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### Public play upon private standards

*How European and international economic law enter into voluntary regimes for sustainability*

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*Chapter 3*  
*VSS in the internal market*  
*Art. 34 TFEU and specific forms of interaction*  
*in the domain of market regulation*

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# 1. Introduction

Free movement provisions and EU competition law play a crucial role in the potential review of VSS. This Chapter, in combination with the next one, aims at assessing the treatment of VSS under both legal areas. Chapter 3 focuses on Art. 34 TFEU and on other EU rules in the domain of market regulation. Relevant EU provisions in the domain of the internal market encompass a host of secondary legislation which applies, directly or indirectly, to VSS. As a whole, this group of diverse legal instruments also determines an extent of coordination and even review of VSS, as well as influences their substantive and procedural features. Art. 34 TFEU and the enforcement of competition law represent a more evident, and somewhat 'harder', tool for review. The measures discussed in Section 3 of this Chapter constitute instead softer mechanisms for influencing and nudging, albeit forms of review are also possible.

The regulatory effects of VSS are felt both in the internal market and outside of it. Since they are standards defining product features,<sup>1</sup> they share several similarities with technical product standards. As such, VSS are potentially under the scope of Art. 34 TFEU insofar as they affect trade between Member States. Section 2 of this Chapter addresses VSS mostly under such a perspective. The objectives pursued by certain schemes, especially those in the domain of environmental and social protection, can be considered as aligned to those of the EU as enshrined in the Treaties. Section 3 therefore also reviews measures which can be seen as possible synergies between public and private regulatory instruments to pursue shared objectives. Measures such as the Renewable Energy Directive and the Public Procurement Directives highlight the implementing and enforcement potential of VSS, a potential which may also have repercussions for VSS' application in the external domain.<sup>2</sup>

Art. 34 TFEU may seem an unlikely candidate among the available legal tools to review private regulatory activity at the transnational stage. A long-standing argument in EU law holds that free movement provisions, in particular Art. 34 TFEU, are applicable only to public measures, or to measures which can be brought under the

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<sup>1</sup> EU law does not treat process requirements any different from product rules, however their connection with a product is. See, among the many cases, C-6/81 *BV Industrie Diensten Groep v J.A. Beele Handelmaatschappij BV* [1982] ECR I-707; C-379/89 *Preussen Elektra AG v Schleswig* [2001] ECR I-2099; C-5/94 *The Queen v Minister of Agriculture, Fisheries and Food ex parte Hedley Lomas* [1996] ECR I-2553.

<sup>2</sup> Certain VSS are consistent and aligned with the EU objective to support both the internal and the external dimension of the 'greening' of trade and its social dimension. Commission Communication COM(2010) 612 final on trade, growth and world affairs. Trade policy as a core component of the EU's 2020 strategy. Provided that VSS' employment in internal market measures is desirable, a horizontal coherence argument could support their employment also in certain instruments of external commercial policy. On external regulatory policy see Cremona, M. (2013) Expanding the internal market: An external regulatory policy for the EU? In Van Vooren, B., Blockmans, S., Wouters, J. (Eds.) *The EU's role in global governance*. Oxford: Oxford University Press, 162-177. On the principle of coherence vis-à-vis the EU's external competences see Gauttier, P. (2004) Horizontal coherence and the external competences of the European Union. *European Law Journal* 10(1), 23-41.

umbrella of public authority. The argument is, however, being challenged both theoretically and by the practice of the CJEU. From a theoretical perspective, a rigid divide between public and private does not just fail to describe reality, but it is also counterproductive for a rigorous legal approach investigating the EU law treatment of transnational private regulation. VSS well epitomise the collapse of the dichotomy between public and private interests, and between regulatory and market behaviour.<sup>3</sup> Still, private regulation can affect the process of integration, both by simulating it, but also by contributing to further fragmentation if conflicting or diverging regimes are established. VSS do not necessarily result in furthering harmonisation and may instead represent barriers to market access. However, through the lense of fundamental rights, by implementing the freedom to conduct a business or freedom of contract, certain VSS may even be considered as independent from and outside the scope of internal market goals.<sup>4</sup>

A catching-up process of the Court *vis-à-vis* the expansion of private regulatory activities is clearly noticeable in the domain of freedom of circulation of persons. Treaty freedoms have been applied to self-regulation and to private regulation, i.e. those private regimes which, different from self-regulation, are binding on actors other than those who drafted the rules. In this way, the Court has contributed to the elevation of the regulatory legitimacy of private regimes, and offered mechanisms of review in light of the explicit institutional support of private regulations which became apparent from the early 2000s.<sup>5</sup> It also certified a transition from the safeguard of private autonomy to the safeguard of regulatory autonomy, also by means of elaboration of specific justificatory grounds for private rules.<sup>6</sup> Different from other freedoms, the application of Art. 34 TFEU to private rules has been less visible, and generally limited to instances of more or less explicit delegation of regulatory powers to private bodies. On occasions the CJEU has incidentally noted that this Article only applies to public measures. Nonetheless, this Chapter shows that a throughout reassessment of case law in light of a different conceptualisation seems to point towards a possible horizontal application also of Art. 34 TFEU. This Chapter investigates whether this normative position is desirable for ensuring review of VSS, how it should be operationalised in order not to hinder private autonomy, and what

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<sup>3</sup> Azoulay, L. (2008) The Court of Justice and the social market economy: The emergence of an idea and the conditions for its realisation. *Common Market Law Review* 45(5), 1345; Semmelmann, C. (2010) The European Union's economic constitution under the Lisbon Treaty: Soul-searching shifts the focus to procedure. *European Law Review* 35(4), 529. See also Póiares Maduro, M. (2010) The chameleon State. EU law and the blurring of the private/public distinction in the market. In Rainer, N. (Ed.) *Conflict of laws and laws of conflict in Europe and beyond: Patterns of supranational and transnational juridification*. Antwerp, Oxford and Portland: Intersentia, 279-292.

<sup>4</sup> Cafaggi, F. (2010) Private law-making and European integration: Where do they meet, when do they conflict? In Oliver, D., Prosser, T., Rawlings, R. (Eds.) *The regulatory State*. Oxford: Oxford University Press, 226.

<sup>5</sup> Commission Communication COM(2001)428 final. A white paper on European governance. C 287.

<sup>6</sup> Mataija, M. (2016) *Private regulation and the internal market. Sport, legal services, and standard setting in EU economic law*. Oxford: Oxford University Press, 260.

specific consequences it would entail for multi-stakeholder, sectoral, and company VSS.

The analysis of the scope *ratione personae* of Art. 34 TFEU must begin with its substantive scope which is, unfortunately, almost as debated as its personal application. The concept of non-discriminatory restrictions to market access is particularly complex to pin down in practice, as Section 2.1 discusses. Section 2.1.1 casts some light over the concept of market access, and Section 2.1.2 tries to identify its boundaries. Subsequently, Section 2.2 assesses the scope *ratione personae* of Art. 34 TFEU. Section 2.2.1 digresses into the analysis of the other freedoms. Section 2.2.2 looks at the private bodies which have been subject to Art. 34 TFEU, which include bodies that could be connected to public authorities. Section 2.2.3 describes the first CJEU case where also a body not so clearly connected to a Member State was subject to Art. 34 TFEU. Section 2.2.4 introduces a useful heuristic framework for predicting which private bodies could be covered by Art. 34 TFEU, and applies it to VSS. Similarly, Section 2.2.5 describes a normative framework which could result in the horizontal application of Art. 34 TFEU by means of the extension of the principle of non-discrimination to horizontal relations, and by means of a functional approach to public authority. Finally, Section 2.3 applies the normative frameworks identified in Sections 2.2.4 and 2.2.5 to VSS. Section 2.3.1 summarises the finding concerning the personal scope of Art. 34 *vis-à-vis* multi-stakeholder, sectoral and company VSS. Section 2.3.2 discusses the substantive application of a market access test to VSS, describing the main challenges and the conceptual problems of an unfettered transposition of the test employed for public measures. Finally, Section 2.3.3 discusses the justification regime and the proportionality appraisal for private actors and, specifically, for VSS.

Having discussed Art. 34 TFEU as a venue for review of VSS, Section 3 addresses the possible means for review, coordination and allocation of regulatory effects, and the influence over procedures and substance of VSS which take place through EU legislation in the domain of market regulation. The aim is to assess how legal instruments which EU authorities already employ can have a positive impact on trade barriers and consumer confusion. Generally, the Section shows the means available to policy makers and legislators to influence transnational private regulatory activity in the domain of sustainability, both by means of instruments specifically targeting a VSS, and also by means of more 'general' regulatory regimes. By applying the framework elucidated in Section 4 of Chapter 2 concerning the interactions between public and private authorities, the conclusive part of this Chapter addresses cases of EU use, facilitation and support of VSS. Section 3.1 studies a case of EU use of VSS within the frame of the Renewable Energy Directive (RED). It shows the extent of coordination between the general stipulations set by EU legislators and the implementation determined by the recognised VSS schemes. It also shows how requirements are imposed on the standards, and the overall possible extent of court review. Section 3.2

analyses the consequences for coordination, influence and effects of a host of regulatory instruments which are conducive to VSS' activities, and which can be subdivided into harmonisation efforts, and meta-rules. Section 3.3 briefly discusses cases of EU support of VSS. Section 3.4 addresses the consequences for the application of EU law in case of use of VSS by a Member State. Section 4 concludes the Chapter.

## 2. Direct application of freedom of movement provisions to VSS

Art. 34 TFEU provides for the elimination of all quantitative restrictions and measures having equivalent effect (MEEs) on the import of goods. The text of the Article, altogether with that of the other freedoms, is neutral concerning the possibility of being applicable only to State measures. Its application to rules established by private actors, such as VSS, deserve a careful discussion because of a continuously expansive approach of the CJEU towards Treaty freedoms, both concerning their substance and their scope *ratione personae*. Further, the link between the personal scope of the Treaty freedoms is becoming increasingly entangled with their substantive scope.<sup>7</sup> It is impossible to discuss the personal application of the market freedoms without addressing their substantive scope as well. Under all Treaty freedoms, Art. 34 TFEU included, the Court employs a 'market access' approach which considers State measures to be unlawful even in the lack of discriminatory elements. The concept of market access is discussed in Section 2.1.1. As many measures can theoretically be seen as restricting market access, the uncertainty of such a test has been extensively criticised in literature.<sup>8</sup> A market access approach is, nevertheless, not unfettered: Section 2.1.2 addresses its limits.

Concerning the personal scope of the Treaty freedoms, earlier case law of the CJEU has been understood by scholars as denying direct horizontal effect to the Treaty freedoms. Cases where the Treaty provisions were applied to private parties were traditionally explained by the presence of connections with Member States, or with

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<sup>7</sup> In other words, as it will be seen, the personal scope of certain Treaty freedom comes close as being identified with, and equated to, the capacity to restrict access to the market. See Prechal, S., De Vries, S. (2009) Seamless web of judicial protection in the internal market? *European Law Review* 34(1), 7-8; Schepel, H. (2012) Constitutionalising the market, marketising the Constitution and to tell the difference: On the horizontal application of the free movement provisions in EU law. *European Law Journal* 18(2), in particular at 184-190.

<sup>8</sup> Spaventa, E. (2004) From *Gebhard* to *Carpenter*: Towards a (non)-economic European Constitution. *Common Market Law Review*, 41(3), 743-773; Oliver, P., Enchelmaier, S. (2007) Free movement of goods: Recent development in the case law. *Common Market Law Review* 44(3), 649-674; Snell, J. (2010) The notion of market access: A concept or a slogan? *Common Market Law Review* 47(2); Oliver, P. (2011) Of trailers and jet skis: Is the case law on Art. 34 TFEU hurtling in a new direction? *Fordham International Law Journal* 33(5), 1423-147; Khan, A. (2015) Corporate mobility, market access and the internal market. *European Law Review* 40(3), 371-390. See also, from a comparative perspective Reid, E. (2010) Regulatory autonomy in the EU and WTO: Defining and defending its limits. *Journal of World Trade* 44(4), 877-901.

the tasks conventionally associated to States.<sup>9</sup> The evolution of case law of the CJEU, at times unclear, has rendered this position increasingly difficult to hold,<sup>10</sup> as Section 2.2 shows.

## 2.1 The substantive scope of Art. 34 TFEU

A disquisition over the substantive scope of Art. 34 TFEU for regulatory measures is linked to the approach to economic integration which is taken into account, insofar as the latter informs the meaning and scope of the substantive test designed by the Court. Clarifying which approach is chosen is particularly important not so much for (relatively uncontroversial) direct and indirect discriminatory measures, but especially for non-discriminatory restrictions to market access. These latter cases push EU freedom of circulation law into delicate domains, where even measures with an indirect or minimal impact on trade could be challenged as in breach of the free movement provisions.

This difficulty is exacerbated by measures like the ones at issue here, which have the purpose of identifying and differentiating quality products for goods which are, in most cases, perfectly marketable and can also originate from a EU country. 'Sweatshop', 'unsustainable', or 'polluting' goods - often originating from outside the EU - under normal circumstances cannot be prevented from entering the EU market and being conferred the custom status of Community goods.<sup>11</sup> This simply means that such goods are in free circulation within the EU, but not necessarily are in compliance with marketing requirements in place at the EU or Member State level and, therefore, marketable.<sup>12</sup> Still, Member States, exactly under Art. 34 TFEU for goods from other EU Members, can restrict sales of imported products originating from outside the EU on the basis of a number of grounds such as public morality, public policy, and the protection of health and life of humans, animals or plants.<sup>13</sup> In the absence of harmonisation, Members may also establish requirements with which products must comply in order to be marketed. Under the scenarios described below for the application of freedom of movement rules to VSS, products are marketable as they are since, in the end, without certification they would still be 'regular' products in compliance with EU harmonising measures. This also includes, for example, sweatshop goods which enter the EU because of ineffective enforcement in the country of origin, or illegally harvested products.

<sup>9</sup> Barnard, C. (2016) *The substantive law of the EU. The four Freedoms*. Oxford: Oxford University Press, 232-234.

<sup>10</sup> Schepel, H. (2012) *Supra* at 7, 179.

<sup>11</sup> As 'release for free circulation shall confer on non-Community goods the customs status of Community goods. It shall entail application of commercial policy measures, completion of the other formalities laid down in respect of the importation of goods and the charging of any duties legally due'. See Council Regulation 2913/92 of 12 October 1992 establishing the Community Customs Code L-302/1.

<sup>12</sup> C-296/00 *Prefetto Provincia di Cuneo v Silvano Carbone* [2002] ECR I-4670, para. 31. See also C-51/75 *EMI Records Limited v Cbs United Kingdom Limited* [1976] ECR I-811.

<sup>13</sup> Art. 24 of Council Regulation (EC) No 260/2009 of 26 February 2009 on the common rules for imports. L 84/2.

VSS constitute obstacles to market access to a Member State in the absence of linking factors to any Member State as, empirically, VSS regulating authority is disconnected from public delegation. Their treatment would be rather different if they were to be found to constitute public measures. Limiting the analysis to a public-equivalent measure to a VSS contemplating a label, generally, labelling requirements are not excluded from Art. 34 TFEU under the *Keck* case-law.<sup>14</sup> Voluntary labels of quality and origin enacted by Member States are caught by the scope of Art. 34 TFEU, as they determine a disadvantage for products which fail to qualify,<sup>15</sup> and they encourage consumers to purchase products bearing the label to the disadvantage of imported products.<sup>16</sup> Pure quality labels enacted by public bodies have not yet appeared before the Court. Even assuming a lack of discrimination, publicly established quality - or sustainability - labels may be considered as *prima facie* hindering market access because they may favour certain products over others.

### 2.1.1 *The notion of market access*

Art. 34 TFEU and fundamental economic freedoms do not confer on traders a general right to trade, nor an unfettered right to pursue unhindered one's economic activity in a market without rules.<sup>17</sup> The Treaties - in particular the rules on the internal market and competition - confer on market participants a *qualified* right to trade, which is the right to compete on equal terms in the internal market, in a framework of ever-increasing integration between Member States.<sup>18</sup> The idea that the Treaties formed a neoliberal charter of economic freedom was swept away already with *Keck*,<sup>19</sup> where relatively clear limits were drawn concerning the possibility for traders to challenge all rules affecting trade. The Court has however struggled to translate the approach above into legal tests determining with acceptable legal clarity which regulatory measures constitute measures having equivalent effect to quantitative restrictions.

The CJEU has famously addressed under Art. 34 TFEU discriminatory measures and measures which discriminate indirectly albeit being facially neutral.<sup>20</sup> Initially, it has

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<sup>14</sup> C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505, para. 31; C-33/97 *Colim NV v Bigg's Continent Noord NV* [1999] ECR I-3175, para. 37.

<sup>15</sup> C-13/78 *Eggers v Die Frie Hansestadt Bremen* [1978] ECR I-1936, para. 26.

<sup>16</sup> C-325/00 *Commission v Germany (Labels of Origin and Quality)* [2002] ECR I-9977, paras. 24-25.

<sup>17</sup> Opinion of Advocate General Tesauro in C-292/92 *Hunermund v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787, para. 25-26; Opinion of Advocate General Poiares Maduro in Joined Cases C-158-59/04 *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [2006] ECR I-8135, para. 37, 41. A similar statement can be found *vis-à-vis* Art. 49 TFEU in Opinion of Advocate General Tizzano in C-442/02 *Caixa Bank France v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-8961, para. 63.

<sup>18</sup> Opinion of Advocate General Poiares Maduro in C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP (Viking Line)* [2007] ECR I-10806, para. 33.

<sup>19</sup> Reich, N. (1994) *The November revolution of the European Court of Justice. Keck, Meng and Audi revisited. Common Market Law Review* 31(3), 459.

<sup>20</sup> Indirectly discriminatory measures are themselves defined broadly as either measures that 'affect essentially' foreign products or persons, or measures that 'can be more easily satisfied' by national goods and persons rather

done so by means of a test whose far-reaching breadth<sup>21</sup> became a source of concern when traders began to file cases where the impact of the regulatory measures on Union trade was tenuous at best.<sup>22</sup> The CJEU therefore defined a class of measures whose impact on market access is not *de jure* nor *de facto* any different for domestic and imported product, that of certain selling arrangements (CSAs),<sup>23</sup> defining the conditions under which products are sold<sup>24</sup> - to be excluded from the scope of Art. 34 TFEU. By referring to the concept of market access, the Court paved the way for a third class of measures (in addition to directly and indirectly discriminatory measures, and product rules) covered by Art. 34 TFEU, those which substantially hinder market access of products from other Member States, and which do not seem to imply any extent of discrimination.<sup>25</sup>

Defining the substance and especially the limits of the concept of market access is therefore crucial. Almost any measure in the domain of market regulation may have the direct or indirect effect of remotely affecting the possibility to enter the market. The reach of Art. 34 TFEU would be unsustainably broad and indistinguishable from the very *Dassonville* formula the Court tried to narrow down.<sup>26</sup> It is thus essential to identify a threshold separating measures which, generally, affect trade from those which affect market access, and to clarify whether discrimination must still be at hand to trigger Court review. Addressing the meaning of market access is crucial in understanding the overall scope of Art. 34 TFEU. All measures covered by Art. 34 TFEU - including directly and indirectly discriminatory measures - can be seen as more or less severe hindrances to market access.<sup>27</sup> Further, an approach based on market access aligns Art. 34 TFEU<sup>28</sup> with the other freedoms where a two-step assessment is employed (1: is there an hindrance?; 2: is it justifiable?).<sup>29</sup>

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than foreign goods or persons, or where 'there is a risk that they may operative to the particular detriment' of foreign goods and persons. See C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-02617, paras. 18-19.

<sup>21</sup> C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR I-837, para. 5.

<sup>22</sup> See, for example, C-145/88 *Torfaen Borough Council v B & Q plc.* [1989] ECR I-03851.

<sup>23</sup> Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6126, para. 16.

<sup>24</sup> Or when, where and how certain products can be sold. Case C-71/02 *Herbert Karner* [2004] ECR I-3025, para. 38. See also Mortelmans, K. (1991) Article 30 of the EEC Treaty and legislation relating to market circumstances: Time to consider a new definition. *Common Market Law Review* 28(1), 115. Barnard, C. (2016) *Supra* at 9, 128.

<sup>25</sup> C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519, para. 37.

<sup>26</sup> Oliver, P. (2011) *Supra* at 8, 1423-1471.

<sup>27</sup> Even product rules are capable of being conceptualised as measures hindering market access, as Advocate General Tesouro already pointed out in his Opinion in *Familiapress*, where a single market access test was suggested for the first time. Opinion of Advocate General Tesouro in C-368/95 *Vereinigte Familiapress GmbH v H. Bauer Verlag* [1997] ECR I-3689, para. 10. See also Opinion of Advocate General Bot in C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519, para. 109.

<sup>28</sup> Already visible in C-250/97 *Monsees v Unabhängiger Verwaltungssenat für Karnten* [1999] ECR I-2921, para. 23.

<sup>29</sup> C-76/90 *Sager v Dennemeyer & Co LTD.* [1991] ECR I-4221; C-415/93 *Union Royale Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921, para. 103; C-384/93 *Alpine Investment BV v Minister van Financien* [1995] ECR I-1141; C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165. See also Khan, A. (2015) *Supra* at 8.

Market access is a flexible concept. It allows the Court to employ a margin of manoeuvre to assess whether measures restricting trade or sales are in fact in breach of Art. 34 TFEU.<sup>30</sup> This flexibility must be retained because, in spite of the broad scope of Art. 34 TFEU, the Court has traditionally denied a *de minimis* rule,<sup>31</sup> and sensibly so. A *de minimis* rule would require the production of economic data which applicants cannot summon, which is often misunderstood by Courts and which, most importantly, leads to uncertainty and possibly diverging application of EU law depending on the facts of the case.<sup>32</sup> Nonetheless, in *Peralta* and *Krantz*, respectively a reverse discrimination and a restriction case, the Court held that the scope of Art. 34 TFEU excludes Member States' measures which are too indirect or uncertain to actually have an effect on trade.<sup>33</sup> A certain causality, which shall not be too remote, seems thus a requirement. Some scholars see this as a *de minimis*.<sup>34</sup> As an 'official' alternative to *de minimis*, however, the Court has traditionally preferred to design categories of measures. Some present discriminatory elements, such as product rules, and are therefore always covered by Art. 34. Some other measures do not discriminate, are not problematic for the freedom of circulation - such as the CSAs as defined in *Keck* - and thus excluded.<sup>35</sup> Less clear is the position of a third group of measures on restriction on use, bans, and any other measure which hinders market access in the apparent lack of discrimination.<sup>36</sup>

### 2.1.2 The limits of a market access approach

Economic literature is not just helpful for the purpose of clarifying the limits of the concept of market access and Art. 34 TFEU, but also for generally understanding the concept of trade barriers enacted by public bodies. The approach below indeed informed the debate over the meaning of market access under EU law.<sup>37</sup> Within the study of barriers to entry into a market under US antitrust law, economists have defined the concept in several manners. A useful definition is that of Stigler, who

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<sup>30</sup> Snell, J. (2010) *Supra* at 8.

<sup>31</sup> Joined Cases C-177/82 and 178/82 *Criminal Proceeding against Jan van de Haar and KAVEKA de Meern BV* [1984] ECR I-1798, para. 13; Case C-67/97 *Criminal proceedings against Ditlev Bluhme* [1998] ECR I-08033.

<sup>32</sup> Davies, G. (2012) The Court's jurisprudence on free movement of goods: Pragmatic presumptions, not philosophical principles. *European Journal of Consumer Law* 2012(2), 31.

<sup>33</sup> C-379/92 *Criminal proceedings against Matteo Peralta* [1994] ECR I-3453, para. 24; C-69/88 H. *Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Netherlands State*, [1990] ECR I-583, para. 11. See also, in the domain of freedom of movement of workers, C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-513, para. 25.

<sup>34</sup> Jansson, M.S., Kalimo, H. (2014) *De minimis* meets 'market access': Transformations in the substance - and the syntax - of EU free movement law? *Common Market Law Review* 51(2), 531.

<sup>35</sup> Horsley, T. (2012) Unearthing buried treasure: Art. 34 TFEU and the exclusionary rules. *European Law Review* 37(6), 734-757.

<sup>36</sup> C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519; C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-04273; C-456/10 *Asociacion Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administracion del Estado* [2012] ECR I-000.

<sup>37</sup> Davies, G. (2010) Understanding market access: Exploring the economic rationality of different conceptions of free movement law. *German Law Journal* 11(8), 682; see also Snell, J. (2010) *Supra* at 8.

suggests that the concept should be addressed in relative terms. If a newcomer has to incur higher costs than those incurred by the market incumbent(s), a market barrier can be deemed to exist.<sup>38</sup>

Nonetheless, such costs shall be understood narrowly, and thus separated by other factors such as features of the market, or better efficiency of certain firms in complying with requirements that thus have a positive impact on the cost an entity has to bear to enter a market. Costs are possibly limited to regulatory burdens which are not affecting in the same factual manner different economic operators.<sup>39</sup> Even excluding the fact that regulations such as product rules always put foreign producers at a disadvantage because of a 'double' obligation, also in an internal situation to adapt products to be in conformity with such measures, albeit resulting in costs, confers an advantage over those companies which have not done so. To this extent, product rules have the effect of constituting a barrier to market access.<sup>40</sup> Although this definition concerns access to a market by domestic actors, it can be transposed to markets whose entrance is sought by economic operators from other Member States as well.

Davies has convincingly based on the grounds above his explanation of CJEU's case-law on market access restrictions under Art. 34 TFEU - and also other freedoms. The restrictions considered by the Court all contained *selective* elements, often times discriminatory on the basis of nationality, singling out certain economic operators. Such elements result in a distortion of the competitive relation between market operators and generally in inequality between them.<sup>41</sup> The approach requires looking at the effects on the importers and on the market, once it is properly identified. Within this framework, measures imposing an additional equal cost on *all* market actors are not challengeable, as they do not alter competitive relations.<sup>42</sup> The limits of the market access test thus exclude measures restricting market access which effectively impact in the same manner on *all* EU producers. Different costs borne by different producers which can be explained under efficiency-based considerations cannot be the basis for a finding of a breach.

Also 'difficult' cases such as cases concerning severe restrictions on use and bans can be explained within this framework as having a selective impact: producers of goods in competition with those producing banned, or restricted, goods are conferred a

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<sup>38</sup> Stigler, G.J. (1968) *The organisation of industry*. Homewood, IL: Richard D. Irwin Inc., 67–70.

<sup>39</sup> Bork, R.H. (1993) *The antitrust paradox*. New York: Maxwell Macmillan, 310–311, 328–329; Snell, J. (2010) *Supra* at 8 439.

<sup>40</sup> Harbord, D., Hoehn, T. (1994) Barriers to entry and exit in European competition policy. *International Review of Law and Economics* 14(4), 411.

<sup>41</sup> Davies, G. (2010) *Supra* at 37, 683 and 695.

<sup>42</sup> See, for an example of such measures in the domain of services: Joined Cases C-544/03 and C-545/03 *Mobistar SA v Commune de Fléron*, and *Belgacom Mobile SA v Commune de Schaerbeek* [2005] ECR I-07723, para. 35.

competitive advantage.<sup>43</sup> The selectivity factor potentially goes further than nationality-based discrimination although, in practice, overlap is to be expected in most cases. It is hard to conceive that the Italian government had entirely banned motorcycle trailers or that Sweden had almost completely restricted the use of jet-skis, in the presence of national producers.<sup>44</sup> It should not be forgotten that the concept of market access as elucidated by the Court seems to contain a reference to the magnitude of the effects of the measure. It must have *considerable* influence on the behaviour of consumers,<sup>45</sup> or must *greatly* restrict the use of a product.<sup>46</sup> In *Trailers* and *Mickelsson*, the 'considerable' impact of the measures on market access is evident, especially if it is taken into account that such products were in the first place lawfully manufactured and marketable in other Member States,<sup>47</sup> and the measure was curtailing the inherent purpose for which the products were designed.<sup>48</sup> Measures which merely limit freedom of actions should not constitute a basis for a breach.<sup>49</sup>

The framework elucidated above makes perfect sense if it is kept in mind that the Treaty rules are still about anti-protectionism, however with far-reaching implications.<sup>50</sup> Integrating the economies of 28 Member States requires the abolition of all measures which discriminate or that factually and unequally limit access to the market of a Member States - which almost always end up favouring domestic or incumbent economic actors. The very concept of a quantitative restriction (and measures having equivalent effects) implies the replacement of supply by domestic products. A measure which merely limits the entrance on a market, or imposes additional costs to all actors, and which is factually equally directed towards all producers, cannot be

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<sup>43</sup> Davies, G. (2010) *Supra* at 37, 696.

<sup>44</sup> C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519; C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-04273.

<sup>45</sup> C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519, para. 56.

<sup>46</sup> See C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-04273, para. 28.

<sup>47</sup> See Opinion of Advocate General Trstenjak in C-265/06 *Commission v Portugal (tinted glass car windows)* [2008] ECR I-2245, para. 38.

<sup>48</sup> Eijstbouts, W.T., Jans, J.H., Prechal, A., Senden, L.A.J. (Eds.) (2012) *Europees Recht. Algemeen Deel*. Groningen: Europa Law Publishing, 96.

<sup>49</sup> Opinion of Advocate General Kokott in C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2006] ECR-I-782, para. 48. This concept is however not always clearly reflected in case-law. For example, in *Blanco Pérez*, the CJEU considered zoning rules concerning planning criteria for the licensing of pharmacies as (justifiable) restrictions hindering the exercise by pharmacists from other Member States of their activity on the Spanish territory. The rule in question merely established that a pharmacy has to serve at least 2000 inhabitants and be at a minimum distance of 250 meters from another pharmacy. Joined Cases C-570/07 and C-571/07 *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios and Principado de Asturias* [2010] ECR I-4629, para. 59. That case is also in contrast with cases where similar rules concerning goods were not considered as restrictions under the Keck doctrine. See C-391/92 *Commission v Greece* [1995] ECR I-1621.

<sup>50</sup> The free movement rights are understood by the Court as 'instruments to opening up markets' as held in Opinion by Advocate General Trstenjak in C-81/09 *Idryma Typou AE v Ypourgos Typou kai Meson Mazikis Enimerosis* [2010] ECR I-10161, para. 75. On the same same position, Advocate General Maduro held that Art. 34 TFEU aims 'to guarantee the opening-up of national markets, offering producers and consumers the possibility of fully enjoying the benefits of an internal market, and not to encourage a general deregulation of national economies.' Opinion of Advocate General Poirares Maduro in Joined Cases C-158-59/04 *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [2006] ECR I-8135, para. 37.

challenged - unless it is agreed that Art. 34 TFEU is construed as an anything-goes deregulatory provision.

## 2.2 Scope *ratione personae* of Art. 34 TFEU *vis-à-vis* private parties

The application of the Treaty freedoms to private parties, also known as direct horizontal effect, has been a divisive issue in doctrine, fuelled by the unclear practice of the Court. Those denying direct horizontal effect explain cases of application of Treaty provisions to private individuals by the presence of connections with Member States or the tasks traditionally associated to the State. An analysis of the practice of the Court shows that the situation may differ. As a starting point, it must be stressed that the evolution of the personal scope of the four freedoms *vis-à-vis* the activities of private parties has not proceeded in parallel for all of them. Freedom of circulation of goods stands out as a limited exception since, until today and in spite of a certain lack of clarity in some instances, the Court has shown more reticence in applying Art. 34 TFEU to the activities of private actors than under other freedoms. Before addressing the question of the personal scope of Art. 34 TFEU in Sections 2.2.2 and 2.2.3, it is therefore necessary to briefly appraise in Section 2.2.1 the situation under Articles 45, 49 and 56 TFEU - generally referred to as free movement of persons - mindful of the general trend of convergence among Treaty freedoms.<sup>51</sup> Finally, Sections 2.2.4 and 2.2.5 discuss normative frameworks which contemplate the horizontal effect of Art. 34 TFEU.

### 2.2.1 Personal scope of the free movement of persons

Under Art. 45, and possibly also Articles 49 and 56 TFEU, the prohibition of discrimination has been applied by the CJEU to all measures by private bodies regulating collectively a certain sector and employment conditions. In addition, free movement provisions have also been applied to private bodies unilaterally regulating employment conditions within the framework of national labour legislation. This expansive approach of the Court dates back to the 1974 *Walrave and Koch* case. There, the Court, by employing a combination of functionalism and *effet utile* reasoning, found that the Union Cycliste Internationale, whose rules deemed the nationality of a pacemaker and a stayer to be the same, was subject to the scope of application of the Treaty provisions prohibiting nationality-based discrimination.<sup>52</sup>

The prohibition of restrictions and obstacles to the enjoyment of freedoms appears to cover cases in which the contested private measure is of a collective nature, i.e. it

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<sup>51</sup> Poiares Maduro, M. (1998) *We the Court. The European Court of Justice and the European economic constitution*. Oxford: Hart Publishing, 101.

<sup>52</sup> C-36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR I-1406, paras. 16-17.

applies mandatorily on a number of private actors.<sup>53</sup> In *Bosman*, the freedom provisions were considered as applicable to all rules regulating employment which are not discriminatory but that, nevertheless, constitute restrictions to the freedom of circulation of workers - irrespective of their public or private nature.<sup>54</sup> In *Wouters*, where Art. 49 TFEU was at issue, the CJEU held that compliance with the freedom to provide services and freedom of establishment is required also in cases where rules are not public, but regulate collectively self-employment and the provision of services, such as those of the Dutch bar.<sup>55</sup> Also in *Delière* the outcome was alike, as the CJEU held that rules enforced by a judo organisation, which had the effect of restricting freedom to provide services, were contrary to Art. 56 TFEU.<sup>56</sup>

In another series of cases, the CJEU expanded its understanding of the types of private bodies whose discriminatory measures are caught, at least, by Art. 45 TFEU. In *Angonese*<sup>57</sup> and *Raccanelli*,<sup>58</sup> private bodies regulating the condition for employment in accordance with national labour law (specifically, an Italian private bank and a German research institution) were caught by the prohibition of indirect discrimination resulting from a combined reading of Articles 18, 45, and 157 TFEU. However, both cases could be explained on the basis of some connection with Member States, such as the legal framework of Italian law in *Angonese*, and the extensive public funding of the research institute at hand in *Raccanelli*.<sup>59</sup> In *Ferlini*, another discrimination case, the Court extended the application of Art. 18 TFEU to all cases 'where a group or organisation such as [the one in the main proceeding] exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty.'<sup>60</sup> The body in *Ferlini* was a consortium of health-care providers, accounting for almost the entirety of the market, arguably in the exercise of typically public powers.<sup>61</sup> The application of the prohibition of discrimination applies not only to measures that aim at regulating collectively, but also to the 'unilateral' measures<sup>62</sup> (i.e.: not collective) at issue in

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<sup>53</sup> Karayigit, M.T. (2011) The horizontal effect of the free movement provisions. *Maastricht Journal of European and Comparative Law* 18(3), 314.

<sup>54</sup> C-415/93 *Union Royale Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921, para. 98-99. The measure at issue concerned the imposition of a fee to be paid at a football club at the moment one of its players, having concluded its contract was about to be transferred to another football club.

<sup>55</sup> C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, para. 120.

<sup>56</sup> Joined Cases C-51/96, C-191/97 *Delière v Ligue francophone de judo et disciplines associées ASBL and Others* [2000] ECR I-2549, para. 60.

<sup>57</sup> C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139.

<sup>58</sup> C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV*. [2008] ECR I-05939.

<sup>59</sup> Mataija, M. (2016) *Supra* at 6, 37.

<sup>60</sup> C-411/98 *Ferlini v Centre Hospitalier de Luxembourg* [2000] ECR I-8126, para. 50.

<sup>61</sup> Davies, G. (2012) Freedom of movement, horizontal effect, and freedom of contract. *European Review of Private Law* 3(4), 815.

<sup>62</sup> Even contractual provisions between private parties have been caught by the prohibition of discrimination under Art. 45 and 56 TFEU. In the earlier *Haug-Adrión*, a German private car insurance provider was offering less favourable insurance premiums to clients purchasing cars with custom plates, which is normally done by customers with foreign residences. The Court found that there was no reason, in principle, to exclude contractual provisions

*Angonese* and *Raccanelli*. It may seem far reaching, but indirectly discriminating against individuals on the basis of nationality constitutes a violation of a fundamental principle such as that contained in Art. 18 TFEU.

The Treaty provisions here considered have been fully applied where a non-public entity has the capacity of imposing discriminatory and restricting rules that hinder the fundamental freedoms. Such capacity stems from 'State-like' authority, or even 'State-like' power arising from the exercise of regulatory power.<sup>63</sup> The Union Cyclist Internationale, the Belgian Football Federation, the Dutch Bar and the French Judo Association at issue in, respectively, *Walrave*, *Bosman*, *Wouters* and *Deliège* have in common a non-public nature, as well as the capacity to autonomously regulate a certain field across the board. The regulatory capacity of these bodies resembles closely that of the State, in spite of the complete lack elements of State control or delegation - with the limited exception of *Wouters*, as Dutch legislation recognises self-regulatory activities of professional associations.

The power relations at issue in the collective regulation cases, and even in the employment cases (*Angonese*, *Raccanelli* and to some extent also in *Ferlini*) are strongly asymmetrical in favour of the employer. In *Walrave*, the very specific profession of the two applicants contributed to their subordinate position *vis-à-vis* the rule-setter determining the conditions for their employment. For the applicants in the cases mentioned above, also due to the very narrow segment of the market at issue, there was no escape but to comply with those private rules; their relation *vis-à-vis* the rule setter was not dissimilar to that *vis-à-vis* a Member State. The powers of the private bodies in question are quasi-legislative, and possessing elements of public authority as they entail typical regulatory tasks resulting in compulsory unilateral and universally applicable regulation.<sup>64</sup>

Regardless of its private or public composition, any body which undertakes activities that are normally considered to fall within the domain of, or with a similar effect as, public regulatory power seems to be subject to a prohibition of discrimination and restriction to market access under Articles 45, 49 and 56 TFEU. This approach has been described as a functional understanding of collective regulation, under which what matters is the mere presence of regulatory power, irrespective of whether it derives from a formal source.<sup>65</sup> Given the ever-expanding role of private law-making

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such as the one at issue from the scope of Art. 45 TFEU. In any case, a finding of discrimination was not made. Also in this case, however, the fact that the insurance contract was officially approved under German legislation could established a 'link' between the private action and the German government. See C-251/83 *Haug-Adrion v Frankfurter Versicherungs AG* [1984] ECR I-4278, paras. 14-18.

<sup>63</sup> Sauter, W., Schepel, H. (2009) *State and market in European Union law. The public and private spheres of the Internal Market before the EU Courts*. Cambridge: Cambridge University Press, 102.

<sup>64</sup> Karayigit, M.T. (2011) *Supra* at 53, 311.

<sup>65</sup> Schepel, H. (2012) *Supra* at 7, 185-187; Sauter, W., Schepel, H. (2009) *Supra* at 63, 97-103. From a similar conclusion from the perspective of the interplay between Art. 16 of the Charter of Fundamental Rights and the

and governance in the EU and elsewhere, coping mechanisms by judicial authorities are unavoidable in order to mitigate its impact on the freedoms of circulation.<sup>66</sup> Accordingly, the Court has shown its willingness to apply the Treaty provisions also to private bodies which exercise regulatory authority that is functionally equivalent to that of the State.

The Court's functional understanding of power and authority in the context of the four freedoms is consistent with the functional interpretation of public power or authority in competition law cases. Different from the situation in *Diego Cali*,<sup>67</sup> where a company was entrusted with a public task by a public body in an explicit fashion, in most of the cases discussed above, no form of public delegation can be found. International or national associations assumed regulatory power on the basis of different justifications and without explicit public delegation. Many cases of self-regulation are therefore covered by the Treaty rules under the freedom of circulation of people both for discriminatory and restrictive behaviour and, in spite of whether a link can be established, to a Member State.

Functional equivalence is understood broadly as the ability to exercise regulatory power over the others. In practice, however, it corresponds to the capacity to obstruct free movement.<sup>68</sup> For this reason, also private bodies not strictly in the exercise of collective regulatory functions such as trade unions have been subject to the Treaty rules.<sup>69</sup> Functionally equivalent forms of public authority can thus also be exercised by means not requiring the presence of delegation<sup>70</sup> or forms of collective regulation, and which may in theory also encompass market power.

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Treaty freedoms see: Babayev, R. (2016) Private autonomy at the Union level: On Article 16 CFREU and free movement rights. *Common Market Law Review* 53(4), 1004.

<sup>66</sup> See, among the many, Chalmers, D. (2006) Private power and public authority in European Union law. In Bell, J., Kilpatrick, C. (Eds.) *The Cambridge Yearbook of European Legal Studies 2005-2006*. Oxford: Hart Publishing, 59-94.

<sup>67</sup> C-343/95 *Diego Cali & Figli Srl v Servizi Ecologici Porto di Genova SpA* [1997] ECR I-1580, para. 23.

<sup>68</sup> Schepel, H. (2012) *Supra* at 7, 185-186; Davies, G. (2012) *Supra* at 61, 824.

<sup>69</sup> It seems that the Court acknowledged the collective regulatory functions of trade unions too, albeit the restrictions in question were not stemming from it. 'In exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively' (italics added). See C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP (Viking Line)* [2007] ECR I-10806, para. 65; C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet (Laval)* [2007] ECR I-11767.

<sup>70</sup> The lack of explicit delegation does not preclude the application of EU law provisions, as explicitly held by the Court in C-171/05P *Laurent Piau v Commission* [2006] ECR I-0037, paras. 76-78.

## 2.2.2 Case-law on private bodies covered by Art. 34 TFEU

The traditional view over the personal scope of Art. 34 TFEU is that the CJEU differentiates between the freedom of circulation of goods and persons.<sup>71</sup> Although the CJEU has (only) once incidentally ruled that 'it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods',<sup>72</sup> more often the Court has remarked that it considers Art. 34 TFEU applicable only to national measures and not to the conduct of undertakings.<sup>73</sup> The focus of the Court on measure enacted by Member States dates back to *Dassonville* and the definition of MEE.<sup>74</sup> According to this view, contracts between private parties such as company VSS and, sometimes, sectoral VSS which contravene the free movement of goods would be covered by the Treaties only insofar as competition provisions are triggered.<sup>75</sup> This view is based on a traditional understanding of the 'division of labor' between freedom of movement and competition law addressing, respectively, public and private measures.<sup>76</sup> It however fails to describe correctly the situation for services - private rules affecting their provision have been subject to both sets of rules - and it ignores the blurring of the public-private divide.

A number of similarities can be observed between Art. 34 TFEU and the other freedoms. It is thus appropriate to begin with those before addressing cases of collective regulation and contractual relations which are relevant for VSS. The major similarity concerning the personal scope of Art. 34 TFEU with the other freedoms is the inclusion of bodies exercising forms of collective regulation under a more or less 'classic' delegation of power and thus an extended vertical effect framework. In assessing whether a private body could be brought within the domain of the State, the Court has employed a rather broad functionalist approach. The Court has declared private bodies' activities to be covered by the scope of Art. 34 TFEU whenever a link

<sup>71</sup> Lohse, E.J. (2007) Fundamental freedoms and private actors - Towards an 'indirect horizontal effect'. *European Public Law* 13(1), 167.

<sup>72</sup> C- 58/80 *Dansk Supermarked v Imerco* [1981] ECR I-181, para. 17. It must be noticed that the 'agreement between individuals' in breach of Art. 34 at issue in that case was relied upon by the claimant on the basis of a Danish law on unfair commercial practice. In other words, the Danish provision was giving a special value to that agreement in order to qualify the commercial practices of the defendant as unfair. The CJEU in fact concluded that the Danish law did not pose any problem, but the agreement in breach of Art. 34 could not be relied upon in order to classify the marketing of certain goods as unfair commercial practice. The case was anyway not followed by the Court, also as the situation could/should have been solved with reference to competition law.

<sup>73</sup> Joined Cases C-46 and 48/93 *Brasserie du Pêcheur SA v Germany and the Queen v Secretary for State and Transport ex parte: Factortame Ltd and Others* [1996] ECR I-1131, para. 54; C-311/85 *Vereniging van Vlaamse Reisbureaus v VZW Sociale Dienst* [1987] ECR I-3821, para. 30; Opinion of Advocate General Warner in Cases 55 and 57/80 *Musik Vertrieb v GEMA* [1980] ECR I-167, para. 174.

<sup>74</sup> C- 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR I-837, para. 5.

<sup>75</sup> Hartkamp, A. (2010) The effect of the EU Treaty in private law: On direct and indirect horizontal effect of primary Community law. *European Review of Private Law* 3(3), 539.

<sup>76</sup> Joined Cases C-177/82 and 178/82 *Criminal Proceeding against Jan van de Haar and KAVEKA de Meern BV* [1984] ECR I-1798, para. 14.

with the Member State could be established. In its case-law, the CJEU has looked at several elements demonstrating governmental involvement, such as: the establishment of a body by means of a governmental act;<sup>77</sup> the presence of a formal legislative recognition combined with the power of imposing sanctions;<sup>78</sup> State control exercised by means of binding instructions;<sup>79</sup> the presence of financial aid, 'moral support' and the appointment of members.<sup>80</sup> Functions, statutory basis, management and funding are therefore the elements that the CJEU will take into account.<sup>81</sup>

In some of the cases decided under Art. 34 TFEU, for example in *Apple and Pear Development Council*, a finding of explicit delegation of State functions made unproblematic the connection of the private-law body's standard-setting and certification activities with the Member State. In other cases, the test for attribution of private conduct seems much less demanding than that under public international law both for a finding of delegation of public authority and effective control.<sup>82</sup> A body like the Irish Goods Council at issue in *Buy Irish*, was deemed to be covered by Art. 34 TFEU in spite of being explicitly considered as *not* in the exercise of public authority. It was hard to prove that the Member State could exercise 'effective control' in the meaning of effectively and strictly controlling and directing the actions of the body.<sup>83</sup> Granted, links between VSS Member States cannot be found. VSS are not established by governmental acts; if financial aid and forms of 'moral' support can be found, these cannot be seen as even remotely reaching the extent of support put by the Irish government into the Buy Irish campaign.<sup>84</sup>

The private-law bodies that were caught by the scope of Art. 34 TFEU, such as the Apple and Pear Development Council and the British Royal Pharmaceutical Society, share the same regulatory capacity possessed by the bodies in the case law under Art. 45, 49 and 56 TFEU. However, these bodies were entrusted by the State with rule-making and enforcement powers, and they thus engaged in mandatory collective regulation of an economic activity. The role of the British Pharmaceutical Society is, to this extent, completely comparable to that of the Dutch Bar in *Wouters*, and so are their relations with their respective governments. This approach therefore shows similarities with the case-law under other freedoms. Art. 34 TFEU has been applied to

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<sup>77</sup> C-222/82 *Apple and Pear Development Council v K.J. Lewis LTD and Other* [1983] ECR I-4083, para. 17.

<sup>78</sup> C-266/87 *The Queen v Royal Pharmaceutical Society of Great Britain* [1989] ECR I-1321, para. 14.

<sup>79</sup> C-302/88 *Hennen Olie* [1990] ECR I-4625.

<sup>80</sup> C-249/81 *Commission v Ireland (Buy Irish)* [1982] ECR I-4005, para. 15; C-325/00 *Commission v Germany (Labels of Origin and Quality)* [2002] ECR I-9977, para. 17.

<sup>81</sup> Opinion of Advocate General Jacobs in C-325/00 *Commission v Germany (Labels of Origin and Quality)* [2002] ECR I-9977, para. 13.

<sup>82</sup> See Section 2.3 of Chapter 5 for further discussion over the relevant public international test for attribution of private conduct.

<sup>83</sup> Hojnik, J. (2012) Free movement of goods in a labyrinth: Can *Buy Irish* survive the crises? *Common Market Law Review* 49(2), 302.

<sup>84</sup> The situation may differ for legislative recognition by a Member State, a scenario addressed in Section 3.4 of this Chapter.

bodies regulating collectively both in cases of discrimination (*Royal Pharmaceutical Society*) and restriction (*Fra.bo*, discussed below in Section 2.2.3), exactly like Art. 45 TFEU.

### 2.2.3 Art. 34 TFEU and measures in the lack of a connection with Member States

A peculiar group of cases under Art. 34 is represented by instances where the Court found that private action unconnected to the State is capable of restricting free movement, and thus the State was to be indirectly held responsible for not having taken measures to remedy the situation.<sup>85</sup> In *Spanish Strawberries*, the CJEU held that Member States shall not refrain from adopting measures required in order to deal with obstacles to the free movement which are not caused by the State. State inaction with respect to private activity representing an obstacle to the freedom of circulation of goods was considered as falling under Art. 34 TFEU in a comparable way as State positive action infringing the freedom of circulation.<sup>86</sup> While this statement, read out of context, seems to imply that Members have an obligation to police private restrictions to an extent that would render them responsible, for example, also for the trade restricting activities of VSS, the reality is that France was basically failing to enforce the most basic fundamental rules of law and order.<sup>87</sup> Art. 34 TFEU contains therefore a good faith positive obligation on Member States to prevent private impediments on the free movement.<sup>88</sup> It seems, however, that it is limited to the most egregious cases of State inaction, and the CJEU recognised a margin of discretion for Member States to decide which private actions must be tackled.<sup>89</sup>

Besides this somewhat special group of cases identifying a duty to eliminate the most severe restriction to trade, it must be stressed that, different from freedom of movement of persons, Art. 34 TFEU has not been applied yet to bodies that regulate collectively *without* at least a degree of State delegation. In other words, there is no equivalent case for Art. 34 TFEU of what *Bosman* and the other sport cases represent for Art. 45 TFEU. To this extent, the functional understanding of collective regulation described above cannot be said to apply to private-law bodies under Art. 34 TFEU.

In *Fra.bo*, where a restriction was at hand, the CJEU nevertheless applied Art. 34 TFEU to the technical standardisation and certification activities of a standard-setter established under private law, whose standards gave rise to a presumption of

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<sup>85</sup> C-265/95 *Commission v France (Spanish Strawberries)* [1997] ECR I-6959; C-112/00 *Schmidberger Internationale Transporte v Austria* [2003] ECR I-5659.

<sup>86</sup> C-265/95 *Commission v France (Spanish Strawberries)* [1997] ECR I-6959 paras. 30-31.

<sup>87</sup> France had been continuously ignoring for several years the physical destruction at the border by enraged French farmers of imported products lawfully entitled to enter the French market.

<sup>88</sup> Baquero Cruz, J. (1999) Free movement and private autonomy. *European Law Review* 24(6), 610.

<sup>89</sup> C-265/95 *Commission v France (Spanish Strawberries)* [1997] ECR I-6959 para. 33.

conformity with German law. The character of the private standard-setter at issue in *Fra.bo* lies very close to the explicit delegation side of the spectrum, as it can be considered as entrusted of special regulatory and market-access powers by the German legislation conferring a presumption of conformity to the products certified under its standards. The CJEU, as a matter of fact, determined whether the activities of the body at issue were restrictive of the freedom of movement 'in the light of inter alia the legislative and regulatory context in which it operates'.<sup>90</sup> The CJEU however did not rule on the legality of German legislation - which, probably, was itself in breach of Art. 34.<sup>91</sup> In case it had not been deemed compatible with Art. 34, any activity of a body receiving this type of empowerment from unlawful legislation, would have been considered in breach of EU law. Still, 'the legislative and regulatory context' referred to by the Court is broad enough to arguably include situations where a private body enjoys a *de facto* regulatory power under the tacit consent of a Member State.

It may simply be that no suitable case has yet reached the Court: obviously also in the domain of goods, certain entirely private associations whose membership is mandatory can *substantially* restrict trade and enforce discriminatory and even protectionist measures.<sup>92</sup> Membership - or acceptance - of certain VSS can become an essential condition to enter a market, but this is determined by factors such as consumer preferences and, generally, market features unconnected to the State. In *Fra.bo*, it is noteworthy that the CJEU acknowledged that certain standards may become *de facto* mandatory requirements to enter the market because of, among several factors, consumer preferences.<sup>93</sup> Under such circumstances, a private body would possess a *de facto* market gate-keeping power that would trigger the application of Art. 34 TFEU. It is, however, far from clear whether such an approach can be extended to standard-setting bodies also in the absence of connecting elements with the State, such as the formal entrustment of specific regulatory tasks.<sup>94</sup>

Another difference between goods and the other freedoms is that, different from *Angonese* and *Raccanelli*, the obligation to respect Art. 34 TFEU has not been imposed on private bodies in cases of unilateral conduct discriminating on the basis of

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<sup>90</sup> C-171/11 *Fra.bo v DVGW* [2012] ECR I-0000, para. 26.

<sup>91</sup> See also Schepel, H. (2013) Case C-171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches*. *European Review of Contract Law* 9(2), 190.

<sup>92</sup> Baquero Cruz, J. (1999) *Supra* at 88, 616.

<sup>93</sup> See C-171/11 *Fra.bo v DVGW* [2012] ECR I-0000, paras 29-30.

<sup>94</sup> The outcome of *Fra.bo* may be problematic in light of that fact that many technical standard setters, including the European Standardising Organisations, operate within similar frameworks connecting them to a Member State. The possibility of unfettered Court review of technical standards is undesirable because it would render unworkable a system which was arguably created to operate efficiently outside the normal procedures applicable for legislative instruments. In addition, Courts hardly possess the expertise to appraise the highly technical character of a technical standard. A narrow reading of *Fra.bo* is also possible, as simply standing for the imposition on standardising bodies within the EU to embrace mutual recognition of certificates of conformity released by third-party bodies. See C-171/11 *Fra.bo v DVGW* [2012] ECR I-0000, para. 10.

origin. This type of discrimination affects the very core of a person's integrity and, accordingly, the Court interpreted the principle of discrimination on the ground of nationality from a means to pursue market integration to a means to protect human dignity.<sup>95</sup> The alleged lack of direct horizontal effect of Art. 34 TFEU can thus be explained by reference to the obvious differences between goods and people.<sup>96</sup> Nonetheless, under Art. 34 TFEU, no case law has appeared before the Court where it had to address private unilateral discriminatory measures. The Court has however dealt with cases of restrictions arising by private contractual relations. In *Sapod-Audic*, the Court discussed the application of Art. 34 TFEU to a contractual obligation between a food processor and a company providing systems for waste disposal concerning the payment of a fee to the waste disposal company, which in return allowed affixing a 'green dot' recycling logo on product packaging. The CJEU held that obligations arising out of contractual provisions between private parties cannot be regarded as a barrier to trade in the meaning of Art. 34 TFEU, since they are not imposed by a Member State but agreed upon between individuals.<sup>97</sup>

#### 2.2.4 A normative venue for review I: interfering with third-party contractual preferences

*Sapod-Audic* is often considered as an expression of the Court's intention to deny direct horizontal effect to Art. 34 TFEU. However, it has been pointed out that freedom of movement can be understood as protecting economic actors from third-party interference in their (interstate) contractual preferences. Within this framework, that case is also in line with a view that holds that a party to a contract cannot employ EU law to escape voluntarily agreed upon contractual obligations.<sup>98</sup> The personal scope of Art. 34 TFEU - and other freedoms as well - acquire more precise boundaries which assist us in determining whether multi-stakeholder, business and company VSS bodies are caught by the Treaty obligations. Measures by private bodies to which freedom of circulation of persons has applied can all be seen as emanating from a

<sup>95</sup> Prechal, S., De Vries, S. (2009) *Supra* at 7, 18.

<sup>96</sup> In the sense that Art. 34 TFEU has much of a weaker connection with Art. 18 TFEU (prohibiting discrimination on the basis of nationality), Art. 20 TFEU (establishing the citizenship of the Union), and Art. 21 TFEU (establishing the right of movement for EU citizens) than the other freedoms, and in the robust link between the freedom of movement of workers and the provisions contained in the Charter of Fundamental Rights. Krenn, C. (2012) A missing piece in the horizontal effect 'jigsaw': Horizontal direct effect and the free movement of goods. *Common Market Law Review* 49(2), 185, 188. It has to be kept in mind, however, that not all of the provisions of the Charter themselves appear to have direct horizontal effect. Opinion of Advocate General Trstenjak in C-282/10 *Dominguez v Centre Informatique du Centre Ouest Atlantique* [2012] ECR I-0000, paras. 80-83. Art. 27 of the Charter on workers' right to information and consultation within the undertaking surely does not have horizontal effect as 'it must be given specific expression in European Law or national law'. See C-176/12 *Association de Médiation Sociale v Union locale des syndicats CGT* [2014], para. 44. Other Articles of the Charter, such as Art. 16 have conversely been given effect in dispute between private actors. See C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL* [2011] ECR I-11959. See also Section 2.3.3 for further discussion.

<sup>97</sup> C-159/00 *Sapod-Audic v Eco-Emballages SA* [2002] ECR I-5057, para. 74.

<sup>98</sup> Davies, G. (2012) *Supra* at 61, 808 and 814.

body capable of limiting the freedom of two other parties to contract. This does not mean that the Treaties confers a right on a given company that consumers and other business entities must enter into a contractual relation with it. Consumer preferences and ordinary purchase practices would therefore be excluded, as third party intervention is a different concept than the exercise of one's preference.<sup>99</sup> Thus, and in line with *Sapod-Audic*, a simple private contractual preference with no regulatory effects outside the relation between the two parties would not be caught by the scope of Art. 34 TFEU.<sup>100</sup>

Without much controversy, this approach would exclude company VSS from the scope of Art. 34 TFEU. An agreement like a company VSS, whose terms are negotiated by both its parties, regardless of disparities of power, is covered neither by Art. 34, nor by other free movement provisions. Conversely, sectoral rules which have been drafted by retailers, which then apply them in their contractual relations with suppliers, can be seen as representing a third party intervention into the freedom to contract between suppliers and each of the retailers. This would be the case of sectoral VSS, and all rules emanated by sectoral associations which apply *de facto* mandatorily in all contractual relations between its members and third-parties, or even as a precondition for membership. Conceptually, there is little difference between those bodies and, for example, that at issue in *Wouters* apart from the fictionally voluntary character of sectoral VSS' provisions. The only missing step in the practice of the CJEU is the severance of the acknowledgement from the *Fra.bo* case that certain requirements may become *de facto* mandatory from the presence of a connecting link to a Member State.

It is clear that also multi-stakeholder VSS can interfere with two other parties' contracting preferences. As for sectoral VSS, this happens whenever certification cannot be granted - normally because the conditions are not met - and therefore preventing the entity seeking certification from contracting with consumers and suppliers willing to purchase. It is, however, debatable whether it really constitutes interference of the same type as, for example, that exercised by the rules of the Belgian football federation concerning contractual relations between players and football clubs. To some extent, the interference exercised by the VSS can be described as an expression itself of the preference of one of the two parties, the one which intends to purchase or supply VSS-certified products. Indeed the scheme-holder is a third party *vis-à-vis* two other entities wishing to enter into a contract and can, under this framework, interfere with two other parties' contracting preferences. Still, what matters is the perceived mandatory character of certification, as no interference

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<sup>99</sup> Davies, G. (2012) *Supra* at 61, 813.

<sup>100</sup> Under this approach, the different application of Art. 45 TFEU to private contractual relations in the sphere of employment (*Angonese and Raccanelli*) is explicable by the explicit reference under Art. 45(2) TFEU to the elimination of all discrimination concerning employment, which would limit substantially employers' capacity to contract.

can be said to occur if certification is *de jure* and *de facto* entirely voluntary. Only in the opposite case would multi-stakeholder VSS fall under Art. 34 TFEU. Preferences from consumers and retailers, to the extent that affect the perceived voluntariness of the scheme for producers, would therefore be crucial for subjecting multi-stakeholder VSS to Art. 34 TFEU.

### 2.2.5 A normative venue for review II: a 'fundamental freedom' approach to Art. 34 TFEU

A means by which private rules may be brought under the scrutiny of Art. 34 TFEU is through the practice of the Court to elevate the norm against discrimination, which is often referred to as a 'fundamental freedom',<sup>101</sup> as a general principle of law and a fundamental right<sup>102</sup> rendering it applicable also in private relations.<sup>103</sup> On these grounds, direct horizontal application of the freedom provisions would be triggered whenever discriminatory impediments from private parties stand in the way of market access. In *Viking Line*, the Court kept this possibility open by holding explicitly that direct horizontal effect of the Treaty freedoms is not limited to bodies exercising quasi-regulatory and quasi-public functions.<sup>104</sup>

Two situations must be considered separately. Where *discrimination* arises from private behaviour, it is the applicability of fundamental rights in private relations which ensures that the private equivalent of public discriminatory measures are caught by Art. 34 TFEU. Conversely, cases of non-discriminatory *restrictions* arising from private parties' regulatory activities can be brought under Art. 34 TFEU by means of the functional approach to collective regulation employed under other freedoms, and described in Section 2.2.1. Case law has not yet clarified whether formally non-mandatory private regulatory regimes are also covered by the Treaty freedoms. As in the framework above, the only missing step in the practice of the CJEU is the severance of the acknowledgement that certain requirements may become *de facto* mandatory, from the presence of a connecting link to a Member State. The presence of regulatory authority restricting freedom of circulation would therefore trigger the application of Art. 34 TFEU even in the absence of any connection with national and Union legislators. The fact that a restriction to free movement arises in the exercise of another fundamental freedom, such as the freedom to conduct an economic activity

<sup>101</sup> See, generally: Morijn, J. (2006) Balancing fundamental rights and comm market freedoms in Union law: *Schmidberger* and *Omega* in the light of the European Constitution. *European Law Review* 12(1), 15-40; de Vries, S.A. (2013) Balancing fundamental rights with economic freedoms according to the European Court of Justice. *Utrecht Law Review* 9(1), 169-192.

<sup>102</sup> C- 240/83 *ABDHU* [1985] ECR I-531, para. 9.

<sup>103</sup> Schepel, H. (2012) *Supra* at 7, 190. See also Tushnet, M. (2003) The issue of state action/horizontal effect in comparative constitutional law. *International Journal of Constitutional Law* 1(1), 79-98.

<sup>104</sup> C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP (Viking Line)* [2007] ECR I-10806, para. 64.

or the freedom of contract, would not render the freedom provision inapplicable as neither fundamental rights nor freedom provisions are absolute.<sup>105</sup>

In his *Viking Line* Opinion, Advocate General Maduro narrowed down this approach in line with common sense, the *Ferlini* formula, and coherently with a functional understanding of public authority. Under the obvious undesirability of subjecting all private behaviour to the Treaty rules,<sup>106</sup> only private action which is capable of effectively restricting others from exercising their rights of free movement would be caught by the scope of the freedom provisions.<sup>107</sup> Freedom provisions are thus to be applied to private parties only under limited circumstances, where the influence wielded is large enough to prevent others from enjoying their right of free movement, and a certain flexibility would be retained between freedoms.<sup>108</sup>

This approach would apply for all freedoms and would likely catch cases of discrimination and restrictive practices by private actors with an economic power such as to prevent the entry of products into a national market. The test overlaps to a large extent with the market access test determining the substantive scope of the obligation, confirming a 'collapse of the substantive scope into the personal scope' of Art. 34 TFEU and of the other freedoms.<sup>109</sup> Be that as it may, the restriction has to originate from a body that does not act like a 'regular' market participant, but instead has State-like characteristics.<sup>110</sup> Arguably the test requires at the very least a situation of dominance that would also trigger Art. 102 TFEU.<sup>111</sup> A powerful retailers' choice to store only domestic goods is, under this approach, probably covered by Art. 34 TFEU, whereas single consumers' preferences or local food vendors' purchase patterns would not be subject to the Treaty provisions.<sup>112</sup>

This normative approach does not go against previous case-law<sup>113</sup> and witnesses a certain acceptance in scholarly literature.<sup>114</sup> Both for cases of discrimination and

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<sup>105</sup> Opinion of Advocate General Poiares Maduro in C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP (Viking Line)* [2007] ECR I-10806, para. 23. This statement is supported by the stance of the Court in its case law under which it was required to mediate between fundamental rights and freedom of circulation, such as *Omega* and *Schmidberger*. The issue will be further discussed in Section 2.3.3.

<sup>106</sup> Opinion of Advocate General Poiares Maduro in *Viking Line*, para. 43.

<sup>107</sup> Opinion of Advocate General Poiares Maduro in *Viking Line*, para. 49.

<sup>108</sup> Opinion of Advocate General Poiares Maduro in *Viking Line*, paras 33-34, 42, 45-48.

<sup>109</sup> Prechal, S., De Vries, S. (2009) *Supra* at 7, 7-8; Schepel, H. (2012) *Supra* at 7, in particular at 184-190.

<sup>110</sup> Lohse, E.J. (2007) *Supra* at 71, 179.

<sup>111</sup> Arguably, the concept of 'market power' in competition law is not sufficient to describe such as situation, as market power simply describes the capacity of an undertaking not to be immediately affected by variation in demand and price. The concept of dominant position is therefore more helpful in determining when an actor has power, in practice, to hinder market access.

<sup>112</sup> Davies, G. (2012) *Supra* at 61, 813; Schepel, H. (2012) *Supra* at 7, 192.

<sup>113</sup> For example, the restriction at issue in *Sapod Audic* would most likely fall below the substantive threshold for market access given its limited impact to restrict access to the market.

<sup>114</sup> Schepel, H. (2013) Freedom of contract in free movement law: Balancing rights and principles in European public and private law. *European Review of Private Law* 21(5-6), 1211-1229.

restrictions, what matters is the capacity to restrict market access in practice and above a certain threshold. The identification of that threshold is crucial for the application of Art. 34 TFEU to VSS, but exposes to the threats of identifying *de minimis* as discussed above. The capacity to hinder access to the market can be equated to the transition between a breach of economic interest to a breach of economic right. The analysis requires an assessment of whether VSS, in particular in light of their regulatory role which is more evident for multi-stakeholder VSS, can fall within the provisions of the Treaty under the functional understanding of collective regulation described in the sections above.

The trigger for the application of the free movement rules would not be the compulsory membership of the private body, nor its monopolistic character (where present). The test would involve an assessment of whether the individual *vis-à-vis* the private body and its standards is in a position similar to that *vis-à-vis* the State.<sup>115</sup> An empirical assessment is required, in particular for cases of restrictions, which can be operationalised by looking at market data and behaviours. For bodies exercising quasi-collectively regulatory functions such as multi-stakeholder VSS, to appraise their capacity to hinder market access would require an investigation looking at whether failure to achieve certification results in the impossibility of entering a market. This depends on empirical factors such as a very strong intensity of consumer or retailer preference for a specific type of VSS. The presence of a narrow product market would also accentuate the risk. This would be, for example, the case where a VSS identifies one very important feature for consumers (referring to sustainability, animal welfare, labor conditions) for a single product.

Conversely, sectoral schemes and company schemes possess a stronger self-regulatory and economic rationale defining their nature as a club or private goods, which, in turn, results in a more or less strong contractual tool expressing business preferences. Such instruments respond to market needs such as structuring commercial relations with suppliers within a framework of contractual freedom and under a fundamental right to pursue an economic activity. After *Wouters*,<sup>116</sup> competition law applies to self-regulation in addition to freedom of movement. Different from *Wouters*, where the rules at issue were drafted by the Dutch bar to be employed by its members for sectoral VSS, and exactly like in *Fra.bo*, the rules are drafted by a sectoral association for potential application by a group *broader* than the association itself. Sectoral and company VSS are schemes designed by economic entities and are employed by the same actors that designed them, often to their direct economic advantage. As Section 2.3.3 discusses, freedom of contract and freedom to run a business are fundamental rights which shall not be unduly encroached upon. However, also certain firms and especially retailers consortia can prevent market

<sup>115</sup> Baquero Cruz, J. (1999) *Supra* at 88, 618.

<sup>116</sup> C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653.

access to such an extent that they erode other economic operators' fundamental economic rights as defined by the CJEU. The threshold is certainly high, and rightly so. There is probably not any company in the EU which can currently exert such a power to prevent market access. Arguably, some retailer organisations may reach the threshold in particular circumstances, which would occur when producers are not able to market *at all* in a given Member State.

The assessment of whether producers are actually prevented from marketing is not as intuitive as it may seem for measures such as VSS, and standards in general. Products and production methods can almost always be modified to meet the criteria provided by private rules. In the end, under normal market circumstances requirements can be imposed on the supply chain to meet certain sustainability preferences, and companies may legitimately want to differentiate their products from those of the competitors. These arguments should be acknowledged and accommodated in order not to hinder private autonomy. The circumstances which may trigger Court review could include the unfeasibility for a producer to alter its products to meet the criteria of the standard, and the appearance of clear exclusionary market effects.

Very difficult to appraise, but nonetheless crucial, is the quantitative definition of how many producers must be excluded from the market before a private body can be said to hinder market access. Transposing the finding from case-law concerning public measures - i.e. a very small subset of affected producers suffices - seems rather problematic as it may trigger litigation whenever even just one producer fails to qualify for private requirements. This occurs basically for all private standards. While this raises no problems for sectoral and company VSS, which are less likely to be covered by the scope of Art. 34 TFEU, the issue is of paramount importance for multi-stakeholder VSS and their viability. We shall return on this point in Section 2.3.2.

### 2.3 Application of Art. 34 TFEU to VSS

Courts like the CJEU can be well placed to impose checks on private regulation, especially when its exclusionary effects cannot be addressed by market forces and by means of the political process.<sup>117</sup> In the lack of any scrutiny, private regulation may be biased in favour of the actors setting or enforcing the rules. Market discipline may fail to remedy these problems in the presence of small individual stakes for consumers compared to the larger stakes for producers. Even open participatory rules such as those of multi-stakeholder VSS offer more incentives for participation to industry actors with higher interests, financial availability and returns from successful capture.<sup>118</sup>

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<sup>117</sup> Mataija, M. (2016) *Supra* at 6, 50-51.

<sup>118</sup> Olson, M. (1965) *The logic of collective action*. Cambridge: Harvard University Press, 49. See also, generally, Domhoff, G.W. (2009) *Who rules America? Challenges to corporate and class dominance*, New York: McGraw Hill Higher Education.

Limited resources, costs, difficulties in dealing with technical matters, and a possible 'chilling effect' over desirable forms of private regulation, however, are factors and risks suggesting that Courts should generally approach private rules with care and moderation.<sup>119</sup> The case-law of the CJEU seems to reflect these concerns. So far, few cases have resulted in the imposition of obligations over private actors and these were limited to case of compulsory and collective forms of private regulation - certainly not market transactions. The CJEU employed different rationales to subject private measures under Treaty scrutiny, such as functionalism, *effet utile*, expansive attribution tests, a reference to the universal nature of non-discrimination. It is possible to expect a future frame in which the Court does not investigate whether a measure is public or private, but simply whether free movement can be hindered.<sup>120</sup> 'Hindrance' is no easy concept either and, as seen above, the CJEU has set flexible boundaries to it.

Sections 2.1 and 2.2 have elucidated fundamental questions of personal and substantive scope of Art. 34 TFEU. It is now appropriate to apply the normative framework identified above to VSS. Section 2.3.1 begins by briefly summarising the conclusions in Section 2.2 concerning the personal scope of Art. 34 TFEU *vis-à-vis* VSS under the two normative approaches. Section 2.3.2 reflects upon the circumstances under which private measures capable of conferring a market advantage, but also of constituting a barrier, should be considered in breach of the market access test. Finally, Section 2.3.3 discusses the possibility to justify the restriction, in particular on the basis of the fundamental right to conduct a business, as well as a possible approach of the Court towards the proportionality assessment.

### 2.3.1 Personal application

Under the approach in Section 2.2.4, which frames current case-law as preventing third-party interference in contractual relations, the following can be concluded for VSS:

- i) company VSS are excluded by Art. 34 TFEU
- ii) sectoral VSS are covered by Art. 34 TFEU if *de facto* non-voluntary
- iii) multi-stakeholder VSS are covered by Art. 34 TFEU if *de facto* non-voluntary.

Under the normative framework in Section 2.2.5, grounded on a functional approach to collective regulation and the horizontal application of the non-discrimination

<sup>119</sup> Benvenuti, E., Downs, G.W. (2012) 'National courts and transnational private regulation'. In Cafaggi, F. (Ed.) *Enforcement of transnational regulation. Ensuring compliance in a global world*. Cheltenham, Northampton: Edward Elgar, in particular at 140-146. See also Cafaggi, F. (2012) 'Enforcing transnational private regulation: Models and patterns'. In Cafaggi, F. (Ed.) *Enforcement of transnational regulation. Ensuring compliance in a global world*. Cheltenham, Northampton: Edward Elgar, 92.

<sup>120</sup> Verbruggen, P. (2014) The impact of primary EU law on private law relationships: Horizontal direct effect under the free movement of goods and services. *European Review of Private Law* 22(2), 215.

principle, what matters is an appraisal of whether the individual *vis-à-vis* the private body at hand is in a similar condition to that *vis-à-vis* the State. Therefore, with respect to private standards:

- i) company VSS are covered by Art. 34 TFEU if the standard constitutes an essential condition to accede to a market
- ii) sectoral VSS are covered by Art. 34 TFEU if the standard constitutes an essential condition to accede to a market
- iii) multi-stakeholder VSS are covered by Art. 34 TFEU if the standard constitutes an essential condition to accede to a market.

The two frameworks overlap to a great extent. A *de facto* mandatory scheme is likely to be so because it constitutes an essential condition to enter a market. Further, it is very unlikely that, under the second normative framework, a single company could exert such power to become a market-gate keeping entity in the lack of links with a Member State. By providing a considerable degree of autonomy to company schemes, the personal framework of application here described is in line with the normative approach to public, club and private goods outlined in Section 3.2 of Chapter 2.

### 2.3.2 Substance thresholds for market access breach

Section 2.1 shows that, according to the classic approach to market access, a rule is considered in breach of Art. 34 TFEU, and thus needs to be justified, as long as it hinders access to a market for some producers. In principle, for public measures, this applies irrespective of whether a measure has a trade-enhancing and pro-market access effect for other producers, even if it includes the majority of them. Transposing this test to private measures and standards such as VSS ignores the fact that all standards have effects which both facilitate and impede market access. These effects indeed matter within the Treaties framework since EU-wide standards - including those addressing sustainability - contribute to integrating the economies of EU Members.<sup>121</sup> Different, some of the private sectoral rules addressed by the CJEU stemmed from nation-wide private bodies and contributed to the fragmentation of the regulatory landscape. Yet, a market access approach would consider many, if not all, VSS covered by the scope of Art. 34 as *prima facie* breaches.

The main conceptual problem concerning the application of a normative market access test for VSS becomes the assessment of the market barrier effect of VSS in comparison to the positive effects on market entrance that VSS generate as well. While cases of direct and indirect discrimination would be covered at all times, non-

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<sup>121</sup> Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 263.

discriminatory restrictions arising from failure to qualify with a VSS are more complex to appraise. Products and production methods can almost always be modified to meet the criteria of the standard at hand. Further, under normal market circumstances, requirements can be imposed on the supply chain to meet certain sustainability preferences, and companies may legitimately want to differentiate their products from those of the competitors by means of quality standards.

Section 2.1 explained that a measure imposing an equal factual 'cost' on *all* actors cannot be considered as a restriction to market access. The impact on market access due to cost increases engendered by participation in a VSS scheme might have different effects depending on the producers considered. For some, it may be almost negligible. For others, on the contrary, compliance may be very difficult, as adjusting products and production processes to meet the VSS requirements can result in severe loss of competitiveness or can be physically impossible. The extreme case scenario occurs when certain producers cannot enter the market anymore because of a loss of competitiveness. The question becomes how large the subset of excluded producers must be to give rise to a finding of infringement.

The CJEU ruled on this point with respect to a State measure in the domain of the freedom of circulation of services, although the finding was made in the context of a discriminatory measure. It does not matter whether discrimination has effects even on a very small group; the fundamental nature of the obligation does not permit even a very limited group of traders from being *completely prevented* from entering the market.<sup>122</sup> This finding under the freedom of movement of services is in line with the above mentioned rejection of a *de minimis* threshold. However, if a producer is excluded from entering into a contractual relation with a powerful retailer, this does not mean that the retailer may be subject to the scope of Art. 34 TFEU. The application of Art. 34 TFEU for discrimination contained in VSS would occur only when (even just a few) producers are *completely prevented from market access*,<sup>123</sup> which involves an assessment of external factors such as, *inter alia*, market structure and alternative channels for distribution. Indirect discrimination can be structurally at issue for certain environmental labelling or certificatory schemes, in particular those addressing the carbon emissions in bringing the product to the market, or the freight emissions measuring the environmental impact of goods transportation. Schemes covering these aspects have the indirect effect of favouring products made in the vicinity of the place of consumption or sale, which normally are national goods.

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<sup>122</sup> C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-1683, para. 52. See also Jansson, M.S., Kalimo, H. (2014) *Supra* at 34, 533.

<sup>123</sup> It shall be recalled that, in its case-law, the Court has referred to measures hindering market access as measures having a *considerable* influence on the behaviour of consumers, or *greatly* restricting the use of a product. See C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519, para. 56; C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-04273, para. 28.

Also for non-discriminatory VSS it may occur that just a few producers are entirely prevented from accessing the market. It may also happen that for some producers access to a market only occurs in the presence of costs higher than those borne by other competitors. It is debatable whether both situations would correspond to a *prima face* breach of Art. 34 TFEU. Firstly, it should be noted that whether the VSS 'holds' or 'raises' the bar has little relevance in itself. As long as a restriction to market access is generated by a VSS, the substantive scope of Art. 34 TFEU would cover it. Secondly, all standards defining 'quality' products have the very purpose of preventing access to the 'quality product' market to products of a lower quality, which are obviously marketable as 'regular' products. Conversely, the standard can be seen as *creating* a market and therefore increasing market opportunities for complying products. A 'quality' standard can be legitimately set extremely high so that only very few producers can comply. A means to appraise these two dynamics against each others is crucial, but does not pertain to the market access test as applied by the Court so far. Thirdly, a fundamental point concerns the costs borne by producers to adjust their products in line with the 'quality' standard. To incur lower costs does not mean anything except that the entity in question has been particularly efficient in adapting, a fact to be commended rather than to be deplored. Indeed, the entity may have incurred lower costs because the standard in question was closely based on the features of its products, perhaps because of regulatory capture in the standard-setting process. Or it may be that an entire national sector has set standards in a manner which would be very costly or impossible for other companies to comply with - a typical protectionist strategy.

Although competition law is a more suitable venue to address market restrictions in these terms,<sup>124</sup> what matters, it is here argued, is the combined *welfare effect* for producers determined by the VSS. An appraisal of combined welfare of producers affected by the VSS could be employed to evaluate the actual market restriction generated by the scheme on the group of producers as a whole. In the presence of a net decrease in producer welfare, it can be concluded that the scheme generates negative effects for producers that would likely be transmitted to the level of market access, in the most straightforward case, because the loss of producers whose products cannot enter the market is higher than the profits incurred by producers whose products qualify with the standard. Such a situation is rather suspect, and the Court may want to take a closer look at why a standard destructs more trade than it creates. Looking at producer welfare also permits the identification of intermediate situations where the standard adds up to producers costs without being matched by an increase in demand or market opportunities. Under such a scenario, it is reasonable to assume that compliance with the standard has occurred not on the basis of an

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<sup>124</sup> Nevertheless, EU competition law does not focus on producer welfare unless it has repercussions on market parameters which, in turn, affect the welfare of consumer - the only yardstick against which anti-competitive agreements are to be assessed. See Chapter 4 for an in-depth discussion.

economically rational decision since no firm would increase its costs without the promise of increased returns, but because of the presence of external pressures - be that of a successful regulatory scheme established because of strong consumer preference in a narrow market segment, or economically powerful retailers which impose their requirements upstream.

A focus on producer welfare is grounded on the arguable purpose of Art. 34 TFEU.<sup>125</sup> It is, however, impossible to determine a legal test which is able to assess the situation above without employing a substantial amount of market data, and at the same time ensuring predictability and uniform application of the law. Restricting the personal scope of Art. 34 TFEU so as to avoid dealing with this type of questions is therefore to be welcomed. Another possibility, which results in the same outcome of avoiding economic analysis, is to consider the restriction arising from a VSS as a *prima facie* breach of a fundamental freedom, and then to balance it against party autonomy as protected by fundamental right to pursue an economic activity, as discussed in the next Section. Both means are 'blunt' devices which only limitedly take into account the specific economic and factual reality - and therefore grant a larger margin of manoeuvre for VSS.

### 2.3.3 Justification and proportionality

A market access test has the effect of transforming many private measures, VSS included, into *prima facie* breaches. This effect is however limited by the arguable presence of a built-in substantive *de minimis* from the test in *Trailers*, which only catches considerable impediments to market access, or a personal *de minimis* under the fundamental freedom avenue which only covers bodies possessing a *de facto* gate-keeping power. Art. 36 TFEU, the mandatory requirements and the assessment of proportionality are, in any event, of fundamental importance. The CJEU ruled that,

<sup>125</sup> EU freedom of circulation law can be framed as being concerned with the welfare of producers and their gains resulting from market access and, at least within Art. 34 TFEU, with interferences on the welfare of producers deriving from State action. (See Póitares Maduro, M. (1998) *Supra* at 51). A test appraising the welfare of producers is thus consistent with this logic. The approach is a consequence of the almost constitutional role played by the principle of mutual recognition, and became more visible with the market-access approach to Art. 34 TFEU. In *Cassis de Dijon* the Court highlighted the 'double burden' borne by producers which have to comply with more than one set of rules, thereby switching the focus of the analysis to the supply side of the market. The second step is the subordination of consumer preferences - determining consumer welfare - to the internal market values and the welfare of consumer, as it can be concluded from the approach of the Court with respect to consumer preferences. The CJEU held that 'legislation of a Member State must not "crystallise" given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them' (C-178/84 *Commission v Germany (Beer purity requirement)* [1987] ECR I-0037, para. 31). The transition towards a market access test accentuates the focus on producer welfare, as Art. 34 TFEU goes much further than the negative integration objective pursued by WTO non-discrimination and necessity provisions. The market access test, in tandem with harmonisation and mutual recognition, results in the actual removal of barriers to trade, including non-discriminatory ones to the *immediate advantage* of producers. Indeed, a welfare increase may be transmitted to society at large by an increase of product choice and efficiency, but the appearance and extent of such effects cannot be presumed *ex ante*.

in principle, many of the expressed grounds for justification contained in Art. 36 TFEU and the overriding reasons of public interest can also be invoked by private parties.<sup>126</sup>

The Court applied justifications and the principle of proportionality to private parties, for example, in *Angonese*, where it was held that private actors as well can rely on objective factors unrelated to nationality, provided that proportionality is respected.<sup>127</sup> Private parties, most of the time, do not pursue the public good by acting in their self-interest. But this should not always preclude access to justificatory grounds such as public policy or public health, as it may occur that private interest is aligned with the public interest. The Court acknowledges that private action can generate similar effects to public action, a finding which holds true especially for the similar regulatory effects of certain private and public measures.

From a pragmatic and functionalist perspective, the application of justificatory grounds normally invocable by a Member State - both those in Art. 36 TFEU and the mandatory requirements - would be permissible when private actors undertake clear State-like regulatory tasks. Chapter 2 shows that this claim holds particularly true for multi-stakeholder VSS, which mediate between values and diverse constituency by means of a deliberative process. In those situations, the restriction could possibly be justified on environmental, or consumer protection grounds and other mandatory requirements of public interest. Private bodies have been granted *ad hoc* structural and organisational justifications such as the need to organise and set sports rules.<sup>128</sup> The possibility of resorting to public goals and not just 'private' justifications recognises that the regulatory authority of private parties legitimately extends to domains other than self-regulation, with a consequent impact on the margin of manoeuvre permitted.

A fundamental problem concerning the application of justificatory grounds to private parties, and to sectoral and company VSS in particular, is that previous rulings of the Court have disallowed the employment of economic and profitability-related grounds to justify infringements to the four freedoms.<sup>129</sup> Extending this prohibition to private bodies would be in contrast with the previous case-law of the CJEU where the Court

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<sup>126</sup> Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921, para. 11. In *Laval*, however, the Court seems to have limited the possibility for private actors to make use of the Treaty derogations, but not of the mandatory requirements. C-341/05 *Laval* [2007] ECR I-11767, para. 84. Generally, on mandatory requirements and the rule of reason, see: Schrauwen, A.A.M. (Ed.) (2005) *Rule of reason. Rethinking another classic of European legal doctrine*. Groningen: Europa Law Publishing.

<sup>127</sup> C-281/98 *Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4161, para. 42. For an explicit statement from the Court concerning the possibility for private actors to make use of mandatory requirements for justifying restrictions: C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP (Viking Line)* [2007] ECR I-10806, para. 90.

<sup>128</sup> Joined Cases C-51/96, C-191/97 *Deliège v Ligue francophone de judo et disciplines associées ASBL and Others* [2000] ECR I-2549, para. 67.

<sup>129</sup> C-120/95 *Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831, para. 39; C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECR I-4113, para. 48.

accepted the possibility that the exercise of a fundamental right of the infringer could be invoked to justify a restriction.<sup>130</sup> Private autonomy and the freedom of contract, which can encompass many economic grounds, constitute a possible iteration of the fundamental right to conduct a business under Art. 16 of the EU Charter of Fundamental Rights,<sup>131</sup> and a cornerstone of the liberal economic model.

More specifically, and particularly relevant for the possibility to subordinate contracting to specific sustainability requirements of products, the CJEU ruled that the freedom to choose whom to do business with constitutes a 'specific expression' of the freedom to conduct an economic activity, which forms part of the general principles of EU law.<sup>132</sup> Within this frame, sectoral and company VSS would constitute an articulation of such freedom.<sup>133</sup> In *Wouters*, although not explicitly connected with fundamental freedoms, the Court accepted without much discussion that self-regulation can legitimately have the objective of guaranteeing the proper practice of a profession.<sup>134</sup> Sectoral VSS which can be connected to the need to ensure the 'proper functioning' of a sector could arguably benefit from this line of justification. Possibly, such a ground could also encompass quality requirements for products, including those addressing social and environmental features. Private autonomy can therefore be used to determine the boundaries of the horizontal application of the Treaty freedoms.<sup>135</sup>

<sup>130</sup> C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP (Viking Line)* [2007] ECR I-10806, para. 75; C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning, Byggettan and Svenska Elektrikerförbundet (Laval)* [2007] ECR I-11767, para. 102. For cases of indirect horizontal effect see C-112/00 *Schmidberger Internationale Transporte v Austria* [2003] ECR I-5659, para. 69. For cases involving state measures see C-36/02 *Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609. See also Lohse, E.J. (2007) *Supra* at 71, 164; Krenn, C. (2012) *Supra* at 96, 212-213.

<sup>131</sup> C-426/11 *Alemo-Herron & others v Parkwood Leisure LTD* [2013] ECR I-0000, para. 32-33.

<sup>132</sup> Joined Cases C-90/90 and 91/90 *Jean Neu and Others v Secrétaire d'Etat à l'Agriculture et à la Viticulture* [1991] ECR I-3633, para. 13. For a more recent application under the Charter see C-281/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECR I-0000, para. 43.

<sup>133</sup> Generally, private regulation grounds its basis either on the constitutional principles of freedom of association or on freedom of contract. In these cases, law-making powers are almost intrinsic to the exercise of such freedoms. Cafaggi, F. (2010) *Private law-making and European integration: Where do they meet, when do they conflict?* In Oliver, D., Prosser, T., Rawlings, R. (Eds.) *Supra* at 4, 213.

<sup>134</sup> C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, para. 123.

<sup>135</sup> This is also due to a considerable overlap between the scope of the Treaty freedoms and Art. 16 of the Charter, insofar as they are both concerned with the freedom of the individual to organise her economic life and to consequently engage in legal relations of her choice. The Treaty freedoms, under this framework, represent a specific and narrower iteration of Art. 16 of the Charter limited to the freedom of market access. See Verbruggen, P. (2014) *Supra* at 120, in particular at 202. See also C-367/12 *Sokoll-Seebacher* [2014] ECR I-0000, para. 20. At least Art. 34 TFEU possesses an instrumental character which is connected to its use by the Court to pursue market integration. See de Cecco, F. (2014) *Fundamental freedoms, fundamental rights and the scope of free movement law*. *German Law Review* 15(3), 385. Differently, a fundamental right of individual autonomy is to be protected as an end in itself. See Babayev, R. (2016) *Supra* at 65, 989.

Under a fundamental right scenario a balancing exercise is required, under which freedom of doing business can restrict market access up to a certain point only. This would be more the case for business actors capable of wielding 'State-like' economic power. The outcome of balancing a fundamental freedom against a fundamental right is inherently unpredictable.<sup>136</sup> There have been cases in which the fundamental right had to yield to the fundamental freedom (*Viking Line* and *Laval*), and cases in which the opposite occurred (*Schmidberger*). Equally unpredictable is the balance between freedom of contract as a fundamental right, and other objectives. The invocation of freedom of contract was not successful to justify the breach of passenger rights and generally consumer protection *acquis*,<sup>137</sup> but on another occasion it has been used aggressively to successfully justify the abrogation of employees rights.<sup>138</sup> It is unfeasible to design a clear hierarchy, but it seems that freedom of contract may be limited in the presence of common rules 'imposing specific restrictions in that regard'.<sup>139</sup> In the end, freedom of contract - like any other fundamental right - is not absolute and must be viewed in relation to its social function.<sup>140</sup>

The justification of a measure in breach of Art. 34 TFEU also includes the oft-decisive assessment of proportionality. Under a market access test, proportionality becomes the main criterion to weed out lawful measures from unlawful ones.<sup>141</sup> Proportionality requires that a measure must be suitable and, most important, necessary for the objective pursued. Specifically, a measure must not go beyond what is necessary for the attainment of its objective. The Court has operationalised this requirement by looking at the presence of an alternative measure capable of achieving the objective to the same extent, but in a less burdensome way, or which limits to a lesser extent the right or the obligation at hand.<sup>142</sup> The CJEU has traditionally been generous towards Member States in recognising justificatory grounds in the form of overriding reasons of public interests; this has been counterbalanced with a certain strictness in the proportionality assessment.<sup>143</sup> The general approach to proportionality is that it is much stricter in the presence of State measures, whereas it is more lenient for Union measures and simply looking at manifest inadequacy.<sup>144</sup>

If we accept a State-like regulatory role for multi-stakeholder VSS, it seems then logical to expect the same stringent approach to proportionality as in vertical

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<sup>136</sup> Schepel, H. (2013) *Supra* at 114, 1228-1229.

<sup>137</sup> Case C-12/11 *McDonagh v Ryanair* [2013] ECR I-0000.

<sup>138</sup> C-426/11 *Alemo-Herron & others v Parkwood Leisure LTD* [2013] ECR I-0000. See also Prassl, J. (2013) Freedom of contract as a general principle of EU law? Transfers of undertakings and the protection of employer rights in EU labour law. *Industrial Law Journal* 42(4), 434-446.

<sup>139</sup> Case C-240/97 *Spain v Commission* [1999] ECR I-6571, para. 99.

<sup>140</sup> C-281/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECR I-0000, para. 45.

<sup>141</sup> Trimadis, T. (2006) *The general principles of EU law*. Oxford: Oxford University Press, 196.

<sup>142</sup> Harbo, T.I. (2010) The function of the proportionality principle in EU law. *European Law Journal* 16(2), 172.

<sup>143</sup> Schepel, H. (2013) *Supra* at 114, 1221.

<sup>144</sup> Trimadis, T. (2006) *Supra* at 141; Harbo, T.I. (2010) *Supra* at 142, 172.

relations. In such a case, for multi-stakeholder VSS freedom of contract would not play a role, as their regulatory function is more evident. The impossibility to balance between fundamental rights would be compensated by the possibility to revert to a rather broad pool of public policy grounds, which could cover all objectives pursued by VSS - among which are environmental protection, the protection of exhaustible resources, moral concerns arising from certain practices, consumer protection.

The approach to proportionality would logically differ for sectoral and company VSS. Their more prominent economic rationale is more closely associated to the exercise of a fundamental right. Where fundamental freedoms and fundamental rights enter into conflicts, Advocate General Trstenjak has suggested, and extended to private actors as well, a 'double proportionality test'. A balance between a fundamental right and a fundamental freedom is to be attained when 'the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom'.<sup>145</sup> In other words, neither the substance of the former nor of the latter must be impaired.<sup>146</sup> This type of assessment shows close resemblance with the *stricto sensu* concept of proportionality.<sup>147</sup>

Practical problems may arise during the assessment of the proportionality of the restriction to market access caused by the substance of the VSS scheme and the objectives pursued. For all VSS, it is difficult to imagine a standard of review when the substance of the scheme is taken into account, unless a mandatory requirement of 'determining quality requirements' is accepted. For VSS that raises the bar, indeed the case for almost all multi-stakeholder VSS, the requirements included go well beyond and are much stricter than the rules with which products would normally be in compliance. How would the CJEU, for example, assess proportionality of an environmental standard for sustainable forest management, or an eco-label awarded to products with a limited environmental impact? Unless an implementing role is acknowledged for certain VSS, which would render applicable provisions not yet applicable, products certified under those VSS are already safe and not harmful for the environment, at least according to the law. Other VSS are less problematic. For example, private rules defining organic agricultural standards are drafted within a EU legal framework which expressly permits private operators to draft rules in that domain, provided that harmonised EU baseline requirements are followed.<sup>148</sup>

<sup>145</sup> Opinion of Advocate General Trstenjak in C-271/08 *Commission v Germany* [2010] ECR I-7091, para. 190.

<sup>146</sup> Harbo, T.I (2010) *Supra* at 142, 175.

<sup>147</sup> de Vries, S.A. (2013) *Supra* at 101, 191.

<sup>148</sup> Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products. L 189/1, Art. 23.

As VSS certification is conferred to products that perform particularly well in a certain domain under criteria designed by the VSS body, the question becomes the choice of the level of protection as well as the objective pursued. Is the standard too stringent in order to achieve, say, generally, environmental protection? Though this is not the type of question a Court might be well equipped to tackle, it must be noted that the choice of the level of protection is seldom disputed by the CJEU for public measures. This standard of review could be extended to multi-stakeholder VSS. *A fortiori*, this would apply also to private sectoral bodies exercising self-regulatory functions, as a sufficient degree of deference is necessary to take into account and protect private autonomy. In addition to allow private parties to employ a broad set of justificatory grounds, therefore, the CJEU has the additional tools for ensuring a sufficient margin of autonomy to private parties, either by a light-touch analysis focusing on procedures, or by exercising deference towards the level of protection chosen.

Generally, it has been suggested that, when addressing private technical standard-setters, the Court should exercise a light review limited to the appraisal of good governance and compliance with principles of good administration.<sup>149</sup> Such requirements could be operationalised on the basis, for example, of the safe-harbour requirements for standardisation agreements under competition law.<sup>150</sup> The CJEU may lack the knowledge to delve into the substance of highly technical questions. Additionally, it may be desirable to safeguard regulatory diversity, experimentation, and the capacity of standardising bodies to set varying levels of protection, and pursue them by different means. This argument may not be relevant in its entirety to all VSS, as some of them do not present very technical features. In any event, case-law shows that the CJEU is willing to look into highly technical matters. In a pending case at the time of writing, the Advocate General supported the Court's jurisdiction to provide interpretation over the technical standards drafted by ESBs.<sup>151</sup>

### 3. Interactions, recognition, and indirect forms of influence at the EU and at the Member State level

Section 2 discussed the interaction between VSS and freedom of movement by means of the application of Art. 34 TFEU to VSS under an assumption that no connecting link with a Member State could be found. Section 3 now turns to the forms of specific interaction addressed in Section 4 of Chapter 2. Albeit these interactions do not necessarily establish such a connecting link, they identify more or less structured

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<sup>149</sup> Mataija, M. (2016) *Supra* at 6, 248.

<sup>150</sup> Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 280. For in-depth discussion, see Section 2.3.4 of Chapter 4.

<sup>151</sup> Opinion of Advocate General Campos Sanchez-Bordona in C-613/14 *James Elliott Construction Limited v Irish Asphalt Limited* [2016] ECR I-0000, paras. 42-63.

mechanisms for review, coordination and allocation of regulatory effects, and procedural and substantive influence between public authorities and VSS. Public bodies and governments, it should be recalled, can either be users, facilitators, or supporters of VSS. This occurs where public authorities, respectively: i) employ VSS in legislation, often for the specific purpose of demonstrating compliance with regulatory requirements; ii) create a legal and policy environment which is favourable to the development and acceptance of VSS; iii) support financially or demonstrate an extent of affiliation and endorsement with a VSS. The objective of this Section is to study how certain EU measures in the broad domain of market regulation<sup>152</sup> apply to VSS within the interactions spelled out above and, generally, to investigate their direct and indirect effects over VSS bodies and their standards.

EU use of VSS is described in Section 3.1. At least in the form it takes within the framework of the Renewable Energy Directive (RED), it results in coordination between public and private authorities, and therefore in an allocation of regulatory effects which brings to the fore the implementing role of VSS. In addition, the procedures and substance of the schemes are influenced by the requirements spelled out by EU legislators. The framework also allows for an extent of review over the recognised VSS. EU facilitation of VSS is described in Section 3.2 as taking two possible forms: harmonisation efforts, and meta-rules. Depending on the legal arrangement at hand, harmonisation and meta-rules result in a varying degree of influence on the substance and procedures of VSS. Coordination may also be established but, different from governmental use of VSS, it takes a softer form which neither entails formal recognition of schemes nor results in legal review of the scheme by EU Courts. Finally, forms of support described in Section 3.3 are likely to result in the least amount of influence on the schemes.

This Section addresses mostly cases of interaction between the EU and VSS, and it focuses on the most evident forms of interaction, i.e. those stemming from legal instruments and policy documents directly referring to VSS. Other types of less direct subtle interactions are indeed possible, but are not considered here. At the Member State level, only the case where Member States are users of VSS is addressed in Section 3.4, given the potential application of EU law which may be triggered as a consequence. The interactions between EU legislators and VSS will be addressed once more in Chapter 5 under WTO provision to the extent that, by establishing a 'link' with private measures, they may result in attribution to the Member of the private rules in question.

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<sup>152</sup> The measures here described are, for simplicity, considered to be taken in the domain of market regulation. However, they are not just legally based on Art. 114 TFEU. For example, the organic products Regulation was exclusively taken on the basis of Art. 43 TFEU concerning the implementation of the common agricultural policy, and the Renewable Energy Directive was also taken on the basis of Art. 192 TFEU which implements the EU shared competence in the environmental domain.

### 3.1 EU use of VSS and its legal consequences

The EU, quite distinctively among global regulators, is itself a user of VSS in one but nonetheless remarkable domain - that of biofuels sustainability. This situation offers a unique opportunity to investigate the extent of the application of legal provisions to VSS with the aim to exercise forms of coordination and control over their activities. This arrangement identifies a situation of co-regulation, where a private regulatory instrument is employed to implement a public policy.<sup>153</sup>

The framework of the Renewable Energy Directive (RED)<sup>154</sup> imposes greenhouse gas (GHG) emissions and other sustainability requirements<sup>155</sup> on biofuel producers in order to account for the calculation of Member States' renewable energy obligations and to be eligible for financial support.<sup>156</sup> Member States are under the obligation to require biofuel producers to demonstrate compliance with the GHG emissions and sustainability requirements.<sup>157</sup> Among possible means, the Commission is given the possibility to recognise voluntary national or international private or public schemes setting standards for the purpose of measuring GHG emissions and ensuring compliance with the sustainability criteria.<sup>158</sup> Such schemes are clearly VSS. The Commission has recognised around twenty schemes which include, among others, multi-stakeholder initiatives such as the Round Table for Responsible Soy,<sup>159</sup> the

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<sup>153</sup> Gaebler, M. (2014) 'Recognition of private sustainability certification systems for public regulation (co-regulation): Lessons learned from the EU Renewable Energy Directive'. In Schmitz-Hoffmann, C., Schmidt, M., Hansmann, B., Palekhov, D. (Eds.) *Voluntary standard systems. A contribution to sustainable development*. Verlag, Berlin and Heidelberg: Springer, 100.

<sup>154</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140.

<sup>155</sup> Specifically, a reduction in emission of GHG of at least 60% for biofuels produced in installations starting operation after 5 October 2015 (Art. 17.2). The sustainability requirements ensure that biofuels are not made from material obtained from lands with a high biodiversity value or with a high carbon stock or from peatland, as defined respectively in Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Articles 17.3 to 17.5.

<sup>156</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Art. 17.1.

<sup>157</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Art. 18.1.

<sup>158</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Art. 18.4.

<sup>159</sup> Commission Implementing Decision 2011/440/EU of 19 July 2011 on the recognition of the 'Round Table on Responsible Soy EU RED' scheme for demonstrating compliance with the sustainability criteria under Directives 2009/28/EC and 2009/30/EC of the European Parliament and of the Council. L 190/83.

International Sustainability and Carbon Certification System,<sup>160</sup> and also sectoral associations' schemes such as 2BSvs.<sup>161</sup>

A coordination relationship between the EU and VSS is thus established, which highlights the implementing role of the recognised VSS. VSS have the objective of specifying the processes to achieve GHG reduction and to ensure sustainability within the framework of the general requirements laid down by the RED. At the same time, by providing a methodology for calculation and assessment of such requirements, they permit identification of biofuels in compliance with the general requirements. By decentralising the operationalisation of the requirements, the EU legislators also allow private actors to employ the scheme that is better suited for their needs. Importantly, as the biofuel requirements apply also to biofuels produced outside the EU, VSS become an essential tool to monitor extraterritorially the sustainability of biofuels, where the EU does not have the formal authority nor the practical capacity to do so.

The RED also contemplates mechanisms for influencing VSS' procedural and substantive requirements with which VSS must be in compliance to benefit from Commission recognition. Requirements are included in Art. 18.5 of the Directive and also clarified by a Commission Communication.<sup>162</sup> Such requirements can be seen as an indirect form of influence on VSS wishing to be recognised. This argument is based on the presumption that recognition is a sought-after status by scheme holders, as it enhances their legitimacy and predictably ensures an increased acceptance. Some requirements concern the substance of the scheme, which must be aligned to certain methodological standards and must contribute to the objective of the RED. The procedural requirements are, however, rather broad and unspecified. A scheme applying for recognition must meet 'adequate standards of reliability, transparency and independent auditing'. For schemes determining areas of high biodiversity values, the RED establishes additional requirements of objectivity, coherence with internationally recognised standards and the presence of an appeal procedure. Such requirements do not seem very articulated, but they are made more detailed by the presence of delegation to the Commission to adopt implementing acts specifying the standards for independent auditing which voluntary schemes must then respect.<sup>163</sup>

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<sup>160</sup> Commission Implementing Decision 2011/438/EU of 19 July 2011 on the recognition of the 'International Sustainability and Carbon Certification' scheme for demonstrating compliance with the sustainability criteria under Directives 2009/28/EC and 2009/30/EC of the European Parliament and of the Council. L 190/79.

<sup>161</sup> Commission Implementing Decision 2011/437/EU of 19 July 2011 on the recognition of the 'Biomass Biofuels Sustainability voluntary scheme' for demonstrating compliance with the sustainability criteria under Directives 2009/28/EC and 2009/30/EC of the European Parliament and of the Council. L 190/77.

<sup>162</sup> Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability schemes [2010] C 160/01.

<sup>163</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Art. 18.5.

The Commission Communication attempts to give more bite to the broad requirements of reliability, transparency and independent auditing spelled forth in the RED by listing more specific assessment and recognition requirements. The Communication, however, only enumerates a number of conditions for auditors to be considered as competent and independent<sup>164</sup> but, remarkably, does not elaborate any further on transparency. The Implementing Decisions recognising the schemes bear no evidence of the actual type of assessment performed by the Commission, which seems to exercise broadly its discretion. Furthermore, a reflexive process of sorts is initiated by the RED. Recognised VSS have to report to the Commission on a number of issues such as independence of audits and certificatory bodies, strategies to deal with non-compliance, transparency in the accessibility and availability of information, level of stakeholder involvement. Parliament and Council are then to analyse these reports and elaborate on a list of best practices.<sup>165</sup>

The RED has caused VSS addressing biofuel sustainability to proliferate, an objective that the Directive itself considers to be in the interest of the EU.<sup>166</sup> The reality is that the schemes recognised differ considerably. Differences are broad to that extent that the standards of some recognised VSS may actually fail to discern cases of non-compliance with the RED requirements. Further, noticeable differences in terms of stringency are observed between broader and pre-existing (normally multi-stakeholder) bar-raising VSS schemes for biofuel sustainability and those created with the specific purpose of establishing and demonstrating RED-compliance.<sup>167</sup> Proliferation is not, in this case, particularly problematic from the perspective of consumer confusion, as these schemes are for business use only. Different from a situation where VSS operate without any level of public involvement, proliferation under this specific scenario is arguably less detrimental for market access, since producers can pick and choose the VSS better crafted for their needs. This means that producers can also strategically opt for the less stringent, or the weakest in assessing compliance. While this impacts favourably on the trade barrier effect, it risks being detrimental to the important environmental objectives pursued by the RED.

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<sup>164</sup> Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability schemes [2010] C 160/01, Art. 2.2.2.

<sup>165</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Art. 18.6.

<sup>166</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Recital 79.

<sup>167</sup> International Union for the Conservation of Nature - National Committee of The Netherlands (2013) Betting on best quality: A comparison of the quality and level of assurance of sustainability standards for biomass, soy and palm-oil, 35. Available at [http://cmsdata.iucn.org/iucn.vm.iway.ch/downloads/betting\\_on\\_best\\_quality.pdf](http://cmsdata.iucn.org/iucn.vm.iway.ch/downloads/betting_on_best_quality.pdf); Schlamann, I. (2013) Searching for sustainability: Comparative analysis of certification schemes for biomass used for the production of biofuels. World Wildlife Fund Deutschland. Gaebler, M. (2014) 'Recognition of private sustainability certification systems for public regulation (co-regulation): Lessons learned from the EU Renewable Energy Directive'. In Schmitz-Hoffmann, C., Schmidt, M., Hansmnn, B., Palekhov, D. (Eds.) *Supra* at 153, 109.

Commission recognition is formally different from delegation of regulatory powers as it occurs, for example, in the domain of technical standardisation.<sup>168</sup> By there not being delegation, but only *ex post* recognition, there is no need for the recognised bodies and the act of recognition to be in compliance with the *Meroni* criteria for delegation of regulatory powers.<sup>169</sup> Recognition does not confer a lawful exercise of *ex novo* regulatory power to another entity, but it deals with a pre-existing entity already in the exercise of regulatory functions, albeit on the basis of private authority. Still, an extent of Court review is possible and determined by the presence of a legal act for recognition. Formal recognition of VSS instruments takes place by means of a Commission Decision;<sup>170</sup> The Court's review of such an act is allowed under Art. 263 TFEU under action by Member States, other EU institutions, or an individual who is 'directly concerned'.<sup>171</sup> But to what extent does the CJEU assess the substance of the standard and the procedural requirements with which the body should be in compliance according to the RED?

In *Artegodan*, a case concerning a Commission's authorisation for marketing certain drugs, which was based on a scientific assessment by the Committee for Proprietary Medicinal Products (CPMP), the Court of First Instance ruled that 'although the CPMP's opinion does not bind the Commission, it is none the less extremely important so that any unlawfulness of that opinion must be regarded as a breach of essential procedural requirements rendering the Commission's decision unlawful'.<sup>172</sup> In that case, where the Commission was dealing with technical matters and was not

<sup>168</sup> The extensive amount of 'legalisation' brought in the EU standardisation regime by means of Regulation 1025/2012 has dispelled the remaining doubts concerning the presence of delegation in the EU standardisation regime. See Schepel, H. (2013) The new approach to the New Approach: The juridification of harmonised standards in EU law. *Maastricht Journal of European and Comparative Law* 12(4), 521-533.

<sup>169</sup> Case C-9/56 *Meroni v High Authority* [1958] ECR I-0135. See also Lenaerts, K. (1993) Regulating the regulatory process: 'Delegation of powers' in the European Community. *European Law Review* 18(1), 41; Donnelly, C.M. (2007) Delegation of governmental power to private parties: A comparative perspective. Oxford: Oxford University Press; Griller, S., Orator, A. (2010) Everything under control? The 'way forward' for European agencies in the footsteps of the *Meroni* Doctrine. *European Law Review* 35(1). The *Meroni* doctrine provides that delegation cannot confer powers different from those the delegating institution is conferred by the Treaty. This means that the exercise of the delegated powers must be subject to the same conditions it would have been subject in the absence of a delegation. Delegation also has to be explicit, and must be ratified by the institution delegating powers. Finally, delegation must not alter the balance of powers established by the Treaty. Delegation shall thus not empower the delegated institution with such a wide margin of discretion that its decisions cannot be evaluated on the basis of objective criteria; in other words, delegation must be limited to strictly executive powers.

<sup>170</sup> For the RED see Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability schemes [2010] C 160/01, Art. 21.

<sup>171</sup> As implementing decisions are regulatory acts, for which the Treaty of Lisbon requires 'direct concern', i.e. 'the measure at issue must directly affect the legal situation of that individual and there must be no discretion left to the addressees of that measure who are responsible for its implementation, that implementation being purely automatic and resulting from Community rules alone without the application of other intermediate rules'. Joined Cases 41/70 to 44/70 *International Fruit Company and Others v Commission* [1971] ECR I-411, paras 23 to 29. For a detailed account of the 'Lisbon test' for regulatory act see Albors-Llorens, A. (2014) 'Judicial protection before the Court of Justice of the European Union'. In Barnard, C., Peers, S. (Eds.) *European Union Law*. Oxford: Oxford University Press, 276-278. Potential directly concerned parties thus include producers, including foreign producers.

<sup>172</sup> Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others v Commission* [2002] ECR II-4945, para. 197.

capable of conducting a scientific or technical evaluation on its own, the CJEU showed its willingness to review the formal procedural legality of the opinion, as well as the exercise of the Commission's discretion. Previously, the Court also held that following without reservation the opinion of technical experts does not *per se* run counter to EU law. However, the quality of the experts that have been consulted and their capacity to conduct an assessment on the subject at hand will be the object of careful scrutiny by the CJEU.<sup>173</sup>

In order to extend those findings to the recognition of VSS within the framework of the RED, the similarity of the situation with that in *Artegoda*n must be stressed. Also in the domain of biofuels, the Commission relies i) on external expertise, ii) to conduct an assessment, iii) which it is not capable of undertaking on its own, which is the appraisal of the environmental impact of biofuel production, particularly in foreign jurisdictions. It has been argued that the CJEU might look at the private body in charge of the assessment, but in its analysis the Court will mostly limit itself to whether the VSS body's procedural requirements have been complied with, whether reasons have been stated, and whether the level of technical expertise is satisfactory.<sup>174</sup> In other words, it verifies compliance with basic principles of goods administration. It must be noted that, by addressing the Commission Decision, no requirements are directly imposed on the VSS body. It can nevertheless occur that the Commission Decision is annulled and, thus, the scheme cannot be employed anymore for demonstrating compliance. It is difficult to assess whether recognised VSS scheme-holders are actually aware of this possibility of indirect review.

The CJEU's review of acts of the institutions where discretion in policy choice is retained is normally rather 'light', in particular in the assessment of proportionality.<sup>175</sup> The Court usually verifies whether the decision is 'not vitiated by a manifest error or a misuse of powers and that the competent authority did not clearly exceed the bounds of its discretion'.<sup>176</sup> Although the RED in Art. 18.5 provides that the Commission shall ensure that schemes meet adequate standards of reliability, transparency and independent auditing, the Commission Communication that sets forth the requirements for recognition, does not operationalise such standards any further, nor does the Commission seem to look at such standards when assessing VSS schemes for the purpose of recognition. It is doubtful whether this type of 'light' review might be a remedy for the equally light control exercised by the Commission. In any event, also

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<sup>173</sup> Case C-269/90 *Technische Universiteit Munchen v Hauptzollamt Munchen* [1991] ECR I-5469, para. 22.

<sup>174</sup> Hofmann, H.C.H., Rowe, G.C., Turk, A.H. (2011) *Administrative law and policy of the European Union*. Oxford: Oxford University Press, 604.

<sup>175</sup> Craig, P. (2012) *EU administrative law*. Oxford: Oxford University Press, 592-593; Harbo, T.I. (2010) *Supra* at 142, 172.

<sup>176</sup> Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegoda*n and *Others v Commission* [2002] ECR II-4945, para. 201.

EU institutions are bound by Art. 34 TFEU.<sup>177</sup> The presence of discriminatory elements in a recognised VSS would lead, in case of a legal challenge, to an arguably less deferential scrutiny of the Commission's discretion. In any case, it can be observed that the presence of a co-regulatory arrangement elevates private rules at the same level of administrative rules, to be treated with the same level of judicial deference.<sup>178</sup>

It can be concluded that in case the EU legislators use a VSS under the legal and institutional dynamics of the RED, regulatory effects are clearly allocated. The extent of indirect influence EU legislators can exert and which is able to affect trade-barriers effects and confusion is theoretically rather high. However, it does not determine direct legal review on the VSS being recognised. There is, however, a strong dependence on the extent of control that the Commission is willing to exert on the schemes it aims at recognising, and the specific legal arrangement. The requirements for recognition, however broadly defined in the Directive, can be made more precise by Commission's practice. Future implementation of the transparency requirements could give an indication of whether the Commission intends to tighten its control, which does not seem very stringent at the moment. The legal arrangement at hand in the framework of the RED contributes to the determination of legal review, albeit limited. The presence of administrative discretion limits the extent of legal review on recognised VSS to major procedural breaches of good administration principles by the VSS body. Arguably, the situation may differ in the presence of discrimination - which would be the only instance in which Art. 34 TFEU can be fully brought into the equation.

### 3.2 EU facilitation as indirect form of influence

Use of a VSS requires the presence of legal acts recognising VSS or, as Chapter 5 will discuss, 'acknowledging and adopting' private rules. Conversely, facilitation does not require legal acts specifically targeting a VSS, but it rather entails a less direct contact between private and public authority. The forms of interaction considered in this Section describing EU facilitation of VSS transcend the characteristics of self-regulation and co-regulation as identified by the EU institutions.<sup>179</sup> EU legislators anyway engage in forms of supervision and control over VSS. This is coherent with the Commission role to verify and exercise control over self-regulation.<sup>180</sup> Many of the interactions observed between the EU and VSS mostly fall within the group of facilitation. The

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<sup>177</sup> C-15/83 *Denkavit Nederland* [1984] ECR I-2171, para. 15; Joined Cases C-154/04, 155/04 *Alliance for Natural Health* [2005] ECR I-6451, para. 47.

<sup>178</sup> Cafaggi, F. (2009) Private regulation in European private law. EUI Working Papers RSCAS 2009/31, 4.

<sup>179</sup> At least as defined in the White Paper on EU Governance and the subsequent Intern-institutional agreement. See Commission Communication COM(2001)428 final. A white paper on European governance. C 287; European Parliament/Council/Commission, Inter-institutional agreement on better law-making [2003] C 321/1.

<sup>180</sup> European Parliament/Council/Commission, Inter-institutional agreement on better law-making [2003] C 321/1, para. 17.

review performed here is not exhaustive, as there may be forms of more indirect facilitation provided, for example, by the strong EU policy preference for CSR.<sup>181</sup>

The instances of facilitation here discussed include all those bearing a discernible impact on VSS which could be identified at the time of writing. They present considerable variations concerning the amount of direct or indirect legal review exercised on the VSS, which is clearly dependent on the legal arrangement at hand. For example, harmonisation efforts such as the organic products Regulation are basically an attempt to directly regulate the substance of VSS in the organic agriculture domain without necessarily imposing a single public scheme. Conversely, the harmonising effort in the framework of the 'internal market for green products' initiative is based on entirely voluntary compliance by VSS. The substance of legislation in question also affects the actual amount of influence that is exercised on the procedures and substance of VSS. The incentive offered by public procurement could have a major impact in extending procedural requirements over VSS bodies but the narrow substantive scope of the Directive has the effect of limiting the range of VSS contracting authorities may employ. The presence of a 'facilitation' interaction does not however result, in all cases, in forms of direct or indirect control. Facilitation arrangements can also entail a limited influence exercised by public authorities, such as under the FLEGT schemes, where only marginal requirements are imposed on VSS.

### *3.2.1 Harmonisation efforts*

Harmonisation of a private regulatory domain can occur mandatorily by means of Regulation like the organic product Regulation, or by softer forms such as the single market for green product initiative launched by the Commission. Both instances harmonise the substance of VSS within a certain domain (i.e. organic agriculture), or their methodology (i.e. for the appraisal of polluting emission).

#### *3.2.1.1 The organic products Regulation*

The organic products Regulation is a form of facilitation interaction between EU and VSS which takes the form of harmonisation. The organic products Regulation mandates that all products making claims relating to organic agriculture must be in compliance with the EU standards laid down in the Regulation.<sup>182</sup> Private (and also public) organic standards are still permitted to coexist in the EU market, and products can bear private organic labels, but this can occur only to the extent that they comply

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<sup>181</sup> See, generally, Commission Communication COM(2011) 681 final on a renewed EU strategy 2011-14 for Corporate Social Responsibility.

<sup>182</sup> Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products. L 189/1, Art. 23.

with the Regulation.<sup>183</sup> This means that organic agriculture VSS can only be more stringent than the Regulation. Existing schemes not in compliance with the Regulation are not *per se* prohibited, but are not permitted to make claims associated with the organic nature of products. Clearly, this considerably reduces their appeal. The presence of common rules for organic agriculture thus has the effect of ratcheting up all private standards in that domain at least to the level of the Regulation. Granted, the EU standards are themselves based on a private initiative,<sup>184</sup> but the presence of common rules prevent newer initiative from diluting the content of the standards.<sup>185</sup>

The Regulation offers an interesting example of how to ratchet up the substance of VSS by means of less voluntary dynamics, and how the creation of common rules can have the effect of leveling, if to a certain extent only, the playing field. To regulate a labelling domain by setting common rules applicable by default and allowing coexistence of other schemes has also the effect of increasing the level of protection. This increases consumer confidence and arguably also lowers trade-barrier effects resulting from divergent approaches to organic agriculture. As the rules of the Regulation can be seen as rather exhaustive and thereby limiting the presence of more stringent VSS, intra-EU trade barriers effects - and arguably consumer confusion as well - are diminished in the presence of at least an extent of harmonisation.

### 3.2.1.2 *The single market for green products initiative*

A similar regulatory effort - however more 'soft' - to ensure uniform substance of the scheme, to improve consumer confidence and take down private trade barriers appears underway in the domain of what the Commission has defined as the single market for green products initiative. The Commission has been undertaking a *sui generis* harmonisation exercise, whereby it has defined one robustly science-based single methodology for appraising the environmental impact of products and organisation. The Commission strongly suggests that these two methodologies be used in the EU by national and private standards for reporting greenhouse gas emissions.

<sup>183</sup> Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products. L 189/1, Art. 25.2.

<sup>184</sup> I.e. the IFOAM standards for organic agriculture, drafted in 1980 by the International Federation of Organic Agriculture Movements, an NGO, and used as input for the Codex Alimentarius Commission Guidelines for the production, processing, labelling and marketing of organically produced food. The Codex Guidelines and IFOAM standards were subsequently used as basis for the previous Organic Food Regulation, EU Regulation 2092/91, which unifies the regulation of organic agriculture in EU Member States. See Van Der Grijp, N., Brander, L. (2004) 'Multi-sector and sector-specific schemes' In Campins Eritja, M. (Ed.) *Sustainability labelling and certification*. Madrid-Barcelona: Marcial Pons, 80.

<sup>185</sup> On this point, and the dual enabling and constraining character of public and private interaction in the organic agriculture domain see Arcuri, A. (2015) The transformation of organic regulation: The ambiguous effects of publicisation. *Regulation and Governance* 9(1), 144-159.

The single methodology would replace some 80 different methodologies for calculating and reporting greenhouse gas emissions, and around 60 methodologies for carbon footprints, which cannot be tackled by the application of the principle of mutual recognition.<sup>186</sup> Private and public schemes are not mandated to employ the Commission methodology, which therefore may constitute a voluntary standard in the meaning of the TBT Agreement.<sup>187</sup> Nonetheless, the Commission is willing to do so to promote its methodology by including it in the Eco-Management and Audit Scheme (EMAS)<sup>188</sup> - EU's environmental management plan, and in the EU Ecolabel.<sup>189</sup> Also this interaction can be categorised as facilitation, since it explicitly aims at the improved operation of different schemes by influencing their substance. It suggests voluntary tools for lowering trade barrier effects which can theoretically also have a positive impact on consumer perception of the schemes.

### 3.2.2 Meta-rules

Meta-rules are broad requirements public authorities demand from VSS schemes, which are left a margin of manoeuvre for their operationalisation and implementation. Such requirements, deriving from public measures such as the public procurement Directive, apply voluntarily but there is an incentive as compliance entitles a scheme to be employed for a specific purpose by public authority - such as to certify 'green' product features in governmental procurement. Meta-rules can therefore be seen as requirements with which VSS must comply if they want to fulfil a specific role. Other meta-rules are entirely voluntary and their uptake is left to the freewill of the scheme-holders.

#### 3.2.2.1 The public procurement Directive

Public procurement is generally a powerful tool for public authorities to indirectly regulate and enforce private conduct.<sup>190</sup> EU public procurement rules also offer an effective incentive mechanism not just for the entities contracting their products, but also for VSS by means of the imposition of certain procedural requirements for their employment. The new public procurement Directive<sup>191</sup> can be seen as an example of facilitation to VSS' activities. To solve the problem for contracting authorities to verify

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<sup>186</sup> Commission Communication COM/2013/0196 final. Building the Single Market for Green Products Facilitating better information on the environmental performance of products and organisations.

<sup>187</sup> See Section 4.1 of Chapter 5 for further discussion.

<sup>188</sup> Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS). L 342/1.

<sup>189</sup> Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel. L 27/1.

<sup>190</sup> Baldwin, R., Cave, M., Lodge, M. (2012) *Understanding regulation: Theory, strategy, and practice*. Oxford: Oxford University Press, 116-117.

<sup>191</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. L 94/65.

process standards and general corporate behaviour, the Directive permits them to employ social and environmental criteria or contract performance conditions in their public contracts, with respect to any stage of products life-cycle.<sup>192</sup> The Directive therefore improves the schemes' popularity among contracting authorities. In addition, the Directive sets requirements that schemes must respect if they want to qualify to be included in public procurements. According to the Directive, private labelling requirements such as those contained in certain VSS can be employed to demonstrate compliance with the requirements of the contracting authorities. Contracting authorities can even *require* a label altogether but, in line with the mutual recognition principles under freedom of movement, they cannot do so without recognising equivalent schemes and should accept alternative means of proof.<sup>193</sup> Also this form of interaction, therefore, results in an allocation of regulatory effects between public and private authority, where the label is used to enforce (and on occasions possibly even implement) the requirements set forth by contracting authorities.

The Directive contributes to a legal environment which positively influences the uptake of VSS by expressly permitting contracting authorities to require the presence of a label as a requirement in public procurements.<sup>194</sup> Labels acquire quite a substantial role; a contracting authority can prescribe the use of a label, without specifying any further product characteristics or technical specifications. A great deal of trust is put in the VSS to certify and identify products which actually conform to the expectations of the contracting authority. For this reason, those schemes that contracting authorities are permitted to employ are expected to respect good governance principles. At the same time, the rule-making authority of the schemes chosen is enhanced.<sup>195</sup> The label requirements shall be based on objectively verifiable<sup>196</sup> and non-discriminatory criteria; standard-setting occurs by means of an open and transparent procedure which is inclusive of all relevant stakeholders; labels are accessible without discrimination to all interested parties; and the standards are set by a third body, over which the economic actor applying for certification does not exercise decisive influence.<sup>197</sup> Such requirements are mostly procedural, and seem to

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<sup>192</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. L 94/65, Art. 42 and Annex VII.

<sup>193</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. L 94/65, Art. 43 - which seems to explicitly overrule previous case law such as C-360/10 *Commission v Netherlands* [2012] ECR I-0000, para. 112, where it was held that the contracting authorities were free to choose to refer in the procurements to the requirements of an eco-label, but not to refer to the eco-label as such.

<sup>194</sup> Caranta, R. (2016) 'Labels as enablers of sustainable public procurement'. In Sjäffjell, B., Wiesbrock, A. (Eds.) *Sustainable public procurement under EU law. New perspective on the State as stakeholder*. Cambridge: Cambridge University Press, 109.

<sup>195</sup> Gulbrandsen, L.H. (2014) Dynamic governance interactions: Evolutionary effects of state responses to non-state certification programs. *Regulation and Governance* 8(1), 82.

<sup>196</sup> The 'objectively verifiable' criteria takes into account the finding of the CJEU in *Concordia Bus*. See C-513/99 *Concordia Bus Finland Oy Ab Helsingin kaupunki, HKL-Bussiliikenne* [1999] ECR I-7213, para. 66.

<sup>197</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. L 94/65. Art. 43.

highlight a correlation between input and output legitimacy which does not necessarily hold true in reality.

The Directive, however, limits the capacity of the contacting authorities to promote sustainability practices in the form of company CSRs. Among the possible social and environmental requirements that contacting authorities can impose, the employment of a general corporate policy is explicitly prohibited.<sup>198</sup> The Directive then must prevent such CSR requirements from entering 'through the backdoor' by means of the labels that contracting authorities may require, and through which many - as discussed - address broader CSR practices within the entity certified by means of management standards. It is thus provided that labels whose requirements do not exclusively refer to the permissible form of technical specifications, but also address, for example, corporate CSR practices, cannot be employed in public procurements. Contracting authorities can still define the specifications by reference to those of the label, but cannot require the label as such, as certification would necessarily impose on the entity compliance with CSR standards.<sup>199</sup> Therefore, the Directive permits a contracting authority to directly employ only a restricted group of VSS, which excludes schemes containing management standards, constituting a sizeable share of VSS.

The reach of basic procedural requirements could seem limited in practice. Nonetheless, they played an important role in improving PEFC's governance structure, which was skewed in favour of business actors. After a scheme was not approved by the Central Point of Expertise on Timber, the body in charge of assessing certification schemes and advising the UK government on timber procurement, PEFC revised and improved its standard-setting procedures to be more inclusive and transparent. It has been observed that, in sectors where VSS compete, public procurement requirements put considerable pressure on the poorly performing programs.<sup>200</sup> Also the effects on certification uptake are notable, especially in certain sectors such as timber products. Evidence shows that, in order to simplify and standardise supply chains, timber suppliers switched to certified products for all customers, and not just the public-sector ones.<sup>201</sup>

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<sup>198</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. L 94/65, Recital 104. This is in line with the Opinion of the Advocate General Kokott in C-360/10 *Commission v Netherlands* [2012] ECR I-0000, para. 88.

<sup>199</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. L 94/65, Art. 43.

<sup>200</sup> Gulbrandsen, L.H. (2014) *Supra* at 195, 83 and 86.

<sup>201</sup> Brack D. (2010) Controlling illegal logging: Consumer-country measures. Chatham House Briefing Paper EERG IL BP 2010/01, 10, 11. Available at <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy%2C%20Environment%20and%20Development/bp0110brack.pdf>. This, generally, confirms the idea that companies operating globally prefer a single regulatory regime, even if it is rather stringent, than laxer but divergent ones. See Bhagwati, J. (2004) *In defence of globalisation*. Oxford: Oxford University Press, 150.

Public procurements can therefore be considered as an effective form of facilitation with multi-faceted effects. The Directive provides a favourable regulatory frame for VSS to be employed by contracting authorities, thereby stimulating their operations. It further sets meta-rules that schemes must comply with in order to be employed by public authority. As no formal review is performed by contracting authorities, nor are such meta-rules imposed in a binding fashion, the influence exercised on VSS is only indirect. Evidence has shown that this dynamic has been effective in starting a 'race to the top' among competing VSS regimes to meet the requirements. Strengthening procedural requirements and, arguably, also substantive outcomes has the expected effect of positively impacting on consumer trust. Private regimes may still diverge and pursue different objectives, without lowering barrier effects.

### *3.2.2.2 The Commission Communication on best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs*

The 2010 Commission Communication on best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs<sup>202</sup> also constitutes a form of facilitation consisting of meta-rules. This form of interaction is, however, 'softer' than the public procurement Directive. The Communication acknowledges the contribution of private standards in the functioning of certain agricultural markets, but also suggests a number of best practices for voluntary certification schemes for agricultural products and foodstuff, which represent a considerable group in the domain of VSS. The Communication is therefore a rather explicit means to influence the procedures of VSS bodies, however in a 'soft' manner. Scheme holders can voluntarily adopt the Commission guidelines, which have no legal value nor do they certify the validity and effectiveness of the schemes in compliance.

The requirements are quite detailed and include transparency and non-discrimination in the standard-setting and management; involvement of all stakeholders especially those from where the scheme applies; sound scientific bases, where required; continuous development; and stability in the standards in order to avoid adaptation costs. Transparency requirements are much more detailed than under the RED, with precise indications concerning the objective of the schemes and the claims associated thereto; information available to the broader public inclusive of translations; the publication of scientific evidence backing the scheme's claims; a clear explanation of the extent to which the scheme goes beyond the relevant legal requirements. The Communication concludes by recommending impartiality in auditing and certification as well as partial or complete mutual recognition or acceptance.

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<sup>202</sup> Commission Communication (2010) EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs C 341/04.

The Communication, it should be stressed again, is entirely voluntary. It merely constitutes the view of the Commission following a public consultation to improve the functioning of the schemes, in the acknowledgment that legislative action was not needed at that stage to correct the shortcomings of certification schemes. If followed and implemented by schemes holders it can have a positive effect on consumer perception of the schemes. Nevertheless, it is surprising that less detailed and less stringent requirements are spelled out for recognised VSS for the purpose of biofuel certification, which seems to be falling as well under the scope of the 2010 Communication on best practice guidelines.

### *3.2.2.3 The forest law enforcement, governance and trade (FLEGT) scheme*

The forest law enforcement, governance and trade (FLEGT) scheme creates an environment which is favourable to VSS operations, by establishing a 'soft' mechanism for coordination in the presence of minimal meta-rules. The regime established by the EU actively fights illegal logging by ensuring that only lawful timber enters the EU. The FLEGT Regulation<sup>203</sup> establishes detailed procedures for the verification of whether timber imported in the EU complies with all legislative requirements of the country of origin, and puts the burden on traders bringing timber on the EU market to prove that timber is lawfully harvested. The Regulation permits traders to employ third-party private certificatory schemes to demonstrate compliance to the extent that, among their standards, they certify that timber products are in accordance with all applicable legislation of their country of origin. FSC and PEFC schemes would fall in that group. No additional requisites for VSS are mentioned, apart from descriptive criteria about the features of the schemes which can be employed, such as to be publicly available, to employ third-party certification, to employ a chain-of-custody approach, and to identify timber gathered in breach of applicable legislation.<sup>204</sup> No reference is made to the substance or the procedures of the scheme.

### *3.2.2.4 The Directive on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings*

The Directive on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings also contains provisions on non-financial reporting. Large undertakings with more than 500 employees are required to report every year that they adhere to all rules applicable to the undertaking's development, performance, position and impact of its activity, relating to

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<sup>203</sup> Regulation (EU) No 995/2010 of the European Parliament and the Council of 11 May 2009 laying down the obligations of operators who place timber and timber products on the market. L 295/13.

<sup>204</sup> Commission implementing regulation (EU) No 607/2012 of 6 July 2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations as provided for in Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market. L 177/16, Art. 4.

environmental, social and employee issues, respect for human rights, anti-corruption and bribery. In implementing the Directive, Member States must provide that companies may rely on national, EU-wide or international frameworks.<sup>205</sup> Among such tools, VSS are a possible means through which companies can report about their impact on sustainability matters.

The Directive expressly mentions as possible options the EU Eco-Management and Audit Scheme (EMAS), a EU management standard which builds on ISO 14000,<sup>206</sup> reporting initiatives such as the Global Compact,<sup>207</sup> and even ISO 26000, ISO's highly criticised<sup>208</sup> foray in the domain of sustainability standards. By making non-financial reporting mandatory for many companies, the Directive arguably generates increased demand for VSS and reporting instruments in order to communicate to consumers about a company's performance. However, it does not provide for any specific requirement concerning the schemes with which companies can resort. The instruments listed by means of example in the Directive are actually rather diverse.

### 3.2.2.5 *The unfair commercial practices Directive*

Among the forms of interaction which generate only indirect effects on VSS, the requirements imposed by EU discipline of unfair commercial practices are worthy of discussion. Although the unfair commercial practices Directive<sup>209</sup> does not make any specific reference to social and environmental product claims, two Commission's Guidance documents have elaborated on the concept of environmental claims in a manner which may have an indirect impact on the substance of at least environmental VSS. The general features of environmental claims, based on Articles 6, 7 and 12 of the Directive, are that they have to be clear, accurate, unambiguous, and must be capable of being substantiated by traders. This means that they should truthfully and accurately represent the scale of the environmental benefit.<sup>210</sup>

<sup>205</sup> Directive 2013/34/EU of the European Parliament and the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings. L 182/13, Art. 19a, as amended by Directive 2014/95/EU of the European Parliament and the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

<sup>206</sup> Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS). L 342 09.

<sup>207</sup> See <https://www.unglobalcompact.org>

<sup>208</sup> Bijlmakers, S., van Calster, G. (2015) 'You'd be surprised how much it costs to look this cheap! A case study of ISO 26000 on social responsibility.' In Delimatsis, P. (Ed.) *The law, economics and politics of international standardisation*. Cambridge, Cambridge University Press, 275-309.

<sup>209</sup> Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market. L 149/22.

<sup>210</sup> European Commission staff working document of 25 May 2016 on guidance on the implementation/application of Directive 2005/29 EC on unfair commercial practices SWD(2016)163 final, 107.

Generally, the current guidance openly favours third-party certification over self-declarations as a means to make environmental claims. However, no additional conditions are laid down to identify which third party schemes are trustworthy and effective for that purpose, although it seems that public schemes are considered as reputable.<sup>211</sup> In a previous version of the Guidance document, issue was taken with certification schemes giving the impression of environmental benefits, whereas such a scheme in fact only verifies compliance with regulatory requirements.<sup>212</sup> Schemes that 'hold the bar' are therefore considered as problematic from the perspective of consumer protection. Such schemes may give the false impression to consumers that products possess specific features, whereas they are merely in compliance with baseline requirements. Generally, by imposing responsibility on traders, the Directive may indirectly have an impact on the acceptance of certain VSS. However, this would occur only in the event that an allegation of unfair commercial practices is made as a result of the employment of a scheme which is ineffective, or whose effects cannot be substantiated. The 'threat' of consumer protection litigation may nonetheless spur producers to opt out from schemes which are ineffective or whose effects are particularly difficult to assess.

### 3.3 EU support of VSS

Cases of support of VSS identify instances where a public authority expresses an extent of affiliation with a scheme. The domain of 'fair trade' has been worthy of two Commission Communications highlighting its important contribution to sustainable development.<sup>213</sup> The latest Communication highlights the criteria normally employed by fair trade schemes, but takes an explicit hands-off approach by claiming EU institutions should not play a role in regulating or even ranking private fair trade schemes. It however describes that, ideally, criteria such as non-discrimination, independent monitoring and offering consumers objective information about the impact on producers' livelihoods of fair trade schemes can have a positive effect on schemes' operation. The Communication can be seen as a form of support, as the Commission commits to provide financing to Fair Trade and other fair trade VSS, through development cooperation instruments and NGO's co-financing. Explicit financial support to fair trade VSS is peculiar, as no other VSS receive EU fundings. Coherently with the hands-off Commission approach, no conditions are imposed on

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<sup>211</sup> European Commission staff working document of 25 May 2016 on guidance on the implementation/application of Directive 2005/29 EC on unfair commercial practices SWD(2016)163 final, 109-111; See also the non legally binding advice of the Multi-stakeholder Group on Environmental Claims available at <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail&groupID=3327>, especially at 37.

<sup>212</sup> European Commission staff working document of 3 December 2009 on guidance on the implementation/application of Directive 2005/29 EC on unfair commercial practices SEC(2009) 1666, 42.

<sup>213</sup> Commission Communication COM(2009)215 final. Contributing to sustainable development: The role of Fair Trade and non-governmental trade-related sustainability assurance schemes; Commission Communication COM(1999) 619 final on 'fair trade'.

VSS which benefit from EU funding. Support to VSS by means of the provisions of funding, at least in the case of fair trade, does not therefore result in any form of coordination, influence or review.

### 3.4 Use of VSS by Member States

The possible use of VSS by Member States is straightjacketed by competences constraints deriving from the Treaties. The Treaties give a large margin of manoeuvre for Member States to take measures in the domain of working conditions to protect workers' health and safety and environmental protection.<sup>214</sup> However, this margin of action is diminished by the broad scope of Art. 114 TFEU as a legal basis - which would arguably interfere with Member State measures involving the labelling of products, such as many VSS, and/or specifying process and production methods of goods. Also in the presence of harmonising measures, Member States can still adopt or maintain national measures if justifiable under the grounds in Art. 36 TFEU and in an area not covered by harmonisation. Member States can also take measures in a harmonised area in order to protect the environment or the working environment. However, an additional requirement of producing new scientific evidence to support their measures, and the requisite that the situation must be specific to a Member State, complicate the justification for introducing or maintaining different and more stringent national rules. As a consequence, Member State's use of a VSS as a means to demonstrate compliance with legal requirements (in the guise of the RED Directive) can only take place if the purpose is to demonstrate compliance with EU requirements (i.e. in the presence of harmonising measures under Art. 114 TFEU), or national requirements in domains not harmonised by EU rules.

It is useful to draw a parallel with technical standards, which also can be employed to demonstrate compliance with EU and national requirements. As a starting point, in the presence of harmonised rules for products already in compliance with EU standards, Member States cannot require additional compliance with other private standards in the same domain.<sup>215</sup> Further, the conferral of a presumption of conformity only to products certified by a national standardising body has the effect of dissuading producers from marketing a product in a Member State and therefore constitutes a breach of Art. 34 TFEU. The Court held that to simply *encourage* economic operators to obtain marks of conformity for products lawfully marketable in another Member State contravenes Art. 34 TFEU.<sup>216</sup> Even just to recommend the uptake of a specific VSS in a harmonised domain would therefore be rather problematic under this line of cases.

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<sup>214</sup> Art. 153 TFEU confers on the EU only supporting, or residual, competence in the area of workers health and safety; Art. 193 TFEU allows Members to take environmental measures more stringent than those agreed upon under Art. 192 TFEU.

<sup>215</sup> C-100/13 *Commission v Germany (Ü Mark)* [2014] ECR I-0000, para. 63.

<sup>216</sup> C-227/06 *Commission v Belgium* [2008] ECR I-46, para. 69. See also Schepel, H. (2013) *Supra* at 91, 187.

In light of this previous Court's finding, and as discussed in Section 2.2.3, it is likely that the CJEU in *Fra.Bo* understood the contested German legislation to be itself in breach of Art. 34 TFEU as it provided legal compliance upon certification under a national standard. The possibility to employ VSS to assess compliance with legislation are also rather limited for Member States. The employment of private standards and VSS to verify compliance with regulatory requirements is circumscribed for cases where products would not be lawfully marketable in the lack of an assessment - for example in the presence of a hypothetical national or EU requirement that the marketing of coffee is limited to coffee sold by producers who have been paid a fair price.

Under this - admittedly rather exceptional - scenario, the VSS would be *directly* covered by Art. 34 TFEU if the body holds a *de facto* gate-keeping power to the market of the Member State. The turning point in *Fra.bo* was the presumption of conformity given by German legislation to products in compliance with DVGW standards, coupled with a practical lack of alternative. This seems to suggest that whenever a Member State confers upon compliance with a VSS - for example FairTrade - a presumption of conformity with a 'fair coffee' requirement, the Court will look at the effective voluntariness of VSS uptake. If alternative means for compliance effectively exist, i.e. other VSS, such as for example UTZ can be employed or other procedures such as a self-declaration by traders, then the risk is lower that a VSS body would hold such a *de facto* market access gate-keeping power.

Conversely, in circumstances under which compliance with one recognised VSS is the only way to meet the legislative requirements, *de jure* or *de facto* - because intense consumer preference for products certified by a specific scheme, such as FairTrade - then review under Art. 34 would be triggered along the lines of the *Fra.bo* case. In this case, the situation would not differ from that under product rules, as the requirement of paying a fair price becomes itself a product rule. A body required to assess compliance could also be directly mandated to apply the principle of mutual recognition, i.e. to consider substantially comparable forms of certification as equivalent of the certification it provides.

To sum up, use of VSS by a Member State is limited by competence constraints of EU law. VSS can be used only if products are not lawfully marketable in the absence of a certification process. This situation may occur if EU or national legislation in a non-harmonised domain provide for certain specific sustainability requirements with which products must comply. A *de facto* gate-keeping power possessed by a VSS body entrusted with certification is likely to result in the application of Art. 34 TFEU and the principle of mutual recognition. A VSS may be required to justify restrictions to market access and, possibly, indirect forms of discrimination in its standards. Conversely, to allow for different schemes to certify products would be less problematic under Art. 34

TFEU. Arguably, the trade-barrier effects are lower when producers can choose which scheme to employ. Indeed, also in this hypothetical scenario, requirements can be imposed by the Member State on the VSS employed, with the objective to ratchet up their procedural and substantive standards and to ensure only trustworthy schemes are employed.

Also at the Member State level, use of VSS results in an extent of legal review of private standards. Different from cases of EU use of VSS, here Art. 34 TFEU is always applicable on the VSS itself, but arguably only in cases where the national legislator requires compliance with one VSS in order to market products on its territory, and which ends up having a gate-keeping power on the Member State's market. However exceptional this situation may be, it would anyway result in a great deal of substantive review over a private body. Which standards of review would the Court employ is a question left open from *Fra.bo*, where the Court simply held that the activity of a private standard-setters hinder market access, and did not proceed in its analysis. As suggested in Section 2.3.3, also in this case, a light-touch review may be appropriate.

## 4. Conclusion

A catching-up process with private regulation and VSS is very noticeable under EU law. At the general level, the practice of the CJEU expands the application of certain fundamental freedoms to private bodies and subjects them to the principles of non-discrimination and proportionality and the prohibition of restricting market access. More specifically, a host of EU regulatory instruments have the effect of coordinating and influencing VSS and harness their potential for the extraterritorial regulation of certain phenomena, or as a means to demonstrate regulatory compliance. Both instances well illustrate how public authorities claim, if partially, their influence over transnational private regulation and exercise supervision over the provision of global public goods in the form of transnational regulation. Both instances also offer, at varying extents, solutions to address and remedy market barrier effects and consumer confusion generated by VSS. This Chapter shows that the current underdevelopment of case-law under Art. 34 TFEU seems to point towards a lack of direct horizontal effects which would exclude its application to VSS. From a more normative vantage point, however, Art. 34 TFEU could offer a (limited) margin of manoeuvre to be applicable to VSS. Conversely, certain EU regulatory instruments are already capable of coordinating and influencing, albeit at varying extents, VSS' activities. The above suggests that scheme holders should ensure compliance with the mostly procedural requirements laid down therein, in order to take advantage from such interactions with EU authorities.

Section 2 attempts to answer the vexed question of the horizontal application of the Treaties' freedoms and of Art. 34 TFEU in particular. A superficial review of case-law

seems to indicate that VSS are excluded from the scope of Art. 34 TFEU as they cannot be considered as public measures - not even under the expansive tests the CJEU has at times made use of. The employment of Art. 34 TFEU as a tool to address VSS appears therefore precluded. A deeper and more systemic approach reveals, instead, that the outcome may not be so clear-cut. A framework which explains the Treaty freedoms as protecting from third-party interference in contractual preferences shows that sectoral VSS and multi-stakeholder VSS which are *de facto* non voluntary are possibly covered by Art. 34 TFEU. In line with this approach, a more normative framework hinging on whether private bodies can obstruct market access in a manner similar to Member States shows that company, sectoral and multi-stakeholder VSS are possibly covered by Art. 34 TFEU - provided that they constitute essential condition to enter a market. The two frameworks, one originating in literature, the other in the doctrinal reasoning of Advocate General Maduro, overlap to a great extent, as a VSS which is *de facto* mandatory is likely to be an essential condition for market access. It is further unlikely that company VSS can acquire a market gate-keeping role in the absence of Member State's empowerment or delegation.

The application of Art. 34 TFEU to private standards, especially quality standards which design rules more stringent than those applicable, is harbinger of thorny issues. This Chapter therefore puts forward a normative substantive test and a framework for justification to be employed by VSS. A transposition of the market access test as it is, is likely to result in VSS being *prima facie* in breach of Art. 34 TFEU. This Chapter submits that a different substantive test looking at variations in producer welfare would better gauge the pro-trade and pro-integration effects on the one hand, and the anti-trade and anti-integration effects of private standards on the other. The same would also hold true for VSS. An economic test would be a more suitable device to weed out restrictive, coercively imposed or even protectionist VSS from legitimate ones. Courts, and the CJEU is no exception, are however not well positioned to delve too deeply into economic analysis. Following a 'traditional' approach to market access, VSS which fall under the scope of Art. 34 TFEU are therefore *prima facie* in breach if even just a producer is *de facto* completely prevented from marketing in a given territory. Admittedly, this is a rather extreme scenario. It could be determined for multi-stakeholder schemes by very strong consumer preference, for sectoral schemes by mandatory compliance with a set of standards within an organisation's self-regulation prerogatives and for company schemes by the presence of monopolist-like market shares.

If private autonomy is to be ensured, a margin of manoeuvre must be granted to VSS covered by the Treaty provisions. If flexibility cannot be granted at the stage of the substantive application of Art. 34, as case-law seems to suggest, then it has to be accommodated at the justification stage. However this generates legal uncertainty and unpredictability. Multi-stakeholder schemes in the possession of a collective governing

role functionally aligned with that of public authorities should be permitted to resort to public policy justificatory grounds. They should also be excluded from a mutual recognition obligation as it is applied to public measures not to hamper experimentation in regulatory approaches. For sectoral and company schemes displaying a prominent economic objective, the fundamental right to conduct a business would be applicable. Sectoral VSS showing notable similarities with self-regulation may be justifiable under the imperative requirement to ensure the proper functioning of a sector, which could arguably include also the need to set certain quality requirements for products. The assessment of proportionality would then appraise a restriction to market access against either a public policy ground, or a 'private' justificatory ground in the form of the fundamental right to conduct a business. In both cases, the assessment is unpredictable and further complicated by the fact that VSS go beyond the requirements which would normally be applicable. One may even conceive of a very light-touch review which simply considers the procedural requirements under which the body at hand operates.

This normative scenario results in limited consequences for VSS. The application of Art. 34 TFEU to private parties is likely to imply several thresholds: a personal threshold (i.e. a *de facto* mandatory character, or the indispensability of compliance of a VSS to market), a substantive threshold (i.e. the impossibility to market a product), and a justification threshold (which appraises the restriction against the objective of the scheme or a fundamental right). These three thresholds considerably restrict the number of VSS which are covered by the personal scope, the substantive scope and which, finally, cannot be saved by derogations. After all these steps, which types of VSS would be considered as in breach of Art. 34 TFEU? Not many.

Arguably, direct discrimination cannot be tolerated for multi-stakeholder VSS which are popular and sought-after by consumers. To include also indirect discrimination may seem logical, but the important caveat is that this would have the effect of turning into a *prima facie* breach of internal market rules environmental schemes addressing emissions which account also for transportation emissions - provided, of course, that the personal threshold has been met. This may not necessarily be a bad outcome, given the often misleading character of those claims. To cover also cases of non-discriminatory restrictions to market access would go against the very concept of quality standards. Since a fundamental freedom cannot consist of a separated non-discrimination right and market access right, then restrictions arising from a multi-stakeholder VSS are *prima facie* infringements, but justifiable. However, a restriction would be deemed to occur only when a producer cannot market *at all* its products in a given Member State. For sectoral and company schemes, the crucial threshold is the personal one. It is rather unlikely that, under the current market structure in the EU, any company possesses an economic power such as to prevent access to the market in the same manner as the State does. It may be more likely to occur for sectoral

schemes. Also in such case, direct and indirect discrimination are less likely to be condoned, whereas restrictions should be justifiable under contractual freedom.

The above describes a situation under which very few VSS can result in breach of Art. 34 TFEU, which possibly include only schemes essential to enter a market with a more or less explicit protectionist effect. To link Court review to the indispensability of a scheme seems reasonable and appropriate to ensure private autonomy. Nevertheless, these high thresholds would have the effect that the majority of VSS would still operate entirely below the radar of Court review. Even a normative test designed to turn Art. 34 TFEU into a horizontally applicable provisions cannot tackle successfully trade barrier effects and consumer confusion generated by VSS by means of legal review. It would, at best, address discrimination by private schemes which are indispensable for market access.

Section 3 studies a host of EU secondary rules which influence VSS and the extent of coordination, influence and review that such measures exercise on the schemes. The specificities of the measure in question determine the actual extent of coordination, influence and/or review of VSS. Certain closer forms of interaction, such as EU use of VSS, result both in: coordination of regulatory effects; influence on the procedures and the substance of the schemes which are recognised; control by the Commission of whether requirements are complied with; and even Court review of the VSS body's compliance with good administration principles. Less structured interactions which do not involve recognition of a VSS can also generate several consequences for the standards at hand. Facilitation arrangements can coordinate regulatory effects when schemes are used, for example, to demonstrate compliance with contracting authorities' specifications under the public procurement Directives, or to verify compliance with the rules applicable in the country of origin of timber products under the FLEGT scheme. Facilitations can either affect substance, such as harmonisation resulting from the organic products Regulation, or procedures, such as the meta-rules of the public procurement Directive. Review and control is limited to the selection of a VSS as a possible tool to fulfil the objective of the measure at issue. This occurs in the public procurement Directive, where the onus of selecting schemes which can be employed falls on contracting authorities.

It seems that at least in some specific domains EU public authorities have already recognised the desirability of the employment of VSS. The legal structures of the specific interactions here considered also seem to provide an opportunity to ratchet up procedures and substance of the schemes, and ultimately improving their effectiveness while minimising their negative consequences. This means that EU regulators may find it desirable to extend some of the features of such interactions to other schemes and other domains. It should nonetheless be done properly. Firstly and very importantly, EU regulators should lay down detailed requirements for recognition,

on which they should then exercise real and accurate control. This would protect the regime from legal challenges, and ensure that the schemes recognised are actually suitable for the purpose of their employment.

The requirements imposed should be closely aligned to international law provisions, in particular the TBT Code of Good Conduct for private standards which will be addressed in Chapter 5 and 6. None of the legal instruments here reviewed provide that the schemes recognised must be no less trade restrictive than necessary; the RED does not even provide that the schemes recognised must not be discriminatory. Both discrimination and unnecessary trade-restrictiveness, as it will be seen, are the cornerstone of the TBT Code, the compliance with which by private standards must be ensured by WTO Members. Regrettably, certain EU regulatory measures fail altogether to specify requirements for VSS. This is the case of the non-financial reporting Directive. Given the diversity of the schemes which companies can employ, credible reporting requires credible means employed for that purpose. Further, the obligations deriving from WTO law may require a closer control on private standards with which legally structured relations are established.

Harmonisation, especially by setting baseline requirements, can in theory be a powerful tool to diminish consumer confusion and trade barrier effects of VSS. It may however come at the cost of hindering experimentation of regulatory approaches. Regulators should in any case consider whether areas other than organic products and 'green' product claims are worthy of harmonisation. The Commission has recently done so in the domain of sustainable fishery standards.<sup>217</sup> Public procurements are a powerful tool to increase the employment of VSS and to successfully influence their requirements, as demonstrated by the case of forestry certification. It appears desirable that contracting authorities are offered the possibility to employ a larger number of VSS, including also those addressing management practices in the domain of sustainability which are, as of now, precluded from being employed. Generally, the employment of VSS in more legal instruments and the resulting allocation of regulatory effects could be fruitful. Schemes along the lines of FLEGT could be extended to different supply chains exposed to the risk of illegal gathering and harvesting, so that other ranges of private schemes could be employed to demonstrate compliance. Possibly, EU legislators could even consider forms of employment of VSS in its trade agreements to verify compliance with their social and environmental chapters.

At the Member State level, use of VSS is confronted with the competence constraints of EU law. Therefore, VSS can only be employed in the limited case of demonstrating compliance with products which would not be marketable without certification under

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<sup>217</sup> Commission Report COM(2016)263 final on options for an EU eco-label scheme for fishery and aquaculture products.

EU or Member States' requirements in an area not subject to harmonisation. The situation is, however, theoretical, as no such cases of Member State use of a VSS could be found. Coordination would arise as a consequence of the scheme's employment as a means to verify compliance. Influence would be possible if the Member State sets requirements for recognition of the standards. Notably, review by the CJEU could be rather intrusive - arguably comparable to that which would be exercised towards the measure of a Member State - in case one single scheme is selected and it therefore ends up exercising market gate-keeping prerogatives.

From the perspective of VSS, the regulatory instruments described in Section 3 show the importance of certain procedural requirements in the standard-setting if the scheme is to benefit from the interaction with public authorities. Each measure may lay down specific substantive requirements for schemes; nevertheless, there is a common preference for procedural features of good administration, however generally framed. In the first place, the auditing should be performed by an independent third-party. Transparency in the standard-setting and its openness to a host of different interest are of paramount importance. There are, however, different stages of the standard-setting which should be open and over which transparent access to information should be ensured from the very early stages of agenda-setting to the implementation of the scheme. For the operationalisation of this principle, standard-setters could comply with meta-rules such as the ISEAL Code. At any stage, standard-setting should not be discriminatory, nor open to regulatory capture by vested interests. A common thread to many regulatory instruments is the need to ensure that the schemes employed are reliable and trustworthy. It requires that the claims made by VSS are objectively verifiable, and should not give the impression to bring about certain effects whereas, in fact, they do not.

All in all, this Chapter shows that VSS do not operate in a legal vacuum under certain provisions of EU law. Certain regulatory measures, under specific conditions, can be suitable and effective to 'regulate' VSS. Conversely, the application of Art. 34 is undermined by structural problems. These include the role of fundamental rights in affecting its scope, and a market access test which focuses on the existence of a trade barrier as the only effect to trigger a *prima facie* breach, and does not permit an appraisal of other effects until the justification stage. Even at that stage, positive effects, for example environmental benefits, are accounted for rather loosely through an arguably deferential proportionality test. Further, Art. 34 TFEU does not allow overall pro-trade effects from being considered at all at any stage of the legal analysis. Although it has the advantage of being more easily enforceable by private applicants than competition rules, Art. 34 TFEU thus constitutes a rather blunt device which prevents a comprehensive evaluation of the effects of a scheme. The next Chapter turns to the analysis of whether EU competition law's legal tool box could be more suitable in assessing the combination of different effects of a scheme, which include

pro-trade and anti-trade consequences, as well as a scheme's contribution to its objective.