PRIVATE REGULATION AND PUBLIC RESPONSIBILITY IN THE INTERNAL MARKET

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I. Introduction

The EU's internal market of today consists of a complicated network of public and private regulation. It has become impossible to demarcate the respective spheres of responsibility of the State and private parties. They are in constant interaction and both seek to regulate and exercise influence on the market. The increased impact of private regulation means that it has become necessary to hold private parties responsible for potential breaches of the free movement provisions. The tool to impose such responsibility is the doctrine of direct effect. Over the years, it has had to develop to accommodate the increase of private regulation in the internal market. As a result, the ECJ has progressively moved from an approach based on the public or private *status* of parties to the *impact* of their regulatory conduct on the market. The effect of regulatory conduct on the internal market now determines whether or not the free movement provisions are applied in a particular case.

This approach to direct effect reflects a reality in which it has become impossible to say what is "public" and what is "private". However, an effects-based approach assumes that parties which are able to have an impact on the internal market are also responsible for that impact. That assumption is challenged in this paper. The various and difficult patterns of cooperation between private parties and the State might mean that private parties exercise a certain influence on the market because of their relationship vis-à-vis the State. The possible public dimensions of private regulation are ignored. Therefore, the extent to which the State is responsible for the exercise and impact of private regulation has to be investigated. This is not a purely theoretical exercise. The direct effect of the free movement provisions constitutes a necessary link to liability for

breaches of the free movement provisions. As the aftermath of the *Laval* case[1] has shown, direct effect provides a building stone towards liability – private parties to which the free movement provisions are applied can also be held liable to compensate potential victims. Although the conditions for liability are not identical to the conditions for direct effect, direct effect is considered to be an indication of the responsibility of private parties for potential breaches of the free movement provisions. However, if it turns out that the State is actually responsible for the impact of private regulation on the internal market, the link from direct effect to liability becomes more tenuous. In such circumstances, the State should be held liable instead of the private party. To do otherwise would be inconsistent with the rationale for extending the application of the free movement provisions to private parties, since they would be held liable for regulatory conduct for which they were not responsible.

This paper has three main parts. The first part will illustrate how developments in the internal market have required a development of the doctrine of direct effect. These developments have raised a number of questions about the relationship between direct effect, responsibility and liability. The second part will discuss a number of cases to illustrate the various patterns of cooperation between the State and private parties in the regulation of the market. Two public dimensions of private regulation will be identified. On the basis of that discussion, the third part will provide a number of criteria to assess in which circumstances the State is responsible for private regulation. It will be shown that in certain cases the vertical right to be protected by the State against interference with one's free movement rights is horizontally enforced against the private party which has exercised private regulation. Finally, the consequences of public responsibility will be discussed by illustrating how it can be linked to State liability. It will be argued that, if the State is responsible for a breach of the free movement provisions which has occurred through the exercise of private regulation, the State should be held liable instead of the private party.

II. Private regulation in the EU's internal market

A. The State and private parties in the internal market

In the early stages of the European Community, the State was believed to be central to the regulation of the market. Its relationship with private parties was hierarchical and the respective responsibilities of the State and private parties were kept separate. This perspective on the

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[1] Case C-341/05, *Laval un Partneri Ltd* v. *Svenska Byggandsarbetareförbundet et al.*, [2007] ECR I-11767.

market was reflected in the articles in the Treaty which provided for the various rights to free movement. Although the wording of the articles was ambiguous,[2] the traditional interpretation was that only the Member States were bound by these provisions. The free movement of goods, persons and services between the markets of the various Member States was to be protected by those parties which were primarily responsible for regulating these markets – the Member States.

In the last decades, the role of the State in the market has changed.[3] It is beyond the scope of this paper to discuss in detail the causes of this transformation, but it is clear that the traditional perception of general regulatory dominance of the State is no longer correct.[4] The globalisation of the market economy – of which the creation of the internal market itself was an example – meant that the State has become less able to control the market. This is closely linked to the increased use and development of technology. All of this means that the State has had to rely much more on private expertise. As a result, two important developments should be noted. First of all, the relationship between the State and private parties has become less hierarchical. Secondly, the spatial dimension of the market has changed, which has enabled private parties to act far beyond the boundaries of the State in which they are based. Both these developments have contributed to a process of emancipation of private parties in the market.

As a consequence, the State and private parties now interact in the regulation of the market in a way which is significantly less hierarchical. The internal market could be seen as a network in which the State and private parties interact and compete for regulatory power.[5] The market has become something of a "mixed zone" in which both the State and private parties are operating.[6] The State, which used to be a market regulator, has become much more of a market player.[7] However, this does not mean that the State has disappeared entirely from the market, or that it has lost all its influence on the market.[8] Similarly, it does not mean that private parties are no

[2] N. Nic Shiubhne, *The Coherence of EU Free Movement Law*, (Oxford, OUP, 2013), 101.
[3] M. Taggart, 'The Nature and Functions of the State', in P. Cane and M. Tushnet (eds.), *The Oxford Handbook of Legal Studies*, (Oxford, OUP, 2005), 101-118.
[4] W. Sauter and H. Schepel, *State and Market in European Union Law*, (Cambridge, CUP, 2009).
[5] K. Ladeur, 'The State in International Law', in C. Joerges and J. Falke (eds.), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, (Oxford, Hart Publishing, 2011), 397-418.
[6] J. Freeman, 'Private Parties, Public Functions and the New Administrative Law', (2000) 52 *Administrative Law Review* 813. For a European perspective, see J. Black, 'Constitutionalising Self-Regulation', (1996) 59 *Modern Law Review* 24.
[7] H. Micklitz and D. Patterson, 'From the Nation State to the Market: The Evolution of EU Private Law as Regulation of the Economy Beyond the Boundaries of the Union?' in B. van Vooren, S. Blockmans and J. Wouters (eds.), *The EU's Role in Global Governance*, (Oxford, OUP, 2013), 59-78.
[8] S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, (Princeton, Princeton University Press, 2006).

longer dependent on the State. Historically, the State has always relied on private parties.[9] At the same time, it should be accepted that globalisation and technology have made it necessary for the State to engage in new patterns of cooperation with private parties.[10]

The emancipation of private parties in the internal market also means that, in principle, it should be possible to impose more responsibility on private parties.[11] If they have really developed a more horizontal relationship vis-à-vis the State, they should also be expected to comply with the same obligations as the State. This could be considered as a process of constitutionalisation of the obligations of private parties in the market.[12] In the context of the EU's internal market, it means that they should be expected to comply with the free movement provisions. However, the starting point should always be that obligations can only be imposed on private parties if they have properly emancipated from the State and are exercising regulatory conduct in an independent manner. If this is not the case and they are still in a hierarchical relationship vis-à-vis the State, it remains the State which is responsible. The problem is that the level of emancipation of private parties is difficult to assess in an internal market in which the patterns of cooperation between the State and the private parties have become more complicated and diffuse. Therefore, it is necessary to look in detail at the interaction between the State and private parties in the regulation of the internal market. It is only through such an investigation that one can properly determine who is responsible for market regulation in a particular case.

B. The development of horizontal direct effect of the free movement provisions

In free movement law, the tool to impose responsibility on the State or on private parties is that of direct effect of the free movement provisions. Parties can only be held responsible for breaches of the free movement provisions if the provisions are directly effective against them. Therefore, direct effect serves as an intermediary tool to establish a link between regulatory conduct in the market and the responsibility for possible breaches of free movement law in the exercise of that regulatory conduct. As such, the doctrine of direct effect has inevitably had to

[9] M. Taggart, 'From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century', (2005) 55 *University of Toronto Law Journal* 575.
[10] M. Taggart, above n 3.
[11] L. Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Idea and the Conditions for its Realization', (2008) 45 *CML Rev* 1335.
[12] H. Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law', (2012) 18 *European Law Journal* 177. See also M. Kumm, 'Who's Afraid of the Total Constitution? Constitional Rights as Principles and the Constitutionalization of Private Law', (2006) 7 *German Law Journal* 342.

develop to reflect the changing patterns of cooperation between the State and private parties.[13] In the case law of the ECJ, three different approaches to direct effect can be identified: a formal approach, a functional approach and an effects-based approach. While it is not correct to argue that these approaches have been used chronologically, it is argued that the ECJ has started to use the effects-based approach more frequently in the last decade. The increased use of the effects-based approach is the direct result of the fact that it has become more difficult to distinguish between public and private regulation.

The formal approach to direct effect of the free movement provisions means that they are only directly effective against the State. Public regulation is caught by the free movement provisions, while private conduct has to be caught by the competition law provisions. The case which is frequently quoted by way of illustration is *Van de Haar*, in which the ECJ held that the rules on competition were intended to govern the conduct of private parties, while the rules on free movement governed the conduct of the State.[14] This is clearly based on a rigid separation of the obligations of the State and private parties. Their relative spheres of responsibility are different and demarcated. A formal approach is unable to deal with cases in which private parties have become more involved in the regulation of the market. The increase of private regulatory power means that sometimes conduct of private parties cannot be caught by the rules on competition, but still has a negative impact on the functioning of the internal market.[15] Similarly, States sometimes engage in anti-competitive conduct which did not come within the free movement provisions. In order to recognise this reality the ECJ has had to extend the direct effect of the free movement provisions to private parties. In parallel, it also extended the application of the competition law provisions to State conduct.[16]

The foundations of the functional approach were laid in *Walrave and Koch*.[17] In that case, a number of professional cyclists challenged a rule imposed by the International Cyclists Union ("UCI") which provided that in a particular type of cyclist races the "pacemaker" had to be of the same nationality as the stayer – the cyclist. The ECJ held that the provision on the free movement of services did not only apply "to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and

[13] J. Baquero Cruz, 'Free Movement and Private Autonomy', (1999) 24 *EL Rev* 603, 617.
[14] Joined Cases C-177/82 and C-178/82, *Criminal Proceedings against Jan van de Haar en Kaveka de Meern BV*, [1984] ECR 1797, para 11.
[15] J. Baquero Cruz, above n 13, 603-604.
[16] Case 267/86, *Pascal van Eycke v ASPA NV*, [1988] ECR 4769 and Case 13/77, *GB-INNO-BM v ATAB*, [1977] ECR 2115.
[17] Case C-36/74, *Walrave and Koch* v. *Association Union cycliste internationale and others*, [1974] ECR 1405.

the provision of services".[18] The exercise of the right freely to provide services "would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law".[19] The ECJ added that in some Member States certain services were regulated by public authorities, while in other Member States these services were regulated by private parties. As a result, it was an implicit confirmation of an internal market in which public and private parties interacted and in which the former borders between their respective responsibilities had become blurred. The extension of the free movement provisions to private parties was necessary to guarantee the effective and uniform application of the free movement provisions.[20]

In *Walrave and Koch* two functional criteria were used to determine whether or not the free movement provisions were directly effective against private parties. First of all, private parties had to be engaged in collective regulation. Secondly, they had to exercise legal autonomy. Neither of these two criteria has ever been defined by the ECJ. This is probably because it does not want to take too formalistic an approach to criteria which are supposed to be functional. The two criteria are essentially used to determine whether private parties are responsible for their conduct in the market – if they are exercising collective regulation on the basis of legal autonomy it can be assumed that they are also responsible for their conduct. Therefore, the application of the free movement provisions to private parties is made conditional on private parties being responsible for their regulatory conduct. This is clear from *Walrave and Koch* itself, in which the private party in question was the UCI. This organisation was responsible for the regulation of cyclist competitions throughout the world and was clearly independent from the State. Similarly, in *Bosman*[21] the free movement provisions were applied to the UEFA, the association which was responsible for the organisations of football competitions in Europe. Again, there was no doubt that this was a very powerful regulator which was in effective control of the market for football services in the EU.

In the last ten years, the ECJ has slowly moved away from relying too much on the functional criteria laid down in *Walrave and Koch*. In *Angonese*,[22] the provision on the free movement of workers was applied to an Italian private bank, which imposed a discriminatory language test

[18] *Walrave and Koch,* above n17, para 17.
[19] *Walrave and Koch,* above n 17, para 18.
[20] S. Van den Bogaert, 'Horizontality: the Court Attacks?', in C. Barnard and J. Scott, (eds.), *The Law of the Single European Market: Unpacking the Premises*, (Hart Publishing, Oxford, 2002), 123-152.
[21] Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL* v. *Jean-Marc Bosman and others*, [1995] ECR I-4921.
[22] Case C-281/98, *Angonese* v. *Casa di Risparmio di Bolzano SpA*, [2000] ECR I-04139.

requirement on candidates for a new job. It is difficult to see how the conduct of this particular bank could be considered as collective regulation,[23] but this did not stop the ECJ from holding that Article 45 TFEU was directly effective against the bank. *Angonese* probably constituted some sort of prelude to the third approach to direct effect in which the ECJ adopts an effects-based approach. The contours of this phase have become more evident in *Viking*[24] and *Laval*. In these cases, the provisions on free movement of establishment and services were applied to trade unions. Again, in the circumstances of these cases, it could be questioned whether the trade unions were really engaged in collective regulation.[25] Furthermore, since the trade unions were operating in tightly regulated national legislative frameworks, the extent to which they were exercising legal autonomy was disputed.[26] Nevertheless, the ECJ had no difficulties in applying the free movement provisions to their conduct. Although it did not formally follow the advice of Advocate General ("AG") Maduro in his Opinion in *Viking*,[27] in fact the ECJ was very much basing the application of the free movement provisions to the trade unions on the impact of their actions on the internal market.

More recently, the ECJ has become more open about its focus on the impact of private regulation on the market. A good example is the case of *Fra.bo*,[28] in which an Italian manufacturer of copper fittings challenged the certification activities of a private German certification organisation ("DVGW"). Certification by DVGW was necessary to be able to place copper fittings on the German market. The ECJ did not mention the distinction between horizontal or vertical direct effect.[29] It did not attempt to apply the *Walrave and Koch* criteria either.[30] In establishing that Article 34 TFEU was applicable to the certification activities of DVGW, it based itself purely on the impact that its certification activities had on the internal market. In other words, because the actions of DVGW constituted a restriction on the right to

[23] H. Schepel, above n 12, 183-184. For a more traditional interpretation of *Angonese*, see A. Dashwood, 'Viking and Laval: Issues of Horizontal Direct Effect', in C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies 2007-2008*, (Oxford, Hart Publishing, 2008), 525-540, 529.
[24] Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union* v. *Viking Line ABP et al.*, [2007] ECR I-10779.
[25] C. Barnard, 'Viking and Laval: An Introduction', in C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies 2007-2008*, (Oxford, Hart Publishing, 2008), 463-492, 473. See also A.C.L. Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ', (2008) *Industrial Law Journal* 126, 136.
[26] B. van Leeuwen, 'An illusion of protection and an assumption of responsibility: the possibility of Swedish State liability after *Laval*', in C. Barnard and M. Gehring (eds.), *The Cambridge Yearbook of European Legal Studies 2011-2012*, (Hart Publishing, Oxford, 2013), 453-473.
[27] Opinion of AG Poiares Maduro in *Viking*, above n 24, paras 38-40.
[28] Case C-171/11, *Fra.bo SpA* v. *Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) – Technisch-Wissenschaftlicher Verein*, judgment of 12 July 2012, not yet reported.
[29] H. van Harten and T. Nauta, 'Towards Horizontal Direct Effect for the Free Movement of Goods? Comment on Fra.bo' (2013) 38 *ELRev* 677, 689.
[30] H. Schepel, 'Case C-171/11, *Fra.bo SPA v Deutsche Vereinigung des Gas- und Wasserfaches*', (2013) 9 *ERCL* 186, 189.

free movement of goods of Fra.bo, Article 34 TFEU was applicable.[31] Traditionally, the application of the free movement provisions was a separate question from the existence of a restriction to free movement. As a consequence, it would seem that the ECJ has moved away from a test based on the status, or even the function, of private parties. Its primary focus is on the effect, or the impact, of their actions on the internal market, or more precisely on the ability of other private parties to exercise their free movement rights.[32] With this approach, the distinction between horizontal and vertical direct effect has lost most of its significance. Moreover, it could be interpreted as meaning that the free movement of goods, which was often considered as something of a bastion of vertical direct effect,[33] is no longer the sole freedom which cannot be relied on in horizontal situations. The ECJ has previously refused to provide horizontal direct effect to Article 34 TFEU.[34] The rationale for this refusal was unclear – it might have had to do with the fact that goods are different from persons and do not involve the fundamental rights implications which are usually connected to the free movement of persons.[35] However, the coherence of that rationale has been criticised on the basis that, from the perspective of the creation of an internal market, there is no justification to apply a different approach to the free movement of goods.[36] In any event, after *Fra.bo*, it can be said that the free movement provisions are now potentially directly effective against all private parties whose activities have an impact on the internal market and who are able to restrict the free movement rights of other parties.

C. The relationship between direct effect, responsibility and liability

This effects-based approach towards the application of the free movement provisions constitutes a third approach to direct effect. It is clear that the intention behind this new approach is to protect the effectiveness of the free movement provisions. A number of questions can be asked about its precise application to particular cases – for example, it could be argued that it introduces a *de minimis* threshold. This paper will concentrate on the consequences of an effects-based approach for the responsibility for regulatory conduct in the internal market. From that perspective, it is important to note that with the formal and functional approaches it is assumed

[31] B. van Leeuwen, 'From Status to Impact, and the Role of National Legislation: The Application of Article 34 TFEU to a Private Certification Organisation in *Fra.bo*', (2013) 3 *European Journal of Risk Regulation* 405, 407.
[32] Leaving aside the question of whether or not the free movement provisions are applied directly to contractual relationships or only to third-party impact outside contractual relationships. See G. Davies, 'Freedom of Contract and the Horizontal Effect of Free Moverment Law' in D. Leczykiewicz and S. Weatherill (eds.), *The Involvement of EU Law in Private Law Relationships*, (Oxford, Hart Publishing, 2013), 53-71.
[33] C. Krenn, 'A Missing Piece in the Horizontal Effect Jigsaw: Horizontal Direct Effect and the Free Movement of Goods', (2012) 49 *CML Rev* 177.
[34] Case C-159/00, *Sapod Audic*, [2002] ECR I-5031.
[35] C. Krenn, above n 33, 182-191.
[36] Ibid., 197-203. See also S. Van den Bogaert, above n 20, 149-152.

that a link between direct effect and responsibility can automatically be made. A finding of responsibility is incorporated in a finding of direct effect of the free movement provisions. The formal distinction between horizontal and vertical direct effect is based on the understanding that the State is responsible for the regulation of the market. Similarly, with the functional approach, it is clear that private parties which are engaged in collective regulation on the basis of the exercise of legal autonomy are also responsible for their conduct. However, with an effects-based approach, such a link cannot automatically be made. This is because that an effects-based approach cannot guarantee that private parties to which the free movement provisions are applied are necessarily responsible for their regulatory conduct in the market.

Private parties might have a particular impact on the internal market because they have engaged in cooperation with the State. This does not necessarily mean that a private party is also responsible for that impact. If we are genuinely moving towards a test based on the effect of private regulatory conduct on the market, we have to ensure that the free movement provisions are applied against those private parties which are responsible for the effect of their actions on the market. Otherwise, the rationale for extending the free movement provisions to their actions is gone.[37] Therefore, it becomes necessary to investigate the various patterns of cooperation between the State and private parties. On that basis, it will become possible to analyse in which circumstances the State is responsible for private conduct in the internal market.

Such a responsibility test is necessary in addition to an effects-based doctrine because direct effect establishes a link between regulatory conduct and liability. If the free movement provisions are directly effective against private parties, and these private parties are found to have acted in breach of them, they can be held liable. This is clear from *Laval*, in which the Swedish Labour Court awarded damages against the trade unions which had breached Laval's right to freely provide services in Sweden.[38] It did so on the express understanding that the ECJ's finding that Article 56 TFEU was directly effective against the trade unions also meant that they had to be held individually responsible for the consequences of a breach of Article 56 TFEU.[39]

III. Public dimensions of private regulation in the internal market

[37] S. Prechal and S. De Vries, 'Seamless Web of Judicial Protection in the Internal Market', (2009) 34 *EL Rev* 5, 24.
[38] *Arbetsdomstolens domar* (Judgments by the Labour Court) 2009 No. 89 of 2 Dec. 2009. Unofficial English translation by L. Carlson, last accessed at http://arbetsratt.juridicum.su.se/Filer/PDF/ErikSjoedin/AD%202009%20nr%2089%20Laval%20English.pdf on 31st March 2014.
[39] U. Bernitz and N. Reich, 'Case comment: The Labour Court Judgment in the Case Laval et Partneri', (2011) 48 *CML. Rev* 603.

A. Delegation

Three different patterns of cooperation between the State and private parties can be identified: delegation, reinforcement and authorisation. Each of these patterns involves a different kind of relationship between the State and private parties. The first category is delegation, which is admittedly a very broad category. The common denominator of these cases is that the State has delegated to private parties tasks which it would normally be required to do itself. In such cases, the private parties fulfil public obligations with the purpose of releasing the State of these obligations. For the purposes of this section, three different areas and types of delegation will be discussed.

The first type consists of cases in which the State has directly appointed private parties to engage in regulatory conduct which is still fully controlled by the State. The private parties effectively act as the arm of the executive. In free movement law, the most obvious example is *Hennen Olie*.[40] In that case, the Dutch State had made a private body responsible for maintaining petroleum stocks in accordance with EU law. This task had been conferred on it by Dutch legislation. Furthermore, the Dutch State was in complete control of the private body. Its members were appointed by the Ministry for Economic Affairs which could also impose directions on it on how to act.[41] The *Buy Irish* case[42] falls in the same category, despite the fact that there was no obvious obligation for the State to promote trade in national products. A private company was created for the purposes of promoting Irish products. Its entire management was appointed by the Irish State, which also heavily subsidised the company. According to the ECJ, it was the State which defined "the aims and the broad outline of the campaign conducted by that institution".[43] In both examples, the State granted regulatory power to private parties. Moreover, the exercise of the regulatory power was strictly controlled by the State – not only through the legislative framework, but also by controlling what is happening "on the work floor" of these private parties.

The second type concerns the regulation of liberal professions. A number of ECJ cases have dealt with the regulation of lawyers, doctors and pharmacists. In some Member States the bodies which are responsible for professional regulation have a public status,[44] while in other Member States these regulatory bodies have a private law status. Regardless of their status, the regulatory

[40] Case C-302/88, *Hennen Olie BV v ICOVA*, [1990] ECR I-4625.
[41] Ibid., para 15.
[42] Case C-249/81, *Commission* v. *Ireland*, [1982] ECR 4005.
[43] Ibid., para 15.
[44] Case C-292/92, *Hünermund v Landesapothekerkammer Baden-Württemberg*, [1993] ECR I-6787.

bodies are recognised by State legislation and have been entrusted with the task of regulating the profession. In *Royal Pharmaceutical Society*,[45] the English professional body which was responsible for the regulation of pharmacists was entrusted with this task by legislation, which also provided which kind of sanctions the body could impose. As such, the scope of its regulatory activities was determined by national legislation. Similarly, in *Wouters*,[46] the Dutch Bar Council was made responsible through legislation for the regulation of advocates in the Netherlands. It had been given the broad power to act in the interests of the profession. The common feature of these cases is that the State entrusted private – and sometimes public – bodies with the task of regulating the professions. Although the general powers were laid down in legislation, the private bodies were more autonomous since the State is not controlling the precise exercise of their tasks. However, through the legislation, the framework in which these actions took place was controlled by the State, which could intervene if necessary. As such, the scope of action of the regulatory bodies was determined by the State.

Thirdly, and finally, there are cases which dealt with the regulation of the labour market. In *Viking* and *Laval*, the free movement provisions were applied against trade unions. In both cases, the trade unions were private law bodies. The task of negotiating wages and working conditions through collective agreements had been delegated to them by the State through legislation.[47] If this task had not been done by the trade unions, the State would have had to adopt legislation on minimum wages and working conditions. In *Laval*, Swedish legislation did not make collective agreements generally applicable. Becoming a party to a collective agreement remained to be negotiated between employers and trade unions on an individual basis.[48] The circumstances in which trade unions could take collective action to force an employer to comply with a collective agreement were laid down in legislation.[49] This meant that the exercise of the regulatory conduct of the trade unions was to an important extent determined by national legislation, which provided in what circumstances they could take collective action. Therefore, the collective action in *Laval* – which was later found to be in breach of Article 56 TFEU – received protection from the Swedish State, which refused to intervene and prevent the collective action. In *Viking*,

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[45] Case C-266/87, *R (ex parte API) v Royal Pharmaceutical Society*, [1989] ECR 1295.
[46] Case C-309/99, *Wouters and others v Nederlandse Orde van Advocaten*, [2002] ECR I-1577.
[47] M. Rönnmar, 'Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the Laval Case from a Swedish Perspective' in C. Barnard (ed.), *The Cambridge Yearbook of European Legal Studies 2007/2008* (Oxford: Hart Publishing, 2008), 493-524, and J. Malmberg and T. Sigeman, 'Industrial action and EU economic freedoms: The autonomous collective bargaining model curtailed by the European Court of Justice' (2008) 45 *CML Rev* 1115.
[48] *Laval*, above n 1, paras 24-26.
[49] Employment (Co-Determination in the Workplace) Act (1976:580); Lex Britannia, consisting of three amendments to the Employment (Co-Determination in the Workplace) Act (1976:580), 1st July 1991; Posting of Workers Act (1999: 678).

Finnish legislation provided for the general applicability of collective agreements concluded in a certain sector.[50] Minimum wages were laid down in collective agreements which were made generally applicable through legislation. The common feature of both *Viking* and *Laval* was that the State had put the trade unions in a position which they could exercise regulatory power. Furthermore, the exercise of that regulatory power was protected by the State. Finally, and particularly in *Laval*, the exercise of the regulatory power of the trade unions was closely connected to and controlled by national legislation, which defined in which circumstances the trade unions could take collective action.[51]

B. Reinforcement

A second pattern of cooperation between the State and private parties could be described as reinforcement. In such cases, private regulation is reinforced by the State – more precisely, the effect or impact of the private regulation is increased by the State. It could easily be considered as another type of delegation. However, there is a subtle difference which will be illustrated by a discussion of *Fra.bo*.

In *Fra.bo*, an Italian manufacturer wanted to place copper fittings on the German market. To be able to do so, it was required by German legislation to obtain certification. Since this was a product which did not come with the New Approach for goods,[52] there was no harmonised European standard for copper fittings. Therefore, certification took place according to a national technical standard which had been developed by DVGW, a private body, which was also responsible for the certification in accordance with its own standards. As such, products certified by DVGW could lawfully be brought on the German market. In the German legislation, specific reference was made to DVGW as responsible for the certification. This did not mean that parties had to obtain certification by DVGW. [53] However, as was noted by the ECJ, DVGW in fact "offers the only possibility for obtaining a compliance certificate for such products".[54] As a

[50] The Employment Contracts Act (55/2001).
[51] See also B. van Leeuwen, above n 26, 459-461.
[52] The New Approach was developed by the EU to increase the free movement of goods. It means that the EU adopts product safety directives which lay down the general, "essential" requirements with which products have to comply before they can be placed on the market. The more detailed technical requirements are laid down in European standards developed by the European standardisation organisations. Once the reference to a European standard has been published in the OJEU, it is presumed that products which comply with the European standard also comply with the essential requirements of the relevant directive. See H. Schepel, *The Constitution of Private Governance*, (Oxford, Hart Publishing, 2005), 225-257.
[53] The German legislation did not formally impose a requirement of certification. It was open to producers to find other means to establish that their goods complied with the "recognised rules of technology" referred to in the German legislation. However, certification was *de facto* necessary for manufacturers to prove that their products complied with the "recognised rules of technology".
[54] *Fra.bo*, above n 28, para 28.

result, it held that DVGW "in reality holds the power to regulate the entry into the German market of products such as the copper fittings at issue in the main proceedings".[55]

DVGW was a private body with no State control. The members of its board were not appointed by the State and it did not receive any State subsidies.[56] As a consequence, an analogy with *Buy Irish* cannot be made. Moreover, the State had no control over the making of the standards and over its certification activities. DVGW was completely autonomous in the standard-setting process and in the certification process which was based on these standards. This is the most important difference with the delegation cases described above. The State is not in control at all of the exercise of the regulatory conduct. Nevertheless, it has provided that this regulatory conduct has an important impact on the market. The German legislation does not impose limits on what DVGW can or cannot do. Basically, it has granted a "carte blanche" to DVGW – it has to accept that DVGW can do with it what it wants to do. The scope of its activities has not been defined in national legislation. At the same time, the requirement of (DVGW) certification imposed by the German legislation means that the German State protects the certification activities of DVGW. In a way, it could be said that it has provided protective effect to its certification without exercising control over it – it has to accept it as it comes. To conclude, the characteristics of this type of cooperation are that the State has granted a private party regulatory power through the reinforcement of its activities without exercising influence on the regulatory conduct itself. Nevertheless, because of the effect provided to the private regulation by national legislation, the State protects the exercise of regulatory conduct by the private party and reinforces its impact on the market.

C. Authorisation

Unlike the previous two types of cooperation, for the third type of cooperation the State does not actually rely on private parties to engage in regulatory conduct for it. In this category, the State authorises private parties to engage in a particular course of conduct. However, this conduct has not been delegated by the State and it does not fulfil a function for the State – permission of the State is simply necessary to be able to engage in it.

The two main examples in free movement law are *Schmidberger*[57] and *Commission v France (Spanish Strawberries)*.[58] While the first case was an example of express authorisation, the second was about

[55] Ibid. para 31.
[56] Ibid., para 24.
[57] Case C-112/00, *Schmidberger Internationale Transporte Planzuge* v. *Austria,* [2003] ECR I-5659.
[58] Case C-265/95, *Commission* v. *France*, [1997] ECR I-6959.

implied authorisation. In *Schmidberger*, an Austrian environmental organisation wanted to organise a protest in the Brenner Tunnel. This protest would involve the blocking of the tunnel for around thirty hours. The result of the protest was that Schmidberger, a German transport company which transported timber from Germany to Italy though the Brenner tunnel, incurred significant delays in the delivery of goods to Italy. It brought proceedings against the Austrian State and claimed that the protest breached its right to free movement of goods guaranteed by Article 34 TFEU. The ECJ agreed that Article 34 TFEU was engaged and that the Austrian State was under an obligation to protect free movement of goods on its territory.[59] However, it held that the restriction to Schmidberger's right to free movement was justified by the legitimate aim of the Austrian authorities to accommodate the right to freedom of expression of the environmental organisation.[60] The environmental organisation had notified the Austrian authorities of their intention to organise the protest. Under Austrian legislation, the authorities subsequently had to decide whether or not to ban the protest. They decided not to do so in this case, which meant that the protest in the Brenner Tunnel was authorised and could go ahead.

In *Commission v France*, French farmers started a campaign against Spanish strawberries which involved frequent attacks on lorries which transported Spanish strawberries into France. The French authorities structurally refused to intervene, which meant that it became much more difficult for Spanish farmers to place their strawberries on the French market. The Commission brought infringement proceedings against France. The ECJ held that France had failed to comply with its obligations under EU law and that it was under a positive obligation – based on the duty of loyal cooperation[61] – to facilitate free movement of goods on its territory. The failure of the French State to intervene – for example, by bringing criminal proceedings against the farmers – meant that France had impliedly authorised the private conduct in this case. Similarly, it had also protected the conduct of the French farmers.

What the two cases have in common is that the private parties were – expressly or impliedly – authorised by the State to exercise private regulation. In the case of *Schmidberger*, the authorisation was based on the application of national legislation. In *Commission v France*, the authorisation was based on the failure of the French State to apply national legislation. In both cases, the effect of the decisions of the State was that the private parties were protected by the State in the exercise of their regulatory conduct.

[59] *Schmidberger*, above n 57, paras 51-64.
[60] Ibid., paras 65-94.
[61] Now found in Article 4(3) TFEU.

IV. Public responsibility for private regulation

A. Two public dimensions of private regulation: State legislation and State control or protection

From the analysis above, it is clear that there are two common dimensions of the interaction between the State and private parties in these cases. First of all, there is the initial act of the State which puts a private party in a position in which it can exercise private regulation. Secondly, the State is also in control of the exercise of private regulation or protects it.

The common feature of all cases is that they have started with the State, which has put private parties in a position in which they can exercise regulatory power. This regulatory power is usually granted to private parties by national legislation. However, the role of national legislation is not immediately obvious – the regulatory power is not always directly found in legislation. In *Schmidberger* and *Commission v France*, the specific State action which led to the obstacles to free movement was the authorisation of the Austrian and French State of private action by an environmental organisation and by French farmers. In these cases it was not national legislation which placed the private parties in a position in which they could exercise regulatory power, but rather the (non-)application of national legislation to a specific case. Therefore, a distinction could be made between (i) national legislation which puts private parties in a position of regulatory power and (ii) the specific application of national legislation to private parties by the State which puts them in a position in which their conduct has a particular impact on the market. In both situations, the source of the exercise of the regulatory power is the State. The private parties would not have been in a position to exercise the regulatory power had it not been for the State legislation. In *Viking* and *Laval*, the Swedish and Finnish legislation had put the trade unions in a position in which they could assume the regulatory power to negotiate wages with employers. But for the national legislation, they would not have been able to assume that power in the way that they did. In *Fra.bo*, the DVGW had been certifying copper fittings long before the German legislation had imposed a requirement of certification.[62] However, without the German legislation, they would never have been in the same position of regulatory power. Furthermore, it is clear that the State must in one way or another have singled out a particular private party – it must have put a particular private party in a position of regulatory power. This privileged position is less obvious in *Schmidberger*. While in *Commission v France* the privilege

[62] *Fra.bo*, above n 28, para 7.

constituted of the non-application of French criminal law to the farmers, in *Schmidberger* the only thing the State did was to consider the request for authorisation.

The second dimension of the cases is that, after having put a private party in a position of regulatory power, the State also controls the exercise of that regulatory power. This control does not always have to be direct. While in *Hennen Olie* the State was able to direct the actions of the private body through directives and through appointing members to its board,[63] in *Laval* it was national legislation which provided in which circumstances the trade unions could take collective actions.[64] The trade unions were only allowed to take action if a case satisfied the requirements imposed by national legislation. In *Schmidberger*, the State was in control of the exercise of the regulatory power because the definition of the scope of the protest was a pre-condition for authorisation. In all these cases, the fact that the State controlled the action also meant that the private parties enjoyed protection by the State. As a result, when Laval alerted the Swedish police, they refused to intervene in the collective undertaken by the Swedish trade unions– under national law the trade unions were perfectly entitled to do what they did.[65] The same applied to *Schmidberger*. Since the private regulation was based on national regulation, the State protected its exercise. The situation in *Fra.bo* was different, in that there was no control by the State of the certification activities of DVGW. The German State had given DVGW something of a "carte blanche", which was already referred to above. The German legislation was construed in such a way that, whatever DVGW would do, it would always enjoy protection by the State. As such, the State was responsible for the broad margin of operation enjoyed by DVGW, to which it had granted a protective effect through national legislation.[66]

What do these two public dimensions of private regulation mean for the responsibility of private parties in the internal market? It will be recalled that it was argued in the first section that private parties should only be held responsible for their regulatory conduct if they themselves were responsible for the impact of that conduct on the internal market. If they are not responsible, there is no more justification to extend the application of the free movement provisions to them. From the previous section it is clear that but for the public dimensions of the private regulation in the discussed cases, the private parties would not have been able to have an impact on the internal market. In other words, if they had not been granted regulatory power by national legislation and if the State had not provided protection to them, the free movement provisions

[63] *Hennen Olie BV*, above n 40, para 15.
[64] *Laval*, above n 1, paras 10-26.
[65] Ibid., para 34.
[66] H. Schepel, above n 30, 190-191.

would not have been applied to them. On that basis, it is possible to formulate a test to determine in which circumstances the State is responsible for private regulation.

Based on the discussion above, four elements have to be present before it can be said that the State is responsible for private regulation in the internal market:

(i) On the basis of national legislation, the State has put a private party in a position in which it can exercise regulatory power.
(ii) The exercise of private regulation is based on the national legislation, which determines its scope of action.
(iii) In the exercise of the private regulation, the private party is controlled or protected by the State.
(iv) But for this control or protection by the State, its regulatory conduct would not have had the same impact on the market.

B. Public responsibility and the horizontal enforcement of a vertical right

If these four elements are present, it is submitted that the State is responsible for the regulatory conduct of private parties – that there is public responsibility for private regulation. In fact, controversial and difficult cases like *Viking*, *Laval* and *Fra.bo* are no more than variations on the *Schmidberger* theme. Ultimately, these cases are about the right of individuals to be protected by the State against interference with their free movement rights. In each of these cases the State has failed to fulfil its positive obligation to facilitate free movement on its territory. It is true that in *Commission v France* the ECJ put the threshold for this positive obligation to be engaged quite high. The ECJ held that, in the circumstances of the case, France had "manifestly and persistently abstained from adopting appropriate and adequate measures".[67] On that basis, it is often concluded that this positive obligation only arises in cases of a persistent and manifest failure of the State to intervene in a situation created by private parties.[68] However, in *Commission v France*, the ECJ also held that it is for the Member States "to adopt all appropriate measures to guarantee the full scope and effect of Community law so as to ensure its proper implementation in the interests of all economic operators".[69] Each of the discussed cases highlighted structural problems with national legislation. As the problem was ultimately to be found in national legislation, the failure was necessarily persistent – if persistency is required at all. The national

[67] *Commission v France*, above n 58, para 65.
[68] C. Barnard, *The Substantive Law of the EU*, (Oxford, OUP, 2013), 78.
[69] *Commission v France*, above n 58, para 56.

legislation in question had a "structural deficit" in that it failed to sufficiently guarantee the protection of free movement rights on its territory. The individual cases, whether we focus on *Viking*, *Laval* or *Fra.bo*, were symptomatic of structural problems with national legislation. It was only through the exercise of private regulation which was based on this national legislation that these problems were uncovered.[70]

If this line of argumentation is followed, the horizontal presentation of these cases was deceptive. In fact, the vertical right to be protected by the State against interference with one's free movement rights was enforced against a private party. This is what could be described as the horizontal enforcement of a vertical right.[71] In such cases, the real challenge is directed against the legislation adopted by the State in combination with the protection by the State of private regulation exercised on the basis of that national legislation. The private parties effectively act as – willing or unwilling – agents of the State. Although the relationship between the State and the private party is different for each of the three categories, which also means that the level of protection by the State might be different, in all three categories the State is ultimately responsible for the impact of private conduct on the market. It is the State which is responsible for the private parties' actions. This also becomes clear by looking more closely at the aftermath of some of the cases. *Laval* is the best example. After the judgment of the ECJ in 2007, the Swedish State took the initiative to reform some of its legislation to comply with the requirements imposed by EU law.[72] A number of amendments to the legislation were introduced.[73] The result is that the collective action which took place in *Laval* would not be allowed under Swedish law today.[74] As a result, it is a good example to illustrate that Laval enforced its right to be protected by the Swedish State to freely provide services in Sweden against the trade unions. *Viking* is less clear, because the Finnish legislation did not control the actions of the trade unions as closely as the Swedish legislation did in *Laval*. However, it is equally clear that the Finnish State, on the basis of Finnish legislation, protected the exercise of collective action which was found to be in breach of the free movement provisions. Therefore, some sort of action or intervention on the part of the Finnish State is required. Finally, the outcome of *Fra.bo* is uncertain. The case is still ongoing in Germany, where the judgment of the

[70] Similarly, in *Commission v France*, the problem was the structural failure of the French State to apply criminal law to the French farmers. In *Schmidberger*, there was no structural problem with the Austrian legislation because it provided for sufficient scope to balance Schmidberger's right to free movement with the environmental organisation's right to freedom of expression.
[71] B. van Leeuwen, above n 26, 456.
[72] 'Action in response to the Laval judgment: Summary', *Swedish Government Official Reports* (SOU 2008: 123). See
[73] M. Rönnmar, 'Laval returns to Sweden: The Final Judgment of the Swedish Labour Court and Swedish Legislative Reforms', (2010) 39 *Industrial Law Journal* 280, 285.
[74] Ibid., 286.

Oberlandesgericht Düsseldorf, in which DVGW was held liable to compensate Fra.bo, has been appealed to the Bundesgerichtshof.[75] It should be noted that DVGW has announced that it will bring a claim against the German State.[76]

C. The consequences of a finding of public responsibility for liability

This short discussion of the outcome of the cases brings us to the final part of this paper. As has been explained in the first section, the direct effect of the free movement provisions is a condition to hold a party liable for a breach of the free movement provisions. If direct effect is primarily based on the impact of regulatory conduct on the internal market, it is necessary to investigate who is responsible for that impact. It logically follows that if the State is responsible on the basis of the criteria set out above, the State should also be held liable. It might be helpful to look at the criteria from the perspective of discretion. If the criteria set out above are fulfilled, either a private party is not exercising any discretion at all or the State is responsible for the margin of discretion within which a private party is operating. In both situations, the State determines the impact of the private conduct. At the same time, it is possible that a private party exceeds the margin of discretion provided by the State. In such cases, the criteria will not be fulfilled because the State is no longer protecting the private conduct in question. As a result, the issue of discretion is closely linked to (State) protection. If the criteria are fulfilled, the compensation for possible breaches of the free movement provisions committed by private parties should be paid by the State. The horizontal presentation of the dispute should not result in the private party being held liable. Unfortunately, this is exactly what happened when *Laval* returned to the Swedish Labour Court.[77]

There are two realistic options to move from a finding of State responsibility to State liability. The first would be for the ECJ to hold that because the State was responsible for the regulatory conduct, the free movement provisions should not be directly effective against the private party which was responsible for the private regulation in the case. The result would be that the case would be sent back to the national court. It would then be for the victim of the breach to bring separate proceedings against the State for State liability on the basis of the *Francovich* criteria.[78]

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[75] Judgment of Oberlandesgericht Düsseldorf of 14th August 2013, VI-2 U (Kart) 15/08.
[76] Ibid., para 42.
[77] *Arbetsdomstolens domar* (Judgments by the Labour Court) 2009 No. 89 of 2 Dec. 2009, above n 38. For a more positive interpretation of this judgment, see U. Bernitz and N. Reich, above n 39. See also, N. Reich, 'Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC rights', (2007) 44 *CML Rev* 705.
[78] Joined Cases C-6/90 and C-9/90, *Francovich and others*, [1991] ECR I-5357. They were reformulated in Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur* v. *Germany* and *The Queen* v. *Secretary of State for Transport ex parte Factortame*, [1996] ECR I-1029.

Depending on national civil procedure, it could also be possible that the State is joined as defendant to the case after it has returned to the national court. Both solutions would prevent the private party from being held liable, but would also mean that it might be more complicated for the victim to get compensation. The alternative would be to hold the private party which exercised the private regulation liable. That private party – already described as the agent of the State – could then reclaim the damages from the State through a separate claim for State liability. It looks like this is what is going to happen after *Fra.bo*.[79] The problem with this approach would be that it is uncertain what the breach of EU law between the private regulator and the State would constitute of. On the basis of *Schmidberger* and *Commission v France*, it could be argued that private parties engaged in regulatory conduct for which the State is responsible have a right against the State to operate in a legislative framework which is compatible with EU law.[80]

Whichever of the two proposed solutions is favoured, in either case significant reliance is placed on the remedy of State liability. The impact of State liability for breaches of EU law at the national level is uncertain – it might have to be improved if it is to make a real difference at the national level.[81] However, the identification and recognition of public responsibility for private regulatory conduct might also have a more precautionary effect, in that it might encourage parties who have been the victim of an alleged breach of the free movement provisions to bring a case against the State if the State is indeed responsible for the actions of private parties. This would improve both the effective and uniform application of the free movement provisions.

V. Conclusion

The flow of the argument of this paper could leave the reader with the impression that the State is everywhere and that the State is liable for all private conduct – in the words of Cass Sunstein: "State action is always present".[82] That has not been the purpose behind this paper and it is not true either. In fact, if the proposed conditions for public responsibility are applied coherently and precisely, the cases in which the State is found responsible and liable are limited. It should be emphasised that the scope of the State's liability for private regulation is determined entirely by the extent to which it has assumed responsibility for that regulatory conduct. By way of conclusion a few variations on the facts of the cases discussed in this paper will be made.

[79] Judgment of Oberlandesgericht Düsseldorf of 14th August 2013, above n 75, para 42.
[80] B. van Leeuwen, above n 26, 465-466.
[81] T. Lock, 'Is Private Enforcement of EU law through State Liability a Myth? An Assessment 20 Years after *Francovich*', (2012) 49 *CML Rev* 1675.
[82] C. Sunstein, 'State Action is Always Present', (2002) 3 *Chicago Journal of International Law* 465.

If the environmental organisation in *Schmidberger* had organised its protest without authorisation of the Austrian State, the case would have been different. If they had simply decided to block the Brenner Tunnel without informing the authorities, they would not have received protection by the State. The State would not have been responsible for the actions of the environmental organisation. This would have been different if the Austrian State had allowed the action to continue for longer than necessary. Then the case would have become much more like *Commission v France*. This means that a difficult assessment would be necessary to determine what the Austrian State could reasonably be expected to do in these circumstances. If the Austrian State had done everything it could to clear the Brenner Tunnel after the unauthorised protest had started, there would not be State responsibility and State liability. The environmental organisation would be held individually liable. Similarly, if the Swedish trade unions in *Laval* had taken collective action which was not allowed by Swedish law, the Swedish State would not have been responsible either. If Laval had called the police in these circumstances, the police would not have allowed the action to continue. Just like in the alternative *Schmidberger* scenario, the State would have had to intervene to minimise the impact of the exercise of private regulation which was not based on national legislation. The State would only be responsible if it failed to remove the obstacles to free movement created by private parties within a reasonable period of time.

The interaction between private parties and the State in the regulation of the internal market has become much more complicated in the last few decades. Rather than being deceived by appearances, we should investigate closely the various patterns of cooperation between the State and private parties. It is clear that strict adherence to a distinction between horizontal and vertical direct effect cannot do justice to these patterns of cooperation and is no longer realistic. From that perspective, an approach which focusses on the impact of regulatory conduct on the market makes perfect sense. However, an effects-based approach *stricto sensu* is not sufficient. If the effect of regulatory conduct on the internal market becomes the key condition for the application of the free movement provisions, it is also a matter for EU law to determine what the causes of that effect are and who is responsible for it. This paper has attempted to provide some guidance on how public responsibility for private regulation can be tested and what it should mean in terms of liability for breaches of the free movement provisions. While we should certainly not blame everything on the State, we should not be afraid "to bring the State back in"[83] either if it has managed to hide in the complicated network of public and private regulation in the EU's internal market.

[83] M. Taggart, above n 9, 627.