THE PERSONAL AND SUBSTANTIVE SCOPE OF THE EU FREE MOVEMENT RULES: THE APPLICATION OF HORIZONTAL DIRECT EFFECT

ÂMBITO DE APLICAÇÃO PESSOAL E SUBSTANTIVO DAS REGRAS DE LIVRE CIRCULAÇÃO NA UNIÃO EUROPEIA : APLICAÇÃO DO EFEITO DIRETO HORIZONTAL

Juliana Silva Resende[1]
Stine Birch[2]

RESUMO

Este artigo é um estudo sobre a aplicação do efeito horizontal direto na livre circulação de trabalhadores, livre circulação de estabelecimento, liberdade de prestar serviços e na livre circulação de bens no território da União Europeia. Pode-se perceber que, com o passar do tempo, a Corte de Justiça da União Europeia (ECJ) vagarosamente expandiu o âmbito de aplicação pessoal às quatro liberdades, reconhecendo a elas o efeito horizontal direto e dando margem a uma aplicação mais ampla às regras antes estabelecidas. A livre circulação de trabalhadores e serviços e a maneira como a ECJ tem interpretado a aplicação do efeito horizontal direto a essas liberdades são os pontos centrais da discussão na primeira parte deste artigo. As normas relativas à livre circulação de bens e às regras de direito da concorrência são analisados em um segundo momneto, no intuito de se ilustrar como esses dois interagem e influenciam cada um. O julgamento Case C-171/11 *Fra.bo SpA v. Deutsche Vereinigung de Gas* será examinado, assim como suas implicações no entendimento relative à livre circulação de bens. Finalmente, este artigo se encerra com uma discussão sobre o

1 Mestre em Direito Europeu pela University of Utrecht – Países Baixos.

2 Mestre em Direito Europeu pela University of Utrecht – Países Baixos.

estudo acadêmico já escrito sobre o efeito horizontal direto e se deveria exister apenas uma base legal para as regras de livre circulação, sendo identificado o ponto de vista das autoras.

PALAVRAS-CHAVE: DIREITO EUROPEU; LIVRE CIRCULAÇÃO; EFEITO DIRETO HORIZONTAL; JURISPRUDÊNCIA FRA.BO

ABSTRACT

This paper is a study of the application of horizontal direct effect on the free movement of workers, free movement of establishment, freedom to provide services and free movement of goods within the territory of the European Union. It is shown that over time the European Court of Justice ("ECJ") has slowly widened the personal scope of the different four freedoms to give it horizontal direct effect, leading to a much broader applicability of the provisions than from the outset. The free movement of workers and services and how the ECJ has over time interpreted horizontal direct effect to apply to these provisions are the main points of discussion in the first part of this paper. The free movement of goods rules and competition law are analyzed in order to illustrate how these interact and influence each other. The case law Case C-171/11 *Fra.bo SpA v. Deutsche Vereinigung de Gas* (unreported) will be examined and the implications for the way we are to understand the implications for free movement of goods will be looked at. Further, a discussion of the relevant academic writing on horizontal direct effect and on whether there should be a single set of free movement rules will be engaged in against which the authors will identify their own standpoint.

KEYWORDS: EUROPEAN LAW; FREE MOVEMENT; HORIZONTAL DIRECT EFFECT; CASE LAW FRA.BO.

SUMARY

1 CONTEXT

Since the creation of the European Union ("EU"), the European institutions together with

the Member States had a task to establish a 'common market'.[3] The internal market, as outlined in article 26 TFEU that 'shall comprise an area without internal frontiers in which free movement of *goods, persons, services* and *capital* is ensured in accordance with the provisions of the Treaties'[4] [emphasis added]. In that sense, the four freedoms can be seen as the wheels of the common market of which the creation 'lay at the heart of the European Community (now European Union)'.[5]

Although the deadline traced for the completion was end of 1992, the internal market is not yet finished. In fact, this is not a finite task. It is a continuous process that requires constant effort, vigilance and updating. The surrounding of the single market changes all the time, with constantly technological and political developments. Even though some obstacles have been removed, new one can appear and must be faced with new solutions. In the order to accomplish the good and effective functioning of the internal market, the European institutions work hard, especially the ECJ. The jurisprudence of the ECJ has the important task to bring solutions and cover gaps or lacks in the various situations confronted by the EU.

The starting point for discussing any of the four freedoms is to understand that they were originally introduced as a way of realising the internal market by allowing unrestricted trade between Member States in order to maximize productivity and economic output.[6] The very early case law of the ECJ has reflected this.[7] However, with time, a process has taken place by which the rules and underlying principles of the free movement provisions have almost 'outgrown'[8] its original starting point and is metamorphosing into a state where it is no longer just a question of economic

3 The establishment of the common market was disposed in the Article 2 EC. Actually, this provision is on Article 3 TFEU and it replaced "common market" with 'internal market'.
4 Article 26(2), TFEU.
5 Barnard, C. (2010). *The Substantive Law of the EU: The Four Freedoms* (3rd edition). Oxford: OUP, p. 10.
6 Barnard, C. above n 2, p.4.
7 Case 8/74 *Dassonville* [1974] ECR 837; Case 120/78 *Rewe Zentrale v. Bundesmonopolverwaltung fur Branntwein ('Cassis de Dijon')* [1979] ECR 649.
8 Schepel, H. (2012). 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law'. *European Law Journal*, Vol. 18(2) p.182.

concerns but also social policy questions.[9] Whether any greater similarity can be found between the way the free movement provisions work will be a subject of this paper.

There are two ways to analyse how the free movement rules apply, one is under the light of the personal scope and the other is under the light of the substantive scope. In the understanding of the authors of this paper, the personal scope is related to *whom* the rules are addressed. That means, who is affected by the Treaty provision. The substantive scope, contrarily, relates to *what* restrictions are caught by the free movement provisions and, also, on what grounds these can be justified.

2 FREE MOVEMENT OF PERSONS AND SERVICES

2.1 Establishing Horizontal Direct Effect

Horizontal direct effect of free movement of persons and services was already introduced, albeit to a limited extent, with the decision in *Walrave and Kock*[10] in 1974. The case concerned the International Cycling Union and their requirement that for competing teams both team members had to be of the same nationality. From this judgment comes the much quoted principle that:[11]

> *'[17] Prohibition of [non-discrimination] does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.'*

This principle, it was held, applied both to workers under art. 45 TFEU (ex-art. 39 EC) and service providers in art. 56 TFEU (ex-art. 49 EC). In *Thieffry*[12] and *Wouters*[13] this was extended

9 Prechal, S. and de Vries, S. (2009). 'Seamless web of judicial protection in the internal market?'. *European Law Review*, Vol. 34, p. 4 and 16.
10 Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1045.
11 *Ibid* para.17.
12 Case 71/76 *Thieffry* [1977] ECR 765.
13 Case C-309/99, *Wouters* [2002] ECR I-1577.

further to the right of establishment under art. 49 TFEU (ex-art. 43 EC).[14] This was not an uncontroversial move, the idea of binding private bodies, like the International Cycling Union, was a big step to take but even the most hardcore critics of horizontal direct effect agree that '[w]here Member States tolerate self-regulation, there is a case to be made for applying the Treaty provisions on the four freedoms'.[15]

2.2 Limitations of the Horizontal Direct Effect

Depending on how you read the principle, then, the case can be found to mean that, rather than creating horizontal direct effect binding private bodies, the case actually widened the personal scope of vertical direct effect by opening up for a wider definition of what constitutes a public or 'state-like' body.[16] This is certainly how it was interpreted in *Bosman*,[17] a case concerning the rules on transfer of football players between clubs in which the ECJ 'disregards the formal legal status of [UEFA] for purposes of the application of the Article 34 TFEU in favour of a functional approach that attributes measures taken by these bodies to the State upon a finding of sufficient State involvement'.[18] This can be compared to and be said to go hand in hand with the *Buy Irish*[19] case law in which the substantive scope is broadened by taking a wide, practical approach to what constitutes a 'rule' that can be caught under the free movement provisions.

It is argued here that the development brought on by *Bosman* is a positive one because taking a black and white approach to the meaning of 'public' would lead to a situation where Member States could undermine the internal market provisions by delegating responsibility to bodies 'private' enough to circumvent the rules. Further, it would create a discrepancy in how different Member States are bound by the free movement provisions, depending on how 'well' they

14 Tans, S. (2008). 'Case Report on *Laval*, 18 December 2007 (Case C-341/05) and *Viking*, 11 December 2007(Case C-438/05)'. *European Journal of Migration and Law*, Vol. 10, p 267.
15 Oliver, P. and Enchelmaier, S. (2007). 'Free Movement of Goods: Recent Developments in the Case Law'. *Common Market Law Review*, Vol. 44, p. 663
16 Tans, S. above n 11, p. 267-8; Schepel, H. above n 6, p. 186.
17 Case C-415/93 *Bosman* [1995] ECR I-4921.
18 Schepel, H. above n 6, p. 182.
19 Case 249/81 *Commission v Ireland ('Buy Irish Campaign')* [1982] ECR 4005.

have delegated regulatory powers. There are instances, however, where one could start to wonder if it would not be more sensible for the ECJ to take the route of indirect effect and hold the Member State liable instead of construing semi-private (and sometimes completely private) associations as falling within the free movement rules. In example is *Casteels v British Airways*[20] in which a private company's social security plan was challenged. It would have been easy to hold the United Kingdom accountable for lack of regulation and control here but the ECJ chose not to. Schepel speculates that it has to do with a 'realisation that large chunks of modern economic life are regulated by private governance regimes of various descriptions' and this will only increase with time, requiring the ECJ to adjust its rules so as to respond to this.[21]

The *Bosman* interpretation of *Walrave* as widening vertical direct effect is not the only way in which *Walrave* can be understood to have widened the scope. In the case of *Angonese,*[22] the facts concerned an italian national applying for a job with a private Italian bank for which a requirement was a diploma in bilingualism in German and Italian from a specific Italian institute. Having lived in Austria for several years, Mr Angonese was fluent in both German and Italian but, since he was not living in Italy it was not possible for him to obtain the diploma from the particular institute. The ECJ, in referring to both the judgment in *Walrave* and *Defrenne,*[23] established that the principle of non-discrimination 'must be regarded as applying to private persons' as well as public institutions[24]. Some confusion arises around the fact that the ECJ referred to *Walrave* in its decision even though *Angonese* could hardly be said to concern rules 'aimed at regulating in a collective manner'[25] and a private bank can hardly be accused of being 'state-like'.[26] Prechal and de Vries[27] explain this by suggesting that the way in which one should read the judgment is that the bank *is* holding a

20 Case C-379/09 Casteels v British Airways Plc [2011] WLR (D) 85.
21 Above n 6, p. 185.
22 Case C-281/98 *Angonese v Cassa de Risparmio de Bolzano* [2000] ECR I-4139.
23 Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455.
24 *Angonese* above n 17, para. 36.
25 *Walrave* above n 7, para. 17.
26 Schepel, H. above n 6, p. 184.
27 Above n 6, p. 15.

dominant position in regard of employing and therefore should also be held accountable for discrimination on grounds of nationality. This, it is pointed out, is confirmed in the cases of *Ferlini*[28] and *Andrea Raccannelli.*[29]

It is undeniable that the decision in *Angonese* broadened the personal scope of free movement of persons and services by effectively establishing horizontal direct effect. for It is noteworthy, however, that the rationale in the decision revolved around the fact that the Italian bank had directly discriminated on grounds of nationality. This, it can be argued, is potentially where the limit to the scope of *Angonese* can be found. Returning to the earlier argument that the four freedoms are no longer only informed by economic interests but also social market concerns, it can be argued that, with fundamental rights taking a more prominent role in the EU in light of the Charter of Fundamental Rights becoming primary law with the entry into force of the Lisbon Treaty, the reference to non-discrimination makes sense. By referencing non-discrimination and applying art. 18 TFEU in *Angonese,*[30] the ECJ manages to raise the free movement provision to a level of constitutional importance. As clever and sensical as that is, there is, however, a problem with this approach—art. 18 TFEU makes no distinction between direct and indirect discrimination. This means that horizontal direct effect cannot, if we are to follow *Angonese*, be limited to the most severe cases of direct discrimination that one would assume was the idea (and a clever one at that) if the use of art. 18 TFEU is to make sense.[31]

2.3 A Return to Chaos?

So far we have identified two ways in which free movement of persons and services has been given horizontal direct effect, the first in accordance with *Bosman* and a widening of the meaning of 'state-like' institutions and the second through *Angonese* and the use of non-discrimination. It can essentially be said that *Bosman* is about *who* causes the restriction and *Angonese* concerns whether

28 Case C-411/98 *Ferlini v Centre hospitalier de Luxembourg* [2000] E.C.R. I-08081.
29 C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* [2008] ECR I-5939.
30 Above, n 17, para. 35.
31 Schepel, H. above n 6, p. 188.

the restriction is *severe enough* to invoke horizontal direct effect. Though neither of these tests are perfect, they have created two clear, understandable limits to the scope of the provisions. But then came the decisions in *Laval*[32] and *Viking*.[33]

Both cases concerned trade union action against companies from other Member States than that of the trade unions and whether the restrictions to the companies in question's free movement of workers and services. The rulings were made within one week of each other and refer to many of the same issues, making it reasonable to study them in conjunction with each other. Rather than discussing the cases in detail, it is more interesting to see how the two limitations discussed above fit into this case. Firstly, in regard of the *Angonese* limitation, the ECJ, having acknowledged that trade unions are private bodies, separate from the state, would have to consider whether the actions of the unions amounted to direct discrimination. However, in both *Laval* and *Viking*, the ECJ emphasised that the collective action of the unions made it 'less attractive' for the companies in question to exercise their free movement of persons.[34] Hence, these cases did not fall under the *Angonese* version of horizontal direct effect.

In regard of the second mode of limitation, the *Bosman* version, the ECJ does both in *Laval* and *Viking* rely on trade unions holding a position of power, considering their legal autonomy as granted by the Member State in question.[35] However, in *Viking*, the ECJ regardless of this, points out that there is no case law 'that could validly support the view that [free movement law] applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers.'[36] Considering that the ECJ decided to include this sentence irrespective of the fact that they could and did, in fact, establish trade unions as holding quasi-legislative powers, indicates that this should be taken as a serious indication of which direction the ECJ wishes to take horizontal direct effect in.

32 Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.
33 Case C-438/05 *International Transport Workers' Federation and others v Viking Line* [2007] ECR I-10779.
34 *Viking* above n 30, para. 72; *Laval* above n 29, para. 99.
35 Tans, above n 11, p. 268.
36 *Viking*, above 30, para. 64.

3 FREE MOVEMENT OF GOODS

3.1 The relationship between Free Movement and Competition Law.

An important question related to the internal market is the distinction between the application of free movement and competition rules (set out in 101 and 102 TFEU), especially concerning their personal scope, that means, to whom the various provisions are addressed. In principle this distinction is very simple: the free movement provisions are addressed to Member States and the competition provisions to private individuals and private undertakings. However, this separation is becoming more and more difficult to see due the semi-private or private bodies that are increasingly exercising public powers which belongs, primary, to governments, and due the public authorities that increasingly use private law instruments instead of traditional public regulations. While, still, the vast majority of cases is dealt with under either competition or free movement provisions without an convergence, there are more and more instances where this distinction is not as easy to make[37]. The jurisprudence of the ECJ provides the key to the answer in these difficult cases. The ECJ has the important task to ascertain case by case and determine which Treaty provision must be applied.

Another way in which free movement and competition law has been distinguished is with reference to economic and non-economic activities. Particularly the sports cases are good for illustrating the change that has taken place in this area, not just in the area of free movement of goods but all four freedoms. In the early case of *Walrave,*[38] for example, the ECJ stated that sport rules were not under the scope of EU law due the fact that sports were a non-economic activity. Many years later, in *Deliège*[39] the ECJ again recognised the non-application of EU law to rules concerned the selection of athletes to national teams since they are inherent to sport's organisations

35 Mortelmans, (2001). 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?'. *Common Market Law Review*, Vol. 38, p. 614.
38 Above, n 8.
39 Case C-51/96 and C-191/97, *Deliège* [2000] ECR I – 2549.

whom has more expertise to the job and this cannot be considered as a restriction to free movement to provide services. However, there was a change of position in the case *Meca-Medina*[40] where the ECJ brought a new interpretation to sports rules and also to application of free movement and competition provisions. The possibility of sport constituting an economic activity was introduced in this case. The ECJ admitted 'where a sporting activity takes the form of gainful employment or the provision of services for remuneration, which is true of the activities of semi-professional or professional sportsmen, it falls, more specifically, within the scope of Article [45 TFEU] or Article [56 TFEU].'[41] The ECJ completed this consideration by saying that the provisions on freedom of movement for workers and services not only apply to public authorities but also apply to rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner.[42]

What is important to illustrate with this discussion of case law is that the ECJ, in seeing that there was in essence a restriction of trade within the internal market but was not able to prevent this restriction due to its stringent division of economic and non-economic purposes found a way to close the loophole and encapsulate these restrictions within the scope of the Treaty. It should not be foregone, though, that the free movement and competition law operate within 'their own modes of application'43 meaning different rules and restrictions will invoke the different set of laws.

3.2 Horizontal Direct Effect of Free Movement of Goods?

It is generally understood that horizontal direct effect applies to free movement of workers and services but not to goods.[44] Free movement of goods is instead, where actions of private individuals is involved, governed by competition law as already mentioned. This was not always so,

40 Case C-519/04 *Meca-Medina* [2006] ECR I-6991
41 *ibid*, para. 23
42 *ibid*, para. 24
43 Prechal, S. and de Vries, S. above n 7, p.11.
44 Schepel, H. above n 6, p. 179.

a case in 1981, *Dansk Supermarked*, took the natural consequence of the decision in *Walrave* (discussed in section 2 above) in finding 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'.[45] However, since then this principle has been effectively overruled in favour of applying competition rules to private bodies rather than free movement law, as illustrated above. In a case decided three years later, *Van de Haar*, the ECJ indirectly overruled *Dansk Supermarked* by choosing to not apply horizontal direct effect but rather tackle the case from the point of competition law and *not* free movement law.[46] Later, in *Vereniging van Vlaamse Reisbureaus*, the ECJ held that free movement of goods only could be invoked where public authorities are involved and not private undertakings, again hinting that the division between free movement law and competition law should be upheld.[47]

More recently in *Commission v Germany*[48] and *Sapod Audic*, the ECJ held that 'a [private] contractual provision cannot be regarded as a barrier to trade for the purposes of [art. 34 TFEU] since it was not imposed by a Member State but agreed between individuals'.[49]

With this line of cases, any confusion there may have been as to whether free movement of goods carries horizontal direct effect has been disposed of. This was, however, only up until three months ago when the case of *Fra.bo* was decided by the ECJ.[50] This paper will now proceed to discuss this case and its consequences.

3.3 The Implications of Fra.bo.

Just as it seemed to be established case law that free movement of goods is not subject to

45 Case 58/80 *Dansk Supermarked v Imerco* [1981] ECR 181, para. 17.
46 Cases 177 & 178/82 *Van der Haar et al.* [1984] ECR.
47 Case 311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801
48 Case C-325/00 *Commission v Italy* [2002] ECR I-9977.
49 Case C-159/00 *Sapod Audic* [2002] ECR I-5031, para. 74.
50 Case C-171/11, *Fra.bo SpA v. Deutsche Vereinigung de Gas – und Wasserfaches eV (DVGW) – Technisch – Wissenschaftlicher Verein*, Unreported, July 12, 2012 (ECJ).

horizontal direct effect, the ECJ made its ruling in *Fra.bo*. As this case is central to the argument this paper is making, a full review of it will be undertaken.

The facts of the case is that the DVGW is a German non-profit body governed by private law created to promote the gas and water sector and it is recognised as a 'public benefit', a status conferred on bodies whose activity is dedicated to the altruistic advancement of the general public in material, spiritual and moral respects. The DVGW draw up around 350 standards for the water sector and it serves as a basis for the certification of products which will come into contact with drinking water. Fra.bo is an undertaking established in Italy which manufactures and sells copper fittings.[51] In 1999, Fra.bo applied to the DVGW certification of its products in order to access German market. In November 2000, Fra.bo received a certificate for a period of five years. In June 2005, after a new test in the products (ozone test), the DVGW informed fra.bo that its products did not comply with the conditions imposed but they could present a positive test within three months. Fra.bo produced a test report issued by an Italian laboratory, duly approved by Italian authorities, although the DVGW did not recognise it on grounds that the content was insufficient and it did not indicate test specifications and material-testing condition. Also in June 2005, Fra.bo has its certificate cancelled by DVGW on grounds it could be no longer extended and Fra.bo did not submit a test report in a new requirement. Fra.bo brought an action against DVGW in the Regional Court of Cologne arguing that its action was contrary the EU law. It submitted that the function exercised by DVGW is bound by the provisions of free movement of goods (article 34 TFEU et seq.) and the cancellation or the refusal to extend the certificate restrict the German market access. The DVGW based its defence on the fact that as private-law association, it suggested that only the Federal Republic of Germany would be required to answer for any infringement of Article 34 TFEU. As DVGW does not seek economical activities for the purpose of agreement, it does not fall neither in the provision of Article 101 TFEU.

A relevant aspect of this judgement was the opinion gave by the Advocate General Verica

51 Copper fittings are connections between two pieces of piping for water or gas, with sealing rings made of malleable material at the ends to make them waterlight.

Trstenjak.[52] In her extensive conclusion, the Advocate General defends the horizontal direct effect application to the free movement of goods provisions. In the contrary of the ECJ decision, which was quite brief and not so explicit about this horizontal direct effect, the opinion of Trstenjak brought a bound of fundaments to this broader interpretation of the EU rules.

In a first moment, the Advocate General analyses the situation of DVGW and concludes that its action falls within the scope of the free movement of goods.[53] As a consequence, Trstenjak suggests that the ECJ should enjoy this opportunity to take an explicit opinion concerned the application of free movement of goods to collectives rules of a non-public-law and completes saying that the horizontal direct effect, in the present case, could be justified *per analogiam* be the argument developed by the ECJ regarding the applicability to the Articles 45 TFEU, 49 TFEU and 56 TFEU., hence making a link between free movement of goods and free movement of workers, services, and establishment.[54] She finishes by stating that in addition to public interests a private body like DVGW can also rely on special reasons of private interest and on fundamental rights.[55]

In a certain way, the ECJ followed the Trstenjak opinion, since the decision stated that the activity exercised by the DVGW fall within the scope of the free movement of goods. Nevertheless, the arguments brought by the ECJ were not the same as suggested by the Advocate General. Although the ECJ accepted the possibility of a private-law body to rely under the provisions of Article 34 TFEU, the reasons it justified it were more superficial. The ECJ briefly described the activity and the consequences of the certificate issued by this entity and concluded 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 copper fittings at issue in the main proceedings.'[56]

52 C-171/11, *Fra.bo SpA v. Deutsche Vereinigung de Gas – und Wasserfaches eV (DVGW) – Technisch – Wissenschaftlicher Verein* , Opinion of Advocate General Trstenjak, delivered on 28 March 2012.
53 Opinion of the Advocate General, para. 41-42
54 *Ibid*, para. 46-48.
55 *ibid*, para. 56.
56 *Fra.bo*, above n 48, para. 31.

In its reasoning the ECJ merely repealed the grounds of justifications stated in previous cases such as *Dassonville*[57] and recognised that the rules established by case law as a measure having an effect equivalent to quantitative restrictions capable to affect the free movement of goods, which is prohibited by Article 34 TFEU. As we can see, the ECJ had a good opportunity to state under situations involving the application of the horizontal direct effect in cases of free movement of goods however it preferred to not explore such delicate issue and chose to justify its decision on the oldest basis of its jurisprudence on the matter.

Such brief conclusion of ECJ can demonstrate how sensitive this decision for the application of EU rules is. Although the ECJ did not explicitly mention horizontal direct effect nor applied the rules by analogy to previous judgements, it cannot be completely excluded that the ECJ to some extent did indirectly support the notion that free movement of goods could carry horizontal direct effect. However, the brief judgment has left everyone with the question open. On one hand, it can be argued that what the ECJ did was merely to widen the vertical direct effect of free movement of goods by following the above-mentioned *Bosman* line of broadening. If this is the case, this in itself can be considered a bit of a step for the free movement provisions[58]. And perhaps we should remember that the ECJ does not normally hold back when it comes to giving controversial judgments, cf. *Laval* and *Viking* above. As of yet, however, a further conclusion will have to wait.

3.4 A Common Set of Free Movement Rules?

Though *Fra.bo* is only just decided and there is next to no literature written on the implications of the decision, it falls into a long line of academic debate regarding whether or not there should be a single test for all freedoms and, if yes, whether that single principle should be horizontal direct effect or not. Already in the light of *Commission v Italy*[59] and the other cases

57 Case 8/74 *Dassonville* [1974] ECR 837.
56 Mortelmans, above n 35, p. 613.
59 Above n 45.

overruling *Dansk Supermarked*[60], a fierce discussion of whether moving away from that decision was a good idea or not emerged. Jarvis argues that it is 'disappointing' the the ECJ with these decisions moved away from a common approach between the different free movements, inhibiting the possibility to 'cross-contaminate' between the freedoms and questions the rationale behind moving away from the use of vertical direct effect in free movement of goods cases. Further, he questions whether it would truly undermine competition law to also allow for the use of horizontal direct effect in certain instances.[61]

Oliver and Enchelmaier, however, praised the overruling of *Dansk Supermarked* not so much for the reason that they found the jettisoning of a unitary approach as recommended but rather because they had very little positive to say about horizontal direct effect and the *Angonese* principle[62] in general.[63] Oliver and Roth, similarly positively set against the abolishing of *Dansk Supermarked*, argue quite contrarily that moving away from a common set of rules for all free movements is a good thing as 'private persons cannot be compared to states (…): their autonomy is the very basis of the internal market.'[64] It is argued that 'free movement of *workers* should be regarded as having a higher moral value than goods'[65] (authors' own emphasis). This, too, is the suggestion offered by Schepel in answering the question of why competition rules should necessarily be better when it comes to free movement of goods than free movement of services, namely that 'people are different'.[66] This not withstanding, Prechal and de Vries do suggest, coming back to the critical remarks made by Jarvis, that because 'the context in which competition law provisions and free movement provisions operate has changed or is still changing' particularly in light of the 'blurred lines' between private and public bodies, the ECJ must (and has been) ready to

60 Above n 42.
61 Jarvis, M. (2003). 'Case C-325/00, *Commission v. Germany*, judgment of the Court of Justice of 5 November 2002. full Court'. *Common Market Law Review*, Vol. 40, p. 725.
62 *Angonese*, above n 19.
63 Oliver and Enchelmaier, above n 12, p. 663.
64 Oliver, P. and Roth, W. (2004). 'The Internal Market and the Four Freedoms'. *Common Market Law Review*, Vol. 41, p. 427.
65 *Ibid*, p. 424.
66 Schepel, above n 6, p. 180.

'fill the remaining gaps' providing for a more whole and functional judicial protection that makes sense in the modern world.[67] The authors of this paper would argue that, though there is sense to the argument that people are different and should be afforded higher protection than goods, the ECJ should not miss an opportunity to close its loopholes between free movement and competition law. In fact, it is suggested that keeping up any appearance of stringency in this area merely creates a situation in which the ECJ does not have the freedom and ability to examine cases individually – something the ECJ normally does best.

4 JUSTIFICATIONS GROUNDS

Regardless of whether the move into the emergence of horizontal direct effect in all areas of free movement law is condoned or condemned, it is nonetheless what is currently taking place, as has been illustrated in the course of this paper. The question we must then turn to is what the consequence of widening the personal scope is for the substantive scope, namely what rules constitute restrictions and whether (and how) they can be justified. The big concern at hand is that if you make private individuals directly liable under the free movement provisions, they will be affected more severely by these provisions that Member States as private individuals logically cannot rely in public policy justification grounds.[68]

However, the ECJ, being aware of this problem, stated already in their decision in *Bosman*[69] that 'given the fact that the prohibition in respect of the free movement of workers applies to private organizations, there is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health.'[70] This has led to some cases in which public interest

67 Above n 7, p. 23.
68 Oliver and Roth, above n 61, p. 427.
69 Above n 15.
70 Mortelmans, K. above n 35, p. 642.

has been given a new, 'private' meanings.[71] An example of this is the case of *Omega* in which the justification ground was read to include the protection of the fundamental right to human dignity as protected by the police.[72]

In *Viking*[73] and *Laval*[74], two cases discussed above, the ECJ had to determine whether a restriction of free movement could be justified on grounds of fundamental rights, namely the right to free expression, the right to strike, and the protection of workers. In both of the cases, the ECJ stated the following:[75]

> *[75] It is apparent from the case-law of the Court that a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see, inter alia, Case C-55/94 Gebhard [1995] ECR 1-4165, paragraph 37, and Bosman, paragraph 104).*

In both of the cases, the ECJ confirms that, like in *Omega*, the protection of fundamental rights can fall under public justification grounds. However, as it is clear from the quote above, the defendants must be able to draw a link between the restriction of free movement and the protection of a relevant fundamental right.[76] However, this is as far as the ECJ comes to weighing free movement and fundamental rights against each other. In fact, the ECJ came to the conclusion in both cases that fundamental freedoms could *not* be used as a valid justification grounds in that case. An extended discussion of this outcome is outside the scope of this paper but it can only be considered odd and perhaps a step backwards of one is to take the EU's pledge to put the protection of fundamental freedoms at its steering.

Concerning the free movement of goods, the ECJ did not talk explicitly about the possibility

71 Tans, above n 12, p. 269.
72 Case C-36/02 *Omega* [2004] ECR I-9609.
73 Above, n 31.
74 Above, n 30.
75 *Viking* above, n 31, para. 75. See also *Laval* above n 30, para. 101 for a similar statement.
76 Tans, above n 12, p. 271.

that a private body could rely on the justifications grounds of public interest, although it recognized the horizontal direct effect on goods provisions on *Fra.bo* case. However, as mentioned above, the Advocate General Trstenjak in *Fra.bo* discussed this issue very clearly in her opinion. She reminds that the ECJ has admitted the public interest as justification grounds of "certain kinds of collective rules of non-public law nature and has not precluded in other judgments a justification for such restrictions on special grounds in the private interest".[77] However, the ECJ did, as mentioned, not make use of the same chance to give a judgment in regard of this and has left yet another hole in the minds of everyone trying to make sense of this decision. It is hence not possible to predict its approach or whether it will apply the same rules already determined for the others freedoms.

5 CONCLUSION

The rules governing the free movements are constantly changing and cannot be treated or seen as static. The internal market is in need of continuous construction and its interpretation follows this development. In this paper, we have illustrated how this change in light of the application of horizontal direct effect has taken place in the context of the different freedoms.

As we have mentioned, concerning the free movement of capital, the ECJ has not yet established in its case law horizontal direct effect for this freedom. However, it is imaginable that after the recognition of horizontal direct effect of goods, this would be mirrored in the area of capital. Further, it is submitted that, considering the case law, the establishment of horizontal direct effect is the natural next step and consequence of the decisions already made in this area of the law.[78] However, as this freedom operates in its own, separate sphere, it has been the choice of the authors to not include free movement of capital within this study.

77 Opinion of Advocate General on *Fra.bo*, para. 38

78 Schepel, above n 6, p. 192. Schepel explains that this is because 'first, the manner in which the [ECJ] has framed Article 63 TFEU as a charter of shareholder rights rather than as an obligation on Member States, and, second, the inherently unstable distinction it draws between the measures it deems to fall under the freedoms of establishment and those that it considers restrictions of the free movement of capital.'

As has been extensively discussed in this paper, the free movement of workers and services has gone through a long line of cases and, as a product of the ECJ's jurisprudence, it is now safe to say that horizontal direct effect has been established in this area of the law. However, it has over time been attempted limited through cases like *Bosman* and *Angonese*, creating a web of limitations in which free movement of persons operates. This considered, we now have to rethink this web as of the decisions in *Viking* and *Laval* which have opened up for a much wider scope of horizontal direct effect.

On the other hand, the free movement of goods is a field still not consolidated to the same extent. Although nevertheless the ECJ has recently admitted the horizontal direct effect under free movement of goods, it only does so to a limited extent. Mainly, the free movement provisions for goods have and are operating side by side with competition law. However, both of them apply in their separate spheres. The circumstances of each situation must be taken into account in order to determine whether it is a case under the free movement provisions or competition law provisions.

In light of these changes, many questions arise from this discussion, especially issues related to the justification grounds. The jurisprudence of the ECJ is also important in this process as has been demonstrated here. It is suggested that if the ECJ is serious about widening the application of horizontal direct effect, it must at the same time rethink its justification grounds to reflect this.

6 BIBLIOGRAPHY

BARNARD, C. (2011). *The Substantive Law of the EU: The Four Freedoms* (3rd edition). Oxford: Oxford University Press.

CHALMERS, D., Davies, G. & Monti, G. (2010). *European Union Law* (2nd edition). Cambridge: Cambridge University Press.

Case C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV* [2008] ECR I-5939.

Case C-281/98 *Angonese v Cassa de Risparmio de Bolzano* [2000] ECR I-4139.

Case C-415/93 *Bosman* [1995] ECR I-4921.

Case C-379/09 Casteels v British Airways Plc [2011] WLR (D) 85.

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

Case 249/81 *Commission v Ireland ('Buy Irish Campaign')* [1982] ECR 4005.

Case 58/80 *Dansk Supermarked A/S v A/S Imerco* [1981] ECR 181.

Case 8/74 *Dassonville* [1974] ECR 837.

Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455.

Case C-411/98 *Ferlini v Centre hospitalier de Luxembourg* [2000] E.C.R. I-08081.

Case C-171/11, *Fra.bo SpA v. Deutsche Vereinigung de Gas – und Wasserfaches eV (DVGW) – Technisch – Wissenschaftlicher Verein* Unreported July 12, 2012 (ECJ).

Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

Case C-438/05 *International Transport Workers' Federation and others v Viking Line* [2007] ECR I-10779.

Case C-519/04 *Meca-Medina* [2006] ECR I-6991.

Case C-36/02 *Omega* [2004] ECR I-9609.

Case 120/78 *Rewe Zentrale v. Bundesmonopolverwaltung fur Branntwein (‘Cassis de Dijon’)* [1979] ECR 649.

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

Case 71/76 *Thieffry* [1977] ECR 765.

Cases 177 & 178/82 *Van der Haar* et al. [1984] ECR.

Case 311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801

Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1045.

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

JARVIS, M. (2003). 'Case C-325/00, *Commission v. Germany*, judgment of the Court of Justice of 5

November 2002. full Court'. *Common Market Law Review*, Vol. 40, 715-728.

MORTELMANS, K. (2001). 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?'. *Common Market Law Review*, Vol. 38, 613-649.

OLIVER, P. and Enchelmaier, S. (2007). 'Free Movement of Goods: Recent Developments in the Case Law'. *Common Market Law Review*, Vol. 44, 649-704.

OLIVER, P. and Roth, W. (2004). 'The Internal Market and the Four Freedoms'. *Common Market Law Review*, Vol. 41, 407-441.

PRECHAL, S. AND DE VRIES, S. (2009). 'Seamless web of judicial protection in the internal market?'. *European Law Review*, Vol. 34, 5-24.

SCHEPEL, H. (2012). 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law'. *European Law Journal*, Vol. 18(2), 177-200.

SHIBHNE, N. N. (2012). 'The Treaty is coming to get you'. *European Law Review*, Vol. 37(4), 367-368.

TANS, S. (2008). 'Case Report on *Laval*, 18 December 2007 (Case C-341/05) and *Viking*, 11 December 2007(Case C-438/05)'. *European Journal of Migration and Law*, Vol. 10, 249-275.

Consolidated version of the Treaty on the Functioning of the European Union C 115/47.

Charter of Fundamental Rights of the European Union (2000/C 364/01).