

**EUROPEAN NETWORK ON
FREE MOVEMENT OF WORKERS**

THEMATIC REPORT

**Breaches of Union law by Private Parties:
The Consequences of such breaches and the circumstances in which they
may give rise to State responsibility**

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1. Introduction

- 1.1 The European Network on the Free Movement of Workers has been requested to examine the circumstances in which Union law may be applied directly to private individuals or entities and the consequence (if any) of any breaches of Union law by private parties or private entities.

- 1.2 This paper will first outline the differentiated application of Union law to private and public parties as reflected in the case-law of the Court of Justice. It will then examine the situations in which the Court has been willing to apply provisions of Union law directly to private individuals and undertakings. Finally, the paper will analyse the circumstances and extent to which Member States may be considered responsible for the decisions and acts of private individuals or entities.

2. Executive Summary

- 2.1 The EU Treaties are international instruments that are essentially addressed to Member States and are binding upon Member States. Consequently, primary responsibility for the application of Union law, as well as accountability for breaches of Union law, rests with Member States.
- 2.2 However, through its case-law the Court of Justice has progressively expanded the scope *ratione personae* of the Treaties and Union secondary legislation. An early and significant step was to increase the obligation to give effect to Union law, beyond Member States, to include all organs of state, regional and local authorities and public entities.¹ Accountability was further enhanced by permitting individuals to rely on provisions of EU law that were sufficiently clear and precise, directly against entities that may be qualified as “emanations of the state”.² In addition, the doctrine of supremacy and state liability each contributed to enhancing the effectiveness and enforcement of Union law in the domestic legal orders of the Member States.
- 2.3 The direct application of Union law to private entities is, however, more limited.³ As a rule, the primary means of ensuring that private parties are subject to Union law is through its full and effective implementation into domestic law. In addition the Court has developed the doctrine of harmonious interpretation to ensure that national law is interpreted insofar as possible in a matter that is in conformity with Union law.
- 2.4 Nevertheless, in a variety of circumstances, the Court has been willing to apply Union law directly to private parties even in the absence of national implementing measures.⁴ Such circumstances include (a) where the nature of the measure is such that private individuals may be regarded as having an interest in its application, for example, in relation to observance of the general principle of equality and non discrimination (b) where the application of Union law is necessary to ensure the effective functioning of the internal market and (c) where a private entity is engaging in activities that have a public law character or is under the decisive control of a Member State or its public authorities.

¹Case 152/84 *Marshall* [1986] ECR 723; Case 222/84 *Johnston* [1986] ECR 1651 para 53; Case 103/88 *Costanzo* [1989] ECR 1839; C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, para 43, and Case C-243/09, *Günter Fuß v. Stadt Halle* [2010] ECR I-9849.

² Cases 152/84 *Marshall* [1986] ECR 723; Case 222/84, *Johnston*, [1986] ECR 1651, and Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

³ Case 152/84 *Marshall* [1986] ECR 723, para 48. Here, the Court held that directives can only be relied upon directly against the State. For recent discussion on direct application of Union law to private entities, see Opinion of Advocate General Trstenjak in Case C-171/11 *Fra.bo SpA*, 28 March 2012, not yet reported, paras. 29 to 35.

⁴ Case 36/74 *Walrave v. Union Cycliste Internationale* [1974] ECR 1405; Case C-415/93 *Bosman* [1995] ECR I-4921; Case C-281/98 *Angonese v. Cassa di Risparmio di Bolzano* [2000] ECR I-4139; Case C-309/99 *Wouters and Others* [2002] ECR I-1577; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767 and Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line'* [2007] ECR I-10779; C-94/07 *Raccanelli* [2008] ECR I-5939, and Case C-171/11 *Fra.bo SpA*, judgment of 12 July 2012, not yet reported.

- 2.5 Where a private individual or entity breaches directly applicable Union law, it is typically that private entity which will be liable for any resulting loss or damage. However, the Court has recognised that there are circumstances in which breaches of Union law by private parties may be attributed to Member States. Such circumstances include where the private entity is carrying out a special public function and is under the decisive control of Member States.⁵ Decisive control over an undertaking may be deduced from a range of different factors. A significant indicator, for example, is whether, according to its governing statute, a private entity is obliged to comply with directions issued by State authorities. Control may also be inferred where public authorities enjoy *de facto* or indirect influence over a particular entity, for example, where the State enjoys effective control over of an entity by virtue of its rights as a majority or sole shareholder or where the State has the power to appoint or remove the entity's governing officers. Each case is considered individually on the basis of its own particular facts.
- 2.6 The acts of private individuals may also give rise to State liability where the measures constitute statements addressed to persons who can reasonably suppose, in the given context, that the statements are authorised and reflect the position of the State.
- 2.7 In addition, the Treaty contains specific obligations on Member States in relation to entities that are conferred with special or exclusive rights for the purpose of carrying out particular functions of a public character. Article 106(1) TFEU prohibits Member States from enacting or maintaining in force, as regards such entities, any measure contrary to the rules contained in the Treaties, including (but without limitation) any measure contrary to the prohibition on discrimination on grounds of nationality (Article 18 TFEU) or contrary to competition rules (Articles 101 to 109 TFEU). It follows from Article 106(1) TFEU that if a private entity that is granted special or exclusive rights operates in a manner that is in breach of Union law, and such breach may be ascribed to measures adopted by a Member State, then that Member State may itself be in breach of Article 106 TFEU. By derogation to this rule, however, a Member State will not be in breach of Union law if it is established that the entity is performing a service of general economic interest and that compliance with Treaty rules would obstruct it from performing the service in question.⁶
- 2.8 Finally, breaches of Union law by private entities may be attributed to Member States where the very existence and nature of the breach is such that it is indicative of a Member State's failure to give full and proper effect to Union law in its national legal order.⁷

⁵ Case 249/81 *Commisson v. Ireland* [1982] ECR 4005 and Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

⁶ Article 106(2) TFEU.

⁷ Case C-265/95 *Commission v. France* [1997] ECR I-6959.

3 The application of Union law to private and public entities

- 3.1 The EU Treaties are international instruments that are negotiated and concluded by Member States. Their provisions are essentially addressed to Member States and binding on Member States. Consequently, the obligation to ensure the effective implementation of Union law primarily rests with Member States.⁸ Nevertheless, the Court of Justice of the European Union, recognising that the EU constitutes a “new legal order” of international law,⁹ has gradually expanded the scope *ratione personae* of the Union Treaties.
- 3.2 In particular, in order to enhance the effectiveness of Union law, the Court has provided an expansive interpretation as regards the parties and entities responsible for ensuring respect of the Union Treaties. The Court has consistently held that the obligation to apply and give full effect to Union Treaties and EU secondary legislation is not confined to Member States, but extends to all organs of State, regional authorities and public bodies.¹⁰
- 3.3 The principle of Supremacy of Union law in combination with the doctrine of “Direct effect” significantly enhanced the applicability and enforceability of Union law in the Member States. Individuals could invoke ‘supreme’ Union law directly against Member States to override conflicting provisions of national law.¹¹ Moreover, in its subsequent case-law, the Court of Justice emphasised that Union law may be invoked directly not only against Member States but against any “emanation of the state”¹² including any entity, whatever its legal form, which pursuant to a State measure is responsible for providing a public service under the control of the State and for that purpose has been conferred with special powers.¹³ Even where a provision was not directly effective, it is settled case-law that national law must be read insofar as possible, in a manner that is in conformity with Union law.¹⁴ Moreover, the Court has been willing to apply direct

⁸ *Pierre Pescatore* “Public and Private Aspects of European Community Competition Law”, *Fordham International Law Journal* Volume 10, Issue 3, 1986. At p. 383. In his Opinion in Case 26/62 *Van Gend & Loos* [1963] ECR I, at p.21 Advocate General Roemer observed that “large parts of the Treaty clearly contain only obligations of Member States”.

⁹ Case 26/62 *Van Gend & Loos* [1963] ECR I.

¹⁰ Cases 152/84 *Marshall* [1986] ECR 723; Case 222/84 *Johnston* [1986] ECR 1651, para 53; Case 103/88 *Costanzo* [1989] ECR 1839; C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, para 43, and Case C-243/09 *Günter Fuß v. Stadt Halle* [2010] ECR I-9849.

¹¹ Case 26/62 *Van Gend & Loos* [1963] ECR I

¹² Cases 152/84, *Marshall* [1986] ECR 723, para 49. Tax authorities (Case C-221/88 *ECSC v. Acciaierie e Ferriere Busseni (in liquidation)* [1990] ECR I-495), local or regional authorities (Case 103/88 *Fratelli Costanzo v. Comune di Milano* [1989] ECR 1839), independent public authorities (Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 and *Foster v. British Gas*, para 19).

¹³ Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313 and Case C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, 24 January 2012, not yet reported, para 38.

¹⁴ Case 14/83 *Van Colson v. Land Nordrhein-Westfalen* [1984] ECR 1891; Case C-106/89 *Marleasing* [1990] ECR I-4135 and Opinion of Advocate General Saggio in Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941. For recent consideration of indirect effect by the Grand Chamber, see: Case C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, 24 January 2012, not yet reported, para 38.

effect, even if such application could have an adverse impact on the rights of third parties (public or private).¹⁵

- 3.4 A further step in reinforcing Union law obligations was to ensure that breaches of Union law could give rise to state liability.¹⁶ In *Francovich*, the Court held that a Member State may be held liable for any sufficiently serious breach of provisions of Union law which intended to confer rights on individuals provided there was a causal connection between the breach committed and the loss suffered. Moreover, reparation must be available regardless of which particular public body or entity is responsible for a particular breach.¹⁷
- 3.5 Thus through the development of the doctrines of supremacy, direct effect and state liability, the Court of Justice has constructed a comprehensive system for ensuring the correct application and enforcement of Union law in the Member States.
- 3.6 However, the direct application of Union law to private entities is more limited. In the absence of implementing measures, it is exceptional for Union law (other than Regulations which are by definition directly applicable) to be applied directly to private entities. Thus for example, the Court of Justice has consistently held that directives are not capable of having horizontal direct effect.¹⁸ Provisions of unimplemented or incorrectly implemented directives cannot be invoked directly against private entities (with the possible exception where such directives give expression to existing general principles of Union law).¹⁹ Equally, the imposition of responsibility and liability for breaches of Union law is typically confined to the actions or defaults committed by Member States and public entities that may be regarded as emanations of the State.
- 3.7 The fact that clear and precise provisions of improperly or unimplemented directives are not capable of being invoked directly against private law entities is susceptible to lead to results that may be considered arbitrary. A public sector employee, for example, will have more remedies at his or her disposal compared with his or her private sector counterpart with respect of a comparable breach of Union law.²⁰

¹⁵ Case C-201/02 *Wells* [2004] ECR I-723, para 57. See also the Opinion of Advocate General Ruiz-Jarabo Colomer (no.2, 27 April 2004) in *Pfeiffer and Others*, para. 41

¹⁶ Joined Cases C-6 & 9/90 *Francovich and Others* [1991] ECR I-5357

¹⁷ C-302/97 *Konle* [1999] ECR I-3099, para 62, and Case C-429/09 *Günter Fuß v. Stadt Halle* [2010] ECR I-2167, para 46. In *Fuß* the Court applied State liability directly to breach by the fire service of a municipal authority.

¹⁸ Case 152/84 *Marshall* [1986] ECR 723, para 48; Case C-106/89 *Marleasing* [1990] ECR I-4135, para 6; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, para 20; Case C-201/02 *Wells* [2004] ECR I-723, para 56; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paras. 108 and 109 and Case C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, 24 January 2012, not yet reported, para 37. See also the Opinion of Advocate General Ruiz-Jarabo Colomer (no.2, 27 April 2004) in *Pfeiffer and Others*.

¹⁹ Case C-144/04 *Mangold* [2005] ECR I-9981 and Case C-555/07 *Küçükdeveci* [2010] ECR I-365. This is considered further in Section 4(a) of this paper.

²⁰ However, the Court of Justice has sought to attenuate the difference by developing the principle of harmonious interpretation or indirect effect, the doctrine of incidental direct affect and State liability. For consideration on the difference in approach to remedies between private and public sector employees, see J.

- 3.8 However, the difference in treatment between public and private law entities is often justified on the grounds that their situation is not comparable. Private entities, by their nature, are not generally entrusted with implementing, regulating, administering or adjudicating rights under Union law. It is argued that they therefore ought not to be held liable for errors arising from such activities. By contrast, it may appear legitimate to “prevent the State from taking advantage of its own failure to comply with Union law”²¹ and to hold a public body accountable for a Member State’s breach of its obligations under the Treaties.
- 3.9 Dougan has observed that this position rests on a certain fiction concerning the extent to which an autonomous public body may in fact be considered responsible for failures in the implementation of Union law.²² Indeed, the mere fact that an entity is public in character does not necessarily mean that in practice it will have any greater influence over the method and timing of the transposition of EU law into the national legal order. Consequently, a public entity may not be any more at fault for the legislature’s late or improper implementation of a Directive than an entity governed by private law.
- 3.10 Nevertheless, it is arguable that permitting directives to be applied directly to all public entities serves to enhance the effectiveness of Union law. Public bodies typically enjoy a degree of autonomy in the performance of their public functions.²³ Extending the doctrine of direct effect to all emanations of the State and ensuring the availability of damages for breach of Union law by any public entity incentivises the exercise of any discretionary powers in a manner that respects Union law. Moreover, the extension of direct effect to all public entities also assists legal certainty and increases the range of remedies available to individuals.²⁴
- 3.11 As a general rule, the primary means of making Union law binding on private entities is through the correct implementation of Union law in the domestic legal order. If Union law is properly implemented it will entail the adoption of clear and binding measures that give effect to principles and objectives laid down in the EU Treaties and secondary law. Member States are afforded a certain degree of autonomy in the implementation of Union law. However, such autonomy is subject to compliance with principles of effectiveness and equivalence.²⁵ Full and effective implementation requires both clear and enforceable rules as well as access to remedies for breaches of such rules in the

Tomkin, Case-note on C-243/09 *Günter Fuß v. Stadt Halle* [2010] ECR I-9849 and Case C-429/09 *Günter Fuß v. Stadt Halle* [2010] ECR I-2167, CMLR, Vol. 49, August 2012.

²¹ Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, para 17. “It is necessary to prevent the State from taking advantage of its own failure to comply with Community law.” See also Case C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, 24 January 2012, not yet reported, para 37.

²² See Dougan, *National Remedies before the Court of Justice Issues of harmonisation and differentiation* (Hart, 2004), pp. 253-255.

²³ See discussion on this point by Advocate General Maduro in his Opinion in Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union, ‘Viking Line’* [2007] ECR I-10779, at para 41.

²⁴ See Dougan, *National Remedies before the Court of Justice Issues of harmonisation and differentiation* (Hart, 2004), p. 255.

²⁵ Case C-456/08 *Commission v. Ireland* [2010] ECR I-859 and Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213.

domestic legal order²⁶ – regardless of whether the breach is committed by a private or public entity. Indeed, systematic breaches of Union law by private entities may be indicative that a Member State has failed in its obligations to implement or enforce Union law effectively in its national legal order.²⁷

3.12 Notwithstanding the general rule, there are circumstances in which the Court of Justice has considered it appropriate for Union law to be applied directly to private individuals or entities, even in the absence of any implementing measures by Member States. Such circumstances include:

- (a) Where the substance of a Union law provision contains obligations in relation to which individuals may be regarded as having particular interest, for example, where they constitute or give effect to general principles of Union law.
- (b) Where a particular non-state measure may hinder the effective functioning of the internal market.
- (c) Where private entities are carrying out functions on behalf and under the control of a Member State, or which may be considered public in character.

3.13 These circumstances are not mutually exclusive and in fact frequently overlap. Each circumstance will be considered in turn.

4 Applying Union law directly to private entities

(a) *Where the substance of Union law provision concerns obligations in relation to which individuals may be regarded as having particular interest, for example, where they constitute or give effect to general principles of Union law*

4.1 The Court of Justice has been willing to apply provisions of the Treaty directly to private parties where they concern an obligation in respect of which individuals are considered to have a particular interest. It is apparent from the case-law of the Court that one such obligation is compliance with the general principles of Union law, and in particular, the principle of equality and the prohibition of discrimination.²⁸

4.2 In the leading case of *Defrenne v. Sabena Airlines*²⁹ an air stewardess claimed that she was paid less than her male colleagues even though their work was identical. Ms Defrenne claimed that her private sector employer was thus in breach of what is now Article 157

²⁶ See Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, para 5. See also Case C-268/06 *Impact* [2008] ECR I-2483; Case C-445/06 *Danske Slagterier* ECR I-2119; Joined Cases C-317-320/08, *Alassini and Others* [2010] ECR 2213, paras. 47 to 49.

²⁷ Case C-265/95 *Commission v. France* [1997] ECR I-6959 and Case C-494/01 *Commission v. Ireland* [2005] ECR I-3331.

²⁸ Case 43/75 *Defrenne* (no.2) [1976] ECR 455; Case C-144/04 *Mangold* [2005] ECR I-9981, and Case C-555/07 *Küçükdeveci* [2010] ECR I-365.

²⁹ Case 43/75 *Defrenne* (no.2) [1976] ECR 455.

TFEU. The Court agreed, emphasising that the fact that the provisions of the Treaty are formally addressed to Member States did not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.³⁰

4.3 The Court held that the right to equal pay for equal work enshrined in what is now Article 157 TFEU is directly applicable and may give rise to individual rights which the Courts must protect. The Court further emphasised that “*The prohibition on discrimination between men and women applies not only to the action of public authorities but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals*”³¹

4.4 Similarly in the case of *Angonese*³² an individual sought to rely on an EU Treaty provision (Article 45 TFEU) directly against a prospective private sector employer. Mr Angonese sought to challenge conditions for recruitment imposed by a private undertaking on the grounds that they infringed the prohibition on discrimination against workers enshrined in what is now Article 45 TFEU. Pursuant to a national collective agreement for savings banks, the employer required candidates seeking positions in the (primarily German-speaking) Italian province of Bolzano to be in possession of a language certificate attesting bi-lingualism in German and Italian. Such certificate could only be issued by public authorities of Bolzano upon successful completion of an examination that could only have been taken in that province.

4.5 In its judgment the Court recalled that the principle of non-discrimination enshrined in what is now Article 45 TFEU is drafted in general terms and is not specifically addressed to the Member States.³³ Referring to its judgment in *Defrenne*, the Court recalled that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual *who has an interest in compliance with the relevant obligation*.³⁴ The Court emphasised that the Treaty prohibition of discrimination was mandatory in nature and applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals.³⁵ The Court ruled that such considerations apply *a fortiori* in relation to Article 45 TFEU as it lays down a fundamental freedom and constitutes a specific application of the general prohibition of discrimination laid down in (what is now) Article 18 TFEU.³⁶

4.6 This approach was subsequently confirmed in the case of *Raccanelli*,³⁷ where the Court emphasised that Article 45 TFEU lays down a fundamental freedom which constitutes a

³⁰ *Ibid.*, para 31.

³¹ *Ibid.*, para 39.

³² Case C-281/98 *Angonese v. Cassa di Risparmio di Bolzano* [2000] ECR I-4139.

³³ *Ibid.*, para 30.

³⁴ *Ibid.*, para 34.

³⁵ *Ibid.*, para 34.

³⁶ *Ibid.*, para 35.

³⁷ C-94/07 *Raccanelli* [2008] ECR I-5939

specific application of the general prohibition of discrimination contained in Article 18 TFEU, and that the prohibition of discrimination applies equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals.

- 4.7 In the case of *Mangold*,³⁸ the Court of Justice considered it was possible to apply a provision of Directive 2000/78³⁹ directly to an employment contract between two private parties, even though the directive had not yet been implemented into national law and the date for its implementation in Germany had not yet expired. This appeared to constitute an exception to the Court's settled case-law on the direct effect of directives. The Court explained, however, that the provision at issue did not confer a new right or obligation on the parties, but merely gave specific expression to the existing general principle of equality which could be applied directly without being conditional upon the expiry of the implementation period afforded to Member States.
- 4.8 This approach was followed by the Court in the case of *Küçükdeveci*.⁴⁰ The Court held that it was for the national court to afford individuals the legal protection they derive from EU law and to ensure the effectiveness of that law. If necessary, that obligation entailed a duty to refrain from applying any provision of national legislation incompatible with the general principle at issue.
- 4.9 It is apparent from the case-law referred to above that the Court of Justice is ready to apply provisions of the Treaty directly to private parties where they concern an obligation in respect of which individuals are to be regarded as having a particular interest, for example, compliance with the general principle of equality and the prohibition on discrimination.

(b) *Where a particular non state measure may hinder the effective functioning of the internal market*

- 4.10 EU competition and free movement rules are designed to achieve an effective and functioning internal market characterised by the abolition as between Member States of obstacles to the free movement of goods, persons, services and capital.⁴¹ The creation of an internal market that promoted a harmonious development of economic activities throughout what was then, the European Economic Community, was a founding objective of the EEC Treaty.⁴²
- 4.11 Whereas competition rules are primarily concerned with the conduct of market participants, the Treaty provisions on fundamental freedoms relate to the regulatory

³⁸ Case C-144/04 *Mangold* [2005] ECR I-9981.

³⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

⁴⁰ Case C-555/07 *Küçükdeveci* [2010] ECR I-365.

⁴¹ Article 3(c) of the EEC Treaty. This objective now features in Article 26 TFEU.

⁴² Article 2 of the EEC Treaty. For an early explanation of the principles underlying EU Competition law, see Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paras. 23 to 26.

framework in which such participants operate. The fundamental freedoms are therefore more evidently of concern to Member States than to private parties.⁴³

4.12 Recognising the private law orientation of Competition rules, the Court of Justice has been disposed to applying Treaty provisions on competition directly to private parties. By contrast, there has been greater reluctance to apply the fundamental freedoms directly to non state actors.⁴⁴ The Court has, however, recognised that measures adopted by private law entities are also capable of hindering free movement rights. In such circumstances, the Court has been willing to review the conduct of non-state actors directly against the fundamental freedoms as enshrined in the Treaties.

(i) *Competition Law*

4.13 EU Competition rules essentially seek to ensure that obstacles removed by State action (in accordance with the requirements of the EU Treaties) are not subsequently resurrected by means of arrangements or conduct of a private character.⁴⁵ The Treaty provisions on competition thus typically relate to the conduct of private economic undertakings in the market (even if in more recent years its scope has widened to include public undertakings).⁴⁶

4.14 The Court of Justice has consistently held that Treaty articles prohibiting anti-competitive behaviour, and in particular rules enshrined in what is now Articles 101 and 102 TFEU, have horizontal effect and may be applied directly against private entities.⁴⁷ Moreover, it has been observed that private operators are not merely bound to comply with what is now Articles 101 and 102 TFEU, but also to respect the principles of an “open market policy”, even through the rules governing that policy are primarily addressed to Member States.⁴⁸

4.15 In the case of *Courage v. Crehan*⁴⁹ the Court confirmed the horizontal effect of the Treaty provisions on competition. The case concerned a publican whose commercial

⁴³ Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union, ‘Viking Line’* [2007] ECR I-10779, Opinion of Advocate General Maduro, para 35.

⁴⁴ Case 311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801, para 30, and Case C-159/00 *Sapod Audic* [2002] ECR I-5031, para 74 – Cited in the *Viking Line* Opinion of Advocate General Maduro at para 37 and by Advocate General Trstenjak in her Opinion in *Fra.bo SpA*, at para 29.

⁴⁵ *Pierre Pescatore* “Public and Private Aspects of European Community Competition Law”, *Fordham International Law Journal* Volume 10, Issue 3, 1986, at p.383.

⁴⁶ See Section 5(b) of this Report.

Case 127/73 *BRT and SABAM (BRT I)* [1974] ECR 51, para16; and Case C-282/95 *P Guérin Automobiles v. Commission* [1997] ECR I-1503, para 39. See also Opinion of Advocate General Maduro in Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union, ‘Viking Line’* [2007] ECR I-10779, paras. 32 to 37.

⁴⁸ *Pierre Pescatore* “Public and Private Aspects of European Community Competition Law”, *Fordham International Law Journal* Volume 10, Issue 3, 1986. Pescatore recalled that in an order made in plenary session, the Court of Justice had held that the integral and uniform application of Treaty rules to citizens of the Member States formed part of the “*ordre public communautaire*”.⁴⁸ He noted that this was a “*strong way of expressing the idea that Treaty rules are mandatory for everybody and not only for the Contracting States*”.

⁴⁹ C-453/99 *Courage v. Crehan* [2001] ECR I-6297.

lease included a provision requiring him to purchase beer exclusively from Courage brewery. That brewery sold beer to the publican at higher prices than those sold to other customers. The Court affirmed that Articles 101 and 102 TFEU “*produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard.*”⁵⁰ Significantly, the Court emphasised that any individual must be in a position to claim damages for loss suffered by contract or conduct that was liable to restrict or distort competition. Otherwise the effectiveness of Article 101 TFEU and the practical effect of the prohibition laid down in that provision would be compromised.⁵¹ This approach was subsequently confirmed by the Court in the case of *Manfredi*.⁵²

(ii) *Freedom of movement for workers, freedom of establishment and freedom to provide services*

4.16 In the early and well known case of *Walrave and Koch*,⁵³ the Court was asked to consider whether rules adopted by the International Cycling Union were subject to conformity with provisions on the Treaty, including, provisions on workers (Articles 45 TFEU) and services (Article 56 TFEU). The rules at issue related to medium-distance world cycling championships behind motorcycles and required pace makers to be the same nationality as the cyclists they were accompanying. The rules were challenged on the basis that they constituted discrimination on grounds of nationality.

4.17 The Court observed that the question arose as to whether the Treaty provisions could apply to legal relationships which do not come under public law. In particular, was it possible for rules of an international sporting federation to be reviewed against provisions of the Treaty?⁵⁴ The Court noted that it had been alleged that the prohibition on restrictions laid down in what is now Articles 45 and 56 TFEU only referred to restrictions which derive from an authority and not to legal acts of persons or associations who do not come under public law.⁵⁵

4.18 The Court held that prohibition on discrimination on grounds of nationality is not limited to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.⁵⁶

4.19 The Court recalled that freedom of movement for persons and the freedom to provide services are fundamental objectives of the Union. The Court reasoned that *abolishing obstacles to such freedoms would be compromised* if the removal of barriers of national origin could be neutralized by measures adopted by associations or organizations which do not come under public law.⁵⁷

⁵⁰ *Ibid.*, para 23.

⁵¹ *Ibid.*, para 23.

⁵² C-295/04 to C-298/04 *Manfredi v. Lloyd* [2006] ECR I-6619.

⁵³ Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405.

⁵⁴ *Ibid.*, para 13.

⁵⁵ *Ibid.*, para 15.

⁵⁶ *Ibid.*, para 17.

⁵⁷ Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405.

- 4.20 The Court acknowledged that Treaty provisions on services made express reference to the abolition of *State measures*. Nevertheless, the Court considered that this fact did not affect the general nature of the prohibition on the restriction of the freedom to provide services which is expressed in general terms and which does not make any distinction between the sources of the restrictions to be abolished. Equally, the Court observed that the prohibition on discrimination of workers as enshrined in what is now Article 45 TFEU similarly extends to agreements and rules which do not emanate from public authorities. The Court concluded that it was possible to assess the compatibility of rules of a sporting organisation in the light of Treaty provisions concerning free movement of workers and the freedom to provide services.
- 4.21 This position was affirmed by the Court in Case C-415/93 *Bosman*.⁵⁸ The Applicant in the main proceedings was a Belgian professional football player who challenged the compatibility of national and international football association rules with Union law. Mr Bosman considered that rules restricting transfer between clubs interfered with the exercise of the right of free movement of workers and was incompatible with EU Competition law.
- 4.22 Given that the relevant football associations and federations are private law entities, the Court was required to consider whether such rules were subject to the Union Treaties. In their observations the football associations and the German Government submitted that what is now Article 45 TFEU should not apply to rules of football associations. The Court, however, recalled its case-law according to which that provision “*not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner.*”⁵⁹
- 4.23 The Court justified its position on teleological grounds. Referring to its judgment in *Walrave and Koch*, the Court considered that “*the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law.*”⁶⁰
- 4.24 The Court further noted that there was disparity among Member States in the manner in which working conditions were regulated. In particular, the Court observed that while working conditions may sometimes be regulated by law or regulation, they may also be regulated by agreements or other acts concluded or adopted by private parties. The Court reasoned that if the scope of what is now Article 45 TFEU was limited to acts of a public authority, then it would lead to inequality in its application. The Court further noted that such a risk was evident in the case of transfer rules which are implemented by different means throughout the Member States.⁶¹

⁵⁸ Case C-415/93 *Bosman* [1995] ECR I-4921.

⁵⁹ *Ibid.*, para 82.

⁶⁰ *Ibid.*, para 83.

⁶¹ See Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405. See also Opinion of Advocate General Mengozzi in Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, at para 157.

- 4.25 The Court further confirmed that if the Treaty provision on free movement of workers could apply directly to rules of private entities, then, where applicable, private entities may be entitled to derogate from that right in accordance with the grounds of general interest laid down in the Treaty.
- 4.26 Similarly, in *Angonese* and subsequently in *Raccanelli*, the Court recognised that the failure to apply the prohibition on discrimination as between private entities could impact adversely on the effective functioning of the internal market.⁶²
- 4.27 These justifications have been repeatedly affirmed in the case-law of the Court of Justice. In the case of *Wouters*,⁶³ the Court of Justice confirmed that measures adopted by a regulatory body for lawyers could be reviewed directly against Treaty provisions on the freedom of establishment and the freedom to provide services. The case at issue concerned rules adopted by the Bar of Netherlands prohibiting multidisciplinary partnerships between lawyers and accountants. The Court held that “*Compliance with Articles [49] and [56 TFEU] of the Treaty is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services.*”⁶⁴ However, the Court ultimately held that the rules at issue in the main proceedings were not incompatible with the Treaties.
- 4.28 In the cases of *Viking* and *Laval*,⁶⁵ the Court of Justice was provided with a further opportunity to consider the extent to which non-state measures could be caught directly by Treaty provisions on the freedom of establishment and the freedom to provide services. These cases were particularly significant as they did not merely concern rules of professional associations or private-law contracts, but concerned the activities of trade unions exercising a fundamental social right, namely the right to take collective action. It was argued that such action instigated by trade unions could impede undertakings from other Member States from exercising their free movement rights. The question arose as to whether it was possible to review collective action (and the exercise of a fundamental social right) against provisions of the Treaty designed to ensure the effective functioning of the internal market.
- 4.29 In *Viking*, the private undertaking was a passenger shipping company which sought to rely on Article 49 TFEU (establishment) to impugn collective action taken by trade unions in Finland on the basis that such action restricted its freedom of establishment. In his Opinion, Advocate General Maduro recalled that competition and free movement rules support the objective of achieving a functioning common market.⁶⁶

⁶² Case C-281/98 *Angonese v. Cassa di Risparmio di Bolzano* [2000] ECR I-4139, paras. 31 to 33 and C-94/07 *Raccanelli* [2008] ECR I-5939, para 44.

⁶³ Case C-309/99 *Wouters and Others* [2002] ECR I-1577.

⁶⁴ *Ibid.*, para 120.

⁶⁵ Case C-341/05 *Laval un Partneri* [2007] ECR I-11767 and Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union, ‘Viking Line’* [2007] ECR I-10779.

⁶⁶ Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union, ‘Viking Line’* [2007] ECR I-10779, Opinion of Advocate General Maduro, para 33.

The Advocate General observed that Member States and public authorities were typically the intended addressees of free movement rules, as they are best placed to intervene in regulating the activities of market participants.⁶⁷ However, he considered that this ought not to preclude free movement provisions from having horizontal effect where it would be necessary to enable market participants throughout the Union to have equal opportunities to gain access to any part of the common market.⁶⁸

4.30 The Advocate General observed that certain measures of private entities that do not derive from any public authority or emanation of the State may nonetheless obstruct the proper functioning of the common market. In these circumstances, notwithstanding its private character, it would be wrong to exclude such action categorically from the application of the rules on freedom of movement. The Advocate General argued that the essential question therefore is not whether a measure is public or private in character, but whether it is liable to obstruct the proper functioning of the internal market.⁶⁹ The Advocate General enunciated a *de minimis* rule according to which only measures that were capable of thwarting the proper functioning of the common market would be caught by the provisions of the Treaty.

4.31 In its judgment, the Court agreed that collective action by private entities must be subject to review against the provisions on freedom of establishment contained in the Treaties. The Court considered that otherwise, the conduct of associations not governed by public law would be liable to compromise measures designed to eliminate obstacles to freedom of movement for persons and freedom to provide services.⁷⁰ The Court held that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down.⁷¹

4.32 The Court further observed that there was no indication in the Court's case-law that direct application of Treaties was limited to associations or to organisations exercising a regulatory task or having quasi-legislative powers. The Court held that through their activities, trade unions participate in the drawing up of agreements that regulate paid work collectively.

4.33 The *Laval*⁷² case raised analogous issues in relation to the freedom to provide services. The Court was required to consider whether collective action by trade unions in Sweden could be precluded by virtue of the Treaty provisions on freedom to provide services as enshrined in what is now Article 56 TFEU.

⁶⁷ *Ibid.*, Opinion of Advocate General Maduro, paras. 33 and 34.

⁶⁸ *Ibid.*, Opinion of Advocate General Maduro, para 35.

⁶⁹ *Ibid.*, Opinion of Advocate General Maduro, paras 35 to 37.

⁷⁰ Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line'* [2007] ECR I-10779, para 57.

⁷¹ *Ibid.*, para 58.

⁷² Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

4.34 In his Opinion, Advocate General Mengozzi observed that this case could be distinguished from previous cases such as *Walrave and Koch* and *Bosman*, since those cases concerned private law regulations whereas the present case concerned co-ordinated action of trade unions.⁷³ Nevertheless, he observed that in Sweden trade unions were conferred with particularly extensive powers enabling them to extend the scope of collective agreements adopted in Sweden to employers not affiliated to an employers' organisation that is a signatory thereto in that Member State, including the power to take collective action if necessary. He suggested that recourse to collective action ultimately represented a manifestation of the exercise by trade unions of their legal autonomy with the aim of regulating the provision of services. The Advocate General concluded that such activities had a collective effect on the Swedish employment market and ought therefore to be subject to Article 56 TFEU.⁷⁴

4.35 In its judgment, the Court agreed stating that “*compliance with [Article 56 TFEU] is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services. The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law.*”

4.36 Considering these cases as a whole it is apparent that Treaty provisions relating to the fundamental freedoms may be applied directly to private entities as regards measures that are liable to hinder the effective functioning of the internal market. This is likely to be the case, for example, where such entities exercise a function in the elaboration of collective rules or collective agreements that are liable to impact upon the exercise of fundamental freedoms as between Member States.

(c) *Measures by private parties having a public character or exercising functions on behalf of a Member State or public authority*

4.37 It is not uncommon for public authorities to exercise certain functions through or in cooperation with entities that are established and governed by private law. Such arrangements may include the establishment of a private law company for the purposes of managing and executing a particular public project or the delegation or sub-contracting of a specific public function to commercial undertakings operating in the market. Such entities may be granted special or exclusive rights in order to fulfil their particular mandate.

4.38 In a variety of different contexts, litigants have sought to challenge acts or decisions of private law entities that are entrusted with public functions or that are largely controlled by the public sector. In such cases, the question has arisen as to whether in light of their public character these entities should be subject to Union law in the same way as

⁷³ *Ibid.*, Opinion of Advocate General Mengozzi, para 158.

⁷⁴ *Ibid.*, Opinion of Advocate General Mengozzi, paras. 156 to 161.

Member States and public law bodies. Alternatively, should their direct exposure to Union law be more limited by virtue of their private law status?

4.39 In deciding whether Union law is applicable to a particular entity or undertaking, both the Court of Justice and the Union legislature have consistently prioritised “substance” over “form”. Throughout its case-law the Court of Justice has been willing to differentiate and recognise the special situation of private law entities that are entrusted with public functions or that are under the decisive control of Member States and to attribute their decisions and actions to the State. In his Opinion in *Foster v. British Gas*,⁷⁵ Advocate General Van Gerven observed that questions concerning the extent to which Union law may be applied directly to private entities have arisen in a variety of different areas of Union law including public procurement, state aid, free movement and value added tax. Each area will be considered below.

(i) *Public procurement*

4.40 EU public procurement rules seek to ensure that public contracting bodies award public contracts in a manner that respects the principle of equality and the obligation of transparency, maximises competition, and serves to promote the proper functioning of the internal market. Directives 2004/18 co-ordinate procurement procedures for public works, services and supply contracts and Directive 2004/17 which co-ordinates procurement procedures of entities operating in the Utilities sectors⁷⁶ define contracting authorities as

“State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.

‘A body governed by public law’ means any body:

- *established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,*
- *having legal personality and*
- *financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;”*

⁷⁵ Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

⁷⁶ Article 1(9) of Directive 2004/18/EC, coordinating the procurement procedures for the award of public works contracts, public supply contracts and public service contracts (the “Public Contracts Directive”, OJ L 134/114, of 30 April 2004) and Article 2 of Directive 2004/17/EC coordinating the procurement procedure of entities operating in the water, energy, transport and postal services sectors (the “Utilities Directive”, OJ L 134/1, of 30 April 2004).

4.41 Directive 2004/18 also applies to public undertakings, which are defined as

“any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

- hold the majority of the undertaking's subscribed capital, or*
- control the majority of the votes attaching to shares issued by the undertaking, or*
- can appoint more than half of the undertaking's administrative, management or supervisory body.”*

4.42 It follows from these definitions that the qualification of an entity as a “contracting authority” or “undertaking” does not depend on whether it is public or private entity. Rather, what is decisive is whether the entity is established for purposes having a general interest or whether it is largely financed or controlled by the State.

4.43 This approach has consistently been adopted by the Court. In Case 31/87 *Beentjes v. Netherlands State*,⁷⁷ the Court was asked to consider whether a local land consolidation committee was to be considered an entity that was subject to procurement rules. The Court explained the term “the State” must be interpreted in functional terms. The aim of the public works directive was to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts. The Court reasoned that such objective would be jeopardized if the provisions of the directive were to be held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration. The Court proceeded to rule that a body whose composition and functions are laid down by legislation and which largely depends on the public authorities must be regarded as falling within the notion of the State.

4.44 In the case of *Connemara Machine Turf Co. Ltd v. Coillte Teoranta*,⁷⁸ the question arose as to whether a forestry board established in the form of a private limited company in Ireland was to be considered a contracting authority within the meaning of the relevant public procurement directive governing supply contracts. In that case both the Irish Government and *Coillte* argued that *Coillte* was not a contracting authority. They noted that *Coillte* was a private undertaking subject to the Irish Companies Acts and consequently a commercial company belonging to the State. It was argued that the powers of appointing and removing its officers and defining its general policy are no more extensive than those which would be provided for in the Memorandum and Articles of Association of any private company owned almost entirely by a single

⁷⁷ Case 31/87 *Beentjes v Netherlands State* [1988] ECR 4635.

⁷⁸ Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta* [1998] ECR I-8761.

shareholder. It was submitted that in its day-to-day business, *Coillte* was managed independently and the State has no influence on the award of contracts.

4.45 By contrast, *Connemara Machine Turf Company* and the Commission submitted that, by virtue of the various provisions governing the status of *Coillte*, that entity must be regarded as falling within the notion of the State for the purposes of the procurement directives.

4.46 In its judgment the Court acknowledged that *Coillte* was a company with a separate legal identity and did not award public contracts on behalf of the State or a regional or local authority. However, the Court considered that it must be considered to be a legal person governed by public law within the meaning of the relevant procurement directive. The Court observed that *Coillte* was established by the State and was entrusted with specific tasks of a public character, including managing the national forests and woodland industries, as well as providing various facilities in the public interest. The Court noted that the State had the power to appoint the principal officers of *Coillte* and also to control *Coillte's* economic activity. Crucially, the Court considered that the State was in a position to exercise control over the award of public supply contracts by *Coillte*, at least indirectly.⁷⁹

(ii) *State-Aid law*

4.47 The prohibition on aids granted by a State enshrined in Article 107 TFEU includes aids granted directly or indirectly through State resources and which are imputable to the State.⁸⁰ In this context, the Court has frequently been required to consider whether aid administered by a private entity may be considered to derive from State resources and are imputable to the State.⁸¹ As in the field of public procurement, the Court of Justice had consistently adopted a substantive rather than a formal approach to determining the source of aid.

4.48 In the case of *Van der Kooy*, the Court was asked whether the supply by a private company of natural gas to horticulturalists at a preferential rate constituted prohibited State aid. The Court observed that 50% of the shareholding in the company was held by the Dutch Government. Moreover, that Government appointed half its board members. Significantly, the Minister for Economic Affairs was responsible for approving the rate. Having regard to these considerations, the Court held that the actions of the private gas company could be attributed to the State.⁸²

⁷⁹ *Ibid.*, para 34.

⁸⁰ Case C-482/99 *France v. Commission* [2002] ECR I-4397, para 24 and case-law cited therein.

⁸¹ Joined Cases 67, 68 and 70/85 *Van der Kooy BV and others v. Commission* [1988] ECR 219; Case C-303/88 *Italy v. Commission* [1991] ECR I-1433, para 11; and C-305/89 *Italy v. Commission (Alfa Romeo)* [1991] ECR I-1603.

⁸² Joined Cases 67, 68 and 70/85 *Van der Kooy BV and others v. Commission* [1988] ECR 219.

4.49 Similarly, in *Italy v. Commission*,⁸³ the Court was required to consider whether a payment by Alfa Romeo's holding company, Finmeccanica constituted illegal state aid. Finmeccanica was the wholly owned subsidiary of a public holding company, IRI. The Management of IRI was appointed by the Italian Government. The Court considered IRI was in a position to exercise decisive influence over Finmeccanica and consequently, the latter's actions could be imputable to the State.

4.50 In the case of *France v. Commission (Stardust marine)*,⁸⁴ the Court rejected the claim that measures taken by public undertakings controlled by the State will automatically *per se* be imputable to the State. The Court observed that a public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. The Court considered that in order to impute an aid to the State it is necessary to examine “*whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of the specific measure at issue.*”⁸⁵ This requirement was, however, qualified by the acknowledgement that it could not be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question. The Court observed that having regard to the fact that relations between the State and public undertakings are close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent way and in breach of the rules on State aid laid down by the Treaty.

(iii) *Free movement of goods*

4.51 The question as to whether a private entity's decisions or actions may be attributed to a Member State has arisen in the context of a number of cases concerning the free movement of goods. The question has typically arisen in relation to decisions or acts of private undertakings that have been entrusted with promoting the marketing of domestic produce or regulating the access of goods to the market. It has been argued that in performing such functions, private entities are capable of adopting measures that impact adversely on the trade of goods between Member States. In a series of cases, the Court has been asked whether such measures may be attributed to the State and constitute a breach of Article 34 TFEU.

4.52 In the case of *Commission v. Ireland*,⁸⁶ the Irish Government had established an “Irish Goods Council” to promote the sale and purchase of Irish products. The Commission considered that such an entity constituted a measure the effect of which was to restrict the free movement of goods. Ireland had argued that the promotional activity was not carried out by the Government, but by the Irish Goods Council, which was created in

⁸³ Case C-305/89 *Italy v. Commission* [1991] ECR I-1603.

⁸⁴ Case C-482/99 *France v. Commission (Stardust marine)* [2003] ECR I-4397.

⁸⁵ *Ibid.*, para 52.

⁸⁶ Case 249/81 *Commission v. Ireland (Buy Irish)* [1982] ECR 4005.

the form of a private company limited by guarantee. Consequently, the acts of the Council could not be imputed to that Member State.

- 4.53 The Court rejected this line of argumentation, focussing instead on the reality underlying the constitution of the Irish Goods Council. The Court noted that the Minister for Industry, Commerce and Energy appointed the Management Committee and its Chairman. It was further noted that the activities of the Irish Goods Council were financed largely by subsidies paid by the Irish Government. Moreover, the Irish Government defined the Council's aims. The Court held that "in the circumstances the Irish Government cannot rely on the fact that the campaign was conducted by a private company in order to escape any liability it may have under the provisions of the Treaty."
- 4.54 The case of *Commission v. Germany*⁸⁷ concerned the establishment of a private limited company, CMA, entrusted with the management of a fund, the object of which was the promotion, marketing and development of German agricultural and food products. Pursuant to its Articles of Association, CMA was authorised to award a quality label to be affixed to products made in Germany that satisfy specified requirements.
- 4.55 The Commission argued that CMA's activities could be imputed to Germany. The German government, however, claimed that the activities at issue did not fall within the competence of public authorities and therefore was not subject to the free movement of goods provisions of the Treaty. Germany emphasised that CMA did not merely have the legal form of a private capital company, but was set up in accordance with private law rules and its resources were supplied by economic operators. The German government further pointed out that the CMA label was not applied on the basis of any law or other official act but on the basis of contracts concluded between the CMA and the undertakings concerned. The CMA concludes licence contracts with the undertakings and no licensee is obliged, by act of state or for other reasons, to conclude such a contract with CMA.
- 4.56 The Court of Justice examined the actual structure of the company and disagreed. It noted that CMA was characterised in law as a central economic body charged with promoting the marketing and exploitation of German agricultural and food products. According to its Articles of Association, originally approved by the competent federal minister, CMA was bound to observe the rules of the public fund it was charged with administering. In addition the company was to be guided, in particular in relation to the commitment of its financial resources, by the general interest of the German agricultural and food sector. Finally, the Court noted that CMA was financed, according to the rules laid down in law, by a compulsory contribution by all the undertakings in the sectors concerned.

⁸⁷ Case C-325/00 *Commission v. Germany* [2002] ECR I-9977.

4.57 Similarly, in the *Apple and Pear Development Council* case,⁸⁸ the Court of Justice held that actions performed by that entity to promote the purchase of apples and pears in the UK could potentially fall within the scope of Article 34 TFEU. However, in this instance, the Court considered that its activities did not breach that provision. Recalling its judgment in *Commission v. Ireland*,⁸⁹ the Court emphasised that a publicity campaign to promote the sale and purchase of domestic products may, in certain circumstances, fall within the prohibition contained in Article 34 TFEU, if the campaign is supported by the public authorities. The court proceeded to hold 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, could not under Union law enjoy the same freedom as regards the methods of advertising used as that enjoyed by producers themselves or producers' associations of a voluntary character..

4.58 In case C-171/11 *Fra.bo SpA*, the Court was requested to determine whether Article 34 TFEU could be applied directly to standardization and certification activities of a private law body, DVGW operating in Germany. It was common ground that DVGW is a non-profit body the activities of which are not financed by Germany. Moreover, Germany does not exercise a decisive influence over its operations.

4.59 The Court observed that under German law, products certified by DVGW are to be regarded as compliant with national legislation. Moreover, DVGW was the only entity authorised to certify the products at issue in the main proceedings such that DVGW offered the only possibility for obtaining a compliance certificate for such products. The Court further noted that the absence of certification places a considerable restriction on the marketing of the products concerned on the German market. The Court concluded that by virtue of its authority to certify the products, DVGW held the power to regulate the entry into the German market of the products at issue in the main proceedings. Consequently, the Court concluded that Article 34 TFEU could apply to such products.

(iv) *The concept of State in Value Added Tax*

4.60 In VAT law, Article 13 of Directive 2006/112/EC⁹⁰ exempts certain activities or transactions involving the State from being regarded as a taxable person within the meaning of that directive. The exemption applies to “the State, regional and local authorities and other bodies governed by public law engage “as public authorities”. Such exemption extends to private entities acting as public authorities. Consequently here too it is the nature of the function that is decisive rather than whether the entity is governed by public or private law.⁹¹

⁸⁸ Case 222/82 *Apple and Pear Development Council* [1983] ECR 4083.

⁸⁹ Case 249/81 *Commission v. Ireland* [1982] ECR 4005.

⁹⁰ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (2006 OJ L 347/1).

⁹¹ This observation was made by Advocate General Van Gerven in Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, at para 15.

(v) *Invoking directives directly against private entities*

- 4.61 It is settled case-law that directives are not capable of having horizontal direct effect.⁹² The provision of unimplemented or improperly implemented directives cannot as a rule be applied against private law entities.⁹³ However, in order to ensure as broad an application of Union law as possible, the Court extended direct effect beyond Member States, to include entities that may be qualified as an emanation of the State. Union law has been invoked directly against a range of bodies including health authorities,⁹⁴ public hospitals,⁹⁵ local government bodies⁹⁶, fire services,⁹⁷ police authorities.⁹⁸
- 4.62 In the leading case of *Foster v. British Gas*,⁹⁹ the Court of Justice was asked to rule whether the provisions of the Directive on equal treatment could be applied directly against a statutory corporation responsible for developing and maintaining a system of gas supply in the United Kingdom, namely the British Gas Corporation. In his Opinion, Advocate General Van Gerven noted that British Gas Corporation operated under the supervision of the authorities and had a monopoly over the supply of gas. Members of the Corporation were appointed by the Secretary of State who also determined their remuneration.¹⁰⁰ However, despite these links, it was also apparent that the Corporation was not an agent of the Secretary of State. The Corporation's employees were not in Crown employment for the purposes of UK employment law. The Corporation had no legislative functions.
- 4.63 Advocate General Van Gerven observed that for the purposes of determining direct effect the Court had previously defined the notion of "State" broadly in order to ensure that a Member State did not benefit from its own failure to implement Union law.¹⁰¹ The Advocate General noted that it was settled case-law that [the notion of state was capable of encompassing any] "public body charged with a particular duty by the Member State from which it derives its authority".¹⁰²
- 4.64 The Advocate General suggested that the critical factor was not the legal form of an entity, but the extent to which its activities were under the control of the State. The Advocate General recommended that direct effect should extend to any entity over which the State has reserved itself the power to exercise decisive influence. He emphasised it was immaterial in that regard in what manner the State could exercise such influence, whether it was by reserving itself the right to issue binding directions or

⁹² Case C-106/89 *Marleasing* [1990] ECR I-4135, para 6.

⁹³ Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835.

⁹⁴ Cases 152/84 *Marshall* [1986] ECR 723.

⁹⁵ C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557.

⁹⁶ Case 103/88 *Fratelli Constanzo SpA v. Comune di Milano* [1989] ECR I-1839.

⁹⁷ Case C-243/09, *Günter Fuß v. Stadt Halle* [2010] ECR I-9849.

⁹⁸ Case C-222/84 *Johnston v. Chief Constable of the RUC* [1986] ECR 1651.

⁹⁹ Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

¹⁰⁰ Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, Opinion of Advocate General Van Gerven, para 3.

¹⁰¹ *Ibid.*, Opinion of Advocate General Van Gerven, para 21.

¹⁰² Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, para 21.

through the exercise of rights as a shareholder.¹⁰³ Indicators of influence included: powers to approve decisions in advance or suspend or annul them after the fact, powers to appoint or dismiss (the majority of) its directors, or to interrupt its funding wholly or in part so as to threaten its continued existence.

4.65 The Advocate General clarified that the possibility of exercising control must, however, extend beyond exercising influence through general legislative functions; on that basis every individual subject to legislation would be considered to be under the influence of a Member State and therefore considered a public entity. The Advocate General further emphasised that the State's influence over the entity must relate to the specific subject matter to which the provision of the unimplemented Directive relates.

4.66 In its judgment, the Court substantially agreed. The Court observed that direct effect serves to enhance the effectiveness of Union legislative measures and recalled that individuals may rely directly on provisions of directives against the State regardless of the capacity in which the State is acting whether as employer or as public authority. The Court further observed that that the State may not take advantage of its own failure to comply with Union law.¹⁰⁴ The Court concluded that:

*“a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.”*¹⁰⁵

(vi) *Conclusion*

4.67 It is apparent from the cases considered above that the Court may apply Union law directly to private entities on the basis of their particular connection with Member States and public authorities. In particular, Union law may be applied directly to an entity where such entity is considered to be exercising a function of a public character or where such entity is under the decisive control of the Member States.

4.68 The Court considers a range of different factors in assessing whether a particular entity is to be regarded as being under the decisive control of a Member State. Such control may be inferred where an entity's governing statute obliges it to comply with binding directions issued by State authorities. Decisive control may also be inferred from the entitlement of public authorities to exercise *de facto* or indirect influence over a particular entity, for example, by virtue of its shareholding or where it has the power to appoint or remove the entity's governing officers. Each case is considered individually on the basis of its own particular facts.

¹⁰³ This approach was confirmed by the Court in Case C-305/89 *Italy v. Commission (Alfa Romeo)* [1991] ECR I-1603.

¹⁰⁴ Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, paras. 16 and 17.

¹⁰⁵ Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

5 State liability for breaches of Union law by private entities exercising functions of a private character

- 5.1 In the preceding sections, this paper has considered the extent to which Union law may be applied directly to private individuals or entities. The question which next arises concerns the consequences of breaches of Union law by private entities. Are there circumstances in which a Member State may be considered responsible for breaches by private entities?
- 5.2 A recent and decidedly circuitous attempt to make a State (and even the Commission) responsible for the acts of private parties occurred in Case T-341/10 *F91 Diddeléng (and others) v. Commission*.¹⁰⁶ In facts reminiscent of *Bosman*, a Luxembourgish football club and six of its players sought to challenge internal rules of the Luxembourg Football Federation on the grounds that they were discriminatory and breached EU free movement and competition rules. Rather than taking action directly against the football federation, the Applicants complained to the Commission and subsequently sought to challenge the Commission's failure to institute Article 258 TFEU infringement proceedings against the Grand Duchy of Luxembourg - notwithstanding that the breach emanated from a private law entity. The Appellants also sought the annulment of the internal rules infringing the free movement of workers and competition law. Interestingly, the Commission had in fact raised the complaint with the Luxembourg authorities to the point of having issued a reasoned opinion against Luxembourg. However, following an amendment to the rules at issue, which satisfied the Commission (but not the Appellants), the proceedings were not pursued.
- 5.3 By Order dated 16 April 2012, the General Court held that the proceedings were inadmissible. In relation to Article 258 TFEU, the General Court recalled that individuals did not have standing to challenge a refusal by the Commission to institute infringements against a Member State. The General Court also pointed out that the internal rules of the football club could not be attributed to the Commission, or to any Union institution, and consequently, there was no question of it having jurisdiction to annul the decision of a national body.
- 5.4 In order for a Member State to be held responsible for breaches by a private entity, it is necessary for there to be a sufficient connection between the actions of the private entity and the public authorities of a Member State. It is apparent from the cases considered in Section 4(a) and (b) that, in a variety of contexts, decisions and acts of private individuals or entities were held to breach Union law without there being any question of such decisions or acts being imputed to the State. In such circumstances, the private individuals may be liable to pay damages, but no question of State responsibility arises. However, where there is a sufficient link between the breaches by a

¹⁰⁶ Case T-341/10 *F91 Diddeléng (and others) v. Commission*, Order of the General Court dated 16 April 2012.

private entity and the public authorities of a Member State, such breaches are susceptible of engaging State responsibility.

5.5 The Court of Justice has been willing to extend State responsibility for the acts of private individuals or entities in a number of different contexts including:

- (a) Where a private entity has been delegated functions of a public nature and is under the decisive control of a Member States
- (b) Where a private individual makes statements which, by reason of their form and circumstances, give the persons to whom they are addressed the impression that they are official positions taken by the State.
- (c) Where a private entity that is granted special or exclusive rights breaches EU law as a direct consequence of measures adopted in relation to it by a Member State
- (d) Where the fact of breach by private entities is indicative of a Member State's failure to give full and proper effect to their obligations under Union law.

5.6 Each will be considered in turn.

(a) *State Responsibility for acts of Private entities carrying out delegated functions under the decisive control of Member States*

5.7 It is apparent from cases considered in section 4(c) above and in particular from cases such as *Commission v. Ireland (Buy Irish)*¹⁰⁷, *Commission v. Germany*,¹⁰⁸ and *Foster v. British Gas*,¹⁰⁹ that decisions and actions of a private entity that breach Union law may be attributed to the State where such entity has been entrusted with carrying out functions of a public character and where it is under the decisive control of Member States, in circumstances where the breach at issue arises in connection with the exercise of such public functions. Thus breaches of Union law by a private entity under the decisive control of Member State have resulted in *Member States being declared to have infringed their obligations* under the Union Treaties.¹¹⁰ It is the State that is considered responsible for the breaches of Union law by private entities.

5.8 It is now well established that a Member State may be regarded as exercising control over a particular entity when it, or its public authorities, is in a position to control the decisions or acts of the private entity concerned either directly or indirectly.¹¹¹ A

¹⁰⁷ Case 249/81 *Commission v. Ireland (Buy Irish)* [1982] ECR 4005.

¹⁰⁸ Case C-325/00 *Commission v. Germany* [2002] ECR I-9977.

¹⁰⁹ Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

¹¹⁰ Case 249/81 *Commission v. Ireland (Buy Irish)* [1982] ECR 4005 and Case C-325/00 *Commission v. Germany* [2002] ECR I-9977 are infringement actions.

¹¹¹ Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313; C-305/89 *Italy v. Commission (Alfa Romeo)* [1991] ECR I-1603, and Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta* [1998] ECR I-8761.

Member State may exercise control directly by being granted special rights in the statute or governing rules of an entity; however, it is also possible to exercise *de facto* control by virtue of having a majority shareholding in the entity concerned.¹¹² A further indicator of control is whether Member States or public authorities are in a position to appoint or remove the officers that control the entity concerned or whether the entity is financed by the State and is therefore dependent on the State.

- 5.9 Where there are a number of factors indicating links between a private entity and a Member State, the Court will consider these factors both individually and cumulatively in order to determine whether, in any particular case, a private entity is to be regarded as being under the decisive control of a Member State and whether its decisions or actions may be attributed to that State.
- 5.10 In *Foster v. British Gas*,¹¹³ the Court emphasised that Union law may be applied directly against any entity, whatever its legal form, “which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.”¹¹⁴ The Court has very recently taken this principle a step further in its judgment in *Fra.bo SpA*.¹¹⁵ Here the Court has confirmed that a private entity may still be subject to Union law directly *even if it is not controlled or financed by the State*, in circumstances where it is exercising a public or regulatory function and where its decisions affect the conditions under which a fundamental freedom may be exercised.¹¹⁶
- 5.11 This judgment raises the question as to whether, in the absence of any State control over a private entity exercising regulatory functions, breaches of Union law by that entity in the performance of such functions could still be attributed to the Member State, such that the breach could result in a declaration of infringement against that Member State or give rise to State liability. In this writer’s view, breaches by such an entity exercising regulatory functions ought to be imputable to Member States. Member States are under an overarching duty, reflected in Article 4(3) TEU, to fulfil the obligations arising out of the Treaties and to facilitate the achievement of the Union’s tasks and objectives. This clearly entails an obligation to establish a legal and regulatory framework consistent with fundamental principles laid down in the Treaties. If breaches of Union law by private regulatory entities did not give rise to State responsibility, the accountability of Member States for the full and effective implementation of Union law would be seriously undermined. This issue, however, remains to be decided by the Court of the Justice.

¹¹² Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta* [1998] ECR I-8761. See also Opinion of Advocate General Van Gerven in Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

¹¹³ Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

¹¹⁴ Case C-188/89 *Foster and Others* [1990] ECR I-3313, para 20; Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, para 22; and Case C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique*, 24 January 2012, not yet reported, para 38.

¹¹⁵ Case C-171/11 *Fra.bo SpA*, judgment of 12 July 2012, not yet reported.

¹¹⁶ Case C-171/11 *Fra.bo SpA*, judgment of 12 July 2012, not yet reported.

(b) *Where a private individual makes statements which, by reason of their form and circumstances, give the persons to whom they are addressed the impression that they are official positions taken by the State.*

5.12 In *A.G.M.-COS.MET Srl*¹¹⁷ an official at the Finnish Ministry of Social Affairs and health repeatedly issued derogatory public statements concerning the safety of certain vehicle lifts manufactured in Italy. The Head of the Ministry's Health and Safety Division sought to distance the Ministry from such statements, saying they reflected the personal views of the official concerned. The manufacturer sought damages before the national court and the question arose as to whether the official's claims could in fact be imputed to the State and constituted a breach of Article 34 TFEU.

5.13 The Court held that the decisive factor for attributing the statements of an official to the State is whether the persons to whom the statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office. Relevant indicators included whether:

- the official has authority generally within the sector in question;
- the official sends out his statements in writing under the official letterhead of the competent department;
- the official gives television interviews on his department's premises;
- the official does not indicate that his statements are personal or that they differ from the official position of the competent department; and
- the competent State departments do not take the necessary steps as soon as possible to dispel the impression on the part of the persons to whom the official's statements are addressed that they are official positions taken by the State.¹¹⁸

(c) *Where a private entity that is granted special or exclusive rights breaches EU law as a direct consequence of measures adopted in relation to it by a Member State*

5.14 When Member States or public authorities decide to exercise certain public functions through or in cooperation with private law entities, they may grant such entities special or exclusive rights, in order to assist them in the performance of such functions. An entity conferred with an exclusive right will enjoy a legal monopoly in the provision of a particular service, whereas an entity conferred with special rights, may be one of a limited number of operators entitled to perform an activity.

5.15 The Union Treaties do not exclude the possibility of undertakings being conferred with special or exclusive rights.¹¹⁹ However, Article 106(1) TFEU prohibits Member States

¹¹⁷ Case C-470/03 *A.G.M.-COS.MET Srl* [2007] ECR I-2749.

¹¹⁸ *Ibid.*, paras. 57 and 58.

from enacting or maintaining in force, as regards such undertakings, any measure contrary to the rules contained in the Treaties, in particular, any measure contrary to the prohibition on discrimination on grounds of nationality (Article 18 TFEU) or contrary to competition rules (Articles 101 to 109 TFEU). The Court of Justice clarified that in this context, the term “undertaking” includes “every entity engaged in an economic activity regardless of the legal status of the entity and the way it is financed”.¹²⁰

- 5.16 Article 106(2) TFEU qualifies Article 106(1) TFEU with respect to entities entrusted with “the operation of services of general economic interest or having the character of a revenue-producing monopoly.” Such entities are only subject to the provisions of the Treaties *in so far as they do not obstruct them from performing, in law or in fact, the particular tasks assigned to them.*
- 5.17 It follows from Article 106 TFEU that if a private entity that is granted special or exclusive rights operates in a manner that is in breach of Union law, and such breach may be ascribed to measures adopted by a Member State, then that Member State will itself be in breach of Article 106 TFEU, unless it can demonstrate that the entity is performing a service of general economic interest and that compliance with Treaty rules would obstruct it from performing the service in question.
- 5.18 In Case 18/88 *Inno*,¹²¹ RTT, an undertaking entrusted with establishing and maintaining a public telephone network was also conferred with an exclusive entitlement to certify telephone equipment offered for sale in Belgium. Another phone manufacturer, GB-Inno, sold unapproved phones at much reduced prices. RTT sought to rely on Belgian law to require its competitor to inform customers that its phones had not been approved by RTT. GB-Inno argued such a requirement infringed Article 34 TFEU as well as Articles 102 and 106 TFEU. In its judgment the Court observed that the extension of RTT’s monopoly to the market in telephone equipment without objective justification breached Article 102 TFEU. Given that the breach was attributable to a State measure, the provision was in breach of Article 106 TFEU.
- 5.19 The wording of Article 106 TFEU is drafted very broadly. Member States are prohibited from enacting or maintaining in force, *any measure* that is incompatible with *any* provision of the Union Treaties as regards entities having special or exclusive rights. Consequently, it is submitted that there may be particular potential for using this provision to ascribe liability to Member States for acts and decisions of private entities with fall within its scope of application.

¹¹⁹ Case 155/73 *Giuseppe Sacchi* [1974] ECR 409, para 14.

¹²⁰ Case C-41/90 *Höfner* [1991] ECR I-1979, para 21.

¹²¹ Case 13/77 *GB-Inno-BM* [1977] ECR 2115.

(d) *State responsibility for private parties as evidence of a failure to implement Union law properly*

- 5.20 A further means by which a Member State may be held liable for the breaches of Union law by private entities is where such breaches may be indicative of a Member State's failure to adequately implement or enforce Union law.
- 5.21 In *Commission v. France*,¹²² the Court of Justice held that France had breached (what is now) Articles 34 TFEU and 4(3) TEU because it failed to take adequate measures to prevent private parties from disrupting the importation of agricultural produce. In its action, the Commission had noted that for over a decade it had regularly received complaints that private individuals and protest movements associated with French farmers committed violent acts in relation to the importation of agricultural products from other Member States. Such acts included the interception of lorries transporting agricultural produce and the destruction of their loads. There were also incidences of violence against lorry drivers and threats against wholesalers and retailers in order to induce them to stock exclusively French produce.
- 5.22 In its judgment, the Court of Justice recalled that the free movement of goods represents one of the fundamental principles of the Treaty. The Court further noted that Member States retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security, and consequently enjoy a margin of discretion as to the most appropriate means of eliminating barriers to the importation of products in a given situation.¹²³ Nevertheless, the Court noted that the incidences giving rise to the proceedings took place regularly for over ten years.¹²⁴ It was also apparent that the Commission notified the French authorities on numerous occasions of the obligation to ensure *de facto* compliance with the principle of the free movement of goods.¹²⁵ The Court noted that notwithstanding explanations of the French Government, the fact remained that year after year serious incidents jeopardized trade in agricultural products. French police were often not present and only very few criminal prosecutions recorded.
- 5.23 Having regard to the frequency and the seriousness of the incidents, the Court concluded that the measures adopted by the French government were manifestly inadequate with respect to their obligations under Union law. The Court held that the French government “manifestly and persistently” abstained from adopting appropriate and adequate measures to put an end to the acts of vandalism which were jeopardising the free movement of goods.
- 5.24 A similar attempt to make a Member States responsible for the acts of private parties was made in the case of *Schmidberger*.¹²⁶ In this case, an international transport

¹²² Case C-265/95 *Commission v. France* [1997] ECR I-6959.

¹²³ *Ibid.*, para 33.

¹²⁴ *Ibid.*, para 40.

¹²⁵ *Ibid.*, para 42.

¹²⁶ Case C-112/00 *Schmidberger* [2003] ECR I-5659.

undertaking issued proceedings against Austria for permitting private demonstrations to result in the closure of sections of the Brenner Motorway for a period of 30 hours. *Schmidberger* argued that such closure hindered the transportation of goods and was therefore in breach of Article 34 TFEU.

- 5.25 Significantly, the Court accepted that the closure at issue constituted a restriction on the free movement of goods, even though it ultimately held that the restriction was justified and proportionate.¹²⁷ Referring to its judgment in *Commission v. France*,¹²⁸ the Court recalled that Article 34 TFEU does not only prohibit measures emanating from the State which in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State.¹²⁹
- 5.26 The Court held that the fact that a Member State abstains from taking action, or fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created by actions by private individuals on its territory is just as likely to obstruct trade between Member States as is a positive act.¹³⁰ The Court further referred to principle of co-operation enshrined in what is now Article 4(3) TEU recalling that Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty and to refrain from any measures which could jeopardise the attainment of the objectives of the Treaty.

6. Conclusion

- 6.1 The primary means of ensuring that private parties are subject to Union law is through its full and effective implementation into the relevant national legal order. However, the Court of Justice has been willing to apply provisions of Union law directly to private individuals or entities where it is considered that individuals or entities have a particular interest in its application, or where necessary to secure fundamental objectives of the Treaties, such as the effective functioning of the internal market. The Court has thus given horizontal effect to the general principle of equality and non-discrimination as well as to provisions relating to competition law, the freedom of movement of workers, freedom of establishment, freedom to provide services and, most recently, to the free movement of goods.
- 6.2 In a number of instances, the Court has been willing to apply Union law to private entities on the basis that they are carrying out public functions or are under the decisive influence of the Member States. In certain cases, the Court has been prepared to attribute the decisions and acts of private entities to Member States. However, at present, such attribution is conditional on the establishment of sufficient connection between the breach by private entities and the public authorities of a Member States.

¹²⁷ *Ibid.*, para 64.

¹²⁸ Case C-265/95 *Commission v. France* [1997] ECR I-6959.

¹²⁹ Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 57.

¹³⁰ *Ibid.*, para 58.

6.3 The evolution of the Court's case-law regarding the application of Union law to private parties reflects an underlying shift in the conceptual borders delimiting public and private spheres of activity. Traditionally, there was a clear conceptual distinction between activities of a private and public character. Public authorities and public law bodies were primarily entrusted with establishing and monitoring the legal and regulatory framework in which private entities operated. Private entities were primarily concerned with carrying out profit-generating activities in the market place. However, increasingly, the boundaries between public and private sector activities are becoming more fluid and less clearly defined. Public operators may be active market participants and private operators may be exercising public regulatory functions. Recognising this development, the Court has progressively moved to uncouple form from function. When determining the application of Union law to private entities, priority is afforded to the underlying nature and purpose of a particular function rather than to the legal form of the entity performing that function.

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