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The Impact of Primary EU Law on Private Law Relationships: Horizontal Direct Effect under the Free Movement of Goods and Services

PAUL VERBRUGGEN*

Abstract: This article examines the basis on which the Court of Justice of the European Union draws a distinction between the free movement of goods (Art. 28 *et seq.* of the Treaty on the Functioning of the European Union (TFEU)) and services (Art. 56 *et seq.* TFEU) as regards their capacity to have horizontal direct effect, that is, be able to create, modify, or extinguish rights and obligations between private parties. It argues that this Court's position to deny horizontal direct effect to the freedom of goods, but award it to the freedom of services, is conceptually unclear and dents the uniform interpretation of EU free movement law. In particular, it is argued that the judge-made distinction between the freedoms of goods and services should be revisited in the light of the reality of today's business relationships and supply chains. Modern trends of the 'servitisation of products' and 'commodification of services' signify that trade in goods and the provision of services are intimately linked and mutually complementary. While the Court has recognized this interdependence in its case law, it fails to follow up on the consequences this has for its case law on the horizontal direct effect of the freedom of goods and services.

Resumé: L'effet direct horizontal d'une norme consiste en la possibilité pour celle-ci de créer, modifier ou faire disparaître des droits ou obligations entre personnes privées. Si la Cour de justice de l'Union européenne l'admet en matière de libre circulation des services (Article 56 et suivantes TFUE), elle la refuse en revanche pour les biens (Article 28 et suivants TFUE). Cette contribution défend l'idée selon laquelle une telle distinction est conceptuellement équivoque et va à l'encontre de l'exigence d'interprétation uniforme des dispositions de l'Union relatives à la libre circulation. Il apparaît en particulier que cette distinction prétorienne entre biens et services devrait être repensée à la lumière de la réalité d'aujourd'hui en matière de relations commerciales et de chaîne logistique. Les tendances actuelles de 'servicisation des produits' et de 'chosification des services' témoignent de la relation étroite et complémentaire entre biens et services. Alors que la Cour a reconnu cette interdépendance dans sa jurisprudence, elle n'en a pas tiré les conséquences en matière d'effet direct horizontal des dispositions relatives à la libre circulation des biens et des services.

* Assistant Professor of Private Law, Business and Law Research Centre, Radboud University Nijmegen. An earlier version of this article was presented at the Workshop 'Primary EU Law and Private Law' held at the European University Institute (Florence) on 12–13 Sep. 2013. I thank Hans-W. Micklitz, Carla Sieburgh, and Barend van Leeuwen for useful comments. The usual disclaimer applies.

Zusammenfassung: Dieser Aufsatz thematisiert die Frage, auf welcher normativen Grundlage der Gerichtshof der Europäischen Union Fälle der unmittelbaren Drittwirkung zwischen Privaten entweder der Warenverkehrsfreiheit (Art. 28 ff AEUV) oder der Dienstleistungsfreiheit (Art. 56 ff. AEUV) zuordnet. Unmittelbare Drittwirkung bezeichnet dabei den Effekt der Grundfreiheiten, Privatpersonen Rechte und Pflichten gegen eine andere Privatperson zu gewähren, diese Rechte auszufüllen oder zu nehmen. Es wird zu zeigen sein, dass die Entscheidung des Gerichtshofs, nur der Warenverkehrs- und nicht der Dienstleistungsfreiheit eine solche Drittwirkung zuzugestehen, nicht nur an konzeptioneller Klarheit vermissen lässt, sondern auch eine Gefahr für die einheitliche Auslegung der Grundfreiheiten darstellt. Insbesondere wird dargelegt, dass die gerichtliche Unterscheidung zwischen der Warenverkehrs- und der Dienstleistungsfreiheit an die Anforderungen unserer heutigen Geschäftswelt und deren Wertschöpfungsketten anzupassen ist. Trends wie die 'Verdienstleistungen von Produkten' und die 'Verpruduktivisierung von Dienstleistungen' sind wichtige Indikatoren dafür, dass Handel mit Waren und Dienstleistungen als Komplementäre anzusehen sind. Zwar hat der Gerichtshof vermehrt auf diesen Zusammenhang in seinen Urteilen hingewiesen, er hat es jedoch unterlassen, hieraus auch Konsequenzen für die unmittelbare Drittwirkung der Waren- und Dienstleistungsfreiheit zu ziehen.

1. Introduction

The provisions of the Treaty on the Functioning of the European Union (TFEU) concerning the free movement of goods (Art. 28 *et seq.* TFEU) and services (Art. 56 *et seq.* TFEU) have a significant impact on private law relationships. While the text of the Treaty provisions concerned suggests that the purpose of the regimes is to preclude measures taken by Member States that disrupt intra-Union trade, the context in which the question of whether such measures are precluded comes up will in fact often concern relationships governed by private law. This is not inadvertently so, since the supply of goods and services typically takes place based on contractual relationships. Hence, the answer given by the Court of Justice of the European Union (the Court) to the question of whether particular national measures are precluded by the Treaty provisions on goods and services may not only have implications for the defendant Member State but also for the underlying private law relationships.[1]

That a Member State default under the Treaty's goods or services regime can have implications for private law relationships is undisputed. A much more thorny issue is the question of whether and to what extent these regimes bind

1 Case C-47/90 *Delhaize* [1992] *ECR* I-3669 offers a fine example in point for the regime of the free movement of goods. In this case, a Spanish wine seller invoked *force majeure* against a Belgian retailer because a Spanish law prevented the sale of wine. As a result, the retailer brought proceedings against the seller claiming specific performance and arguing that the national law was contrary to Art. 35 TFEU. The national court referred the case to the Court, which held that Art. 35 TFEU precluded the Spanish law. As a result, the buyer could require the seller to fulfil its obligations under the contract of sale. See for an example of this type of case in the field of services: Case C-346/06 *Rüffert* [2008] *ECR* I-1989.

private parties in exercising their private autonomy.[2] Here, the two regimes demonstrate a remarkable dichotomy: whereas the Court has held that the freedom of goods only concerns measures taken by Member States and not by private parties, it has considered that under the freedom of services private measures can be subject to the same standards applicable to State measures. Accordingly, the regime concerning the free movement of goods has not been attributed horizontal direct effect, while the regime on services in principle has.

This article examines the basis on which the Court draws the distinction between the freedom of goods and services as regards horizontal direct effect, that is, the capacity of EU law provisions to 'create, modify or extinguish rights and obligations between individuals'.[3] It has been argued by several commentators that this distinction in the Court's case law challenges the uniform interpretation of EU free movement law.[4] This article draws attention to a different argument that critiques the judge-made distinction between the freedom of goods and services as regards horizontal direct effect, namely that this distinction conflicts with the reality of today's business relationships and supply chains. In this context, trade in goods and the provision of services are intimately linked and mutually complementary. Not only may a service be provided in the form of goods (e.g., a service for Internet access by the supply of a modem), but the sale of goods is frequently accompanied by related services regulated by service contracts.[5] This development of the 'servitisation of products' is complemented by a trend known as the 'commodification of services', in which services are offered as if they were commodity goods. Taken together, these trends highlight the

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2 See, e.g., H. SCHEPEL, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law, 18(2). *European Law Journal* 2012, pp. 177-200; D. WYATT, 'Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold, and the Implications for Community Competence', *Croatian Yearbook of European Law and Policy*, University of Zagreb, Zagreb 2008, pp. 1-48; P. OLIVER & W.-H. ROTH, 'The Internal Market and the Four Freedoms', 41(2). *CMLR* (*Common Market Law Review*) 2004, pp. 407-441 at 421-429; J. BAQUERO CRUZ, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*, Hart Publishing, Oxford 2002, pp. 105-125; J. SNELL, *Goods and Services in EC Law*, Oxford University Press, Oxford 2002, pp. 135-159; S. VAN DEN BOGAERT, 'Horizontality: The Court Attacks?', in C. Barnard, J. Scott (eds), *The Law of the Single European Market*, Hart Publishing, Oxford 2002, pp. 123-152; E. STEINDORFF, *EG-Vertrag und Privatrecht* Nomos, Baden-Baden 1996, pp. 277-301.

3 *Cf.* A. HARTKAMP, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law', 18(3). *European Review of Private Law* 2010, pp. 527-548 at 529.

4 See, e.g., SNELL, 2002 (n. 2), pp. 22-26.

5 The latter aspect is also recognized in the recent Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (Brussels, 11 Oct. 2011, COM (2011)635 final), which includes a number of specific provisions regulating service contracts related to the sale of goods.

interdependence between goods and services in modern-day capitalist economies. The Court recognizes this interdependence in its case law, but does not fully follow up on the consequences this has for its case law on the horizontal direct effect of the Treaty provisions on the freedom of goods and services.

The article proceeds as follows: It first discusses the Court's case law on the horizontal direct effect of the Treaty provisions of free movement law. Section 2 highlights the case law on the freedom of services, in relation to which the Court has held that the prohibition to impose restrictions on the cross-border provision of services (Art. 56 TFEU) applies to Member States and private entities alike. Section 3 discusses the case law concerning the prohibitions of the free movement of goods contained in Articles 34 and 35 TFEU, which as of yet the Court did not consider to have horizontal direct effect. Section 4 criticizes the approach of the Court by drawing attention to the difficulty of distinguishing between goods and services in today's business relationships. It shows that the Court in fact itself has recognized the interdependence between goods and services in its case law but fails to spell out the consequences this has for its case law on the horizontal direct effect of the Treaty provisions on the freedom of goods and services. To highlight the difficulties the Court brings itself in by maintaining its position to deny horizontal direct effect to the freedom of goods, section 5 offers an example of a 'hard case' in which private parties collectively regulate economic activities and affect both the trade in goods and the provision of services at the same time. Section 6 concludes by arguing that the Court should move towards a more functional approach in applying the Treaty provisions on goods and services to relationships governed by private law.

2. Horizontal Direct Effect of Freedom of Services

The freedom to provide services has been considered to apply to private parties, thereby creating, modifying, and extinguishing rights and obligations between them. The leading case in the line of jurisprudence of the Court is *Walrave*,[6] which concerned the compatibility of nationality requirements for international cycling championships with the Treaty provisions relating to the free movement of workers and the freedom to provide services (i.e., Arts 45 and 56 TFEU). In holding that the nationality requirements in point should be considered incompatible with these Treaty prohibitions, the Court stated that those prohibitions do not only apply to the action of public authorities but extends likewise 'to rules of any other national aimed at regulating in a collective manner' economic activities.[7] If the Treaty provisions would be limited to public measures, the Court noted, the objective to create an Internal Market could be compromised

6 Case 36/74 *Walrave* [1974] *ECR* 1405.

7 *Ibid.*, para. 17.

by the exercise of the legal autonomy by associations or organizations governed by private law.[8] Furthermore, given that in some Member States working conditions are governed through public legal frameworks and in others by means of (collective) agreements or other private means, a limitation of the applicability of the Treaty prohibitions to public law measures would breed risks of inequality.[9]

We can find this *effet utile* reasoning in other cases in which sporting rules have been tested against the prohibition of discrimination on grounds of nationality under the freedom to provide services.[10] In the same vein, the Court held in *Van Ameyde* that the prohibition also applied to private insurance services collectively regulating the settling of accident claims caused by foreign motor vehicles.[11] In *Wouters*, it considered that private bodies regulating the provision of professional services by their members are required to comply with Article 56 TFEU irrespective of whether they operate on the basis of a public law mandate.[12] More recently, in the *Viking* and *Laval* cases, also strikes, boycotts, and other trade union action were caught by Article 56 TFEU.[13]

It emerges from this case law that the freedom of services applies to private measures restricting the provision of cross-border services as it applies to public law measures, provided that they regulate service provision *collectively*. In the area of the free movement of workers, the Court has also applied the prohibition to discriminate on the basis of nationality in *individual* contractual relations. It follows from *Angonese* and *Raccanelli* that an employer cannot discriminate against job candidates or workers, respectively, on the basis of nationality.[14] In the field of services, however, the Court does not give a clear-cut answer to the question of whether the prohibition of restrictions on provision of services and to discriminate on the basis of nationality also extends to individual transactions governed by private law, such as the conclusion and execution of contracts. In *Haug-Adrion*, the Court did engage into a substantive test of discrimination of

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8 *Ibid.*, para. 18.

9 *Ibid.*, para. 19.

10 Case 13/76 *Donà* [1976] *ECR* 1333, para. 17; Case C-415/93 *Bosman* [1995] *ECR* I-4921, para. 83; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] *ECR* I-2549, para. 47; Case 176/96 *Lehtonen* [2000] *ECR* I-2681, para. 35; and Case C-519/04 P *Meca-Medina* [2006] *ECR* I-6991, paras 24–29.

11 Case 90/76 *Van Ameyde* [1977] *ECR* 1091, para. 28.

12 Case C-309/99 *Wouters* [2002] *ECR* I-1577, para. 120.

13 Case C-438/05 *Viking* [2007] *ECR* I-10779, para. 33 and Case C-341/05 *Laval* [2007] *ECR* I-11767, para. 98.

14 Case C-281/98 *Angonese* [2000] *ECR* I-4139, paras 32–35 and Case C-94/07 *Raccanelli* [2008] *ECR* I-5939, paras 42–46. In the latter case, the Court held in para. 45: '(…) with regard to [Article 45 TFEU], which lays down a fundamental freedom and which constitutes a specific application of the general principle of discrimination contained in [Article 18 TFEU], the prohibition of discrimination applies equally to all agreements intended to regulate paid labor collectively, as well as to contracts between individuals'.

standard contract terms used by a private insurance company *vis-à-vis* its clients without considering the collectiveness dimension of that usage.[15] Likewise, the Court considered in *Ferlini* that the fixing of scales of fees for non-nationals receiving medical and hospital maternity care – a service within the meaning of Article 57 TFEU – by all hospitals in one Member State constituted an infringement of the general prohibition of discrimination on the grounds of nationality (Art. 18 TFEU) as these fees were higher than those applicable to persons affiliated to the national social security scheme.[16] Article 18 TFEU, as the Court held, 'also applies in cases where a group or organisation such as the [group of hospitals] exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty'.[17] Arguably, it may be inferred from this ruling that Article 56 TFEU, as a *lex specialis* of Article 18 TFEU, also applies to agreements restricting the cross-border provision of services.

In *Viking*, however, the Court appeared to draw specific attention to the element of collectiveness when examining the horizontal direct effect of the freedom to provide services. It noted that trade unions 'in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, [...] participate in the drawing up of agreements seeking to regulate paid work *collectively*'.[18] Accordingly, the Court dismissed the argument raised by Advocate General (AG) Maduro that Articles 45 and 56 TFEU – and indeed all prohibitions relating to discrimination on the basis of nationality enshrined in the Treaty provisions on free movement – should apply to 'any private action that is capable of effectively restricting individuals from exercising their right to freedom of movement', including bilateral and multilateral agreements.[19]

What does this imply for the capacity of the prohibition of Article 56 TFEU to have horizontal direct effect? Has the Court awarded full horizontal direct effect to the freedom to provide services? It appears to follow from *Viking*, and in particular from its refusal to follow AG Maduro's approach, that the Court retains the element of *collectiveness* as a requirement to consider whether the obligations arising from the freedom to provide services also bind private parties.[20] In this

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15 Case 251/83 *Haug-Adrion* [1984] *ECR* 4277, paras 14–16.

16 Case C-411/98 *Ferlini* [2000] *ECR* I-8081, para. 58.

17 *Ibid.*, para. 50.

18 *Viking* (n. 13), para. 65 (emphasis added).

19 Opinion AG Maduro in *Viking* (n. 13), para. 43.

20 See also C. BARNARD, *The Substantive Law of the EU: The Four Freedoms*, 3rd edn, Oxford University Press, Oxford, 2010, pp. 234–235. In addition, AG Trstenjak draws attention to the dimension of collectiveness in discussing the Court's case law on the horizontal direct effect of the Treaty provisions relating to services in her Opinion in *Fra.bo*. See Opinion AG Trstenjak in Case C-171/11 *Fra.bo*, n.y.r., paras 30–34.

sense, the regulatory dimension of activities governed by private law remains pivotal: Private measures are only caught by Article 56 TFEU in so far as they affect the freedom to provide services like public authorities do, namely in a collective manner. In this sense, the approach does not differ from measures adopted by private actors mandated by public law (e.g., professional regulatory bodies). Contractual obligations arising from bilateral and multilateral agreements, by contrast, have not been considered to restrict the cross-border provision of services.[21] Here, the Court has so far not followed its approach in *Angonese* and *Raccanelli* under the free movement of workers. Consequently, it can be contended that the Court has not awarded full or unconditional horizontal direct effect to the services regime: It applies to relationships governed by private law only in so far as they collectively affect the cross-border provision of services.

3. Horizontal Direct Effect of the Freedom of Goods

While the Court has conditionally accepted horizontal direct effect of the freedom to provide services, it has taken a much more reserved position as regards the free movement of goods.[22] Indeed, the Court has so far firmly denied horizontal direct effect in this area by refusing to extend the *effet utile* reasoning as it developed in its case law following *Walrave*. Support for this position is already found in the landmark case of *Dassonville*, in which the Court held the notion of 'measures having equivalent effect' to include 'all trading rules *enacted by Member States* which are capable of hindering, direct or indirectly, actually or potentially, intra-[Union] trade'.[23] This appears to suggest that Article 28 *et seq.* TFEU bind Member States only and not private individuals.

How does the Court explain its alternative approach under the free movement of goods regime? It is not quite straightforward about this reasoning, to say the least. In the most recent case about the horizontal direct effect of the free movement of goods – *Fra.bo*[24] – it did not even refer to the concept of 'horizontal direct effect' as developed in its case law under the regimes of free movement of persons.[25] In this case, the Court had to consider whether the refusal of a private standardization body in Germany to certify – as required by

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21 *Haug-Adrion* (n. 15), para. 18 and *Ferlini* (n. 16), para. 50.

22 So far it is unclear whether the Court considers the free movement of capital to have horizontal direct effect. Schepel has argued that the Court is likely to do so. SCHEPEL, 2012 (n. 2), pp. 192-196.

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

24 *Fra.bo* (n. 20), para. 44.

25 The opinion of AG Trstenjak, by contrast, was riddled with the rhetoric of horizontal direct effect. In the opening paragraph of her opinion, she qualifies the questions of the referring national court to be essentially concerned with 'the question of horizontal effect of the fundament freedoms in general and of the free movement of goods in particular'. Opinion AG Trstenjak in *Fra.bo* (n. 20), para. 1.

German product safety laws – Italian-made copper fittings for the drinking water supply sector would amount to a restriction under Article 34 TFEU. It held that given the applicable legal framework and the difficulties this arrangement imposed for producers to enter the German market, the certification activity should be considered so similar to Member State action that it must be treated under the free movement of goods.[26] Accordingly, the Court remained far from answering the question of why it has not – so far – extended the concept of horizontal direct effect to Articles 34 and 35 TFEU.[27]

In the literature, this question has been commonly answered by reference to the relation between the free movement of goods and EU competition law. It is contended that Article 34 TFEU prohibits *public* measures taken by Member States that impede the free movement of goods, whereas Articles 101 and 102 TFEU have been designed to address the conduct of *private* undertakings and associations of undertakings.[28] This position finds support in the earlier case law of the Court.[29] In *Dansk Supermarked*, the Court added to this in rather unconditional terms 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'.[30] Similarly, in *Vlaamse Reisbureaus*, the Court considered that Articles 34 and 35 TFEU 'concern only public measures and not the conduct of undertakings'.[31] Somewhat more nuanced was the Court in *Sapod Audic*, in which it 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'.[32]

There is, however, a parallel development in the Court's case law suggesting that Article 34 TFEU can be applied also to private activities

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26 *Fra.bo* (n. 20), paras 26–31.

27 See for an analysis of its consequences: N. NIC SHUIBHNE, 'The Treaty Is Coming to Get You', 37(4). *ELR* (*European Law Review*) 2012, pp. 367–368, R. VAN GESTEL & H.-W. MICAKLITZ, 'European Integration through Standardization: How Judicial Review Is Breaking Down the Club House of Private Standardization Bodies', 50(1). *CMLR* 2013, pp. 145–182; H. SCHEPEL, 'Case C-171/11 Frabo SpA v. Deutsche Vereinigung des Gas- und Wasserfaches', 9(2). *European Review of Contract Law* 2013, pp. 186–192; and B. VAN LEEUWEN, 'From Status to Impact, and the Role of National Legislation: The Application of Article 34 TFEU to a Private Certification Organisation in *Fra.bo*', 3. *European Journal of Risk Regulation* 2013, pp. 405–408.

28 See e.g.: SNELL, 2002 (n. 2), pp. 145–153; OLIVER & ROTH, 2004 (n. 2), pp. 423–424; and S. PRECHAL & S. DE VRIES, 'Seamless Web of Judicial Protection in the Internal Market?, 34(1). *ELR* 2009, pp. 5–24 at 18. See for an extensive critique on this approach: SCHEPEL, 2012 (n. 2), p. 180.

29 See in particular: Joined Cases 177 and 178/82 *Van der Haar* [1984] *ECR* 1797, paras 11–12 and Case 65/86, *Bayer* [1988] *ECR* 5249, para. 11.

30 Case 58/80 *Dansk Supermarked* [1981] *ECR* 181, para. 17 (emphasis added).

31 Case 311/85 *Vlaamse Reisbureaus* [1987] *ECR* 3801, para. 30.

32 Case C-159/00 *Sapod Audic* [2002] *ECR* I-5031, para. 74.

hindering inter-state trade. This puts nuance to the claim that the free movement of goods does not regulate private restrictions on cross-border economic activities. It is held that in two situations such application of Article 34 TFEU can be distinguished.[33] The first concerns the application of Article 34 TFEU to regulatory, professional, or semi-public organizations. By extending the notion of 'Member State', the activities of these organizations have been considered to fall within the ambit of the free movement of goods regime.[34] The mere involvement of a private legal person does not make Article 34 TFEU inapplicable, provided that the Member State can be seen as the source of the activity of that person.[35] This reasoning goes back to the *effet utile* argument put forward by the Court in *Walrave* when considering that if Member States could evade their obligations arising under the principles of free movement law by simply transferring their competences to private actors, this would result in the lack of uniformity in the application of EU law.[36] That argument is also implicit in the Court's reasoning in *Fra.bo*: While in some Member States the certification of products remains a task performed only by public authorities, in Germany national product safety legislation devolved that task to a private standardization body.[37] If Article 34 TFEU would not to apply also to such a private body, its effectiveness would be compromised.

A second situation in which Article 34 TFEU extends to private activities is highlighted by the Court's case law on the application of the principle of sincere cooperation as enshrined in Article 4(3) of the Treaty on the European Union (TEU) in relation to the provisions of free movement of goods. Two cases are central: *Commission* v. *France*,[38] which concerned a violent protest by farmers in the south of France affecting the imports of fruit and vegetable from other

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33 It has also been submitted that EU competition law does not strictly concern horizontal relations between private undertakings and also extends to more vertical relations. See on this development generally: BAQUERO CRUZ, 2002 (n. 2), Ch. 6; J. SZOSBOSZLAI, 'Delegation of State Regulatory Powers to Private Parties – Towards an Active Supervision Test', 29(1). *World Competition* 2006, pp. 73–87; and PRECHAL & DE VRIES, 2009 (n. 28).

34 See, e.g., Case 249/81 *Commission* v. *Ireland* ('Buy Irish') [1982] *ECR* 4005; Case 222/82 *Apple and Pear Development Council* [1983] *ECR* 4083; and Case C-325/00 *Commission* v. *Germany* [2002] *ECR* I-9977, in which the Court ruled that also private organizations involved with publicity campaigns and quality labelling for home-grown fruits are covered by Art. 34 TFEU. In Joined Cases 266 and 267/87 *Royal Pharmaceutical Association of Great Britain* [1989] *ECR* 1295 and Case C-292/92 *Hünermund* [1993] *ECR* I-6787, the Court held that the rulemaking activities of professional associations of pharmacists fell within the scope of Art. 34 TFEU since it was national legislation that allowed them to exercise that regulatory power.

35 SNELL, 2002 (n. 2), p. 136.

36 *Walrave* (n. 6), paras 18–19.

37 *Fra.bo* (n. 20), paras 27–29.

38 Case C-265/95 *Commission* v. *France* ('Spanish strawberries') [1997] *ECR* I-6959.

Member States, and *Schmidberger*,[39] in which an environmental protest that was organized by an NGO and authorized by the Austrian authorities led to the temporary closure of the Brenner Pass inter-state motorway. In both cases, the Court considered that Member States are, under certain circumstances, required by Article 4(3) TEU to protect the exercise by private individuals of the rights arising under the free movement of goods against impediments created by other private individuals.[40] While some have argued that in *Commission* v. *France* and *Schmidberger* it was not private action that was held incompatible with the provisions of the free movement of goods, but rather the *public inaction* to prevent or ban that private conduct,[41] the result of the Court's approach in those two cases is, as AG Trstenjak concludes in *Fra.bo*, that 'the actions of private individuals can, under certain circumstances, be measured against an obligation on the Member States to protect the guarantees of the fundamental freedoms and so, indirectly, against those fundamental freedoms'.[42] It would also appear, however, that in so far as the free movement of goods does extend to private activities, these activities must be of a collective nature, like a boycott or demonstration. Seemingly, individual transactions governed by private law remain untouched.

4. Criticizing the Court's Approach

It follows from this overview that the freedoms of goods and services do not equally apply to relationships governed by private law. The crux of the matter is that the Court finds the Treaty provisions on services – and *not* those on goods – to apply in relations between private individuals and entities that have the capacity to collectively affect intra-Union trade. As a consequence, rule-making activities of sports organizations, decisions of professional regulatory bodies, strikes, and boycotts organized by trade unions have been considered to fall within the scope of the freedom of services.[43] However, if such activities restrict the intra-Union trade in goods, they have not been considered to fall within the scope of the freedom of goods regime. Only if the private entity involved falls under the scope of the term 'public authority' or if the Member State involved has violated

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

40 *Commission* v. *France* (n. 38), para. 52 and *Schmidberger* (n. 39), para. 64.

41 A. DASHWOOD, 'Viking and Laval: Issues of Horizontal Direct Effect', 10. *Cambridge Yearbook of European Legal Studies* 2008, pp. 525–540 at 532 (emphasis as in original).

42 Opinion AG Trstenjak in *Fra.bo* (n. 20), para. 31. In addition, AG Maduro relied on *Commission* v. *France* and *Schmidberger* to argue in *Viking* that the free movement rules have horizontal direct effect. See Opinion AG Maduro in *Viking* (n. 13), paras 38–40. See in a similar vein: WYATT, 2008 (n. 2), p. 19. However, in *Fra.bo* the Court itself does not cite either *Commission* v. *France* or *Schmidberger* (or *Walrave*!) in any part of its decision.

43 However, contractual obligations arising from bilateral and multilateral agreements have not been considered to restrict the cross-border provision of services as such. See *Haug-Adrion* (n. 15), para. 18 and *Ferlini* (n. 16), para. 50.

its obligations under Article 4(3) TEU, private regulatory activities are caught by Treaty provisions on the free movement of goods.

Two lines of argument can be put forward to criticize this rigged stance of the Court's case law. The first follows from a systematic perspective on primary EU law, whereas the second is more practical. To start with the first line of argument, the Court's position to deny horizontal direct effect to the goods regime dents the uniform application of free movement law. This view is well articulated by several commentators of EU law. Snell, for example, holds that '(t)he Court's approach to the free movement of goods and services has been doctrinally fundamentally different, for no obvious reason. It seems that no effort has been made to co-ordinate the jurisprudence'.[44] He contends that, from both a legal and economic perspective, the supply of goods and services form an inherently linked pair so that treating them in a uniform manner under EU law is to be preferred.[45] In a similar vein, Schepel holds that since the Court's decision in *Walrave*, its case law extending horizontal direct effect to other domains of free movement law has been incoherent. Since it is unclear under which circumstances private entities are bound by the free movement provisions, Schepel argues rather provocatively, the concept of horizontal direct effect is best abandoned.[46]

A second line of argument to criticize the Court's approach draws attention to the practical difficulties the Court faces as a result of its reserved position to deny horizontal direct effect for the goods regime. A first point to note is that the supply of goods may imply the provision of services. Goods manufactured today increasingly include a high service component. In management and economics literature, this development is referred to as the 'servitisation of products'.[47] It implies that sellers of goods seek to add value by providing additional services to their goods. Accordingly, they try to better accommodate individual preferences of buyers in the sale of goods. Second, in some sectors or industries, like telecommunication, services are increasingly offered as if they were commodities: Providers offer set packages of non-personalized services to which recipients adjust their preferences. This trend of a 'commodification of services' clearly moves away from the more traditional conception of services that is embodied in

44 SNELL, 2002 (n. 2), p. 144.

45 *Ibid.*, pp. 22-26.

46 SCHEPEL, 2012 (n. 2).

47 See in general on this development: S. VANDERMERWE & J. RADA, 'Servitization of Business: Adding Value by Adding Services', 6(4). *European Management Journal* 1988, pp. 314-324. Neely offers more recent empirical evidence about the forms and extent to which firms in developed countries 'servitise' their manufactured products. See A. NEELY, 'Exploring the Financial Consequences of the Servitization of Manufacturing', 1(2). *Operations Management Research* 2008, pp. 103-118.

national private law, in which the service recipient has a big influence in determining the specifics of the performance of the service provider.[48]

The servitization of products and commodification of services highlight a fundamental issue to make sense of and understand the Court's position on the horizontal direct effect of the Treaty provisions on the freedoms of goods and services, namely that the supply of goods and services can be inextricably linked. There simply are instances in which the one cannot be told from the other and that both the Treaty provisions on goods and services should be applied simultaneously. The Court recognized this matter in the case of *Canal Satélite Digital*.[49] In this case, the Court found that in relation to services for digital satellite television made possible by the purchase or rent of a digital decoder device, the freedoms of goods and services should be applied jointly in order to assess the legality of a Member State measure that required the operators of such decoder devices to register themselves and obtain an administrative certification of compliance with technical norms.[50] Accordingly, the Court recognized that in the field of telecommunications it can be difficult, and at times impossible, to determine which of the two freedoms should prevail as they are often intimately linked. In the end, the national measure was thus considered in the light of both Articles 34 and 56 TFEU.

Likewise, in the area of advertising and marketing communications, public measures actually or potentially disrupting intra-Union trade have been considered under the regime of goods and services simultaneously. Two Swedish cases on local legislative bans of broadcast advertising serve to illustrate this issue. In *De Agostini & TV-Shop*, the Court considered that an outright ban of television advertising for children fell within the remit of both the regimes of goods and services.[51] The prohibition not only affected intra-Union trade in the advertised goods (children magazines) but also restricted the provision of cross-border services (the offering of advertising space to traders established in other Member States). Similarly, the Court held in *Gourmet International Products* that the national ban of television and radio advertising of alcoholic drinks harmed both the trade in goods and provision of services.[52] Accordingly,

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48 This is different for professional services provided, for example, by architects, doctors, journalists, lawyers, and notaries), where the professional capacity of the service provider has been employed to award a larger margin of discretion as regards the performance of services and the conditions under which they should be performed. See T.F.E. TJONG TJIN TAI, 'Service a Product: Commodification of Contracts in European Private Law', TISCO Working Paper on Banking, Finance and Services No. 7/2010, available at http://ssrn.com/abstract=1701194, pp. 15-16.

49 Case C-390/99 *Canal Satélite Digital* [2002] *ECR* I-635.

50 *Ibid.*, paras 32-33.

51 Joined Cases C-34/95 to 36/95 *De Agostini and TV-Shop* [1997] *ECR* I-3843, paras 44 and 50.

52 Case C-405/98 *Gourmet International Products* [2001] *ECR* I-1795, paras 25 and 39.

the Court applied, in apparent conflict with the wording of Article 57 TFEU, the provisions on the free movement of goods and freedom to provide services concurrently.

As the case law of the Court shows, there are situations in which a regulatory measure or activity can affect both the freedom of goods and services at the same time. What will the Court do when a private measure is considered to fall within scope of the free movement of goods and freedom to provide services at the same time? Will the Court then apply both freedoms concurrently? If so, it implies that also the freedom of goods has horizontal direct effect. The Court may be able to escape these thorny questions by arguing that the freedom of goods is auxiliary to the freedom of services and may be applied together with it. The Court commonly applies this argument to prevent it from having to consider both regimes at the same time. Then, it only applies the regime that concerns the focal point of the national measure.[53] However, it follows from *Canal Satélite Digital*, *De Agostini & TV-Shop*, and *Gourmet International Products* that this is not always possible as measures may restrict the freedom of goods as much as they restrict the freedom of services. In these circumstances, the Court cannot circumvent the question of whether the regime on goods, like that of services, has horizontal direct effect and has to apply both regimes. By applying the Treaty provisions on the freedom of goods in such circumstances, it would logically follow that also these Treaty provisions can directly affect private law relationships. So far, the Court has failed to spell out the consequence of the increasing interdependence of the supply of goods and services for its case law on the horizontal direct effect of the freedom of goods and services.

5. A Hard Case: Advertising Self-Regulation

To illustrate the difficulties that the Court's position on the horizontal direct effect of the Treaty provisions on freedoms of goods and services raises, a hypothetical case may be considered in which private parties regulate economic activities in a collective manner and affect both the trade in goods and the provision of services. Here, the fundamental question emerges of whether the regulatory action at hand should be dealt with under the regime of the free movement of goods, the freedom to provide services, or indeed both. If the Court treats the action under the regime for goods, it will not be held contrary to primary EU law, whereas if it treats it under the regime for services it will. If, however, both freedoms apply, the Court's position to deny horizontal direct effect to the freedom of goods appears very difficult to sustain.

53 See e.g. in the case law on this 'focal point' approach in the area of free movement of goods and services: *Canal Satélite Digital* (n. 49); Case C-71/02 *Karner* [2004] *ECR* I-3025, para. 46; Case C-36/02 *Omega* [2004] *ECR* I-9609, para. 26; and Case C-20/03 *Burmanjer and Others* [2005] *ECR* I-4133, para. 35.

The hard case in point concerns the example of advertising self-regulation. Since the early 1900s, the advertising industry has developed private systems to regulate advertising practices and marketing communications.[54] In Europe, such systems commonly involve a code of conduct in which rules and principles are set to guide advertising practices and a procedure for the adoption, review, and enforcement of that code. Whereas a code is typically adopted by trade associations, its application and enforcement is usually entrusted to a complaints board that is independent from the industry and that has at its disposal a range of sanctions to settle complaints about advertising.[55] These sanctions are enforced mainly through the support of media that are affiliated to the system. Membership rules oblige the affiliated media to endorse decisions of the adjudication board. If media members follow a decision of the adjudication board that an advertisement should not appear any longer, they deny media access to it. Given that a substantial part of the advertising produced today requires a medium to target audiences, a media boycott effectively prevents an advertiser that violates the applicable code of conduct from accessing the market. The advertiser is likely to sustain damages as a result of the collective ousting of its campaign by the media and may therefore seek to recover them from the private system or the media involved via civil law litigation based on tort or breach of contract respectively. In such litigation, the question may arise of whether (a rule in) the code of conduct that is enforced through a complaints board with the support of media boycotts is caught by the Treaty provisions on the free movement of goods and/or freedom to provide services.

In *De Agostini* and *Gourmet International Products*, the Court considered that legislative bans like those on children's advertising and advertising of alcoholic beverages have been considered to fall within the scope of the free movement of goods provided that they do not apply to all traders operating within the national territory and do not affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[56] At the same time, the Court held in those cases that the bans could violate the freedom to provide services since they restricted the possibility of local firms to offer

54 In Europe alone, some 25 of these systems have developed at the national level. See for a comprehensive analysis: P. VERBRUGGEN, 'Transnational Private Regulation in the Advertising Industry', Case Study Report HiiL Research Project 'Constitutional Foundations of Transnational Private Regulation', Florence, 2011, available at http://www.hiil.org/privateregulation.

55 P. VERBRUGGEN, 'Enforcement of Transnational Private Regulation of Advertising Practices: Decentralization, Mechanisms and Procedural Fairness', in F. Cafaggi (ed.), *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World*, Edward Elgar, Cheltenham 2012, pp. 302–327.

56 *De Agostini & TV-Shop* (n. 51), para. 40 and *Gourmet International Products* (n. 52), para. 17, both building on Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] *ECR* I-6097, para. 16.

advertising space to advertisers established in other Member States.[57] Consequently, both the regimes of freedom of goods and services were applied simultaneously.

Would the Court, if faced with an advertising ban similar to the cases of *De Agostini* and *Gourmet International Products* but administered by a self-regulatory body set up by the advertising industry, also decide to treat this ban under both the regimes of freedom of goods and services? As for the freedom to provide services, the Court has held since *Walrave* that Article 56 TFEU prohibits private measures that regulate cross-border service provision in a collective manner. As self-regulatory systems in the advertising industry involve trade associations in the adoption of codes of conduct and tend to enforce these codes through collective media boycotts, it should be held that their regulatory activities are caught by the freedom of services. The intriguing question is what this conclusion would imply for the position of the Court on the horizontal direct effect of the free movement of goods. From both a systematic and pragmatic standpoint, it can be argued that if a ban on certain advertising by a code of conduct can simultaneously affect the trade in goods and the provision of services, and falls within the scope of the freedom to provide services, the Court should also consider that ban to fall within the scope of the free movement of goods. Accordingly, the Court would grant horizontal direct effect to the Treaty provisions on the freedom of goods.

6. Conclusion: Towards a More Functional Approach?

This contribution has linked the Court's bifurcated position on the horizontal direct effect of the freedom of goods and services with current trends in the supply of goods and services to provide an argument that private activities that collectively regulate the intra-Union trade in goods should be considered to fall within the scope of the Treaty provisions concerning the free movement of goods. Such understanding would clearly enhance the uniformity in the interpretation and application of the Treaty provisions on free movement law and with the freedom to provide services in particular. As such, it would contribute to legal certainty in the application of primary EU law to relationships governed by private law.

Provided that uniformity in the interpretation and application of free movement law is the vantage point, the question remains of what the benchmark for uniformity is when it comes to the horizontal direct effect of primary EU law on private law relationships. Should the benchmark be that all private activities that are capable of effectively restricting the right to free movement are caught by the Treaty provisions, as is the case in relation to public measures?[58]

57 *Gourmet International Products* (n. 52), para. 39.

58 *Cf.* AG Maduro in his opinion in *Viking* (n. 13), para. 43.

Or should it be more modest and primarily concerned with private action collectively regulating economic activities protected under free movement law? There is a line of case law of the Court emerging in which the question of whether there is an obstacle to free movement or discriminatory activities is increasingly decoupled from the question of whether the actor creating the obstacle or discriminating on the basis of nationality is bound by the relevant Treaty provisions.[59] A move to a more functional approach in the application of free movement law is therefore apparent, but the real question is one of scope: should all private action that is capable of effectively restricting the right to free movement be caught by the Treaty provisions on free movement, individual and collective action alike, or should the Court limit it to private regulatory action collectively restricting that right?

As noted, in the area of the free movement of workers, the Court accepted in the cases of *Angonese* and *Raccanelli* that the prohibition of discrimination on grounds of nationality extends to individual labour contracts negotiated between private individuals. In the domains of goods and services, such interpretation has not found application so far and would not be preferable from a systematic perspective on primary EU law. It should be reminded that not the Treaty provisions free movement law but those on competition law (Arts 101 and 102 TFEU) were designed to address and assess agreements negotiated between private entities.[60] Only in so far as private, collective regulatory activities are not caught by Articles 101 and 102 TFEU, but nonetheless have a negative effect on the intra-Union trade in goods and services, they should be considered under the provisions on free movement law. In that sense, free movement law operates as a safety net for private activities that fall outside the scope of the competition law regime but restrict intra-Union trade.

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59 PRECHAL & DE VRIES, 2009 (n. 28), p. 7.

60 See also SNELL, 2002 (n. 2), p. 144 *et seq.*

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