



KYIV-MOHYLA
LAW & POLITICS JOURNAL

KYIV-MOHYLA SCHOLARLY PEER-REVIEWED JOURNALS

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Source: Kyiv-Mohyla Law and Politics Journal 1 (2015): 21–37

Published by: National University of Kyiv-Mohyla Academy

<http://kmlpj.ukma.edu.ua/>

Direct Horizontal Effect of the Basic Freedoms of the EU Internal Market

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Abstract

Direct horizontal effect of the basic freedoms of the EU internal market as they are laid down in articles 28 to 66 TFEU is not a new question of European Union law: neither for legal doctrine nor for legal practice. But it has gained new momentum in the jurisprudence of the European Court of Justice (ECJ) and in the legal scientific literature in recent time, which demands the clarification of the normative approach to this topic and of its ramifications for single issues.

Key Words: direct horizontal effect, EU internal market, basic freedoms, transnational market access freedoms, direct horizontal applicability.



A. The Issue

The issue is whether not only Member States and institutions of the Union are addressees of and bound by the transnational market access freedoms (the so called vertical dimension), but whether also non-public entities, such as trade unions, sport associations, technical standardisation bodies, private research organisations, employers, individual enterprises or churches can infringe the transnational market access freedoms. Examples include trade unions which impede the free movement of goods, services, workers and enterprises when they boycott the unloading of a foreign ship, block the access to construction sites of a foreign building contractor,² discriminate against foreign workers or hinder the relocation of an enterprise into another Member State³; or sport associations when they impede the transnational transfer of sportsmen, in particular professional soccer players, between clubs⁴; or private technical standardisation bodies when they withhold the certification of products which have been

1 The text of this article is based on a German lecture of the author. An extended German version is separately published.

2 See ECJ, Case C-341/05, *Laval un Partneri Ltd. v Svenska Byggnadsarbetareförbundet et al.* (2007) ECR I-11767.

3 See ECJ, Case C-438/05, *ITWF and FSU v Viking Line ABP and OÜ Viking Line Eesti* (2007) ECR I-10779.

4 See ECJ, Case C-415/93, *Union royale belge des sociétés de football association v Jean-Marc Bosman, Royal club liégeois v Jean-Marc Bosman and others, Union des associations européennes de football (UEFA) v Jean-Marc Bosman* (1995) ECR I-4921.

produced in another Member State⁵; or enterprises when they refuse to buy goods from certain other Member States or when they hinder the employment of workers with the nationality of other Member States.

This question has to be distinguished from the issue of indirect horizontal effect. This term “indirect” characterises the impact of the market freedoms on the shape of national private law for which national legislation or jurisdiction is responsible and which binds individuals and/or other private persons; e.g. national company law which restricts the acquisition of shares by investors from other Member States⁶; or national intellectual property law which enables private persons to enforce import bans against foreign goods⁷; or private conduct that is accountable to a state authority (such as the advertising campaign “Buy Irish” run by a private body which was financed by the Irish government⁸). In contrast to indirect horizontal effect’s impact on national private law the issue of *direct* horizontal effect addresses private persons when they act autonomously.

In the German legal doctrine a significant body of literature has examined the matter of direct horizontal applicability in recent time. 16 relevant monographs in German alone have been published in the past decade.⁹ There is also no lack of individual texts such as articles and

5 ECJ, Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches e.V. (DVGW)* — *Technisch-Wissenschaftlicher Verein* (judgement 2012) = NJW 2013, 523.

6 ECJ, Case C-367/98, *Commission/Portugal* (2002) ECR I-4731 paragraph 42.

7 See, e.g., ECJ, Case 15/74, *Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc.* (1974) ECR1147; ECJ, Case 16/74, *Centrafarm BV et Adriaan de Peijper v Winthrop BV* (1974) ECR1183.

8 ECJ, Case 249/81, *Commission/Ireland* (1982) ECR4005.

9 Ted Oliver Ganten, *Die Drittwirkung der Grundfreiheiten* (Berlin: Duncker & Humblot, 2000); Stephan Wernicke, *Die Privatwirkung im Europäischen Gemeinschaftsrecht* (Baden-Baden: Nomos, 2002); Rasso Graber, *Die unmittelbare Drittwirkung der Grundfreiheiten: eine Untersuchung anhand einer Auslegung des EG-Vertrages, der Rechtsprechung des Gerichtshofes und der Folgen einer angenommenen unmittelbaren Drittwirkung* (München: VVF, 2002); Heike Parpart, *Die unmittelbare Bindung Privater an die Personenverkehrsfreiheiten im europäischen Gemeinschaftsrecht* (München: C. H. Beck, 2003); Friedemann Kainer, *Unternehmensübernahmen im Binnenmarktrecht. Zugleich ein Beitrag zur Privatrechtswirkung der Grundfreiheiten* (Baden-Baden: Nomos, 2004), 208ff.; Torsten Körber, *Grundfreiheiten und Privatrecht* (Tübingen: Mohr Siebeck, 2004); Kara Preedy, *Die Bindung Privater an die europäischen Grundfreiheiten. Zur sogenannten Drittwirkung im Europarecht* (Berlin: Duncker & Humblot, 2005); Julia Lübke, *Der Erwerb von Gesellschaftsanteilen zwischen Kapitalverkehrs- und Niederlassungsfreiheit* (Baden-Baden: Nomos, 2006), 256ff.; Philipp Förster, *Die unmittelbare Drittwirkung von Grundfreiheiten. Zur Dogmatik des Adressatenkreises von Pflichten der EG-Grundfreiheiten* (Frankfurt am Main; New York: Lang, 2007); Stephan Löwisch, *Die horizontale Direktwirkung der Europäischen Grundfreiheiten. Zur Frage der unmittelbaren Verpflichtung Privater durch die Grundfreiheiten des EG-Vertrages* (Baden-Baden: Nomos 2009); Aline-Maria Lengauer, *Drittwirkung von Grundfreiheiten. Ein Beitrag zu dem Konzept des Normadressaten im Gemeinschaftsrecht* (Wien: Springer, 2010); partly also Karl Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (Berlin: De Gruyter Recht, 2003), 84ff.; Oliver Remien, *Zwingendes Vertragsrecht und Grundfreiheiten des EG-Vertrages* (Tübingen: Mohr Siebeck, 2003), 178ff.; see

commentaries.¹⁰ The topic is about an issue which has been tackled and designed in a scholarly way as early as 1987 by the doctoral dissertation of *Detlef Schaefer*.¹¹ The spectrum of opinion ranges from general rejections of direct horizontal applicability (e.g. *Riesenhuber*,¹² *Körber*¹³) through to differentiated solutions¹⁴ and to general affirmative answers (e.g. *Schaefer*,¹⁵ *Förster*,¹⁶ *Löwisch*¹⁷). The courts encounter from time to time new questions on the issue arising in particular cases, and give answers specific to the case at hand, although of course such decisions are made within the framework of legal provisions and scholarly systems. Elaborating a coherent overall theory of direct horizontal applicability is the task of genuine legal scholarship, which forms the doctrine (“Dogmatik”) in dialogue with positive law.

Several recent decisions of the ECJ provide a reason to take a new look at this issue — among them in particular the judgement of July 12, 2012 involving an Italian manufacturer of copper fittings for tubes which transport drinking water (named *Fra.bo*) and a private standardization and certification association in Germany (*Deutsche Vereinigung des Gas- und Wasserfachs e.V.*), in which the ECJ held that the association was bound by the prohibition of

also already Michael Jaensch, *Die unmittelbare Drittwirkung der Grundfreiheiten: Untersuchung der Verpflichtung von Privatpersonen durch Art. 30, 48, 52, 59, 73b EGV* (Baden-Baden: Nomos, 1997); Margit Hintersteiniger, *Binnenmarkt und Diskriminierungsverbot. Unter besonderer Berücksichtigung der Situation nicht-staatlicher Handlungseinheiten* (Berlin: Duncker & Humblot, 1999).

10 See, e.g., recently Bachmann, in *AcP* 210 (2010): 424 (465ff.); Wulf-Henning Roth, “Privatautonomie und die Grundfreiheiten des EG-Vertrags,” in *Perspektiven des Privatrechts am Anfang des 21. Jahrhunderts. Festschrift für Dieter Medicus zum 80. Geburtstag*, ed. Volker Beuthien et al. (Köln: Heymann, 2009), 393ff.; Gunnar Franck, *Die horizontale unmittelbare Anwendbarkeit der EG-Grundfreiheiten — Grundlagen und aktuelle Entwicklung* (Halle (Saale): Institut für Wirtschaftsrecht, 2009); Müller-Graff, in *Europarecht Beiheft* 1 (2006): 19ff.; Klaus Vieweg and Anne Röthel, “Verbandsautonomie und Grundfreiheiten,” *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 166.1 (2002): 6ff.; Claus-Wilhelm Canaris, “Drittwirkung der gemeinschaftsrechtlichen Grundfreiheiten,” in *Umwelt, Wirtschaft und Recht: Wissenschaftliches Symposium aus Anlass des 65. Geburtstages von Reiner Schmidt, 16./17. November 2001*, ed. Hartmut Bauer et al. (Tübingen: Mohr Siebeck, 2002), 29ff.; Anne Röthel, “Grundfreiheiten und private Normgebung — zur unmittelbaren Drittwirkung der Grundfreiheiten auf Verbandsnormen,” *EuR* 6 (2001): 908ff.

11 Detlef Schaefer, *Die unmittelbare Wirkung des Verbots der nichttarifären Handelshemmnisse (Art. 30 EWGV) in den Rechtsbeziehungen zwischen Privaten: Probleme der horizontalen unmittelbaren Wirkung des Gemeinschaftsrechts, gezeigt am Beispiel des Art. 30 EWGV* (Frankfurt am Main; New York: P. Lang, 1987).

12 See Riesenhuber, *supra*, 101ff.

13 See Körber, *supra*, 796f.

14 See, e.g. Bachmann, *supra*, 465ff.

15 See Schaefer, *supra*, 180f.

16 See Förster, *supra*, 194f.

17 See Löwisch, *supra*, 220ff.

measures which have equivalent effect to a quantitative import restriction in the sense of article 34 TFEU.¹⁸

The following observations will be divided into two parts. First, the cross-sectional issue which concerns all transnational market freedoms in the internal market has to be raised: the question of whether, and to what extent, the imposition of an obligation on private protagonists to respect the market access freedoms is conceptionally and legally compatible with the relevant provisions of primary Union law (B). And second, the issue of what legal consequences arise in the case of an affirmative answer to the first question (C).

B. The Issue of the Compatibility of Horizontal Applicability of the Market Freedoms with Union Law.

The basic issue which concerns all transnational market freedoms provided for in primary Union law, namely the free movement of workers, self-employed persons and companies, the free movement of services, the free movement of goods and the free movement of capital and payments as laid down in the TFEU (articles 28 et sequentes, articles 45 and sequentes, articles 49 et sequentes, article 54, articles 56 et sequentes, articles 63 et sequentes), is whether the assumption of an obligation of private protagonists to comply with them is compatible with these provisions.

In this context I shall not discuss the specific German notion of “Drittwirkung” (meaning: “effect on actors other than public authorities”) which evolved from the famous controversial scholarly debate in the 1950s between *Hans Carl Nipperdey* and *Günter Dürig* on the direct applicability of fundamental rights of the German constitution (*Grundgesetz*) to the conduct of private persons.¹⁹ Although the term “Drittwirkung” has been lifted by German academic authors from the level of German constitutional law debates to the issue of direct horizontal applicability of the transnational market freedoms, this transfer is fundamentally misguided since the transnational market access freedoms on the one hand and the fundamental rights on the other hand have a different function. This remains the case despite the fact that article 15 par. 2 of the complex Charter of Fundamental Rights of the EU, in a unnecessary and conceptually misleading provision, partly repeats some transnational market access freedoms: the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

Concerning the basic question of conceptional and legal compatibility there are aspects *against* (I) and arguments *for* (II) direct horizontal applicability.

¹⁸ See ECJ, Case C-171/11 (*Fra.bo*), *supra*.

¹⁹ See on the one hand Hans Carl Nipperdey, *Grundrechte und Privatrecht* (Krefeld: Scherpe, 1961), 15 and on the other hand, Günter Dürig, “Grundrechte und Privatrechtsprechung,” in *Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung. Festschrift zum 75. Geburtstag von Hans Nawiasky*, ed. Theodor Maunz (München: Isar Verlag, 1956), 157, 173.

I. Arguments against Direct Horizontal Applicability (Historical and Systematic Interpretation)

In the discussion already mentioned word “Drittwirkung” transports a categorical pre-understanding (“Vorverständnis”) which perceives the transnational market access freedoms as prohibitions which primarily address *state authorities*. This finds a textual basis in the Treaties in the area of the free movement of goods in the prohibition of customs duties on imports and exports and charges having equivalent effect (article 30 TFEU) which (by their very nature) can be levied only by public authorities (although not only by states but also by the Union itself; article 31 TFEU). The generalization of this view about which actors are addressed to all market freedoms may be supported by several aspects of the emergence of European primary law: such as the creation of the common market territory by the founding states, by the former standstill clauses which addressed the states and by the international law character of the prohibitions. It is reflected in certain formulations of the ECJ (e.g. in the decision “*Vlaamse Reisebureaus*”²⁰ in which the court said that the — then — Articles 30 and 34 “concern only public measures”; or in the decision “*Viking*” in which the court characterized the prohibitions as provisions which “are formally addressed to the Member States”²¹). Additional arguments are drawn by some authors first from the State-focused content of certain explicit grounds for restrictions (such as “public morality, public policy or public security” in article 36 TFEU), second, from the existence of specific prohibitions concerning restrictions of competition which address undertakings (articles 101 and 102 TFEU) and third, from the pure quantity of restrictions applicable to state authorities in the jurisprudence of the ECJ. These are essentially arguments based on general historical and systematic aspects of EU law.

II. Arguments for Direct Horizontal Applicability

However, if the full classical canon of interpretation methods²² is brought into action then the text and purpose of the prohibitions throw doubt on the traditional view.

1. The Text (Grammatical Interpretation). As already mentioned the basic primary law prohibitions of transnational market access restrictions which constitute the internal market do not address the Member States explicitly, but only (implicitly) in the very specific area of customs duties and charges having equivalent effect and on quantitative restrictions to imports or exports which can be imposed only by public authorities. All other prohibitions are expressly or indirectly directed against “restrictions between Member States” without

20 ECJ, Case 311/85, *ASVL Vereniging van Vlaamse Reisebureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* (1987) ECR3801 paragraph 30.

21 ECJ, Case C-438/05 (*Viking*), *supra*, paragraph 59.

22 See for the methods of interpretation of primary EU law Matthias Pechstein and Carola Drechsler, “Die Auslegung und Fortbildung des Primärrechts,” in *Europäische Methodenlehre*, ed. Karl Riesenhuber (Berlin; New York: De Gruyter, 2010), 226ff.; for the methods of interpretation of secondary EU law Riesenhuber, *id.*, 201ff.

specifying the possible sources of such restrictions. The basic provisions are well known: in the area of movement of goods the famous prohibitions of measures having equivalent effect to quantitative restrictions to imports or exports (articles 34 and 35 TFEU); in the area of the labour force article 45 TFEU which states that “freedom of movement for workers shall be secured within the Union” entailing the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment; in relation to self-employed citizens of the Union and companies formed in accordance with the law of a Member State and connected to the Union articles 49 and 54 provide that “restrictions on the freedom of establishment shall be prohibited”. This is also the case for the provision of services within the Union in respect to citizens of the Union who are established in a Member State other than that of the person for whom the services are intended (article 56 TFEU). Finally Article 63 TFEU prohibits “all restrictions on the movement of capital and payments between Member States” (and in addition also between Member States and third countries).

Hence the text appears clear. Except of the area of classical public forms of protective measures (such as customs duties et al.), there is no indication in the text that the prohibitions are limited to cases where a state authority is the originator of the restriction. In respect of transnational services the ECJ drew this conclusion more than forty years ago in the decision “*Walrave/UCP*”.²³ This result does not astonish when looking at the shared purpose of the prohibitions.

2. The Purpose (Teleological Interpretation). Viewed together, the mentioned prohibitions are conceptionally aimed at all restrictions of the transnational market access within the Union (article 26 par. 2 TFEU).

a. This common aim flows from the intention to merge the national economies into one common market (today: internal market) in order to, first, guarantee the free movement of all productive factors and products according to the principle of comparative costs’ advantage (*Ricardo*²⁴) and, second, promote the three basic objectives of the Union: peace, values and well-being (article 3 par. 1 TEU).²⁵ From this perspective it is not of prime interest which actor is responsible for a restriction: a national authority, an institution of the Union, a private association or a single private protagonist. Otherwise the uniform abolition of restrictions would be subject to the legal and social organization of public and private power in a Member State.

b. A recent instructive example for this can be found in the mentioned “*Fra.bo*” case. According to the ECJ the facts were as follows:²⁶ “*Fra.bo*,” an Italian undertaking, produced and sold copper fittings. The DVGW is a non-profit association in Germany governed by private law the object of which is to promote the gas and water sector (the “association”). For the water

23 ECJ, Case 36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo* (1974) ECR1405 paragraph 20.

24 The idea of comparative cost advantage was developed by David Ricardo, *The Principles of Trade and Taxation*, 3rd ed. (London: John Murray, 1821), Chapter 7.

25 As an analysis see Peter-Christian Müller-Graff, “Verfassungsziele der EU,” in *Handbuch des EU Wirtschaftsrechts*, ed. Manfred Dauses (München: Beck, 2012), A I paragraphs 90 et seq.

26 ECJ, Case C-171/11 (*Fra.bo*), supra.

sector there are approximately 350 technical standards drawn up by the association. The technical standard W 534 was relevant in the “Fra.bo” case. It serves as the basis for certification, on a voluntary basis, of products, which come into contact with drinking water. In 1999 Fra.bo applied to the association for certification of its copper fittings and was granted a certificate for the period of five years. After complaints by third parties, the association in accordance with its rules instituted a reassessment. In 2005 it cancelled Fra.bo’s certificate on the ground that it had not submitted a positive test report on the so called 3000-hours-test (exposing the copper fitting’s elastomeric waterproof joint to a temperature of 110 degrees Celsius in boiling water for 3000 hours). The association also rejected an application of Fra.bo for extension of the certificate. Fra.bo went to court in Köln and argued that the cancellation and/or the refusal to extend the certificate were contrary to (then equivalent of) article 34 TFEU (prohibition of quantitative restrictions of imports and measures having equivalent effect). The association argued that as a private body it was not bound by the mentioned article. It contended that it was not prevented from drawing up technical standards going beyond those in place in Member States other than Germany and applying them in its certification process. It also considered itself to be free, on quality-related grounds, to take account only of laboratories accredited by it. Moreover, it argued that as a standard-setting body, it did not pursue economic activities for the purpose of cartel agreements. The Köln court dismissed Fra.bo’s action. Fra.bo appealed against this decision. The Düsseldorf Court of Appeals asked the ECJ whether (the then equivalent of) Article 34 TFEU must be interpreted as applying to the standardization and certification activities of a private law body, where the national legislation regards the products certified by that body to be compliant with national law and hence makes it at least considerably more difficult in practice to market products which are not certified by that body. The reasoning of the judgement of the ECJ is focused, first, on the functions and role of the private association: setting technical standards, certifying products, triggering the assumption of compliance with national legislation on the marketability of products, combined with the fact that it is the sole institution of this kind in Germany. Second, the judgement looks at the effects of the DVGW’s activities (specifically the behaviour of producers, which unanimously seek certification from the association) and comes to the conclusion: “In such circumstances, it is clear that a body such as the DVGW, by virtue of its authority to certify the products in reality holds the power to regulate the entry into the German market of products such as the copper fittings at issue.”²⁷ Only at the very end did the ECJ draw a link to the compliance assumption in German law,²⁸ without, however, indicating that the German public authorities were accountable neither for the conduct of the private association nor for the reaction of the market participants.

c. The result of this decision (namely to declare the association to be bound by the prohibition of measures having equivalent effect to quantitative restrictions) fits the genesis of the term and concept of the common market. This concept is rooted in the very first supranational European organisation, the European Community for Steel and Coal (ECSC). *Jean Monnet* ascribes the creation of the basic idea and term to a member of his circle, *Pierre Uri*.²⁹

27 Id., paragraph 31.

28 Id., paragraph 32.

29 Jean Monnet, *Erinnerungen eines Europäers* (Baden-Baden: Nomos, 1988), 379.

In order to construct a fundamentally new relationship between France and Germany, more was needed than the conclusion of a classical international treaty of economic relations with mutual concessions. Rather, what was embraced was the idea of a common market, with the free coordination of free preference decisions of supply and demand of the market participants. Preference is always selective, a fact which is the very core of a market and of competition. Preference decisions are at the heart of autonomous self-determination and individual responsibility. A market realises the vision of freedom for individuals and undertakings: private initiative as the first source of economic, social and transnational integration (an idea already described by *Rudolf von Jhering*³⁰), although within the framework of rules in the interest of protecting public goods such as health, the environment or social solidarity.

Already *Jean Monnet's* original text of the proposal of the ECSC, the blueprint of the *Schuman*-declaration of 1950, contains the sentence: "Progressivement, se dégageront les conditions assurant spontanément la repartition la plus rationnelle de la production au niveau de productivité le plus élevée."³¹ Later in the ECSC-Treaty the wording was "von sich aus" (in Latin: "eo ipso" or "per se"; meaning: positive economic results from conditions which arise from themselves). This is the idea of a macroeconomic transnational autopoiesis (in the sense of "Selbststeuerung" or a self-steering system) based on all the individual preference decisions. In its objective it significantly differs from the original idea of fundamental rights as protections against public authorities in the 18th century. In this context Monnet talks only generally about the obstacles that have to be abolished by referring to (in translation): "area without customs barriers and discriminations."³² Consequently, in order to identify a measure, which is contrary to this common market idea the prime criterion is the restricting effect³³ on transnational market access of a measure or behaviour, but not its authorship. Hence, direct horizontal applicability of the prohibitions of restrictions is not only compatible, but, in principle, in line (theologically) with the basic concept of the internal market in primary Union law.

III. Remaining Systematic Objections.

Nevertheless there are still two remaining systematic objections drawn from the Treaty, which have to be considered: the explicit reasons for the justification of restrictions and the existence of competition rules for undertakings. Do they contradict the assumption of direct horizontal effect of the market freedoms?

1. It is true that the explicit reasons for the justification of restrictions address national public authorities, since they aim at promoting or protecting aspects of the public good such as public morality, public policy and public security (articles 36, 44, 52 TFEU). Non-public protagonists

30 Rudolf von Jhering, *Zweck im Recht, Band I* (Leipzig: Breitkopf & Härtel, 1904), 280; for the general social dimension of a market see Max Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie* (Tübingen: Mohr, 1972), 382.

31 Jean Monnet, *Mémoires* (Paris: Fayard, 1976), 353.

32 Monnet, *Erinnerungen*, 379f.

33 Franck, *supra*, 27f.

are, in principle, not authorized to perform self-help in order to pursue a public interest by way of restricting transnational market access. This was not fully recognized by the ECJ in several decisions, e.g. in the famous “*Bosman*” case in which the court examined the issue of whether “mandatory interests” could justify the restricting measure of a private association.³⁴ Correctly viewed, they cannot.

However, the question raised by the Court of whether the freedom to associate (article 11 ECHR) of an international football association justifies its rule requiring a club to pay a transfer fee for a player³⁵ is of some weight. Guaranteeing the freedom to associate is per se the expression of a mandatory requirement of any polity that is based on the respect for freedom, such as the Union and its Member States (article 2 TEU). Hence it is justified to assess restrictions of transnational market access by private actors in the light of their freedoms of action. And it follows from the principle of private autonomy that “objective factors” of the private decision suffice for justification. This was rightly the criterion applied by the ECJ in the “*Angonese*”-decision, although in later decisions the ECJ swerved back to use the term “mandatory requirements” (as in “*Casteels*,”³⁶ “*Laval*”³⁷ and “*Olympique Lyonnais*”³⁸).

2. The second traditional systematic objection against direct horizontal effect has gradually lost support: namely the argument that only the competition rules (articles 101, 102 TFEU) bind private actors. However, these rules have a limited scope: they address only undertakings, but not all private protagonists such as trade unions or standardization associations (if they are not associations of undertakings). They are, in addition, only concerned with certain defined forms of behaviour (cartel agreements and abuse of a dominant market position). Hence direct horizontal effect of the transnational market access freedoms is, in principle, not excluded by the pure existence of competition rules. And in cases in which both sets of rules are fitting, their parallel applicability cannot be excluded.³⁹ However, when considering the justification of a restriction of a basic market freedom the specific conditions of exemption of article 101 par. 3 TFEU are to be taken in account.⁴⁰

B. Legal Consequences of Binding Private Actors

Moving on to single legal consequences of the assumption that private actors are bound by the transnational market freedoms, several questions arise: among them in particular the range of the freedoms to which direct horizontal effect applies (I), the type of restrictions (II),

34 ECJ, Case C-415/593 (*Bosman*), supra, paragraph 86; see for this reasoning Kluth, *AöR*122 (1997):557ff.

35 ECJ, Case C-415/593 (*Bosman*), supra, paragraph 79.

36 ECJ, Case C-379/09, *Maurits Casteels v British Airways plc* (Judgement 2011) NZA 2011, 561ff., paragraph 30.

37 ECJ, Case C-341/05 (*Laval*), supra, paragraph 117.

38 ECJ, Case C-325/08, *Olympique Lyonnais v Olivier Bernard and Newcastle UFC* (2010), ECR I-2177 paragraph 38.

39 See ECJ, Case C-309/99, *J.C.J. Wouters, J. W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* (2002), ECR I-1577 paragraphs 119 et seq.

40 See Roth, supra, 401; indirectly ECJ, Case C-415/93 (*Bosman*), supra, paragraph 138.

the contents of restrictions (III), the categories of private addressees (IV) and the dogmatic borderline between the immanent restriction of a prohibition and justification (V).

I. The Freedoms Concerned.

It follows from an understanding of the prohibitions as generally applicable to private actors that none of the groups of the market freedoms is excluded from direct horizontal effect — neither factor freedoms nor product freedoms, and neither transnational market access freedoms of the citizens of the Union (articles 45, 49 and 56 TFEU) nor general transnational market access freedoms (articles 28 et sequentes, article 63 TFEU). Therefore the question of the range of the freedoms concerned is not of whether a horizontal obligation exists at all, but which variants of the prohibitions — due to their pure nature — cannot address private actors. As already mentioned, in the area of the movement of goods these are the customs duties and charges having equivalent effect and quantitative restrictions on imports and exports. Hence privately charged tolls for using private border-crossing roads do not fall within the scope of article 28 TFEU.

The jurisprudence of the ECJ has in fact already confirmed a good part of this reasoning. Here restrictions of the freedom of movement of *workers* have proved to be most relevant. This freedom would be broadly endangered if private collective bargaining agreements or statutes of associations were not bound by the guarantee of free movement. Hence decisions of the ECJ concerning sports associations from “*Walrave*”⁴¹ (cycling) and “*Donà*”⁴² (football) to “*Bosman*”⁴³ (football) and “*Lehtonen*”⁴⁴ (basketball) are clearly convincing. Moreover, discriminations on grounds of nationality in collective bargaining agreements, statutes or individual employment contracts are declared as void by secondary law (Article 7 (4) regulation (EU) 492/2011⁴⁵), notwithstanding that this is already the consequence of primary law. Hence the decisions of the ECJ, which concerned measures of individual private actors such as a bank in Southern Tyrol⁴⁶ and a research institute,⁴⁷ are compelling.

In a similar way the freedom to *provide services* and the right of transnational *establishment* proved to be endangered by private actions as shown by the trade union boycotts in the cases

41 ECJ, Case 36/74 (*Walrave*), supra, paragraphs 16 to 19.

42 ECJ, Case 13/76, *Gaetano Donà v Mario Mantero* (1976) ECR1333, paragraphs 17 and 18.

43 ECJ, Case C-415/93 (*Bosman*), supra, paragraphs 82 to 84.

44 ECJ, Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* (2000) ECR I-2681, paragraph 35.

45 OJ 2011 L 141/1.

46 ECJ, Case C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA* (2000) ECR I-4139, paragraph 36.

47 ECJ, Case C-94/07, *Andrea Raccanelli v Mack-Planck-Gesellschaft zur Förderung der Wissenschaften e.V.* (2008) ECR I-5939, paragraph 48.

“*Laval*”⁴⁸ and “*Viking*”⁴⁹ and as also demonstrated in the cases “*Walrave*”⁵⁰ and “*Bosman*.”⁵¹ This is also true for the *movement of goods*, which was already foreseen by scholarly literature⁵² before the decision of the ECJ in the “*Fra.bo*” case discussed above. Parallel cases can be imagined in the area of movement of *capital* and *payments*; e.g. cases of private defence measures against transnational take-overs of enterprises; or of assessments of rating agencies which reduce the credit standing of certain financial products and their aptitude for securing the fulfillment of obligations in cross-border leasing contracts. As soon as such cases arise the same approach must be taken by the courts to ensure the systemic rationality of the law, and hence its justice in the sense of its certainty and predictability. Individual decisions of courts have to fit into the overall normative system.

II. The Legal Type of Restrictions.

The second consequence of binding private actors concerns the legal types of restrictions subject to the prohibitions. The dichotomy between legally binding measures and non-binding measures as developed for restricting state measures fits also here.

1. Binding Measures. The beginning of the jurisprudence on direct horizontal effect was concerned with *binding measures* such as collective agreements or statutes of associations (e.g.: “*Walrave*,”⁵³ “*Bosman*”⁵⁴). No set of rules established by a private actor with binding effect for others can be, in principle, excluded: those of the already mentioned organisations are included as well as those of associations of hospitals (“*Ferlini*”⁵⁵), professional groups (“*Wouters*,”⁵⁶ “*Broekmeulen*”⁵⁷) and semi-professional groups (“*BNIC*,” “*BNIA*”),⁵⁸ but also churches and corporations. Also single conditions of contracts can be attacked such as discriminatory

48 ECJ, Case C-341/05 (*Laval*), supra, paragraph 98.

49 ECJ, Case C-438/05 (*Viking*), supra, paragraphs 56 to 66.

50 ECJ, Case 36/74 (*Walrave*), supra, paragraphs 16 to 19.

51 ECJ, Case C-415/93 (*Bosman*), supra, paragraphs 82 to 84.

52 See, e.g., Peter-Christian Müller-Graff, “Artt. 30–36 EWGV — Freier Warenverkehr, Kommentierung,” in *Kommentar zum EWG-Vertrag*, ed. Hans von der Groeben et al. (Baden-Baden: Nomos, 1991), Art. 30 EWGV paragraphs 127 to 131.

53 ECJ, Case 36/74 (*Walrave*), supra, paragraph 17.

54 ECJ, Case C-415/93 (*Bosman*), supra, paragraph 40 and 83.

55 ECJ, Case C-411/98, *Angelo Ferlini v Centre hospitalier de Luxembourg* (2000) ECR I-8081, paragraphs 48 to 50.

56 ECJ, Case C-309/99 (*Wouters*), supra, paragraph 120.

57 ECJ, Case 246/80, *C. Broekmeulen v. Huisarts Registratie Commissie* (1981) ECR2311, paragraph 3 (“private association”; according to its statutes the provisions of its internal rules concerning the recognition and registration of medical specialists, experts in social medicine and general practitioners may be amended only in consultation with certain Dutch public authorities).

58 Commission, Decision 76/684/EWG, JZ 1977, 645ff.

conditions of insurance contracts (“*Haug-Adrion*”⁵⁹) or the prohibition in a rental contract to use a satellite dish for receiving a broadcast from another Member State.⁶⁰

2. Factual Measures. *Purely factual private measures* can also fall under the prohibitions. This is mirrored by the increasing number of cases in this respect such as: acts of violence (e.g. barring the import of Spanish strawberries in Southern France⁶¹; blockading the construction site of a Latvian company in Sweden⁶²), boycotts (e.g. of an international trade union against a Finnish shipping company⁶³), demonstrations which hinder transports on the roads (“*Schmidberger*”: Brennerautobahn in Tyrol⁶⁴), and the imposition of conditions for applications by an enterprise (“*Angonese*”⁶⁵).

III. The Content of Restrictions.

A third consequence is the scope of the content of restrictions. Like state restrictions, private restrictions also raise the question of whether only measures, which discriminate on the grounds of nationality or origin, are addressed or also measures which do not discriminate on these grounds.

1. Discriminatory Measures. In cases of measures, which discriminate on the grounds of nationality or origin a specific problem emerges due to the regular and normal preference decisions of market participants, discussed above. In this respect the imaginable range of conflicts is unlimited. Should, e.g., a Bavarian innkeeper be prohibited from pursuing a business model based on Bavarian authenticity in which only service staff with an authentic command of the Bavarian dialect is hired? Or is a Danish trader in wine violating article 34 TFEU if he exclusively specialises in offering French red wine at the disadvantage of red wines grown in other Member States? However, there is a solution to the challenge posed by these examples. In these cases we encounter preference decisions of market participants. Such choices based on preference lie at the heart of a system based on the free coordination of free decisions. They are at the core of the constitutive norms of the market economy based on free competition in the internal market. They are inherent to the system (“systemimmanent”). This reasoning applies, in the principle, independently from the role of the market participant: consumer or entrepreneur, supplier or buyer. Restrictions exist only for undertakings within the scope of applicability of the competition rules and for employers within the prohibition

59 In the principle, but not in the concrete case ECJ, Case 251/83, *Eberhard Haug-Adrion v Frankfurter Versicherungs-AG* (1984) ECR4277 paragraph 14 et seq.

60 BGH, NJW 2006, 1062, 1064.

61 ECJ, Case C-265/95, *Commission v France* (1997) ECR I-6959, paragraph 2.

62 ECJ, Case C-341/05 (*Laval*), supra, paragraph 34.

63 ECJ, Case C-438/05 (*Viking*), supra, paragraph 12.

64 ECJ, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* (2003) ECR I-5659, paragraph 14.

65 ECJ, Case C-281/98 (*Angonese*), supra, paragraphs 6 and 7.

of “discrimination” (distinction without reasonable grounds) on grounds of nationality as a consequence of the fundamental role of this prohibition in Union law. However, if private measures which hinder the free transnational movement are not taken by market participants in an actual or potential transaction, but by third actors (such as trade unions), they cannot be considered as being genuine (and conceptually desirable) preference decisions in the course of market transactions.

2. Non-discriminatory Measures. Hence, even private measures which do not discriminate on the mentioned grounds but are generally applicable such as, e.g. the requirement of a transfer fee for a football player, can constitute a restriction of transnational market access. As far as they do, they cannot be excluded from the prohibition. Consequently the practice of certification as pursued by the DVGW was correctly assessed by the ECJ as contradicting article 34 TFEU.⁶⁶ In contrast, as preference decisions of market participants are not covered by the prohibition, then this has to apply even more to decisions without such discrimination. The boundary is marked by the role of the originator of a measure. It is decisive whether he is a market participant to a transaction or a third party which actually or potentially “excludes” or “burdens” a transnational transaction of other persons.

IV. The Categories of Private Addressees.

A fourth issue concerns the categories of private addressees.

1. A traditional line of thinking argues for a limitation to private organisations, which exercise a public, semi-public or intermediary regulatory function. This idea stems from the “*Walrave*” case, which involved the statutes of an international cyclist association.⁶⁷ It is clear that the prohibitions should apply to such associations since they are capable to internally bind or influence their members in their external conduct (e.g. by rules) and can even externally and directly influence the options of market participants (e.g. by boycott).

2. Since, however, the decisive criterion for the applicability of the market freedoms is the restriction of transnational market access a limitation of direct horizontal effect to private organisations of the mentioned kind is not compelling. As seen in the cases “*Angonese*”⁶⁸ and “*Raccanelli*”⁶⁹ access restrictions can also be generated by the conduct of individual private protagonists.

66 ECJ, Case C-171/11 (*Fra.bo*), supra, paragraph 32.

67 ECJ, Case 36/74 (*Walrave*), supra, paragraphs 16 to 19.

68 ECJ, Case C-281/98 (*Angonese*), supra, paragraph 36.

69 ECJ, Case C-94/07 (*Raccanelli*), supra, paragraph 46.

V. Justification of Restrictions?

A fifth and last issue arising from the assumption of direct horizontal effect of the market freedoms concerns the question of whether restrictions which arise from the exertion of private autonomy are or can be justified.

1. State Obligation to Protect? Some authors want to avoid this question by favouring the so called “Schutzpflichten” — idea, in other words by denying direct horizontal effect, but by holding a Member State accountable for not protecting the transnational market freedom of individuals against privately initiated restrictions on its territory (such as, e.g., France for not protecting the importers of Spanish strawberries against street blockades put up by private gangs⁷⁰). However, this solution is neither efficient in practice nor compelling in theory. In practice it amounts to a deviation of the enforcement against the originators (e.g. the rules or measure of an international association) to the public authorities of a Member State in which a statute provision becomes effective. From a theoretical perspective, it would be paradoxical to oblige a State to stop or avoid a private measure which is not prohibited.

2. Justification. Hence the legal question cannot be avoided of whether the exertion of private autonomy can justify restrictions of transnational transactions. My proposal is for a threefold test. First, the question has to be answered whether a private behaviour amounts to a restriction of market access. Second, if this is the case, it can be assumed in principle that the behaviour is based on a preference decision in accordance with the basic idea of market competition as envisaged by the market freedoms and hence this restriction is not covered by the prohibition. Third, if this assumption is not valid in a concrete fact scenario (e.g. restrictions as a consequence of a rule or factual measures taken by a third actor) the private rule or behaviour can only be justified if its objective serves reasonable purposes, and if its implementation is suitable and necessary to these ends (a test which cannot allow the use of force in any case) and is proportional in relation to the restrictions of the transnational market access. In the “*Fra.bo*” case these interesting questions were not raised.⁷¹ But they are part in the overall issue whether a concrete private behaviour is compatible with the market freedoms or contradicts them. There are many questions to be posed and to be answered in the interest of a functioning internal market and in the interest of the Union as a whole.

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⁷⁰ ECJ, C-265/95 (*Commission/France*), *supra*, paragraph 66.

⁷¹ See, however, rudimentary the opinion of advocate general *Trstenjak* in Case 171/11 (*Fra.bo*) *supra*.

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