The fundamental freedoms of the single market on the path towards horizontal direct effect: the free movement of capital – *lex lata* and *lex ferenda*

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Abstract

The paper examines both likeliness and expediency of establishing horizontal direct effect of the TFEU provisions inaugurating the free movement of capital as the "youngest" of the four fundamental freedoms in the Single Market. In pursuing this aim, author starts with portraying the status quo regarding horizontal direct effect of other fundamental freedoms and attempts to deduce from some of the cornerstone cases the most important arguments given by the CJEU, i.e. key rationale utilized thus far for establishing horizontal direct effect. After these general analyses, the author examines the current scope of application of the free movement of capital provisions in view of the issue at hand and investigates whether in conjunction with the reasoning of the CJEU in other free movement cases similar approach is likely to be utilized in order to establish the same effect of Article 63 TFEU. Finally, notwithstanding certain opposite opinions, the author establishes that this particular fundamental freedom becoming horizontally effective is not something likely to happen any time soon and makes an effort to support such standpoint. Moreover, conclusion is put forward that even if it opts for such course of action the CJEU should take certain preliminary, i.e. precautionary measures.

Keywords: *fundamental freedoms; free movement of capital; horizontal direct effect; effet utile; public entities; private entities.*

JEL Classification: K22, K33.

1. Introductory remarks

It is a long established fact that that the provisions of the Treaty on the Functioning of the European Union (hereinafter: "TFEU") in which the fundamental freedoms of the Single Market are enshrined satisfy the standard "*Van Gend en Loos* eligibility test" for establishing direct effect of EU law.[2] At the time when this famous case was decided by the Court of Justice of the European Union (hereinafter: "CJEU")[3], the notion of direct effect equalled the nowadays notion of

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[2] For a recapitulation of the case and the test itself, for instance, see Tony Storey and Chris Turner, *Unlocking EU Law*, Routledge, Abingdon, NY, 2014 (4th ed.), p. 153; Morten Rasmussen, *Revolutionizing European law: A history of the Van Gend en Loos judgment*, „International Journal of Constitutional Law", Vol. 12(1), January 2014, pp. 136-163.

[3] The Court of Justice of the European Union plays an important role in the application of the Treaty to concrete situations occurring among Member States, and has set benchmarks over time to strengthen the internal market – see Cătălin-Silviu Săraru, *State Aids that are Incompatible with the Internal Market in European Court of Justice Case Law*, in Cătălin-Silviu Săraru (ed.), *Studies of Business Law – Recent Developments and Perspectives*, Peter Lang, Frankfurt am Main, 2013, p. 48.

vertical direct effect, which allows private persons to rely directly on an EU law provision to regulate their relation with a Member State or its various emanations, i.e. public entities.[4] It was not long after the *Van Gend en Loos*,[5] though, before the CJEU established the concept of full direct effect in *Defrenne v Sabena*,[6] i.e. both vertical and horizontal direct effect of certain EU law provisions. In time, recognizing of such "enhanced" effect of EU law provisions by the CJEU has become more and more common. Therefore, today there are numerous provisions of EU law having direct effect not only with regard to relation between a private actor and a Member State but between purely private actors as well (i.e. horizontal direct effect). Put differently, one private person may now invoke the duties of another under particular provisions of EU law before a national court just as it would do so, for instance, with regard to national legislation in the field of contract or administrative law. Moreover, there is even evidence now that not only certain segments of its formal sources but also the uncodified principles of EU law have been recognized as having horizontal direct effect.[7]

As for the fundamental freedoms of the Single Market, it has been notorious dilemma for quite some time now which free movement provisions of the TFEU have horizontal direct effect and under which circumstances? The debate on this topic is ongoing and quite lively, and it is so largely thanks to the CJEU. Namely, in delivering preliminary rulings in cases involving horizontal direct effect, the CJEU has not only demonstrated different approach with regard to different freedoms but its approach (*ratio decidendi*) has been known to vary – some would say evolve - slightly but noticeably from one case to another addressing the protection of the same fundamental freedom.[8] In its defense, it seems that the CJEU was bound to demonstrate such approach in a legal system as specific as that of the EU, whose regulatory framework is renowned for generalized definitions of certain legal notions enshrined in its key regulatory instruments. Put differently, as much as it interprets the ideas of the European

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[4] For the purpose of this particular paper, the notion of public entity is understood in its broadest sense, so as to include state agencies, public institutions, local self-governments, state-owned commercial entities exercising commercial activity of general, i.e. public interest, as well as exclusively private entities entrusted with executing specific public function, when executing it, all of which are occasionally also referred to as "emanations of the state" by the CJEU. For a more detailed analysis of this notion under the CJEU case law, for instance, see Maria Wiberg, *The EU Services Directive: Law or Simply Policy?* T.M.C. Asser Press, Hague, 2014, 141-147.

[5] See Case C 26-62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (5 February 1963) EU:C:1963:1.

[6] See Case C 43 - 75, Gabrielle Defrenne **v** Société anonyme belge de navigation aérienne Sabena (8 April 1976) EU:C:1976:56.

[7] See Mirjam de Mol, *Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law: Court of Justice of the European Union (Grand Chamber) Judgment of 19 January 2010, Case C-555/07*, "European Constitutional Law Review", Vol. 6(2), 2010, pp. 293-308.

[8] For instance, see Eva Julia Lohse, *Fundamental Freedoms and Private Actors – towards an 'Indirect Horizontal Effect'* "European Public Law", February 2007, Vol. 13(1), pp. 159-190; Harm Schepel, *Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law*, "European Law Journal", Vol. 18(2), 2012, pp. 177-200.

legislator embodied in the TFEU and other regulatory instruments, the CJEU is virtually forced to simultaneously create new rules of the EU law in order to adapt generalized regulatory definitions to factual circumstances of the particular cases it adjudicates.[9]

Be the above as it may, the fact remains that the CJEU still has some distance to cover before it establishes unified, generally uncontested and sound case law regarding the issue of horizontal direct effect of the fundamental freedom provisions of the TFEU. In view of that fact, the paper examines more closely the possibility, as well as expediency of establishing the horizontal direct effect of the TFEU provisions inaugurating free movement of capital. Namely, although there are opposite opinions on the matter,[10] the author finds that this particular fundamental freedom becoming horizontally effective is not something likely to happen any time soon and makes an effort to support such standpoint. In doing so, in the second part of this paper the author proceeds by portraying the *status quo* with regard to horizontal effect of other fundamental freedoms and attempts to deduce from some of the cornerstone cases the most important arguments given by the CJEU, i.e. key rationale utilized thus far for establishing direct horizontal effect of the TFEU free movement provisions. In the third part of the paper, author analyzes the current scope of application of the free movement of capital provisions in view of the issue at hand and investigates whether - in conjunction with the reasoning of the CJEU in the free movement cases in which horizontal direct effect is already established – current approach is likely to be "upgraded" in order to establish the same effect of the freedom of capital movement provisions. Finally, the paper proceeds with the concluding remarks in which an estimation is made that the CJEU is still miles away from establishing horizontal direct effect of the freedom of capital movement. Furthermore, conclusion is suggested that before taking such course of action the court should bear in mind possible detrimental effect to European economy and economies of the Member States in particular. Accordingly, the author draws a conclusion that the current cautious approach of the CJEU in terms of establishing horizontal direct effect of the free movement of capital provisions may be considered as sound and well justified in this particular regard.

[9] Indeed, partially because of the said nature of the regulatory solutions provided by the EU legislator and partially due to convergence of the legal systems of the Member States, the case law of the CJEU is becoming more and more important source of law. For instance, see Gundega Mikelsone, *The Binding Force of the Case Law of the Court of Justice of the European Union*, "Jurisprudence" Vol. 20(2), 2013, pp. 469-495.

[10] See Harm Schepel, *op. cit.*, p. 192.

2. Horizontal direct effect of the fundamental freedoms in the CJEU case law – extent and *ratio decidendi*

2.1. *Status Quo*

It has been noted already that the free movement of capital is not among those fundamental freedoms the horizontal effect of which is already established. Namely, it still has effect only between the parties one of which is a state or its emanation in the view of the court. Therefore, a closer look will be taken here at the current case law interpreting and implementing provisions other fundamental freedoms are embedded in so as to examine the court's reasoning, i.e. *ratio decidendi* in these cases. This is executed with the view to later examining the appropriateness of using such or similar reasoning for establishing horizontal direct effect of Article 63 TFEU inaugurating free movement of capital.

Among the remaining three out of the total of four fundamental freedoms of the Single Market,[11] the status regarding horizontal effect of the key provision these freedoms are embedded in is the following.

The free movement of workers provisions (Article 45 TFEU) seem to represent the one freedom in case of which there is little dilemma in academic community about the existence of its horizontal direct effect,[12] although - as will be explained regarding this and other bellow analyzed fundamental freedoms - there is plenty of room for speculation in terms of the extent of it. One of the first and most notable cases in which horizontal direct effect of the free movement of workers was recognized by the CJEU was Walrave.[13] The CJEU stated in its judgment that prohibition of discrimination on the basis of nationality between workers of the Member States "does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services".[14] It further proceeded with even more explicit statement by reiterating that "working conditions in the various member states are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons", hence "to limit the prohibitions in question to acts of a public

[11] There are opposing views on whether freedom of establishment and free provision of services should be regarded as a single legal concept, i.e. single freedom, or these two should be regarded as representing two distinctive freedoms. Since the freedom to provide services includes, i.e. presupposes the right of establishment in the cases in which one opts to provide services based on the permanent (formal) presence in another Member State, it seems appropriate to consider freedom of establishment as a part of the free movement of services. On the other hand, the fact will also be taken into account as regards further analyses presented in this paper that the freedom of establishment is occasionally treated and safeguarded separately in the CJEU case law.

[12] For instance, see Maria Wiberg, *op. cit.* p. 156.

[13] See Case C-36/74, B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo (12 December 1974) EU:C:1974:140.

[14] *Ibid*, par. 17 of the Judgment.

authority would risk creating inequality in their application".[15] After this precedent, the scope of application of the TFEU free of movement of workers provisions was additionally broadened in Bosman,[16] when the CJEU included within the range of restrictions both discriminatory and non-discriminatory legal instruments enacted by private actors with the view to regulating gainful employment in a collective manner.[17] Finally, in Angonese, the CJEU has made another step forward by including within the range of restrictions on free movement of workers not only those created by organizations engaged in regulating employment in a collective manner but such restrictions created by other private actors (non-public entities) as well.[18] Namely, the CJEU has actually reiterated its findings from earlier landmark cases, such as Walrave and Bossman, that the abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if it could be circumvented by barriers resulting from the exercise of their legal autonomy by associations or organizations not governed by public law.[19] However, in Angonese, the CJEU has also taken the general position that abolition of obstacles to freedom of movement of persons constitutes a specific application of the general prohibition of discrimination, which has uncontested full direct effect. Hence, it was no surprise that the court has expressly stated in Angonese that, "the prohibition of discrimination on grounds of nationality laid down in Article 48 (currently Article 45 TFEU) of the Treaty must be regarded as applying to private persons as well".[20] In doing so, the CJEU has cleared any doubts as to whether freedom of movement for workers is both vertically and horizontally effective. In other words, provisions of the TFEU regulating free movement of workers were expressly recognized by the CJEU as being effective directly in terms of relations between private actors. The one dilemma that evidently remained to be resolved was whether Article 45 TFEU should be considered as applying to relations between private actors in such cases in which the potential restriction examined by the court is not of discriminatory nature.

As explained above, the answer to above dilemma – a positive one - was first provided with regard to relations between the private actors one of which is in a position to regulate in a collective manner gainful employment. In addition, in Casteels,[21] the CJEU has slightly but noticeably broaden such effect of the free movement of workers by spreading it to relations between private actors resulting out of mandatory collective labor agreements - regulatory instrument of somewhat different nature than private regulation previously founded by the CJEU to represent impermissible restriction in Walrave and Bosman. Furthermore, another

[15] *Ibid*, par. 19 of the Judgment.
[16] See Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman* (15 December 1995) EU:C:1995:463.
[17] *Ibid*, Par. 103 of the Judgment.
[18] See Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA (6 June 2000)* EU:C:2000:296.
[19] See Judgment in Angonese, par. 32.
[20] *Ibid*, par. 36.
[21] See Case C-379/09 Maurits Casteels v British Airways plc. (10 March 2011) EU:C:2011:131.

important "move" was made by the CJEU in Casteels towards general horizontal direct effect of article 45 TFEU. The court stated that "Article 45 TFEU militates against any measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by European Union nationals of the fundamental freedoms guaranteed by the Treaty".[22] In doing so, the CJEU actually suggested that free movement of worker provisions could be regarded in the future as a freedom having horizontal direct effect in terms of all types of legal relations between private actors.

As for the free movement of services (Article 56 TFEU) and freedom of establishment (Article 49 TFEU), these are also generally recognized for having horizontal direct effect. As mentioned already, in Walrave and subsequent cases, along with the free movement of workers, the CJEU has accorded horizontal effect to free movement of services and freedom of establishment provisions of the TFEU by utilizing identical or similar arguments. Therefore, it would be just to conclude that the CJEU has utilized the same *ratio decidendi* for originally establishing horizontal effect of the free movement of workers, services and of the freedom of establishment provisions.[23] This trend has continued throughout the years, although some separate developments in terms of further expansion of the general notion of restriction may be spotted in certain cases involving specifically free movement of services and freedom of establishment, such as Viking[24] (with regard to freedom of establishment) and Laval[25] (with regard to free movement of services). More precisely, in the said cases the court included within the range of restrictions to free movement of services and freedom of establishment collective actions by worker's syndicates, i.e. trade unions, which in these particular cases were private actors acting within their legal rights. However, unlike Walrave, the hindering (restrictive) activity (i.e. collective action) in Viking and Laval were activities other than regulation of gainful employment in a collective manner.[26]

The free movement of goods is one of the fundamental freedoms classified by many at this point of time as not having horizontal direct effect – at least not to the extent that has been reached in terms of two previously examined fundamental freedoms. As some authors put it, the CJEU provided us with "glimpses" of horizontal direct effect of the free movement of goods in the tribunal's early history,[27] but afterwards it repeatedly demonstrated persistence in hindering, even

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[22] *Ibid*, par. 22. of the Judgment.

[23] See Jules Stuyck, "The European Court of Justice as a motor of private law", in Christian Twigg-Flesner (ed.) *European Private Law*, Cambridge University Press, 2010, p. 108.

[24] Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti (11 December 2007) EU:C:2007:772.

[25] Case C-341/05 *Laval un Partneri Ltd vt Svenska Byggnadsarbetarefbsrbundet and Others (18 December 2008)* EU:C:2007:809.

[26] Still, there are authors offering somewhat different but equally legitimate explanation on Viking, Laval and similar CJEU cases by subsuming the court's approach in these cases under the notion of "extended vertical effect". See Christine Barnard, '*Viking* and *Laval*: *An Introduction'*, "Cambridge Yearbook of European Legal Studies*"* Vol. 10, 2008, p.469, 472.

[27] See Crisitoph Krenn, *A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement Of Goods, "*Common Market Law Review", Vol. 49(1), 2012, p. 179.

denying this fundamental freedom horizontal direct effect. Namely, although the CJEU started with applying free movement of goods provisions with regard to actions taken by the private actors already in 1982, in Buy Irish,[28] throughout the following decades it has remained true to its primary position established in that case that applying the free movement of goods provisions to legal relations involving exclusively private actors is possible only when their actions causing or threatening with restrictive effect are unquestionably attributable to the state.[29] Truth be told, in Buy Irish it was the State of Ireland which was the party to the proceedings before the CJEU, whilst subsequent cases such as Association of Pharmaceutical Importers[30] and Fra.bo[31] were preliminary ruling proceedings parties to which were private actors. Nevertheless, the principle remained the same – in order to find that the TFEU freedom of goods provisions are directly effective in terms of private actor's doing, the court needed to established that there is an obvious connection between the restrictive action (i.e. private actor's doing) and the state (or one of its emanations) involvement in the matter.

Hence, one the one hand, cases such as Pharmaceutical Importers and Fra.bo can be considered to represent an extension of vertical direct effect. On the other hand, since private actors are directly and the state only indirectly involved, one could also find these cases to establish horizontal direct effect of the free movement of goods provisions. However, bearing in mind the wording of the judgments and the emphasis that were put by the court on the state involvement in the activities examined, it seems that the latter was not the intention of the CJEU. To that end, many are is still inclined to accept the view that freedom of movement of goods does not have horizontal direct effect.[32]

Finally, the above dilemma was further complicated by the cases such as Commission v. France.[33] Namely in this one, as well as some other subsequent cases, the CJEU has established that under the free movement of goods provisions of the TFEU there is an obligation of each Member State to prevent the creation of restrictions on free movement of goods by actions of the private persons on its territory.[34] Hence, although actions by private parties were regarded as if they can create obstacles to free movement of goods, they were not banned directly by the

[28] Case 249/81, Commission of the European Communities v Ireland (24 November 1982) EU:C:1982:402.

[29] See Judgment in Buy Irish, par. 7.

[30] Case C-266/87, *The Queen v Royal Pharmaceutical Society of Great Britain, ex parte Association of Pharmaceutical Importers and others* (18 May 1989) EU:C:1989:205.

[31] Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein* (12 July 2012) EU:C:2012:453.

[32] For instance, see Friedl Weiss and Clemens Kaupa, *European Union Internal Market Law* Cambridge University Press, Cambridge, 2014, p. 47; Crisitoph Krenn, *op. cit*. p. 181. For somewhat opposite conclusions in view of recent developments, see Pedro Caro de Sousa, *Horizontal Expressions of Vertical Desires: Horizontal Effect and the Scope of the EU Fundamental Freedoms*, "Cambridge Journal of International and Comparative Law*"* Vol . 2. Iss. 3, 2013, p. 484-486.

[33] Case C-265/95 *Commission v France (9 December* 1997) EU:C:1997:595,

[34] *Ibid*, Par. 31. of the Judgment.

court. Instead, the CJEU has established liability of a Member State for not acting so as to prevent such actions. Obviously, this can be seen as another step towards establishing horizontal direct effect of the free movement of goods provisions. However, it could also be regarded as another CJEU's mechanism to go around, i.e. avoid explicitly establishing such effect of Article 34 TFEU. Be this as it may, the dilemma remains and the future case law will hopefully provide more definitive answers to it.

2.2. *Ratio Decidendi*

Even from the above presented general overview of horizontal direct effect of the three fundamental freedoms, one can manage to deduct and understand the basic rationale utilized by the CJEU to establish such effect. In that regard, it seems that there are at least two closely related constants in the relevant case law. First, there is a repeated hesitation of the court to establish full, i.e. unrestricted horizontal effect of the fundamental freedom provisions. Namely, the CJEU had numerous opportunities to proceed with such approach and end the debate this paper is also a part of. Nonetheless, it did not. It has opted for establishing horizontal direct effect on a case by case basis, in limited number of situations that have been addressed by the court. Secondly, though extremely cautiously, the court has also repeatedly, step by step, expended the scope of application of the free movement provisions and within it the scope of implementation of the principle of horizontal direct effect. Therefore, although the CJEU may be reluctant to establish unrestricted horizontal direct effect, the experience we had with its case law during the last 50 years strongly implies that this judicial institution will continue to slowly expand the scope of application of fundamental freedom provisions to private actors and their obstructive, i.e. restrictive actions.

Notwithstanding the fact that any generalization is hazardous, this author finds that behind the above two constants in CJEU's approach to establishing horizontal direct effect of the fundamental freedoms are two driving motives. As for the obvious hesitation with regard to establishing unrestricted horizontal direct effect, the court's persistence is mostly the result of the need to avoid rushing with establishing supremacy of the *acquis* over national legislation in private law sphere, a course of action to which Member States are extremely sensitive and that could therefore lead to serious stalls in integration process, or even large setbacks. Namely, it is obvious that the scope of application of various provision of EU law has been expanding in correspondence with the rise of the level of integration within this *sui generis* supranational entity, which took both time and great sensibility in coping with different, often opposite Member State interests. This was the case and still is particularly so regarding the issue of EU law superseding part of national legislation regulating relations between private actors.[35]

[35] For more on the complex relations between the CJEU and the Member States and the influence that the latter has on the former, for instance, see Michael Blauberger, Susanne K. Schmidt, *The European Court of Justice and its political impact* „West European Politics", Vol. 40(4), 2017, p 907-918.

As for the second constant - steady expansion of the scope of application of the fundamental freedom provisions by introducing and occasionally recognizing particular new private law instruments as impermissible restrictions, this is clearly driven by the courts legal reasoning that has been more or less evident in each of the cases establishing new situations in which the horizontal direct effect exists. More precisely, virtually in each of these cases the CJEU utilized phrases such as the one in Viking, which reads as follows:

"Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application."[36]

As the CJEU itself explained,[37] this argument is but a repetition or reformulation of those utilized in cases such as Walrave (par. 19), Bosman (par. 84) and Angonese (par. 33). Accordingly, this fact clearly implies the existence of the court's general but only occasionally manifested inclination towards not allowing the difference between the legal natures of the restrictive acts, as well as the difference between the legal subjects creating such restrictions to present an obstacle in securing the efficiency of the free movement provisions.[38] Put differently, it seems evident that it was the *effet utile* doctrine that represented the predominant driving motive behind broadening of the scope of application of the free movement provisions in terms of introducing their horizontal direct effect.[39]

Effet utile, i.e. the principle of effectiveness of EU law, which even those who contest its broad application refer to as a "meta-rule" of interpretation of the CJEU,[40] allows the court to interpret a rule with the view to achieving the best possible effect of the EU law. Arguably, it serves as one of the key corrective mechanisms created by the CJEU for rectifying the shortcomings of the European legislator, as seen by the court itself. Hence, as explained above, the CJEU used it on number of occasions to extend the scope of application of the free movement provisions of the TFEU so as to avoid that what it repeatedly termed "inequality in application" and achieve the best possible effectiveness of interpreted EU law provisions.[41]

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[36] Par. 34 of the Judgment in Viking (see *supra* note 23).

[37] *Ibid.*

[38] The term occasional used here should not by any means be perceived as if implying randomness in the court's approach. It should be understood as implying that what has been termed as the CJEU's incrementalism in implementing EU law. See Urska Sadl, *The Role of Effet Utile In Preserving the Continuity and Authority of European Union Law: Evidence From the Citation Web of the Pre-accession Case Law of the Court Of Justice of the EU*, "European Journal of Legal Studies", Vol. 8(1), 2015, pp. 18-45.

[39] There are authors emphasizing equal or similar importance of other motives, apart from *effet utile.* See Mustafa T. Karayigit, *The horizontal effect of the free movement provisions*, "Masstricht Journal of European and Comparative Law", Vol. 18(3), 2011, p. 317.

[40] See Stefan Mayr, *Putting a leash on the Court of Justice? Preconceptions in National Methodology v Effet Utile as a Meta Rule*, "European Journal of Legal Studies", Vol. 5(2), 2012/13, pp. 7-21.

[41] See *supra* note 35.

3. Prospects for horizontal direct effect of the free movement of capital

The free movement of capital is probably the most specific among the four fundamental freedoms. It is not only because it became fully operational much later than the other three – when the Maastricht Treaty entered into force in 1993 – but also because it offers protection to natural and legal persons from third countries, which makes the challenge of developing according case law even greater.[42] The key provision introducing this freedom is enshrined in Article 63(1) of the TFEU. It is a general rule simply prohibiting any kind of obstacles to the free movement of capital. In addition, under Article 63(2), the freedom of payments is introduced as an element of the broader notion of the free movement of capital in the Single Market. However, neither Article 63 nor Article 64-66 TFEU provide any definition of the notions of capital and the movement thereof.[43] Therefore, in order to fill in this gap, apart from exercising its inherent authority to interpret EU law in any given context, including this specific one,[44] the CJEU occasionally refers to open list of capital movements provided in the Annex 1 of the Directive 88/361/EEC.[45]

Although the CJEU case law regarding free movement of capital is due to obvious reasons not as extensive as in case of remaining three fundamental freedoms, it is both substantive and indicative enough for drawing some important conclusions.[46] Firstly, as already stated, there is no horizontal direct effect of the freedom of capital movement provisions. This is so due to the fact that all of the restrictive measures established as impermissible in terms of Article 63 TFEU by the CJEU were explicitly seen by the court as posing direct or in some rare cases consequential but nonetheless evident doing of states or another public entities. Secondly, it is the conglomerate of the so-called "golden shares cases" in which the free movement of capital provisions have been accorded the broadest scope of application.[47] Put differently, this is the segment of the CJEU case law on the free movement of capital in which this freedom has come closest to other fundamental

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[42] For an outline of the historical development of EU primary and secondary law regulating free movement of capital, for instance, see John A. Usher, "The Evolution of the Free Movement of Capital", 31(5) *Fordham International Law Journal* (2007), pp. 1533-1570.

[43] Article 64-66 TFEU, along with Article 63 TFEU, are part of the Chapter 4 – Capital and Payments of the Title IV TFEU. Generally, these articles serve to introduce various kinds of permissible exceptions to general prohibition of restriction to free movement of capital under Article 63 TFEU.

[44] See Rafi Karagöl, "Free Movement of Capital in the Context of Turkey's EU Candidature", 1(1) Ankara *Bar Review* (2008), p. 74.

[45] Council Directive 88/361/EEC for the implementation of Article 67 of the Treaty (24 June 1988), Official Journal of the European Communities, No. L 178/5.

[46] Arguably the best summary of the most relevant CJEU case law pertaining to the freedom of capital movement is provided by the European Commission within its broader series of guides concerning the case law of the CJEU on fundamental freedoms. Available at: https://ec.europa.eu/info/system/files/case-law-guide-court-of-justice-23022016_en.pdf (30 October 2017).

[47] Today, the term "golden share" has become a generic term for various types of special rights of states and other public entities in privatized companies introduced by public or private law instruments so as to preserve decisive influence of public entities on certain types of company's decisions, which would otherwise be impossible. See Vladimir Savkovic, The *Alleged Case of Golden Shares in Montenegro: A Candidate Country's Experience as an Incentive for Including Acta Jure Gestionis within the Range of Restrictions on Free Movement of Capital*, "Review of Central and East European Law", Vol 41(2), 2016, pp. 155-193.

freedoms in terms of moving towards horizontal direct effect. It is for that reason exactly that some authors find it only a matter of time when the CJEU is going to establish such effect of the freedom of capital movement in one of its future golden shares cases.[48] This author, however, only partially agrees with such findings.

First of all, in terms of bringing closer the freedom of capital movement to becoming "horizontally effective", it does seem evident that golden shares case law has the highest potential.[49] However, is this really only a matter of time? Having in mind all the past and current intricacies surrounding the development of the CJEU case law and that of the European institutional and regulatory framework in general, it is hardly so. But let us first see to what point has the current golden share case law taken us to this date.

It is well-known that in the first golden shares cases the European Commission was actually centering particular instruments belonging to primary or secondary legislation, which were adopted by Member States in order to allow them to preserve certain special rights they would otherwise not keep if at the time existing national company legislation would have been applied without additional modifications.[50] However, as the result of the development in understanding of the notion of restrictions on free movement of capital, the CJEU has soon introduced a new line of cases, such as Commission v. Kingdom of the Netherlands,[51] Commission v. United Kingdom,[52] or Commission v. Portuguese Republic.[53] In these and some more recent cases the CJEU has founded that not only instruments of primary or secondary legislation but articles of association of a company can represent an impermissible restrictive measure – not surprisingly, however – provided that special rights of the states embedded in them "do not arise as the result of the normal operation of company law".[54] Hence, the CJEU has ceased with clearly differentiating in this regard between the acts, i.e. doings of the state in its public capacity (*acta iure imperii*) and those in its private capacity (*acta iure gestionis*). Accordingly, since the Member States in their private capacity may act only as if they were any other private person (actor), it is clear how such approach of the court could be interpreted as a step towards establishing horizontal direct effect of the TFEU free movement of capital provisions.

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[48] See Harm Schepel, *op. cit.*, p. 192.

[49] It is enough to take a general insight in the relevant summaries of the types of cases belonging to the CJEU case law regarding the freedom of capital movement (see *supra* note 45) to conclude that, apart from the golden shares cases, virtually all others are such cases in which the CJEU addressed restrictions which were legislative acts or other regulatory acts created by the state or one of its emanations in the broadest sense.

[50] For instance, see Case C-463/00 Commission v. Kingdom of Spain (13 May 2003) EU:C:2003:272; Case C 367/98 Commission v. Portuguese Republic (4 June 2002) EU:C:2002:326; Case C483/99 Commission v. French Republic (4 June 2002) EU:C:2002:327.

[51] Joined cases C-282/04 and C-283/04 Commission v. Kingdom of the Netherlands (28 September 2006) EU:C:2006:608.

[52] Case C-98/01 Commission v. United Kingdom (13 May 2003) EU:C:2003:273.

[53] Case C-171/08 Commission v. Portuguese Republic (8 July 2010) EU:C:2010:412.

[54] Commission v. United Kingdom, *supra* note 51, par. 48 of the Judgment. Similarly, Commission v. Kingdom of the Netherlands, *supra* note 50, par. 32 of the Judgment.

Be the above as it may, it still seems clear – particularly from the above underlined wording of the judgments in golden shares cases - that the general motivation behind the CJEU case law was not to establish horizontal direct effect but to expand the scope of application of the free movement of capital provisions under the principle of vertical direct effect. Namely, under the existing case law, in order for the CJEU to find particular articles of association to represent restrictive measure, a strong connection needs to be established between the distortion of regular company law allowing persistence of the Member State's special rights and actions of such state stemming out of its dominant position as a public entity. Put differently, in light of the current case law, it is obvious that the CJEU is still inclined not to treat all articles of association establishing special rights as state measures and restrictions on the free movement of capital. It is prepared to do so only regarding ones that - although created by states or other public entities in their capacity as private actors - have still been imposed on private parties (i.e. other shareholders of the privatized company) through some type of indirect but clear manifestation of their public powers.[55]

Another fine detail that can further help resolve dilemma about the direction in which the CJEU is going currently with its golden shares case law is the treatment of *iure gestionis* acts other than articles of association. To this date, the CJEU has analyzed, i.e. examined such legal instruments as potential restrictions on the free movement of capital in only one adjudicated case, which is actually another golden share case of Commission v. Portuguese Republic ("Commission v. Portuguese Republic II").[56] Nevertheless, it still illustrative enough not only in terms of the court's current reasoning but also regarding its future approach to both *iure gestionis* acts, as well as purely private law instruments as potential restrictions to freedom of capital movement.

In Commission v. Portuguese Republic II, the CJEU has examined both articles of association of the GALP Energia SGPS SA ("GALP") establishing special rights for public entities,[57] as well as the shareholders' agreement which has been concluded in execution of the special rights established under GALP's articles of association between the state owned bank Caixa Geral de Depósitos SA ('CGD') and some of the other shareholders. In short, apart from unequivocally considering articles of association a state measure introducing special rights of the Portuguese Republic, the CJEU also stated that it regards the shareholders' agreement as an instrument

[55] A similar understanding of the Court's reasoning has been recently offered by Möslein in light of the debate on the outcome of the reopening of the so-called "Volkswagen case", (see Case C 95/12 *Commission v. Germany* (22 October 2013) EU:C:2013:676). More specifically, this author finds the court's attitude to be that "articles of association can equally qualify as restrictions on the free movement of capital, at least if they originate in Member State action". See Florian Möslein, *Compliance with CJEU judgments vs. compatibility with EU law – Free movement of capital issues unresolved after the second ruling on the Volkswagen law: Commission v. Germany*, "Common *Market Law* Review" 52(3), 2015, p. 811.

[56] Case C-212/09 Commission v. Portuguese Republic (10 November 2011) EU:C:2011:717.

[57] Worth stressing is that GALP's articles of association were adopted in pursuance of public law instrument - Decree-Law approving the first phase of the privatization of the share capital of GALP (see par. 4 of the Judgment in Commission v. Portuguese Republic, *supra* note 55.

utilized by the Portuguese Republic in order to "maintain its influence over the composition and management of GALP".[58] Hence, as to the effect of the two legal instruments, it seems that the CJEU has founded both of these to have restrictive effect on the free movement of capital in the Single Market. However, in the final order of the judgment, the CJEU has founded articles of association to represent restrictive and impermissible state measure in terms of the freedom of capital movement but avoided making any statement on whether it finds shareholders' agreement entered into by the CGD to represent such measure. Moreover, although the CJEU did elaborate on the issue of the legal nature of the said shareholders' agreement in the reasons for the judgment (i.e. "Findings of the Court"), even in this part of the judgment it avoided making explicit statements on whether it finds that shareholders' agreement could be treated as a state measure *per se*.

There are different ways of explaining the court's stance regarding the shareholders' agreement examined in Commission v. Portuguese Republic II. On the one hand, it may be that the CJEU found it unnecessary or even imprudent to set a precedent regarding contracts as genuine and potentially impermissible state measure in a case in which it was not even needed in order to find that a Member State has actually breached its duties under Article 63 TFEU. However, it seems more likely that the court has simply stuck to its former case law based on the presumption that special rights of the state in privatized companies and legal instruments introducing them may be declared impermissible only if some distortion of company law has been established in relation to such rights. Namely, as already explained, in cases in which articles of association have been declared impermissible restrictions to free movement of capital the CJEU has founded that special rights embedded in such articles of association do not arise out of normal operation of company law. Put differently, it established that such special rights were imposed on the private investor and other shareholder through indirect but nevertheless clear manifestation of public authority. The state, however, is far less likely to achieve all that by means of contract as a legal instrument, which is mainly due to the fact that contractual relations, unlike some other type of legal relations,[59] can result exclusively out of manifested intention to enter into a contract (i.e. *animus contrahendi*). Accordingly, though it may also be possible, it would be much more difficult for the court to establish that a contractual right of the Member State was somehow imposed on other contracting party or parties.

Notwithstanding the difficulties above, in view of the *effet utile* principle of interpretation as the driving motive behind establishing of horizontal direct effect in case of other fundamental freedoms,[60] this author finds that further broadening of the range of restrictions on the free movement of capital with new types of *iure gestions* acts should be regarded as a sound approach. In short, it is the intended effect that should count primarily, not the instrument utilized for establishing

[58] *Ibid*, par. 51 of the Judgment.

[59] For example, in case of articles of association as a tool for providing Member States or public entities with privileged position in a company, rules incorporated in such regulatory instrument apply equally to those that voted for and those that voted against it at the shareholders' assembly.

[60] See *supra* 2. Horizontal Direct Effect of the Fundamental Freedoms in the CJEU Case Law – Extent and *Ratio Decidendi*.

special rights.[61] However, as explained, it is considerably more difficult to establish detrimental, i.e. restrictive effect of state contracts than that of articles of association of privatized companies. Therefore, it is probably for this reason that the European Commission has so far avoided bringing charges against Members States in the former type of cases.

Finally, it is particularly important to notice the following. Even if the CJEU decides at some future point in time to establish that a contract concluded by a public entity represents an impermissible restriction on the free movement of capital in the Single Market, this does not mean that by definition this tribunal will do so with regard to contracts representing purely private law instruments, i.e. those contracting parties to which are exclusively private legal or natural persons.[62] On the contrary, notwithstanding the fact that company law legislation on the global scale is becoming more on more mandatory due to financial and economic crises from the beginning of the 21st century, freedom of contract is still one of the key regulatory principles in this branch of law. Hence, including contracts and other purely private law instruments within the range of restrictions on the free movement of capital would constitute another big step towards restricting the application of this important regulatory principle in many national company law systems. Because of this reason the CJEU would almost certainly avoid immediately equaling, in terms of the judicial treatment, *iure gestionis* acts and purely private law instruments, in spite of the fact that *effet utile* principle of interpretation is at least *prima facie* directing those utilizing it towards universal implementation of a given provision. Moreover, any such approach would need to be carefully weighed against the need to preserve and gradually improve investment ambience, which is, particularly so today, one of the driving motives of prudent regulatory policy in international economic law.

4. Concluding remarks

The initial aim of this paper was to investigate prospects for the TFEU freedom of capital movement provisions being accorded horizontal direct effect. To that end, an overview was made in the second part of the paper of the CJEU case law in which such effect has already been accorded to other fundamental freedoms of the Single Market so as to establish what seems to be the key rationale behind it. In doing so, the author has come to conclusion that it is the *effet utile* doctrine that represented the driving force behind recognition of horizontal direct effect of the free movement provisions so far. Essentially, the CJEU has recognized horizontal direct effect of the fundamental freedoms other than the free movement of capital in cases in which it has founded that pursuing the difference in terms of

[61] See Vladimir Savkovic, *op. cit.*

[62] This author finds that the notion of purely private person should not include such companies and other legal persons that are owned or in any other way predominantly controlled by state or another public entity.

legal nature of the instruments causing restrictive effect would risk creating inequality in application of the free movement provisions themselves.[63]

In the third part of the paper the existing golden shares case law was examined more closely, considering that it represents the line of cases in which the CJEU has gone farthest in bringing closer the freedom of capital movement to having horizontal direct effect. The analysis, however, demonstrated not only that there are no signs of this freedom becoming horizontally effective in the near future but also that the CJEU is reluctant to recognize most of *iure gestionis* acts as potentially impermissible state measures in terms of Article 63 TFEU. More specifically, it was established that articles of association are the only type of such acts recognized so far as restrictive measures by this tribunal. Namely, the CJEU did imply in *obiter dictum* of the judgment in Commission v. Portuguese Republic II that it finds that the shareholder's agreement examined has a restrictive effect on the free movement of capital, but it avoided finding this document to represent an impermissible state measure and creating an important precedent in doing so.[64]

Finally, while the author finds that the court should essentially proceed with equal treatment of all *iure gestionis* acts, i.e. consider them all as potential restrictions under the principle of (extended) vertical direct effect, conclusion is offered that establishing horizontal direct effect of the TFEU free movement of capital provisions should be addressed with extreme cautiousness. This is particularly so because such action could interfere with some strongly rooted foundations of both company and contract law of the Member States, as well as with everlasting endeavors on improving business and particularly investment ambience. To that end, and having in mind the "youth", as well as certain other specific features of the freedom of capital movement, not rushing into establishing horizontal direct effect of the free movement of capital should be seen as a sound approach of the CJEU. Even if this is to occur in the future, before taking such course of action, the CJEU would do good to establish clear and generally uncontested criteria for recognizing horizontal direct effect regarding at least one of the fundamental freedoms with far richer tradition than the free movement of capital both generally and in terms of full direct effect. Such order of moves would also be in line with some of the court's ultimate goes, which are to uphold the principle of legal certainty and improve effectiveness of EU law.

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[63] See *supra* note 14.
[64] See supra 3. Prospects for Horizontal Direct Effect of the Free Movement of Capital.

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