to me to be essential in the light of the requirements of genuine Union citizenship. It would be desirable for the same system to be applied to all the citizens of the Union wishing to use their freedom of movement or freedom to move services, goods or capital as well as their freedom to reside or to set up the seat of their activities in the Community".

86. Cf. White, op. cit. *supra* note 83, 260 et seq.; Snell however points to the fact that the Court hardly makes a difference in its interpretation in regard to Art. 56 TFEU, whether the service provider moves or not; cf. Snell, op. cit. *supra* note 53, 63 et seq.

87. Nic Shuibhne, op. cit. *supra* note 82, 194.

individuals not just to establish an internal market but for their own sake, as ends in themselves,[88] in line with the *ratio* of Article 21 TFEU.[89]

Up to this point we have discussed certain developments in free movement law from a general perspective. Questions remain as to what this analysis tells us as to whether the Court's differential approach to horizontal direct effect is justified. One might wonder if there is a link between the different additional dimensions the free movement of persons have gained and the attribution of horizontal direct effect. *Prima facie*, the differential treatment of the fundamental freedoms with regard to horizontal direct effect does appear to insert itself neatly into a general pattern whose genesis is directly associated with the impact of citizenship and the double-nature as fundamental freedoms and rights. The classic *Bosman*, the ground-breaking judgment in *Angonese* and its confirmation in *Raccanelli* all concerned the free movement of workers, a fundamental freedom that is unequivocally considered simultaneously a fundamental right and where the individual as Union citizen is at the centre.

Consequently, it is not surprising that some scholars link the attribution of horizontal direct effect to a fundamental freedom to its interaction with citizenship[90] or more frequently to its close links to fundamental rights.[91] However, the Court has never explicitly stated that the specific nature of a fundamental freedom is constitutive for the attribution of horizontal direct effect. Exceptionally, in *Bosman* there was a concrete sign that the double-status of Article 45 TFEU as fundamental freedom and fundamental right might play a role in the attribution of horizontal direct effect.[92] In order to verify what role the additional dimensions play in the attribution of horizontal direct effect, it is necessary to consider the arguments the Court brought forward to substantiate the acceptance of horizontal direct effect for the free movement of persons.

88. Cf. Snell, op. cit. *supra* note 53, 68.

89. Cf. *supra* note 55.

90. Cf. Nic Shuibhne, op. cit. *supra* note 82, 173 et seq.; who states that the "undercurrent" of citizenship perhaps helps to "rationalize the extension of horizontal effect to Article [45 TFEU] in *Angonese*".

91. Cf. Lengauer, "Drittwirkung von Grundfreiheiten – Eine Besprechung der Rs C-281/98, Angonese", 42 *Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht* (2001), 64; in a later published monograph Lengauer argues that having fundamental rights character should be one of two constitutive criteria for the attribution of horizontal direct effect: cf. Lengauer, op. cit. *supra* note 37, 406; cf. also Prechal and De Vries, op. cit. *supra* note 37, 18; Van den Bogaert, op. cit. *supra* note 5, 150; Snell, op. cit. *supra* note 53, 60.

92. The claim by A.G. Lenz, that the free movement of workers is simultaneously a fundamental right (Opinion by A.G. Lenz in *Bosman*, cited *supra* note 1, para 203) was taken up by the Court and integrated in its judgment (*Bosman*, cited *supra* note 1, para 129).

4. Searching for "upgrades" in the Court's case law

In support of its finding that Articles 45, 49 and 56 TFEU were horizontally directly applicable the Court has essentially relied on three arguments. Taking as a starting point the open wording of fundamental freedoms it has relied, as the central pillar of its reasoning, on (i) an *effet utile* interpretation[93] and the linked argument of preserving the unity of Union law.[94] In later cases, it has pointed to (ii) the provisions' close relationship with Article 18;[95] and (iii) their relation to Article 157 TFEU.[96] While the *effet utile* argument, as presented by the Court,[97] is essentially neutral[98] in its application to all freedoms, the two other points deserve closer consideration.

4.1. *The relationship to Article 18 TFEU*

Article 18 TFEU provides for the general prohibition of discrimination on grounds of nationality within the scope of application of the Treaties. Discussion of the relationship between Article 18 TFEU and the fundamental freedoms is a necessary first step, followed by commentary on the role of Article 18 TFEU in judgments establishing horizontal direct effect.

4.1.1. *The relationship between Article 18 TFEU and the fundamental freedoms*

Characterized as the *leitmotiv*[99] of the Treaties, Article 18 TFEU has undergone a comparable evolution to the free movement of persons. It has been attributed horizontal direct effect[100] and it is also conceptualized as a

93. *Walrave and Koch*, cited *supra* note 8, para 18; *Bosman*, cited *supra* note 1, para 83; Joined Cases C-51/96 and 191/97, *Deliège*, [2000] ECR I-2549, para 47; *Angonese*, cited *supra* note 1, para 32; Case C-309/99, *Wouters*, [2002] ECR I-1577, para 120; *Viking*, cited *supra* note 1, para 57; Case C-341/05, *Laval*, [2007] ECR I-11767, para 98.

94. Cf. already *Walrave and Koch*, cited *supra* note 8, para 19.

95. Cf. *Angonese*, cited *supra* note 1, para 35 and *Raccanelli*, cited *supra* note 1, para 45.

96. *Angonese*, cited *supra* note 1, paras. 34 et seq. and *Viking*, cited *supra* note 1, para 58.

97. It will be argued later that in fact the *effet utile* argument is apt to differentiate adequately between the freedoms. This is however not apparent from the Court's use of this argument in its horizontal direct effect case law.

98. Cf. Körber, op. cit. *supra* note 13, 777; Ganten, op. cit. *supra* note 24, 103.

99. Cf. Von Bogdandy, "Art 18", in Grabitz, Hilf and Nettesheim (Eds.), *Das Recht der Europäischen Union*, vol. I (Beck, 2010), No. 1.

100. The horizontal direct effect of Art. 18 TFEU was explicitly confirmed in *Ferlini*, cited *supra* note 10, where this provision was used as a stand-alone legal basis – neither Art. 45 TFEU nor secondary legislation was applicable – to apply the principle of non-discrimination on grounds of nationality to a case between private actors.

fundamental right[101] or at least as "fundamental-rights-like".[102] This is confirmed by the inclusion of Article 18 TFEU, in its exact wording, as Article 21(2) of the Charter of Fundamental Rights.[103]

The free movement of workers, the freedom of establishment and the free movement of services may be considered as specific expressions of Article 18 TFEU, being applied by the Court as *leges speciales*.[104] All four prohibit direct discrimination on grounds of nationality that attach directly to personal characteristics – this is, according to prevailing legal doctrine, the decisive criterion that expresses Article 18 TFEU. Prohibitions that attach, for example, to the origin of goods are only indirect discrimination on grounds of nationality.[105] Consequently, Article 34 TFEU, where the nationality of the trader is irrelevant and only discriminations on the ground of the origin of a good fall into its ambit,[106] is not to be considered a specific expression of Article 18 TFEU.[107]

4.1.2. *The role of Article 18 TFEU in the Court's argumentation*

In *Angonese*,[108] the Court justified the application of Article 45 TFEU to private contracts with an "*a fortiori* argument". Based on its ruling in *Defrenne II* it held that "in relation to a provision of the Treaty which was mandatory in nature [Article 156 TFEU; equal pay for men and women],… the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as contracts between individuals… such considerations must a fortiori apply to Article [45 TFEU], which lays

101. Cf. Odendahl, "§ 45 Diskriminierungsverbote", in Heselhaus and Nowak (Eds.), *Handbuch der Europäischen Grundrechte* (Beck, 2006), p. 1198, No. 25 et seq.; Von Bogdandy, op. cit. *supra* note 99, No. 2.

102. Cf. Epiney, "Art. 18 EGV", in Calliess and Ruffert (Eds.), *EUV/EGV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, 4th ed. (Beck, 2011), No. 2.

103. There was also a hint to the development of the rationale of Art. 18 TFEU in light of the evolution of EU law, namely the changed emphasis from a tool for market integration to the protection of human dignity. Cf. Prechal and De Vries, op. cit. *supra* note 37, 17.

104. Cf. Odendahl, op. cit. *supra* note 101, No. 7.

105. Cf. Epiney, op. cit. *supra* note 102, No. 6; Odendahl, op. cit. *supra* note 101, No. 5 et seq.; Nicolaysen, "Inländerdiskriminierung im Warenverkehr", 26 EuR (1991), 99; different opinion: Holoubek, "Art 12 EGV", in Schwarze (Ed.), *EU-Kommentar*, 2nd ed. (Nomos, 2009), p. 340, No. 8 et seq.

106. Cf. e.g. Case 249/81, *Commission* v. *Ireland*, [1982] ECR 4005, which centred on a "Buy-national-campaign", attributed by the Court to the Irish State, that discriminated against non-Irish products irrelevant of the nationality of the trader. The products of an Irish trader importing for instance French liquor would also have been discriminated against.

107. Cf. Oliver and Enchelmaier, op. cit. *supra* note 49, 667; Gormley, op. cit. *supra* note 39, 1689.

108. *Angonese*, cited *supra* note 1.

down a fundamental freedom *and which constitutes a specific application of the general prohibition of discrimination contained in Article [18 TFEU]*".[109] In *Raccanelli*, a few years later, a similar argument was employed.[110]

What the Court seems to do here, is to establish the resemblance to Article 156 TFEU, i.e. the mandatory nature of Article 45 TFEU, by pointing first, to the fact that the free movement of workers is a fundamental freedom and second, by stating that Article 45 TFEU is a specific application of Article 18 TFEU. Hence, one of the two reasons for the horizontal direct effect of the free movement of workers lies in its quality as a specific expression of Article 18 TFEU.

Thus, Article 18 TFEU was seen as constituting a basis for attributing horizontal direct effect, either due to its fundamental rights character[111] or its status as *leitmotiv* of the Treaties.[112] Roth, writing before *Angonese*, was already of the opinion that Article 18 TFEU has to serve as the main legal basis for the attribution of horizontal direct effect.[113] If the fundamental freedoms were applied as specific expressions of Article 18 TFEU – i.e. in cases where discrimination on grounds of nationality occurs within the scope of a fundamental freedom – they would be equipped with horizontal direct effect to avoid inconsistencies.[114]

If these arguments were accepted, this would entail that only those provisions that include a prohibition of direct discrimination on grounds of nationality could enjoy horizontal direct effect. The free movement of goods would be excluded. However, this proposition seems to be too far-reaching. Roth himself, admits in a later article that the Court has deprived this argumentation of its basis, through its subsequent further development of the concept of horizontal direct effect in the case law.[115] In *Bosman* and several later cases the Court held that not only the prohibition of discrimination on grounds of nationality was horizontally directly applicable but also the

109. *Angonese*, cited *supra* note 1, paras. 34 et seq. (emphasis added); for a critical discussion of the Court's "logic" in this case cf. Lane and Nic Shuibhne, op. cit. *supra* note 4, 1244, in the same sense Körber, op. cit. *supra* note 13, 730 et seq.

110. *Raccanelli*, cited *supra* note 1, para 45; it is surprising that *Raccanelli*, the first confirmation of the ground-breaking and controversial judgment in *Angonese*, was decided by a chamber composed of only three judges, instead of the standard composition of five judges. One might conclude that the "*Angonese*-approach" was considered as settled by the Court.

111. Cf. Prechal and De Vries, op. cit. *supra* note 37, 16.

112. Cf. Roth, "Drittwirkung der Grundfreiheiten", in Due, Lutter and Schwarze (Eds.), *Festschrift für Ulrich Everling, vol. II* (Nomos, 1995), p. 1245 et seq.; also in that sense Forsthoff, "Drittwirkung der Grundfreiheiten: Das EuGH-Urteil Angonese", 11 *Europäisches Wirtschafts- und Steuerrecht* (2000), 393.

113. Cf. Roth, op. cit. *supra* note 112, 1242, 1245 et seq.

114. Cf. ibid., 1245 et seq.

115. Cf. Roth, op. cit. *supra* note 7, 400.

prohibition of restrictions on fundamental freedoms had horizontal direct effect,[116] extending its reach beyond the substance of Article 18 TFEU.[117] Yet, other scholars argue that the claim to institute Article 18 TFEU as the source of horizontal direct effect has not been followed by the ECJ.[118] Accordingly, the fact that Article 34 TFEU does not include a direct prohibition of discrimination on grounds of nationality is not a bar to the attribution of horizontal direct effect to the free movement of goods.

However, *Angonese* and *Raccanelli* show that although being a "specific application" of Article 18 TFEU is not a *sine qua non* for the attribution of horizontal direct effect,[119] it is an element in the Court's reasoning.

4.2. *The relationship to Article 157 TFEU*

Article 157 TFEU obliges every Member State to ensure that the "principle of equal pay for male and female workers for equal work or work of equal value is applied". Just like Article 18 TFEU, it is established, since the renowned judgment in *Defrenne II*,[120] that this provision has horizontal direct effect; and similarly to Article 18 TFEU it has also played a role in the Court's argumentation in the free movement horizontal direct effect cases.

In *Angonese*[121] and *Viking*,[122] the *Defrenne II* case was cited in support of an attribution of horizontal direct effect to Articles 45 and 49 TFEU respectively. In *Defrenne II*, the Court had held that Article 157 TFEU was "mandatory in nature", although not further explaining why.[123] In *Angonese* the Court held that *a fortiori* also Article 45 TFEU must be mandatory in nature because it first, lays down a fundamental freedom and second, constitutes a specific

116. *Bosman*, cited *supra* note 1, para 96; Case C-176/96, *Lehtonen*, [2000] ECR I-2681.

117. Kluth, "Die Bindung privater Wirtschaftsteilnehmer an die Grundfreiheiten des EG-Vertrages. Eine Analyse am Beispiel des Bosman-Urteils des EuGH", 122 AÖR (1997), 562 et seq.

118. Cf. Körber, op. cit. *supra* note 13, 738 et seq; Jaensch, op. cit. *supra* note 25, 80; this is also supported by the way the Court established horizontal direct effect for Art. 18 TFEU in *Ferlini*, cited *supra* note 10, where it reasoned quite the opposite, deducing from the horizontal direct effect of Arts. 157, 45 and 56 TFEU the horizontal direct effect of Art. 18 TFEU (cf. Körber, op. cit. *supra* note 13, 738). One cannot have it both ways.

119. If it were a *conditio sine qua non* it would also be difficult to reconcile this approach with the fact that in cases on Art. 56 TFEU where the service, and not the service provider, moves there is a parallel situation to the free movement of goods, i.e. an indirect discrimination on the grounds of nationality relying solely on the origin of the service.

120. *Defrenne II*, cited *supra* note 11.

121. *Angonese*, cited *supra* note 1, paras. 34 et seq.

122. *Viking*, cited *supra* note 1, para 58.

123. *Defrenne II*, cited *supra* note 11, para 39.

application of Article 18 TFEU. The Court added that both provisions "are designed to ensure that there is no discrimination on the labour market".[124]

Indeed, there is a certain resemblance between those fundamental freedoms that enjoy horizontal direct effect and Article 157 TFEU. They all contain a prohibition of discrimination attached to characteristics of the individual – Article 157 TFEU does not attach to discrimination on grounds of nationality but to discrimination on grounds of sex. More importantly, the free movement of persons and Article 157 are both understood as being or, at least, as being akin to fundamental rights.[125] Apart from this, Articles 157 and 45 TFEU are both strongly based on social motives.[126] Consequently, Lengauer derives from *Defrenne II*, which she classifies as being foundational for a general concept of horizontal direct effect, the requirement that a fundamental freedom must be also a fundamental right in order to enjoy horizontal direct effect.[127] This would necessarily mean that Article 34 TFEU could not be attributed horizontal direct effect.[128]

Despite seemingly inserting itself smoothly into the dividing line between the freedoms, which has been drawn above, this argument finds little backing in the case law. The common mandatory nature of Articles 157 and 45 TFEU in *Angonese* was not established by the shared quality as fundamental rights, but rather by the relative importance of the two provisions in the framework of the Treaties. This relative importance is, with respect to the fundamental freedoms, due to their status *qua* fundamental freedom and, in the case of *Angonese*, additionally because of their quality as a specific application of Article 18 TFEU and not because of their "double-nature" as fundamental freedom and right. This also appears clearly from *Viking* where the mandatory nature of Article 49 TFEU was established by the sole reference to its quality as fundamental freedom.[129]

The mandatory nature *qua* fundamental freedom also applies to Article 34 TFEU. The Court's use of Article 157 TFEU neither reflects the Court's reliance on the different nature of the freedoms, nor does it explain the Court's differential treatment of the freedoms regarding horizontal direct effect.

124. *Angonese*, cited *supra* note 1, para 35.

125. For Arts. 45, 49 and 56 TFEU cf. *supra* section 3.2.1.; for Art. 157 TFEU cf. Lengauer, op. cit. *supra* note 37, 390 et seq.; Streinz and Leible, "Die unmittelbare Drittwirkung der Grundfreiheiten", 11 EuZW (2000), 462. For a contrasting view, Odendahl, "§ 44 Gleichheit von Männern und Frauen", in Heselhaus and Nowak (Eds.), *Handbuch der Europäischen Grundrechte* (Beck, 2006), p. 1161, No. 32 et seq.

126. Cf. Van den Bogaert, op. cit. *supra* note 5, 138.

127. Cf. Lengauer, op. cit. *supra* note 37, 390.

128. Ibid., 406.

129. *Viking*, cited *supra* note 1, para 59.

4.3. *Interim conclusions*

Two principal conclusions can be drawn and an answer to the question posed at the outset. The first conclusion must be that the Court has established in its horizontal direct effect case law, to a certain extent, a basis for treating the fundamental freedoms differently. By relying on the conceptual affinity between Article 18 TFEU and the free movement of persons, it institutes a legal difference in the structure and nature of the freedoms, implicitly also invoking the fundamental rights character of the free movement of persons and its special relationship with Union citizenship. This is however the only indication in the case law on horizontal direct effect that the Court considers the development that the free movement of persons has undergone as an essential criterion in the attribution of horizontal direct effect to a fundamental freedom. The second conclusion is that the arguments the Court employs in its horizontal direct effect case law cannot provide grounds to exclude the horizontal direct effect of Article 34 TFEU. The Court's differential approach to the principle is therefore incoherent insofar as it does not only treat the free movement of goods differently but in fact excludes it from enjoying horizontal direct effect.

5. Proposing a solution

In fact, a concept of horizontal direct effect for Article 34 TFEU can be positively derived from EU law, whilst giving due weight to the differences between the freedoms noted above. Such a concept would go some way to resolving the inconsistencies in the Court's case law. To do so, it will be argued that the horizontal direct effect of Article 34 TFEU should be constructed around the central pillar of the Court's argumentation when accepting horizontal direct effect for Articles 45, 49 and 56 TFEU: an *effet utile* interpretation.[130] This interpretative technique strives to ensure that EU law enjoys its full effect, and that the objectives of the Treaties are to the largest extent possible achieved.[131] Most scholars, irrespective of whether they accept or reject the concept of horizontal direct effect, accept in principle the validity of this technique.[132] Moreover, it is accepted that purpose-oriented interpretation takes a prominent place in the interpretation of EU law operated

130. Cf. the references in note 93 *supra*.

131. Cf. Van den Bogaert, op. cit. *supra* note 5, 136.

132. Cf. e.g. MacGowan and Quinn, op. cit. *supra* note 25, 166; who reject horizontal direct effect for the free movement of goods; Jaensch, op. cit. *supra* note 25, 254 et seq.; Körber, op. cit. *supra* note 13, 776; Streinz and Leible, op. cit. *supra* note 125, 461; who reject the concept of horizontal direct effect of the fundamental freedoms in general; for proponents of horizontal

by the Court – especially to fundamental but openly and vaguely drafted provisions such as the fundamental freedoms.[133] Referring precisely to Article 34 TFEU, Tridimas enquires rather poignantly: "But what is a measure having equivalent effect? And how can the answer to that question be given without recourse to the objectives, the spirit and the scheme of the Treaty?"[134]

Effet utile is however, for good reasons, not an undisputed technique.[135] The main critique is not about its central assumption, but about its limits. Critics stress that *effet utile* should not be "abused" to justify every measure that furthers the realization of an objective of the Treaties.[136] Definitely, the pitfall of employing *effet utile* as a "methodological bat" has to be avoided by observing certain limits. These limits can be derived from the case law and the traditional canon of EU law interpretation. First, an *effet utile* interpretation has to respect the limits of the text of the norm;[137] second, it has to fit into the system of the Treaties and the *effet utile* of other provisions must not be impaired,[138] which essentially adds a systematic component to interpretation; and third, the interpretation, in light of the principle of proportionality as a general principle of EU law,[139] must not go beyond what is necessary to achieve the objective of a norm. These limits will be dealt with later in more detail after having presented the *effet utile* argument in its application to Article 34 TFEU in a first step.

direct effect cf. e.g.: Ganten, op. cit. *supra* note 24, 112 et seq.; Steindorff, *EG-Vertrag und Privatrecht* (Nomos, 1996), p. 292.

133. Cf. Koopmans, "The theory of interpretation and the Court of Justice", in O'Keeffe et al. (Eds.), *Liber amicorum in honour of Lord Slynn of Hadley. vol. I.* (Kluwer, 2000), p. 53; Poiares Maduro, "Interpreting European law – Judicial adjudication in a context of constitutional pluralism", Working Paper IE Law School, 5 Feb. 2008, 6; accessible at: <ssrn.com/abstract=1134503>.

134. Tridimas, "The Court of Justice and judcial activism", 21 EL Rev. (1996), 205.

135. Cf. e.g. Streinz, "Der 'effet utile' in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften", in Due, Lutter and Schwarze (Eds.), *Festschrift für Ulrich Everling. vol II* (Nomos, 1995), pp. 1506 et seq.

136. Cf. Streinz and Leible, op. cit. *supra* note 125, 462; Kluth, op. cit. *supra* note 117, 576 et seq.; Kingreen, "Art. 34–37 AEUV", in Calliess and Ruffert (Eds.), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, 4th ed. (Beck, 2011), No. 115.

137. A textual interpretation is normallly a preliminary step of the Court, when reasoning with *effet utile*; cf. Potacs, "Effet utile als Auslegungsgrundsatz", 44 EuR (2009), 474.

138. Cf. in this sense Körber, op. cit. *supra* note 13, 760.

139. Cf. Calliess, "Art 5 EGV", in Calliess and Ruffert (Eds.), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, 4th ed. (Beck, 2011), No. 44.

5.2. *Analysing the argument*

Körber has analysed the Court's *effet utile* interpretation in establishing horizontal direct effect for Articles 45, 49 and 56 TFEU and has split it into four logical steps.[140] These different steps, with some adaptation, are a useful starting point for considering Article 34 TFEU:

(i) The wording of Article 34 TFEU is neutral, so as to make it in principle possible to include private parties among its addressees.
(ii) The internal market comprises an area without internal frontiers where the free movement of goods, persons, services and capital is ensured. The free movement of goods serves the objective of an internal market by ensuring free movement.
(iii) Not only States but also private parties can compromise this objective.
(iv) From this follows that Article 34 TFEU must apply to the conduct of private actors.

In reality, none of these steps should appear too contentious, given precedents in the case law and academic commentaries. However, the concluding proposition has not been truly engaged with.

Step (i): *The neutrality of the text*
Textual arguments have not featured prominently in our discussion to this point, nor do they in either the academic debate or the case law on horizontal direct effect. It is uncontentious that the wording of Article 34 TFEU neither excludes nor supports horizontal direct effect.[141]

Step (ii): *The internal market objective*
As has been shown above, the purpose of Article 34 TFEU is as a vehicle for the establishment of the internal market.[142] Although the line between instrumentality and autonomy is also not absolutely clear-cut in the free movement of goods, individuals enjoy the rights that spring from Article 34 TFEU not for their own sake but as instrumental rights. For the free movement of goods it is hence the internal market objective that should be rendered fully effective.

140. Körber, op. cit. *supra* note 13, 776.
141. Cf. *inter alia* Streinz and Leible, op. cit. *supra* note 125, 460; Ganten, op. cit. *supra* note 24, 56 et seq.; Körber, op. cit. *supra* note 13, 722 et seq.
142. *Supra* section 3.

Step (iii): *Threats to the objectives of Article 34 TFEU by the conduct of private actors*

The third step of our argument claims that not only measures originating from the State but also private conduct can compromise the objectives of Article 34 TFEU. This assertion is neither new to academic debate nor to the Court's case law. There are a number of classic examples that should be briefly discussed. Concurrently, a more general but intensifying challenge to the traditional concept of Article 34 TFEU as applying to State measures should be introduced: the blurring of the public-private divide.

a) Classic examples. It is undisputed that the conduct of private parties can – in a quite similar manner to other fundamental freedoms – compromise the objectives of Article 34 TFEU. Possible threats mentioned in the literature include: strikes and blockades of import routes,[143] privately organized "buy national campaigns" that aim at encouraging consumers to buy domestic products,[144] a magazine that prints only domestic advertisements,[145] the refusal of a private consumer organization to test the quality of foreign products,[146] an insurance company that refuses to insure imported cars, without holding a dominant position or being party to an agreement,[147] or the choice of individual consumers not to buy products from other Member States.[148]

An understanding of this potential threat to the objectives of Article 34 TFEU from the conduct of private parties is also not novel to the Court of Justice. In its case law one finds a number of examples that could have – with some minor adaptations[149] – been cases of application for horizontal direct effect. The Court already established the threat of private import blockades to Article 34 TFEU in *Commission* v. *France*[150] and in *Schmidberger*[151] with regard to the violent hindrance of strawberry imports from Spain by French farmers and the peaceful blocking of an Austrian highway by environmental

143. Cf. VerLoren van Themaat and Gormley, "Prohibiting restrictions of free trade within the Community: Articles 30–36 of the EEC Treaty", 3 *Northwestern Journal of International Law and Business* (1981), p. 608; cf. also Schaefer, *Die unmittelbare Wirkung des Verbots der nichttarifären Handelshemmnisse (Art. 30 EWGV) in den Rechtsbeziehungen zwischen Privaten* (Lang, 1987), pp. 175 et seq.

144. Cf. Schaefer, op. cit. *supra* note 143, 170 et seq. See also in this Review Hojnik, Free movement of goods in a labyrinth: Can *Buy Irish* survive the crises?

145. Cf. Milner-Moore, "The accountability of private parties under the free movement of goods principle", (1995) Harvard Jean Monnet WP 9/95.

146. Cf. Schaefer, op. cit. *supra* note 143, 178 et seq.

147. Cf. Jarvis, "Scope: Persons bound", in Oliver (Ed.), *Oliver on Free Movement of Goods in the European Union*, 5th ed. (Hart, 2010), p. 68.

148. Cf. Milner Moore, op. cit. *supra* note 145.

149. In the cases cited *infra,* the Court attributed the conduct of private parties to the State.

150. Case C-265/95, *Commission* v. *France*, [1998] ECR I-6959.

151. Case C-112/00, *Schmidberger*, [2003] ECR I-5659.

activists.[152] Likewise, the more subtle hindrance of "buy-national campaigns" has already been dealt with by the Court. In *Commission* v. *Ireland ("Buy Irish")*,[153] *Apple and Pear Development Council*[154] and *Commission* v. *Germany ("CMA")*[155] the Court had to deal with organizations that were established to promote domestic goods through campaigns and specific labelling and to encourage consumers to buy these products. The Court managed to attribute or assimilate these organizations to the State due to their structure, control and funding.[156] However, similar cases, which differ from the above-mentioned only through a missing link to the State, are clearly conceivable.[157]

b) Self-regulation and the blurring of the public-private divide. Another topical development which also whirls around the relationship between competition and free movement law is the rise of private regulation and the "dilution"[158] or even "collapse"[159] of the traditional public-private divide.

Private regulation or "private governance"[160] – meaning rules that are no longer drafted by the State but by private actors alone or in the form of "co-regulation" with the State – is not a new phenomenon, but is significantly growing in importance and frequency. Private regulation spans diverse sectors, such as sports regulation, social and employment law, food safety,

152. Cf. especially the Court's interesting statement in *Viking*, cited *supra* note 1, para 62 where the Court held: "This interpretation is also supported by the case law on the Treaty provisions on the free movement of goods, from which it is apparent that restrictions may be the result of actions by individuals or groups of such individuals rather than caused by the State", citing *Commission* v. *France*, cited *supra* note 150 and *Schmidberger*, cited *supra* note 151.

153. *Commission* v. *Ireland*, cited *supra* note 106.

154. Case 222/82, *Apple and Pear Development Council*, [1983] ECR 4083.

155. Case C-325/00, *Commission* v. *Germany*, [2002] ECR I-9977.

156. Cf. Wernicke, *Die Privatwirkung im Europäischen Gemeinschaftsrecht. Strukturen und Kategorien der Pflichtenstellungen Privater aus dem primären Gemeinschaftsrecht unter besonderer Berücksichtigung der Privatisierungsfolgen* (Nomos, 2002), pp. 143 et seq. in regard to the first two cases; on *Commission* v. *Germany* cf. the case note by Jarvis, "Case C-325/00, Commission v. Germany", 40 CML Rev. (2003), 725.

157. Cf. e.g. the written question by MEP Lomas to the Commission concerning a "Buy British campaign" of the British newspaper Daily Express, O.J. 1983, C 219/14; for further examples cf. Hintersteininger, op. cit. *supra* note 38, 105.

158. Prechal and De Vries, op. cit. *supra* note 37, 5 et seq.

159. Sauter and Schepel, "'State' and 'market' in the competition and free movement case law of the EU Courts", TILEC Discussion Paper 2007/024, <ssrn.com/abstract=1010075>, 14.

160. Cf. Wernicke, "Au nom de qui? The European Court of Justice between Member States, civil society and Union citizens", 13 ELJ (2007), 401 et seq., who defines private governance as "any private influence on processes that are equivalent in their effects to public influences" (at 405).

Internet regulation or environmental governance.[161] On a global scale this weakens national governments, gives further rise to multinational corporations and supply chains and leads to the "proliferation, diversification and internationalization of new social movements and their strategies".[162] At the EU level, Chalmers speaks of a "transformation" of EU law, where private law-making is a "central and expanding feature".[163] This trend also applies to Member State governments, albeit the withdrawal of the State and the rise of private regulation is not a uniform process in the EU. Member States follow different paths in terms of intensity and speed.[164]

These developments necessarily provoke questions with regard to accountability, legitimacy and justiciability in cases where private governance supersedes public governance. The Court has sought to answer these concerns, in the knowledge that the classics of horizontal direct effect, such as *Walrave and Koch* and *Bosman*, where rules drawn up by self-regulated sporting organizations were scrutinized under free movement law, were precisely concerned with private governance. Specifically, the Court's attempt in *Bosman* to "constitutionalize" private governance structures is identified as the watershed moment of the Court's reaction to the challenges of private regulation.[165] In later cases the Court has moved beyond the concept of regulatory power to embrace also factual power,[166] especially evident from *Viking*.[167] It is this broad understanding of power as factual or legal power to obstruct the establishment of an internal market that is employed in this article.[168]

Step (iv): *Conclusion: Article 34 TFEU applies to the conduct of private actors*

The last step is a logical conclusion in light of the reasoning above. As Article 34 TFEU is openly drafted (step i), and the underlying objective of the free

161. Chalmers, "Private power and public authority in European Union law", 8 CYELS (2005/06), 59; on the various forms of self-regulation and some of its critique cf. Ogus, "Rethinking self-regulation", 15 *Oxford Journal of Legal Studies* (1995), 97.

162. Cf. Wessel and Wouters, "The phenomenon of multilevel regulation: Interactions between global, EU and national regulatory spheres", (2007) *International Organizations Law Review*, 271.

163. Cf. Chalmers, op. cit. *supra* note 161, 59 et seq.

164. Cf. Sauter and Schepel, op. cit. *supra* note 159, 16.

165. Cf. Wernicke, op. cit. *supra* note 156, 210, 254.

166. Cf. ibid., 212–224.

167. *Viking*, cited *supra* note 1, paras. 64 et seq.; in this sense also Chalmers, Davies and Monti, *European Union Law. Cases and Materials*, 2nd ed. (CUP, 2010), 802.

168. For a comparably wide understanding of the concept of power cf. *Barnett and Duvall*, "Power in global governance", in Barnett and Duvall (Eds.), *Power in Global Governance* (CUP, 2005), 1.

movement of goods to contribute to establishing an internal market (step ii) can be compromised by the conduct of private actors (step iii) the *effet utile* justification of horizontal direct effect appears applicable to Article 34 TFEU.

5.3. *The limits of an effet utile interpretation*

The question remains whether this interpretation respects the three limits considered above that chart meaningful boundaries for an *effet utile* interpretation. The first limit, a semantic one with reference to Article 34 TFEU, was already discussed and confirmed as step (i) of the above-presented argument. Hence, the second limit remains to be considered, requiring the result of an *effet utile* interpretation to fit into the system of the Treaties – specific examination of the impact on the *effet utile* of competition rules and of the grounds of justification for the breach of Article 34 TFEU is required here. Finally, with regard to the third limit, namely that the interpretation does not go beyond what is necessary to achieve the objective of Article 34 TFEU, traditional proportionality concerns must be addressed.

By insisting on a prominent engagement with the limits of an *effet utile* interpretation, this article does not seek to undermine the importance of deriving horizontal direct effect positively from EU law.[169] Moreover, this discussion should not be misconceived as a fight against windmills. However, it would be hard to create acceptance for this disputed concept if its limits were not intensively engaged with, where these are – as it was argued earlier – the most critical part of an *effet utile* argument.

5.3.1. *The effet utile of competition rules – Interfering with the system of the Treaties?*

Traditionally, it is competition law that deals with the conduct of private actors in EU law. A central debate, since the early beginnings of the discussion on horizontal direct effect, therefore reflected on the significance and the role of competition law for the question of who the addressees of the fundamental freedoms are.[170] Critics of horizontal direct effect voice two main systematic arguments relying on the role of competition law in the Treaties to refute the horizontal direct application of the fundamental freedoms.

169. Cf. section 5.2. *supra*.

170. Cf. only the well-known debate in the Fordham International Law Journal between Pierre Pescatore, op. cit. *supra* note 22, and Guiliano Marenco (Marenco, "Competition between national economies and competition between businesses – A response to judge Pescatore", 10 *Fordham International Law Journal* (1986), 420).

Firstly, the critique goes, if the fundamental freedoms also applied to private conduct, they would interfere with competition law and its specific mode of application. This is due to the different structure and legal method employed in the two fields of law. A simple example suffices. The application of Articles 101 et seq. TFEU is subject to a *de minimis* threshold, the underlying *ratio* thereof being that undertakings that do not pose a considerable threat to EU-wide competition due to a lack of market power should not be caught by competition law.[171] This concept is not adopted in the regime of the fundamental freedoms, where potential or indirect effects on intra-Union trade also trigger their application.[172] As a result, the parallel application of competition law and Article 34 TFEU to a case between private parties could result in situations where conduct is considered legal under competition law because it does not pass the *de minimis* threshold but is nevertheless considered an infringement of Article 34 TFEU. This could endanger the system of the Treaties[173] and undermine the nuanced and balanced system of competition law and the good reasons to exempt certain conduct from its scrutiny.[174]

Secondly, critics add, real questions can be asked as to the necessity of horizontal direct effect in light of the very existence of competition law. If a certain conduct is already considered illegal under competition law rules (Arts. 101et seq.), why should it be necessary to cumulatively apply Article 34 TFEU?[175]

These two arguments do not promote a complete rejection of horizontal direct effect. However, they argue that where competition law applies, a fundamental freedom may not apply as well, independently of the question whether the application of competition law eventually results in the prohibition of a given conduct or not. Free movement and competition law would therefore be considered as mutually exclusive, the latter taking precedence if both were applicable. If these claims were indeed to be followed it would significantly reduce the possible field of application of Article 34 TFEU. The free movement of goods would only apply horizontally directly to private parties that do not come under the broad notion of undertaking.[176]

171. Cf. Snell, op. cit. *supra* note 17, 229; cf. also Marenco, op. cit. *supra* note 170, 425.

172. Cf. Baquero Cruz, op. cit. *supra* note 2, 86.

173. Cf. Snell, op. cit. *supra* note 17, 230.

174. Cf. Kluth, op. cit. *supra* note 117, 573; MacGowan and Quinn, op. cit. *supra* note 25, 168.

175. Cf. Kluth, op. cit. *supra* note 117, 573; Körber, op. cit. *supra* note 13, 766 et seq.

176. Cf. generally Odudu, *The Boundaries of EC Competition Law. The Scope of Article 81* (OUP, 2006), 23 et seq.; the Commission and the Court have classified, e.g., an opera singer, an

Nevertheless, these critiques are disputed and in fact the Court applies competition law and fundamental freedoms cumulatively. In *Bosman*, Advocate General Lenz argued that competition law and Article 45 TFEU may be applied to a single factual situation.[177] The Court implicitly accepted this proposition.[178] The Court took a similar stance in the field of services in *Deliège*,[179] although it did not evaluate the case from a competition law perspective because of a lack of information. However, it did not reject a parallel application of free movement of services and competition law provisions in principle. The Court also applied Article 34 TFEU cumulatively with competition law, albeit to State conduct.[180]

This approach finds support in academic commentaries, where it is argued that competition and free movement law play different roles, serving different objectives in the internal market's establishment and preservation. In this view, the fundamental freedoms constitute the internal market and have to be seen as a prerequisite for the functioning of EU competition law.[181] They are meant to establish, as a first step, the internal market by ensuring free movement of goods, persons, capital and services. Within this created internal market, competition rules ensure, in a second step, that market power is not abused and that competitive relationships are upheld.[182] Competition law is, in contrast to the fundamental freedoms, not a means to establish the internal market but a necessary supplement for its proper functioning.[183] Their cumulative application by the Court reflects and respects these differences well. In light of these considerations, one is inclined to agree with Baquero

agricultural co-operative or an inventor exploiting his invention as an undertaking within the meaning of Arts 101 et seq. TFEU; cf. Snell, op. cit. *supra* note 17, 233.

177. Opinion by A.G. Lenz in *Bosman*, cited *supra* note 1, para 253.

178. *Bosman*, cited *supra* note 1, para 138. The Court handed down a similar judgment in *Lehtonen*, cited *supra* note 116, checking compatibility with competition law and the free movement of workers at the same time, although it did not consider the information provided sufficient to go into the substance of competition law (paras. 28 et seq.); cf. also Ganten, op. cit. *supra* note 24, 155.

179. *Deliège*, cited *supra* note 130, para 38.

180. Joined Cases C-140 & 142/94, *DiP Sp.A*, [1995] ECR I-3257, paras. 14 et seq. and 29 et seq. The application of competition law to the State is the other side of the coin of the relationship between competition and free movement; cf. Poiares Maduro, "The chameleon State. EU law and the blurring of the private/public distinction in the market", 5 et seq., available at <ssrn.com/abstract=1575542>.

181. Cf. Immenga and Mestmäcker, "Die Bedeutung der Wettbewerbsregeln in der Wirtschaftsverfassung der EG", in Immenga and Mestmäcker (Eds.), *Wettbewerbsrecht, vol. 1/part 1*, 4th ed. (Beck, 2007), p. 26, No. 14; Ganten, op. cit. *supra* note 24, 77 et seq.

182. Cf. Löwisch, op. cit. *supra* note 30, 152 et seq.; Wernicke, op. cit. *supra* note 156, 218 et seq.

183. Moreover, since the amendments in the Treaty of Lisbon, competition no longer constitutes a "goal" of the Union but rather a means to the end goal of the Treaty, which includes the fundamental freedoms.

Cruz that "the possibility of their joint application should not be seen as a systemic misconstruction of these provisions of Community law, but rather as the natural effect of their overlapping and yet autonomous fields of application".[184]

5.3.2. *The grounds of justification – Tailored to State conduct?*

Express grounds for derogation laid out in Article 36 TFEU as well as the grounds identified by the Court in its case law regulate possible justifications to restrictions on the free movement of goods. They typically lie in the public interest and are invoked by the State in the name of the public good. This could pose problems for a concept of horizontal direct effect for private conduct, as the latter conduct would necessarily be scrutinized more restrictively than State measures. The Court reacted to this problem in *Bosman*, where the objection was raised.[185] The Court reasoned:

> "There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question".[186]

In principle, this statement opens up the grounds of justification for private actors. However, it does not address the issue that, in fact, individuals do not act for reasons that lie in the public good and hence do not search to legitimize their behaviour by referring to grounds such as public policy or public health. The subsequent case law of the Court seems to respond to these concerns. In *Angonese*, the Court accepted that a private actor could rely on "objective factors unrelated to the nationality of the persons concerned" if they were proportional to the aim legitimately pursued.[187] Commentators accordingly proposed that these factors could – in contrast to factors Member States may rely on[188] – also be of an economic nature,[189] including private autonomy[190] and fundamental rights.[191] In this regard it should also be borne in mind that

184. Cf. Baquero Cruz, "Free movement and private autonomy", 24 EL Rev. (1999), 619; cf. also Wernicke, op. cit. *supra* note 156, 218 et seq.; Steindorff, op. cit. *supra* note 132, 293; Schrödermeier, "Die Ernte der 'Maissaat': Einige Anmerkungen zum Verhältnis von Art. 30 und 85 EWG-Vertrag", 36 GRUR Int. (1987), 87 et seq.; for a cumulative application cf. already Müller-Graff, "Intermediäre Marktverbände im Wettbewerbs- und Warenverkehrsrecht des EWG-Vertrages", 32 JZ (1977), 635.

185. *Bosman*, cited *supra* note 1, para 85; the same objection was already made by MacGowan and Quinn, op. cit. *supra* note 25.

186. *Bosman*, cited *supra* note 1, para 86.

187. *Angonese*, cited *supra* note 1, para 42.

188. Member States may not rely on economic grounds to justify restrictions to trade; cf. e.g. Case 288/83, *Commission* v. *Ireland*, [1985] ECR 1761, para 28.

the Court has in the past proven to be very flexible in extending and adapting the possible grounds of justification.[192] The grounds of justification as they are handled by the ECJ are fashioned in an open manner so as to allow in principle a meaningful application to the conduct of private actors.

5.3.3. *The necessity of horizontal direct effect in light of an alternative concept*

The third limit to an *effet utile* interpretation requires that it not go beyond what is necessary to achieve the objective of Article 34 TFEU. In this sense, it needs to be assessed whether the application of horizontal direct effect to Article 34 TFEU would be unnecessary in light of the existence of an alternative concept that is able to tackle, in a comparably effective manner, the threats of private conduct to the objectives of the free movement of goods.

The Court developed such a concept in two key decisions: *Commission* v. *France*[193] and *Schmidberger*.[194] The Court applied Article 34 TFEU in conjunction with the loyalty clause of Article 4(3) TEU relying on the horizontal *indirect*[195] effect of the free movement of goods. The Court scrutinized not the actions of individuals who had – without being directed, supported or otherwise influenced by the State – set up obstacles to the free movement of goods, but the reaction of Member States to this conduct. The Court therefore focused the assessment on whether the State had done what was necessary and proportionate to hinder the individuals from obstructing free trade.[196] Shortly after the judgment in *Commission* v. *France* the Council adopted Regulation 2679/98.[197] This regulation was drafted to set up a more speedy procedure to allow the Commission to react to obstacles set up by

189. Cf. Nowak, "§ 6. Grundrechtsberechtigte und Grundrechtsadressaten", in Heselhaus and Nowak (Eds.), *Handbuch der Europäischen Grundrechte* (Beck, 2006), p. 212, No. 53; Forsthoff, op. cit. *supra* note 112, 395.

190. Cf. Nowak, previous note, No. 54, referring to the Court's jurisprudence in *Schmidberger*, cited *supra* note 151.

191. Cf. Hartkamp, "The effect of the EC Treaty in private law: On direct and indirect horizontal effects of primary community law", 18 E.R.P.L. (2010), 545 et seq. In this hypothesis, the tension between fundamental rights and freedoms would resurface, as in *Schmidberger*, cited *supra* note 151.

192. Case 120/78, *Cassis de Dijon*, [1979] ECR 649, para 8; cf. Streinz and Leible, op. cit. *supra* note 125, 463 et seq.

193. *Commission* v. *France*, cited *supra* note 150.

194. *Schmidberger*, cited *supra* note 151.

195. Emphases are added only in this sub-chapter.

196. Cf. Muylle, "Angry farmers and passive policemen: Private conduct and the free movement of goods", 23 EL Rev. (1998), 468 et seq.

197. Council Reg. (EC) No. 2679/98 of 7 Dec. 1998 on the Functioning of the internal market in relation to the free movement of goods among the Member States, O.J. 1998, L 337/8.

private parties and to inadequate reactions thereto by the concerned Member States.

The concept of horizontal *indirect* effect is from a conceptual point of view – in contrast to the doctrine of horizontal direct effect – hardly disputed.[198] However, there is a rare consensus in the academic debate that horizontal *indirect* effect cannot be comparably effective to *direct* effect. Even a number of those scholars who reject in principle the doctrine of horizontal *direct* effect admit this.[199]

The first and foremost deficiency of horizontal *indirect* effect is that it is only apt to provide a remedy against certain kinds of private conduct infringing Article 34 TFEU. In *Commission* v. *France* and *Schmidberger*, where public order was disrupted, the State disposed of the requisite authority and power to end the infringement of Article 34 TFEU. In other cases such as *Viking*, where collective action of trade unions neither threatened public order nor was illegal under national law, it is hard to imagine what the State could have done to end the alleged infringement.[200] A second deficiency of horizontal *indirect* effect is its inferior enforcement mechanism[201] since proceedings against a Member State can only be initiated by the Commission or another Member State. These proceedings are a lengthy endeavour, where political considerations can play a decisive, retarding role.[202] The private party concerned is left with the mere possibility of proposing an investigation to the Commission. Thirdly, the margin of discretion granted to Member States in deciding which measures are most appropriate to do away with the infringement of a fundamental freedom[203] limits the predictability and reliability of horizontal *indirect* effect as an instrument to respond to threats to the objectives of Article 34 TFEU by private actors.[204]

To be clear, it should not be denied that horizontal *indirect* effect is a useful concept in cases such as *Commission* v. *France* and *Schmidberger*, where the conduct of private individuals or *ad hoc* groups without legal personality is at

198. Cf. e.g. Schillig, "The interpretation of European private law in the light of market freedoms and EU fundamental rights", 15 MJ (2008), 293; cf. also Jarvis, case note on Case C-265/95, *Commission* v. *French Republic*, 35 CML Rev. (1998), 1377.

199. Cf. Streinz and Leible, op. cit. *supra* note 125, 466; Burgi, "Mitgliedstaatliche Garantenpflicht statt unmittelbare Drittwirkung der Grundfreiheiten", 10 *Europäisches Wirtschafts- und Steuerrecht* (1999), 330 et seq.

200. Cf. Hartkamp, op. cit. *supra* note 191, 547.

201. Ibid., 547; Löwisch, op. cit. *supra* note 30, 209 et seq.; Snell, op. cit. *supra* note 17, 239 et seq. Cf. on the benefits of private litigation, *infra*, section 6.2.

202. Cf. Snell, op. cit. *supra* note 17, 240.

203. Cf. *Commission* v. *France*, cited *supra* note 150, para 33; *Schmidberger*, cited *supra* note 151, para 82.

204. Cf. Snell, op. cit. *supra* note 17, 239 et seq.

stake.[205] There, it may be difficult for the party concerned to bring an action against these actors basing its claims on the horizontal direct application of Article 34 TFEU.[206] The State's duty to protect is under these specific circumstances probably more apt to tackle infringements of Article 34 TFEU.[207] Its application to other fundamental freedoms apart from Article 34 TFEU may even prove meaning- and useful.[208] However, the existence of this alternative concept does not make the horizontal direct application of Article 34 TFEU unnecessary, since in most cases horizontal *indirect* effect is an inefficient concept.

6. The concrete application of Article 34 TFEU to private parties

As seen above, the potential threats to the free movement of goods originating from private conduct are manifold and diverse in their intensity and possible impact, ranging from powerful self-regulating bodies to individual consumer preferences. Countering such threats *via* Article 34 TFEU nevertheless can sometimes appear unfeasible, not to mention excessive and ridiculous – especially as regards the latter end of the spectrum.[209] Common sense suggests the introduction of a threshold. It remains to be determined whether EU law supports the same conclusion, and how such a threshold should be tailored and inserted into the system of the Treaties. Finally, two issues are addressed: justifications when Article 34 TFEU is applicable to private actors and the practical question of enforcement and remedies.

6.1. *A concept of de minimis for private conduct*

The starting point must be symmetry to the Court's approach when applying Article 34 TFEU to State measures. In such cases, it identifies under its standard test "all trading rules enacted by Member States which are *capable of hindering, directly or indirectly, actually or potentially*, intra-community trade" as falling under Article 34 TFEU.[210] There are tendencies to introduce

205. Cf. ibid., 237.

206. Cf. Jarvis, op. cit. *supra* note 198, 1379.

207. Cf. Ganten, op. cit. *supra* note 24, 70; Löwisch, op. cit. *supra* note 30, 213; Snell, op. cit. *supra* note 17, 237; Vieweg and Röthel, "Verbandsautonomie und Grundfreiheiten", 166 ZHR (2002), 20.

208. Cf. Meurer, "Verpflichtung der Mitgliedstaaten zum Schutz des freien Warenverkehrs", 9 *Europäisches Wirtschafts- und Steuerrecht* (1998), 202; Van den Bogaert, op. cit. *supra* note 5, 152.

209. Cf. Snell, op. cit. *supra* note 17, 230.

210. Case 8/74, *Dassonville*, [1974] ECR 837, para 5 (emphasis added).

a threshold to this broad test, under which certain measures could be considered too insignificant to be caught by Article 34 TFEU. This idea, also referred to as "remoteness", can be traced through the entire corpus of free movement law.[211] Measures that are "too insignificant and uncertain"[212] have in the case law been occasionally excluded from Article 34 TFEU.[213] Some sort of reductionist reading of Article 34 TFEU's scope has also been invoked in academic literature[214] and postulated by advocates general.[215] Despite, these reductionist tendencies, the concept of remoteness has so far not been systematically used by the ECJ.[216]

This tentative approach to minimal threats in free movement law is in contrast to the strategy towards a similar problem in competition law, where certain corporate behaviour is excluded from the ambit of Articles 101 et seq. TFEU if its economic effects are not sufficiently grave in quantitative terms. This is an essential component of the EU's competition policy. The Commission has devised in its Notice on Agreements of Minor Importance ("*de minimis*")[217] "safe harbours", using market shares as a criterion to exclude certain non-appreciably restrictive agreements between undertakings from the scope of Article 101 TFEU. Similarly, in regard to unilateral behaviour of undertakings, the dominance of an undertaking is a necessary element to trigger the application of competition law.[218]

Three conclusions can be drawn for our purposes from the contrasting attempts of the Court to limit the scope of both competition and free movement law.

211. Arnull, *The European Union and its Court of Justice*, 2nd ed. (OUP, 2006), p. 491.

212. Case C-20/03, *Burmanjer*, [2005] ECR I-4133, para 31.

213. Cf. also Case C-93/92, *CMC Motorradcenter*, [1993] ECR I-5009, para 12; Case C-379/92, *Peralta*, [1994] ECR I-3453, para 24 (where the restrictive effects are "too uncertain and indirect"); and Case C-67/97, *Ditlev Bluhme*, [1998] ECR I-8033, para 22.

214. Cf. e.g. Sack, "Staatliche Werbebeschränkungen und die Art. 30 und 59 EG-Vertrag", 44 *Wettbewerb in Recht und Praxis* (1998), 117; Fezer, "Anmerkung zu C-93/92, CMC-Motorradcenter", 49 JZ (1994), 624.

215. Cf. the Opinion by A.G. Jacobs in Case C-412/93, *Leclerc-Siplec*, [1995] ECR I-179, para 42, advocating a *de minimis* test for Art. 34 TFEU.

216. Cf. Frenz, *Handbuch Europarecht. Europäische Grundfreiheiten. vol. I* (Springer, 2004), p. 308 et seq.; cf. in this regard the Opinion by A.G. Kokott in Case C-142/05, *Åklagaren*, [2009] ECR I-4273, para 46, where the A.G. admits the occasional exclusion by the Court of measures "whose effects on trade are too uncertain or too indirect" from Art. 34 TFEU but rejects the use of these criteria as they are "difficult to clarify and thus do not contribute to legal certainty".

217. Cf. "Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)", O.J. 2001, C 368/13.

218. For a detailed discussion of the Court's test cf. Monti, *EC Competition Law* (CUP, 2007), pp. 127 et seq.

First of all, excluding from a provision's scope certain insignificant threats to its respective underlying goals would be a sign of maturity in the application of Article 34 TFEU, allowing an efficient control of those measures that present a significant peril to the internal market. This is accepted as common sense in competition law but also in principle accepted in regard to Article 34 TFEU.[219]

Secondly, the threshold defined in competition and free movement law would differ due to the different actors normally addressed under these norms. The reluctance to apply a consistent *de minimis* threshold in free movement law is traditionally explained by the potentially far-reaching effects of State measures on trade[220] aggravated by the fact that State authorities are, compared to private actors, less likely to react to market incentives.[221]

Thirdly, and most importantly, it is the effect of a measure that should serve as the critical yardstick to measure whether the *de minimis* threshold is passed or not. This follows from the *effet utile* argument which was employed above to justify the application of Article 34 TFEU on the conduct of private actors and from the aim to efficiently control significant threats to the internal market.

It is important to determine the angle under which one assesses this effect, because the choice of perspective decisively impacts the threshold: is it the effect on the internal market or is it the effect on the subjective right to trade of another private actor[222] derived from Article 34 TFEU that this criterion should be based on? In the first case, the threshold would be considerably higher than in the second. The answer follows from the foregoing discussion. Our argument is built on the *effet utile* of the internal market and we have discussed earlier that, in contrast to other fundamental freedoms, the instrumental aims of the free movement of goods are predominant. It is clear that the effect on the internal market and not on the individual's right derived from Article 34 TFEU must be assessed.[223] It is hence also immaterial whether a measure is discriminatory or a non-discriminatory restriction.[224]

219. Cf. Chalmers, Davies and Monti, op. cit. *supra* note 167, 754; Wernicke, op. cit. *supra* note 156, 220 et seq.

220. Cf. Baquero Cruz, op. cit. *supra* note 2, 86.

221. Cf. A.G. Poiares Maduro in his Opinion in *Viking*, cited *supra* note 1, para 41.

222. This is promoted by Möllers when discussing a *de minimis* threshold for horizontally directly applicable fundamental freedoms; cf. Möllers, "Doppelte Rechtsfortbildung contra legem?", 33 EuR (1998), 36; cf. also Ganten, op. cit. *supra* note 24, 145, accepting horizontal direct effect but rejecting a *de minimis* threshold as such.

223. Cf. also Körber, op. cit. *supra* note 13, 764.

224. In the same sense Hintersteininger, *Binnenmarkt und Diskriminierungsverbot. Unter besonderer Berücksichtigung der Situation nicht-staatlicher Handlungseinheiten* (Duncker und Humblot, 1999), pp. 116 and 201; who promotes a *de minimis* threshold by drawing an analogy to competition law.

In that sense, a *de minimis* test could build upon the Court's ruling in *Commission* v. *Italy*,[225] exempting private conduct from the scope of Article 34 TFEU by considering its effect on the access of products to the market. Consequently, if the effect of a given conduct is not such as to substantially hinder or prevent market access, the free movement of goods does not apply. The refusal of individual traders or resellers to buy products from other Member States can hardly pass this threshold since alternative channels for marketing products exist.[226] The focus on alternatives to enter the market could indeed help to concretize which measures are to be understood as substantial hindrances in practice.[227]

6.2. *Justifications and enforcement*

If measures originating from private conduct are caught by Article 34 TFEU passing the *de minimis* threshold this does not necessarily mean that this conduct is considered an infringement of the free movement of goods. This conduct can possibly be justified on diverse grounds. We have already seen above[228] that the Court is flexible in adjusting and renewing the possible grounds under which restrictions to free movement may be justified, having recognized not only the classic treaty and case law based justifications but also the reliance on "objective factors".[229]

Besides the general notion of "objective factors" two groups of justifications seem, according to the Court's case law, to be open for private actors to rely on. First, all those grounds that are open to the Member States.[230] These grounds may be especially useful in cases of self-regulation, where the motivation to restrict the free movement of goods may be grounded on public policy, environmental or consumer protection concerns.

Second, the Court has accepted that conduct of private parties restricting a fundamental freedom may be justified by invoking the legitimate exercise of

225. Case C-110/05, *Commission* v. *Italy*, [2009] ECR I-519.

226. Roth has argued that as a general rule participants in the commercial exchange (i.e. individual consumers or traders) should never be addressees of Art. 34 TFEU, only restrictions by third parties should be tackled by the free movement of goods (cf. Roth, op. cit. *supra* note 7, 404 et seq.). Arguably, a general *de minimis* test is preferable since it excludes non-significant restrictions by third parties from the ambit of Art. 34 TFEU and is easier to handle, inserting itself into a general trend to exclude measures that are "too insignificant and uncertain" from the ambit of the free movement provisions.

227. Cf. also the Opinion by A.G. Poiares Maduro in *Viking*, cited *supra* note 1, paras. 41 et seq.

228. Cf. *supra* section 5.3.2.

229. *Angonese*, cited *supra* note 1, para 42.

230. *Bosman*, cited *supra* note 1, para 86.

fundamental rights by the infringer.[231] Besides those known from *Schmidberger* (freedom of expression and freedom of assembly) and *Viking* and *Laval* (right of collective action) also private autonomy, being considered a fundamental right and general principle of EU law,[232] could theoretically be relied on, as emphatically championed by some scholars.[233] Indeed, it is indisputable that private autonomy constitutes part of the very basis of the liberal European economic model and is the driving force behind market integration. Private individuals do, in general, not have to act in the public interest but may pursue non-altruistic goals relying on their sole self-interest.[234] However, the relationship between private autonomy and market integration is not simply a one-way street. Directing non-interventionist claims only against the State disregards the considerable power wielded by some private parties, while relying on their private autonomy, who can thereby threaten market integration.[235] This problem is intensified by the dilution of the public-private divide and rise of self-regulation. As noted by some scholars, modes of accountability and questions of legitimacy and justiciability of private actors can be raised if one broadly accepts that the exercise of considerable private power justifies the imposition of certain obligations.[236] The private autonomy of such actors

231. *Viking*, cited *supra* note 1, paras. 75 et seq.; *Laval*, cited *supra* note 93, paras. 102 et seq. (in these two cases the Court identified the right of collective action as a fundamental right that may be invoked to justify restrictions of horizontally directly applied fundamental freedoms); *Schmidberger*, cited *supra* note 151, paras. 69 et seq. (where Austria successfully invoked that it had to respect the fundamental rights of the infringers and could not comply with its duty to protect the free movement of goods); cf. also, albeit not in a horizontal effect context: Case C-36/02, *Omega*, [2004] ECR I-9609 (where Germany relied on its duty to ensure respect for human dignity in order to prohibit the organization of "laser gaming" that included simulated killings).

232. Cf. Haratsch, "§ 18, Allgemeine Handlungsfreiheit", in Heselhaus and Nowak (Eds.), *Handbuch der Europäischen Grundrechte* (Beck, 2006), p. 558, No. 13; cf. also Nowak, op. cit. *supra* note 189, No. 54

233. Cf. e.g. Oliver and Roth, op. cit. *supra* note 53, 423 and 427; Cherednychenko, "EU fundamental rights, EC fundamental freedoms and private law", (2006) E.R.P.L., 41 et seq.

234. Relevant, in this context, is the Court's case law in the field of establishment, where the simple search for beneficial legal systems by a private party is accepted as a legitimate instance of free movement; cf. Case C-9/02, *Lasteyrie du Saillant*, [2004] ECR I-2409 (*tax law*) and Case C-212/97, *Centros*, [1999] ECR I-1459 (*corporate law*).

235. Cf. Wernicke, op. cit. *supra* note 156, 233 et seq. For the concept of power cf. *supra* section 5.2. step 3b.

236. For a comparative law approach including Germany, France, Great Britain and the United States cf. Wernicke, op. cit. *supra* note 156, 30–105; for a constitutional perspective and the claim to "constitutionalize" private autonomy cf.: Joerges, "The impact of European integration on private law: Reductionist perceptions, true conflicts and a new constitutional perspective", 3 ELJ (1997), 392 et seq.; for the repercussions on the functioning of democracy cf. Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie* (Suhrkamp, 1998), pp. 91 et seq.

cannot be used as a justification to avoid these obligations. Obligations that mirror those that public governance has to embrace are increasingly imposed on private governance, relying on a functional analysis[237] that attaches the imposition of obligations to the exercise of a public function (and thereby crossing the public-private divide).[238] That said, the justification of private autonomy may hence be only of limited significance and practical value.

From a procedural point of view it is evident that it is – infringement proceedings not being available[239] – for the national judge to directly apply Article 34 TFEU in proceedings between private parties, if necessary after having gained interpretative advice by posing a preliminary question to the Court.[240] This enforcement mechanism would arguably take some pressure off the Commission as *"guardian of the Treaties"* but would on the other hand not go so far as risking an explosion of private claims before the ECJ – due to the proposed *de minimis* threshold. It would empower private litigation and thereby contribute to the effectiveness of EU law.[241] The legal consequences of an infringement by a private actor of a horizontally directly applicable fundamental freedom are to be determined by the national laws of the Member States, having to ensure that the breach of a fundamental freedom is effectively sanctioned.[242] Contracts, or rules of an association, like in *Walrave and Koch*,[243] for instance, do not need to be enforced by the State; the victims of an infringement of a fundamental freedom can seek redress. In Mr Angonese's case,[244] he could have relied on Article 45 TFEU read in conjunction with the respective provisions of national tort law to receive compensation in order to address the infringement, by an Italian bank, of his rights flowing from the free movement of workers.

237. The German term "Funktionsgerechtigkeit" describes this idea probably best; cf. Wernicke, op. cit. *supra* note 156, 255.

238. Cf. Cafaggi, "Private regulation in European private law", EUI-Working Paper, RSCAS 2009/31, 3.

239. They can only be initiated against Member States, cf. Arts. 258–260 TFEU.

240. Art. 267 TFEU.

241. The role of private litigants is often described as the key to the effectiveness of EU law. Cf. Poiares Maduro, op. cit. *supra* note 39, 9 and Triantafyllou, "L'interdiction des abus de droit en tant que principe général du droit communautaire", 38 CDE (2002), 613 et seq. On the reduced effectiveness of infringement proceedings cf. already section 5.3.3. *supra*.

242. Cf. Roth, op. cit. *supra* note 7, 419; cf. for the current possibility for private damages actions in competition cases Case C-453/99, *Courage*, [2001] ECR I-6297.

243. *Walrave and Koch*, cited *supra* note 8.

244. *Angonese*, cited *supra* note 1.

7. Concluding remarks

The sometimes piecemeal and regularly context-specific nature of the evolution of the concept of horizontal effect in EU law as guided by the Court of Justice has provided exciting narratives through seminal cases such as *Bosman*, *Angonese* or *Viking Line*. However, a broader perspective on this concept reveals its state as a jigsaw puzzle waiting for pieces to fall into place. The identification of the oddity in the treatment of the free movement of goods in this article provides an opportunity to add a remaining piece and to re-assess how to go forward. In so doing, it is submitted that there are compelling arguments for attributing horizontal direct effect also to Article 34 TFEU. Yet, for the design of the puzzle to fall into place one should strive for a sound and coherent picture where the fault lines between the individual pieces disappear. In that sense this article seeks to contribute to the general debate on the doctrine of horizontal effect in EU law and its argumentative grounding by peering through the prism of the free movement of goods. Certain nuances in free movement law are worth being underscored and have been highlighted here. The "upgrading" of the free movement of persons, in cases where the citizen is moving, to providing rights that are (at least) akin to fundamental rights opens the possibility of tailoring horizontal direct effect, depending on which fundamental freedom, in which permutation, applies. A possible instrument to do so could be a flexible *de minimis* threshold; for the free movement of citizens, this should lie significantly below the threshold proposed in this article for Article 34 TFEU, since the former – as was shown earlier[245] – serves not only to protect the internal market but also the autonomous rights of individuals.

245. Cf. *supra* section 3.