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THE DOCTRINE OF HORIZONTAL DIRECT EFFECT IN EC LAW AND THE CASE OF ANGONESE

by

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PREFACE

After completing this essay I feel inclined to describe some of my personal reflections on the scientific process and it's preconditions. It is in this respect important to emphasise that this task was in all essentials accomplished while I was studying as an Erasmus student at Ghent University, Ghent, Belgium. This fact is significant because of two reasons. First I am quite certain that the choice of topic to this essay and the design of this essay are very much interlinked with the substantial amount of source material that I had access to. In this regard I consider it to be appropriate to express my gratitude to Dr Marc Maresceau, Head of the Department of European Institutions at the Faculty of Law at Ghent University, which provided for my access to the European Law Library at Ghent University. The quality and the quantity of the material in this library indeed facilitated the working process and the selection of material.

Secondly it is quite clear that the year abroad in Belgium and the focus on European Law provided for my inspiration to write this essay. Thus it was difficult to not get affected and be influenced by the European integration project while studying in the heart of Europe. This partly explains my selection of topic to this essay in the respect that direct effect is one of the cornerstones of the legal integration project. On the topic of inspiration it would be great negligence on my part if I neglected to mention two of my teachers at Ghent University, which admittedly opened my eyes for the legal and political implication of the integration project. Therefore I feel inclined to express my gratitude to Dr Inga Govaere, Professor of European Law, and Dr Erwan Lannon, Professor of European Law. Without their commitment and devotion to community law and their skills as teachers it is unlikely that I would have written this essay.

Finally I am indebted to my supervisor Dr Carl-Fredrik Bergström, Associate Professor of European Integration Law at the Faculty of Law at Stockholm University, who was my leading guide through the whole process of completing this essay. His professional assistance was of great importance in the beginning phase of the project when I admittedly was a little bit in the dark with regard to the topic and the structure of this essay. Personally it was also of great significance for me that Carl-Fredrik was an expert on European integration law and that he was interested in the topic of this essay. As a conclusion it is clear that without his assistance and guidance this essay would never have been completed. Thanks also to my family, which always provide for invaluable professional and emotional support.

Stockholm, October 2007,

Jacob Öberg

1. INTRODUCTION

The concept of direct effect in the Community legal order has, since the beginning of the European Community, played an arguably important role for individuals in enforcing the rights which are derived from community law as well as maximising the integration of the Community law into the national legal systems, the principle of effete utile.[1]While it has been accepted that most of the provisions of the EC Treaty can be invoked by individuals directly before the national courts of the Member States against the Member States, there have been doubts whether the same reasoning could be applied in the situation where private parties endeavoured to assert the rights derived directly from the provisions of the EC Treaty against other private parties.[2] There have thus been proposals that (unlike the rules on competition in the EC Treaty, which expressly are directed against private parties the provisions in the Treaty concerning free movement) they are primarily targeted against the Member States.[3] In accordance with this view the Court of Justice of the European Communities [4] has held that the provisions concerning free movement of goods cannot have horizontal direct effect among private parties.[5] However the question remains whether the reasoning in Vlaamse Reisiebureau from ECJ could be applied to the other provisions concerning free movement in the EC Treaty.

In the year of 2000, the ECJ delivered a well-known judgement among European lawyers, Angonese, which indeed recognised horizontal direct effect of community law among private parties in the field of free movement of workers.[6] The ECJ thus held that a job applicant could sue a private bank before the national court on the basis of the prohibition of discrimination in Article 39 of the EC Treaty (Article 39). Some commentators argue that this development of EC law in the field of free movement of workers could have significant influence on private legal

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1 See Steiner, J, Twigg- Flesner, C and Woods, L, EU law, 9th edition, 2006, Oxford University Press, p.112, hereinafter Steiner and P.Craig and G.De Burcá, EU law, Text, Cases and Materials, Third edition (2003), p.185, hereinafter Craig and C-26/62, *NV Algemene Transporten Expeditie Ondermening van Gend en Loos v. Nederlandse Administratie der Belastingen.* [1963] ECR 1; [1963] CMLR 105.

2 See and Barnard, C, The Substantive Law of the EU, First Edition, 2004, Oxford University Press, p.262, hereinafter Barnard, and Craig, n.1, (2003), 702-703, 771

3 See Article 81,82 and 141 of in Consolidated Version of the Treaty Establishing the European Community, as amended in accordance with the Treaty of Nice Consolidated Version and the 2003 Accession Treaty, hereinafter called the EC Treaty.

4 Hereinafter referred to as ECJ.

5 See See C- 311/85, ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten, [1987] ECR 3801.

6 See Roman Angonese v Cassa di Risparmio di Bolzano SpA. C-281/98, [2000] ECR I-04139.
For an analysis of this case and a description of facts, see Chapter 2.4.

relationships whereas Article 39 now clearly is binding on private employers. [7] These commentators even argue, "Mr Angonese will now join the annals of community law pioneers," suggested that this case is an evidence of ECJ's renowned "judicial activism". [8]Nevertheless as will be seen below if one takes a narrow view of the legal rationale of Angonese one could make an argument that the legal and practical importance of Angonese should not be overestimated. [9]Despite this remark I will briefly mention some arguments why the Angonese case and the recognitions of horizontal direct effect of Article 39 could be seen as important in the field of community law.

Although the practical importance and implications of this interpretation from ECJ of Article 39 still remains unknown one could assert that the recognition of horizontal direct effect arguably strengthen the integration and enforcement of EC law[10] in the Member States which are the central aims that underlines the concept of direct effect.[11]. The implication of the judgement is the more important when one consider that Article 141 of the EC Treaty, which was held directly applicable in Defrenne, merely covers discrimination in payment based on sex.[12] This implies that inter alia discrimination based on nationality is not encompassed by this provision.

Nevertheless the introduction of horizontal direct effect of Article 39 could have practical significance for job seekers, workers and employers in their endeavours to enforce the rights that are derived from the EC Treaty. On the other hand it is also material to note down that the introduction of horizontal direct effect of Article 39 also could impose obligations on private employers. In particular because of this policy conflict it is an interesting topic to examine whereas it illustrates the ECJ's role in shaping the rights that are derived from the EC Treaty and the criticism that could be launched against ECJ's activities. Thus the final analysis of the subject matter of this essay will be primarily concerned with the underlying policy considerations that underline the legal reasoning of ECJ in Angonese. In the final conclusions I will argue that the decisive arguments for recognizing of horizontal direct effect are concerned with the principle of effet utile, promotion of individual rights and legal certainty. It will also be clear from the final analysis that there exists a close relation between the supremacy doctrine, the doctrine of direct

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[7] See R.Lane and N.Nic Shuibhne, CMLR 37 2000, p.1237,1243, hereinafter Lane. Which are in general critical to ECJ's line of reasoning.
[8] Ibid,1244-45 1247.
[9] See Chapter 4.5
[10] The expression EC law refers to the first pillar of the community. This pillar is often referred as the "Community pillar". The expression "community law" is also often used to describe the law under the first pillar. Community law and EC law is used interchangeably throughout this essay. The expressions EC law and community law is generally referring to the EC treaty and the legislation that is derived from this Treaty.
[11] See Craig, n.1, (2003), 185 and Steiner n.1, 112.
[12] See C- 43/75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, [1976] ECR 455.

effect and the recognition of horizontal direct effect. However it is also evident from the conclusions that there still remain uncertainties and doubts whether the legal rationale of Angonese also could be applied to free movement of services and establishment, notably Art 43, 48 and 49 of the EC Treaty.

1.1 Purpose and research questions

The essential aim of this essay is to provide an examination and critical analysis of the concept of horizontal direct effect in the field of free movement of workers, in particular to analyse in what manner the ECJ legally justified the recognition of this concept in relation to Article 39. To be able to achieve this purpose I will examine several different areas relating to the concept of horizontal direct effect of Article 39.

Hence, there are in this respect several questions that have to be answered in the context of this essay. For example, is it possible to more generally define the legal scope of this doctrine as a general legal principle in community law or is the rationale of Angonese restricted to the facts of the case? What could be the legal and practical implications of this case law? Which is the legal base for the recognition of this doctrine? And finally could the introduction of horizontal direct effect of Article 39 be justified in legal and political terms?

1.2 Delimitations

I will delimit the area of research in the respect that I will solely examine the concept of horizontal direct effect in a community environment. Henceforth I will not study cases before the national courts in the Member States in relation to the enforcement of Article 39 by private parties against other private parties. The reason for this is as I implied above that the aim of this essay is essentially focused on the activities of the ECJ and it's case law. In order to give an answer on my research questions it is therefore not necessary to examine the jurisprudence of the national courts in relation to horizontal direct effect of Article 39. This delimitation does nonetheless not mean that I deny the significance of the developments in the national legal systems of this concept.[13] It is arguably crucial for the integration of community law that individuals are aware of the right to sue private parties on the basis of Article 39 and that the national courts acknowledges this right. [14]

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[13] See Weiler, J, "The Community System: The Dual Character of Supranationalism (1981), 1 YBEL 267

[14] See concerning this argument and the doctrine of supremacy, Steiner, n.1, 77,86 and Craig,n.1, (2003), 285-315

Moreover it emanates from the specific subject matter of this essay that I will not in a comprehensive manner deal with horizontal direct effect of the Treaty provisions that concerns free movement of goods, discrimination based on sex, freedom to provide services and freedom of establishment. Nevertheless this delimitation does not have to entail that some legal analysis regarding these matters cannot be done whereas it will arguably shed some light on the main topic of this essay. It is certainly worthwhile to examine de lege ferenda whether the Angonese reasoning could and should apply to the other Treaty freedoms.[15] It is in this regard useful to analyse and understand the reasoning given by the ECJ in relation to the question of horizontal direct effect and Article 141. Furthermore it is also apparent from the heading of this essay that this essay does not deal essentially with the enforcement of Article 39 by individuals against Member States (the doctrine of vertical direct effect).[16]

Another delimitation also follows from the fact that this essay does not attempt to deal with the general subject matter of free movement of workers in relation to EC law. As mentioned above this essay solely examine whether Article 39 catches measures that are enacted by individuals in the field of free movement of workers. This does nevertheless not imply that the author will abstain from making generally descriptions on certain matters within this area of EC law where this is suitable and the situation so requires for reasons of clarity.[17] This essay is also restricted to examine horizontal direct effect in relation to Article 39 of the EC Treaty and other Treaty provisions and thus not horizontal direct effect that is derived from regulations, international treaties or decisions.[18]

Finally my essay will not deal extensively with the complex legal development of indirect effect of directives, consistent interpretation and incidental horizontal effects that has been elaborated by the ECJ in relation to the legal effects of directives.[19] That does nevertheless not exclude the possibility to draw some conclusions from the jurisprudence when it is material and could give clarifications for the legal questions that arises in relation to the main topic of this essay. Moreover I will deal with the ECJ's jurisprudence of horizontal direct effect of directives

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[15] See Chapter 4.5

[16] See Craig,n.1, (2003), 179-228. See however Chapter 1, Section 1.2-3 for a general description of direct effect and the distinction between vertical and horizontal direct effect

[17] See Chapter 4.4-5 relating to the similarities and differences between the Treaty freedoms

[18] See Craig, n.1, (2003), 189-202

[19] See C- 14/83, Von Colson and Kamann v. Land Nordrhein-Westfalen, [1984] ECR 1891, C-106/89, Marleasing SA v. La Comercial Internacionale, de Alimentacion SA, [1990] ECR I-4135, C-194/94, CIA Security International SA v. Signalson SA and Securitel SPRL, [1996] ECR I-2201

whereas this question in my point of view could arguably have importance for the principal analysis of the horizontal application of Article 39 of the EC Treaty.[20]

1.3 Methodology and material

My point of departure for the methodology of this essay is to use traditional legal method. This means that in order to find answers on my research questions I will primarily study jurisprudence from the ECJ and the provisions of the EC Treaty. In relation to the jurisprudence of ECJ I will also examine the opinions from the Advocate Generals (AG) of ECJ in order to scrutinise the ECJ's legal reasoning and find answers on some of my research questions. In addition I will also study academic literature encompassing textbooks and articles in relation to the subject matter of this essay.

To understand my choice of material it is in this respect significant to stress the importance of the supremacy doctrine developed in EC law by the ECJ. Explained in a simplified way this doctrine clearly gives precedence to EC law in relation to domestic law in the situation where there is a conflict of law between these two legal systems.[21] This principle even entails that constitutional law in the member states that is contrary to EC law will have to give way in a clash between the different legal orders.[22] Accordingly my selection of material will focus mainly on EC law whereas national jurisprudence and legislation has only subsidiary significance in this hierarchy of norms.[23] The supremacy doctrine also provide that judgements from ECJ in for example the preliminary ruling procedure concerning the validity and interpretation of community law is binding on all Member States, national courts, individuals and the Community institutions.[24]

In addition it is relevant to emphasise that in order to understand my analysis of different legal sources it is useful to bear in mind that I will use a critical method. Accordingly my point of departure is that legal science is arguably not an objective science. Thus there always exist different interpretations of legal sources and the analysis will therefore aim to compare different interpretations in order to find an answer to the proposed research questions. Moreover the

[20] See Chapter 2.5
[21] See C- 6/64, Costa (Flaminio) v Ente Nazionale per l'Energia Elettrica, [1964] ECR 585, [1964]CMLR 425
[22] Case 11-70., Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel., [1970] ECR I- 01125.
[23] See Note 12 and 13 for the problems with this argument.
[24] See Article 234 EC Treaty.

author considers that legal science is not possible to falsify.[25] Consequently there is not necessary to propose a general theory whereas it anyway is not possible in an objective manner to test this theory.

Concerning the choice of material I will also preliminary discuss the opinions of the Advocate General[26] in relation to the jurisprudence of ECJ. It is crucial to understand that the opinions of the AG is not legally binding for the Court and thus the ECJ is free to depart from the opinion of the AG. Nevertheless some authors argue that the opinions of the AG can be a useful tool to appreciate and evaluate the reasoning of the ECJ. Commentators highlight this in particular when it comes to the criticism directed against the Court. The basis for this criticism is that the ECJ delivers unnecessary short, unclear and obscure judgements.[27] The AG's function is thus to make a thorough analysis of the law and the facts of the case where he usually summarises the jurisprudence of the ECJ in relation to the subject matter of the case. Finally he proposes a solution to all the legal questions that has been submitted to ECJ. In conclusion the AG's opinion could in my point of view give a substantial contribution to grasp the jurisprudence of ECJ and subsequently in a later stage provide answers to the research questions put forward above.[28]

To explain the method of this essay it is also significant to stress that the legal method used for this essay must be possible to analyse in a critical manner. Thus the author will attempt to disclose all relevant sources that have been used in order for the reader to make a critical analysis of this essay. In essence the legal method is arguably the method of thinking in order to come up with a correct solution of a case.[29] Some authors will even argue that a legal method must have a transparent characteristic whereas the method must clearly show the arguments that justify the author's solution on a legal problem. [30]

Another question that should be addressed here is the issue of the ECJ's methodology. To be able to understand the subject matter of this essay one has to comprehend the legal methodology of the ECJ. Since the focus of this essay is mainly concerned with the jurisprudence of the ECJ I will therefore devote a chapter on describing the legal methodology of ECJ, notably

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25 See Popper, Karl, *The Logic of Scientific Discovery*, Basic Books, New York, NY, 1959

26 Hereinafter AG

27 See Steiner, n.1, 36 and N.L Brown and T.Kennedy, The Court of Justice of the European Communities, Fifth edition, (2000), Sweet and Maxwell, 69-70, hereinafter Kennedy

28 See Craig,n.1, (2003),94-96 and see below Chapter 1, Section 1.5

29 See See P.Raisch, Vom Nutzen der Uberkommenen Auslegungskanones fur die praktische Rechtsanwendung, Heidelberg, 1988, 1

30 See Minnesanteckningar från Nordiskt årsmöte i rättsinformatik 7 - 10 november 2001, http://www.juridicum.su.se/IRI/hela/minnesanteckningar_nordiskt.htm,

Chapter 4. It is in this regard important to stress that the Article 39 of the EC Treaty not expressly provided that the obligations that are included in this article also applied to private parties. Therefore the question of legal methodology is notably how ECJ in the absence of a textual basis could justify that Article 39 also was applicable to private parties.[31] Nevertheless as I already mentioned above I will because of the importance of the legal methodology of ECJ devote more analysis to this issue below. It is therefore sufficient in this respect to reiterate the significance of the role of ECJ in the elaboration of the concept of direct horizontal effect in relation to free movement of workers whereas there existed no clear support in wording of this interpretation.[32]

The outline of the essay will be structured in the following way. Chapter 2 will deal briefly with basic legal concepts in the community law, notably direct effect and horizontal direct effect of community law. This chapter will briefly discuss some legal theory concerning direct effect and the jurisprudence from ECJ concerning direct effect of community law. Chapter 3 will outline the jurisprudence from ECJ in relation to the question of horizontal direct effect of the provisions of the EC Treaty concerning free movement of workers, notably Article 39. Chapter 4 will briefly discuss the methodology employed by the ECJ when applying and interpreting community law. This chapter will in more detail examine briefly the relation between the method employed by ECJ and the outcome and reasoning from ECJ in the Angonese case. In the final chapter I will provide for a broad analysis of the subject matter of this essay. This chapter will deal briefly with legal and policy considerations that arguably were employed by the ECJ in the Angonese case. I will also discuss legal and practical implications of the Angonese case and make some conclusions regarding the future development of community law in this area of law.

Nonetheless it is now time to outline the legal background to the recognition of horizontal direct effect of Article 39 in the Angonese case.

31 See Chapter 3.3.9

32 See Craig, n.1, (2003), 184. The authors argue that the teleological method was used when ECJ elaborated the concept of direct effect in C- 26/62, Van Gend en Loos.

2. THE CONCEPT OF HORISONTAL DIRECT EFFECT

2.1 Introduction

The aim of this chapter is to outline the legal background of the concept of horizontal direct effect. This entails an attempt to elaborate and describe horizontal direct effect as a general legal concept. This requires a careful and rigorous analysis of ECJ's jurisprudence in relation to the elaboration of this concept. I will first generally account for the concept of direct effect and the concept of direct applicability. Then I will examine the distinction between horizontal direct effect and vertical direct effect and more notably in relation to directives. Although these issues could arguably be considered as somewhat irrelevant and immaterial for the topic of this essay I consider that this background is necessary for the logical consistency and cognisance of the topic of this essay. My argument is also that the ECJ has encountered the same principal problems concerning the introduction of horizontal direct effect of Treaty provisions as with directives.

2.2 Direct effect and direct applicability of community law

As a preliminary point it is clear that the concept of direct effect is one of the most discussed an arguably most important legal doctrines that has been created by ECJ.[33] However it is material to first ask the question why direct effect matters? Why is this concept important for individuals and what are the reasons for giving direct effect to community law?

The underlying reasons for the development of this concept were arguably practical. Member States had to comply with their obligations according to the loyalty principle.[34] This in it's turn entailed that the national courts was obliged according to the principle of supremacy to give precedence to community law in a conflict with national law and *apply* the community law *directly* in a legal dispute. The fundamental aim of the Treaty would otherwise be seriously hindered unless individuals could invoke the provisions of the Treaty before the national courts. The impact and effectiveness, effet utile, of EC law accordingly required that the national courts were obliged to apply community law in the situation where it was applicable.[35]

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[33] See Prinssen, J.M, Schrauwen.A, Direct Effect-Rethinking a Classic of EC Legal Doctrine, hereinafter, hereinafter Prinssen. See also Steiner n.1,112 and Craig, n.1, (2003), 182,184

[34] See Article 10 of the EC Treaty

[35] See Prinssen, n.31, 45 and Craig,n.1, (2003),185

It is also argued that the uniform application of community law would be jeopardized if Treaty provisions were denied direct effect before the national courts.[36] In addition there has been an argument in favour of direct effect that stress the rights of the individual. This reasoning is based on the assumption that an individual can invoke EC law in the situation where neither the Member State nor the Commission would pay regard to it. Finally it is argued that individuals that rely on the doctrines of supremacy and direct effect could eventually decide not to follow national authorities.[37]

There exist still today doubts and disagreements among commentators about the legal scope of this concept.[38] My description below has consequently not the aim to provide for the whole legal framework of this concept. The description will nonetheless provide for a historical overview of those in my point of view most fundamental legal developments that have occurred in relation to the concept of direct effect. In this respect it is material to recall that there were some essential questions in the beginning of the community relating to which legal effect community law should have in the national legal orders. These questions had to be answered in an authoritative manner by ECJ whereas the EC Treaty itself did arguably not provide for answers to these questions.

The core issue in the earlier days of the community was hence which legal effect the community law had or ought to have in the national legal orders of the Member States? The question was in particular whether individuals could invoke the EC Treaty and it's provisions directly before the national courts of the Member States? Or in a rephrased manner, was the community legal order a part of the national legal order without any requirements concerning implementation? Or could on the contrary the Treaty provisions only be invoked before the national courts following the transposition and incorporation of the community law into the national legal orders of the Member States?

It is in this respect important to underline that according to the legal tradition of customary international law the legal effects of an international treaty has to be assessed in accordance with the constitutional law of each contracting state. This means that the invocability of an international treaty by individuals could potentially be strictly circumscribed in countries, which

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[36] Ibid,n.1, 185

[37] See, Nicolas Emiliou & David O'Keeffe (eds), , The European Union and World Trade Law – After the GATT Uruguay Round, by Chichester, John Wiley & Sons, 1996, 315

[38] See Craig, n.1, (2003), 179-182 and S.Prechal, "Does Direct Effect Still Matter"? (2000) 37 CMLRev.1047. See also in Prinssen, n.31, 3

have a dualistic approach to international treaties.[39]It is argued that the original Member States to the EC Treaty did not foresee that the provisions of the Treaty could be invoked directly before the national courts.[40] It is nevertheless clear from ECJ that the dualistic approach to community law cannot be accepted in the community sphere.

The ECJ held accordingly in the landmark judgement of Van Gend en Loos: " This treaty is more than an agreement creating only mutual obligations between the contracting parties…Community law not only *imposes obligations on indiviuduals but also confers on them rights which become part of their legal heritage. The wording of article 12 (now 25) contains a clear and unconditional prohibition, which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states, which would make its implementation conditional upon a positive legislative measure enacted under national law*. The very nature of this prohibition makes it ideally adapted to *produce direct effects in the legal relationship between member states and their subjects*. The implementation of article 12 does not require any legislative intervention on the part of the states. *The fact that under this article it is the member states who are made subject of the negative obligations does not imply that their nationals cannot benefit from this obligation*."[41]

This judgement gives at first sight clearly the answer to the question put forward in the beginning in so far as it pronounces that individuals can invoke the Treaty provisions even in the case where the Member States has not implemented the obligations arising from community law in their national legal orders. Consequently the concept of direct effect in community law implies that community law indeed is an essential part of the national legal orders whereas it creates rights for individuals against the Member States in cases where for example the Member States have failed to implement community law into their national legal orders. Nevertheless one should also mention in this regard that the *Van Gend en Loos* judgement made an important qualification to the concept of direct effect. The conditions for direct effect were that the provision must be sufficiently clear, precise (in the eyes of the judge), negative, and unconditional (no time-limit or reservation) and leave no room for the exercise of discretion in the implementation process for the Member States.[42]According to some commentators these requirements has not genuinely

[39] See D.Wyatt,"New legal order or old" (1982) 7 ELRev.14. The term invocability is a term used by scholars to describe if a provision of an international treaty could be invoked before a national court of a contracting state by private parties. See Prinssen.,, n.31, 184

[40] See Craig, n.1, (2003), 179 and Steiner, n.1, 90

[41] See C- 26/62, Van Gend en Loos, paras. 12-13

[42] See Craig, n.1, (2003), 185 and Steiner,n.1, 92

hindered the practical application of the concept of direct effect whereas most provisions of the EC Treaty has been found to be directly applicable.[43]

In this respect I will nevertheless emphasise that ECJ has used the concepts of *direct effect* and *direct applicability* without any legal distinction. One could argue that direct applicability is more concerned with the question whether international treaty provisions are a part of the national legal order without any further implementation while direct effect is more concerned with the issue whether individuals before the national court could invoke the provision in question.[44] This line of thinking is connected with the notion of a broad or narrow conception of direct effect.[45] I will for purposed of this essay employ a narrow conception of direct effect. This implies that one can only say that a provision has direct effect where it is capable of conferring rights to individuals, which can be relied on before the national courts.[46] One commentator argues that there exist directly applicable provisions in an international treaty, which however fail to fulfil the conditions under the Van Gend en Loos judgement since these provisions are deemed to be too vague and ambiguous to create legal rights for individuals.[47] But the counter question is then how one could consider that certain provisions are directly applicable if they cannot be invoked by individuals and be *applied directly* before a court?

Hypothetically one could imagine situations where states can invoke direct applicability of treaty provisions before international forums such as the World Trade Organisation or in international negotiations notwithstanding that individuals cannot invoke these provisions before a national court of a contracting state. In this particular situation the distinction between direct applicability and direct effect could be useful. Nevertheless it makes little sense for purposes of this essay to maintain this distinction when it comes to internal community situations, which does merely involve the question whether individuals could invoke community law directly before the national courts of the Member States. [48] I will consequently with the intention to avoid confusion and conceptual difficulties use the narrow concept of direct effect. *Hence the subject matter of this*

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[43] See Craig, n.1, (2003), 186 and Prinssen ,n.31, 26. and Schermers and Waelbroek, Judicial Protection in the European Union,(Kluwer, The Hague, 2001). Schermers and Waelbroek consider that the following articles in the Treaty have direct effect: Art. 12; Art. 23;Art.25; Arts 28, 29 and 30; Art. 31(1) and (2); Arts 39-55 in general and particularly Arts 39,43,49 and 50;Art.81(1); Art.82;Art.86 (1) and (2); Art.88(3), last sentence; Art.90, first and second paras; and Art.141, 183-185

[44] See Prechal, S, Directives in EC law, second completed revised edition, Oxford University Press (2005 (2005), for a general discussion, p.226-229 which is more concerned with the differences with *directly applicable regulations and directly effective directives.*

[45] See for a discussion, Craig,n.1, 179.-182.

[46] Ibid,n.1, 180. For an opposite perspective. S.Prechal,n.42, (2005), 231

[47] See Steiner, n.1, 90

[48] Regarding legal effects of international law in general: Prinssen, n.31, 215-229., and Craig, n.1, (2003) 181

essay concerns the question whether an individual could rely on the Treaty provisions and invoke them against other private parties before the national courts of Member States.

In conclusion it is however crucial that one could determine initially if a provision has direct effect before one could turn to the question if it is applicable to a private party. Accordingly the requirements laid down in Van Gend en Loos must be fulfilled in order to invoke Article 39 directly before the national courts. [49]

2.3 Horizontal direct effect or vertical direct effect

In order to systematize and comprehend the jurisprudence of the ECJ commentators and scholars have developed legal concepts with the intention to describe which subjects that are the targets for community law. [50] Hence after one has reached the conclusion that a provision has direct effect the next question is if this provision could be invoked before the national courts merely against the Member States, *vertical direct effect* or if it also is applicable to private parties, *horizontal direct effect*. This distinction has arguably been helpful to explain the different legal approaches that ECJ have been taken concerning the legal effects of community law. The basic problem with this distinction is that, apart from some provisions of the EC Treaty relating to inter alia competition rules[51], the Treaty itself is arguably silent on the question whether it's provisions only applies to the Member States, private parties or both categories? Or put in another way, does the origin of the rules or the measures, whether they originates from a public body or a private party, make any difference concerning the issue whether they could be applied directly before the national courts of the Member States?

In an attempt to define these concepts one could argue that commentators have traditionally been speaking of vertical direct effect when the measure or the rule in question *originate*s from the *Member State or a public body*. The rational conclusion is accordingly that in a legal dispute the individual will sue the *state* or the public body for not *complying* with its obligation under EC law. This failure to fulfil the obligation normally consists of the fact that a public body may applies a national law contrary to the community law on the reason that the Member State has failed to implement community legislation.[52]. The failure can also consist of the fact that a

[49] ECJ has recognised the direct effect of Article 39 in C- 36/74, Walrave and Koch v. Association Union Cycliste Internationale, [1974] ECR 1405. See however below the arguably more lenient approach to those criteria in relation to directives, section.1.4
[50] See Craig, n.1, (2003), pp.202
[51] See Article 81 and 82 of the EC Treaty
[52] Which it is required to do according to Article 10 of the EC Treaty.

national court or public body applies a national law, which is contrary to the EC Treaty or a directly applicable regulation. The concept of vertical direct effect consequently suggests that the individual will invoke community law *against* the *Member State or a public body*.

Horizontal direct effect on the other hand implies that the *rule or measure, which allegedly is contrary to community law,* can be derived from a *private party*. This means that in some instances a *private* body or a person are under *obligation* that *originates* from community law to *not* apply their own *rules or contracts* when these rules are *contrary* to community law. The logical implication is that if the private party does not fulfil this obligation another individual will in legal litigation invoke its rights that are enshrined in community law *against this private party*.

In a *strict sense* I will define the concept of *horizontal direct effect* as the situation where a private party invokes community law against rules or measures of a private party that arguably are in breach of community law with the qualification that these rules or measures do *not* regulate the exercise and access of free movement in *a collective manner*.[53] I will use the concept of *semi-horizontal effect* where the contested rules or measures do regulate the access and exercise of a free movement in a *collective manner*. Although these definitions are not entirely clear it is necessary to have these definitions when analysing the jurisprudence of ECJ below. Moreover I will argue below that there are reasons to employ these concepts whereas they will clarify the legal meaning and implications of the jurisprudence from ECJ.

As implied above the distinction between vertical and horizontal direct effect is crucial for the topic of this essay and for understanding the nature and legal effects of community law.[54] The primary reason for this is that ECJ has given different interpretations of the concept direct effect depending not only of the type of community legislation at stake but also depending on the nature of the provision itself. The most central example concerns the question whether a directive has direct effect, or more notably if a directive has vertical direct effect or horizontal direct effect?[55] The answer on the question is affirmative, given that the requirements of Van Gend en Loos are fulfilled, if the private party invoke the directive against a public body but negative if the individual invoke the directive against a private party.[56] The essential arguments

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[53] See Prechal, S. In Prinssen, n.31, 26. The author is on the other hand using the concept "genuine horizontal direct effect".

[54] See Steiner, .1, 97

[55] See also the distinction between horizontal and vertical direct effect of Article 28: C- 311/85 Vereninging Van Vlaamse Reisbureau v. Sociale Dienst van de Plaatselijke en Gewestlijke Overheidsdiensten, [1987] ECR 3801, [1989] 4 CMLR 213

[56] See C- 41/74, Van Duyn v Home Office, [1974] ECR 1337 and C- 152/84 Marshall v Southampton and South West Hampshire Area Health Authority (Teaching), [1986] ECR 723. In this regard I do not consider it as relevant for the purposes of this essay to examine the arguably broad interpretation given by the ECJ of the concept of a state

why ECJ has not despite criticism from legal scholars and General Advocates given horizontal direct effect to directives could in my point of view give more cognisance for the main topic of this essay and therefore I will provide for a brief overview of this question.

2.4 Vertical direct effect of directives

The problem of giving direct effect to a directive can in a simplified manner be exemplified by presenting certain contradictory arguments. The reason to not give direct effect to a directive is that a directive needs to be implemented and often leave a certain room of discretion to the Member States when they are transposing the directive into national law.[57]Even though every Member State has to achieve the aim of the directive the implementation of it needs not to be uniform in all the Member States. The directive will therefore require measures of implementation and if the directive merely in general terms frame it's purpose it may fail to pass the test of direct effect laid down in Van Gend en Loos. Thus the provisions of a directive will be in many cases considered as conditional, imprecise and thus leaving substantial discretion for the Member States in relation to the implementing phase with the result that direct effect of the provisions will be denied. [58]Moreover one could argue that the distinction between directly applicable regulations and directives, which is clear from the wording of Article 249 of the EC Treaty, must be uphold. To give direct effect to directives would blur this distinction and lead to legal insecurity and upset the system of different types of community acts as laid down in the Treaty.[59]

The counter argument is that if the community has as it's aim to promote legal integration and effectiveness of community law in the Member States the national courts and the community courts should give direct effect to a directive.[60] The argument of effet utile is well known and was applied by ECJ previously in the landmark case of Van Gend en Loos. This is also the argument that according to scholars has had most significance in the ECJ's jurisprudence with respect to the elaboration of the concept of direct effect. Accordingly it is argued that the policies pursued

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body and the different effects of directives which are arguably similar to horizontal direct effect. See for this argument, Steiner, n.1, 371-373. And also: C- 103/88, Fratelli Costanzo SpA v Commune di Milano, [1989] ECR 1839 and C- 188/89, A. Foster and others v British Gas plc, [1990] ECR I-3313. This jurisprudence of ECJ concerning giving legal effects of directives which are arguably similar to horizontal direct effects have been described critically by S.Prechal, n.41 2005, p.261 which points out that there seems to exist …" a slight form of schizophrenia on the Court's part following Faccini"….. .

[57] See Article 249 (3) of the EC treaty: "A directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods".

[58] See Steiner, p.94

[59] See S.Prechal, n.42, (2005), 216

[60] Ibid, n.42, 217, 219

by the community will clearly be hampered if the directives are not implemented in a correct manner. The proper way of remedying this problem is hence simply to give direct effect to directives.[61] Moreover there is an argument that the binding nature of a directive entails that it has to be enforceable before the national courts.[62] The ECJ was faced with the problem of the direct effect of directives in the case of Van Duyn v. Home office.

The ECJ held the following:"It would be incompatible with the *binding effect* attributed to a directive by Article 189 (now 249) to exclude in principle, the possiblity that the *obligation which it imposes may be invoked by those concerned*. In particular, where the community authorities have by directive, *imposed on Member States* the obligation to pursue a a particular course of conduct, the *useful effect* of such an act would be *weakened if individuals were prevented from relying on it* before national courts and if the latter were prevented from taking it into considerations as an element of community law. *Article 177* (now 234), which empowers national courts to refer to the court questions concerning the validity and interpretation of all acts of the community institutions, without distinction*, implies* furthermore that *these acts may be invoked by individuals* in the national courts. It is necessary to examine in *every* case, whether the *nature, general scheme and wording* of the provision in question are capable of having *direct effects* on the relation between *Member States and individuals."*[63]

As a first remark it is material to observe that ECJ merely discusses the effect of the directive between *Member States and individuals*, vertical direct effect. Thus it is clear that ECJ does not pronounce itself on the question whether directive could have horizontal direct effect . What is important for our purposes is however the reasoning that is applied by the Court to justify direct effect of directives. The main reason to give direct effect to directives is to ensure the *practical effectiveness and legal integration* of community law in the national legal orders, the principle of effet utile.[64] In order to achieve these aims the provisions of a directive have to be possible to invoke in the case where the provisions of the directives have fulfilled the requirements in Van Gend en Loos. Otherwise the *useful effect* of community law would be *weakened*. Furthermore ECJ relies on the *binding nature* of a directive in order to give it direct effect.

The general conclusion that one could draw from the jurisprudence of ECJ in *Van Duyn* and other cases concerning the vertical direct effect of directives is that the arguably severe test of direct effect in *Van Gend en Loos* was according to some commentators and Member States not

[61] See, Craig,n.1, (2003), 404-406 regarding the relation between private and public enforcement
[62] See Prechal, n.42, (2005), 218.
[63] See C- 41/74, Van Duyn, para.12
[64] See for this argument Chapter1.1.3, section.2 ,Chapter 1.1 , Section.1 and Chapter 4.2

merely relaxed in relation to the provisions of directives but unjustified amended.[65] The fact that there was room for discretion on the part of the Member State in the implementation phase did not bar ECJ from holding that an individual could rely directly on the provisions of a directive. This occured inter alia where the Member State had completely exercised it's discretion, where an explicit and specified obligation could be derived from different parts of the directive or even in the situation where the Member State had sough permission for derogation under Article 95(4) and the Commission had not responded to such a request.[66]Thus if the obligation under an directive was clear, complete and unconditional and the Member State had failed to implement this provision in the national legal order the ECJ would grant individual the right to rely directly on the directive before the national court in order to strengthen the practical effectiveness of EC law. This approach from ECJ with respect to the legal effects of directives could arguably be given as a proof of ECJ's view of favouring strongly the effet utile principle.

2.5 Horizontal direct effect of directives

The question nonethless remained if the foregoing considerations that induced ECJ to give vertical direct effect to directives also would lead the ECJ to hold that directives had *horizontal direct effect*. The question was consequently if the line of reasoning given by the ECJ in Van Duyn also would bear scrutiny in the situation where a private party invoked a provision of a directive in legal litigation against another private party. The ECJ was directly confronted with this question in the case of Marshall.[67]

The ECJ held the following:" With regard to the argument that a directive may not be relied upon *against an individual*, it must be emphazised that according to Article 189 (now 249) of the EEC Treaty (EC Treaty), the *binding* nature of a directive, which constitutes the *basis* for the *possibility of relying on the directive* before a national court, exists *only* in relation to "*each Member State* to which it is adressed". It follows that a directive may not of itself impose *obligations on an individual and that a provision of a directive may not be relied upon as such against such a person*." [68]

In order to explain this judgement from ECJ some remarks should be done. The ECJ's main reason for not giving horizontal direct effect to directives is textual in the regard that Article

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[65] See Steiner,n.1,52

[66] See Craig,n.1, (2003), 204 and C –441/ 99, Riksskatteverket v Ghareveran, [2001] ECR p. I-07687. and C-303/98, SIMAP v Valencia Sindicatode Médicos Assistencia Pública, [2000] ECR p. I-07963. This jurisprudence were not generally received in a positive manner by the Member States, See Craig,n.1, (2003), 204

[67] See C- 152/84, Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), [1986] ECR 723

[68] Ibid para.48

249 of the EC Treaty merely mentions *each member state* and consequently the obligations under a directive are *only adressed to a Member State.*[69] In this respect it is material to compare ECJ's textual faithfulness in Marshall case to it's appoach to other Treaty provisions which are clearly targeted to the Member States. [70]. The Marshall judgement were followed by a lively academic debate and discussion which essentially concerned the question whether the ECJ's attitude to the horizontal direct effect of directives could be justified from a legal perspective.[71]

The main criticism against ECJ's approach to the legal effects of directives is in my opinion convincingly and clearly stated in the Opinion of AG LENZ in Faccini Dori. AG LENZ is favouring giving horizontal direct effect to directives:"Foremost among the arguments in favour of directives "*having horizontal effect*" is that relating to *equality* of conditions of *competition*. Moreover, in the absence of horizontal effect, persons in Member States which comply with Community law are frequently placed at a *disadvantage*. The principle of the *prohibition of discrimination*, which ranks as a fundamental right, also militates in favour of directives being given horizontal effect, from several point of view. First, it is unsatisfactory that individuals should be subject to *different rules*, depending on whether they have comparable legal relations with a *body connected with the state or with a private individual*. Secondly, it is contrary to the requirements of an *internal market* for individuals to be subject to *different laws* in the various Member States even though *harmonization measures* have been adopted on community level. If those *disparities* were to be maintained, it would go against the stated *aim of the approximation of legislation*."[72]

AG Lenz set out several other arguments but the argument based on uniform application of community law is in my point of view worth noting down.[73] The rationale of this argument is to strengthen the uniform application of community law not only among Member States but also within Member States. In my point of view this reasoning from the AG Lenz is also important from another perspective despite it's legal persuasiveness. My argument is thus that the reasoning from AG Lenz is very similar to the reasoning applied by ECJ in the Angonese case in order to

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[69] See AG JACOBS in C-316/93 *Vaneetveld,* [1994] ECR I-770, Para.20 and Craig, n.1, (2003), 207-208 . See ECJ's approach to the textual methodology of interpretation, 3.3.5

[70] See for the analysis of *Defrenne*, Section 2.3 and S.Prechal, n.42, (2005), 255

[71] See Mastroianni, R, "On the Distinction Between Vertical and Horizontal Direct Effect Of Directives: What Role for the Principle of Equality?" (1999), 5 EPL 417, AG GERVEN on C-271/91 *Marshall II* [1993] ECR I-4388, AG JACOBS in C-316/93 *Vaneetveld* [, AG LENZ in C-91/92 *Dori* [1994] ECR I-3325 argued that the Court should recognize horizontal direct effect to Directives whereas AG VERLOREN VAN THEMAAT C-89/81, *Hong Kong Trade Development Council* [1982] ECR 1296, AG SIR GORDON SLYNN C-152/84 *Marshal I* [AG MISCHO in C-80/86 *Kolpinghuis* [1987] ECR 3977 were contrary to the recognition of direct effect .See C. TIMMERMANS, "Community Directives Revisited", [1997] *YEL* 17 1-28.

[72] See AG LENZ in C- 91/92, Faccini Dori, paras.50-52 and S.Prechal, n.42, (2005), 258

[73] See C 91/92, Faccini Dori, paras. 53-60.

justify horizontal direct effect of Article 39 of the EC Treaty.[74] I will not elaborate my theory in this section but for the purposes of this essay the "discrimination" argument, put forward by AG Lenz in Faccini Dori, has be remembered for the further analysis of the subject matter of this essay, notably the reasoning from ECJ in Angonese to give horizontal direct effect of Article 39.

Another important argument to give horizontal direct effect to directives is the argument based on the practical application of commuity law.[75] If the intention is that indviduals which have rights under community law should be able have practical use of these rights directives need to be applicable independently whether the subject that is being sued is private or public. National courts of the Member States have hence an obligation under community law to provide an effective remedy for individuals.

In addition there is an argument that is favouring horizontal direct effect that concernns the effet utile of community law. The effectiveness of community law and directives would increase the Member States compliance and the mentioned uniform application of community law. The effectiveness of community law would also strengthen the protection of rights for indivduals.[76]

Despite this criticism and pressure from several authors and Advocate Generals the Court refused in a decisive manner in the Faccini Dori case to give horizontal direct effect to a directive.The ECJ held the following: "The effect of extending that case-law (that of direct effect of directives) to the sphere of relations between individuals *would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations."*[77]

The important question for the purposes of this essay can be reiterated. What were the reasons that made ECJ come to this conclusion despite huge criticism? [78]The interesting feature

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[74] See for the discrimination argument, Chapter 2.4.2.1

[75] AG JACOBS in C-316/93, *Vaneetveld* , paras.29-30

76 See S.Prechal, n.42, (2005), 258

77 See C –91/92 , Faccini Dori, para.24

78. It is interesting to see the extent of commentators that have criticised the ECJ in this ruling. T. TRIDIMAS, "Horizontal effect of directives: a missed opportunity?" [1994] ELRev 19 621; P. CRAIG, "Directives, Direct Effect, Indirect Effect and the Construction of national legislation" [1997 ELRev 22 519; F. EMMERT, M. PEREIRA DEAZEVEDO, "L´effet horizontal des directives La jurisprudence de la CJCE: un bateau ivre?" [1993] RTD eur 29 (3); J. PALACIO GONZÁLEZ, Derecho Procesal y del Contencioso Comunitario, Aranzadi Editorial, Elcano (Navarra), 2000, p. 46, who speaks about a "denial of remedy by reason of the private character of the party to the proceedings". B. PÉREZ DE LAS HERAS, Ordenamiento Jurídico Comunitario y Tutela Judicial Efectiva CGPJ-DJGV, Vitoria-Gasteiz, 1995. At p. 95-109; R. MASTROIANNI, "On the Distinction Between Vertical and Horizontal Effects of Community Directives: What Role for the Principle of Equality?" [1999] EPL, V5 I3, at p.417-435; W.VAN GERVEN, "The Horizontal Effect of Directive Provisions Revisited: The Reality of Catchwords", in D. CURTIN and T. HEUKELS, Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers,
Martinus Nijhoff Publishers, Dordrecht, 1994;

of this judgment is that ECJ also pronounces itself around the issue of competence between Member States and held that this issue of competence was as a decisive reason to deny horizontal direct effect to a directive. Thus the ECJ considers that the community does not have the competence to impose obligations on individuals by the means of directives. This is instead a competence, which has been assigned to the Member States. Nevertheless the core of reasoning of the ECJ circle arguably around the hostility from the part of the Court to impose a burden on an individual.[79]The textual justification for this interpretation of the law is accordingly the express wording of Article 249 of the EC Treaty, which only imposes the obligation to achieve the aim of a directive on the Member State. This interpretation of the Treaty is nevertheless consistent with the previous case law and the judgment in Marshall.

One could however in this respect ask whether it is of relevance if the community decides to adopt a regulation instead of a directive with the aim of imposing obligations on individuals. Moreover it is clear that directives generally impose obligations on individuals when they are implemented into the national legal orders. Even though the obligations do not have effect immediately it is nevertheless the community in the end, which decides the scope of the obligations. Hence the community has in fact the power to impose obligations on individuals through directives.

In order to encounter this argument it could be argued that the form of legislation that is employed by the community legislator reflects certain policy choices. The directives are arguably used as legislation when the area under discussion is more sensitive from a political point of view on the part of the Member States and where it is difficult to find agreement and common ground. The contradictory argument to this argument is that the obligation imposed on the individual is in fact determined by the *Member State and not by the community*. Moreover the exact *scope of the obligation and the effect* of the directive become relevant merely when it is fleshed out in national legislation.

The underlying reasoning from ECJ to give these judgments in Marshall and Faccini Dori is not easy to extract but in my opinion the argument is based on the rule of law and legal certainty.[80] The problem with giving horizontal direct effect to directives lies in the fact that many individuals would suffer from legal uncertainty. It is thus recognized that an individual may be affected by legal obligation and burdens deriving from a directive notwithstanding that he is ac*ting in accordance with national law*. It will thus lead to severe difficulties for individuals when they have

79 See AG LENZ , in C-91/92 Faccini Dori, para.45

80 See the defense for the denial of horizontal direct effect of directives put forward by Edward, D , in Prinssen,n.39, 10-11,

to deal with *two different legal systems*, which are contrary to each other. Individuals may have to make difficult legal assessments whether the national law complies with community law and in a conflict, which is the correct law to follow. The counter argument here is that the primacy of community law also imposes a burden on individuals as well as Member States to follow community law in the case of a conflict with national law. The practical effectiveness of community law would accordingly be endangered if directives were not given horizontal direct effect.

The most *convincing* argument to not give direct effect to directives is however that the burden of a directive is *not foreseeabl*e for individuals assuming that the directive has been published and the period of transposition has expired. For reasons of legal certainty it is also clear that individuals would be confused by the fact that contrary to the express wording of the Treaty, the provisions of this Treaty would imposed burdens on them on the basis of obligations that seemingly are addressed to the Member States. The counter argument to this line of reasoning is that directives on the basis of legitimate expectations can only have future effects and that it never can create rights for a Member State against an individual or impose criminal liability.[81]

Whereas I have now made some conclusions regarding the legal justification to not give horizontal direct effect to directives it is now time to face the question of horizontal applicability of the treaty freedom relating to free movement of workers. I will nevertheless stress here that the essential arguments that were put forward in the debate of horizontal direct effect of directives should be kept in mind for the later analysis of the Angonese case and the horizontal application of Article 39 of the EC Treaty.[82]

[81] See C- 80/86 Kolpinghuis Nijmegen [1987] ECR 3969 and AG JACOBS in C-316/93, Vaneetveld, para.33
[82] See Chapter 5.1 and 5.2

3. APPLICATION OF ARTICLE 39 OF THE EC TREATY TO PRIVATE PARTIES

3.1 Introduction

My general theory regarding the introduction of horizontal direct effect by the ECJ in Angonese is that ECJ has had a consistent approach to the application of Article 39 to private parties. Thus the legal result of the Angonese case was in a rational sense no surprise. There existed thus a firm legal base for the rationale of Angonese. This account of the jurisprudence of the ECJ will follow a historical path and carefully analyse the jurisprudence of the Court beginning with the Walrave case.[83] I will nevertheless not restrict myself only to cases, which are related to free movement of workers whereas an examination of these cases will not be sufficient for the legal analysis. Moreover as will be seen below ECJ did not consistently base its judgement in Angonese concerning the horizontal direct effect of Article 39 to jurisprudence concerning free movement of workers.[84] This could imply that the ECJ did not find it legally sufficient to base its judgement in Angonese on the reasoning of Walrave and Bosman. This account will also despite the historical outline attempt to pursue a systematic account of the legal characteristics in the concept of horizontal direct effect.

The outline of the analysis of the jurisprudence of ECJ will be structured after a similar pattern. I will first make an account for the facts and the legal outcome of the cases. I will here recite the most important paragraphs from the ECJ's judgements. Thereafter I will analyse the case from a legal point of view and make conclusions on the legal scope of the judgement. In this analysis I will moreover make critical remarks on the analysis employed by the ECJ when I consider it necessary. Nevertheless I want to point out that the analysis regarding Angonese will be more substantial and careful whereas the subject matter of this essay is essentially concerned with this case.

Some remarks should be done in order to explain my selection of cases. As a first point I selected these cases whereas they illustrate the development and the elaboration of the legal framework of horizontal direct effect in relation to free movement of workers, which finally was affirmed in Angonese. Another reason to choose this jurisprudence is that ECJ clearly employed this case law as support its reasoning and conclusions in Angonese. [85]Thus ECJ used this

[83] See C- 36/74, Walrave and Koch v. Association Union Cycliste Internationale, [1974] ECR 1405
[84] See C-281/98, Angonese, para 34
[85] Ibid paras. 31-34

jurisprudence as the legal base for the decision in Angonese. Nevertheless one could question why I did restrict my material to this jurisprudence and chose to not include a legal analysis of the case law of Bosman and Dona whereas this jurisprudence also relates to horizontal or semi-horizontal application of Article 39. My reason is simple. I consider that the jurisprudence of Bosman and Dona hardly provided for any clarification or refinement of the legal scope of the judgement in Defrenne and Walrave whereas Bosman and Dona merely recalled and reiterated the paragraphs and quotations from Walrave and Defrenne. Hence Dona and Bosman did not in my point of view alter or modify the legal framework of horizontal direct effect with respect to free movement of workers.

3.2. The Walrave case

3.2.1 Rules of any nature aimed at regulating in a collective manner gainful employment and the provision of services

The background of the litigation of Walrave was that two Dutch Cyclist raised an action against the Union Cycliste International (UCI) and the Dutch and the Spanish cycling federations. UCI was a non-governmental association governed by private law. This organisation laid down general rules which governed the cycling profession. The disputed rules had been enacted with respect to the medium distance World Cycling Championship behind motorbikes. The basic problem for the Dutch cyclists was that the rules of UCI pronounced that the pacemaker and the stayer must be of the same nationality. Whereas the Dutch cyclists normally both performed the task of pacemakers in other races this rule in fact implied that one of them had to refrain from taking part in the race.[86]Thus there was according to the Dutch cyclists an obstacle to the free movement of workers and free movement of services.

Thus the national court referred inter alia to ECJ the question whether the rules of UCI were caught by Article 39 and 49 of the EC Treay? The argument from UCI was that rules which originate from a private organisation is not caught by Article 39 and Article 49. They asserted that Article 39 and 49 only refer to restrictions which can be derived from an act of a state body.

The ECJ rejected this argument and held:" The prohibition of such discrimination (referring to Arts. 12, 39 and 49 of the EC Treaty) 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*

[86] Ibid. paras. 1-3

employment and the provision of services. The abolition as between member states of obstacles to freedom of movement for persons and to freedom to provide services, which are fundmental objectives of the community contained in article 3 (C) of the treaty, would be *compromised* if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their *legal autonomy by associations or organisations which do not come under public law*. Since, moreover 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, to limit the prohibition in question to acts of a public authority would risk creating *inequality* in their application."[87]

3.2.2 Legal analysis of Walrave

In order to understand this judgement a brief analyis is required. First I want to argue that according to ECJ this organisation, the Union Cycliste Internationale, in fact is functioning as a substitution for a state body *whereas it in a comprehensive and collective manner regulates working conditions*.[88] This kind of organisation has thus a regulatory power over it's members that correspond to a public authority.[89] This reasoning does nevertheless not clarify whether the same rationale could be used when the rules in question *does not* in a collective manner regulates working conditions. One could imagine for instance that the prohibtion of discrimination in Article 39 does not apply when the rules in question do not govern in a collective manner the working conditions. The ECJ in this judgement in para.18 refers accordingly only to organisations and associations. It is doubtful therefore if the same applies to *individual employers*.The reason why ECJ did not make any conclusion on the question of the horizontal direct effect of Article 39 may nevertheless be found in the content of the questions and facts submitted to the ECJ. Consequently the Court does not usually give decisive judgements about matters and questions which are not expressly referred to the Court.

Secondly it is relevant to note down the legal base which was used in this case for arriving at this legal conclusion. The ECJ held not merely that the Treaty in itself provided for a semi-horisontal application of the provsion of free movement of workers but that this view was also reinforced by secondary EC legislation. Hence the ECJ argued that Article 7 of regulation (EEC)

87 Ibid. paras. 17-19
88 See also C-13/76, Gaetano Dona v Mario Mantero, [1976] ECR 1333, paras. 17-18
89 See C-415/93 Bosman, para. 83

no. 1612/68/EC of the Council underpinned the view that Article 39 also was applicable to private subjects.[90] It was clear from this provision according to ECJ that the community also had the intention that private employers should be bound by community law. The legal technique of examining the whole system of EC law confirms the methodolgy used by ECJ in other landmark judgements.[91] This methodology, that is generally known as the teleological method of interpretation, will nonetheless be discussed in a more comprehensive manner below.[92]

The third point I want to stress is the approach taken by ECJ in view of the question which significance that can be attributed to the exact wording of the Treaty provisions with respect to the issue of semi-horizontal direct effect of the four freedoms.[93] In this respect the ECJ discuss the free movement of workers, Article 39 as well as Article 49, the freedom to provide services. The ECJ initally consider that even though one has to take into account the *general nature* of Article 49 of the Treaty the Court nevertheless point out that Article 49 specifically mention acts enacted by the *state*.[94] In contrast to Article 39 on free movement of workers Article 49 expressly mentions acts by the Member States and therefore the Court may have felt obliged to provide more convincing reasoning in order to justify the application of Article 49 in the Walrave case.

The reason given from the ECJ in this regard is nonetheless hardly convincing in a textual sense. The ECJ holds that even though Article 50,52 and 54 in the Treaty expressly mentions acts by Member States the provisions do not make a distinction depending of the origin of the rules. I do not agree on this point. Whereas these provisions expressly mentions measures enacted by the Member States it could be argued that it is indeed envisaged that the Member States are the targets of these provisions and that they thus have the responsibility to give effect to these provisons. Despite that my argument could be disputed with reference to the general scheme and aim of the Treaty I neverthless consider that the reasoning given by ECJ in this regard is in a textual sense insufficient to give semi-horizontal direct effect to Article 49. This is even more so when considering that the Treaty itself implies that the provisions that relates to the free movement of services are mainy focussed on acts and measures enacted by the Member States. Accordingly the introduction of semi-horizontal direct effect could arguably not be based on a textual interpretation of the Treaty.

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90 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community

91 See C-36/74, Walrave, para. 21-22

92 See Chapter 3.3.6

93 The Four freedoms are Free movement of goods, person, services and capital. See Steiner, n.1, 309

94 Ibid. para.20

Neverthelss one could argue that Walrave and the following Dona case *imply not only a semi-horizontal application of Article 49 of the Treaty but also a horisontal application of this provision*. The doubts against this argument are that ECJ does not expressly conclude that Article 49 has direct horisontal application and that the legal reasoning for this proposition is not convincing from a textual point of view.[95]However there exists arguably after the judgement of Angonses an argument for a full horisontal application of the provisions relating to free movement of services and freedom of establishment.[96] The justification for horizontal direct effect of these treaty freedoms must nevertheless be further examined and developed. Thus the reasoning given by the ECJ in Walrave and Dona is not adequate to justify horizontal direct effect of Article 43, 48 and 49 of the EC Treaty.

It is in this regard interesting to note down that the ECJ do not discuss the general nature of Article 39. According to my opinion the reason for this is that Article *39 does not mention particularly acts enacted by Member States but is silent on which subjects this provision is applicable to*. There exists consequently hardly any direct textual support in Article 39 that speaks *against* an application of this provision to private parties. On the other hand the wording of Article 39 does neither in an expressed manner prescribe that Article 39 *does in fact apply to private parties*. The conclusion is that it is a painstaking task to decide only on the basis of the wording of Article 39 whether this provisions has or has not horizontal direct effect.

Finally I will also draw attention to the fact that ECJ does not only mentions a semi-horisontal application of the prohibition of discrimination but that *also obstacles caused by rules of private bodies are caught by Article 39*. One could therefore make an argument for the conclusion that in the case where Article 39 is applicable to rules by private parties the *application of this provision will also catch purely non-discriminatory rules* . This argument is in agreement with the jurisprudence on free movement of workers concerning indistinctly applicable measures.[97]This argument should be bore in mind when analysing the Angonese case.[98]

However in order to proceed in the analysis I need to make some conclusions on the legal scope of this judgement. *The first conclusion from this judgement is that it clearly shows that ECJ consider that the wording of Article 39 does not prevent the provisions to be applied to associations which are governed by private law*. Since both the prohibitions of discrimination in Article 12 and 39 are designed in a general manner the Treaty in itself is not a hinder for an application of Article 39 to private

[95] See C-13/76, Dona, paras. 17-18 and C- 325/00, Commission v Germany (Markenqualität), [2002] ECR 1-9977, see paras. 17,18 and 20
[96] This issue is discussed in Chapter 5.4-5
[97] See C-190/98, Volker Graf v Filzmoser Maschinenbau GmbH., [2000] ECR I-493, para.23
[98] See the discussion in Chapter 5.4-5

associations. *The second important conclusion is that in order to enforce legal integration of EC law and notably Article 12 and 39* of the Treaty the ECJ holds that rules of private organisation has to fall within the scope of these provisions. The principle of effet utile of community law would be compromised if rules by private organisations fell outside these provisions.[99] *Finally community law must be applied in an equal manner and the fundamental free movement of workers cannot thus be dependent upon whether working conditions are regulated by law or by private agreements.*[100] These conclusions are all important to keep in mind for the following analysis of the jurisprudence of ECJ. After concluding that rules from private organisations and associations are caught by Article 39 and Article 49 it is now time to consider whether other Treaty articles that are not formally adressed to individuals nevertheless could be applied in private litigation. The most important judgement concerning this question is the Defrenne II case which I now turn to examine.[101]

3.3 The Defrenne II case

3.3.1 The prohibition of discrimination in Article 141 of the Treaty applies to contracts between individuals

The background to the legal dispute in Defrenne II was that an Gabrielle Defrenne (Defrenne), air hostess claimed compensation from her employer, Sabena SA, on the ground that she had been treated in a discriminatory manner in comparison to her male collegaues. This case was concerned with Article 141 of the Treaty which essentially set out that women and men should be given the same payment if they perform the same work (the principle of equal pay for equal work). According to Defrenne the discriminatory treatment consisted in that the male cabin stewards had received higher salary for the same work performed by her as an air hostess. The parties to the dispute agreed that the work performed as an air hostess was similar to the work as a cabin steward. Defrenne had thus in fact under the relevant period of employment been discriminated with respect to the paid salary. Notwithstanding that this case was mainly concerned with the implementation and direct effect of Article 141 in the national legal order of Belgium it is for our purposes merely relevant to examine whether ECJ would recognise or deny the horizontal direct effect of this provision.

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[99] It is argued that the underlying reason from ECJ to give this semi-horizontal effect to Article 39 and 49 lies in the fact that "much employment and provison of services takes place in the service sector. If these provisions would not be applied to private parties they would be deprived most of their practical meaning." See M.Quinn and N.McGowan, "Could Article 30 impose obligations on Individuals?" (1987) 12 Elrev.163, p.165

[100] See C-36/74, Walrave, para.19 and C-415/93 Bosman para. 84

[101] See C- 43/75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, [1976] ECR 455

The ECJ held that Article 141 could have direct effect and went on to say the following about the application of this provision to private parties:" Indeed as the court has already found in other contexts, the fact that certain provisions of the treaty are *formally adressed to the member states* does not prevent *rights* from being conferred at the same time on any *individua*l who has an interest in the performance of the *duties* thus laid down. Furthermore it is not possible to sustain any objection that the application by national courts of the principle of equal pay would amount to modifying *independent agreement concluded privately or in the sphere of industrial relations such as individual contracts* and collective labour agreements. In fact, since Article 119 (now 141) is mandatory in nature, the prohibition of discrimination between men and women applies not only to the action of the public authorities, *but also extends to all agreements which are intended to regulate paid labour collectively as well as contracts between individuals*." [102]

3.3.2 Legal analysis of Defrenne II

The first remark that is necessary to make is that paragraph 31 in the Defrenne judgement was evidently introducing *direct effect* of Article 141 despite that this provision only expressly mentioned the Member States and also was formally adressed to the Member States.[103] One could have arguably conceived that a failure of the Member State to implement this provision could *only be remedied by an enforcement action by the European Commission against the Member State under Article 226*.[104] Nevertheless this argument was according to ECJ not persuasive. On the basis of the arguments mentioned above for giving direct effect to community law, notably the principle of effet utile of community law and uniform application of community law, it is not according to my opinion a surprise that ECJ did not consider this argument convincing. The rationale is that practical effectivness and legal intgration of community law requires that individuals can take action and enforce their rights according to community law before the national courts.

It is in this regard however significant to stress that the reasoning given in Para. 31 was principally in my point of view applied to justify the direct effect of this provision and was accordingly not aiming at the justification of horisontal direct effect of this provision.[105]On the

[102] Ibid paras. 31, 38-39
[103] See Article 141(1): "*Each Member State* shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied".
[104] See Craig, (2003), pp.404-406
[105] Ibid. paras. 31-37. It is clear that ECJ first had to deal with the question whether Article 141 at all could have direct effect. The question of horizontal direct effect was thus arguably of subsidiary importance in this case according to my opinion.

other hand it is though material to remember for purposes of the following analysis that *the argument in para. 31* in Defrenne was one of the arguments that ECJ availed itself *in Angonese* to justify horisontal direct effect.[106]

Moreover one could on the basis of the reasoning in para. 38 argue that ECJ will *not be hindered by private law regulations of the Member States in pursuing the policy of giving practical effect to community law*. Thus ECJ is arguably hinting that private contracts and private law relations can be subject for a legal scrutiny by the Court if they allegedly are contrary to community law. Apart from this it is noticeable that ECJ is very brief in their justification why the prohibition of discrimination in Article 141 should have horisontal direct effect. Independently whether the prohibition of discrimination in Article 141 is mandatory in nature one could reasonably have anticipated some more legal reasoning why this provision has horisontal direct effect. This is even more so since this provision as mentioned above is clearly targeted against the Member State. Recalling the judgement in Walrave it is clear that this provision should logically apply to associations which are regulating working conditions in a collective manner. Nonetheless it is apparent that ECJ is adding the formula *"as well as contracts between individuals"* to the legal scope of the Walrave judgement without providing any elaborated legal reasoning.

Even though ECJ may have come to the right conclusion it is surprising that a "jump" from vertical direct effect to horisontal direct effect of the provisions of the Treaty takes place without very few material legal arguments. It is possible, as mentioned in the foregoing, to argue that the Cycling association in Walrave was assuming the same role as the state in their task of regulating working conditions. This is nevertheless not the case in Defrenne. *Thus one has to draw according to my opinion a distinction between the situation in Walrave and Defrenne whereas the judgement in the former case arguably legally justified the private application of Article 39 on the assumption that the Cycling association had similar functions and characteristics as a public body. In Defrenne on the other hand the employer did not assume the functions and responsiblities of a public body and did neither regulate working conditions in a collective manner. Hence the situation in Defrenne concerned a pure private law relation between an employer and an employee.*

My argument is in conclusion that the factual and legal circumstances between Defrenne and Walrave are considerable different. Consequently it is not legally convincing to draw an analogy between these cases in order to justify the legal outcome in Defrenne. In reinforcing this conclusion one can moreover recall that the ECJ judgement of Walrave is not either mentioned

[106] See Angonese, para.34

in Defrenne.[107] Since it is in my opinion not legally suitable to apply the legal reasoning in Walrave to justify the result in Defrenne there exists considerable doubts and uncertainties on how and on what legal basis ECJ came to the conclusion that Article 141 also applied to private parties.[108] As will be seen at a later point it is legally feasible to defend the outcome in Defrenne but I must admit that I am critical to ECJ's briefness in their legal reasoning in Defrenne.[109]

As to the legal scope of the judgement it is now clear that Treaty provisions, notably Article 141, can under certain circumstances be invoked before national courts by individuals against other individuals. Thus Article 141 has horizontal direct effect according to the defintion I proposed earlier. Whether horisontal application of the Treaty provisions extends beyond Article 141 remains however unclear. It is also questionable how one could conclude that a *Treaty provision is mandatory in nature*. The question whether a Treaty provision is mandatory in nature is after Defrenne seems to be essential since this characterisation have arguably decisive authority after Defrenne with respect to the determination whether a Treaty provision could be applied against individuals as well as state bodies.[110] Now it is nevertheless time to turn to the most essential judgement delivered by ECJ in relation to the horisontal application of Article 39, notably the Angonese case.

3.4. The Angonese Case

3.4.1 Application of Article 39 of the EC Treaty to private parties

The context of the litigation in Angonese related to a certain requirement on bilingualism laid down by a private bank in Bolzano, Cassa di Risparmio. Roman Angonese (Angonese) was an Italian citizen but he had german as mother tongue. Moreover he had studied in Austria between 1993 and 1997 where he had learned Polish, English and Slovene at the Faculty of Philosophy. Nevertheless in 1997 Angonese responded to a notice in the local Italian newspaper in which he notfied his intent to apply for a job at Cassa di Risparmio. The problem in this case was that in order to particpate in the competition for the post at Cassa di Risparmio all applicants had to

[107] Even though the judgement of ECJ in Defrenne was delivered more than one year later than the judgement of Walrave. The judges of ECJ must reasonably have been aware of the judgement of Walrave when it decided the case of Defrenne.
[108] See however AG Trabucchi in C- 43/75, Defrenne, which consider that the prohibtion of discrimination although adressed primarily to the Member States are concerned with the relation between individuals.
[109] For a general criticism against the briefness of the ECJ's reasoning: U.Everling, "The ECJ as a Decision-making Authority" (1994) 82 MichLR 1294
[110] See C-281/98, Angonese, paras.34-35

provide a certain certificate, the B-certficate (which was the exclusive way that the applicants could prove that they were were bilingual in German and Italian). The certificate was only issued by the public authorities after an examination that had to take place in Bolzano. According to the facts of the case most citizens in the province of Bolzano had obtained this certificate for employment purposes. Whereas Angonese could not provide for this certificate the Cassa di Risparmio sent him a letter where it informed him that he was not permitted to take part in the competition for the employment in the bank.[111]

Nonetheless the Italian national Court held that notwithstanding that Angonese not had provided for the required certificate he was impeccably bilingual. Moreover the Court considered that it was diffcult for citizens which were not resident in the region of Bolzano to obtain the certificate. In particular the Court held that applications for the job had to be submitted only two months after the notice had been published in the local newspaper. However there was laid down a minimum period between the oral and written examinations that were arranged to grant the certificate . Moreover there was merely a restricted figure of sittings every year. [112]

The ECJ was asked several questions and in particualr whether this requirement of the certificate was contrary to Article 39 of the EC Treaty. In order to provide the answer to this question the ECJ perceived that it first had to answer the essential question whether Article 39 could be invoked against private parties.

The ECJ pronounced in a decisive manner that Article 39 had horizontal direct effect in the following paragraphs: " Thus, the Court has held that the prohibition of discrimination based on nationality applies not only to the *actions of public authorities* but also to *rules* of any other nature aimed at regulating in a *collective manner* gainful employment and the provision of services (see Case 36/74 *Walrave* v Union Cycliste Internationale [1974] ECR 1405, paragraph 17). The Court has held that the abolition, as between Member States, of *obstacles to freedom of movement for persons* 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* (see *Walrave,* paragraph 18, and Case C-415/93 Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others [1995] ECR I-4921, paragraph 83). Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by *agreements and other acts concluded or adopted by private persons*, limiting application of the prohibition of discrimination based on nationality to acts of a public

[111] Ibid. 5-7,9
[112] Ibid. 8,10

authority *risks creating inequality in its application* (see *Walrave*, paragraph 19, and Bosman, paragraph 84). The Court has also ruled 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 (see Case 43/75 *Defrenne* v Sabena [1976] ECR 455, paragraph 31). The Court accordingly held, in relation to a provision of the Treaty which was *mandatory in nature*, that the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, *as well as to contracts between individuals* (see *Defrenne*, paragraph 39). Such considerations must, a fortiori, be applicable to Article 48 (now 39 EC) of the Treaty, which lays down a *fundamental freedom and which constitutes a specific application of the general prohibition of discrimination* contained in Article 6 of the EC Treaty (now, after amendment, Article 12 EC). In that respect, like Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), *it is designed to ensure that there is no discrimination on the labour marke*t. Consequently, the prohibition of discrimination on grounds of nationality laid down in Article 48 of the Treaty must be *regarded as applying to private persons as well."*[113]

3.4.2 Legal analysis of Angonese

The first thing I intended to do is to describe the main argument put forward by ECJ in a general manner. I will thus briefly describe the principle of equal application of community law[114] and thereafter the principle of effet utile. Subsequently I will discuss with a critical approach the legal reasoning employed by ECJ in the Angonese case. This structure differs indeed from the former structure . The reason for this changed structure relates to the importance of the Angonese case and the principal arguments and policy considerations that the case contains. These special considerations made it necessary to deal with this case in a slightly different manner. I will hence now turn to briefly describe the argument of uniform application of community law.

[113] Ibid, paras.31-36

3.4.3 The principle of uniform application of community law and the principle of non-discrimination

The principle of uniform application of community law and the non-discrimination principle had in my point of view some importance for the legal rationale in Angonese. These two principles have common features since both principles are striving to ensure that community law is applied in the same manner in the case where similar factual and legal circumstances are present.Concerning the principle of non-discrimination there seems to be some confusion on it's field of application. Does for example the principle of non-discrimination only refer to discrimination due to nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation?[115]One could argue that the principle of uniform application of community law is a part of the non-discrimination principle as expressed in Article 12,13 of the EC Treaty. Hence the principle of non-discrimination could arguably have a very broad field of application in a community context. Or in a rephrased manner, does the principle of non-discrimination in addtion implies that the law should apply in an equal or in a non-discriminatory manner independently whether the disputed rules are of private or state origin? The answer on this question has to be negative according to myopinion. These princicples consequently needs to be distinguished and in this later referred situation the principle of uniform application of community law steps in.

The main rationale for uniform application of community law imply in the first hand that the law should apply in the same manner if the persons concerned are in similar situations.[116] The right to a remedy for an individual in a situation which concerns community law should for example not differ depending on in which Member State he chooses to enforce his rights. Moreover the enforcment of the rights that an individual derives from a directive cannot differ dependent on the fact that some Member States have correctly implemented the directive and some not. The national courts are obliged to give full effect to community law despite the deficient implementaton on the part of the Member State with respect to their obligations under community law. If this was not case the common sense of justice would be seriously distorted.

This does nevertheless not mean that this principle apply where the persons concerned are discriminated on the basis of the grounds mentioned in Article 12 of the EC Treaty. In this later situation it is not the principle of uniform application of community law that applies but instead

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[115] Article 12,13 of the EC Treaty

[116] See Lenaerts, K and Van Nuffel, P., and Bray, R. editor, Constitutional law of the European Union, (2005), Thomson/Sweet & Maxwell, London, 609-610

the principle of non-discrimination .The argument in relation to the uniform application of community law was essentially employed in developing the principle of supremacy but has also been used by ECJ in the jurisprudence concerning direct effect.[117] This distinction could at first sight appear a little bit abstract and theoretical but does clearly have impact in practice.

In the judgement of Angonese the question of uniform application of community law and the principle of non-discrimination accordingly arose in sligthly different contexts. On the one hand the Angonese case concerned the general prohibition of discrimination in Article 12 of the Treaty and the special expression that this principle has with respect to free movement of workers in Article 39. On the other hand the case concerned the issue whether community law had been applied or should be applied in a uniform manner.The principle of uniform application of the law was thus more concerned with the question whether it was justified that community law applied in a different manner dependent upon the origin of the rules. There could for instance be good reasons why situations that at first sight appear similar are treated in different manners.

Nevertheless this question will be analysed in a more principal manner in the last chapter.[118]Before turning to the principle of effet utile it is relevant to stress that the principle of uniform application of community law is connected to the principle of effet utile. One could consequently argue that in order to ensure the maximal effectivenss of community law one has to ensure that similar legal and factual situations are treated in the same manner, notably in accordance with the principle of uniform application of community law. The aim and the integration of the community law would be endangered if national courts applied community law in different and contradictory manners where the legal and factual circumstances are similar or identical. However there are conceptual differences which makes it necessary to draw a disinction between these arguments. The origin of the principle of uniform application of community law is hence more concerned with the principle of non-discrimination in the sense that individuals should not be treated in different manners where they are in identical or material similar situations. The effet utile principle is on the other hand more related with the overriding aim to interpret and apply community law in a manner which ensures the maximal legal integration and effectiveness of community law.

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[117] See with respect to the principle of supremacy; C- 6/64, Costa v.Enel and Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle fur Getreide und Futtermittel, [1970], ECR 1125 and concerning direct effect; C- 36/74, Walrave and C- 43/75, Defrenne

[118] Chapter 5.1 -2

3.4.4 The principle of effet utile

The first remark with regard to the principle of effet utile is that one could argue that effet utile is not a material principle but rather a principle of interpretation. This notion does nevertheless not diminsh the importance of this principle. The origin of the principle could however be derived from Public International law. One commentator has described the principle in this manner: "This principle presupposes that the authors of the Treaty had the intention of adopting a text not stripped of all significance, i.e. that words should be interpreted at least to give a *minimum efficacy* to the Treaty".[119] One could argue that the principle of effet utile has a textual basis in Article 10 of the EC Treaty which provides that the:" Member States take all appropriate measures, whether general or particular to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the community" and also to " abstain form any measure which could jeopardize the attainment of objectives of the Treaty".[120]

It is not controversial to argue that this principle has had substantial importance for ECJ's jurisprudence. This is particularly clear in the context of introducing the legal concepts as the principle of supremacy, direct effect and state liability. In the landmark judgment of Internationalle Handelsgesellschaft the ECJ held: " Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the uniformity and *efficacy of community law".* [121]Subsequently the ECJ confirmed the effet utile principle in an authoritative manner and pronounced accordingly that national courts had to give *"full force and effect"* to community rules". [122]There is thus a firm argument that the doctrine of supremacy is based on the principle of effet utile.[123]The significance of this principle is nevertheless not restricted to the principle of supremacy. As I mentioned earlier the principles of direct effect and state liability also rely on the principle of effet utile of community law.[124]

For the purposes of this essay it is essential to note down that this principle was according to my opinion applied in Angonese particularly to justify horizontal direct effect of Article 39. The effectiveness of the fundamental principles of non-discrimination and free movement of

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[119], Bredimas, Anna. *Methods of Interpretation and Community Law*, North Holland 1978, p.
p. 77 and I. Bengoexta, The Legal reasoning of the European Court of Justice, (1993), Clarendon Press, Oxford. The latter describes the argument of effete utile as a dynamic functional criterion, p.251, 254-255
[120] See Lennaerts, p.118
[121] See C- 11/70 Internationale Handelsgesellschaft
[122] Case 106/77, Amministrazione delle Finanze dello Stato v. Simmentahl SpA, [1978] ECR 629, para.22. It could be noted that ECJ mentioned the principle of effet utile not less than six times in this case, paras. 18, 21,23,24
[123] See Craig, p282-283, (2003), no.1
[124] See C- 26/62 Van Gend en Loos and C- 6 and 9/90, Francovich and Bonifaci v. Italy, [1991] ECR I-5357

workers would consequently be seriously hindered if they did not apply to private parties.[125] The principle of effet utile in Angonese also implies that the individual rights that are derived from the EC Treaty would be practically meaningless if they could only be relied on against state bodies. Whether the argument of effet utile is sufficient to justify horizontal direct effect will also be more closely examined in the last chapter of this essay.

3.4.5 Critical legal analysis of the Angonese case

The first remark that is material with respect to the legal analysis of *Angonese* is that ECJ applies the argument from *Para.31 in Defrenne II here to justify horizontal direct effect*. Neverthelss as I previously concluded the reasoning in Para.31 in *Defrenne* was essentially employed by ECJ to explain why Article 141 of the EC Treaty had *direct effect*. My argument is that ECJ had primarily the intention *in Defrenne* to declare that Article 141 had *vertical direct effect* despite that the wording in itself of this article did not support that individuals could be granted rights on the basis of this provision. It is thus hardly controversial to accept that Article 141 could be invoked against the Member State whereas this provision is *as such capable of having direct effect.*[126] According to ECJ it is consequently clear that Article 141 pass the legal test for direct effect in Van Gend en Loos. It is however, which I implied above, another thing to accept that the same reasoning should be applied in *horizontal relations*. It is accordingly problematic to accept that Treaty provisions applies to private parties since neither Article 141 or Article 39 expressly provides that private rules or measures are caught by these provisions.

The same textual argument that was put forward to criticise the legal reasoning of ECJ in Defrenne is relevant with respect to the Angonese case. The argument is simple and straightforward. The botttom line of the argument is that Article 40-42 of the EC Treaty concerning free movement of workers could be interpreted in the manner that it is the *Member States that are responsible to ensure* that the aim of free movement of workers is accomplished by the process of enacting regulations and directives. It is consequently not unreasonable to envisage that Article 39 in the same manner as Article 141 is primarily *targeted against the Member States*. It is diffcult to conceive from the structure and the wording of these provisions that they were intended to put *obligations on private parties*.

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[125] See Angonese, para. 32

[126] Even though the direct effect of Article 141 was disputed by the Member States. See Craig, p.188, (2003), no.1 and C-43/75, Defrenne, where the ECJ is denying the relevance of the arguments put forward by the Member States: paras. 28-36

Against this line of thinking one could argue that, unlike Article 141, the Member States are not directly mentioned in Article 39. On the other hand the scheme and the construction of Article 39-43 supports the conclusion that these provisions are primarily targeted against the Member States. Thus from my point of view one could assert that because of the wording and the structure of Article 39-43 there exists a *textual disincentive against giving horizontal direct effect to Article 39*. Against this textual argument one could contend that one has to examinethe whole structure of the Treaty, the preamble and the policy goals in Article 3 of the Treaty to answer the question of horizontal direct effect of the Treaty provisions.[127]Accordingly it is at this point sufficient to conclude that it is desirable if there exists other legal arguments beyond the textual arguent in order to justify an application of Article 39 to private parties.

The next issue I will emphazise is that the situation in Angonese must be distiguished to the situation in Walrave and Bosman since the later cases concerned situations where the associations in question arguably *exercised the same role in practice as the Member States* . Accordingly the Angonese case pronounce a clear departure from semi-horisontal direct effect or any similar vertical effects.

It is nevertheless possible to imagine a contention to this argument. One could argue for example that since Cassa di Risparmio's requirements affected potentially all job applicants in the European Union they were regulating working conditions in a collective manner. Cassa di Risparmio could accordingly be placed on the equal footing as a state body or a private association. It is irrrelvant in this respect that Cassa di Risparmio is a private employer since it however fulfill the requirement in Walrave and Bosman concerning" regulating working conditions in a collective manner". Consequently one interpretation of the Angonese case is that we are after this case still only concerned with semi-horisontal application of Article 39 of the EC Treaty.

But do this argument really bear scrutiny after a strict legal examination? The answer according to my opinion is negative. In contrast it is more reasonable to argue that the requirements imposed by Cassa di Risparmio did *not regulate working conditions in a collective manner*. Angonese was thus arguably concerned merely with a genuine private law situation since the

127 See note 26 and see inter alia for some examples of this methodology of interpretation: C- 3,4 and 6/76, Kramer, [1976] ECR 1279, para.19 and C- 22/70, Commission v. Council, [1971] ECR 263 , and several cases in competition law: para.15, and C- 68/94 and 30/95, France v. Commission, [1998] ECR I-1375, paras.166-172 and C- 6/72, Euroemballage Corporation and Continental Can Co. Inc. v. Commission, [1973] ECR 215, para. 22-27 and C- 27/76, United Brands Company and United Brands Continental BV v. Commission, [1978] ECR 207, para. 183 and C- 6 and 7 /73, Istituto Chemicoterapio Italiano SpA and Commercial Solvents v. Commission, [1974] ECR 223, para.25 and C- 249/81, Commission V Ireland, [1982] ECR 4005, para.28 and C- 53/81, Levin v. Staatssecretaris van Justitie, [1982] ECR 1035, para.15

disputed rules originated from a company, a private bank, which hardly could be considered to regulate working conditions in a collective manner. On account of this reasoning I argue that it is not desirable to make an analogy between Angonese and Walrave since these cases are concerned with *different factual situations*. The application of Article 39 to private parties on the basis of the jurisprudence of Walrave and Bosman is in my point of view conditioned on the fact that the rules or measures at stake are enacted by an organization or association that has in fact the same functions as a state body. While *this condition is absent in Angonese and the textual basis of Article 39 does not imply that this provision applies to private parties* I conclude that the jurisprudence of Walrave and Bosman is an insufficent legal basis to justify horizontal direct effect.

In the end the answer on this general and principal question may however depend on whether one will give a broad or narrow interpretation of the requirement *"regulating working conditions in a collective manner"*. Nevertheless it seems in my point of view unreasonable to argue that a private company like Cassa di Risparmio that does not have any state function or collective regulating power over an industry or a profession fulfills the requirement in question.

Nonetheless it must be acknowledged that the application of Article 39 to private parties is *consistent* with the jurisprudence of Defrenne. The reason for this is that Angonese as well as Defrenne concerned a situation where a private person had a claim against an undertaking. It is in this regard immaterial that Defrenne was concerned with an employee and Angonese with a job applicant. Since ECJ in Defrenne clearly had pronounced horizontal direct effect in an *essentially similar situation* as Angonese it is in this respect not surprising that ECJ recognised horizontal direct effect of Article 39. There existed thus a firm legal basis for making an analogy between Angonese and Defrenne whereas both cases involved similar factual situations.[128]

Furthermore it is clear that Article 39 as well as Article 141 concerned the p*rohibtion against discrimination which is outlined in these provisions and in a general manner in Article 12*. This is important to emphazise whereas the decisive reason for ECJ to give direct effect to Article 39 and 141 in Defrenne and Angonses is arguably that the prohibtion of discrimination in these provisions is *of essential significance in the community legal order and that it therefore are mandatory in nature*.[129] The notion of "mandatory in nature" is thus decisive for the outcome of this case. Nevertheless one has to ask what ECJ actually means with" mandatory in nature"? And which provisions of the Treay are mandatory in nature? Is the legal meaning of a mandatory provision that it applies to all legal subjects regardless whether it is a state or an indvidual?

[128] See AG Fennelly in C-281/98, Angonese, para.40. Nevertheless it must be noted that he does not really delve into the question whether Article 39 should have horizontal direct effect.

My answer to the last question is affirmative. The rationale is that a mandatory provision is a provision of such nature that is essential for a legal system. Because of the aims to ensure it's *effectiveness and enforcement it has to apply to all legal entities*. This argument is not an entirely unconvincing argument in my opinion since it reveal the driving forces behind the integration mechanism. The aim and object of the prohibition of discrimination is to *create equal conditions on the labour market and further economic integration in the community. To accomplish these purposes it is essential that the prohibition of discrimination applies to all legal subjects.*[130]

As a general conclusion one could argue that the reasoning in Angonese is an example of the teleological approach from ECJ. Although it is clear that this line of reasoning will further the aims and objects of the EC Treaty it is still doubtful if this argument is sufficient to put obligations on individuals? Could for example the jurisprudence in Angonese and Defrenne c be criticized from a perspective of legal certainty and foreseeabilty?[131]

In sum the textual argument for giving horizontal direct effect is not entirely convincing . It is accordingly not controversial to argue that the text and the wording of the Article 39 does not answer the question whether this provisions should have horizontal direct effect. There is nevertheless several policy arguments that could be advanced in favour of the rationale in Angonese to give horizontal direct effect to Article 39. The general policy considerations that the Court put forward in Angonese concerning practical effectiveness, effet utile, and uniform application of community law is thus feasible to defend.[132] The legal integration of community law would be put in danger if the national courts could deny the horizontal direct effect of community law. Moreover it is in accordance with the principle of effet utile that the Treaty provisions take precedence over conflicting national law and also applies in horizontal relations. It could be argued that it is desirable to reinforce the notion that community law is a part of the national law and because of community law's superiority in the hierarchy of legal norms the community law must be applied to private law relations. Otherwise, put in a more psychological sense , individuals would never recognise or accept community law and assume the rights and obligations which follows from the EC Treaty.

My argument, which will be discussed further down, is that the question whether horizontal direct effect should be give a Treaty provision , depends on the interpretation one gives to the aims and objectives of the EC Treaty. It must be emphasized that this question is not only a question that is concerned with a strict legal analysis but also a question on which policy

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[130] The emphasis on the fundamental aims of the Treaty by ECJ will be discussed below, see Chapter 4.3.9
[131] See the discussion in Chapter 2, section 2.5 on horizontal direct effect of directives
[132] This arguments was put forward by ECJ already in the landmark judgement C- 6/64, Costa

considerations that are most convincing in the analysis whether the provisions of the EC Treaty should apply in horizontal relations. Nevertheless it is now time to turn to the question of ECJ's methodology and why this question are connected to the Angonese case.

4. LEGAL METHODOLOGY OF THE EUROPEAN COURT OF JUSTICE

The main reason why the legal methodology employed by ECJ has importance for the Angonese case is that it is diffcult according to my opinion to understand the rationale of Angonese if one does not possess knowledge of the method used by ECJ in this case.This chapter will depart on a descripitve approach and attempts to explain the legal techniques and devices employed by the ECJ to decide a legal case. My argument is that ECJ essentially employed the teleological methodology in connection with a contextual interpretation in Angonese to elaborate the concept of horizontal direct effect of Article 39.[133] As I already mentioned earlier one of the essential questions for the subject-matter of this essay is how ECJ without any textual basis from the EC Treaty itself could come up to the conclusion that Article 39 of the Treaty has horizontal direct effect?

The question of legal methodology is from a scientific view of importance since scholars generally assess the persuasiveness of a legal argument from a methological perspective. The legal method in itself could as I implied above be described as the manner and way in which the man use their thinking to come up with a solution on a problem.[134] It could also be reiterated that the legal method is a question on which sources that are used to come up with a correct solution on a legal problem. [135]Thus the first general question for our purposes is which sources and which manner of thinking ECJ employs in a given case to come up with an adequate solution on a legal problem?

4.1 Legal methods of interpretation

Although the important question for the subject-matter of this essay is concerned with what legal method ECJ employed in Angonese I will nevertheless for reasons of clarity start to describe in a general manner the traditional approach to methods of interpreting legal texts. Neverthless I have the intention to make two preliminary remarks concerning *interpretation*. Firstly one has to emphazise that the expression *interpretation* arguably has a *special legal meaning*. One could hence argue that *interpretation* does not in essence concern a problem of *truth* but rather *certain devices* that are employed to manage *contradictions* in the legal system.[136] Secondly one could make a distinction

[133] See Chapter 4.3.9
[134] See Chapter 1.4, note 27
[135] see Bengoetxea,n.112,66-80 for a general description of sources in community law
[136] See Strömholm, Stig. *Rätt, rättsskällor och rättstillämpning: en lärobok i allmän rättslära*,

between *interpretation, technical devices in the application of the law*, and expressions that describe how *extensivly a legal rule* could be applied.[137] Accordingly the question whether a legal rule is applied in an extensive or in restrictive manner is decided on the basis of interpretation and cannot be assimilated with any special method of legal interpretation.[138] This does nevertheless not mean that the question of interpreting a legal norm in an extensive or restrictive manner lacks importance. It could on the contrary be argued that the use of a legal analogy in particular had an impact of the outcome of the Angonese case. It could hence be argued that the feasibilty of making an analogy is a highly relevant question for understanding the outcome of Angonese.[139]This chapter is nevertheless not concerned with the question of making analogies in legal systems but rather concerned with methods of interpretation. I will start to describe the textual interpretation of legal texts.

4.2 Textual interpretation

A traditional attitude to interpretation of law is to interpret the law objectively in accordance with the actual wording of the law. This approach is generally described as a textual objective method or an interpretation that is based on the essential meaning of the words. The rationale of this method is that since the author of a legal text is subjected to the written language in order to communicate an intention or a message every interpretation should arguably begin with examining this text in a pure lingual sense to obtain a conception of what the the text actually means.[140]

Moreover textual interpretation could be understood as an exercise of examining a rule and infer it's lingual meaning by paying attention to the singular words and the meaning they obtain in the normal usage. The basic assumption of this method is that the author of the legislation is consistent from a lingual perspective. Consequently he should respect essential logical rules and ensure that the same expressions mean the same thing in other contexts.[141]

Third edition, 1988, pp. 392, hereinafter Strömholm

[137] See Bredimas, n.112, p.77

[138] See general about analogies in community law: O. Wiklund, EG-domstolens tolkningsutrymme. Om förhållandet mellan normstruktur, kompetensfördelning och tolkningsutrymme inom EG-rätten, first edition 1997.

[139] See Chapter 4.3.2.4

[140] This could be contrasted to other more subjective interpretations of law. See 4.2.4

141 This is sometimes called logical interpretation, See Strömholm, n.129, pp. 397 and Peczenik, Aleksander, *Vad är rätt?* First edition, 1995,331

4.3 Systematical interpretation

The main rationale of the systematical or contextual interpretation is that the words and expressions in a legal text have to be considered in the light of the whole legal context. This method assumes that the rule in question could be regarded as a part of a superior legal system which in itself is coherent and consistent. In a comparison to the logical method of interpretation one could argue that the contextual interpretation envisage that the structure of the legislation is consistent and that the rules' mutual structure and interdependece have bearing on the meaning of a single rule.

One author argues that the contextual interpretaion could be applied to give guidelines to the teleological method, i.e. it becomes a tool to discern and classify certain objectives by giving more significance to adjacent rules which are considered to give expression to general and superior aims. [142] Thus normally the contextual interpretation pays attention to the superior objectives of the legislation and the superior and general rules of a law or a treaty. This in turn implies that exceptions to these overriding objectives and general rules must be construed narrowly.[143]

4.4 Subjective and objective teleolgical method

Another method of interpretation of the law is the teleological method. Simply put it this method emphazise that one has to take into account the aim and purpose of a rule when one interprets it. One approach to the teleological method is that the decisive aim of the legislation is the actual will of the author which is substantiated in the law's explanatory statement (the subjective teleological method or historical method). Another approach to the teleological method is the objective teleogical method. This method endevaour to infer conclusions with respect to the aim of the legislation from the legislaton itself.[144] Accordingly when applying the teleological method one has answer some hypothetical and fictious questions: What should a reasonable and rational legislator have intended with this legislation? What interests does the law intend to protect?

In order to provide for legal security and legitimate expectations in relation to the application of the law one could argue that the aims and objectives have to be classified in a systematic manner and provide an answer to the question which aim has priortiy over another in

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142 See Strömholm., n.129, 422 .
143 See Kennedy,n.25 , 336-337
144 See for the so called radical teleological method, PO Ekelöf, Rättegång, första häftet, seventh edition, 1990,

a given situation. In general this method is arguably employed when a literal and contextual interpretation has been unable able to give an answer to the question of interpreting a certain legal norm.[145]

The objective teleological method of deciding which situations that are intended to fall under a certain legal rule appears to be an abstract process of logical thinking. On the other hand one could argue that in employing this method the court do not have to take a strict logical approach to the teleogical method but could take a dynamic approach to interpretation and further certain political objectives of the legislation .[146]

Now it is time to turn to the question how one could describe ECJ's method of interpretation. Consequently one has to consider the question whether it is feasible to fit ECJ's method of interpretation into any of the foregoing described methods or if ECJ's method of interpretation is independent and of a special character? Moreover for the purposes of the subject matter of this essay one has to answer the question concerning which methods of interpretation that the ECJ employed in the Angonese case?

4.5 The European Court of Justice's method of interpretation

As a first point one has to grasp that ECJ has at least two problems when it comes to interpretation of community law and the EC Treaty. The first dimension implies that the legislative content of the Treaty itself is arguably not very detailed but rather meagre . Many political and legal issues could consequently not be resolved when the community was established and the later amendments of the EC Treaty and the promulgation of secondary legislation has arguably not provided for comprehensive solutions on many legal and political tensions that arises from the community law. The second point is that the explanatory statement of the Treaty of Rome in 1957, the travaux préparatoires, were never published and could consequently not be used as a source.[147]

In general ECJ has arguably not created any new modes of interpretation but draw inspiration from national legal orders. Nevertheless the special requirements of community law, notably the plurlingual dimension of the community law, the special character of community law

[145] See C- 6/72 Continental Can and C- 22/70 , ERTA
[146] See Craig, n.1, (2003), 98-99 for the general discussion on the conception of the teleogical method with further references.
[147] See Craig, n.1, (2003), 98

and the drafting technnique of the Treaty has allegedly required ECJ to adopt it's own style of interpretation.[148]

4.6 The European Court of Justice's approach to the subjective teleological method (historical method)

With respect to the subjective teleological method one should make an essential remark. Since the EC Treaty is a multilateral treaty one could scarcely speak of an actual will of the legislator. An application of the subjective teleologcial method in accordance with international law hence imply that the EC Treaty must be interpreted with the contracting parties' common intent.[149] There exists nevertheless no substantial emprical evidence that ECJ has favoured this manner of interpretation.

As an illustration and substantiation of this empirical argument one could take the following example of ECJ's jurisprudence. In relation to the travaux preparatoires ECJ accordingly held the following in Commission v United Kingdom of Great Britain and Northern Ireland:" The evidence on interpretation to be taken into consideration *cannot be limited to the historical background* to the drawing up of the Treaty, or to the contents of the and *certain declarations mentioned in the travaux préparatoires* of the Treaty that its possible *unilateral declarations* made by the *representatives of certain States* who took part in the *negotiations* which led to the signature of that Treaty. As the Advocate General rightly pointed out in points 80 and 81 of his Opinion, it is clear from that background application to the military uses of nuclear energy was *envisaged and discussed by the representatives of the States who took part in those negotiations.* However, it is also *apparent that they held differing opinions on that issue and that they decided to leave it unresolved. Consequently, the guidance provided by that evidence is not sufficient for it to be asserted that the framers of the Treaty intended to* make its provisions applicable to military installations and military applications of nuclear energy."[150]

This quotation displays the problems of employing the travaux préparatoires as a legal source when interpreting the EC Treaty. The travaux préparatoires is hence too ambiguous and obscure to be relied on when interpreting the different provisions of the EC Treaty. Whether this quotation is entirely clarifying on the issue of ECJ's attitude to the explanatory statements of the legislation could be questioned. Nevertheless one can draw the conclusion that the actual will of the legislator will not be of decisive importance for ECJ when it interprets a rule.

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[148] See Kennedy, n.25, 322-323

[149] See Bredimas, n.112, 57 and Kennedy, n.25, 330-331

[150] See C-61/03, Commission V United Kingdom of Great Britain and Northern Ireland, [2005] ECR I-02477, para.29. See also C -293/83, Gravier v. City of Liége, [1985] ECR 593

Commentators accordingly argue that the significance of the travaux preparatoires is fairly negligible since ECJ as concluded earlier has done few references to them throughout the development of the community and the community law.[151]

4.7 The European Court of Justice and the textual method

The main argument with respect to ECJ's attitude to the textual method of interpretation is that the Court is not relying entirely on the wording of a legal provision when it applies it. [152]Despite that ECJ under normal circumstances begins with a scrutiny of the wording of a certain rule in it's interpretation of that rule there is an argument that ECJ is not applying the method used by english courts in which the courts are carefully defining every word in a certain rule to understand the meaning of the rule.[153] Even though the wording of the text is undisputed the ECJ accordingly proceeds to examine the rule with a teleological and systematical method. This implies that ECJ examines the aim of the rule and the whole legal context of the rule. Some commentators argues that ECJ sometimes even disregard the wording of the rule if considerable teleological arguments speak against it.[154]Whether the weak reliance on the wording when ECJ applies a rule could be explained on account of any judicial activism of the ECJ is a disputed issue but not a material question for the purposes of this essay.[155]

4.8 The European Court of Justice, the objective teleological method and general gap-filliong principles of law

The primary argument concerning the teleological method is that this method is the most important among the different methods of interpretation used by ECJ.[156] Commentator argues that the reason for this is that this method satisfies the special requirements that are laid down by the Treaty of Rome.[157]As implied above the Treaty itself have arguably a thin content and merely

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151 See Bredimas, n.112, 63, Bengoetxea, n.112, 71 and Kennedy, n.25 , 330

152 See Craig,n.1 (2003), 98 and T. Millet, Rules of Interpretation of the E.E.C. Legislation; in *Statute Law Review*, Volume 10, Number 3, Winter 1989, 168.

153 See for a clarifying statement on this problem: Bulmer V Bollinger [1974] ch.401 at 425;[(1974] 2 All E.R. 1226 at 1237

154 See Craig,n.1,(2003), 98 and Kennedy, n.25, 324

155 See example of the criticim against the ECJ's method of interpretation: H Rasmussen, On law and Policy in the European Court of Justice, (Nijhoff, 1986), 62 and examples of the defense of ECJ's activities: M.Cappelettti, The Judicial Process in Comparative Perspective (Clarendon Press, 1989), 390-91

156 See J.Bengoetxeaa, n.112, 233 and T. Koopmans, "The theory of interpretation and the Court of Justice", in D.O. Keefe and A.Bavasso (eds.), n.187 and Craig, n.1, (2003), 98 and Kennedy,n.25, 339

157Pierre, Pescatore. Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice, i *Miscellanea W. J. Ganshof van*

contains a number of principles and aims. The ECJ is consequently compelled to apply the teleological method to find a solution when the text of the Treaty itself does not provide an answer. In this respect it could be recalled that this section is not interested by the subjective teleological method but rather the objective teleological method.[158] It is also material to recall that the objective teleogical method put forward the main assumption that the judge should examine the law from the view of what a rational and reasonable legislator could have intended with a certain rule.

In order to discover which aims that the rational legislator wants to promote with a cetain rule ECJ is normally taking recourse to the overriding objectives and aims of the EC Treaty.There is accordingly considerable jurisprudence that supports that in the situation where the ECJ is applying the telelogical method it usually refers to the general goals and aims that are expressed in Article 2 and 3 of the EC Treaty.[159]

4.9 Systematical interpretation and The European Court of Justice

It is argued that this mode of interpretation is also very important for ECJ.[160] Thus there is an argument that ECJ is employing the systematical (contextual) mode of interpretation in connection with the teleological method to resolve the problems that arises because of the meagre content of the EC Treaty and the lack of subjective intentions from the contracting parties to the Treaty.[161] The basic idea of the contextual interpretation is to place a certain provision in it's legislative context and interpret it in a consistent manner in relation to other provisions of the EC Treaty. Thus one has to examine the treaty provisions in the light of the spirit and overriding aims of the EC Treaty.

I have already mentioned that in applying the teleological method one has to pay regard to the general programme and superior aims of the community that are outlined in Article 2 and 3 of the EC Treaty. This remark display that there is a close connection between the systematical and the teleological method of interpretation. The systematical method could allegedly resolve conflicts, that the teleological method cannot resolve, by way of pronouncing which among two conflicting provisons has a higher value in the hierarchical order of legal rules and also provide a

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der Meersch, Bruylant 1972, II p. 328. and Kennedy, n-25, 325-329

158 See for the subjective telelogical method, Section 4.3.5 and Kennedy,n.25, 339-340

159 See note 91 and Kennedy, n-25, 339 and Bengoextea,n.112, 252

160 See Kennedy,n.25, 334 and for a general description and analysis: Bengoetxea,n.112, 241-251

161 See Kennedy,n.25, 324

solution for the conflict between disputing policy aims.[162] The ECJ accordingly takes account to which part of the Treaty a certain provision belongs, how that provision relates to other provisions in that part and what general objectivs permeate that part or heading of the Treaty. There is substantial jurisprudence that can substantiate this argument.[163]

Nevertheless the ECJ has througout the development of the community felt inclined to elaborate general principles of law to resolve difficult issues of law in the community context. The reason for this is a reiteration of the reasoning given in the first passage of this section, notably that the EC Treaty and the secondary law has an imperfect content and is filled with gaps.[164] These principles are applied as gapfillers when neither the Treaty itself, the aims of the Treaty nor the textual method provide for an answer on the legal question. The general principle of law could furthermore be applied in the situation where there is a conflict between norms or principles. The underlying reason for the reference to these general principles of community law is that at least two of these general principles had significance for the rationale and the outcome of Angonese, notably the principle of effet utile and the uniform application of community law.[165] It is nonetheless important to empahzise that in *this context* these general principles are employed as *tools for interpretation of other rules*. On the other hand it is recognised that general principles have an independent value in the community context.[166]Another way of framing this notion is to argue that some principles are not only principles of interpretation but also material principles of law.

From a more principal perspective it is difficult to discern when a general principle of law applies as a tool for the interpretation and when it is applied as a material principle of law.[167] For purposes of this essay it is however not necessary to make such a distinction. Nevertheless for reasons of clarity it should be emphasized that the principle of effet utile is usually considered as a gap-filling principle.[168] Whether the principle of uniform application of community law should be described as a principle that is a device for interpretation or as a material principle could be discussed. My argument is that this principle that is also employed as a device of interpretation.

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[162] See Kutscher, Hans. Methods of interpretation as seen by a judge at the Court of Justice, in *Judiciell and Academic Conference* 27-28 September 1976, Luxemburg, 36.
[163] See inter alia: C- 6/64 Costa v.Enel, C- 190/73 Officer Van Justitie v. Van Haaster [1974] ECR 1123; [1974] 2 C.L.M.R 521., C- 24/68 Commission v. Italian Republic [1969] ECR 193; [1971] C.M.L.R 611, , C- 2 and 3/62, Commission v. Luxembourg and Belgium, [1962] ECR 425; [1963], C.M.L.R 58, C 125/73 Sotgiu v. Deutsche Bundespost, [1974] ECR 153, C- 22/70 Commission v.Council, C- 68/94 and C 30/95 France v EC Commission
[164] See Craig,n.1, (2003) , 371 and Lennaerts, n.109, 711
[165] See Chapter 3.4.2.2
[166] See Craig,n.1, (2003), 372-396
[167] See Bengoextxea, n.112, 75
[168] See Kennedy, n.25, 343-344

Community law should accordingly be interpreted in a manner, which promotes the uniform application of community law in all EU's Member States.[169]

As a conclusion ECJ arguably consider that the telelogical method and the contetxual method are the most important methods of interpretation. Neverthelss this does not mean that the court is only applying these methods. Instead it could be argued that ECJ is a pragmatic institution that employs different methods of interpretation depending on the circumstances of the case.[170] A quotation of Kutscher sums up ECJ's approach to interpretation in an illustrative manner: " *You have to start with the wording (ordinary or special meaning). The Court can take into account the subjective intention of the legislature and the function of the rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic relationship with other provisions in such a way that it has reasonable and effective meaning. The rule must be understood in connexion with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules of which it is a part, may be taken into consideration. Considerations based on comparative law are admissible or necessary. In new fields of law the court must feel its way from case to case (continental legal thought is fully conversant with reasoning from case to case)*".[171]

After a brief description of the genereal approach from ECJ to different methods of interpreting legal texts it is now time to consider which modes of interpretation that ECJ employed in the Angonese case.

4.10 The Angonese case and the methods of interpretation employed by the European Court of Justice

This analysis will provide for my own line of reasoning based on this general overview of the different modes of interpretation used by ECJ. This bried account will explain the legal devices employed by ECJ to come up with the conclusion in Angonese and thus the introduction of horizontal direct effect of Article 39.

The first remark in this analysis concerns ECJ's approach to the textual method of interpretation. This overview begins with paragraph 30 of the Angonese Case. The ECJ begin to note down that a pure textual interpretation of Article 39 could not provide an answer on the question whether this provision applies to private parties. This implies that ECJ seemingly did not employ the textual method to find a solution in this case.The second remark with respect to

[169] See C- 314/85, Firma Foto-Frost v. Hauptzollamt Lubeck-Ost, [1987] ECR 4199 , para.15 and C- 66/80, International Chemical Corporation v. Admminstrazione delle Finanze dello Stato, [1981] ECR 1191, para.11
[170] See for example , C- 22/70, ERTA , and, C- 6 /72, Continental Can
[171] See Kutscher, n.155, : pt.1, sects.5-6

paragraph 30 is that since Article 39 is couched in general terms the primary aim with this rule is arguably to abolish and strike down obstacles in relation to the free movement of workers. This thus entails that the provision will also apply to rules laid down by collective associations. This argument is teleological whereas it allegedly stress the aim of Article 39.

The third point of analysis concerns paragraph 32 and the principle of effet utile.[172] In order to give maximal effectiveness to the Treaty provisions concerning free movement of workers the prohibition against discrimination must necessarily also embrace rules created by organisation that are governed by private law. This is also a teleolgical argument which basically means in this context that one has to consider the Treaty as a system and provide a solution which promotes the aim of giving theTreaty provision it's maximal effectiveness in the Member States' national legal orders.

The fourth point is related to paragraph 33 and the teleological method and the principle of uniform application.[173] Accordingly one could argue that the purpose of the rule in Article 39 is that it should apply in a uniform manner. This means that the factual and legal situation for a private person which is exercising it's right to free movement and is therefter prevented from exercising this right ought to be considered to be the same independently whether the rules are of private or public origin. This argument is also teleolgical whereas it aims to clarify that one of the inherent objectives of the Treaty and Article 39 is that the provision in question should be interpreted in a uniform manner when individuals in the community context are situated in essentially similar situations.

The next remark is concerned with paragraph 34 and a potential conflict between the textual method of interpretation and the teleological method of interpretation. From the reasoning of this paragraph it could be extracted and argued that ECJ considers that the aim of a certain rule is of greater significance than the actual wording of the rule. This implies consequently that since the overriding aim of Article 141 is to grant rights to individuals it lacks legal significance that the textual content of Article 141 are concerned with acts by the Member States. The ECJ accordingly disregards the textual content of the Treaty since the overriding aim of the Treaty has more importance than the express wording of the rule in Article 141 of the EC Treaty. Even though the ECJ examines the aim of Article 141 the same teleogcial considerations seems to apply equally to Article 39 of the Treaty.[174]

172 See Chapter 3.4.2.2
173 See Chapter 3.4.2.1
174 See para. 35, first sentence

The final remark concerns ECJ's approach to the systematical and teleogical method in paragraph 35. The ECJ draw attenttion to the special purpose of Article 39 and connects this purpose with another provision of the Treaty, notably Article 141. When ECJ considers Article 39 in the light of Article 141, the Court concludes that both these provisions has an overriding objective to prevent discrimination on the labour market. This argument is systematical and teleogical since it consider the underlying purpose of Article 39 in the context of another provision of the Treaty. But ECJ does not make an end here. The ECJ stress the special importance of Article 39 of the Treaty whereas this provision contains a fundamental freedom.[175] Since this provision is the expression of a fundamental aim of the Treaty it requires adequate legal protection and courts are consequently obliged to give the utmost effectiveness to this freedom .[176]

The ECJ also emphazise the context of Article 39 in another regard, notably that this provision is a specific expression of the general prohibition of discrimination on the grounds of nationality in Article 12 of the Treaty. Article 12 of the Treaty is situated in the Chapter of the Treaty concerning general principles and has arguably a superior rank in context of community law. In order to understand the importance of the prohibition of discrimination in Article 39 of the Treaty one has to consider this provision in the light of Article 12, which contains a fundamental principle of the Treaty. In this context the ECJ considers that it is necessary that this principle is applied effectively and cannot be circumvented or rendered meaningless on the reason that the disputed rules or measures are enacted by a private party. In emphasising that Article 39 is an expression for a fundamental principle of community law the ECJ also here takes a systematical approach.[177]

It is in this regard important to recall that this is not the first time the teleological and systematical method of interpretation has taken precedence over the textual method of interpretation. It is accordingly argued that ECJ has developed and elaborated significant legal concepts in other areas of community law arguably in the absence of any textual basis of the treaty.[178]

As a conclusion I contend that the interpreting devices that were employed by ECJ in Angonese were well-known and fairly transparent from a legal perspective. The legal method

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175 See Bengoetxea, n.112, 244 for the use of the expression a fortiori. He means that this expression indicate a systematic approach.

176 See the effet utile argument in paragraph 32 of Angonese.

177 See Bengoetxea, n.112, 247

178 For example inter alia the legal doctrines of Direct effect; C.-26/62, Van Gend en Loos and Supremacy; C- 6/64 Costa v. Enel, and State liability; C- 6 and 9/90, Francovich

employed by ECJ was consequently consistent with it's earlier jurispudence and thus fairly clear and predictable.

Nevertheless it is in my point of view essential to examine the underlying arguments employed by ECJ in the Angonese case more closely to fully comprehend the implications of this case. This implies in particular a scrutiny with respect to the legal and political basis that was used in order to introduc horizontal direct effect in relation to Article 39 of the Treaty. After having explained the methods of interpretation which were employed by ECJ in the Angonese case for concluding that Article 39 had horizontal direct effect it is now time to assess whether the arguments and conclusions could be justified or should be criticised?[179]

[179] See for a thorough analysis of the concept of legal justification: Bengoetxea, n.112, 141-180

5. LEGAL CONCLUSIONS AND DISCUSSIONS CONCERNING THE IMPLICATIONS OF THE ANGONESE CASE

5.1 Introduction

This final chapter of this essay aims to summarise the legal discussion in this essay with respect to the concept of horizontal direct effect. Moreover this chapter will examine the principal arguments that could justify horizontal direct effect as a legal concept. On the other hand this analysis will also contain the principal criticism that could be launched against the concept of horizontal direct effect. In the end I will also discuss the practical importance of the Angonese case and consider the question whether this case actually deserves to be designated as a landmark judgement. This question implies in fact a principal discussion which on the one hand gives a broad reading of the case and on the other hand construes the legal implications of Angonese narrowly.

The first part of the analysis will nevertheless take a broad perspective and consider the arguments employed by ECJ in a larger context. The arguments that I employ can certainly be questioned and are arguably both political and legal.

The main reason for taking a broad view, arguably a political perspective on the rationale of Angonese, is that I do not believe that one can entirely grasp the reasoning of ECJ without considering the case from a broader larger perspective. Although the reader of this essay is arguably more interested of the legal examination of the concept of horizontal direct effect I consider that it is necessary to set out the broader perspective since this perspective will provide impetus for a more general discussion. This discussion concerns the principal question whether ECJ has departed on the right legal direction when it introduced horizontal direct effect of Article 39 of the Treaty.

5.2. Which are the essential arguments that supports the conclusion in the Angonese case and which are the underlying legal and policy reasons behind these arguments?

If we turn back to the beginning of this essay and consider the policy aims behind the introduction of the doctrine on direct effect one could draw some conclusions. Recalling that the doctrine of direct effect was introduced to ensure the practical effectiveness of community law one has to consider the implications of this argument. Assuming that the contracting parties to the EC Treaty, the Member States, voluntarily subjected themseleves to a special legal order

which granted supranational powers to certain instititions established by this treaty the Member States have to take the legal and political consequences of this decision.[180] This implies that the Member States have decided to abandon a part of their legislative soverignity in favour of the community.[181] One of the most important political conseqeuences of this transfer of soverignity is that the legislation and policy that are enacted by this community have be given practical effectiveness in the Member States of the Community, the principle of effet utilet.[182] The political aims of the Treaty would accordingly be seriously hindered and meaningless if their effectiveness was not ensured in a proper manner.[183]

But this line of thinking does not stop here. One could argue that it is not sufficient to give practical effectiveness of the Community legislation but one has to give community law *full effectiveness*.[184] This policy of effet utile derived from Costa entails logically two significant implications, which are deduced from the principle of supremacy. The first is that in the situation where the Member States in a certain field have transferred their soverignity they are no longer entitled to create policy that is inconsistent with the policy of the Community. Moreover the Member States have to avoid to apply legislation that is incompatible with the legislation enacted by the Community. If these considerations were not taken taken into account by the Member States they could easily render the rules enacted by the Community meaningless in practice simply by enacting a new law which according to the principle of lex posterior took precedence over a law decided by the Community. But this is clearly not sufficient to ensure the full effectiveness of community law. The principle of supremacy implies also consequently that the policy that is decided by the community takes precedence over national law independently whether the national law is of consitutional rank or not.[185] The last argument could be considered to be the logical implication that necessarily occurs when the principle of effet utile is given the broadest conceivable sphere of application.

The second consequence of effet utile is arguably that it is not sufficent to ensure that policy decided by the community is superior and takes precedence in all conflicts with national

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180 See C- 6/64 Costa v.Enel and C- 26/62 Van Gend en Loos .
181 This assumption of supremacy is not undisputed: J. Weiler The Community System: The Dual Character of Supranationalism (1981) I YBEL 267, 275-76 and B. De Witte, " Community Law and National Consitutional Values (1991) 2 LIEI 1, 4 and also " Direct Effect, Supremacy and the Nature of the Legal Order", in P.Craig and G.De Burca (eds.), The Evolution of EU law (Oxford University Press, 1999)
182 See C- 41/74, Van Duyn, para.12 and C- 11/70, Internationale Handelsgesellschaft, para.3
183 See Steiner, n.1, 73
184 See C- 6 and 9/90 , Francovich and C-46/93, and C-48/93 Brasserie du Pecheur SA v. Germany, and R. v. Secreratary of State for Transport, ex parte Factortame Ltd. And others, [1996] ECR I-1029, para.20 and Kutscher, n.155, 41
185 See C- 11/70 Internationale Handelsgesellschaft, para.3 and C- 106/77, Simmentahl,paras.21-23

law. What do I mean by this sentence? The answer to the questions is that in order to ensure the full effectiveness of community law it is thus required to ensure that community legislation is applied by the national courts of all the Member States, the principle of direct effect. This logic demand that individuals can enforce their rights deduced from community law in any Member States of the Communty. Moreover this principle obviously require that national courts of the Member States admit the action and indeed apply community law in the situation where community law has to be applied .[186] National courts are thus under an obligation according to the principle of effet utile to protect individual rights that are derived from community law where community law is applicable to the facts of the case and give precedence to community law if it is contrary to the national law of the Member State concerned.

But is this really enough to ensure that policy enacted by the community has full impact in the Member States? One could argue that it is not. If commuity law thus should have full effectiveness in the Member States national courts cannot dismiss it's application merely on the reason that community law is invoked by a private party against another private party. The reasoning from Costa, Walrave, Defrenne , Bosmand and Angonese implies that not only states are bound by policy decisions from the Community but that also individuals have obligations under Community law. Courts of the Member States are consequently required to guarantee the invocablity of community law by a private party against another private party, the principle of horizontal direct effect. If this was not the case the full efficency of commuity law would be put at danger.[187]

In the light of these foregoing policy considerations the outcome of Angonese could be justified since the horizontal direct effect of Article 39 is just the logical implication of a policy decision taken earlier by ECJ in it's previous jurisprudence, notably to give fulll effectiveness to community law.[188] This implies that the fundamental freedom concerning free movement of workers has to be guaranteed to the utmost possible extent. In my point of view the argument of effet utile is the most significant and convincing policy argument put forward by ECJ when it decided to give horizontal direct effect to Article 39.

Another strong policy consideration concerns the uniform application of community law. It would of course be problematic and disturbing if individuals had different rights dependent on whether they were exercising their rights against a state body or a private individual. There could as Prechal has pointed out arise difficult situations where by example an employee are employed

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[186] C- 26/62, Van Gend en Loos, paras.12-13
[187] See C-36/74, Walrave, para.18, C-415/93, Bosman, para.83 and C- 281/98, Angonese, para.32
[188] P.Pescatore, "The Doctrine of Direct Effect": An infant disease of Community Law,(1983) 8 ELRev. 155, 158.

by a private company and a public company.[189] It would be upsetting if community law was not applied in a uniform manner in the described situation since no obvious reason could explain a disuniform treament of the employee. This distinction with respect to the direct effect of the Treaty provisions could hence lead to discrimination and inequality in the condistions for competition. It is in this respect clear that the EC Treaty has the manifest objective of creating an internal market without any obstacle. This objective could nevertheless only be obtained if obstacles that orginiates from private parties are also caught by Article 39 of the EC Treaty.[190] In order to ensure the uniform application of Article 39 this provision must consequently apply independently whether the hindrance to the free movement of workers could be derived from a measure enacted by a private party or a state body.

Because of reasons of clarity and completeness I will also examine the argument that justify horizontal direct effect on the assumption that this effect indeed will promote rights of individuals which have an interest that they are complied with.[191] The main rationale of this argument is that, in accordance with the reasoning of Van Gend en Loos, the introduction of horizontal direct effect of community law will arguably improve individuals' rights in their enforcement of community law. Moreover one could argue that it is only when individuals have the procedural remedies and rights that enable them to enforce EC Law before the courts that the provisions of the EC Treaty will have any genuine significance for individuals.[192]

However in this respect one should not forget that this development in EC Law in relation to individual's rights and their enforcement is not an isolated phenomenon. In this regard the Community and ECJ have throughout the development of the Community step by step reinforced and improved the individual's rights by legislation and jurisprudence. It is clearly not the purpose of this analysis to outline this substantial and significant development of the individual enforcement of EC Law. Nevertheless I want to draw attention to the fact that the topic of this essay has to be considered together with these developments in order to fully understand the scope of the individual's enforcement of the rights deduced from the EC Treaty. The ECJ has accordingly throughout the whole history of the community elaborated legal concepts as for example state liability, indirect effect, supremacy and direct effect that promote

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[189]Prechal, (2005), 301

[190] See on the argument of uniform application of community law: AG JACOBS in C –316/93, *Vaneetveld*[para.29 and AG Lenz in C-91/92, *Faccini Dori*, paras.51-53. AG Lenz discuss the prohibition of discirimination but in my point of view he is relying primarily on the argument concerning the uniform application of community law.

[191] See para.34 in C-281/98, Angonese

[192] See The European Union and World Trade Law,(eds) Emiliou, N and Keefe O, David, John Wiley and Sons Ltd, (1996), 314

individual rights. The community legislator has on his part in recent years arguably in connection with ECJ's jurisprudence adopted important legislation as the Citizenship's Directive with the aim of consolidating the individual's rights.[193]

One could hence argue that this line of jurisprudence from ECJ and the recognition of horizontal direct effect in the Angonese case is consistent with the whole picture of strengthening and improving individual' rights in the community sphere and thus bringing the community law closer to the citizens of the European Union.[194] Since it is argued that the community law is of an evolutionary character the emphasis on the individual in the context of the development of the community supports ECJ's approach to the horizontal application of the Treaty provisions.[195]

Nonetheless one has to stress that the policy consideration with respect to individual rights did not seem to have been of decisive importance for ECJ's conclusion in the Angonese case. One could hence argue that ECJ is more pragmatic and merely seeks to find a practical solution on a given legal dispute.[196] Moreover if one take into account the former jurisprudence of ECJ and the court's devoted respect to the principles of effet utile and uniform application of community law it is more reasonable to assume that these policy considerations were of decisive significance in the Angonese case.[197] Now it is however time to turn to the policy considerations that could be raised against the recognition of horizontal direct effect.

5.3 Which policy considerations could be raised against the recognition of horizontal direct effect of the treaty provisions?

The essential argument against giving horizontal direct effect to the provisions of the EC Treaty is concerned by legal certainty.[198] The main rationale of this argument is that notwithstanding that some provisions of the Treaty expressly provide for a horizontal application, e.g. the rules on competition, it could be argued that the Treaty itself does not put obligations on individuals. It is consequently clear that the citizens of Europe were not a contracting party to the Treaty and has arguably had little influence on the community legislation process. Is it then under these

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193 See Craig, n.1, 2003, 178-215

194 See AG Lenz, in C-91/92, *Faccini Dori* , para.53 and AG JACOBS in C-316/93, Vaneetveld, para.30 and AG Tesauro in Joined cases C-46/93 and C-48/93 Brasserie du Pecheur, para.39

195 See for a general discussion on the importance of individual rights: A.Ward, Judicial Review and the Rights of Private Parties in EC Law , (2000), Oxford University Press, 2-16

196 See Steiner,n.1 ,73

197Ibid,n.1, .112, and Craig, n.1, (2003), 185 and Prechal, (2005) concerning the arguments in favour of horizontal direct effect, 298

circumstances reasonable to impose legal obligations on private parties? And could a normally reasonable individual predict that the Treaty itself would impose legal obligations on them?[199]

This argument is even more convincing when one considers Article 39 in relation to the following provisions of the Chapter relating to free movement of workers. Article 40-43 of the Treaty thus manifestly provides that the Member States are responsible for abolishing restrictions to the free movement of workers.

In the light of the foregoing considerations one could grasp that it is not an easy task for a private party to ascertain whether he or she is bound by a provision of the EC Treaty. It is thus fairly convincing to contend that a private party will act in the reliance that his behaviour will not be assessed according to the Treaty provisions concerning free movement of workers. One could moreover assert that the denial of the textual basis in favour of the overriding aims of the Treaty cannot be justified with a teleological interpretation since there exists considerable doubts whether the authors of the EC Treaty without a textual basis intended it to impose obligations on individuals. The recognition of horizontal direct effect is accordingly contrary to the spirit of the Treaty since the effectiveness of community law was not envisaged to take precedence over the individual's legitimate expectations and legal protection.

The confusion for the private party becomes even larger if he or she examines the jurisprudence of ECJ with respect to the direct effect of directives.[200] In this regard a private party may arguably get the impression that ECJ on the basis of legal certainty will not lightly impose obligations on individuals where the private party has painstaking problem to assess whether his behaviour is in accordance with national and community law.[201]One could in the same manner allege that the obligations imposed by Article 39 are burdens which are not reasonable foreseeable. Therefore one should on the basis of principle of legal certainty dismiss the horizontal application of Article 39 of the EC Treaty.

[199] See for a general discussion of legal certainty and horizontal direct effect of directives: AG Lenz in C-91/92, Faccini Dori, paras.63-68, 72-73

[200] See C- 152/84, Marshall and C- 91/92, Faccini Dori

[201] See Section 2.5 and for a general description of the argument against horizontal direct effect: S. Prechal, Directives in European Community Law- A study of directives and their enforrcement in national courts, (1995, Oxford University Press), 297-98

5.4 Final analysis- which policy arguments are most convincing?

For reasons of completeness I will analyse if the preceding arguments bears scrutiny in the light of the considerations put forward in favour of horizontal direct effect of Article 39. My first remark is concerned by the legal fiction that is arguably produced by the argument concerning legal certainty. My argument is that it is unlikely that private parties in general are aware of the exact formulation of the law. This could depend on several reasons, which are more or less morally acceptable. The first example is that the private party may have known about the law but did not make any further enquiry with respect to the exact formulation of the law. He could also have been aware of the law and it's exact formulation without having for that sake the capabilities or skills that are required to unravel the exact meaning of the law. Finally there is the situation where the individual had no possibility to discover and grasp the content of the law. In this situation the individual was not even aware that the law existed.

In all these situations my argument is similar and well known. Independently on the reasons why the private party was ignorant of the law he still has to face the legal obligations under the law. With respect to criminal liability the usual legal test for determining whether the perpetrator had an intention is if he or she actually was aware of the factual circumstances that constituted the crime.[202] It is accordingly not required that the perpetrator is aware of the fact that the factual circumstances legally constituted the crime. Nevertheless it is clear that because of the rule of law and for reasons of legal certainty people must have a reasonable possibility to ascertain the content of the law. Therefore if a law should be applied against a private person it must have been published in some official journal or register which private persons could get access to. If this is not the case the law cannot be applied against a private party.

The same reasoning applies if an individual commit an act or omission, which is lawful at the time when it is undertaken but in a later stage becomes illegal by a subsequent enacted law. In this situation the court cannot as a general rule apply the law in a retroactive manner. The main rationale is accordingly that if there exists a law at the moment when the legal dispute arises that is correctly published in an official register which is possible to get access to one cannot reasonably argue on the basis of legal certainty that the law cannot be applied to a private party. The main purpose of the law is normally to ensure that it is applied in an efficient manner. In

[202] See the comment under Chapter 1 (2) Brottsbalken. En Kommentar på Internet, Berggren, NO, Bäcklund, A, Holmqvist, L Leijonhufvud, M, Munck, J, Träskman, P, Wennberg, Wersäll, F, Victor, D, Uppdaterad per den 1 januari 2007,

order to govern people's behaviour in the manner that the law is intended to do it has to applied even in situations where individuals are not fully aware of it's content.

It is nevertheless not sufficient to take into account the legal certainty of the defendant. It is accordingly also required that regard is paid to the legal interest of the applicant.[203] Individual should consequently be able to act in reliance on their rights according to community law. One could hence argue that it would be disturbing and upsetting for the legal certainty of Roman Angonese or Gabrielle Defrenne if they could not act in reliance on the rights that they acquired under community law. It is nevertheless difficult to assess and decide whose rights, which should be protected.

The ECJ's jurisprudence concerning direct effect of directives clearly displays this problem when the court aims to strike a balance between the interests of effet utile, uniform application of community law and legal certainty. In this respect the problem of legal certainty becomes complex since a directive in fact could be contrary to a national law, which the individual relies on. Moreover it could be argued that he relied on the national law in a reasonable manner since an individual by reasons of commercial security and predictability should be able to assess it's behaviour in the light of the national legal order. Is it really desirable that the Courts impose legal obligation on an individual when his behaviour was in accordance with one national legal system?

One could on the other hand argue that the obligations that individuals are under community law are reasonable foreseeable since the doctrine of supremacy consistently has been applied by ECJ and clearly pronounced that community law has to be applied even though it is contrary to a national law. [204] There should consequently come as no surprise for individuals that directives have horizontal direct effect.

On the other hand it is clear that not all national courts of the Member States have upheld the doctrine of supremacy in a consistent manner. Hence if the Member States are not fulfilling their obligation under the principle of supremacy individuals are put in a dangerous and impossible situation when they have to assess whether their behaviour is lawful and if their behaviour entails legal obligations.

Despite that the intrinsic logic of the doctrine of supremacy from the perspective of ECJ arguably should have led to a horizontal application of directives this has not been the case. Whether this problem lies in the foregoing considerations or not is virtually impossible to spell

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[203] See Prechal, (2005), on horizontal direct effect and legal certainty, 304

[204] See on the criticism against employing the argument of legal certainty in order to deny horizontal direct effect of directives: Emmert, Horizontale Drittwirkung von Richtlinien, EWS 1992, 65 and Van Gerven, The Horizontal Direct Effect of Directive Provisions Revisited: The Reality of Catchwords, in Curtin and Heukels (eds.), The institutional dynamics of European Integration.Liber Amicorum Henry G.Schermers, Nijhoff, Dordrecht 1994, 352

out. In my point of view the argument of legal certainty and the painstaking problems that individuals are in when they strive to ascertain whether their acts are in accordance with the law may lead to the conclusion that horizontal direct effect of directive should be dismissed.[205]

But how should then one assess the situation where an individual act in accordance with his national law but contrary to a Treaty provision? Since it is clear that the doctrine of supremacy under these circumstances also clearly pronounces that community law takes precedence over national law it is conceivable that individuals in this situation have to assume their obligations under community law. The supremacy doctrine has also for long time been recognised and consistently applied by ECJ. One could hence argue that people in general should have been aware of the problem of acting in accordance with national law but contrary to community law.

But is the same reasoning applicable for individual that lives in Member States where this doctrine is not applied in the same confirmative manner and instead the national law is applied contrary to community law. Is their situation not comparable to the situation mentioned concerning directives? One could argue that the situations are comparable since both concern the conflict between national law and community law. My conclusion is nevertheless that the effet utile argument of community law in conjunction with the emphasis on individual rights and the concern of uniform application of community law should prevails and consequently individuals have to assume their obligations under Article 39 of the EC Treaty.

Is it nevertheless possible to make an argument with respect to legal certainty and put forward a claim that Article 39 of the EC Treaty should not have horizontal direct effect? Given that the EC Treaty did not expressly provide for this effect one could thus argue that individuals should not be able to sue other individuals on the basis of community law since the obligations under Article 39 impose a burden on individuals, which is unforeseeable.

The counterargument is here again that it has been recognised in the jurisprudence of ECJ and the academic literature that Treaty provisions could have vertical as well as horizontal direct effect.[206]Nevertheless it still seem to exist uncertainties and doubts among commentators whether all Treaty provision given that they fulfil the Van Gend en Loos-test applies in a horizontal and vertical manner.[207]

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[206] See C-13/76, Walrave and C 43/75, Defrenne and.Lennaerts, n.109, 702. Lennaerts arguably considers that if a community provision is recognised as having direct effect it should apply in a vertical manner as well as in a horizontal manner. This could be questioned on the basis of Article 28 and the jurisprudence in Vlaamsebureau. See also note.41.

[207] See Craig, n. , 771.

In an attempt to summarise the arguments put forward here I propose the conclusion that the arguments of predictability and legal certainty speaks against horizontal direct effect of Article 39. Despite these concerns it could be contended that an individual should arguably have been aware of the problem that may arise where he or she behave contrary to community law. It is in addition desirable in the light of the foregoing arguments to recall that the horizontal direct effect can be justified on the basis of the principle of effet utile, uniform application of community law and the promotion of individual rights. After an overall assessment of the main arguments I come to the conclusion that the concerns expressed in the preceding sentence takes precedence. The ECJ's introduction of horizontal direct effect was accordingly the right legal path to depart on. Although the judgement of the Angonese case in my opinion expresses these underlying policy decisions I consider that ECJ's conclusions are justified. The reason for this conclusion is that ECJ arguably in their reasoning in Angonese had the intention to decide this case in a manner that was consistent with these policy aims and their earlier jurisprudence. The recognition of horizontal direct effect was accordingly reasonable and foreseeable.

5.5 Legal and practical scope of the Angonese judgement- Broad construction

In the introduction to this essay I mentioned that some authors have designated the case of Angonese as a landmark judgement. Is this a correct statement? The answer on this question could be affirmative if you give the case a broad reading.

The broad construction implies as a first point that Article 39 catches all restrictions on free movement of workers that originates from private employers. Drawing from the jurisprudence of Walrave and Bosman one could argue that the Angonese rationale is not only applicable to discrimination on the basis of nationality but to all hindrances and disincentives that originates from private employers.[208]

The second and more radical conclusion from Angonese is that private employers that are governed by private law have considerable obligations under community law. This proposition also applies according to the principle of supremacy in the case where they do not have these obligations under national law The second conclusion from Angonese could be considered as a proof that ECJ is again asserting it's identity and fleshing their muscles. This means more clearly pronounce that ECJ once again impose the supranational character of community law on the national legal systems and accordingly gives preference to the effectiveness of community law,

[208] C-13/76, Walrave, para.18 and C-415/93, Bosman

uniform application of community law and the promotion of individual rights over private law of the Member States. If this argument is drawn to it's extreme one could argue that this is an evidence of judicial activism on the part of ECJ.

The third point concerns the practical importance that the conclusions Angonese have for individuals. In this regard one could assert that job-seekers, workers and former employees are now able to invoke community law in order ensure that employers abolish all restrictions and discriminatory measures that potentially have a disincentive effect on their right to free movement. With respect to the broad scope of the concept of restriction it could be argued that individuals in the labour market has a much stronger bargaining position after Angonese against the employers than they had before.[209] One could thus argue that employers indeed will suffer burdens and costs since they have to ensure that they are acting in accordance with their obligations under community law. Whether these assumptions are correct is indeed beyond my knowledge but the potential implications ought to be considered.

The fourth remark in relation to the scope of the Angonese rationale concerns which implications the conclusions of Angonese may have on the other free movements, notably freedom of establishment and free movement of services. In the light of the judgement of Walrave and Angonese there is an argument that ECJ now is reinforcing in a more general sense the horizontal application of the provisions of the Treaty, which have been not expressly pronounced but rather implied by the earlier jurisprudence of ECJ.[210]Since the freedom of establishment and free movement of services have similar aims and goals as the free movement of workers the same reasoning could arguably be applied to these freedoms.[211]

The important characteristics that are similar to all these freedoms are that they are all concerned with the overriding aim of abolishing all restrictions against cross-border movement of persons and thus creating an internal market.[212] Moreover the concept of restriction has arguably been elaborated and framed in a similar manner in the jurisprudence of ECJ. In this respect I argue that the court has outlined a broad notion of restriction that not only applies to discriminatory measures but also to indistinctly applicable measures. Furthermore the exceptions

[209] See on the broad scope of the concept of a restriction to the free movement of workers: C-415/93, Bosman and C-281/98, Angonese

[210] See C-13/76, Walrave, para.18 and the semi-horizontal application of the free movement of services. See also C-6/64 Costa v. Enel, which indeed recognise that individuals have obligations under community law

[211] See Craig,n.1, 766-768, and Steiner,n.1, 313-318. Both these authors outline the similar characteristics of the Treaty freedoms.

[212] See Article 14 of the EC Treaty.

to these free movements are similar to all these freedoms. It is also clear that the general prohibition of discrimination that is outlined in Article 12 concerns all these freedoms.

More importantly perhaps is that all these freedoms have been given direct effect in the jurisprudence of ECJ.[213] Assuming that also the provisions in Article 43, 48 and 49 of the EC Treaty are sufficiently clear, precise and unambiguous there is no logical argument why they should not also apply in horizontal relations. There is neither any firm argument that favours the conclusion that only Article 39 should apply in horizontal relation on the reason that this provision are of more importance in the community context. There is thus nothing in the Treaty, the jurisprudence of ECJ or in the academic literature that suggest that the Treaty provisions are ranked in a hierarchical order. Moreover the promotion of individual rights and the effet utile of community law should have the same value and importance with respect to the free movement of services and freedom of establishment in relation to the free movement of workers. Since I now have outlined the arguably broad interpretation of the Angonese case I will now turn to consider the more narrow construction of this case.

5.6 Practical and legal scope of Angonese- Narrow construction

By proposing a narrow interpretation of the implications of Angonese I will consequently deal with the arguments that was put forward in the preceding section. The most important criticism of the broad construction of the Angonese case lies in the assumption that ECJ in fact based it's decision in this case essentially on account of the circumstances of the case.[214] With this perspective one could argue that the facts of the case put forward a strong incentive for ECJ to adopt this solution and give horizontal direct effect to Article 39. Preliminary I also want to argue that Angonese concerned a case of discrimination, which the ECJ expressed in convincing terms.[215]Thus the ECJ did *not clearly express* that the same reasoning could be adopted if the case was concerned with a *restriction to the free movement of workers*. This interpretation of the horizontal application of Article 39 would be too far-reaching and consequently impose excessive burdens

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[214] A reservation must be made here since it is clear that ECJ's jurisdiction mainly is concerned with interpretation of the law and not assessment of the facts. This does not however mean that the ECJ never can interpret the law on the basis of the factual circumstances of the case. ECJ thus has to make a legal qualification of the facts of the case. See C- 6/64, Costa . And J.Bengoetxea, N.MacCormick, L.M.Soriano 'Integration and integrity in the legal reasoning of the European Court of Justice' in G.De Burca and J.H.H.Weiler (eds.) op cit, 43-86 at 60. Also for a critical examination of the ECJ's approach to interpretation of facts: Davies, Gareth T., "The Division of Powers Between the European Court of Justice and National Courts: A Critical Look at Interpretation and Application in the Preliminary Reference Procedure". REGULATING THE INTERNAL MARKET, Niamh Nic Shuibne, ed, Edward Elgar, 2006.

[215] See C-281/98, Angonese, para.39

and legal obligations on employers in the European Union. It is thus not convincing and justified to extend the horizontal application of Article 39 to all restrictions to the free movement of workers on merely the rationale of the Angonese case.

With respect to the second argument favouring a broad notion of the conclusions of the Angonese case I will stress that this argument, which was concerned with putting extensive obligations on employers, is both controversial as well as argumentative. As a first point it is clear that the *only obligation that is imposed on employers in Angonese is the prohibition against discriminating jobseekers on the basis of nationality*. The exercise of imposing other obligations on the basis of the Angonese rationale is speculative as well as hypothetical.

Secondly it could be argued that the legal assessment in Angonese would have been performed in an entirely different manner if the facts and circumstances of the case had been different. The reasoning from ECJ on the basis of supremacy and horizontal direct effect may consequently have been different if there would have existed an Italian law of constitutional character when the case was decided, which clearly allowed employers to impose whatever restrictions or requirements they preferred. One could not be entirely certain that ECJ would have recognised horizontal direct effect of Article 39 in the case where community law clearly was contrary to Italian constitutional law.[216]

Moreover the argument that is based on the assumption that the underlying reason for ECJ to give horizontal direct effect was to impose supranational policies is also fairly speculative. The reasons to introduce concept as direct effect and supremacy were arguably pragmatic and the basic intention was accordingly to resolve practical conflicts between national law and community law and giving guidance of the effects of community law.[217]

The supranational and federalist approach of the ECJ is moreover extremely difficult to verify and assess in a scientific manner. It is arguably difficult to measure whether a court is creating law and not interpreting law. Besides if one has the aim to criticise the methodology employed by ECJ in Angonese one has to take into account to the underlying reasons for ECJ to employ the teleological approach. It is sufficient to recall that ECJ is seized with practical legal disputes that it is required to resolve in the light of a meagre and half empty legal material, notably the EC Treaty.[218] In the light of these considerations one could argue that the method

[216] This argument would however be inconsistent with ECJ's jurisprudence, See C- 11/70, Simmentahl
[217] See Prinssen, p.1-14
[218] See F.Jacobs," Is the Court of Justice of the European Communities a Constitutional Court", in D.Curtin, DO Keefe (eds.), Constituional Adjudiciation in European Community and National Law (1992, Butterworth),25-33

employed to come up with a solution in Angonese was consistent with ECJ's earlier jurisprudence in similar cases.

In sum, ECJ will only intervene in private law relations when the legal dispute concerns an area in which the Member States have transferred their legislative sovereignty to the community. The competence of the community and ECJ is attributed and ECJ has in theory only jurisdiction when it is clearly expressly provided for in the EC Treaty or secondary legislation.[219] Where the Member States have not transferred their sovereignty there is no claim for the community to intervene in the internal legislative affairs of the Member States.[220]

With respect to the third argument the main contention is again that the Angonese case was essentially because of the circumstances of the case. It is hence not convincing to argue that ECJ had any genuine intention of creating substantially new rights for job seekers and workers and thus mutually material obligations for employers. It is consequently speculative and overstated to assert that the climate on the labour market will change because of the Angonese case. In addition it is important to stress that there exists arguably no empirical evidence that supports this theory.

Accordingly it remains to be seen whether the Angonese case has any practical importance for the conditions on the labour market. Again it is relevant to recall that it is not an easy task to measure in a scientific manner if the costs and burdens of employers have increased because of Angonese and whether job seekers' or employee's rights have been reinforced. *It is sufficient to reiterate that the only clear obligation for employers that could be extracted from Angonese is the obligation to not discriminate job seekers on the basis of nationality. And the only right that could be derived from Angonese for job seekers and employees is the right to not be discriminated on the basis of nationality.*

The last point with regard to the narrow understanding of Angonese is concerned with the application of the Angonese reasoning on the other treaty freedoms. It is here important to recall that the extension of the Treaty freedoms into the areas of private law of the Member States is arguably a political sensitive question. In this regard it is significant to put emphasis on the discussion that took place before the adoption of the new Service's directive.[221]The political sensitivity of the fields of free movement of services and freedom of establishment could also be

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[219] See however Steiner, n.1, 47-48. Here the author describe the complex ECJ doctrine of implied powers.
[220] See Craig, n.1, (2003), on the principle of subsidiarity, 132-138
[221] See the statement from Charlie McCreevy Commissioner for Internal Market and Services Statement on the Revised Proposal for the Services Directive European Parliament Plenary Session Strasbourg, 4 April2006,http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/220&format=HTML&aged=0&language=EN&guiLanguage=en, Reference: SPEECH/06/220 Date: 04/04/2006

perceived in the jurisprudence of ECJ.[222]One could consequently argue that on the basis of similar facts the Angonese case would have been decided in another manner if it had concerned freedom to provides services or freedom of establishment.

For reasons of clarity I could provide for some examples. If a credit institution established in a Member State of the European Union would outright prohibit a citizen of another Member State to make a withdrawal of money with his credit card it is doubtful that ECJ would consider this action by the credit institution as a measure that constitutes an obstacle to the *free provision of services*. Moreover if a certain bank machine merely recognise credit cards that are issued by the bank that is the owner of this bank machine I think it is controversial to assert that this is an *obstacle to the free movement of services*. Obviously it is important for a tourist to be able to withdraw money from bank machines. The described measures from the credit institutions could accordingly be considered to be disincentives for the *cross-border movement of tourist services*. Nevertheless I consider that one would go too far if the Treaty freedoms were given a horizontal application in these situations. It would consequently be too much cost and burdens involved for the commercial operators in order to fully comply with the obligations arising under community law.

Finally I want to assert that an obstacle to the freedom of establishment that originates from a private party or an organisation instead should be decided under the competition rules in Article 81 and 82. It is difficult to imagine an obstacle to the freedom of establishment, which originates from a private part, which cannot be decided under the well-established community competition law. Here the similarities with the case law on free movement of goods are obvious.[223] The horizontal side of the Treaty freedoms in Article 28 and 43 are thus intended to be decided under Article 81 and 82 of the EC Treaty. The inherent aim of Article 81 and 82 is to catch restrictions to competition and obstacles to the freedom of establishment, which originates from undertakings or private associations. The inherent logic of these rules consequently requires that situations that genuinely concern the horizontal application of the freedom of establishment be decided under the community competition rules.

[222] See C- 275/92 , Customs and Excise v. Schindler [1994] ECR I-1039, C- 159/90, SPUC v.Grogan, [1991] ECR I-4865, C- 263/86, Belgium v. Humbel, [1988] ECR 5365
[223] See C-311/85, Vlaamse Reisebureau

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