

# EU LAW : SPRING 2012

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## NOTES ON HORIZONTAL DIRECT EFFECT AND ART 34 TFEU

In **Commission v France** (Fruits and Vegetables) the Court of Justice (CJ) finds France breached Art. 34 TFEU for failing to prevent the French farmers from impeding the free movement of fruits and vegetables from Spain into France. We have not read a decision in which the Court has stated that Art. 34 TFEU does not produce horizontal direct effects but the Court has not stated that it does. Other provisions of the Treaty do impose obligations on non-state entities.

Advocate General Trstenjak's opinion in **Frabo SpA v DGVW** (Case C-171/11) argues for an expanded reading of Art. 34 TFEU:

"I propose that the Court answer the questions referred as follows: Private-law institutions established for the purpose of drawing up technical standards in a certain area and of certifying products on the basis of those technical standards are bound by Article 34 TFEU when undertaking that standardisation and certification activity, if the national legislature explicitly regards products equipped with a certificate of that private-law institution as complying with the law and it is therefore virtually impossible in practice to market products which are not equipped with such a certificate." (¶ 62).

Note that this is a statement that the private law institutions are bound by Art 34, and not that the state is responsible where such private law institutions set standards in ways that impede the free movement of goods.

The proposed answer relies on a number of steps:

1. The idea that the CJ takes "a broad view of the concept of measures taken by Member States" (¶ 29).
2. The CJ's "tendency ... to enlarge the scope of the fundamental freedoms indirectly to include, in special circumstances, action taken by private individuals, even though they do not exercise any powers similar to sovereign powers" (¶ 30) (citing e.g. *Commission v France* in ¶ 31).
3. "settled case-law that Articles 45 TFEU, 49 TFEU and 56 TFEU apply not only to acts of official bodies, but also to bodies of rules of other kinds intended collectively to govern employment, self-employment and the provision of services." (¶ 32) (e.g. *Olympique Lyonnais* ).
4. *Viking Line*: the Treaty provisions on freedom of establishment apply to "collective measures [of] a trade union or trade union federation which is not a public-law entity against an undertaking" to force it to conclude a collective agreement which would interfere with the undertaking's freedom of establishment. (¶ 33)
5. In *Angonese* the Court held a non-state entity was bound not to discriminate against nationals of other Member States (¶ 35) (bank seeking to hire worker required a certificate of bilingualism from a particular certificate provider such that it would be easier for local applicants than for foreign applicants to acquire the certificate).
6. Para 44: "the applicability of the freedom of movement for workers, the freedom of establishment and the freedom to provide services to collective rules of a non-public-law nature which concern employment, self-employment and the provision of

services is essentially justified by the Court with a reference to the effects of those collective rules. Seen from that angle, it would be difficult to understand why the possibility of the direct applicability of the freedom of movement for workers, the freedom of establishment and the freedom to provide services with respect to collective rules of a non-public-law nature should be acceptable under certain conditions, while that direct applicability should be categorically excluded in respect of the free movement of goods and capital.”

7. Horizontal direct effect with respect to the activities of a “ a private-law association with de facto rule-making competence (¶ 45) is necessary for the “effet utile” of EU law since “DVGW is able de facto to determine, by issuing standards and certifying products for the installation, enlargement, alteration and maintenance of drinking water equipment on the house-side of the connection, which products gain access to the German market. Consequently, DVGW and its wholly owned subsidiary are quite capable of erecting new barriers to the free movement of goods in the European Union when exercising that de facto power.” (¶ 47)

Note that with respect to possible justifications for DVGW’s acts which might interfere with free movement of goods the AG suggests 3 possible sources of justification:

- i. “the ‘written’ grounds for justification explicitly provided for in the TFEU” (¶ 37)
- ii. “the ‘unwritten’ overriding reasons in the public interest within the meaning of the judgment in *Cassis de Dijon*” (¶ 37)
- iii. special grounds in the private interest (¶ 38) (e.g. *Olympique Lyonnais*: “promoting the recruitment and training of young players”; ) (¶ 39) (e.g. *Angonese* “objective considerations”) .