Review Article
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DIRECT HORIZONTAL EFFECT OF THE FREE MOVEMENT OF GOODS AND RESHAPING OF THE EUROPEAN ECONOMIC CONSTITUTION. BACK TO THE FUTURE?

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ABSTRACT

The Court of Justice of EU has established very early in its history direct vertical effect of Treaty provisions on free movement of goods. However, direct horizontal effect of the same rules has never been recognized. This paper furthers a following thesis: hypothetical future recognition of direct horizontal effect of the Article 34 and 35 TFEU (prohibition of quantitative restrictions on imports and exports and all measures having equivalent effect) would reshape European Economic Constitution and provide basis for more ordoliberal reading of the Treaty. Viewing market freedoms as fundamental constitutional rights on which individuals can rely in private relations is logical consequence of such interpretation. This paper looks to the case law development, like the recent judgement in the Fra.bo case, to detect possible shifts from established jurisprudence in non recognizing horizontal direct effect of the free movement of goods rules.

KEYWORDS: direct horizontal effect, free movement of goods, European Economic Constitution, EU Internal Market Law, ordoliberalism, social market economy, judicial activism.

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1. PROBLEM

The direct vertical effect of Treaty provisions on free movement of goods has been established by activist interpretation by the Court of Justice of the European Union (CJEU) very early in the history of EU Law. Famous judgement in the landmark 1963 *Van Gend en Loos*[1] case introduced the principle of direct effect. This judge-made principle forms essential, almost sacrosanct, element of genesis narrative in every conventional introductory EU Law course. Although Treaty provisions on free movement of goods encompass prohibition of customs duties on imports/exports (including charges having equivalent effect)[2] between Member States and prohibition of tax discrimination[3] main regulatory impetus in market-building process was, so far at least[4], to be found in the field of quotas. More formally put, it was based in prohibition of quantitative restrictions on imports and exports and all measures having equivalent effect contained in Articles 34[5] and 35[6] of the TFEU. In the words of W.P.J.Wils aforementioned prohibition became the tool for *policing the borderline between legitimate and illegitimate national regulation*[7]. While vertical direct effect of Articles 34 and 35 became non-contentiously established doctrine and one of the corner-stones of the EU Law, direct horizontal effect of this same rules has never been recognized. Why?

Most simplistic and obvious answer is that Court wanted to limit the regulatory scope of these provisions. Transversal of rights to individuals, natural and legal persons, was intended via principle of direct effect only to protect them from Member States interventions in the internal market (exclusively in situations with actual or potential cross border effect)[8]. In the words of Norbert

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[1] Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen*, EU:C:1963:1

[2] Article 30 TFEU

[3] Article 110 TFEU

[4] Recently the Court of Justice of the EU in the field of free movement of goods experienced influx off tax discrimination cases.

[5] Article 34 of the TFEU (*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States*).

[6] Article 35 of the TFEU (*Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States*).

[7] Wils, W.P.J., *The Search for the Rule in Article 30 EEC: Much Ado About Nothing?*,European Law Review 18,1993, p 478.

[8] Problem of absence of direct horizontal effect in Treaty provisions on free movement of goods is of such magnitude that the Court of Justice extend obligation of harmonious interpretation (or indirect effect), first developed in the case law on the effect of Directives (*Von Colson and Kamman – Marleasing - Kolpinghuis Nijmegen-Pupino* line of jurisprudence), to

Reich EU Law is *not a panacea against every state regulation which restricts competition*[9]. Thus free movement of goods is not designed to be a source of independent constitutional fundamental right, something like an economic due process clause, but only a freedom from the Member State intervention. Following that interpretation distinction between vertical and horizontal direct effect of Articles 34 and 35 becomes demarcation between constitutional fundamental right on one side and a freedom from the State intervention (in cross-border situations) on the other side. It is not very hard to conclude from such reading that hypothetical change in the recognition of horizontal direct effect of free movement of goods would signal shift in the EU Law and nature of integration process in general.

2. MODELS OF EUROPEAN ECONOMIC CONSTITUTION: NEW HORIZONS

Former Advocate General Maduro in his reward wining research[10] on the application of Article 34 of the Treaty (at that time Article 30), develops different models of European Economic Constitution: judicial, centralised, competitive and decentralised model. Constitutional models are results of different intrinsic tensions in the process of market integration. Basic idea behind this approach establishes a correlation between application of rules on free movement of goods and building of the European Economic Constitution. Maduro borrows from theory of comparative institutional analysis developed by US scholar Neil Komesar[11]. Answer to the question of content of the European Economic Constitution can be found somewhere in dichotomy between broader economic liberalism and pure anti-protectionism. Maduro develops this dichotomy on the framework of discrimination tests, typological tests and balancing (cost/benefit) tests for the application of Article 34. The Economic

Article 34 TFEU. In *Spanish strawberries* and *Schmidberger* cases France and Austria were held liable for not taking adequate steps to remove barriers to free movement of goods generated by private entities (protestors blocking the road traffic). See case C-265/95 *Commission v France* , EU:C:1997:595 and case C-112/00 *Schmidberger*, EU:C:2003:333

[9] Reich, N, *Review article: Europe's economic constitution, or: a new look at Keck*, Oxford Journal Of Legal Studies, 19(2), 1999, p 343.

[10] Maduro, L.M.P., *We the Court - The European Court of Justice and the European Economic Constitution,* Oxford Hart Publishing, 1998

[11] Komesar, Neil K., *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative,* Michigan Law Review, Vol. 79, 1350, 1981 and Komesar, Neil K., *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press, 1994

Constitution has three building elements: EU, Member States and individuals (perceived as market citizens).

Judicial model basically interprets approach taken by the European Court of Justice within framework of majoritarian activism. Majoritanian activism in the sense that Court of Justice , when acting as a market regulator, balances between various confronting interests and seeks *a majoritanian interests against minoritarian positions of some states or trades*[12]. This forms 'reasons behind reasoning'. Judicial regulation in the application of free movement of goods is primarily designed against national measures of Member States with cross-border effect, especially in areas lacking harmonization at EU level. It is not protection against any public intervention in the market. When majoritanian view is difficult to ascertain Court *is no longer ready to strike down national measures*[13].

Centralised model favours a process of market regulation by the replacement of national laws with EU legislation: national regulation incompatible with the aim of integrated market should be replace with harmonised legislation. This model lies upon two basic assumptions: *first, political control over the internal market is only possible at EU level, secondly, political control over the economic sphere is legitimate*[14]. Centralised model requires setting up institutions at Union level responsible for harmonising legislation. Competitive model of the European Economic Constitution has its basis on a *fully-fledged application of free movement and competition rules*[15]. These are intended to safeguard the market from public intervention and to promote competition among rules (regulatory competition) through the mutual recognition. Decentralised model can be summarised as a *system in which States retain regulatory powers but are, at the same time, required not to discriminate against foreign products or persons in the exercise of those powers*[16]. For consumers decentralised model offers more choice but competitive model offers more protection. In a decentralised model main regulatory institutions will be the Member States themselves.

Maduro links competitive model with ordoliberalism (although he does not distinguish clearly ordoliberalism and neoliberalism). Ordoliberalism has its roots in Freiburg school of economic thought founded in 1930's. It was was developed by German economists and legal scholars like Walter Eucken,

[12] *Supra* note 9, pp. 339

[13] *Supra* note 10, pp. 73

[14] *Ibid*, pp. 111

[15] *Ibid*, pp. 126

[16] *Ibid*, pp. 143

Franz Böhm and Hans Grossmann-Doerth. Ordoliberlas shared opposition to corporatist and oligopolistic economic policy of Nazi Germany which made them subject to moderate prosecution. Ordoliberal theory holds that the state must create neutral legal environment for the economy and maintain a high level of competition (*ordungspolitik*). Thus, ordoliberalism traditionally puts strong emphasize on competition rules. Unlike neoliberals orodliberals are not opposed *a priori* to the strong role of the State (or public authority). For them market principles are the source of legitimacy for regulatory intervention. It is not hard to see how in Maduro's competitive model market freedoms are perceived as fundamental rights which guarantee EU citizens opportunity to pursue economic activity free from interference of public intervention. In the words of Ernst-Ulrich Petersmann: *fundamental freedoms are the sources of legitimation of market integration, non-discriminatory competition, in that they increase individual autonomy, equality and responsibility, control abuses of government and maximize economic welfare*[17].

Maduro denies any real basis for ordoliberal reading of the European Economic Constitution and argues for its open character. This open character of Economic Constitution emerges from the need to balance between various conflicting interests intrinsic to the process of market integration. Open character is presupposed to exist within the framework of general economic liberal idea and comparative advantage.

Absence of purely and exclusively ordoliberal, or neoliberal for that matter, reading of the Treaty provisions on free movement of goods is a conclusion that can hardly be rejected. European regulatory market policy can certainly be described as floating between heuristic models excellently developed by Maduro. However, there is a twist that separates findings of this paper from Maduro's original conclusions. Open character of the European Economic Constitution requires critical review in light of recent changes to the primary EU law.

Changes in primary EU Law introduced by the entry into legal force of the Lisbon Treaty on December 1st 2009 are telling somewhat different narrative than fully open nature of European Economic Constitution. Article 3 of the TEU requires that EU establish its Internal Market as *highly competitive social market economy*. Social market economy is a concept of undeniably German origin (*Soziale Marktwirtschaft*)[18] that evolved from ordoliberalism.

[17] Petersmann, E-U, *Proposals for a new constitution for the European Union: Building-blocks for a constitutional theory and constitutional law of the EU,* 32 Common Market Law Review, Issue 5, 1995 p. 1154

[18] The term *Soziale Marktwirtschaft* was probably first used by its main theoretical proponent, economist Alfred Müller-Armack, in his article *Wirtschaftslenkung und Marktwirtschaft*

It keeps original ordoliberal emphasize on rule of law and competition rules. It also interprets market freedoms as fundamental rights but allows for more balancing with wider societal interests. However, this balancing (between market and wider societal interests) in social market economy should be exercised by neutral public authority in non-discriminatory and proportional manner. Sounds familiar? Social market economy became dominate at home in West Germany and is often accredited for impressive post-war economic recovery (*Wirtschaftswunder*). Maduro's claim *that there is no correspondence between ordoliberal economic constitutional concepts and the constitutional traditions of Member States*(...) *Nor are such concepts reflected in the text, or even the genesis, of the EC Treaty*[19] in the light of the existence the new aim of the Treaty - social market economy (and its clear German origin) can therefore be rejected.

How can the European Economic Constitution be still open in character when Lisbon Treaty stipulates social market economy as aim of EU Internal Market? Previous versions of the Treaties lacked any mention of social market economy. Treaty of Nice used the concept of *open market economy with free competition* (Art 4 of TEC). Normative shift from *open market economy* to *social market economy* in EU primary law is clearly visible when describing character of the Economic Constitution. This does not represent radical change in substance of the European Economic Constitution. Social market economy itself is a heteronymous concept. Such normative change represents evolution because it merely narrows wide scope of regulatory choices. European Economic Constitution did not become purely ordoliberal but it became more ordoliberal in comparison to previous normative *teleos*. This reading also follows from the principle of sincere cooperation: *Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives* (Art 4 TEU). Since entry into legal force of the Lisbon Treaty, let us conclude, European Economic Constitution became more closed in character. In the future it will be implemented within the broader framework of social market economy.

(Müller-Armack , A, *Wirtschaftslenkung und Marktwirtschaft,* Verlag für Wirtschaft und Sozialpolitik Hamburg, 1947, p 88). On possibility that Ludwig W. Erhard coined the term (or that more person came to used independently) see more in Glossner L, Christian; Gregosz, David (eds.), *60 years of social market economy- Formation, Development and Perspectives of a Peacemaking Formula*, Konrad-Adenauer-Stiftung e.V , 2010.

[19] *Supra* note 10, pp. 159

3. DIRECT HORIZONTAL EFFECT OF ARTICLE 34. TFEU: CASE LAW ANALYSIS

Opposite to what could be derived from the introduction of this paper CJEU case law on the direct horizontal application of Article 34 is not perfectly clear. Case law that rejects direct horizontal effect is, naturally, dominant. Case often cited by legal commentators[20] confirming absence of horizontal direct effect is *Sapod Audic* judgment from 2002. The Court interpreted that *a contractual provision cannot be regarded as a barrier to trade for the purposes of Article 34 since it was not imposed by a Member State but agreed between individuals*[21]. However, there are cases that could potentially be seen as challenging traditional conclusion of non-existence of direct horizontal effect. We could classify these cases into three following categories: early IP (intellectual property) cases, cases applying direct horizontal effect as supposed legal reality (very rear) and 'shades of grey' cases in which horizontal/vertical distinction is blurred by different modes of delegation of public authority to private entities.

Early IP cases, starting from the 1971 and judgement in *Deutsche Grammophon*[22] case, introduced clear line of jurisprudence by virtue of which exercise of IP rights by their private holders could be subject of judicial review under the present Article 34. This line of jurisprudence borrowed from the case law on competition rules (in the matter of separating competition and IP law) when differentiating between exercise and existence of IP rights. Meer existence of IP right was not sufficient to evoke horizontal application of Article 34. However, exercise of these rights by their private holders in situations with cross-border effect was sufficient for a judicial review under the Article 34. In *Terrapin*[23] and *Centrafarm v. American Home Products*[24] the Court of Justice developed particular criteria for judicial review of IP rights under Article 34. Out of the scope of Treaty prohibition contained in Article 34 were measures (exercise of IP rights) not discriminatory in nature and deprived of intention of market partition (subjective element). However limited[25], this line of jurispru-

[20] See for example: Krenn, C, *A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods*, Common Market Law Review, Vol 49, pp 177-215, 2012 and Löwisch, S, *Die horizontale Direktwirkung der Europäischen Grundfreiheiten*, Nomos, 2009.

[21] Case C-159/00 *Sapod Audic*, EU:C:2002:343, para 74

[22] Case 78/70 *Deutsche Grammophon*, EU:C:1971:59

[23] Case 119/75 *Terrapin*, EU:C:1976:94

[24] Case 3/78 *Centrafarm* v. *American Home Products*, EU:C:1978:174

[25] Aplicabble in specific situations when IP rights of private holders impede free movement of goods.

dence that could potentially be seen as recognizing direct horizontal effect of Article 34 has been abandoned by the subsequent case law development. By the end of 1980's the Court of Justice did not use demarcation between exercise and existence of IP rights anymore. Scope of judicial review in this matter has been limited only to IP legislation of Member States. Exercise of IP rights by their private holders could only be scrutinised via compatibility of national legislation with free movement of goods.

Cases applying direct horizontal effect of Article 34 as supposed legal reality are very rear occurrence indeed. The ultimate example for this category of cases is 1981 judgment of the Court in the *Dansk Supermarked*[26] case. The case was about group of private Danish hardware merchants called Imerco. Imerco commissioned in UK a china service with pictures of Danish royal castles and group markings on the occasion of their anniversary. The sale of that service was reserved exclusively to members of Imerco group. However, it was agreed between them and the British manufacturer that the substandard pieces might be marketed by the manufacturer in the UK but might not in any circumstances be exported to Denmark (or to other Scandinavian countries). Dansk Supermarked, a company that does not hold any affiliations with Imerco group, has been able to obtain through its dealers a number of china services which marketed in the UK and offer them at prices considerably lower than those sold by Imerco's members. Upon a law suit from Imerco group Dansk Supermarked has been found in breach of Danish Marketing Law. Supermarked claimed that this Danish decision amounts to measure having equivalent effect to quantitative restriction of imports. The Court of Justice in his judgement applied principle of mutual recognition[27]. Obvious problem with this case is lingering question of direct horizontal effect. Strikingly, the Court very explicitly states:

It must furthermore be remarked 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[28][!].

When *Dansk Supermarked* case was decided in the beginning of the eighties it could seam, especial in the aftermath of the *Walrave and Koch*[29] judgment (from the field of freedom to provide services), that outright introduction of

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

27 *Ibid*, para 18: *importation into a Member State of goods lawfully marketed in another Member State cannot as such be classified as an improper or unfair commercial practice.*

28 *Ibid*, para 17

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

horizontal direct effect of the Treaty provisions on free movement of goods is eminent. However, this did not happen. The subsequent case-law remained more or less persistent in the denial of horizontal direct effect. In retrospective it is quite possible that the Court in the period from the beginning of 1970's to the end of 1980's had been open to the possibility of horizontal direct effect. Case law analysis certainly point towards that conclusion. Pressure generated by increasing case-load in the field of free movement of goods after *Cassis de Dijon*[30] judgment in 1979 combined with impetus for market integration from the legislative process after the adoption of Single European Act in 1986 closed this openness on the side of the Court. *Keck*[31] judgment which substantially reduced the regulatory scope of Article 34 in 1993 confirms this line of reasoning.

Third categories are 'shades of grey' cases in which distinction between horizontal and vertical is blurred by different modes of delegation of public authority to private entities. These cases are probably most interesting from the standpoint of direct horizontal effect due to the two reasons. Firstly, they are simply actually and potentially most numerous. Secondly, they potential allow for wide scope of regulatory choices between outright recognition or denial of horizontal direct effect of Article 34. The Court of Justice has, in number of occasions[32], demonstrated that it prefers to leave itself a widest possible range of regulatory choices in case-law development. Therefore "shades of grey" category would be most suitable area for any hypothetical shift in the question of direct horizontal effect of Treaty provisions on free movement of goods.

Most recent (and quite popular in legal scholarship[33]) case that can be classified into 'shades of grey' category is the judgment of the Court from 2012 in *Fra.bo*[34]. The case revolves around German private professional non-profit association DVGW. DVGW, among its many activities issues various technical certificates to private undertakings. Fra.bo, Italian manufacturer of copper

[30] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, EU:C:1979:42

[31] Joined cases C-267 i 268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard,* EU:C:1993:905

[32] Most obvious example of such regulatory approach is judge – made *Dassonville* formula defining what constitutes a measure having equivalent effect (*all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions*).

[33] Van Harten, H; *Towards horizontal direct effect for the free movement of goods? Comment on Fra.bo*, European Law Review, 38(5), 2013, 677-694.

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

fittings was denied certificate for its copper fittings on the grounds it did not meet the requirements of a new endurance test organised by the DVGW. Fra.bo brought an action against the DVGW before the Landgericht Köln arguing that the cancellation and/or the refusal to extend the certificate are contrary to EU Law. In Fra.bo's view, the DVGW is bound by the provisions governing the free movement of goods. As a private-law association, the DVGW considered that it is not bound by Treaty provisions on free movement of goods and that only Germany is required to answer for any infringements of EU Law. However, the whole case was determined by the Court upon the fact that German public procurement legislation gave special status to DVGW certificates. Therefore, the Court interpreted:

...it is clear that a body such as the DVGW, by virtue of its authority to certify the products, in reality holds the power to regulate the entry into the German market of products such as the copper fittings at issue in the main proceedings Accordingly, the answer to the first question is that Article 28 EC [Article 34 TFEU] *must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body* [35].

Seemingly *Fra.bo* turned to be just a case of delegation of powers by the Member Sate to a private organisation. However, one interesting circumstance remains: Fra.bo copper fittings were certified in Italy. The underlying issue of mutual recognition was not tackled by the judgement. Furthermore, in *Fra.bo* the Court of Justice confirmed that is willing to scrutinise measures of private entities according to the criteria of market access (e.g. power to entry into specific market) under Article 34. Emphasize seems to be more on substantive power to regulate market and less on delegating acts of public power. Advocate General Trstenjak in her Opinion suggested the *applicability of the principle of the free movement of goods to a private-law association with de facto rule-making competence*[36]. Such substantive criteria can be viewed as opening the door for application of Article 34 in situations when private entities are in reality holding the position of market regulator even without any specific act of delegation by Member Sate (which was not the case in *Fra.bo*). Let us imagine situation where DVGW certificates are not empowered by the national (public procurement or other) legislation but are generally recognized by the

[35] *Ibid*, para 31-32.

[36] Opinion of Advocate General Trstenjak in Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) - Technisch-Wissenschaftlicher Verein,* EU:C:2012:453, para 45

national business community. Thus, in this hypothetical situation, certification activity would also constitute a substantive barrier to entry (or to stay) in the market. What would the Court decide then? If hypothetical judicial decision in that situation would remain the same as in the real *Fra.bo* case it would mean recognition of horizontal direct effect of Article 34 to, at least, private entities that engage in standardisation and certification activities.

4. LEGAL REASONING AND DIRECT HORIZONTAL EFFECT OF FREE MOVEMENT OF GOODS RULES

There are many proponents of recognition of direct horizontal effect of free movement of goods rules in legal scholarship. We would not even try to name or number them all. Instead, this paper will try to summarise main arguments for direct horizontal effect and then proceed to generating some new ones in relation with the reshaping of European Economic Constitution and entry into legal force of the Lisbon Treaty. Before embarking into affirmative argumentation we should note that there are also numerous legal arguments against recognition of direct horizontal effect.

Substantive negative argument is that there is simply no need for it. This view naturally views freedom of movement of goods as merely freedom from State intervention and not as a constitutional fundamental freedom with full direct effect. As we have seen earlier, the Court of Justice is also[37] dominantly lining to such line of reasoning when it comes to free movement of goods rules (which is not the case in other market freedoms). According to this view addressee of Article 34 and 35 are Member States and not individuals. The wording of Article 34 and 35 is neutral. Thus, fundamental question behind this dilemma is really a nature of Economic Constitution embedded in the norm. Obstacles to free movement of goods can be generated by private entities (statement akin to common knowledge). Attributing direct effect only to State actions, without any substantive explanation of reasons for doing so in case law, could be seen as deprived of substance and formalistic. Especially because the existence of possibility that private entities generate obstacles to free movement was used as argumentation for recognizing direct horizontal effect in other market freedoms. Another traditional negative argument is, of course, interference with competition rules. That argument is, in general, rejected in the case law. In judgment in joined cases *DiP Sp.A*[38] the Court of Justice cumulative applied competition rules (on state aid) with Treaty provisions on free movement of

[37] *Supra 3. Direct horizontal effect of Article 34. TFEU: case law analysis.*

[38] Joined Cases C-140 & 142/94, *DiP Sp.A*, EU:C:1995:330

goods. Possibility of cumulative application of free movement rules with competition rules has also been accepted in the other market freedom by the case law development.

First affirmative argument is coherence of the EU Internal Market Law. There can be hardly any doubt about existence of convergence between market freedoms[39]. In *Walrave and Koch* judgment Court recognized direct horizontal effect of Treaty provisions on freedom to provide services and in *Angonese*[40] case it confirmed direct horizontal effect of Treaty provision on free movement of workers. Furthermore, some commentators, like Schepel[41], believe that is only a matter of time for Court to establish the horizontal direct effect of Article 63 TFEU (free movement of capital). Naturally, convergence of market freedoms is not, and shall never be, absolute because of the intrinsic differences between market freedoms. Goods are not humans *et vice versa*, to put it simply. However, according to this line of argumentation, similarities in regulatory choices made in EU Internal Market Law serve the purpose of establishing and maintaining Internal Market (that should be exercised, let us not forget, within the concept of social market economy).

Catherine Barnard developed idea of so called 'extended vertical direct effect'[42]. This idea basically points that horizontal direct effect is only to be established when private subjects assert the regulatory powers of the Member State. These powers are not necessarily transferred to them. Private individuals can also undertake metamorphosis into quasi-state behaviour. Most obvious examples are processional sport organizations (e.g. FIFA). This is different of simply delegation powers to private subjects. Schepel in his paper on horizontal application of free movement rules[43] rejects idea of 'extended vertical direct effect'. Such general explanation, as Scehpel interprets, is denied by the Court *inter alia* in the important *Viking* judgment: *it does not follow from the case-law (…) that that interpretation applies only to quasi-public organisations or to associations exercising a regulatory task and having quasi-legislative*

[39] Krenn, C, *A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods*, Common Market Law Review, Vol 49, p 183 and Maduro, L.M.P., *We the Court - The European Court of Justice and the European Economic Constitution,* Oxford Hart Publishing, 1998, pp. 101

[40] Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* EU:C:2000:296

[41] Schepel, H, *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, 18, 2, 2012, 177–200.

[42] Barnard, C, *The Substantive Law of the EU - the four freedoms*, Oxford University Press, 2004, pp. 262

[43] *Supra* note 38

powers[44]. However, possible rejection of this idea in one set of free movement rules (or in general for that matter) does not necessary means rejection in other set of rules – free movement of goods in particular. Obviously, then coherence between market freedoms becomes secondary. Professional sport organizations mainly self-regulate in the field of free movement of workers and services but professional standardisation private organizations (such as DVGW) mainly regulate in the field of free movement of goods. If one accept 'shades of grey' category of cases as most likely candidates for horizontal direct effect of Article 34, which is proposed earlier in this paper, than idea of 'extended vertical direct effect' can fit perfectly into the picture of hypothetical future recognition.

Second argument is *effet utile* application of Article 34. Krenn in his paper on the topic adapts logical four step interpretation original made by Körber[45] in other market freedoms that excellently summarise this line of argumentation:

i. *The wording of Article 34 TFEU is neutral, so as to make it in principle possible to include private parties among its addressees.*

ii. *The internal market comprises an area without internal frontiers where the free movement of goods, persons, services and capital is ensured. The free movement of goods serves the objective of an internal market by ensuring free movement.*

iii. *Not only States but also private parties can compromise this objective.*

iv. *From this follows that Article 34 TFEU must apply to the conduct of private actors.*[46]

Krenn (basically) accepts *effet utile* argumentation and proposes *de minimis* threshold for the direct horizontal application of Article 34. Krenn's *de mnimis* threshold represents adoption of market access criteria. Horizontal applicability, according to Krenn's proposal, would exist in situations when behaviour of private entities impedes access of product to market (he is citing judgment in *Commission v. Italy*[47]). Interestingly, the same legal reasoning is deployed, as we have seen, by the Court of Justice in *Fra.bo* case. Of course, important addition is that in *Fra.bo* judgement the Court, apart from deploying market access criteria, scrutinised behaviour of private entity in relation to delegation of public powers.

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[44] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* EU:C:2007:772, para 64.

[45] Körber, T, *Grundfreiheiten und Privatrecht,* Mohr Siebeck, 2004, pp. 776.

[46] *Supra* note 20, Krenn, pp. 199

[47] Case C-110/05, *Commission v. Italy*, EU:C:2009:66

Third argument is the necessity to correlate free movement rules with other Treaty provisions, mainly general principles and fundamental rights. This has been done in judicial application of other market freedoms. General prohibition of discrimination on grounds of nationality (now contained in Article 18 TFEU), which is directly horizontally applicable, is the most obvious link. Striking example of such legal reasoning in the area of free movement of workers can be found in *Angonese* and *Raccaneli*[48] judgements. In both of this cases general prohibition of discrimination on grounds of nationality served as a building block for establishing direct horizontal effect on Treaty provisions on free movement of workers (present Article 45 TFEU). General prohibition of discrimination on grounds of nationality in the free movement of workers covers indirect discrimination. Thus, analogous application of this principle with horizontal application of Article 34 would constitute significant substantive expansion of regulatory scope. Furthermore, such argumentation can be used to equalise market freedom with fundamental rights. This was what Court has done in *Bosman*[49] when free movement of workers has been interpreted cumulatively as a market freedom and fundamental right from the aspect of right to a free access to employment. Very ordoliberal indeed. Proposal of Derrick Waytt on direct horizontal application of free movement rules in situations when private entities engage in discriminatory steps outside normal market behaviour[50] is within this line of argumentation, albeit more moderate in scope. Of course, correlation of free movement of goods rules with general principles and fundamental rights is 'a whole different ball game' in comparison to the pervious affirmative arguments. Nevertheless, it can be a way of attributing horizontal direct effect to Articles 34 and 35. That line of argumentation, although it may seem tempting, is not derived of risks for regulatory policy. Danger of such correlation for judicial regulatory policy is that it represents a slippery slope. Once when general principle or fundamental right is linked with free movement provisions denying full blown direct horizontal effect becomes very hard task. Therefore, idea of 'extended vertical effect' in 'shades of grey' category of cases seems as more likely candidate, at least in the opening phase, for attributing horizontal direct effect to free movement of goods Treaty provisions.

[48] Case C-94/07, *Raccanelli*, EU:C:2008:425, para 45

[49] Case C-415/93, *Bosman*, EU:C:1995:463, para 129

[50] Waytt, D, *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 & Policy, Vol. 4, 2008 and Oxford Legal Studies Research Paper No. 20/2008. Waytt considers that purchasing choices, even if discriminatory, should fall out of the scope of direct horizontal applicability (since they constitute normal market behaviour).

5. CONCLUSION

Lisbon Treaty stipulates social market economy as objective of EU Internal market. Normative shift from *open market economy* to *social market economy* in EU primary law (from Nice to Lisabon) dictates substantive shift in reading of European Economic Constitution. Normative shift could not happen without majoritanian consensus at EU level. Although there are differences between original ordoliberalism and concept of social market economy correlation is undeniable. Thus, normative conclusion is that reading of EU Internal Market Law is required to become more ordoliberal than before December 1st 2009. Market integration process still encompasses different intrinsic tensions and competing heuristic models (excellently described by Maduro). The European Economic Constitution did not become exclusively ordoliberal but it became more ordoliberal in comparison to previous normative *teleos*. We did not see yet any real changes in market regulatory policy that would follow from this formal normative shift.

Dilemma of horizontal direct effect of market freedoms is one of the most suitable areas for manifesting shifts in nature of European Economic Constitution. This is because the rules on free movement are source of constitutional legitimacy. In orodliberalism market principles are the source of legitimacy for regulatory intervention in market. Viewing market freedoms of EU Law as fundamental freedoms follows that ordoliberal interpretation. This is exactly what the European Court of Justice has done in the field of free movement of workers, freedom to provide services and right of establishment (and failed to do in the field of free movement of goods and capital). Advocate General Maduro in his Opinion in the *Viking* case has unwittingly summarised orodliberal reading of market freedoms in respect to the issue of horizontal direct effect:

The rules on freedom of movement and the rules on competition achieve this purpose principally by granting rights to market participants. Essentially, they protect market participants by empowering them to challenge certain impediments to the opportunity to compete on equal terms in the common market. The existence of that opportunity is the crucial element in the pursuit of allocative efficiency in the Community as a whole. Without the rules on freedom of movement and competition, it would be impossible to achieve the Community's fundamental aim of having a functioning common market.

(...)

On the contrary, such horizontal effect would follow logically from the Treaty where it would be necessary in order to enable market participants throug-

hout the Community to have equal opportunities to gain access to any part of the common market[51].

Direct horizontal effect of Treaty provisions on free movement of goods, mainly of Article 34 TFEU, has been a subject of a much academic debate. Despite explicit and dominant rejection of direct horizontal effect of Article 34 in the case-law (one of the most recent examples is *Sapod Audic* judegment) there have been, from time to time, cases that could suggest different narrative. This paper classify such cases into three categories: early IP cases, cases applying direct horizontal effect as supposed legal reality (*Dansk Supermarked* judgement being probably most striking example) and 'shades of grey' cases in which horizontal/vertical distinction is blurred. Case law evolution in each of these categories can potentially go back and generate interpretative shifts in the doctrine (enough room to go back to the future). 'Shades of grey' category of cases is detected to be a most suitable candidate for the shift in the doctrine of direct horizontal effect of free movement of goods rules. 'Shades of grey' category potential allow for wide scope of regulatory choices between outright recognition or denial of horizontal direct effect of Article 34. Most recent case from this category is judgment in *Fra.bo* that turned to be specific situation of delegation of powers. However, power of private entity to regulate market was emphasized in the judgement. Another basis of recognizing direct horizontal effect of free movement rules could be their correlation with general principles and fundamental rights. Especially with horizontally applicable general prohibition on grounds of nationality. However, such method represent a slippery slope because once when general principle is linked with free movement provisions denying full blown direct horizontal effect becomes very hard task.

'Shades of grey' category of cases encompasses situations when private entities undertake metamorphosis into quasi-state behaviour. Public powers are not necessarily transferred to them, they simply generate self-regulation. Such private regulation can of course create obstacles to free movement of goods. Particularly interesting is private regulation that can impede access of products to markets (as in *Fra.bo*, with important addition of Member State sanctioning this impediment). Catherine Barnard developed idea of 'extended vertical direct effect'. This concept when applied to aforementioned situations ('shades of grey' category deprived of delegating acts) would amount to recognition of horizontal direct effect of free movement of goods. Such recognition would be limited in regulatory scope by market access criteria and address only private

[51] Opinion of Advocate General Maduro in the Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, , EU:C:2007:772, para 33 and 35.

entities that engage in self-regulation. This could be a good starting point for reshaping of European Economic Constitution.

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