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Private Parties and the Free Movement of Goods: Responsible, Irresponsible, or a Lack of Principles?

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Abstract

Whether the free movement of goods provisions in EU law apply to the acts of private parties has long been the subject of discussion in the literature, although for many years the discussion was rather inactive. However, because of developments in the case-law of the European Court of Justice on the other freedoms, the question of the extent to which actions of private parties are caught has become of particular interest. This Article addresses this debate and seeks to offer some guidance towards its resolution.

KEYWORDS: International Law, European Court of Justice

ARTICLE

PRIVATE PARTIES AND THE FREE MOVEMENT OF GOODS: RESPONSIBLE, IRRESPONSIBLE, OR A LACK OF PRINCIPLES?

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INTRODUCTION

Whether the free movement of goods provisions in EU law[1] apply to the acts of private parties has long been the subject of

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1. The major primary sources of EU law are to be found in the Treaty on European Union ("TEU") and the Treaty on the Functioning of the European Union ("TFEU"), and in the Euratom Treaty. *See generally* Consolidated Version of the Treaty on European Union 2012 O.J. C 326/13, Consolidated Version of the Treaty on the Functioning of the European Union 2012 O.J. C 326/47 [hereinafter TFEU]. The relevant provisions for this discussion are Articles 30–36 TFEU, which deal with the prohibitions of quantititative restrictions on imports and exports and measures having equivalent effect, and the principal Treaty-based grounds of justification for such measures. See the present Author's earlier contributions in this area in this Journal: Laurence W. Gormley, *Two Years after Keck* 19 FORDHAM INT'L L.J. 866 (1996); Laurence W. Gormley, *Silver Threads Among the Gold . . . 50 Years of the Free Movement of Goods*, 31 FORDHAM INT'L. L.J. 1637 (2008); Laurence W. Gormley, *Free Movement of Goods and their Use – What is the Use of it?*, 33 FORDHAM INT'L. L.J. 1589 (2010). A brief note on new citation is appropriate. Citations for ECJ cases are given to the European Court Reports ("ECR") where this is available, as well as to the new ECSI. Since January 1, 2012 the

discussion in the literature,[2] although for many years the discussion was rather inactive. However, because of developments in the case-law of the European Court of Justice on the other freedoms,[3] the question of the extent to which actions of private parties are caught has become of particular interest. This Article addresses this debate and seeks to offer some guidance towards its resolution.

The free movement of goods provisions have traditionally been seen as not usually applying to acts of private individuals—thus your blinkered uncle who thinks that all things foreign are nasty is perfectly free to decide not to buy French wine because he finds garlic and philosophy corrupting influences on the minds of young people, no matter how misguided that view undoubtedly is. The well-known department stores, Harrods, in London, and KaDeWe in Berlin are free to promote British or German products respectively if they wish.[4]

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printed versions of the ECR. are no longer produced. Judgments both before and after that date may be found using the search form on the ECJ's website http://curia.europa.eu/juris/recherche.jsf?language=en or through the Euro-Lex website http://eur-lex.europa.eu/homepage.html?locale=en. The ECLI reference has nothing to do with the ECJ's case number but is the European Case Law Identifier, see further, http://en.wikipedia.org/wiki/European_Case_Law_Identifier; it is only mentioned here the first time a judgment is cited..

2. *E.g.*, W. van Gerven, *The recent case law of the Court of Justice concerning Articles 30 and 36 of the EEC Treaty*, 14 COMMON MKT. L. REV. 5, 22–23 (1977); P. VerLoren van Themaat & L.W. Gormley, *Prohibiting Restriction of Free Trade within the Community: Articles 30–36 of the EEC Treaty*, 3 NW. J. INT'L L. & BUS. 577 (1981); L.W. GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC 259–62 (North Holland, 1985); N. MacGowan & M. Quinn, *Could Article 30 Impose Obligations on Individuals?*, 12 EURO. L. REV. 163 (1987); J. Banquero Cruz, *Free Movement and Private Autonomy*, 18 EURO. L.REV. 603 (1999); J. Snell, *Private Parties and the Free Movement of Goods and Services*, *in* SERVICES AND FREE MOVEMENT 211–43 (M. Andenas & W.-H. Roth eds., Oxford University Press, 2002); S. van den Bogaert, *in* THE LAW OF THE SINGLE EUROPEAN MARKET UNPACKING THE PREMISES 123–52 (C. Barnard & J. Scott eds., Hart, 2002); W.-H. Roth, *Privatautonomie und die Grundfreiheiten des EG-Vertrags*, *in* FESTSCHRIFT FÜR DIETER MEDICUS (V. Beuthien et al. eds., 2009) 303; E.J. Lohse, *Fundamental Freedoms and Private Actors – Towards an "Indirect Horizontal Effect"*, 13 EUR. PUBL. L. 159 (2007); M. Jarvis, *in* OLIVER ON FREE MOVEMENT OF GOODS IN THE EUROPEAN UNION 67–78 (P. Oliver ed., 5th ed. 2010) (with references to further literature, see id. at 67); H. Schepel, *Constitutionalising the Market, Marketing the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law*, 18 EURO. L. J. 177 (2012); L.J. Ankersmit, GLOBALISATION AND THE INTERNAL MARKET 217–43 (Diss., Free University of Amsterdam, 2015).

3. The other freedoms are the free movement of workers (arts. 45–48 TFEU); the freedom of establishment (arts. 49–55 TFEU); the free movement of services (arts. 56–62 TFEU), and the free movement of capital and payments (arts. 63–66 TFEU).

4. In Commission v. United Kingdom, Case 207/83 [1985] E.C.R. 1201, 1212, ECLI:EU:C:1985:161 the Court observed (at ¶ 21) that "if the national origin of goods brings certain qualities to the minds of consumers, it is in manufacturers' interests to indicate it

But the public sector may not.[5] The traditional view has been that the only circumstances in which what are now Articles 34–36 TFEU could affect the actions of a private party are in relation to attempts to use industrial and commercial property rights under national legislation to prevent parallel imports from other Member States: thus an injunction granted by a national court to restrain imports would fall foul of EU law if it restrained the parallel importation of goods lawfully placed on the market in another Member State by the right owner or with his, her, or its consent.[6] The Court of Justice also made it clear in the intellectual property context that agreements between private individuals cannot not derogate from the free movement of goods.[7] In line with this approach, but in the context of charges having equivalent effect to customs duties, the Court has held that the prohibition of such charges extended to catch a transit charge designed to compensate a private undertaking for bearing costs arising from the performance by the customs and veterinary services of their tasks as providers of services in the public interest even if the charge had not been imposed by the State but arose from an agreement concluded by the undertaking concerned with its customers.[8]

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themselves on the goods or on their packaging and it is not necessary to compel them to do so."

5. *See, e.g.*, Commission v. Ireland, Case 249/81, [1982] E.C.R. 4005, ECLI:EU:C:1982:402; *see also* L.W. GORMLEY, EU LAW OF FREE MOVEMENT OF GOODS AND CUSTOMS UNION 420–23 (2009); S. Enchelmaier, *in* OLIVER ON FREE MOVEMENT OF GOODS IN THE EUROPEAN UNION, *supra* note 2, at 168–69.

6. Industrie Diensten Groep BV v. J.A. Beele Handelmaatschappij BV, Case 6/81 [1982] E.C.R. 707, 716–17 (¶ 7–9), ECLI:EU:C:1982:72.

7. Dansk Supermarked A/S v. A/S Imerco, Case 58/80, [1981] E.C.R. 181, 195 (¶ 17), ECLI:EU:C:1981:17. The Court was referring to the fact that a clause in such an agreement which purported to restrict exports or imports would be unenforceable, as an injunction in restraint of importation or exportation (or the award of damages in lieu) is a measure having equivalent effect. *See* Beele, *supra* note 6, at 716, ¶ 7. Any justification for such a measure would have to be decided on the facts, rather than be pre-empted by the agreement.

8. Édouard Dubois et Fils SA et al. v. Garonor Exploitation SA, Case C-16/94, [1995] E.C.R. I-2421, 2438. (¶ 20–21) ECLI:EU:C:1995:268. The charge, irrespective of by whom it was imposed, arose directly or indirectly from the failure of the Member State concerned to fulfil its financial obligations in relation to controls and formalities carried out in connection with the cross-border movement of goods from other Member States.

I. *EARLY DISCUSSIONS*

There was always some discussion of this question in the literature on the European continent in various languages.[9] VerLoren van Themaat and the present Author discussed the question at some length in an article in 1981,[10] looking at whether what are now Articles 34–36 TFEU could impose duties as well as confer rights on individuals. We considered three examples:

> (1) a collective boycott of imports by employees seeking to resist any threat to their jobs posed by imports;
>
> (2) a collective refusal by employees, acting in sympathy with colleagues striking in another Member State, to handle products destined for export, and finally,
>
> (3) private behavioural standards for industrial products.

We argued that the wording of what is now Articles 34—36 TFEU did not itself exclude their application to these types of actions, and considered an analogy with the judgments of the Court in *Walrave & Koch*[11] (which made it plain that rules of sporting governing bodies, in so far as they covered professional sport, have to comply with the free movement of workers and the freedom to provide services) and in *Defrenne v. SABENA*[12] (which showed that prohibition on discrimination between men and women applied not only to the action of public authorities, but also extended to all agreements which were intended to regulate paid labor collectively, as well as to contracts between individuals).

That great jurist, Walter van Gerven, argued in 1977 in part on the basis of the judgment in *Walrave & Koch*[13] and the judgments in *Sterling Drug*[14] and *DGG v. Metro*,[15] and in part on the basis of *Defrenne v. SABENA*[16] that the Court had indeed adopted this

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9. *See, e.g.*, *supra* note 3 and accompanying text.

10. van Themaat & Gormley, *supra* note 2, at 607–09.

11. Walrave & Koch v. Association Union Cycliste Internationale et al, Case 36/74 [1974] E.C.R. 1405, 1418–19 (¶ 16 *et seq.*), ECLI:EU:C:1974:140; *see* Donà v. Mantero, Case 13/76 [1976] E.C.R. 1333, ECLI:EU:C:1976:115.

12. Defrenne v. Société Anonyme Belge de Navigation Aérienne SABENA, Case 45/75 [1976] E.C.R. 455, 476 (¶ 39), ECLI:EU:C:1976:56

13. *Walrave & Koch*, *supra* note 11, at 1418–19 (¶ 15 & 25).

14. Centrafarm BV v. Sterling Drug Inc., Case 15/74 [1974] E.C.R. 1147 at 1163 (¶ 15), ECLI:EU:C:1974:114.

15. Deutsche Grammophon Gesellschaft mbH v. Metro Großmärkte GmbH & Co. KG, Case 78/70 [1971] E.C.R. 487, 500 (see in particular ¶ 12–13) ECLI:EU:C:1971:59.

16. *Defrenne v. Sabena*, *supra* note 12, ¶ 39.

analogy.[17] VerLoren van Themaat and the present writer submitted that the question at that time remained open, but that the extension of the prohibition of quantitative restrictions to measures having equivalent effect meant that any attempted evasion of the free movement principle by collective action should fall within the prohibition.[18] At the same time, they recalled that the case-law-based justifications stemming from *Dassonville* itself would permit certain reasonable hindrances to imports or exports for non-economic purposes.[19]

II. *BUY-NATIONAL CAMPAIGNS AND STATE RESOURCES*

By 1985, it began to become clear that the trend of the case-law was going against private parties being caught. Cases such as *Commission v. Ireland*[20] (the *Buy-Irish* case) and *Apple & Pear Development Council v. Lewis*[21] demonstrated that private parties had far more freedom of action than State-managed and State-financed bodies. In *Buy-Irish* the Court emphasised that a buy-national campaign which was State-initiated, managed by State appointees, largely State-funded, and the aims and broad outline of which were defined by the government, even though through the form of a private company, could not be considered in the same way as a campaign by an undertakings or group of undertakings—whether public or private—to promote their products.[22] In *Apple & Pear Development Council v. Lewis* the Court expressly stated that:

> a body such as the Development Council, which is set up by the government of a Member State and is financed by a charge imposed on growers cannot under Community law enjoy the same freedom as regards the methods of advertising used as that

17. W. van Gerven, 14 COMMON MKT. L. REV. 5, 22–23 (1977).

18. *See* van Themaat & Gormley, *supra* note 2, at 608–09.

19. *See id*. at 609.

20. Commission v. Ireland Case 249/81 [1982] E.C.R. 4005, ECLI:EU:C:1982:402.

21. Apple & Pear Development Council v. K.J. Lewis Ltd. et al., Case 222/82 [1983] E.C.R. 4083, ECLI:EU:C:1983:370.

22. *Commission v. Ireland*, *supra* note 20, at 4022 (¶ 23). The Guaranteed Irish campaign (which still exists) was later separated from the Irish Goods Council and carried on without State funding or State appointments. It was launched by the then President of Ireland in 1984. That does not, however, amount to State involvement, nor would it be enough to attribute the actions of the Guaranteed Irish campaign to the State.

> enjoyed by producers themselves or producers' associations of a voluntary character.[23]

The Court did not actually rule on what freedom was actually enjoyed by private parties, but simply confined itself to the restrictions placed on public sector involvement.

The objections to the application of Articles 34–36 TFEU to actions of private parties were based in part on the observation that the judgments in *Walrave & Koch* and *Defrenne* had rather more to do with discrimination than with free movement as such, and in part on the possibility that collective action might amount to a concerted practice within the context of competition law.[24] But they were also based on the *reductio ad absurdam* argument that a person who decided to buy, say, a British product should not feel that she or he ran the risk of being sued by an importer of a rival product.[25] The TFEU leaves the exercise of consumer choice entirely in the hands of the consumer, so that both consumer and trader are in principle free to buy and sell respectively throughout the single market which the Treaty establishes. Perhaps strangely in view of the Court's approach in the *Buy-Irish* case, MacGowan and Quinn pleaded that what is now Article 34 TFEU should only impose obligations on private parties if there was a legal relationship between the private parties, and the measures of the party intended to be bound by Article 34 were legally binding acts, and such measures were taken in pursuance of an economic activity.[26] In *Buy-Irish*, the Court had of course rejected the contention that only *legally binding* State measures were caught.[27]

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23. *Apple & Pear Development Council*, *supra* note 21, at 4119 (¶ 17). The Court went on to state (*id.* ¶18–19) that such a body was:

> under a duty not to engage in any advertising intended to discourage the purchase of products of other Member States or to disparage those products in the eyes of consumers. Nor must it advise consumers to purchase domestic products solely by reason of their national origin. On the other hand, Article [34 TFEU] does not prevent such a body from drawing attention, in its publicity, to the specific qualities of fruit grown in the Member State in question or from organising campaigns to promote the sale of certain varieties, mentioning their particular properties, even if those varieties are typical of national production.

See, in to a quality label for German produce, Commission v. Germany, Case C-325/00 [2002] E.C.R. I-9997, ECLI:EU:C:2002:633. *See also* the European Commission's Community Guidelines: Aid for advertising of certain products, O.J. C 252/5 (2001) ¶ 1, 4–8, 19–24, 35–50.

24. *See* GORMLEY, *supra* note 2, at 261.

25. *Id.* at 262.

26. *See* MacGowan & Quinn, *supra* note 2, at 177–78.

27. *See Commission v. Ireland*, *supra* note 20, at 4023 (¶ 28–29).

The case-law against Articles 34–36 TFEU imposing obligations on private parties started to grow in other areas. In holding that Articles 34 and 35 TFEU only concerned public measures and not the conduct of undertakings, judgments such as those in *Vlaamse reisbureaus*[28] and *Bayer v. Süllhöfer*[29] make it plain that there is a clear separation in function between the free movement provisions and the competition provisions of the Treaty.[30] The judgment in *Sapod Audic* demonstrates that contractual terms agreed between private parties will not fall foul of Articles 34–36 TFEU.[31] This latter case can be distinguished from the approach in *Dansk Supermarked* which really related to the use of intellectual property rights emanating from national legislation, thus the use of possibilities made available by State measures.[32] It was the State measures activated at the instance of a private party (through an injunction) which would actually cause the barrier to trade.[33]

Yet the view that private parties are not bound by Articles 34–36 TFEU does not mean that their conduct is unaffected by those provisions.[34] If the State shelters behind a private body, *Buy Irish*, and *Commission v. Germany*[35] on the CMA quality label, demonstrate that such a construction will offer no protection against Articles 34–36.[36] Similarly, *Commission v. United Kingdom* on origin marking

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28. VZW Vereniging van Vlaamse Reisbureaus v. VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten, Case 311/85 [1987] E.C.R. 3801, 3830 (¶ 30), ECLI:EU:C:1987:418.

29. Bayer AG et al. v. Süllhöfer, Case 65/86 [1988] E.C.R. 5249, 5285 (¶ 11–12), ECLI:EU:C:1988:448. This case concerned a no-challenge clause in a patent licensing agreement: the Court found that this did not involve the application of a national intellectual property right likely to be a barrier to the free movement of goods between Member States, but the validity of an agreement between undertakings which could have as its object or effect the restriction or distortion of competition, thus the question fell to be decided under what is now Article 101 TFEU.

30. This also followed from the judgment in Officier van Justitie v. van de Haar et al, Joined Cases 177 & 178/82 [1984] E.C.R. 1797, 1812–13 (¶ 11–13) ECLI:EU:C:1984:144.

31. Sapod Audic v. Eco-Emballanges SA, Case C-159/00 [2002] E.C.R. I-5031, 5085 (¶ 74), ECLI:EU:C:2002:343.

32. *See Dansk Supermarket*, *supra* note 7.

33. *See Beele*, *supra* note 6; Pharmon v. Hoechst, Case 19/84 [1985] E.C.R. 2281, 2297 (¶ 22) ECLI:EU:C:1985:304.

34. *See* GORMLEY, *supra* note 2, at 262. This is well-demonstrated by the intellectual property cases discussed in the text above.

35. *Commission v. Germany*, *supra*, note 23, at 10000–02 (¶ 17–21).

36. *See* Hennen Olie BV v. Stichting Interim Centraal Orgaan Voorraadvorming Aardolieproducten & State of the Netherlands, Case 302/88 [1990] E.C.R. I-4639, 4643 (¶ 14–15), ECLI:EU:C:1990:455.

demonstrates that the Court will look behind the face of measures to see exactly what is going on and expose bogus justifications for what they are.[37] The tacit delegation and transfer of a financial burden by the State to a private undertaking is also caught by the free movement of goods provisions.[38] Disciplinary measures (in this case aimed at penalising the prescription of parallel imports) adopted by a body established by Royal Charter, which has a committee that exercises statutory disciplinary powers over the members of the body, may also constitute measures having equivalent effect to quantitative restrictions.[39]

Where the State (in any manifestation) can be demonstrated to have 'grandfathered'[40] national standards, such as Deustche Industrie Normen ("DIN") norms or British Standards by making compliance with them obligatory in the award of public contracts, there will be a breach of Articles 34–36 TFEU, and now also of the relevant procurement directive if it applies; the lessons of *Dundalk*[41] have been learned.

But it is not only in relation to procurement that standardisation and certification is relevant. In *Fra.Bo*[42] the Court considered the activities of a private-law standardisation and cerrtification body ("DVGW"), addressing the question whether that body had to comply with the provisions of primary EU law on the free movement of goods in drawing up specifications and in certifying products. In a remarkably short, yet quietly powerful judgment, the Court noted that the fact that an importer might be dissuaded from introducing or marketing a particular product in a Member State constituted a restriction on the free movement of goods for the importer.[43] It also

37. *See generally* Commission. v. U.K., Case 207/83 [1985] E.C.R. 1201.

38. *See Dubiois*, *supra* note 8.

39. R. v. Royal Pharmaceutical Society of Great Britain, *ex parte* Association of Pharmaceutical Importers, Joined Cases 266 & 267/87 [1989] E.C.R. 1295, ECLI:EU:C:1989:205.

40. The term "grandfathering" comes from the United States. *See* Guinn & Beal v. United States, 238 U.S. 347 (1915); Myers v. Anderson, 238 U.S. 368 (1915).

41. Commission v. Ireland, Case 45/87 [1988] E.C.R. 4929, ECLI:EU:C:1988:435. As to the procurement directives, see European Parliament & Council Directive 2004/18, O.J. L 134/114 (2004), art. 23; European Parliament & Council Directive 2014/24, O.J. L 94/65 (2014), art. 42.

42. Fra.bo SpA v. Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) – Technisch-Wissenschaftlicher Verein, Case C-171/11 (July 12, 2012), ECLI:EU:C:2012:453.

43. Commission v. Luxembourg, Case C-286/07 [2008] E.C.R. I-63* (transcript in French only), *available at* http://curia.europa.eu/juris/document/document.jsf?

noted that it had condemned measures whereby a Member State, without lawful justification, encouraged economic operators wishing to market in its territory construction products, lawfully manufactured and/or marketed in another Member State, to obtain national marks of conformity[44] when it refused to recognise the equivalence of approval certificates issued by another Member State.[45] It was common ground that DVGW was a non-profit, private-law body whose activities were not financed by the German State, nor did the latter have any decisive influence over the standardisation and certification activities, even though some of DVGW's members were public bodies.

The Court observed that the relevant national law provided that products certified were compliant with national legislation and that it was undisputed that DVGW was the only body able to certify the copper fittings at issue in the main proceedings for the purposes of the German legislation. The referring national court had stated that in practice the lack of such certification placed a considerable restriction on the marketing of the products concerned on the German market. Although the German law merely laid down the general sales conditions as between water supply undertakings and their customers, from which the parties were free to depart, it was apparent that, in practice, almost all German consumers purchased copper fittings certified by DVGW, so that access to the German market for non-DVGW-certified copper fittings was well nigh impossible.[46] In these circumstances, it was clear that DVGW, by virtue of its authority to certify the products, in reality held the power to regulate the entry into the German market for, in this case, copper fittings. It followed, therefore, as night follows day, that in the circumstances the Court found the ambit of what is now Article 34 TFEU extended to DVGW's standardization and certification activities.[47]

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text=&docid=72070&pageIndex=0&doclang=FR &mode=lst&dir=&occ=first&part=1&cid=588386 (see ¶ 27)), ECLI:EU:C:2008:251.

44. Commission v. Belgium, Case C-227/06 [2008] E.C.R. I-46*, (¶ 34) (transcript in French only), *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=70344&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=586149 (see ¶ 27).

45. Commission v. Portugal, Case C-432/03 [2005] E.C.R. I-9665, 9698–9701 (¶ 41, 49, 52).

46. Technically there was another route, but it was so cumbersome that in reality it was impractical.

47. The Court did not discuss any possible justifications, although Advocate General Trstenjak briefly did so. *See* ECLI:EU:C:2012:176, ¶ 54 *et seq*.

Although DVGW was not acting as the formal agent of the State, it certainly acted as a body to whom power had been effectively devolved or whose activities were legislatively blessed. In the circumstances, the conclusion that its activities had to conform to the free movement of goods provisions of the Treaty is wholly logical: functionally it had become an extension or instrument of the State. There is, however, nothing in the judgment which actually suggests that in other circumstances standardization and certification activities would be caught. In effect the German approach was acutally very similar to that taken at EU level in the 'New Approach' harmonisation instruments.[48] Products certified as conforming to the relevant standard are deemed to comply with the essential health and safety criteria demanded by the European legislation. The fact that almost all German consumers purchased copper fittings certified by DVGW was not on its own a reason for finding that the activities of DVGW were caught, rather it is evidence of the impact on market access which the certificaton requirement had.

III. *DEVELOPMENTS IN THE OTHER FREEDOMS*

For many years it has been clear that at least as far as private collective measures are concerned, the freedom of movement

48. As to which, see A Mattera, L' Arrêt, *'Cassis de Dijon': Une nouvelle approche pour la réalisation et le bon fonctionnement du marché intérieur'*, RMC 505 (1980); L.W. Gormley, *Cassis de Dijon and the Communication from the Commission*, 6 EUR. L. REV. 454 (1981); J. McMillan, *Qu'est-ce que la normalisation? Normes et règles et techniques et libre circulation des produits dans la Communauté*, RMC 93 (1985); R.H. Lauwaars, *The 'Model Directive' on Technical Harmonization*, in 1992: ONE EUROPEAN MARKET? 151 (R. Bieber et al. eds., Nomos, 1988); L.W. Gormley, *Some Reflections on the Internal Market and Free Movement of Goods*, LIEI 9,10-13 (1989/1); J. McMillan, *La "certification", la reconnaissance mutuelle et le marché unique*, RMUE 181 (1991); F. Aubry-Caillaud, *Nouvelle approche et normalisation européenne en matière de libre circulation des marchandises*, *in* LA LIBRE CIRCULATION DES MARCHANDISES NOUVELLE APPROCHE ET NORMALISATION EUROPEENNE (Pedone. 1998); J. McMillan, *La politique réglementaire communautaire pour la libre circulation des marchandises et l'approfondissement/achèvement du marché intérieur*, RDUE 229 (2010). Copper fittings were 'construction products' in respect of which no harmonized standard, European technical approval or national standard recognized at EU level within the meaning of Article 4(2) of the Construction Products Directive (Directive 89/106 (O.J. L 40/12 (1989) as amended by Reg. 1882/2003 (O.J. L 284/1) (2003)). Directive 89/106 has now been repealed by Regulation 305/2011 (O.J. L 88/5 (2011)). Accordingly, by virtue of Article 6(2) of the directive, Member States were obliged to allow such products to be placed on the market in their territory if they satisfy national provisions consistent with the Treaty until European technical specifications provided otherwise. The case fell thus to be decided solely under the free movement of goods provisions, without further regard to the directive, *Commission v. Belgium*, *supra* note 44 (¶ 69).

concerning workers, establishment, and the provision of services have to be complied with.[49] In *Angonese* the Court made it plain that this applies equally to individual measures taken by private sector employers.[50] This development is perfectly rational and was to an extent foreseen in relation to the free movement of workers in Articles 7–9 of the old Regulation 1612/68[51] (see now Articles 7–9 of Regulation 492/2011).[52] In more recent years the emphasis in the free movement of workers, the right of establishment, and the freedom to provide services has moved away from merely being concerned with non-discrimination on grounds of nationality. Thus measures which preclude or deter nationals of a Member State from leaving their country of origin in order to exercise their right to freedom of movement are an obstacle to that freedom even if they apply without regard to the nationality of the person concerned.[53] The importance of this development cannot be overestimated. With this broad approach the Court brought a principle crafted in the often highly technical context of social security cases clearly into mainstream free movement case-law. In condemning measures which prohibit, impede or render less attractive the exercise of the free movement of workers, establishment and services[54] the Court confirmed that these freedoms

49. *See supra* note 11 and accompanying text.

50. Angonese v. Cassa di Risparmio di Bolzano SpA, Case C-281/98 [2000] E.C.R. I-4139, 4173 (¶ 36), ECLI:EU:C:2000:296. This is in line with the approach that private employers cannot resurrect barriers to free movement that the Member States have been obliged to abolish: equal treatment is thus central to the freedoms (although they are not limited to equal treatment requirements).

51. O.J. English Special Edition Series I, 1968 (II) 475.

52. O.J. L 141/1 (2009). These provisions deal with equal treatment of migrant workers from other Member States: disciminatory provisions in collective or individual agreements are void (art. 7(4)); the possibility of participating in trade union activities is ensured (art. 8); and equal access to housing is guaranteed (art. 9). The use of a regulation (as opposed to a directive) for these rights ensured that the rights would be directly applicable and enforceable both *vertically* (against the public authorities) and *horizontally* (against private employers).

53. Union royale belge des sociétés de football association ASBL v. Bosman et al., Case C-415/93 [1995] E.C.R. I-4921, 5069 (¶ 96), ECLI:EU:C:1995:463; *see* Deliège v. Ligue francophone de judo et disciplines associées ASBL et al., Joined Cases C-51/96 & 191/97 [2000] E.C.R. I-2549, ECLI:EU:C:2000:199; Lehtonen et al. v.. Fédération royal belge des sociétés de basket-ball ASBL (FRBSB), Case C-176/96 [2000] E.C.R. I-2681, ECLI:EU:C:2000:201. In *Bosman*, the Court cited its earlier judgment in Maggio v. Bundesknappschaft, Case C-10/90 [1991] E.C.R. I-1119, 1139–40 (¶ 18–19) in relation to social security benefits. That latter judgment invoked case-law stretching back to 1975 in support of the widest possible use of free movement rights.

54. *See, e.g.*, Corporación Dermoesthética SA v. To Me Group Advertising Media, Case C-500/06 [2008] E.C.R. I-5785, 5826 (¶ 32), ECLI:EU:C:2008:421, and case-law cited there.

had outgrown their roots in non-discrimination. In relation to the free movement of goods nationality is in any event irrelevant.[55]

Returning to the examples that VerLoren van Themaat and the present Author gave in relation to private action, the response of the Court to attempts to thwart the exercise of free movement rights by industrial action has been very significant. The clearest analogy for evaluating collective action in the context of the free movement of goods is the judgments in relation to the freedom of establishment and the freedom to provide services respectively in *Viking*[56] and in *Laval*.[57] These cases, which have generated a host of literature,[58] most of it extremely hostile, make it plain that collective action can constitute an obstacle to the fundamental freedoms of the Treaty, and that the extent and effects of such action will influence the examination of the proportionality of the measure concerned. In *Viking*, the measure was clearly wholly excessive, as it took no account of situations in which equal or even better rights were being offered on the reflagging of vessels. In *Laval*, the Court effectively followed the line dictated by the EU's Posted Workers Directive.[59]

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55. The provisions of the TFEU on the free movement of goods benefits the goods, irrespective of the nationality of the owner, consignor, consignee, or person in possession of them. Sociaal Fonds voor de Diamantarbeiders v. SA Ch Brachfeld & Sons, Joined Cases 2 & 3/69 [1969] E.C.R. 211, 223 (¶ 24/26), ECLI:EU:C:1969:30.

56. International Transport Workers' Federation et al. v. Viking Line ABP et al., Case C-438/05 [2007] E.C.R. I-10779, ECLI:EU:C:2007:772.

57. Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, Case C-341/05 [2007] E.C.R. I-11767, ECLI:EU:C:2007:809.

58. *See, e.g.*, *VIKING*, *LAVAL* AND BEYOND (M. Freedland & J. Prassl eds., 2014), with an extensive bibliography; C. Joerges & F. Rödl, *Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in* Viking *and* Laval, 15 EURO. L. J. 1 (2009); L. Azoulai, *The Court of Justice and the Social Market Economy: the Emergence of an Ideal and the Conditions for its Realisation*, 45 COMMON MKT. L. REV. 1335 (2008); C. Barnard, *British Jobs for British Workers: the Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market*, 28 IND. L. J. 245 (2009); N. Nic Shuibhne, *Settling Dust? Reflections on the Judgments in* Viking *and* Laval, 21 EBLR 681 (2010). As to the follow-up to *Viking* and *Laval*, see U. Bernitz & N. Reich's case note on the decision of the Swedish Labour Court (Arbetsdomstolen) No. 89/09 of 2 December 2009 in *Laval*, 48 COMMON MKT. L. REV. 603 (2011). In *Viking* the case was settled and the ship was reflagged to Sweden, rather than to Estonia; Laval (by then insolvent) was awarded damages for economic loss and exemplary damages against the leading trade union involved (although the amounts awarded were substantially lower than those claimed). *See also* M. Rönnmar, *Sweden*, *in VIKING, LAVAL* AND BEYOND 241, 249–52 (M. Freedland & J. Prassl eds., Hart, 2014); M.Rönnmar, *Laval Returns to Sweden: The Final Judgment of the Swedish Labour Court* 39 INDUS. L.J. 280 (2010); B. van Leeuwen, *An illusion of Protection and an assumption of responsibility: the possibility of Swedish State liability after* Laval, 14 CAMB. YELS 453 (2011–2012).

59. European Parliament and Council Directive 96/71 O.J. L 18/1 (1997).

Weatherill refers to these judgments as "corruptions in EU internal market law—corruptions of the Court's otherwise rather good track record in striking a balance between market deregulation and protection of social, cultural and political values delivered by the Member States."[60] The real complaint appears to be that the Court's evaluation of the proportionality of the industrial action was unnuanced and insensitive to the justifications advanced, and that the Court should have been more willing to grant the national regulator a margin of discretion.[61] With great respect, it should be recalled that the Court has rightly refused to allow sectors of national law to be protected from European scrutiny on the ground that they are special or sensitive,[62] and the Court was right not to call open season for attempts to prevent people from taking advantage of the freedoms of the internal market. It had already found that maintaining industrial peace as a means of bringing a collective labour dispute to an end and thereby preventing any adverse effects on an economic sector could not constitute a reason relating to the general interest that justifies a restriction of a fundamental freedom guaranteed by the Treaty.[63] As is well-known, economic justifications will not be accepted by the Court.[64] While, as will be discussed below, there has been a degree of latitude in the face of peaceful, short-term protests, systematic use of industrial action to torpedo the exercise of fundamental freedoms will quickly be found to be excessive, particularly when protests are of a violent and aggressive nature.

These cases relating to labour disputes almost always involve a collective element, which is designed to have private market regulatory effects (ensuring compliance with the collective agreements). The collective element is also present in cases such as

60. S. Weatherill, Viking *and* Laval*: The EU Internal Market Perspective, in* VIKING, LAVAL AND BEYOND, *supra* note 58.

61. *Id*. at 35–39.

62. *E.g.*, Casati, Case 203/80 [1981] E.C.R. 2595, 2618 (¶ 27), ECLI:EU:C:1981:261; Cowan v. Trésor public, Case 186/87 [1989] E.C.R. 195, 221–22 (¶19), ECLI:EU:C:1981:261; The Society for the Protection of Unborn Children Ireland Ltd. v. Grogan et al., Case C-159/90 [1991] E.C.R. I-4685 (¶ 18–21), ECLI:EU:C:1991:378.

63. *See* Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion ("SETTG"), Case C-398/95 [1997] E.C.R. I-3091, 3121 (¶ 22–24), ECLI:EU:C:1997:282.

64. *E.g.*, Commission v. Italy, Case 7/61 [1961] E.C.R. 317, 329, ECLI:EU:C:1961:31; Commission v. Italy, Case 95/81 [1982] E.C.R. 2187, 2204 (¶ 27), ECLI:EU:C:1982:216; SETTG, *supra* note 63, at 3121 (¶ 23).

Walrave & Koch,[65] although the regulatory function there is essentially private in the judgments on sports bodies, as opposed to a proper public law regulatory function through statutory powers.[66] The action of the individual employer in *Angonese* (requiring that the language certificate issued exclusively by a regional authority at a single examination centre in Bolzano) was a specific requirement in the recruitment process: while a collective agreement authorised employers to lay down conditions and rules for recruitment competitions and selection criteria, the agreement did not itself specify any language requirement; such lingusitic problems are very much a regional issue in *Alto Adige* (South Tirol).[67] Any collective element in *Angonese* is, however, so extremely indirect and remote to say the least, that the case should not be characterised as one with a collective element. That judgment also dealt with the issue purely in terms of non-discrimination, rather than in terms of the wider scope of the fundamental freedoms. While Jarvis characterises it as a controversial judgment,[68] in reality it simply ensures that the rule of non-disdrimination must be respected in all situations governed by EU law;[69] thus private employers cannot escape from compliance with the demands of the European workplace. Any other result whould have been wholly unconscionable. In *Raccanelli* the Court confirmed its approach in *Angonese*.[70] In *Ferlini*, the Court dealt with an agreement between hospitals relating to fees, finding that the general principle of non-discrimination of nationality, now set out in Article 18 TFEU, also applied in cases where a group or organisation exercised a certain power over individuals and was in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty.[71] While the Court

65. *See supra* note 11 and accompanying text; *see also, e.g.*, *Bosman*, *Deliège*, & *Lehtonen*, *supra* note 53; Wouters et al. v. Nederlandse Orde van Advocaten, Case C-309/99, [2002] E.C.R. I-1577, 1694 (¶ 120), ECLI:EU:C:2001:390.

66. *See Royal Pharmaceutical Society*, *supra* note 39.

67. *See Angonese*, *supra*, note 50, [2000] E.C.R. I-4139, 4167 (¶ 11).

68. M. Jarvis, *in* OLIVER ON FREE MOVEMENT OF GOODS IN THE EUROPEAN UNION, *supra* note 2, at 74. Although Jarvis suggests that the judgment is confined to the free movement of workers, there is, with respect, no reason to deny its applicability in relation to the right of establishment and the freedom to provide services.

69. *See, e.g.*, *Cowan*, *supra* note 62.

70. Raccanelli v. Max Planck Gesellschaft zur Förderung der Wissenschaft eV, Case C-94/07 [2008] E.C.R. I-5939, 5954–56 (¶ 41–48), ECLI:EU:C:2008:425.

71. Ferlini v. Centre hospitalier de Luxembourg, Case C-411/98 [2000] E.C.R. I-8081, 8141, (¶ 50), ECLI:EU:C:2000:530.

did not refer to the collective element, that was certainly present, as the effect of the agreement on fees between the hospitals concerned. As with the trade union cases, the aim was the enforcement of a private collective agreement aimed at 'regulating' (or rather more accurately, 'fixing') the market.

Some of the case-law in this field appears to support the view that at least a collective element or aspect will be necessary to catch private actors, save where specific rights are conferred on individuals by EU regulations which are enforceable in both public and private sectors. In some cases a regulatory function or aspect has also been involved. *Angonese* and *Raccanellii* however, show that the Court is willing to go further in respect of enabling persons to avail themselves of the rights guaranteed by EU law.

IV. *EFFECTS ON THE FREE MOVEMENT OF GOODS*

In view of the judgments in *Viking* and *Laval* in particular, issues relating to the effects of industrial action on the free movement of goods have assumed new relevance. If industrial action can infringe the TFEU provisions on the right of establishment and the freedom to provide (and receive) services, what logical reason is there not to find that such action can hinder the free movement of goods? The principle of private actors not being allowed to in effect resurrect or create barriers to trade that the Member States have been required to abolish is as surely applicable to barriers to trade in goods as it is to barriers to trade in services.

The tendency in the free movement of goods field at European level has so far been to face the Member State with its responsibility for failure to take steps to ensure the free movement of goods, rather than to attack the collective actors as such. In the case of industrial action, the Member State concerned is under an obligation to take appropriate measures to ensure the free movement of goods,[72] and failure to do so adequately or at all is likely to lead to infringement proceedings, particularly where there has been widespread disruption and lawlessness, as the *Angry farmers* judgment well demonstrates.[73] However, in reconciling competing interests, the question is always

72. This obligation stems from the duty of loyal cooperation contained now in Article 4(3) TEU.

73. Commission v. France, Case C-265/95, [1997] E.C.R. I-6959 ('*Angry Framers*'), ECLI:EU:C:1997:595.

where the balance should be struck. While obstruction of the movement of goods clearly constitutes a hindrance to trade between Member States, there may sometimes be an acceptable justification, if the usual requirements of proportionality are observed. Thus *Schmidberger* shows that not every instance of obstruction will give rise to a right to a remedy in damages for an entity whose transport operations have been disrupted.[74] The Court recognized the importance of freedom of speech in the context of localized disruption, announced in advance as part of a legitimate right to protest about environmental issues. It was significant in this case that there were other routes available,[75] so that there was not a wholesale blockade, even if the Brenner route was the most important route.

Largely as a result of the *Angry farmers* judgment, but also against the background of years of difficulties, particularly, but not only, in France, European legislative action appeared in the form of Regulation 2679/98.[76] This regulation requires the Member States to notify the Commission of any obstacle to the free movement of goods attributable to a Member State, whether through action or inaction on its part, which occurs or threatens to occur, which may infringe Articles 34–36 TFEU and which physically or otherwise prevents, delays or diverts trade importation into, exportation from, or transit between Member States, and causes serious loss to the individuals affected, and requires immediate action to prevent any continuation, increase or intensification of the loss or disruption concerned. The regulation does not, though, affect the exercise of fundamental rights as recognized in the Member States, including the right or freedom to strike or take other actions covered by the specific industrial relations systems in Member States. Essentially, it is a notification and consultation measure, the Commission cannot simply issue a decision

74. Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich, Case C-112/00 [2003] E.C.R. I-5659, ECLI:EU:C:2003:333. As to attempts by the Austrian authorities to restrict trans-alpine lorry transit, see Commission v. Austria, Case C-320/03 [2005] E.C.R. I-9871, ECLI:EU:C:2005:684, noted by A. Schrauwen, 43 COMMON MKT. L. REV. 1447 (2006), & Commission v. Austria, Case C-28/09 [2011] E.C.R. I-13525, ECLI:EU:C:2011:854, noted by S. Enchelmaier, 50 COMMON MKT. L. REV. 183 (2013).

75. This point is, though, at odds with other later judgments in which the Court regarded the availability of other import routes as not negating the existence of a restriction of the free movement of goods. *See, e.g.*, Commission v. Austria, Case C-320/03, *supra* note 74 (¶ 67); Commission v. Austria, Case C-28/09, *supra* note 74 (¶ 116).

76. O.J. L 337/8 (1998); *see also* the Resolution of the Member States meeting within the Council of 7 December 1998, O.J. L 337/10 (1998).

ordering the Member State to take action to break or lift industrial action.

While it is clear that collective action can give rise to an obstacle to the free movement of goods, the Commission's approach would be limited to taking action against the Member State under Article 259 TFEU for failure to ensure the free movement of goods, which may or may not be linked to infringement of Article 4(3) TFEU and/or the regulation in the case of non-cooperation. Private parties would be left to seek damages in the national courts from the Member State concerned, if the circumstances were serious enough (a sufficiently serious breach), although that might well be difficult in practice.[77] This indirect direct effect of Articles 34–36 is, it is submitted, too uncertain in its outcome to be a realistic path to pursue in litigation for all except those with the deepest pockets. The Commission would not, of course, act against a trade union that had organized the action, as there would be no procedure for bringing proceedings. Any private individuals who sought to obtain redress in national courts for losses they had suffered through the collective action could, depending on the jurisdiction, be met with arguments invoking immunity from tortious liability under national law. This, however, might fall foul of the obligation on national courts to give effect to the freedoms guaranteed by the Treaty and to ensure that appropriate remedies are available. If the private individuals, finding that they obtained nothing from the trade union, then sought to obtain redress from the Member State as compensation for the failure to maintain public order in relation to ensuring free movement of goods, the field day for lawyers would be evident. One thing seems certain, however, that any prospect of individual strikers being sued would be wholly undesirable on policy grounds and make no legal sense at all, just as nobody suggests that an individual consumer who declines to buy products from another Member State should face the prospect of civil action by an importer or vendor of those products. Such an attitude, while it may have an effect on the sales of imported products, is simply too remote from any form of societal barrier through the action of the State or those having collective or regulatory influence on economic activities.

77. *See* K. Apps, *Damages Claims Against Trade Unions After* Viking *And* Laval, 34 EUR. L. REV. 141 (2009).

Krenn,[78] building on the analysis of Körber,[79] has recently stimulatingly argued in favour of the horizontal direct effect of Article 34 TFEU, arguing that private regulation (as opposed to State regulation) is becoming more important and is encountered more frequently, either in cooperation with the State or independently of it. Thus the divide between public and private regulation is becoming more blurred.[80] On this basis, he sees the logic of the argument that the open drafting of Articles 34–36 TFEU, the importance of the contribution of the free movement of goods to the achievement of the internal market, the threat to the unity of that market through privately-errected barriers, lead inexcorably to the conclusion that Articles 34–36 TFEU must be capable of horizontal direct effect. They must be invokable by one private party against another.

The arguments against this based on interference with the role of EU competiton law, are, he notes, essentially twofold: (i) conduct which might not be caught because of the *de minimis* test in competiton law might be caught under free movement of goods case-law; (ii) given the existence of competiton law for attacking anti-competitve practices capable of hindering inter-State trade, why would one need to have horizontal direct effect in the free movement of goods applied cumulatively? He rightly notes, however, that such arguments are not undisputed, and that while the Court has spoken of the roles of the competition law provisions and the free movement of goods provisions being discrete, examples can be found of their being applied at the same time, just as the free movement of persons and services was considered in *Bosman*, in which the Court also examined the problem through the lens of competition law.[81] Krenn also observes that the Court has stated that private parties could rely on the Treaty-based justifications for barriers to trade contained now in Article 36 TFEU;[82] presumably the same would apply to the case-law-based justifications (although they are not available to disciminatory measures, with the sole and perhaps understandable exception of environmental protection measures). This conclusion by the Court always seems, with respect, rather strange, as at least some

78. C. Krenn, *A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods*, 49 COMMON MKT. L. REV. 177 (2012).

79. T. KÖRBER, GRUNDFREIHEITEN UND PRIVATRECHT 716 (2004).

80. *See* Krenn, *supra* note 78, at 201–02.

81. *See id.* at 205–06.

82. *See id.* at 206–07.

of these public interest justifications are more appropriate in relation to State action than to private action (public policy and public security, for example).[83] As has been suggested above, the indirect route of seeking damages against the State for failure to prevent disruption to the free movement of goods is not a sure defence and weapon!

Krenn tries to square the circle by proposing a form of *de minimis* test for the conduct of private individuals in the context of Articles 34–36.[84] But ultimately the Court is rightly still adamant that *de minimis* has no place in Articles 30–36 TFEU. This applies just as much to Article 34 TFEU[85] as to the prohibition of charges having equivalent effect to customs duties.[86] As is well-known, Advocate General Tesauro in *Hünermund* was unconvinced of the feasibility of a *de minimis* test: it would be a 'very difficult, if not downright impossible exercise: quite apart from anything else, proving the degree of hypothetical effects would be a *probation diabolica*.'[87] The contrary view was most famously put by Advocate General Jacobs in *Leclerc-Siplec*.[88] Mr. Jacobs (as he then was) pleaded for a *de minimis* approach for equally-applicable measures as an alternative to the widely discredited *Keck* approach to selling arrangements (he felt though that *de minimis* would be inappropriate to deal with overtly discriminatory measures). However, this rapidly falls foul of the thin end of the wedge argument: where should the line be drawn? Several

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83. In the same sense, K. Mortelmans in his annotation of *Bosman*, *in* SOCIAAL-ECONOMISCHE WETGEVING 141–49 (1996).

84. *See* Krenn, *supra* note 78, at 209–12; *see also* M.S. Jansson & H. Kalimo, De Minimis *meets Market Access: Transformations in the Substance – and the Syntax – of EU Free Movement Law?*, 51 COMMON MKT. L. REV. 523 (2014).

85. *E.g.*, Prantl, Case 16/83 [1984] E.C.R. 1299, 1326, ¶ 20, ECLI:EU:C:1984:101; Van der Haar et al., Joined Cases 177 & 178/82 [1984] E.C.R. 1797, ¶ 13, ECLI:EU:C:1984:144; Commission v. France, Case 269/83 [1985] E.C.R. 837, ¶ 10, ECLI:EU:C:1985:115; Commission v. Italy, Case 103/84 [1986] E.C.R. 1759, ¶ 18, ECLI:EU:C:1986:229; Radlberger Getränkegesellschaft mbH & Co et al. v. Land Baden-Württemberg, Case C-309/02 [2004] E.C.R. I-11763, ¶ 68, ECLI:EU:C:2004:799. *See generally* Corsica Ferries France v. Direction générale des douanes françaises, Case C-49/89 [1989] E.C.R. 4441, ¶ 8, ECLI:EU:C:1989:649.

86. *E.g.*, Commission v. Italy, Case 24/68 [1969] E.C.R. 193, ¶ 9, ECLI:EU:C:1969:29; Commission v. Greece, Case 229/87 [1988] E.C.R. 6347, ¶ 19, ECLI:EU:C:1988:501; Carbonati Apuani Srl v. Comune di Carrara, Case C-72/03 [2004] E.C.R. I-8027, ¶ 20, ECLI:EU:C:2004:506 .

87. Hünermund v. Landesapothekerkammer Baden-Württemberg, Case C-292/92 [1993] E.C.R. I-6787, ¶ 17 of his Opinion, ECLI:EU:C:1993:863.

88. Société d'importation Édouard Leclerc v. TFI Publicité SA et al., Case C-412/93 [1995] E.C.R. I-179, ¶¶ 42–49 of his Opinion, ECLI:EU:C:1994:393.

criteria might come to mind: a percentage of GDP; a percentage of the national market (and what would be the relevant market); the value of a day's imports, or the amount of the daily penalty for non-compliance with an ECJ judgment or failure to implement a directive adequately or at all.[89] Unlike in competition law, where a *de minimis* threshold is well-known,[90] in the free movement of goods cases it would be wholly unworkable and arbitrary.

That said, the Court's approach in the Use cases appears to have given some encouragement to those who feel that a *de minimis* approach in Article 34 TFEU would be a good idea. This comes from the Court's observation in *Commission v. Italy* that a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State.'[91] This is not, however, an introduction of a *de minimis* threshold by the back door. In the reasoning of the Court this sentence merely demonstrates that the effect is not hypothetical or so remote as to be unrealistic. If there is an obstacle to the use of a product, in the form of a prohibition or restriction, the (virtual) non-existence of a market for it is scarcely surprising. In *Mickelson & Roos* (which was decided at Chamber level, after the Grand Chamber's judgment in *Commission v. Italy*) the Court referred to the national regulations for the designation of the navigable waters and waterways having "the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use." Enchelmaier regards this as accepting that minor restrictions on use would fall outside the scope of Article 34 TFEU.[92] He gives as probable examples: speed limits for cars; a ban on commercial flights at night; a prohibition on using hand-held

89. See the European Commission's Communication: Updating of Data Used to Calculate Lump Sum and Penalty Payments to be Proposed by the Commission to the Court of Justice in Infringement Proceeding, C (2014) 6767 final (Sept. 17, 2014).

90. See the Commission's latest *de minimis* notice O.J. C 291/1 (2014) and the Commission's Staff Working Document (SWD 198 (2014)).

91. Commission v. Italy, Case C-110/95 [2009] E.C.R. I-2019, ¶ 56.

92. S. Enchelmaier, *supra* note 5, at 191–92. He sees restrictions on use being caught if (i) they constitute total bans on use; or (ii) they prevent goods being employed for the 'specific and inherent purposes for which they were intended, or (iii) they 'greatly restrict their use.' See making a similar analysis with some similar and some other examples, N. de Sadeleer, '*L'examen au régard de l'article 28 CE, des règles régissant l'utilisation de certains produits*', JDE 247, 248 (2009) and 2 EJCL 231, 240 (2012). Enchelmaier regards these last two criteria as not being notable for their precision.

mobile phones while driving a motor vehicle; bans on minors being served alcohol in restaurants or using ultra-violet sun-beds, and a ban on the use of mobile phones in hospitals. But he rightly acknowledges that such examples would be regarded as having a too uncertain or indirect effect to be regarded as hindering trade between Member States. Even if, which is unlikely, they were not to be so regarded, it is submitted that various justifications (such as road safety, environmental/health protection and avoiding threats to the integrity of hospital equipment) would be easily available to ensure that such measures would not be regarded as prohibited.

While there have indeed been a handful of cases in which the Court has regarded the measure concerned as being too remote or the effect too uncertain or indirect[93]—a way of saying that the integrationist merit was very thin indeed—these are very rare

93. Peralta, Case C-379/92 [1994] E.C.R. I-3453, ¶ 24, ECLI:EU:C:1994:296 (*citing* Krantz v. Ontvanger der Directe Belastingen, Case C-69/88 [1990] E.C.R. I-583, ¶ 11, ECLI:EU:C:1990:97; CMC Motorradcenter v. Pelin Baskiciogullari, Case C-93/92 [1993] E.C.R. I-5009, ¶ 12, ECLI:EU:C:1993:838). In *Peralta*, the Court noted that the measure was equally applicable and was not designed to regulate trade in goods between Member States. The first of these points is not a matter which would *per se* take a measure outside the definition of measures having equivalent effect (as is shown by e.g. *Cassis de Dijon* (Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, Case 120/78 [1979] E.C.R. 649, ECLI:EU:C:1979:42), and the second point is, as has been demonstrated above, manifestly irrelevant to the analysis. The final point, that the restrictive effects the measure might have on the free movement of goods were too uncertain or indirect, has rather more weight. *See* Centro Servizi Spediporto, Case C-96/94 [1995] E.C.R. I-2883, ¶ 41, ECLI:EU:C:1995:308; DIP SpA et al. v. Commune di Bassano del Grappa et al., Joined Cases C-140–142/94 [1995] E.C.R. I-3257, ¶ 29, ECLI:EU:C:1995:330; Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di Genova Coop. Arl et al., Case C-266/96 [1998] E.C.R. I-3949, ¶ 31, ECLI:EU:C:1998:306. Another example of this can be seen in Blesgen v. Belgium, Case 75/81 [1982] E.C.R. 1211, ¶ 9–10, ECLI:EU:C:1982:117, in which, having expressly noted that even if a measure did not directly affect imports, it might, according to the circumstances, affect prospects for importing products from other Member States, the Court concluded that the restrictions on the sale of strong spirits in places open to the public made no distinction whatsoever based on the nature or origin of the products; the measure, the Court stated, had in fact no connection with importation of the products and for that reason was not of such a nature as to impede trade between Member States. In relation to exports, in ED Srl v. Italo Fenocchio, Case C-412/97 [1999] E.C.R. I-3845, ¶ 11, ECLI:EU:C:1999:324, the Court found that different treatment of creditors under Article 633 of the Italian Civil Code according to whether the debtor was resident in or outside Italy was too uncertain or indirect for the provision to be regarded as liable to hinder trade between Member States. But in that case, it could equally well be argued that under the criterion in P.B. Groenveld BV v. Produktschap voor Vee en Vlees, Case 15/79 [1979] E.C.R. 3409, ¶ 7, ECLI:EU:C:1979:253, there was no particular advantage for national production or for the domestic Italian market. While the Court cited that criterion (albeit referring to a later judgment), it was, with respect, misguided to do so, because the *Groenveld* criterion was evolved in the context of measures applicable irrespective of the destination of the products, not for different treatment.

occurrences indeed. These judgments are usually cited as examples of a remoteness test: they are *not* examples of a *de minimis* test.[94] Remoteness is *not* a form of *de minimis*. In its celebrated judgment in *Bluhme*,[95] which dealt with a prohibition on importing onto the island of Lesø bees other than the Lesø brown bee, the Court rejected a remoteness argument. This case, like others, demonstrates that even if the measure covers only a small part of national territory, it can still fall foul of Article 34 TFEU.[96] Thus there is no *de minimis* approach in relation to the internal market, either in the economic extent of the measure or in its territorial scope, or in any other aspect. Krenn's proposal for a *de minimis* threshold in relation to conduct by individuals, understandably in view of the structure of his argument, chooses the effect on the internal market rather than the mere effect on the individual's right derived from Articles 30—36,[97] but utimately his threshold would offer little solace to an individual litigant, even if a national judge were to agree to refer each claim to the Court of Justice under Article 267 TFEU for a preliminary ruling.

CONCLUSION

Perhaps the better solution is to regard actions by individuals as being too remote from the realities of intra-Union trade, but action that takes a collective form of pressure, or incitation, or action against foreign goods as being caught, just as an act by a private market regulator is caught. Thus regard would be had to the circumstances in the round, rather than to pure theoretical dogma. This approach would avoid the slippery slope of *de minimis*. In line with the Court of Justice's steadfast refusal to accept purely economic justifications for

94. In Corsa Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di Genova Coop. Arl, Case C-266/96 [1998] E.C.R. I-3949, 3392 (¶ 30), the Court noted that the effects of the mooring services charge concerned persons as well as goods, but if only goods were involved the costs of the mooring services were very small indeed as an additional cost for transported products (approximately 0.05%). But here too, (at ¶ 31) the Court actually adopted a *Peralta* approach (effects too uncertain and indirect),The charge was for the mooring services offered by exclusive concessionnaires.

95. *Bluhme*, Case C-67/97 [1998] E.C.R. I-8033, 8063 (¶ 22) ECLI:EU:C:1998:584.

96. *See* Aragonesa de Publicidad Exterior SA et al. v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña, Joined Cases C-1/90 & 176/90 [1991] E.C.R. I-4151, 4186 (¶ 24) ECLI:EU:C:1991:327; Ligur Carni Srl et al. v. Unità Sanitaria Locale No XV di Genova et al., Joined Cases C-277/91, C-318/91 & C-319/91 [1993] E.C.R. I-6621, 6661 (¶ 37) ECLI:EU:C:1993:927; *see* Carbonati Apuani Srl v. Comune di Carrara, Case C-72/03 [2004] E.C.R. I-8027, 8060 (¶ 20) ECLI:EU:C:2004:506.

97. *See* Krenn, *supra* note 78, at 211.

barriers to trade,[98] economic arguments would not be available. It is difficult to see how justifications other than those expressly recognized in the TFEU could be advanced, as a boycott in particular is inherently discriminatory. While the freedom of expression of individuals is recognised in EU law as a ground of justification, it can be argued that it is now essentially a Treaty-based right (given the importance of fundamental rights in the post-Lisbon Treaties), as opposed to being (as initially) a case-law-based right, so that it would remain available to discriminatory action, even though the case-law-based justifications are not available in such cases. Fundamental rights do indeed have a special status in EU law, but (as *Viking* and *Laval* show in the context of establishment and services) that does not mean that the freedom of expression will always trump free movement rights, as the freedom of expression is a relative right, not an absolute right,[99] no matter how much the purveyors of alleged social interests find the consequences of a single internal market difficult to accept. Accordingly, a pragmatic approach may be more appropriate than a wholly theoretical one! It is submitted that private individuals should always have the right to their views and to express them, but that collective action should certainly be open to being tested before national courts. If a justification known to EU law can, in all the circumstances, be prayed in aid, if the action is proportionate, then the appropriate conclusion can be drawn. But a dogmatic standpoint is frankly not what the Court is there to deliver: it is there to solve concrete problems, and from those solutions principles can be distilled. The Court tries to be consistent and coherent, and does not always come anywhere near succeeding, but it is essentially a pragmatic body. Its solutions, and where it draws the line, may not always be convincing, but doctrine for the sake of

98. *E.g.*, Commission v. Italy, Case 7/61 [1961] E.C.R. 317, 329, ECLI:EU:C:1961:31; Commission v. Italy, Case 95/81 [1982] E.C.R. 2187, 2204 (¶ 27) ECLI:EU:C:1982:216; Duphar BV v. Netherlands, Case 238/82 [1984] E.C.R. 523, 542 (¶ 23) ECLI:EU:C:1984:45; Campus Oil Ltd. v. Minister for Industry and Energy, Case 72/83 [1984] E.C.R. 2727, 2752 (¶ 35) ECLI:EU:C:1984:256, in which the Court accepted (¶ 36) that in the light of the seriousness of the consequences of an interruption in supplies of petroleum products could have for a country's existence, the aim of ensuring a minimum supply of such products at all times was to be regarded as transcending purely economic considerations and thus as capable of falling within the concept of public security); Commission v. Ireland, Case 288/83 [1985] E.C.R. 1761, 1776 (¶ 28) ECLI:EU:C:1985:251; Commission v. France, Case C-265/95 [1997] E.C.R. I-6959, 7004 (¶ 62); Deutscher Apothekerverband eV v. 0800 DocMorris NV et al., Case C-322/01 [2003] E.C.R. I-14887, 15001 (¶ 122) ECLI:EU:C:2003:664.

99. *See, e.g.*, Schmidberger, *supra* note 74, ¶¶ 79–80.

doctrine does not always offer a sensible outcome which would command consensus among litigants, or even among the general public. The analysis offered here may, it is to be hoped, provide a prod towards continued pragmatism.

VALEDICTORY

Peter-Jan Kuijper has been a most distinguished colleague, both in academic life and at the Commission. It is a real pleasure to write for him, albeit on an apparently different aspect of EU law than his own specialities of external relations and international trade law. But the struggle against barriers to trade is as important in EU law as it is in WTO law, and the one can certainly learn from the other in many ways. May your great contribution to our discipline and to European and international trade law in particular long continue: emeritus status simply gives you the freedom to write more, and, as Gordon Slynn once put it: as an emeritus professor, you don't teach, you lecture. *Ad multos annos!*