Guarding the guardians – examination of the EU rules limiting the power of market gatekeepers

Re-examining the Foundations of EU Law

Master's thesis

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EU pursues its objectives though a barrier free single market, where a free movement of goods, services, capital, and persons prevails, and environment guaranteeing fair and open competition among businesses is promoted. Any party – gatekeeper - capable of hindering access to markets needs to be guided by rules preventing this.

The key rules guiding the gatekeepers consist of free movement articles and competition articles in the Treaty on the Functioning of the European Union (TFEU). The provisions of these articles are enhanced with a high number of lower-level rules and regulations, and principles developed by the European Court of Justice (ECJ) in its case law.

The purpose of this work is to find the key rules and principles guiding the gatekeepers capable of hindering access to the EU markets, see who the relevant gatekeepers in the current market circumstances are, and to examine the coherence and coverage of the set of rules guiding these gatekeepers. The research method used is legal dogmatic.

The coherence and coverage of the set of relevant rules is examined by first going through the key rules and relevant court cases providing further guidance per area (the key rules are collected on tables), and by then gradually constructing the big picture out of the reviewed details. The gatekeepers in the scope of the free movement rules and competition rules are identified. Also, new type of gatekeepers that have emerged along with new business models related to a platform economy, and rules to guide these (Digital Markets Act, DMA) are incorporated into the consideration.

The systematic comparison of the rules and the logic that the Court has used when applying the rules reveals some points of vagueness. Also, the different logic for applying the rules in different areas, and possible overlaps of the legal areas raise questions. Whether a horizontal application can come to question regarding different free movement rules is relevant to finding a correct kind of logic for the application of the rules of different areas. Traditionally, the Member States have been the addressees of the free movement rules, and undertaking the addressees of the competition rules, but during the last few decades the court has applied the free movement laws also to Labour Unions, Sports Organizations, and even private companies. Now the question belongs: are there limitations to including private gatekeepers in the scope of the free movement laws, or can both types of rules be applied also to private parties? If yes, how is the logic for deciding which rules to prevail? The logic of applying the rules is different per area: for example, on the side of the competition laws the market power is evaluated when making decisions on the applicability, while on the side of free movement laws the qualities, like size, of the gatekeepers has had no relevance on application.

To answer the above question, and to clarify the application of the rules in different practical cases, a simplified overall objective-driven model was introduced in the work. It is proposed that the horizontal application of the free movement rules is allowed on the *effect utile* basis when relevant – like the case seems to be now. However, in addition to for example the Digital Markets Act, also the competition rules are considered *lex specialis* and thus, given precedence over the free movement rules. The free movement rules are to be used only in cases where the application of the competition rules does not come to question. As the evaluation, regardless of different sub objectives of the areas, is finally aiming at the same goal, the welfare of the peoples of the EU, the outcome of the judgement of the case should nevertheless be similar regardless of the rules applied, eventually.

Keywords: Free movement law, Competition law, Digital Markets Act, gatekeeper, the EU internal market, horizontal application.

Pro gradu -tutkielma

Oppiaine: EU-oikeus, kilpailuoikeus
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Euroopan unioni pyrkii tavoitteisiinsa luomalla esteettömät sisämarkkinat, joilla vallitsee tavaroiden, palvelujen, pääoman ja henkilöiden vapaa liikkuvuus. Yritysten välistä reilua ja avointa kilpailua pyritään edistämään. Jokaisen osapuolen – portinvartijan – joka kykenee estämään markkinoille pääsyn, on noudatettava tätä estäviä sääntöjä. Portinvartijoita ohjaavat keskeiset säännöt koostuvat Euroopan unionin toiminnasta tehdyn sopimuksen (SEUT) vapaata liikkuvuutta ja kilpailua koskevista artikloista. Näiden artiklojen määräyksiä tehostetaan lukuisilla alemman tason säännöksillä ja määräyksillä sekä periaatteilla, jotka Euroopan yhteisöjen tuomioistuin on kehittänyt oikeuskäytännössään.

Tämän työn tarkoituksena on löytää keskeiset säännöt ja periaatteet, joilla ohjataan portinvartijoita, jotka voisivat estää pääsyn EU:n markkinoille, selvittää, ketkä ovat relevantteja portinvartijoita nykyisissä markkinaolosuhteissa, sekä tutkia näitä tahoja ohjaavien sääntöjen johdonmukaisuutta ja kattavuutta. Tässä hyödynnetään oikeusdogmaattista tutkimusmenetelmää.

Sääntöjen muodostaman kokonaisuuden johdonmukaisuutta ja kattavuutta tarkastellaan käymällä ensin alueittain läpi keskeiset säännöt ja tärkeimmät näihin lisäohjausta antavat oikeustapaukset (säännöt ja periaatteet koostetaan taulukoksi). Tämän jälkeen rakennetaan vähitellen kokonaiskuva tarkastelun alla olleista yksityiskotaisista säännöistä. Vapaan liikkuvuuden sääntöjen ja kilpailusääntöjen soveltamisalaan kuuluvat toimijat yksilöidään. Tarkasteluun otetaan mukaan myös alustatalouteen liittyvien uusien liiketoimintamallien myötä syntyneet uudentyyppiset portinvartijat ja näitä ohjaavat säännöt (digimarkkinasäädös - Digital Markets Act, DMA).

Sääntöjen systemaattinen vertailu ja tuomioistuimen sääntöjen soveltamisessa käyttämä logiikka paljastavat joitakin epämääräisyyksiä. Myös oikeusalueittain vaihteleva logiikka sääntöjen soveltamisessa ja mahdolliset päällekkäisyydet soveltamisaloissa herättävät kysymyksiä. Se, voiko vapaan liikkuvuuden sääntöjä soveltaa horisontaalisuhteissa, on olennaista etsittäessä toimivaa logiikkaa eri alojen sääntöjen soveltamiselle. Perinteisesti vapaan liikkuvuuden sääntöjen kohteena ovat olleet jäsenvaltiot ja kilpailusääntöjen kohteena yritykset, mutta viime vuosikymmeninä tuomioistuin on soveltanut vapaan liikkuvuuden lakeja myös ammattiliittoihin, urheilujärjestöihin ja jopa yksityisiin yrityksiin. Nyt kysymys kuuluukin: rajataanko vapaan liikkuvuuden sovellettavuutta horisontaalisuhteissa jotenkin, vai voidaanko molempia sääntötyyppejä soveltaa myös yksityisiin tahoihin? Jos voidaan, millaisella logiikalla päätetään mitä sääntöjä sovelletaan? Sääntöjen soveltamisen logiikka on erilainen eri alueilla: esimerkiksi kilpailulakien sovellettavuutta koskevia päätöksiä tehdessä arvioidaan mahdollisen portinvartijan markkinavoimaa, kun taas vapaan liikkuvuuden lakeja sovellettaessa portinvartijoiden ominaisuuksia, kuten kokoa, ei ole oikeustapauksissa näytetty huomioidun mitenkään.

Työssä esitellään yksinkertaistettu kokonaistavoitteeseen nojaava malli sääntöjen soveltamisen selkeyttämiseksi. Vapaan liikkuvuuden sääntöjen horisontaalista soveltamista ehdotetaan sallittavaksi *effect utile* periaatteen mukaisesti, tarvittaessa. Kuitenkin digimarkkinasäädöksen tyyppisten lakien lisäksi myös kilpailusääntöjä on pidettävä erityislakeina, jolloin ne tulevan sovellettavaksi ennen vapaan liikkuvuuden sääntöjä. Näitä puolestaan on tarkoitus käyttää ensisijaisesti vain niissä tapauksissa, joissa kilpailusääntöjen soveltaminen ei tule kyseeseen. Koska arviointi, riippumatta alueiden erilaisista alatavoitteista, tähtää lopulta samaan päämäärään, hyvinvointiin, pitäisi tuloksen olla kokonaistavoitteen kannalta joka tapauksessa samanlainen riippumatta sovelletuista säännöistä.

Avainsanat: vapaa liikkuvuus, kilpailuoikeus, digimarkkinasäädös, Digital Markets Act, DMA, portinvartija, EU:n sisämarkkinat, horisontaalinen soveltaminen.

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Case C-496/01 *Commission of the European Communities v French Republic* [2004] ECR I-02351.

Case C-319/02 *Petri Manninen* [2004], ECJ I-07477.

Case C-464/02 *Commission of the European Communities v Kingdom of Denmark* [2005] ECR I-07929.

Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2004] ECR II-04463.

Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-03601.

Joined Cases C-282/04 and C-283/04 *Commission of the European Communities v Kingdom of the Netherlands* [2006] ECR I-09141.

Case C-110/05 *Commission of the European Communities v Italian Republic* [2009] ECR I-156.

Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I – 4304.

Case 217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* [2006] ECR I-11987.

Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

Case C-345/05 *Commission of the European Communities v Portuguese Republic* [2006] ECR I-10633.

Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

Case E-2/06 *EFTA Surveillance Authority v. Norway* [2007] EFTA Ct. Rep. 164.

Case 155/06 *Tomra Systems ASA v Commission of the European Communities* [2010] ECR II-4361.

Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-01683.

Case C-443/06 *Erika Waltraud Ilse Hollmann v Fazenda Pública* [2007] ECJ I-08491

Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECR I-4863.

Case C-112/05 *Commission of the European Communities v Federal Republic of Germany* [2007] ECR I-08995.

Case C-171/08 *European Commission v Portuguese Republic* [2010] ECR I-06817.

Case C-280/08 *P Deutsche Telekom v Commission* [2010] ECR I-09555.

Case C-458/08 *European Commission v Portuguese Republic* [2010] ECR I-11599.

Case C-118/09 *Robert Koller* [2010] ECR I-13627.

Case T-286/09 *Intel Corp. v European Commission* [2014] EU:T:2014:547.

Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] EU:C:2012:172.

Case C-378/10 *VALE Építési kft* [2012] EU:C:2012:440.

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

Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* [2012] EU:C:2012:795.

Case C-544/11 *Helga Petersen and Peter Petersen v Finanzamt Ludwigshafen* [2013] EU:C:2013:124.

Case C-327/12 *Ministero dello Sviluppo economico v SOA Nazionale Costruttori* [2013] EU:C:2013:827.

Joined Cases C-58/13 and C-59/13 *Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerata* [2014] EU:C:2014:2088.

Case 23/14 *Post Danmark A/S v Konkurrencerådet* [2015] EU:C:2015:651.

Case C-345/14 *Maxima Latvija* [2015] EU:C:2015:784.

Case C-106/16 *Proceedings brought by Polbud - Wykonawstwo sp. z o.o.* [2017] EU:C:2017:804.

Case C-235/17 *Commission v Hungary (Usufruct Over Agricultural Land)* [1995] EU:C:2019:432.

List of Abbreviations

CSS	comparison-shopping services
DMA	Digital Markets Act
ECJ	European Court of Justice
GDPR	General Data Protection Regulation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
IT	Information Technology

1 Introduction

EU has traditionally pursued its economic and political objectives through a common target: economic efficiency within its area. The economic efficiency has been aimed through an idea of a common market – later, single market – where principle of four freedoms, the free movement of goods, services, people, and capital, is applied. Allowing commodities and production factors to move freely where most efficiently utilized the economic efficiency is supposed to be realized – this is seen to be a source of competitiveness, welfare and unity in the area, a factor providing benefits for all parties of the single market, inter alia consumers and Member States.

Maintaining well-functioning single market with freely moving commodities and production factors requires rules for preventing any capable party to harmfully limit access to any specific markets within the EU area only for its own benefit or for other invalid reasons. But who are then the "gatekeepers" able to limit the access to different kinds of markets within the EU and what are the rules created for preventing them to harmfully limiting the access to markets? The answer is, there are many: there are traditional parties and rules as well as newer parties and rules that have gradually evolved as a result of developments in the social and business environment over the last decades.

Traditionally, EU Member States have been seen as gatekeepers when it comes to country specific markets: they are responsible for the local legislation, and implementation and enforcement of the EU level rules related to the markets in their area. Member States were clearly the primary subjects for the obligations delivered in the Treaty of Rome[1] that was the Treaty establishing the European Economic Community (EEC), the predecessor of the EU, when signed in 1957. However, not only the public parties are set to be accountable for access to markets, but also private parties have been identified to be responsible for maintaining barrier free environment within the EU area. The need for regulating also private side was identified already in the 'Spaak report'[2] that is regarded as a preparatory work for the Treaty of Rome, the predecessor of the current EU Treaties. While the Members states' capabilities to hinder access to the markets in their territory is curbed by the Articles and rules considered belonging to the group of 'free movement laws', comparable barriers set by private parties are

[1] Treaty Establishing the European Economic Community [1957] <http://data.europa.eu/eli/treaty/teec/sign> accessed 22 November 2022.
[2] Rapport Des Chefs De Delegation Aux Ministres Des Affaires Etrangeres ('Spaak Report'), Brussels 1956.

dealt primarily through Articles and rules considered belonging to the group of 'competition laws'. The standardized framework for the competition law within the EU was first established in the Regulation 17/62/EEC[3] adopted in 1962. Currently, the two treaties forming the foundations of the EU and constituting the core of the EU primary law, Treaty on European Union (TEU)[4] and the Treaty on the Functioning of the European Union (TFEU)[5], contain Articles for both areas. Since the Lisbon Treaty that came into force in December 2009, also the Charter of Fundamental Rights has been a part of the primary legislation.[6]

Member States are forbidden to create barriers for access to markets through taxation, customs duties or procedures, through setting quantitative restrictions on imports or exports, or by any other means without acceptable reasons for doing so. Private parties, companies, especially the ones in a dominant market position, are forbidden to abuse their position for example by preventing competitors to access a specific market. Companies may also be in a position where they operate an essential facility that is an only 'gate' to a specific market – in this kind of case they do not necessarily compete with other companies utilizing the gateway they are operating, but rather become responsible for guaranteeing fair and equal market access for other companies only. Also, companies that are not in a dominant position belong to the scope of the competition rules when they form cartels with other companies. The actions of all parties must be in line with the provisions related to fundamental rights, regardless of whether the parties or actions belong to the scope of the freedom laws or competition law.

It seems that in addition to the member states and different types of companies that were the initial targets of the Articles and regulation created for enabling barrier free markets within the EU, also other types of gatekeepers have emerged over the years. For example, labour unions and sports organizations may sometimes have a significant impact on market access even though they are not public parties creating or supervising the rules directly related to market access, either are they companies aiming to exclude their competitors from the market they are operating in. On the other hand, the drastically changed market environment has brought new types of players into the filed: the parties in charge of different platforms play

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[3] Council Regulation 17/62/EEC [1962] OJ P013, 204.
[4] Consolidated version of the Treaty on European Union [2012] OJ C326.
[5] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326.
[6] Charter of Fundamental Rights of the European Union [2016] OJ C202; European Union, 'The European Union's Primary Law' (EUR-Lex) <https://eur-lex.europa.eu/EN/legal-content/summary/the-european-union-s-primary-law.html> accessed 14 January 2012.

enormously big role in the current environment where the markets are operating in or through different platforms – the essence of the emerging platform economy.[7] These operators acting in a multidimensional market environment do have a big role in guaranteeing equal, fair and barrier free access to different types and levels of markets.

The fact that the basis for the rules which aim is to prevent different gatekeepers to set barriers for accessing markets within the EU was set up already decades ago, raises questions. Are the rules still capable of preventing different gatekeepers to hinder market access? Are there maybe new gatekeepers that are not concerned? How about the fact that the two areas of legislation, the free movement laws and competition laws, have developed for example though case law quite independently over the years – are they still constituting somewhat coherent big picture when it comes to their common overall objective, barrier free market within the EU?

I want to figure out answers on the above questions in my work. As I have special interest towards business aspects and demand supply chains of companies due to my earlier education and work experience related to those areas, I want to look at the situation not *only* in general level, but also from perspective of companies. I try to maintain the business viewpoint throughout my work and consider whether the different gatekeepers are treated fairly and equally. I also intend to simplify the sets of rules examined in the first phase of the study by presenting the relevant sources of law and the key rules relevant to businesses, in simple tables. Aspects that do not have direct connection to demand supply chains in private businesses, like the free movement of individual persons other than workers, rules set to guide only the operations of public entities, or state aid, are to be left out of the scope of the work. Also, considerations related to fundamental rights are not to be part of this work – irrespective of the fact that some sources considered these to constitute an own area of legislation relevant to the market integration, and therefore also for the free movement of commodities within the EU[8].

My research questions are: i) what are the main sources of law guiding the possibilities to limit access to markets within the areas of EU the free movement laws and competition laws, ii) what are the determining rules and principles guiding the rights and wrongs when

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[7] Martin Kenney, and John Zysman. 'The Rise of the Platform Economy.' [2016] Vol 32 (3), Issues in Science and Technology <https://issues.org/rise-platform-economy-big-data-work/> accessed 19 November 2022.
[8] Julio Baquero Cruz, *Between competition and free movement: the economic constitutional law of the European Community* (1st edn, Hart Publishing 2002), vi.

evaluating the actions related to limiting the market access, iii) do the current rules and principles cover all relevant gatekeepers that are able to hinder the access to markets and iv) do the different rules and principles impose coherent and consistent guidelines for different parties that are able to set barriers for the market access within the EU?

The research method I use is legal dogmatic. My purpose is to find answers though first diving into details of the currently valid regulation, rules and principles, and moving then to higher level, building the big picture out of the found key details in an analytical manner. This way I hope to figure out whether the currently valid set of rules is coherent, concerns relevant gatekeepers and treats them equally, consistently fulfilling its overall purpose – not only by an area but also, when bringing the details and aspects of the free movement laws and competition laws into the same big picture.

The fundamentals relevant to this work are naturally in the EU Treaties, TEU and TFEU. The rules are specified and defined further in the EU regulations and through directives, and finetuned and structured through the case law and principles created by the European Court of Justice (ECJ). In addition to case law and the primary and secondary sources of law, I will utilize literature and articles as materials for my study, as well as different materials provided by the European Commission. Due to rather large legal field that is under research, key sources of law and literature presenting larger lines of the EU law are to be used more than materials analysing small parts or nuances of the concerned fields. Focus is on outcomes derived from primary legal sources.

I will handle two areas, the free movement laws and competition law, first separately in dedicated sections, by also collecting the key rules of each area into tables. After, I will look at the gatekeepers: does it seem that the rules are covering all relevant gatekeepers able to hinder the access to markets within the EU. From the analyses of relevant gatekeepers, I will move to compare the substantial parts of the key rules and principles by elaborating the coherence of the big picture they constitute and the fairness and logicality of the treatment of the concerned gatekeepers. Finally, I shall conclude the outcomes of the research and give my proposal for tackling possible challenges, and for the topics of further research.

As both areas of laws under review, the free movement laws and competition laws, are individual and separate, but still aiming to adjust actions to reach the same critical EU-level target, single market, it is interesting to figure out whether the measures are comparable and equal from gate keepers' point of view in both areas. It is equally interesting to see whether

the current rules make a logical integrity when looking the system from the bird's eye perspective and whether the rules, in many parts originated already almost seventy years ago, still cover all relevant parties in the markets that have experienced remarkable changes over the years.

2 Free Movement Laws – the sources of law, rules, and primarily targeted gatekeepers

In this part I will answer to the question 'what are the main sources of law that guide limiting access to markets when it comes to the internal market law, and more specifically the free movement laws. I will also cover the answer to the question 'what are the determining rules and principles that guide the rights and wrongs when evaluating the actions related to limiting the market access' and identify the gatekeepers that are primarily targeted by these rules and principles.

Like in all market access related legal areas, the foundations for the rules and principles are laid down in the treaties, out of which for the purposes of this work most remarkably in the TFEU, and possibly then explicated and specified further in the EU regulations and through directives. The details and principles for interpretation are to be derived from the ECJ case law. This all is supported by non-binding instructions and supportive elements created by different EU level institutions.

The four freedoms with related aspects will be handled one by one in the following. After walking through the main rules and principles related to market access and identifying the primary addressees of the rules regarding the specific freedom, the key features are concluded in a summary table.

2.1 Free movement of Goods

The free movement law related Articles of the TFEU providing the rules related to market access are, first of all, Articles 28-33 concerning customs duties and Articles 110-113 concerning taxation – both being areas that could be used for creating unequal circumstances for trading domestic and imported goods.[9] Secondly, the Articles 34-37 of the TFEU concern market access by forbidding quantitative restrictions on imports and exports.[10] Especially, the second group of articles requires deeper look into the case law to get even a high-level understanding about the practical meaning of the Articles. The Commission has also provided additional case law -based guidance for national authorities and stakeholders regarding these

[9] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 673.
[10] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 682-697.

articles through its notice given in 2021[11] – the notice is naturally not legally binding though. I will in any case start by handling the formerly mentioned customs duties and taxes related Articles first.

2.1.1 Rules related to customs duties and import and export taxes

The Articles 28-32 of the TFEU provide that the EU comprises a customs union where all import or export duties for trade of any goods within its area are prohibited. Also, any other charges having an equivalent effect are prohibited, as well as customs duties of a fiscal nature. The goods imported from outside of the EU may be subject to import duties at the point when they are released for free circulation into the EU: the Common Customs Tariff duties charged for the goods at the point of import into the EU are fixed by the Council on the proposal of the Commission. Commission is obligated to take different EU internal interests into account when setting the proposal on the duty.

The Articles 110-113 of the TFEU define the rules and restrictions concerning taxes imposed on products. The taxes that EU member states impose on products, directly or indirectly, must be equal for domestic products and similar products of other member states. The articles also forbid Member States to impose on the products of other Member States any such internal taxation that would afford indirect protection to other products. In addition, the Articles state that any tax repayment granted for the products at the point of export to another member state is not allowed to exceed the internal tax amount imposed on them, directly or indirectly. Member states are allowed to implement other charges than turnover taxes, excise duties and other forms or indirect taxes for imports from other member states, or remissions and repayments for exports to other member states, only if the Council has approved measures for this based on a proposal from the Commission. These kinds of measures can be accepted only for limited time periods. According to the Article 113 the Council can also adopt provisions for harmonizing legislation regarding turnover taxes, excise duties, and other type on indirect taxation, if it is necessary for ensuring the establishment and functioning of the single market, and to avoid distortion of competition, and the Council carries this out unanimously by following a special legislative procedure.

[11] Commission Notice, Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) [2021] OJ C100/03.

The ECJ has provided in several decisions over the years that the prohibition of imposing import or export duties or charges, or any other charges having an equivalent effect, implies despite its purpose: the validity of the prohibition depends on the effect of the duty or charge, not its purpose. Therefore, also taxes resembling duties or charges are forbidden per se.[12] For example in the case Commission v Italy[13] in 1968, Italy pointed out that it imposed an export tax on artistic, historical, and archaeological items, to protect the artistic heritage of the country. It stated that the tax is not levied for the purpose of raising revenue, and that the items should not be regarded as goods for the purpose of the customs union. The ECJ stated that the provision of the treaty makes no distinction based on the purpose of the duties and charges, and that the tax in question falls into the scope of the respective treaty article (current Article 30 TFEU) due to the fact that export trade of the given goods is hindered 'by the pecuniary burden which it imposes on the price of the exported articles'.[14] In the Diamantarbeiders case the Court made it clear that the purpose of the action does not need to be protective in nature: the case was about Belgian law requiring 0,33% of the value of imported diamonds to be paid to social fund of workers. According to the ECJ it was enough that crossing the border created an obligation to pay the charge: the charge was decided to be against the rules set in the treaty.[15] Also, the way the charge is imposed is not meaningful: the treaty states not only the import and export duties are forbidden, but also the charges having and 'equivalent effect'. This is brought up also for example in a case Comission v Italy[16] in 1969 that handled a situation where Italy allegedly had imposed a levy on the goods exported to other member states to collect statistical material to observe trade patterns. The ECJ provided that the case needs to be looked at in the light of the purpose of the Treaty. Considering the purpose of including also the 'charges having an equivalent effect' into the scope of forbidden charges – the idea being supplementing the prohibition of creating any obstacles for the free movement of goods between the member states by duties – does mean that 'any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect […], even if it is not imposed for the benefit of the State, is

[12] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 674-675.
[13] Case 7/68 *Commission v Italy* [1968] ECR 423.
[14] Case 7/68 *Commission v Italy* [1968] ECR 429.
[15] Cases 2 and 3/69 *Sociaal Fonds voor de Diamantarbeiders v S.A. Ch. Brachfeld & Sons and Chougol Diamond Co* [1969] ECLI:EU:C:1969:30 212.
[16] Case 24/68 *Commission of the European Communities v Italian Republic* [1969] ECR 194.

not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product[17]'. According to the decision of the ECJ, the prohibition in question constitutes a fundamental rule where no exceptions are permitted without prejudice to the other provision of the Treaty. Later, one small exception has occurred, though: member state is allowed to impose a charge to cover the cost of mandatory inspection required by the EU law.[18]

For the taxes that are levied after importation, the legality is to be considered from two aspects.[19] First, the idea is to avoid situation where barriers are created by imposing different taxes on *similar* products – this is forbidden in the TFEU 110(1). The main question here is that when products are to be considered similar. In John Walker case[20] the ECJ provided that the products in question – whiskey and liqueur fruit wine - were not to be considered similar as they did not possess the same alcohol amount, and the production processes of the products were different. In the case Commission v Italy[21], the ECJ came up with a conclusion that Italy did not need to maintain same tax level for bananas and other fruits due to products' 'similarity': based on the objective characteristics of the products, and consumer need they were fulfilling, the products were considered different. When the differently taxed products under review are not considered similar, the second aspect of the legality is brought into spotlight.[22] The second part of the Article 110 TFEU forbids 'any internal taxation of such a nature as to afford indirect protection to other products.' The ECJ has used a two stage analyse in several cases to evaluate whether the tax is protective in a manner intended in the Article 110(2) TFEU.[23] First the ECJ has evaluated whether the products in question are competing against each other, and if they are, the ECJ has moved to evaluate whether the tax system has a forbidden protective nature. The evaluation has been carried out for example by first determining the cross-elasticity of the products and then evaluating the protective quality of the tax on the context. The bigger the cross-elasticity, the lower the tax needs to be to be protective, and vice versa.[24] Even if discriminatory taxation is generally forbidden, it might in some cases to be allowed: while direct discrimination is never accepted, Member States may

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[17] Case 24/68 *Commission of the European Communities v Italian Republic* [1969] ECR 194, para 9.
[18] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 679.
[19] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 686.
[20] Case 243/84 *John Walker & Sons Ltd v Ministeriet for Skatter og Afgifter* [1986] ECR 877.
[21] Case 184/85 *Commission of the European Communities v Italian Republic* [1987] ECR 2023.
[22] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 691.
[23] For example, Case 356/85 *Commission of the European Communities v Kingdom of Belgium* [1987] ECR 3321; Case 184/85 *Commission of the European Communities v Italian Republic* [1987] ECR 2023.
[24] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 691.

sometimes be able to justify indirect discrimination by some objective policy reason acceptable to the EU.[25] For example in the case Commission v France[26] the ECJ decided to accept imposing lower taxes for local sweet wines produced in a traditional manner, regardless of the fact that imported wines were not entitled to it, as the rationale for lower tax was to provide a fiscal incentive to cultivate wine in areas having very challenging circumstances. Similarly, ECJ has accepted different tax levels for example for the objective reasons related to environmental considerations.[27]

As a conclusion, any duty or any other charge, including taxes, imposed on goods based on the fact that goods are crossing a border between member states, is forbidden. For the taxes imposed on goods based on something else that transferring them from one EU member state to another, the situation is a bit different. Here the guiding principles is related to equal treatment: discriminatory taxation is forbidden. Similar products need to have similar tax treatment regardless of whether the product is domestic or from another EU member state. And, if the goods are not considered similar as per se, the tax should not, in any case, afford indirect protection to other products, unless there is a valid objective justification for it.

2.1.2 Quantitative restrictions

In addition to different charges set for goods that are transferred to another EU member state, the market access can be hindered also through so called quantitative restrictions. The Articles 34-37 of the TFEU forbid quantitative restrictions on imports and exports and all measures having equivalent effect, unless there is justified grounds for it. The Article 36 lists acceptable grounds: public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; and the protection of industrial and commercial property. The same article declares that prohibitions or restrictions should not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. For example, provisions on minimum or maximum prices or less favourable prices for imported products, different payment conditions set for imported products, or any other artificially

[25] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 686.
[26] Case 196/85 *Commission of the European Communities v French Republic* [1987] ECR 1613.
[27] Case C-132/88 *Commission of the European Communities v Hellenic Republic* [1990] I -1588.

created conditions that do put imported or exported products into weaker position compared with domestic ones, can be considered quantitative restrictions.[28]

Due to the fact that the 'quantitative restrictions' concerned in the Articles 34-37 do cover rather multidimensional and large set of actions – especially as the Commission and the Court have taken a broad view on the measures belonging to the scope of the Articles,[29] more detailed guidelines for evaluating different cases have been necessary. The ECJ has provided principles and guidelines through its case law. I will go briefly through the most important cases and the principles derived from them in the following.

Dassonville case[30] sheds light on the scope of the applicability of the Articles 34-37. The case was about Belgian requirement of providing certificate of origin for products bearing a designation of origin. Dassonville imported Scotch whiskey from France to Belgium. Due to the fact the product was already imported into France, the British certificate was very difficult to obtain. The Court decided that the Belgium was not entitled to require the certificate – the requirement constituted a forbidden measure equivalent to quantitative restriction as it hindered trade. The court famously defined the scope of forbidden measures in the case by stating that 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.[31]' This statement makes it clear that discrimination, for example between imported goods and domestic goods, is not required for an action to be considered forbidden – the fact that the measure may potentially affect negatively on free flow of goods is enough. This does not, however, mean that the ECJ would not look very carefully after discrimination: for example, in the case Commission v Italy[32] the ECJ decided that the car registration requirements set by the Italian government making the registration of imported cars slower and more costly than the registration of domestic cars was against Article 34 TFEU. It is worth noting that in the light of case law, the interpretation of Articles 34 and 35, therefore import and export restrictions, are to be seen differently when it comes to discrimination. While breach of Article 34 that concerns imports does not require discriminatory characteristics, the Article 35 that concerns exports does. This

[28] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 700-701.
[29] Ibid. 700.
[30] Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 838.
[31] Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 838 para 5.
[32] Case 154/85 *Commission of the European Communities v Italian Republic* [1985] ECR 1753.

becomes clear in the Groenveld case[33] where the ECJ accepted Dutch rules that forbid stocking and processing horsemeat, even though these rules prevented exporting horse meat products to other member states. The Court stated that 'a national measure prohibiting all manufacturers of meat products from having in stock or processing horsemeat is not incompatible with Article 34 [now Article 35] of the Treaty if it does not discriminate between products intended for export and those marketed within the Member State in question.[34]'

While the Dassonville case defined the extent of the area where the quantitative restrictions related rules can be applied, a Cassis de Dijon[35] case provides the basis for the eligibility of products that can get to the field of application. Casses de Dijon provides answers to situations where the product related country specific rules do not discriminate but still prevent goods from flowing freely: in the case French liqueur, Casses de Dijon, could not be imported to Germany as its alcohol level was too low to correspond to the one defined in the German law. In the case the ECJ did not find Germany's arguments for defending its rules convincing. Instead of being willing to accept the reasons why Cassis de Dijon could not be imported into Germany, the ECJ introduced a remarkable idea of *mutual recognition*: when a product, now alcoholic beverage, has been lawfully produced and marketed in one of the Member States, it has to be accepted elsewhere as well, unless a specific public interest related justifications apply, and related objectives take precedence over the free movement of goods. The idea – principle - of mutual recognition has been utilized quite largely in different fields of EU legislation and operations, but in the field of the free movement of goods it has become clear that the mutual recognition concerns products as such. The actions related to selling arrangements are treated differently: in a Keck case[36] the ECJ provided that even if the idea of mutual recognition presented in the Casses de Dijon case is still valid, the sales arrangements are not in the scope of the mutual recognition requirement. The sales arrangements related legislation is up to Member States, and therefore does not belong to the scope of the quantitative restriction related treaty articles, as long as the selling arrangements are not discriminatory. Therefore, in Keck case, France could freely forbid selling products at a price which was lower than their purchase price as long as the rule was not discriminatory. For

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[33] Case 15/79 *P.B. Groenveld BV v Produktschap voor Vee en Vlees* [1979] ECR 3410.
[34] Case 15/79 *P.B. Groenveld BV v Produktschap voor Vee en Vlees* [1979] ECR 3410 para 9.
[35] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 650.
[36] Cases C-267 and 268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I – 6126.

example, in cases Agostini[37] and Gourmet[38] the Court clarified further the requirement of non-discrimination by providing that the discrimination is forbidden not only when it appears in law but also when it appears in fact. In the cases the ECJ brought up that even though prohibition of advertisement of specific products seems to concern all parties equally, the actual impact of the prohibition may be unequal: it can be difficult or even impossible for new foreign products to get to a specific market unless they can be advertised, while the domestic products may already be well known in the market and therefore do not require advertisements to get to attention of potential customers.

In addition to clarifications regarding the concept of discrimination when it comes to selling arrangements, the ECJ has also clarified the approach when the limitations set for the product use are affecting the possibility to sell products in specific Member States. In the trailers case[39] and jet ski case[40] the ECJ provided that the limitations on the use of products are in the scope of Article 34. The earlier mentioned case was about Italy prohibiting for example motorcycles from towing trailers that were designed for that purpose. According to the ECJ this was a breach of Article 34 TFEU. However, the action was validly justified on the grounds of public safety. The latter case was about Sweden prohibiting the use of jet skis elsewhere than in the designated waterways. The result was similar to the Italian trailer case: the restriction fell into the scope of the Article 34, but the ECJ found the justification based on the grounds of protecting environment legitimate.

2.1.3 Gatekeepers in the scope and summary of the key findings

The primary gatekeepers targeted by the rules related to the free movement of goods seem to be the EU Member States or parties with authority provided by the Member States. This seems rather obvious for two reasons. Firstly, the actions that are in the scope of the majority of the rules are such that belong to the authority of the Member States: levying taxes and customs duties are naturally actions tightly related to the institutional nature of states. Secondly, the Member States are nominated to be the responsible parties in the textual expression of the Articles: not only the tax and customs duties related articles contain the

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[37] Cases C-34-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB* [1997] ECR I – 3875.
[38] Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* [2001] ECR I – 1816.
[39] Case C-110/05 *Commission of the European Communities v Italian Republic* [2009] ECR I – 156.
[40] Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I – 4304.

reference to Member States but also the Articles covering the quantitative restrictions related rules refer to the responsibilities of the Member States. For example, the Article 34 in Chapter 3 titled 'prohibition of quantitative restrictions between member states' states: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.' The content of the prohibition itself could bring also other addressees than Member States into the scope of the Article, but the wording "between Member States" can be understood to refer to the States as addressees of the rule and not as locations of the trading partners. This is not very clear though, especially, as the different language versions of the given Article do give a bit different impression. For example, the Finnish version could provide even third different way of understanding the aim of the Article: the precise meaning of the wording of the Finnish version of the TFEU could be understood to refer only to trade between the institutional parts of the States when prohibiting the quantitative restrictions, and then to include also other trading partners into the scope of the Article prohibition when the equivalent effects are in question. This interpretation naturally does not make much of sense, as the business is in most cases done between private parties established within the States, and as the purpose of the Article must be to have a single meaning throughout its content.

Regardless of the various possibilities to interpret the wording of the Articles, I do stick into the idea of the *primary* addressees, i.e., responsible gatekeepers, aimed to be bound by the Articles being Member States. Also, the overview on the ECJ case law supports this view, as it seems to be concentrating around actions taken against Member States or parties utilizing authority derived from the Member States. However, despite the fact that the Member States can be considered primary addresses of the Article rules, they have not been the only ones. Case Fra.Bo[41] provides an example of a situation where the Court applies the prohibition of quantitative restriction in horizontal relation. In the case the prohibition is applied to a private-law body carrying out standardisation and certification activities. According to national law the certification given by the party in question ensures compliance with the law.[42] Due to the fact that the private-law party was provided with a sort of 'authority' in law, the case can be seen to also have a governmental dimension. Since the Court has generally avoided providing the Article 34 with horizontal direct effect before the given case[43], the applicability to private

[41] Case C-171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein.* [2012] EU:C:2012:453.
[42] Ibid, para 24-27.
[43] Christoph Krenn, 'A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods' [2012] Vol.49 (1) Common Market Law Review 177, 181-182; Case C-159/00 Sapod Audic v Eco-Emballages SA [2002] ECR I-05031.

parties seems still unclear. The issue of horizontal direct effect will be discussed in more details in later parts of the work.

To conclude the walk through of the free movement of goods related rules and responsibilities, the key findings are summarized in the following table. Next, it is time to move to handle the area of free movement of capital.

Rule	Substantial object	What is forbidden?	When forbidden?	Who is the primarily targeted 'gatekeeper'?	Main consideration when evaluating the applicability
Art 28-32 TFEU	Customs duties and charges having an equivalent effect	Imposing customs duties on imports or exports or any charges having equivalent effect (incl. duties of a fiscal nature)	Always (not if the fee is applied to cover the cost of mandatory inspection required by the EU)	Member state	- Is the fee triggered based on the transfer between Member States? - If inspection fee in question, does the EU require this inspection?
Art 34-37 TFEU	Quantitative restrictions and measures having equivalent effect	Imposing quantitative restrictions on imports and exports, or any measures having equivalent effect.	For imports: - Always forbidden if capable of hindering, directly or indirectly, actually or potentially, intra-Community trade unless there is valid objective justification available (concerns also rules related to product use). - Selling arrangements are in the scope of the article only in case found discriminatory - 'Mutual recognition' concerns products but not selling arrangements. - All discriminatory rules and actions are forbidden, not only when discriminatory in law but also when discriminatory in fact. For exports: - For exports, the discriminatory element is required in order the rule or action to be forbidden.	Member state (and private parties?)	- Is the rule/action capable of hindering, directly or indirectly, actually or potentially, intra-Community trade? - Is it a selling arrangement? - Is it discriminatory? - Is there justified grounds for restrictions: public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; and the protection of industrial and commercial property. (If there is, is there discrimination or a disguised restriction on trade between Member States?)

Art 110-113 TFEU	Taxes	Impose, directly or indirectly, on the products of other MSs any internal taxation in excess of that imposed on similar domestic products, or to impose any internal taxation affording indirect protection to other products. Any repayment of internal taxation at the point of export is not allowed to exceed the directly or indirectly imposed internal taxation.	a) Always if the tax is imposed based on the transfer of goods over the Member State border (transfer between Member States). b) When the tax is imposed within the Member State, it is forbidden if: - similar products are imposed different taxes in a discriminatory manner and this has no valid objective justification. - taxation of different products forms indirect protection of other products and the indirect discrimination does not have valid objective justification.	Member state	The trigger of the tax? If tax imposed only within the Member State is it the same for all similar products (indiscriminatory)? If the imposed tax is discriminatory or if it constitutes indirect discrimination (even when imposed to different products), is there a valid objective justification for it?

Table Key free movement of goods related Articles and rules that guide the gatekeepers' actions related to access to markets in the EU.

2.2 Free movement of capital

2.2.1 Sources of Law, applicability, and Key Rules and Principles

The free movement of capital is one of the initial freedoms provided already in the Treaty of Rome. The Maastricht Treaty with effect from 1994, however, revised the content of the freedom rather profoundly. Currently the main Articles related to the free movement of capital are the Articles 63-66 of the TFEU. The post Maastricht Treaty case law has also an important role in interpretating and defining the meaning and content of these Treaty articles.[44]

[44] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 756.

The 63 TFEU states that all the restrictions on the movement of capital and on payments between Member States and Member States and third countries are forbidden if they belong to the framework defined in the Articles 63-66 TFEU. The Article 65 defines the circumstances in which Article 63 is to be rendered inapplicable. It is stated in the Article 65 that the article 63 is without prejudice to the right of Member States to apply their national tax rules that distinguishes the taxpayers by place of residence or by place of investment. The Article 63 is also without prejudice when Member States take 'measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or when they lay down procedures for the declaration of capital movements for purposes of administrative or statistical information. In addition, the same Article is without prejudice when the Member States take measures which are justified on grounds of public policy or public security. The Article 65 provides that the restrictions on the right of establishment, when being compatible with the Treaties, are applicable despite the Article 63 provisions. It is, however, pointed out in the article that the aforementioned reasons and situations allowing the Article 63 prohibition not to be followed cannot constitute 'arbitrary discrimination or a disguised restriction on the free movement of capital and payments'. In addition to the above-mentioned limitations, the Article 64 still provides some additional limitations to the applicability of the prohibition regarding third countries – the limitation concerns national rules that have been in force before 1993/1999. In addition to the prohibitions and limitations to those, the Articles also define the rights and roles of the EU institutions and Member States for adopting new rules in the area. The Article 66 for example provides the Council, on a proposal from the Commission and after consulting the European Central Bank, a right to take safeguard measures if movement of capital to or from third countries causes, or threatens to cause, serious problems for the operation of economic and monetary union. The given measures can be applied for maximum six months period and only when strictly necessary.

The first noticeable difference compared to the earlier handled laws related to the free movement of goods, concerns the applicability: the free movement of Capital related rules apply not only to capital movements between Member States but also to Capital movements between Member States and third countries, with some limitation provided in the Articles 64, 65(4) and 66, though. Applying the rules to capital movement between a Member State and

third country is a valid condition also in a case Sanz de Lera[45] in which currency is aimed to be transported from Spain to Switzerland. In the case the question was about the legality of the Spanish rules that required applying for authorization in advance when exporting larger amounts of coins, banknotes or bearer cheques to abroad. The Court found that the requirement for applying for a prior authorization for being able to export coins, banknotes, or bearer cheques from a Member State to another country is to be held forbidden restriction, while requirement of giving a prior declaration of the export is not in the scope of the prohibition provided in the Articles. In the case, the Court also confirmed the direct applicability of the free movement of capital related Articles: even though the related Articles provide discretion to Member States in the predefined circumstances, the prohibition itself is clear and unconditional and thus directly applicable.

The Articles concerning the free movement of capital do not provide definition for the 'movement of capital'. It is therefore eventually up to the ECJ to decide whether a specific measure is to be considered belonging to the scope of the Articles: more detailed analyses on the definition of 'movement of capital' in relation to the Articles in question would therefore require closer look at the case law. I will, however, only give examples of subjects considered belonging to the scope of the Articles, and pass the more detailed evaluation of the definition by only pointing out that the ECJ has referred to the list, 'Nomenclature of the Capital Movements', provided in the Directive 88/361[46], in its free movement of capital related case law - the list provided in the directive is not exhaustive, though.[47] The case law around free movement of capital has concerned for example mortgages, taxation of different type of property, investments in shares and real property, usufruct, administration, leasing and sale of real property, granting credit on commercial basis, guarantees granted by residents of different countries, and inheritances and gifts.[48]

The logic of providing prohibitions in the Article 63 and the circumstances in which the Article 63 is not applicable in Articles 64 and 65(1,2) is clear in high level, but rather open

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[45] Joined Cases C-163/94, C-165/94 and C-250/94 *Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu* [1995] ECR I-04821.
[46] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1988] OJ L178.
[47] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 758; Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECR I-04071.
[48] Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms* (7th edn, OUP 2022), 520; Case C-235/17 *Commission v. Hungary* [2019] EU:C:2019:432.

categories of issues not belonging to the scope of the prohibition and separately mentioned prohibition of discrimination have brought some additional complexity in the area. The ECJ case law provides further guidance for interpreting the Articles.

The Court has provided that 'a measure […] which restricts the free movement of capital, is permissible only if it is justified by overriding reasons in the public interest and observes the principle of proportionality'.[49] It seems that possibly also other overriding reasons than the ones expressly provided in the Treaty can come to question as a basis for circumventing the Treaty prohibition.[50] On the other hand, also the reasons related to exceptions expressly provided in the treaty need to fulfil further requirements: for example, purely economic objectives – like purpose to gain tax revenues or gather investments to a specific Member State – are not considered suitable objectives in the case law.[51] The exceptions concerning public policy and public security are to be interpreted narrowly and Members States do have the burden of proof in the related cases.[52] In addition to disproportional measures taken to reach the objective, also too imprecise link between taken measures and the objective have caused rejection before the Court.[53]

The express prohibition of discrimination is provided in the Art 65(3) which states that the exceptions provided in the same Article 'paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.' For example, in the case Hollmann[54] the question was about taxes imposed on capital gains resulted from sales of immovable property in Portugal. According to the judgement of the Court the Treaty provisions related to the free movement of capital preclude rules of the Portuguese taxation system that impose higher taxes on gains of residents of other Member States than on gains of resident of Portugal. In the judgement, the Court provides that the unequal treatment permitted under Art 58(1) (current Art 65(1)) must be distinguished from arbitrary discrimination prohibited in other Art 68(3) (current Art

[49] Case C-235/17 *Commission v Hungary (Usufruct Over Agricultural Land)* [1995] EU:C:2019:432, para 59.
[50] Case C-367/98 *Commission of the European Communities v Portuguese Republic* [2002], ECJ I-04731 para 49.
[51] Case C-319/02 *Petri Manninen* [2004], ECJ I-07477 para 49; Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECJ I-04071, para 59.
[52] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 760.
[53] Case C-54/99 *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister* [2000] ECR I-01335.
[54] Case C-443/06 *Erika Waltraud Ilse Hollmann v Fazenda Pública* [2007] ECJ I-08491.

65(3)).[55] For example in case Albore[56] the Court points out that it is up to national court to evaluate whether there is sufficient justification for the discriminatory actions taken in the case, and whether there is less restrictive measure to reach the objective available. In the case EFTA Surveillance Authority v. Norway[57], the EFTA Court found acceptable objective justification for the discrimination. After, the Court evaluated whether the measures used for reaching the justified target were suitable for reaching the target, as well as proportionate and necessary.

Barnard provides, that 'it seems likely that, following the model of other three freedoms, Article 63(1) TFEU prohibits national measures which are both directly and indirectly discriminatory as well as non-discriminatory measures which (substantially) hinder access to the market.'[58] Jukka Snell summarizes the outcome of the Treaty provisions and guidelines provided by the ECJ even more incisive manner: the measure is to be held forbidden in case it prevents international movement of capital, either by hindering the access to specific markets or by discriminating between different actors. In case the objective pursued through the measure is listed in the Articles, or in case the measure is non-discriminatory and pursues objective of public interest, it can be justified. The measure taken to reach the objective has still to be proportionate and necessary in order it to be acceptable, according to case law.[59]

As noticed, in the actual evaluation both, possible discrimination and hindrance of the movement of capital and payments, must be considered. It seems that the logic of evaluating discriminatory actions and the logic of evaluating the exceptions provided for following the prohibition do have a connection: requirements for justified objectives seem to have common elements, as well as the requirements set for measures that are taken to reach the objectives. Therefore, it seems logical to first consider whether a specific measure is forbidden by the articles in the first place: it is forbidden by the articles if it either i) does hinder the free movement of capital and is not belonging to the scope of the articles or case law provisions excluding the prohibition and/or ii) it is discriminatory. As the ECJ requires valid justification not only for exceptions to be applicable, but also for discrimination to be acceptable, the second stage of the evaluation can therefore concentrate on these justifications: the measures

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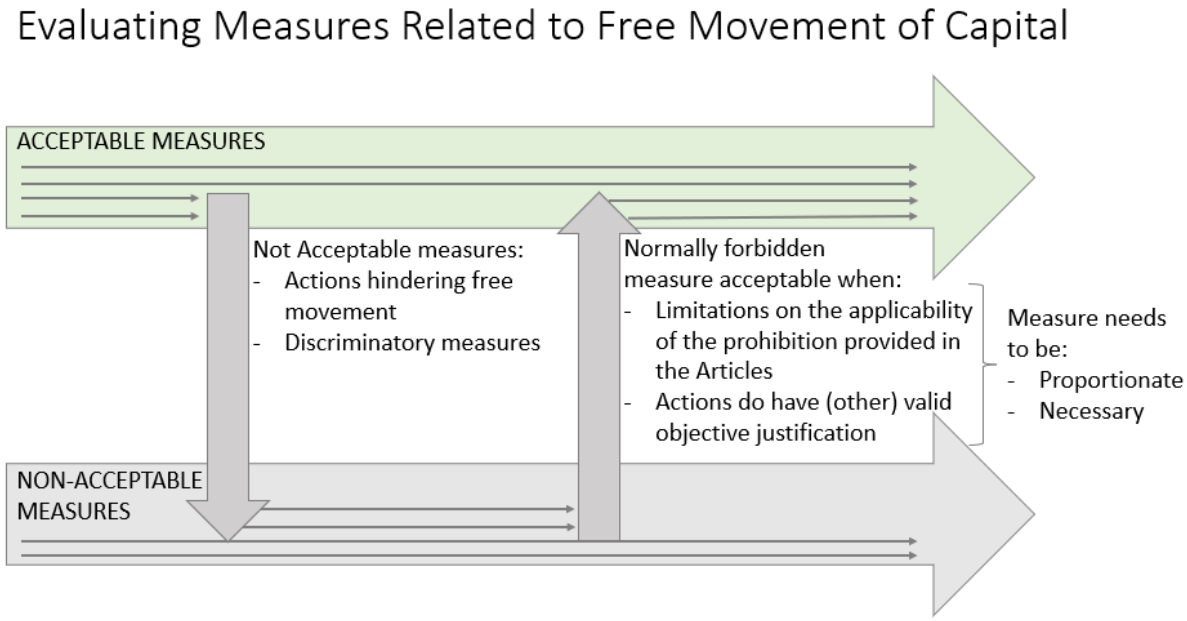
[55] Case C-443/06 *Erika Waltraud Ilse Hollmann v Fazenda Pública* [2007] ECJ I-08491, para 44.
[56] Case C-423/98 *Alfredo Albore* [2000] ECJ I-05965, paras 17, 19, 23-24.
[57] Case E-2/06 *EFTA Surveillance Authority v. Norway* [2007] EFTA Ct. Rep. 164.
[58] Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms* (7th edn, OUP 2022), 527.
[59] Jukka Snell, Course Material, Re-evaluating the Foundations of EU Law, 19.12.2022.

can be saved in case valid objective justification does exist.[60] After considering whether there is acceptable justification available, the admissibility of the measures themselves is to be evaluated. The ECJ case law provides that the measures taken to reach the justified objective have to be proportionate and necessary.[61] Also the need to reach the objectives and impact of the measures taken for reaching the given objective have to be shown: too lightly shown need to achieve the objective or too unclear relationship between the measures and aimed objective have been reasons for ECJ to reject the proposed justification.[62] The overall idea for the evaluation is presented in the picture below.



Picture Evaluating the Measures in the field of Free Movement of Capital

2.2.2 Gatekeepers in the scope and summary of the key findings

It is rather natural to consider the primary addressees of the rules related to the free movement of Capital to be Member States: Article provisions refer to Member States and case law is heavily centred around the national rules which restrictive nature is considered being against the provisions of the Articles. Like regarding the Article 34 concerning the free movement of

[60] Case C-98/01 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [2003] EU:C:2019:432 para 49; Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms* (7th edn, OUP 2022), 531.
[61] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECJ I-04165; Case C-235/17 *Commission v Hungary (Usufruct Over Agricultural Land)* [1995] EU:C:2019:432, paras 59-62.
[62] Case C-222/97 *Manfred Trummer and Peter Mayer* [1999] ECJ I-01661.

goods, it is nevertheless possible to think of horizontal application and thus including also other types of gatekeepers, like private parties, into the scope of the Article 63, too. The reason for this is the fact that the Article 63 providing the prohibition of restricting the movement of capital or payments, does not provide any reference to parties obligated by the prohibition. Conversely, all sub points of the Article 65 providing exceptions on the prohibition, are dedicated to Member States and actions belonging to the area of their responsibility.

The Court has not introduced direct horizontal applicability in the field of free movement of capital.[63] It has touched the horizontal application for example in a Commission v Germany case[64] where the question was about private law agreement which content was transformed to a law called VW Law by Federal Republic of Germany at the point of creating and privatizing the public limited company Volkswagen. The initial agreement was made to express 'the will of the shareholders and all the other persons and all other groups which had laid claim to private rights' over the undertaking in the 50s'.[65] The Court in any case saw Federal Republic of Germany breaching the free movement of Capital Article as it enabled VW Law to provide more limited possibilities and less influence in the company for part of the possible investors compared to what was provided through general company law. The question of the acceptability of so called 'golden shares' is nevertheless still rather open: even though the mentioned case provides that the Court considers 'golden share type of actions' breaching the free movement of capital related Articles when instructed in the law provided by Member State, it does not provide clear cut instructions for cases where similar types of rules are provided in private agreements. In these cases, the creator of the rules and the addressee of the free movement of capital Article rules would be a private party. It in any case seems that the Court is unwilling to apply the Articles in horizontal relations. It has brought up in several cases that in addition to primary and secondary legislation also articles of association can be considered including forbidden restrictive measures.[66] In any case, the Court also provides in specific cases that even special rights provided to Member States in articles of association 'do

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[63] Vladimir Savković, 'The fundamental freedoms of the single market on the path towards horizontal direct effect: the free movement of capital – lex lata and lex ferenda' [2017] Vol.7 (2) Juridical tribune 208.
[64] Case C-112/05 *Commission of the European Communities v Federal Republic of Germany* [2007] ECR I-08995.
[65] Ibid, para 24.
[66] Joined Cases C-282/04 and C-283/04 *Commission of the European Communities v Kingdom of the Netherlands* [2006] ECR I-09141; Case C-171/08 *European Commission v Portuguese Republic* [2010] ECR I-06817, paras 48-50.

not arise as the result of the normal operation of company law'.[67] It seems that when the Member States act in their private capacity in specific cases, they are not seen breaching the free movement of Capital Articles. The accountability for the breach requires acts as Member State.[68] The approach is seen to be good to uphold the principle of freedom of contract and larger ideas of free markets it relates to.[69] On the other hand, the approach raises questions on the coherence of horizontal applicability within the area of the free movement laws as whole.

After rather light walk through of judgements in golden share cases and related opinions of Advocate Generals, the impression I have is as follows: the above-described approach prevails - the free movement of capital rules do not reach private actors even when articles of association providing special rights to specific shareholders are seen restrictive and acting against the free movement of capital, if they follow the general company law. When Member States are involved, the 'capacity of acting as Member State' is nevertheless searched eagerly. The Member States are placed under magnifying class for finding dimensions pulling them out of the 'private procedure' and therefore it is hard for Member States to act in a role of 'normal investor' with special rights provided by articles of association.[70]. I am wondering what the rationale for this is in the bigger picture. I believe that the rationale for not limiting the right to create articles of association with 'biased' rights within the companies may be related to liberalistic ideas[71] behind the freedom of contract and freedom of organizing businesses and ownerships as desired by the parties. The question concerns therefore also the fact that Member States seem to be pulled out of that area of freedom rather anxiously. As I do not think that the possibilities of Member States owning golden shares to hinder the movement of capital would be significantly greater compared for example to mega size companies in the same position as per se, the reason at current times cannot be related to size-based power. Instead, the reason might be the Member States' capacity to legislate and change the company law if needed. Or, alternatively, the rationale could be related to the idea of keeping the roles and addressees of the free movement laws and competition laws

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[67] Case C-98/01 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [2003] ECR I-04641, para 48; Vladimir Savković, 'The fundamental freedoms of the single market on the path towards horizontal direct effect: the free movement of capital – lex lata and lex ferenda' [2017] Vol.7 (2) Juridical tribune 208, 218.
[68] Vladimir Savković, 'The fundamental freedoms of the single market on the path towards horizontal direct effect: the free movement of capital – lex lata and lex ferenda' [2017] Vol.7 (2) Juridical tribune 208, 218-219.
[69] Ibid.
[70] E.g. Joined Cases C-282/04 and C-283/04 *Commission of the European Communities v Kingdom of the Netherlands* [2006] ECR I-09141, Opinion of AG Poiares Maduro, para 22-25.
[71] Edmund Fawcett, Liberalism: the life of an idea (2nd edn, Princeton University Press 2018).

separated: the free movement laws to guide Member States and the competition laws to guide companies. No matter what the logic is, it should be transparent to maintain efficiency and coherence in the application of the free movement Articles. I will consider the issue further in later parts of the work.

The summary of key aspects related to application of rules concerning the free movement of capital is presented in the table below.

Rule	**Substantial object**	**What is forbidden?**	**When forbidden?**	**Who is the primarily targeted 'gatekeeper'?**	**Main consideration when evaluating the applicability**
Art 63-66 TFEU	Restrictions on the free movement of capital or payments	All restrictions on the movement of capital and on payments between Member States and Member States and third countries.	Always except in the following circumstances: - Member States do apply their national taxation rules even when the tax law distinguishes the taxpayers by place of residence or by place of investment - Member States take 'measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or when they lay down procedures for the declaration of capital movements for purposes of administrative or statistical information - Member States take measures which are justified on grounds of public policy or public security (- additional limitations regarding 3rd countries (in Art 64) - concerns national rules valid before 1993/1999) However, none of the reasons and situations allowing the Article 63 prohibition not to be followed cannot constitute 'arbitrary discrimination or a disguised restriction on the free movement of capital and payments'. Case law: both, restrictive actions and discriminative actions do need to have justified objective, and	Member States (and private parties?)	Is the action restricting international movement of capital or payments by hindering access to markets or by discriminating? If yes: i) is this a result of pursuing Article based justified objective or ii) is the restrictive measure non-discriminatory and pursuing public interest based justified objective? iii) is the restriction connected to a restriction on the right of establishment compatible with the Treaties? In any of the above cases: are the means to reach the objectively justified objective proportionate and necessary?

			measures taken to reach the objective need to be proportionate and necessary. In case the justification is based on public interest not directly mentioned in the Article, discriminative measures cannot be justified. Restrictions on the right of establishment, when being compatible with the Treaties, are applicable despite the Article 63 provisions.		

Table Key free movement of capital related Articles and rules that guide the gatekeepers' actions related to access to markets in the EU.

2.3 Free movement of workers

2.3.1 Sources of Law, applicability, and Key Rules and Principles

Free movement of workers has been one of the four freedoms promoted in the EU since the times of the Treaty of Rome - currently the corresponding source of law for the free movement of workers is the Article 45 TFEU. The scope of the freedom has however expanded over the years: the ECJ judgements and subsequently further legislation in the area have for example included family members into the scope of the rights provided for the workers. For instance, the Regulation 492/2011[72] and directives 2004/38[73] and 2014/54[74] provide further guidelines regarding the free movement of workers.[75] Rights concerning other persons than workers and their family members have been provided through the Charter of the Fundamental Rights, which Article 45 is dedicated for freedoms of movement and residence. I will nevertheless concentrate primarily on the free movement of workers in my work.

[72] Regulation (EU) No 492/2011 of the European Parliament and of The Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141.
[73] Directive 2004/38/EC of the European Parliament and of The Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158.
[74] Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers Text with EEA relevance [2014] OJ L128.
[75] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 781-830.

The Article 45 provides that the movement of workers is to be secured within the EU, and thus, any nationality-based discrimination between the workers from different Member States must be abolished when it comes to employment, remuneration or other conditions related to employment or work. Only the public policy, public security and public health -based derogations can justify impeding i) accepting offers of employment, ii) moving freely within the territory of Member States for purposes of employment or work, iii) staying in a Member State for the purpose of employment in accordance with the local rules and regulations governing the employment of nationals of that State, or iv) remaining in the territory of a Member State after having been employed in that State, following the conditions set in Commission regulations. None of the provisions of the Article 45 apply to employment in the public service.

The definition of "worker" in the sense of Article 45 is defined by the ECJ in its case law and clarified also in secondary legislation in the area. In the Hoekstra case[76] the ECJ provided that the definition of the worker cannot be derived from the domestic rules, but it is a matter of EU law: otherwise, the objectives of the Treaty could be watered down by definitions developed at domestic level. The term has been construed consistently broadly.[77] According to the ECJ case law, the worker does not need to work full-time or to earn for example domestically defined minimum wage to belong to the scope of the article: it is enough that the worker pursues 'effective and genuine' employment activities that are not only 'purely marginal and ancillary'.[78] In Kempf case[79] the court provided that a German person working in Netherlands as a part-time music teacher giving 12 lessons a week and needing in addition social assistance from the public fond to supplement the income, was considered a 'worker' in the sense of the Article 45. In Lawrie-Blum case the Court provided three-part definition for employment relationship: the essential feature is that 'for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.'[80] Therefore, a trainee teacher was considered as worker in the given case. The Court has provided rather wide applicability of the Article 45 also on job-seekers – even

[76]Case C- 75-63 *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)* [1964] EU:C:1964:19, p 184.
[77] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 785.
[78] Case 53/81 *D.M. Levin v Staatssecretaris van Justitie* [1982] ECR 01035, para 17.
[79] Case 139/85 *R. H. Kempf v Staatssecretaris van Justitie* [1986] ECR 01741, para 16.
[80] Case 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 02121, para 17.

wider than what the words of the Article convey.[81] In case Antonissen[82] the Court points out that 'a strict interpretation of Article 48(3) would jeopardize the actual chances that a national of a Member State who is seeking employment will find it in another Member State, and would, as a result, make that provision ineffective.'[83] Therefore, it states that 'freedom also entails the right for nationals of Member States to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment.'[84] The Court provides that the job-seeker may, however, be required to leave the territory of that State if he does not find employment after reasonable period of time.[85]

The Article 45 refers only to movement of workers between Member States, and not to nationality of the workers. This has led to situation where the ECJ has interpreted the Treaty text partly utilizing secondary legislation that guides the actions in the area, like Regulation 1612/68[86] (current Regulation 492/2011[87]), when considering the applicability of the Article 45. The Regulation refers to the nationals of the Member States and their families – the latter without reference to nationality. Without going into more details of the general EU Citizen rights of moving and residing freely within the territory of the Member States, I just want to point out that the provisions of Directive L257/2[88] impact also on part of the issues related to the free movement of workers. The Article 45 TFEU refers to movement of workers between Member States: 'wholly internal' situations are not considered to be in the scope of the Article 45.[89] The work itself does not always need to be located within the territories of the Member States in order the Article 45 to be applicable. For example, in the case Walrave[90] the fact that the employment relationship was entered within the EU, and in case Petersen[91] the fact that employment relationship had close enough link with the EU and sufficiently close link

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[81] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 794.
[82] Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-00745.
[83] Ibid, para 12.
[84] Ibid, paras 13.
[85] Ibid, para 22.
[86] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2.
[87] Regulation (EU) No 492/2011 of the European Parliament and of The Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141.
[88] Directive 2004/38/EC of the European Parliament and of The Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158.
[89] Case 175/78 *The Queen v Vera Ann Saunders* [1979] ECR 01129.
[90] Case 36-74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 01405.
[91] Case C-544/11 *Helga Petersen and Peter Petersen v Finanzamt Ludwigshafen* [2013] EU:C:2013:124.

between the employment relationship and the law of a Member State, were justifying the applicability of the Article even though the work was not carried out within the territory of the EU.

When it comes to provisions of the Article 45 - both, regarding prohibition to hinder the free movement of workers and regarding the prohibition of discrimination, - and the acceptable justifications provided in the Article, the logic seems to follow the logic provided also for the free movement of Capital and free movement of Goods[92]. Not only the direct nationality-based discrimination is forbidden, but also the indirect discrimination. This is provided for example in the case Ugliola[93] in which an Italian worker was discriminated indirectly by the provisions of German law providing that the security of employment was protected by taking the military service in the Bundeswehr into account when counting the length of employment. The Court held that this was to be held indirect discrimination as the rule favoured German nationals. The rule constituted an unjustifiable restriction. Like regarding all the other movement freedoms, also the prohibition to prevent the free movement of workers concerns not only discriminatory actions, but also situations where the action hinders or renders less attractive right to the free movement.[94] This is provided for example in the case Commission v. Portugal[95] where the Portuguese tax rules did enable tax exemptions for capital gains related taxation only in case the gains would be reinvested in real property in Portugal. This was considered breaching Article 39 EC (current Article 45). The Court came to similar conclusion also in case Commission v. Denmark[96] where the question was about Danish rules providing that the acceptability of the use of company vehicles registered in another Member State was dependent on the nature of the employment contract in that other Member State. The Danish rules allowed residents to use the car in case the question was about main employment, but not if the employment was not principal – here an additional temporary tax registration was required. In the judgement the Court provides that the measures breached the Article 39 (current Article 43) and 'could be allowed only as a derogation expressly provided for by Article 39(3) EC or if they pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest.'[97] The Court restated the guideline provided in earlier case law: 'reduction of tax revenue cannot be regarded as an overriding

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[92] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 799.
[93] Case 15-69 *Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola* [1969] EU:C:1969:46.
[94] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 798.
[95] Case C-345/05 *Commission of the European Communities v Portuguese Republic* [2006] ECR I-10633.
[96] Case C-464/02 *Commission of the European Communities v Kingdom of Denmark* [2005] ECR I-07929.
[97] Ibid, para 53.

reason in public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom'.[98] As there was no acceptable justification provided in the case, the Court found the measures breaching the right of free movement of workers. In other cases, the Court provides that in case the justified objective exists, the measures taken to pursue the objective need to be proportionate and necessary[99] – the requirements are equal to the ones related to the other free movement rights.

2.3.2 Gatekeepers in the scope and summary of the key findings

The Article 45 provision is rather neutral when it comes to the parties targeted by it: the wording of the key rule – '[f]reedom of movement for workers shall be secured within the Union' - does not direct the rule to concern anyone specifically. In any case, like when the other free movement rights are in question, also the free movement of workers related rules seem to be clearly addressed at least to Member States who are expected to abolish related barriers. Major part of the case law consists of cases where breaches of Member States or parties that are provided with the authority by the Member States are in question – parties being often in a role of legislator or executor of domestic rules. Also, the fact that the derogations provided in the Article – measures can be justified on the grounds of public policy, public security, or public health – seem to clearly address the primary responsibility for following the rules to Member States. However, there is less need for guessing whether the rules can have also horizontal implications than regarding part of the other freedom rules: since case Bosman[100] the applicability also to horizontal relations has been clear. The sports organizations were brought into the scope of the Article 45 in the case. The Court further developed the horizontal applicability for example in Agonese case.[101] The parties in the case are private person applying for job and a private banking undertaking requiring specific language certificate available only through examination held in Bolzonaro in Italy, from the job applicants. The Court states in the judgement that 'the prohibition of discrimination on grounds of nationality laid down in Article 48 of the Treaty must be regarded as applying to private persons'. As the case concerns work application process it is related to the free movement of workers. It, however, is not clear whether the discrimination aspect is required

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[98] Ibid, para 80; Case C-319/02 *Manninen* [2004] ECR I-7477 para 49.
[99] Ibid, para 53; Case 66/85 Deborah Lawrie-Blum v Land Baden-Württemberg [1986] ECR 02121, para 26.
[100] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-04921.
[101] Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139

when the free movement of workers related rules are extended to concern such private parties that do not regulate employment or provision of services in a collective manner.[102] Some of the cases relevant to the horizontal application, including case Bosman, as well as dynamics of the application of the rules are presented in more details in later parts of this work.

The summary of key aspects related to application of rules concerning the free movement of workers is presented in the table below.

Rule	Substantial object	What is forbidden?	When forbidden?	Who is the primarily targeted 'gatekeeper'?	Main consideration when evaluating the applicability
Art 45 TFEU	Restrictions on the free movement of workers	Actions hindering the free movement of workers between Member States. Discrimination based on nationality between workers of the Member States as regards conditions of work or employment.	Employment in the public service not in scope. Otherwise forbidden always unless public policy, public security or public health based objective justification available. Case law: public interest based overriding reason may constitute justified objective - measures used to reach the objective have to be proportionate and necessary. Nationals of the Member States and their families in scope.	Member States and private parties	Is other than employment in public service in question? Does the worker pursue 'effective and genuine' employment activities that are not only 'purely marginal and ancillary'? Are more than one Member State involved in the case or is it 'wholly internal' situation? Is the action restricting movement of workers between Member States by hindering the access to markets or making it less attractive, or by discriminating? If yes, does the action have public policy, public security or public health based or other overriding public interest based objective justification available? If yes, are the means to reach the objectively justified objective proportionate and necessary?

Table Key free movement of workers related Article and rules that guide the gatekeepers' actions related to access to markets in the EU.

[102] Vladimir Savković, 'The fundamental freedoms of the single market on the path towards horizontal direct effect: the free movement of capital – lex lata and lex ferenda' [2017] Vol.7 (2) Juridical tribune 208.

2.4 Free movement of services and right of establishment

Free movement of services constitute the fourth freedom within the EU internal market. In this work I will combine the handling of the free movement of services together with right of establishment due to the overall approach of this work, even though the right of establishment together with the free movement of workers is formally considered constituting the entity of free movement of persons. Like the other three key freedoms introduced to pursue common market, later single market, also the services related rules were already part of the Treaty of Rome. As the portion of economic activity concurred by services has in any case got wider only during the latest decades, while goods have concurred clearly more significant part of the activities since the post war times, services and establishment related case law and rules have developed slower compared to the ones related to movement of goods. For example, the number of court cases concerning services started to increase only in the 1990s and some important secondary legislation was introduced in 2000s.[103] The foundations for the freedom of establishment are set in the Articles 49-55 of the TFEU, while the Articles 56-62 of the TFEU set the key rules for the free movement of services. The freedom of establishment is at stake when 'self-employed' persons or companies want to establish themselves in another Member State for pursuing economic activity for an indefinite period of time, while movement of services is in question when services are provided, purchased or received crossing a border for a temporary period.[104] The important secondary legislation covering both aspects consist for example of Directive 2005/36/EC[105] concerning recognition of professional qualifications and of 'Services Directive'[106]. In addition, for example Directive 2004/38[107] coping with the terms and conditions governing EU Citizens' and their family

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[103] Her Majesty's Government, Review of the Balance of Competences between the United Kingdom and the European Union The Single Market: Free Movement of Services, 2014. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/332668/bis-14-987-free-movement-of-services-balance-of-competencies-report.pdf> accessed 30 December 2022; Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 832-833.

[104] Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms* (7th edn, OUP 2022), 241-242; Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 832-833, 860; Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-08615; Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] I-06279, paras 29-33.

[105] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L255/22.

[106] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.

[107] Directive 2004/38/EC of the European Parliament and of The Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158.

members' right to enter and stay in the Member States, concerns naturally also parties in the scope of the given Treaty articles. Like when handling the free movement of workers in the previous part of the work, more detailed evaluation of the Citizen rights and provisions of the Directive is left out of the scope of the work also here.

2.4.1 Freedom of establishment

Like pointed out above, the key rules concerning freedom of establishment are provided in the Articles 49-55 of the TFEU. The Articles provide a prohibition of restricting the freedom of establishment of nationals of a Member State in the territory of another Member State. The prohibition concerns also restrictions related to setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. The freedom of establishment includes 'the right to take up and pursue activities as self-employed persons and to set up and manage undertakings […] under the conditions laid down for its own nationals by the law of the country where such establishment is effected'. The right of establishment is provided both for natural persons who are nationals of the EU Member States and for Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union. According to the Article 54(2) '[c]ompanies or firms' refers to 'companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.' The given provisions are mentioned to be subject to the provisions of the TFEU Chapter relating to capital. The provisions concerning freedom of establishment do not apply to activities which are connected, even occasionally, with the exercise of official authority in the given Member State or to activities that are out scoped by the European Parliament and the Council following the ordinary legislative procedure. The prohibition of restricting the freedom of establishment is not applicable when restrictive provisions are laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security, or public health.

An action is seen to belong to the scope of the right of establishment related TFEU Articles when the one purposing to establish in another Member State is an EU national – either natural or legal person – and is about 'to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of

activities as self-employed persons'[108]. In specific circumstances nationals of the Member States can rely on the prohibition of hindrance of the right of establishment also against their own state.[109] While in a case Werner, in which the person who carried out business in a Member State he was national of but who lived in another Member State, could not rely on the Articles for challenging the tax rules of his own Member State[110], in a case Asscher[111] the conclusion of the Court was opposite. In the Asscher case, a Dutch person residing in Belgium and acting as a director in companies in two countries, Belgium and Netherlands, was able to rely on the Articles when challenging his own Member State allocating heavier tax burden on him than on the residents of the State. In the case, the domestic rules discriminated indirectly residents of other Member States and constituted therefore a breach of the Article 49. Also, for example cases related to acceptance of the professional qualifications and therefore also to the Directive 2005/36/EC[112] concerning recognition of professional qualifications, own Member States have been successfully challenged: here the EU connection is present through the education or professional qualifications obtained in another Member State.[113] Even though the possibility to challenge own national State exist in certain circumstances, the dilemma of 'wholly internal' situations concerns also the field of right of establishment: nationals of Member States are out of the scope of the Articles, when the case does not have EU connection. This becomes obvious for example in a case where the ECJ held that the Spanish person living in Belgium – no matter whether in French- or Dutch-speaking regions – must be entitled to care insurance that is validly available only to Belgian citizens living in Dutch-speaking areas. Belgian persons that do not have EU connection and who live in French- or German-speaking parts of the country are not, by contrary, belonging to the scope of the Treaty Articles and therefore capable of relying on the Articles to search for the right to the same insurance.[114]

In Segers case the ECJ provided that the Company is considered being established within the EU when it is formed in one of the Member States according to the domestic requirements

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[108] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165.
[109] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 839.
[110] Case C-112/91 *Hans Werner v Finanzamt Aachen-Innenstadt* [1993] ECR I-00429.
[111] Case C-107/94 *P. H. Asscher v Staatssecretaris van Financiën* [1996] I-03089.
[112] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L255/22.
[113] Case C-118/09 *Robert Koller* [2010] ECR I-13627; Joined Cases C-58/13 and C-59/13 *Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerata* [2014] EU:C:2014:2088.
[114] C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-01683, para 63.

and has a registered office in that given Member State. It can have its principal place of business somewhere else within the EU.[115] Even though highly varying local legislation is in relevant role when Companies establish and operate within the Members States, the Member States cannot hinder the right of establishment through domestic laws or procedures: Member States cannot prevent companies moving their operations to other Member States, even if the establishment in the first Member State has been carried out only for the purposes of establishing and moving the operations to another Member State. Also, for example the domestic rules guiding the conversions of the companies cannot be more restrictive for the cross-border conversions than for conversions happening within the Member State – the treatment must be equal regardless of the possible cross-border aspect.[116]

The logic of the application of the rules and interpretation of the Articles seem to be mainly similar to the logic used when other rights and freedoms are in question. Following the logic of the ree movement of workers related rules and interpretation, also the right of establishment related Articles are seen to concern not only situations where nationals of the EU Member States are facing discrimination when aiming to establish in another Member States, but also situations where non-discriminatory unjustified obstacles are hindering the right of establishment.[117] The Treaty articles related to right of establishment are not applicable to activities containing exercise of official authority, even occasionally. For example, the work of avocats is not excluded from the application of the Treaty articles: even though avocats may be in close and regular connection with the Courts, their activities are not considered to contain 'official authority'. The official authority based non-applicability of the Treaty articles 'must be restricted to those of the activities […] which in themselves involve a direct and specific connexion with the exercise of official authority'.[118] The 'official authority' is to be interpreted narrowly.[119] The second possible situation where the application of the Articles is limited is when the Council and Parliament are driving this through the ordinary legislative process. Third situation where it may be legal not to follow the prohibition to hinder the right of establishment consists of utilizing derogations provided in

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[115] Case 79/85 *D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* [1986] ECR 02375, para 19.
[116] Case C-378/10 *VALE Építési kft* [2012] EU:C:2012:440, paras 54, 62; Case C-106/16 *Proceedings brought by Polbud - Wykonawstwo sp. z o.o.* [2017] EU:C:2017:804.
[117] Case C-107/94 *P. H. Asscher v Staatssecretaris van Financiën* [1996] I-03089; Case C-496/01 *Commission of the European Communities v French Republic* [2004] ECR I-02351, para 39.
[118] Case 2-74 *Jean Reyners v Belgian State* [1974] ECR 00631.
[119] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 837.

Treaty and through the ECJ case law: the activities must have objectives that are justified on the grounds of public policy, public security, public health or on the grounds of other overriding public interest. The measures taken to reach the justified objective must be proportionate and necessary. The Court summarized the requirements for justified hinderance of the fundamental freedoms, regardless of the freedom in question, in a case Gebhard: '[n]ational measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.'[120] In any event, the Member States cannot utilize the available public interest based derogations for excluding entire economic sectors from the scope of the rules set in the Articles.[121]

2.4.2 Free movement of Services

The Articles 56-62 TFEU include the key rules related to the free movement services. According to the Articles, restrictions on freedom to provide services within the union are prohibited. The prohibition concerns situations where a national of a Member State – either a natural person or company - is established in one of the Member States and provides service to a party established in another Member State - in other words, the service provider and receiver must be established in different Member States, the Articles to be applicable. The Parliament and Council may extend the provisions to also concern nationals of third countries established and providing services within the Union, by following the ordinary legislative process. The services are such in the meaning of the treaty Articles if they are normally provided for remuneration, and they are not belonging to the scope of the Articles governing the free movement of goods, capital, or persons. The Article 57 states that 'services' do particularly include activities of an industrial or commercial character, and activities of craftsmen and the professions. It is pointed out in the Articles that service providers may, in order to provide services, temporarily pursue activities in the Member State where the service is provided, under the conditions imposed on the own nationals of the given state. Transport services, as well as banking and insurance services belonging to the scope of the Articles concerning capital movements, are governed by Articles dedicated to these fields, and are

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[120] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECJ I-04165, para 37.
[121] Case C-496/01 *Commission of the European Communities v French Republic* [2004] ECR I-02351, para 38.

therefore not in the scope of the Articles under review now. On the other hand, part of the provisions applicable to services are the same as for the right of establishment. The provisions concerning inclusion and definition of 'Companies', the non-applicability to official authority related activities, and the derogations provided on the grounds of public policy, public security, and public health, are made valid by simply referring to the respective right of establishment related Articles (Articles 51-54).

In order an activity to belong to the scope of the free movement of services related Articles, the provider of the service established within the Member State needs to carry out economic activity, i.e., provide service that is normally provided for remuneration, in a specific Member State where either provider or receiver of the service is not established in, for a temporary period of time.[122] Thus, there are both party and location related requirements, as well as requirements related to the service production itself. The first requirements for applicability concern the nationality of the service provider, and place of establishment of the service provider and the service receiver. For natural persons, the requirement is self-explaining, while when a legal persons are in question, the Article refers to 'companies or firms formed under a law of a Member State and having the seat prescribed by their statutes, or their centre of administration, or their main establishment situated within the Community, provided that when only that seat is situated within the Community their activity shows real and continuous link with the economy of a Member State: such link shall not be one of nationality, whether of the members of the company or firm, or of the persons holding managerial or supervisory posts therein, or of the holders of the capital'[123]. The next requirements concern locations and possibilities to reach or offer the service. As natural, when considering the high-level purpose of the provisions of the Articles, it does not seem to matter which location or point of the demand-supply chain the hindrance takes place in or which point it imposes its effects to, in order the Articles to apply - either does it matter whether it is the service provider or service receiver who brings the required inter-state factor into the case. For example, the Members States commit to forbidden hindrance of the free movement of services in case they hinder parties established within their territory or in a territory of another Member State to provide or to receive services either within their territory or in the territory of another Member State, without justified reasons.[124] Sometimes the activity can be in the scope of the prohibition

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[122] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 860.
[123] General Program for the abolition of restrictions on freedom to provide services [1961] OJ 2/32.
[124] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR 01141, para 30; Joined cases C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge*

provided in the Articles even though there is not even identifiable customers yet: in the Alpine Investment case the Court brought up that the prohibition to give phone calls to potential customers in another Member State without their prior consent can constitute a restriction on freedom to provide services if it prevents effective marketing of the service.[125] Even though the text of the Articles does concentrate more on the part of service providers, when delivering prohibition to hinder the cross-border service provision and defining the services in the scope of the Articles, also the service receivers' right to move to receive service in another Member States than his state of establishment is provided through the wording: the fact that either the service provider or the service receiver is not in his place of establishment for purposes of delivering or receiving the service, renders the Articles applicable. The Court has provided in the case Luisi and Carbone that 'the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions […] and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services.'[126]

In addition to the requirements set for parties and locations, there are also requirements to be fulfilled regarding the services provided, in order the Articles to be applicable. The first requirement for the services to belong to the scope of the Articles is 'economic nature' of them. For example the fact that the service is paid by another party than the one receiving it does not affect the applicability.[127] In the case Deliège the Court provided that 'concepts of economic activities and the provision of services […] define the field of application of one of the fundamental freedoms guaranteed by the Treaty and, as such, may not be interpreted restrictively'.[128] The Court also refers for example to the 'marginal and ancillary' definition familiar from the free movement of workers when evaluating the economic nature of the provision of services.[129] Therefore it seems logical to expect the standards for 'economic activity' to be similar to the ones applied when other free movement rights are in question.

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de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97) [2000] ECR I-02549; Joined cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* [1984] ECR 00377; Case 63/86 Commission of the European Communities v Italian Republic [1988] ECR 00029.

[125] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR 01141, paras 26-28.

[126] Joined cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* [1984] ECR 00377, para 16.

[127] Case 352/85 *Bond van Adverteerders and others v The Netherlands State* [1998] ECR 02085, para 16.

[128] Joined cases C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97)* [2000] ECR I-02549, para 52.

[129] Ibid, para 54.

Like pointed out above, there is also a requirement related to continuity of service provision. In order the activity to be considered belonging to the scope of service-related Articles, and not to fall into the scope of right of establishment Articles, the provision of services in a Member State that is not the state of establishment for the service provider, needs to be temporary. Whether the time spent in a Member State can fit into the definition 'temporary', has to be evaluated case by case, and, as provided in the case Gebhard, to be determined 'in the light of its duration, regularity, periodicity and continuity'[130]. For example, in case the service is provided for a large scale construction project, even years long presence in a country has not been a factor determining the activity to belong to the scope or right of establishment Articles instead of services related Articles.[131] In this light it seems rather natural that, for example, an office in a specific Member State has not, as such, been a predominant factor when aspect of temporariness has been considered: in the mentioned Gebhard case, the Court provided that the service provider 'may equip himself in the host Member State with the infrastructure necessary for the purposes of performing the services in question'[132] However, there may be also opposite cases: in some rare cases in which service provider was established in one country but continuously provided all its services in another Member State to evade for example from some regulation or professional rules in force in the state where the activities took place, the Court considered the behaviour abusive: here it held the Articles related to establishment to prevail, regardless of the artificial set up fulfilling the prerequisites of the Articles related to services.[133]

Like pointed out already in the part handling the right of establishment, for example the case Gebhard[134] provides that the logic for applying the free movement rights related rules is the same, regardless of the right in question. Inter alia case Sägers[135] also re-emphasizes the fact that the Articles are to be applied also to non-discriminatory measures hindering the free movement of services, following the same logic applicable to other freedom rights. As, in addition, the exact same Articles govern the available justifications and derogations in the

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[130] *Case C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECJ I-04165, para 39.
[131] Case C-215/01 *Bruno Schnitzer* [2003] ECR I-14847, para 40; Case C-458/08 *European Commission v Portuguese Republic* [2010] ECR I-11599, para 85.
[132] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECJ I-04165, para 39.
[133] Case C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen [1999] ECR I-01459, para 39; Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 861.
[134] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECJ I-04165.
[135] Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* [1991] ECR I-04221.

areas of right of establishment and freedom to provide services, there is no reason to review the logic in more details separately here. One very relevant aspect is in any case still worth highlighting, to bring up what the aim to maintain stable logic regardless of the freedom in question, is bringing with it: in the case Alpine investment the Court showed that the principle of mutual recognition evoked through the Cassis de Dijon case[136] in the area of free movement of Goods, is to be applied also in the area of free movement of services.[137] This indicates that the Member States need to have justified objectives available and proportionate and necessary measures in use in order them not to accept services that are legally provided elsewhere to be provided also in their territories. While the total harmonization of local legislation does not come to question as a means to flatten barriers caused by varying local rules, for example the directive 2005/36/EC [138] concerning the recognition of professional qualifications is used do flatten the barriers in one area, but the unlimited scope of 'mutual recognition' is able to provide harmonization of very different extent, if so desired.

2.4.3 Gatekeepers in the scope and summary of the key findings

Like regarding all handled freedom rights, also the rules related to the free movement of services and right of establishment seem to be primarily addressed to Member States. This is, however, somewhat less visible in the text of the Articles – especially when it comes to the free movement of services related Articles - than for example in Articles concerning the free movement of Capital. For example, the Article 60 makes the primary idea behind the text in any case rather clear: 'As long as restrictions on freedom to provide services have not been abolished, *each Member State shall apply such restrictions* [emphases added] without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56.' Also, again, all the preclusions and derogations related provisions are addressed to Member States.

Even though the Treaty text seems to be addressed primarily to guide Member States, and majority of the court cases is related to Member States or parties utilizing authority provided by the Member States, several Court cases show that the given Articles can be utilized also in horizontal relations. Again, for example, sports organizations and labour unions, have been

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[136] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 650.
[137] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR 01141; Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 872.
[138] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L255/22.

parties whose activities have been challenged based on the Articles. For example, in the case Deliège[139], judoka Ms Deliège brought an action against sport organizations selecting the representatives to high-level judo competitions claiming that the procedure constituted a breach of the Article 59 TFEU. In Laval case[140], Latvian construction company utilized the same Article for challenging the labour unions requiring to sign a contract with a local union to be able to provide services in Sweden. In Viking case[141] the actions of a labour union were challenged based on the Article 49 TFEU and the right of establishment. Two later cases are handled in more details in later parts of this work.

The summary of key aspects related to application of rules concerning the right or establishment and the free movement of services are presented in the following tables.

[139] Joined cases C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97)* [2000] ECR I-02549.
[140] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.
[141] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

Rule	Substantial object	What is forbidden?	When forbidden?	Who is the primarily targeted 'gatekeeper'?	Main consideration when evaluating the applicability
Art 49-55 TFEU	Restrictions on the right of establishment	Restrictions on the right of establishment of nationals of a Member State (natural persons or companies) in the territory of another Member State (e.g. right to take up and pursue activities as self-employed persons, set up and manage undertakings, under the conditions laid down for own nationals by the law of the country). Restrictions can be unjustified discriminatory actions or unjustified non-discriminatory actions hindering the use of the right.	Forbidden always unless public policy, public security or public health based objective justification available. Case law: public interest based overriding reason may constitute justified objective - measures used to reach the objective have to be proportionate and necessary. The provisions are not applicable to activities that are connected, even occasionally, with the exercise of official authority or activities that have been out scoped by the Parliament and Council following the ordinary legislative procedure. The provisions related to the right of establishment are subject to the provisions of the Chapter relating to capital.	Member States and private parties	Is the action connected to exercise of official authority or otherwise excluded from the application of the Articles? Is the activity subject to the provisions of the Articles related to the free movement of capital? Is more than one Member State involved in relevant manner in the case or is it 'wholly internal' situation? Is the action restricting establishments between Member States by i) hindering the access to markets or ii) making it less attractive, or by iii) discriminating (directly or indirectly)? If yes, does the action have public policy, public security or public health based or other overriding public interest based objective justification available? If yes, are the means to reach the objectively justified objective proportionate and necessary?

Table Key right of establishment related Articles and rules that guide the gatekeepers' actions related to access to markets in the EU.

Rule	Substantial object	What is forbidden?	When forbidden?	Who is the primarily targeted 'gatekeeper'?	Main consideration when evaluating the applicability
Art 56-62 TFEU	Restrictions on the free movement of services	Actions hindering the free movement of services between Member States when provided by nationals, natural persons, or companies of the Member State / established within the EU.	Forbidden always unless public policy, public security or public health based objective justification available. Case law: public interest based overriding reason may constitute justified objective - measures used to reach the objective have to be proportionate and necessary. The provisions are not applicable to activities that are connected, even occasionally, with the exercise of official authority or activities that have been out scoped by the Parliament and Council following the ordinary legislative procedure. The provisions related to the right of establishment are subject to the provisions of the Chapter relating to capital.	Member States and private parties	Is the action connected to exercise of official authority or otherwise excluded from the application of the Articles? Is the activity subject to the provisions of the Articles related to the free movement of capital? Is more than one Member State involved in relevant manner in the case or is it 'wholly internal' situation? Is the action restricting establishment between Member States by i) hindering the access to markets or ii) making it less attractive, or by iii) discriminating (directly or indirectly)? If yes, does the action have public policy, public security or public health based or other overriding public interest based objective justification available? If yes, are the means to reach the objectively justified objective proportionate and necessary?

Table Key free movement of services related Articles and rules that guide the gatekeepers' actions related to access to markets in the EU.

3 Competition law – the sources of law, rules, and primarily targeted gatekeepers

Competition law, like the free movement laws handled in the previous part of the work, is a key instrument for pursuing the EU internal market related objectives.[142] The target of the competition law is to enable barrier free and fair market environment.[143] While the free movement laws are addressed primarily to guide states, the competition law is addressed primarily to guide companies operating in the EU markets.[144]

In this part of the work, I will answer to the questions: 'what are the main sources of law' and 'what are the key rules and principles guiding the gatekeepers' possibilities to limit the access to markets', it the area of competition law. Also, the potential gatekeepers in the scope of the rules are considered.

Those parts of the competition law relevant to the topic of this work are based on the articles 101 and 102 of the TFEU. The Article 101 concerns such horizontal and vertical agreements between the market operators, that create barriers and possible anti-competitive effects in the markets. The Article 102 concentrates on the possible anti-competitive effects that high market power can bring: it guides behaviour of market operators in dominant positions. Again, case law and secondary level sources of law provide further guidance in both areas. Due to clearly separate function of the two key TFEU Articles, I will handle the two Articles with related rules and principles separately in the following. Following the logic adopted in the earlier parts of this work, a summary of the key rules and principles and their application is presented in a form of a table at the end of each part.

3.1 Fighting against barriers caused by cartels – Art 101

Article 101 TFEU concerns vertical and horizontal agreements that may create artificial barriers for accessing and operating in the markets in the EU area. Its content and main rules and principles that have been derived from it are handled in the following. Again, the key rules stand in the Treaties, but more detailed rules and principles are developed and delivered through secondary legislation, instructions, and especially through case law of the ECJ.

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[142] Wolf Sauter, *Coherence in EU competition law* (OUP, 2016) 32.
[143] European Parliament, 'Competition Policy' (Fact Sheets on the European Union, 2022) <https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.6.12.pdf> accessed 07 January 2023.
[144] Kirsi Leivo and others, *EU:n ja Suomen kilpailuoikeus* (2nd edn, Talentum Media Oy, 2012) 50.

The Article 101 is twofold. First the Article tells what kind of agreements and actions are forbidden, and states that agreements or decisions that area against the prohibition are void. Then after, the Article provides reasons that may, however, make it acceptable to carry out the actions that are forbidden in the first place.

According to the Article 101 TFEU 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market' are forbidden. It further clarifies that it particularly means such actions that:

> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

After defining the forbidden actions and stating that agreements on such actions are to be considered void, the Article provides that the given injunctions are inapplicable in case the given actions do contribute 'to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'. At the same time, it is required that the actions are indispensable for reaching the given objectives, and that the actions do not 'afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'

Kuoppamäki has created a four-step decision making chart to support the process of concluding whether a specific agreement is to be prohibited based on the Article 101.[145] The

[145] Petri Kuoppamäki, *Markkinavoiman Sääntely EY:n ja Suomen Kilpailuoikeudessa* (Gummerrus Kirjapaino Oy, 2003), 449.

idea is that different aspects related to Article 101 applicability are evaluated in such order that minimizes the work: if the agreement under review is not considered belonging to the scope of the the competition law provisions due to aspect evaluated at specific step, the detailed analyse on aspects belonging to the later steps is not needed. In the first step, the idea is to figure out whether the agreement in question is belonging to the scope of the competition law in the first place or whether it is out scoped from the application of the provisions for example due to applicability of de-minimis rule or block exemptions. The second step concerns reasons for concluding the given agreement: are there such efficiency gains resulted from the agreement that save the agreement from the application of the competition law provisions? The impacts that the agreement is imposing on the markets are evaluated in the third step. In case remarkable harm to competition is found, the possible benefits and harms are weighted against each other in the step four. As Kuoppamäki's decision chart seems to provide efficient order for evaluating different factors affecting to the applicability of the Article 101, I will utilize similar type of order when reviewing different application related aspects in the following. However, I will start the review from a bit 'earlier' stage of the evaluation and discuss first about the higher-level elements that need to exist in order an agreement or activity to possibly belong to the scope of the Article, based on the Article text.

The scope of the Articles can be seen to be limited through provisions representing three different dimensions: the first dimension consists of the operators – gatekeepers - that are in the scope of the Articles, the second consists of the possible effect of the activities in the scope of the Articles, and the third one consists of the nature of the activities themselves.

In the light of Art 101 the gatekeepers in the scope of the regulation are "undertakings". The Article does not define the term, but the EU courts and competition authorities have taken a broad view on the definition. The definition, however, has its limits as well: it does not cover public or other actors whose exclusive purpose is to fulfil social objective, without economic activity.[146] The Article 106 of the TFEU links the competition regulation with undertakings that have public background by stating that

> (…) in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain

[146] Paul Craig, Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (7th edn, OUP 2020), 1036; Petri Kuoppamäki, *Markkinavoiman Sääntely EY:n ja Suomen Kilpailuoikeudessa* (Gummerrus Kirjapaino Oy, 2003), 452-456.

> in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

The Article also states that '[u]ndertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly' are in the scope of the given rules 'in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.'

The court brought up the significance of the economic activity aspect in its decision in Höfner case[147]. In Höfner the Court provided that 'every entity' – like a public employment agency that engaged in the business of employment procurement in the case – 'engaged in an economic activity, regardless of its legal status and the way in which it is financed' is to be classified as an undertaking subject to the community competition rules.[148] In SOA Natzionale Costruttori case[149] and Motorsykletistiki Omospondia Ellados NPID[150] case the Court further clarified the role of public connection: when public or state-owned entity carries out commercial actions, it is to be considered an undertaking in the sense of Art 101, and therefore the actions are subject to the rules provided in the Article. When a private party, on the other hand, is vested with public power, the vested part is not to be considered being in the scope of the Article 101.

Parties that conclude collective agreements in the name of management and labour seem to be in a special position: they are not considered undertakings in the scope of Art 101 due to reasons that are related to the purpose of their existence. The court reasoned this in the Albany case[151] by stating that the social objectives of the agreements would not be reached if the actions were considered belonging to the scope of the Article 101. In the Viking Line case[152], the court however brought up that also these kinds of actors and actions do belong to the scope of free establishment related rules, and therefore are not totally out of the scope of the EU internal market related laws.

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[147] Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-01979.
[148] Ibid [21].
[149] Case C-327/12 *Ministero dello Sviluppo economico v SOA Nazionale Costruttori* [2013] EU:C:2013:827.
[150] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECR I-4863.
[151] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751.
[152] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

In addition to the dimension of public versus private operations, the definition of undertaking and its competition law related implications has also another relevant but rather complicated aspect: namely the view on what legally distinct parts are belonging to the same entity when the entity is considered being in the scope of the Article 101. The question is relevant, for example, when starting to evaluate lawfulness of actions of a company with subsidiaries. According to the ECJ case law, the question is about autonomy of different parts of the consolidated corporation. In case a subsidiary has real autonomy, it should be held as a separate entity from its parent company from the competition law viewpoint. When a subsidiary, on the other hand, is carrying out its parent's instructions, and thus does not have a real autonomy for deciding how to act in the markets, it is seen to constitute an integral economic unit with its parent company. In this case these legally separate companies are considered one united entity from the competition law viewpoint. [153]

In order the Art 101 to be applicable, trade between Member States must be affected. This criteria is seen to be fulfilled quite easily: the Court provided the guidelines already in 1965 in the Société Technique Minière case by stating that to affect trade between Member States 'it [agreement] must be of such a nature that, on the basis of a set of objective factors of law or of fact and having regard to what can reasonably be foreseen, it is to be feared that it might have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States capable of preventing the realization of a single market between the said States.'[154] In case this criteria is fulfilled, the next step is to look at the de Minimis doctrine related to the competition law applicability.

The Court has developed an idea of an appreciable impact that actions or agreements have to have on competition or trade between the Member states in order them to be in the scope of Article 101.[155] At the same time, the Court has provided that in case *the objective* of a specific agreement or action is to limit competition, it is *always* in the scope of the Article 101.[156] The de Minimis doctrine has been further defined in the guidelines that the Commission has

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[153] Petri Kuoppamäki, *Markkinavoiman Sääntely EY:n ja Suomen Kilpailuoikeudessa* (Gummerrus Kirjapaino Oy, 2003), 451; Case 15/74 *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc.* [1974] ECR 01147, para 41; Case 22/71 *A Béguelin Import Co. v S.A.G.L. Import Export* [1971] ECR 949; Case 217/05 Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA [2006] ECR I-11987.
[154] Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1965] ECR 235, 251.
[155] Case 5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295, 302.
[156] Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* [2012] EU:C:2012:795, para 37; Case C-345/14 *Maxima Latvija* [2015] EU:C:2015:784, paras 15-21; Mark Friend, 'Restrictions by Object Under EU Competition Law' [2020] Vol 79 (3) CLJ 427.

delivered (De Minimis Notice).[157] The guidelines delivered in the de Minimis Notice are summarized in the table below.

De Minimis conditions for Art 101 TFEU applicability	
Object of an agreement is to prevent, restrict or distort competition within the internal market	Art 101 always applicable
Parties to the agreement are actual or potential competitors on any of the affected markets (or if difficult to classify whether competitors or not)	Art 101 applicable if aggregate market share held by the parties to the agreement exceeds 10 % on any of the relevant markets affected by the agreement*
Parties to the agreement are not actual or potential competitors on any of the affected markets	Art 101 applicable if share held by any of the parties exceeds 15 % on any of the relevant markets affected by the agreement*
When cumulative foreclosure effect of parallel networks of agreements exists (no matter if the agreements are between competitors or non-competitors)**	The threshold for Art 101 applicability is to be reduced to 5 % in both two above cases*
*Notice: According to Commission's view the agreements do not appreciably restrict competition if the market shares of the parties to the agreement do not exceed the set thresholds of 10 %, 15 % and 5 % during two successive calendar years by more than 2 percentage points. **Notice: '*Individual suppliers or distributors with a market share not exceeding 5 %, are in general not considered to contribute significantly to a cumulative foreclosure effect. A cumulative foreclosure effect is unlikely to exist if less than 30 % of the relevant market is covered by parallel (networks of) agreements having similar effects.'*[158]	

Table: Summary of De Minimis guidelines

[157] European Commission, *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)* [2014] OJ C291/01.

[158] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C291/01, para 10.

In addition to the scale of impact of agreement and actions, also the nature of the actions need to be reviewed in more details before judging whether the application of the Art 101 comes into question. The Article 101(3) provides factors that may exclude agreements and actions from the scope of the Art 101 prohibitions. The Court has provided guidelines for evaluating whether different types of contracts or actions are in the scope of the Article, through its case law. However, the guidelines have also been codified and clarified further through block exemption regulations given by the Commission. Commission has given regulations both for vertical and for horizontal cases. For example, a newly updated Regulation 2022/720 concerns the application of Article 101 to categories of vertical agreements and concerted practices[159], while a research and development agreements related regulation 1217/2010[160] and specialisation agreements related regulation 1218/2010[161] concern mainly horizontal agreements and concerted practices. Also, the two latter regulations are under replacement or renewal process: the currently valid regulations expire at the end of the year 2022 (extended to June 2023). In addition to the mentioned block exemptions, block exemption regulation is available also in other areas, including for example technology transfers[162].

The block exemption regulations are targeting to simplify both, the administrative supervision and the legislative framework, when pursuing the requirements of ensuring the effective protection of competition and providing adequate legal security for undertakings.[163] In practice, they aim to provide categories of agreements and circumstances that can be considered always fulfilling the requirements set in the Article 101(3) for declaring the Article 101 prohibitions inapplicable.[164] The block exemptions intensify the evaluation process, as more detailed evaluation on the Art 101(3) is needed only for cases that are not 'categorically'

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[159] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2022] OJ L134/4.
[160] Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements Text with EEA relevance [2010] L335/36.
[161] Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements Text with EEA relevance [2010] OJ L335/43.
[162] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements [2014] OJ L93/17.
[163] Reg 316/2014 [2014] OJ L93/17, para 3; Reg 1218/2010 [2010] OJ L335/43, para 3; Reg 1217/2010 [2010] L335/36, para 4.
[164] Paul Craig, Gráinne de Búrca, EU Law – Text, Cases, and Materials (7th edn, OUP 2020), 1063; Commission 'Block Exemption Regulations' (Competition Policy) <https://competition-policy.ec.europa.eu/antitrust/legislation/block-exemption-regulations_en> accessed 6 October 2022.

out scoped of the application of the Article 101 through the block exemptions. It is worth pointing out that there is also the competition law related sector specific regulation providing rules and guidelines for specific market actors and gatekeepers. For example, agricultural production is not always in the scope of the competition laws: Article 42 and 43 of the TFEU provide Commission a right to submit proposals for the Parliament and Council regarding applicability of the competition laws to production of and trade in agricultural products.[165] Due to limited page count allowed in this work I, however, need to leave out more detailed review and analyses of these sector specific rules, and continue examining the general rules and principles the competition law addresses to market gatekeepers.

For the overall Article 101 applicability evaluation the Commission has provided principles in the guidelines it has given separately for horizontal agreements and concerted practices[166] and for vertical agreements and concerted practices[167].

If a specific case under evaluation is not dropped off from the scope of Article 101 in the above-mentioned phases of the evaluation, the next step is to evaluate reasons for the agreement or concerted practices under inspection. If the reasons found do not include any genuine efficiency gains, the question is purely about forbidden anti-competitive action, and no further evaluation is needed. If, on the other hand, efficiency gains related reasons for actions are found, the next step is to evaluate competitive environment: this requires reviewing different factors, like the parties' role in relevant markets, number of competitors, market concentration, barriers to enter the market and so forth, to evaluate the impact of the actions under assessment on the competition environment. In case the agreement or concerted practice in question does not harm the competition, but the competition is seen to be adequately intense also after the implementation of the agreement or concerted practice, it is to be considered acceptable.[168] In case the agreement or concerted practice does harm the competition, the detailed evaluation based on the Art 101(3) is needed. In order an agreement or concerted practice to be acceptable, the positive implications specified in the Art101(3),

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[165] Petri Kuoppamäki, *Markkinavoiman Sääntely EY:n ja Suomen Kilpailuoikeudessa* (Gummerrus Kirjapaino Oy, 2003), 458-459; European Commission, 'Competition Policy, Agriculture' <https://competition-policy.ec.europa.eu/sectors/agriculture/agriculture_en> accessed 26 September 2022.
[166] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1.
[167] Communication from the Commission - Commission Notice, Guidelines on vertical restraints [2022] OJ C248/1.
[168] Petri Kuoppamäki, *Markkinavoiman Sääntely EY:n ja Suomen Kilpailuoikeudessa* (Gummerrus Kirjapaino Oy, 2003), 449.

namely improvement of the production or distribution of goods or promotion of technical or economic progress, need to be bigger than negative impacts it imposes on competition. In addition, the consumers must gain fair share of the benefit, and the agreement or concerted practice is not allowed to be able to prevent the competition substantially in the related product area, in order it to be acceptable. In case the agreement leads to a situation where it creates or bolsters parties' dominant market position, it is likely considered unacceptable.[169]

Before moving to handle dominant market position related aspects of the competition law, I still want to briefly mention the Articles 107 and 108 of the TFEU and Commission's general block exemption regulation No 651/2014[170]. The Articles and the Regulation concern State aid: they define what kind of state aid is allowed and not in contradiction to the competition laws. Despite the competition law dimension of the given regulations, and the apparent connection with other block exemptions, these are not in a core of this work, and will therefore not be gone through in more details here.

3.2 Preventing abuse of dominant market position – Art 102

In this part of the work, I will examine the sources of law and key rules and principles guiding the gatekeepers that are in a dominant market position, and therefore able to limit the access to markets.

The key source of law is the Article 102 of the TFEU. Unlike with Article 101 and cartel regulation, the Commission has not provided additional regulation to further guide the actions related to the abuse of dominant market position.[171] However, the Court has naturally provided guidelines also for the interpretation of this Article. Also, Commission has provided guidelines for supporting evaluation of different aspects related to abuse of dominant market position: the key guidelines are mentioned in the respective points in the following.

The Article 102 prohibits abusing market power. It forbids abuse of dominant market position, held by one or more undertakings together, within internal market or substantial part of it, when it may impact trade between member states. The Article provides particular examples of forbidden actions: i) defining directly or indirectly unreasonable purchase or

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[169] [169] Petri Kuoppamäki, *Markkinavoiman Sääntely EY:n ja Suomen Kilpailuoikeudessa* (Gummerrus Kirjapaino Oy, 2003), 449.
[170] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1.
[171] Wolf Sauter, *Coherence in EU competition law* (OUP, 2016) 29.

sales prices or other trade conditions, ii) limiting production, markets, or technical developments with prejudice to consumers, iii) damaging fair competition by applying dissimilar trade conditions for similar output by trading partner, and iv) setting supplementary obligations not having connection with the subject of the contract as a prerequisite for closing the contract.

In practice, the Article 102 related evaluation can be divided into three phases. First phase concerns the verification of condition of market dominance. This naturally requires first defining the relevant market, and then evaluating whether the undertaking is in a dominant position in the market. Also, the necessary precondition of possible impact on trade between Member States needs to be present in order the Art 102 to be applicable. The second phase of the evaluation concerns the decisive condition of abuse. It is about evaluating whether specific action is to be considered abusive and therefore forbidden, or whether it is a desirable part of competition: a natural and well-working competition environment facilitates situations where parties that are less efficient and less attractive to consumers leave the market[172] unless they manage to improve their offering. The possibilities to compete are to be maintained regardless of possible presence of a party with dominant position. The third phase of the evaluation is closely related to the second one: it concerns possible defences. The possibility to utilize defences is not provided in the Article 102 as it is in Article 101, but the ECJ has nevertheless provided the possibility and guidelines for this in its case law, like presented in the following parts of this work.

To conclude, it seems that because of guidelines provided by the ECJ through its case law, the high-level logic for applying the provisions of Article 102 is similar to the application of other Articles and rules guiding the gatekeepers' possibilities to limit the access to markers. The given steps do follow the normal procedure of i) first figuring out whether the rules apply to parties and circumstances present in the case, then ii) figuring out whether the activities do consist of forbidden type of action, and finally iii) figuring out whether there are derogations or justifications saving the activity from the scope of the prohibition provided in the respective Article, and weather the measures taken are acceptable for pursuing the found justified objective. Next, the steps are gone through in more details regarding the Article 102.

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[172] Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, [2012] EU:C:2012:172.

3.2.1 Market dominance

Market dominance is a precondition for the applicability of the Article 102. To be able to set a party – or more parties together – by their relevant parts into a correct market context for evaluating whether the precondition of dominant position exists, three different market definition related dimensions are to be considered: product market, geographical market, and temporal factor.[173] Fixing the product dimension requires figuring out what are the products competing against each other, and thus belonging to the same market. Geographical dimensions of the market need to be fixed to be able to evaluate the market position of the party in correctly defined geographical context. Also, the time scale that is to be used when carrying out the evaluation needs to be defined. For example, the demand of some products is very seasonal, while for some other products the phase of technological development is crucial from the demand point of view: the temporal factor needs to be considered when defining the market position of the party, especially, when these kinds of products are in question. The guidelines for evaluating the market dominance and defining the relevant market are provided by the ECJ through its various case law[174], but especially for the temporal dimension also by Commission through its decision on the Tetra Pack II case[175]. Furthermore, the Commission gave a Notice on the definition of relevant market for the purposes of Community competition law[176] in 1997. In the notice the Commission gives advice and tools for defining relevant market through considering a product dimension and a geographical dimension. It also delivers advice on defining the market share, that is to be calculated for the relevant market constituted based on the dimension specific evaluations.

Even if the high market share is considered central for the high market power, the actual market dominance cannot, however, be determined only based on the market share, but also other factors may indicate dominance.[177] In a United Brands case, the ECJ provides that 'an undertaking does not have to have eliminated all opportunity for competition in order to be in

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[173] Paul Craig, Gráinne de Búrca, EU Law – Text, Cases, and Materials (7th edn, OUP 2020), 1088.
[174] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities. Chiquita Bananas.* [1978] ECR 207; Case T-340/03 *France Télécom SA v Commission of the European Communities* [2007] ECR II-00107; Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 215; Case C-333/94 *Tetra Pak International SA v Commission of the European Communities* [1996] ECR I-05951.
[175] *Elopak Italia Srl v Tetra Pak* (Case IV/31043) Commission Decision 92/163/EEC [1992] OJ L72, paras 92-97.
[176] Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C372.
[177] Paul Craig, Gráinne de Búrca, EU Law – Text, Cases, and Materials (7th edn, OUP 2020), 1096-1098; Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461.

dominant position'. [178] In the same case the Court provided that the undertaking's 45% market share in the relevant market is enough it to have a dominant position provided that also some other factors support the existence of the dominance. According to the Court the dominance relates to a position of economic strength that enables an undertaking to act in a way that prevents efficient competition: it can operate to an appreciable extent without being dependent on its competitors, customers, or consumers. The reason for the situation can vary and does not need to consist of one factor only but can be a summary of many factors that separately would not be able to provide dominance.[179] In the given case the fact that the United Brands was able to adopt large scale strategy against new competitors in the relevant markets due to its own size and due to the entry cost that imposed practical barrier for others to enter the market, made the Court hold the United Brands being in a dominant position. Others had, in theory, possibility to build big enough production and delivery capabilities to reach the required efficiency level to compete with United Brands, but the Court found that the combination of the costs related to finance, required marketing, building wide enough supply capabilities and logistics networks comprised '*almost insuperable practical and financial obstacles*' for others to build up the capabilities to compete against United Brands in practice.[180]

Before moving to handle the factor of 'abuse' that is relevant to prohibitions of Article 102 to be applicable, I still want to briefly bring up one more aspect possibly causing complexity for forming the understanding of the relevant market and for judging whether the undertaking is in a dominant position. Namely, the idea of joint dominance: in specific cases more than one party can constitute a unit that is seen to hold a dominant position. The Article 102 states that abuse of dominance of one or more undertakings is forbidden. In practice, more than one undertaking can be in the mentioned position when the undertakings or some parts of them constitute an economic unit[181], but for example in the joined cases T-68/89, T-77/89 and T-78/89[182], and in the cases C-395-396/96[183] the Court brought up factors that can make also

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[178] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities. Chiquita Bananas.* [1978] ECR 207, para 113.
[179] Ibid, para 6.
[180] Ibid, para 123.
[181] Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 215, paras 36-41.
[182] Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities* [1992] ECR II-01403.
[183] Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports SA, Compagnie maritime belge SA and Dafra-Lines A/S v Commission of the European Communities* [2000] ECR I-01365.

separate oligopolistic units to constitute a group of undertakings occupying a dominant position together. Due to the page limit, I have, I will not go into more details regarding the guidelines delivered for evaluating the jointly occupied dominant position but will move to examine the notion of abuse.

3.2.2 Abuse

The second phase of the Article 102 related evaluation concerns examination of whether a specific action is to be considered abusive and therefore forbidden, or whether it is to be held only as a normal and desired part of competition. The Article gives examples of the forbidden – abusive – actions, but the list of abusive actions is not exhaustive: the Court has provided further clarification on possibly abusive actions through its case law, while legal scholars have provided different groupings of the abusive actions to make the big picture of forbidden actions clearer.[184] Also, the Commission has guided business community, national level competition law enforcers, and other stake holders on its approach on the abusive actions for example through Competition Discussion Paper[185] and following Guidance Paper[186] it delivered in the 2008. Through these documents the Commission provided information on different exclusionary abuses and its stance on them, introducing for example the Commissions effects-based approach to exclusionary conduct under the Article 102.

It is naturally clear that holding a dominant position is not forbidden per se[187], but the case law provides that the undertakings in a dominant position have in any case a special responsibility to look after the competitive environment when making business decisions[188]: decisions and actions that would possibly be acceptable for undertakings not occupying a dominant position, are therefore not always allowed for undertakings that do occupy such positions. An undertaking in a dominant position is allowed to protect its own interests in the

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[184] Kuoppamäki, *Markkinavoiman Sääntely EY:n ja Suomen Kilpailuoikeudessa* (Gummerrus Kirjapaino Oy, 2003), 782-991; Kirsi Leivo and others, EU:n ja Suomen kilpailuoikeus (2nd edn, Talentum Media Oy, 2012) 735-859.
[185] Commission, DG Competition Discussion Paper on the application of article 82 of the treaty to exclusionary abuses [2005] < https://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> accessed 7 January 2023.
[186] Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/02.
[187] Alison Jones and Christopher Townley, 'Competition Law' in Catherine Barnard, Steve Peers (eds), *European Union Law* (3rd edn, OUP 2020), 573; Stephen Weatherill, Cases & Materials on EU Law (12th edn, OUP 2016), 490.
[188] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR 3461, para 10.

competitive circumstances but strengthening its dominant position is considered an abuse.[189] The undertakings in dominant positions should not carry out actions that are exploitative and therefore directly harmful to consumers, but either should they carry out actions that are exclusionary and therefore damaging the competitive process.[190] The exploitative abuses can be understood as 'behavioural' abuses, like unfair pricing, forbidden clearly in the Article 102, while the exclusionary abuses are considered as 'structural' abuses weakening the competition.[191] The exclusionary abuses impact primarily on the competitors instead of consumers, but as they are seen to impair the competition, they are considered harmful also to consumers in the longer term.[192] The exclusionary abuses are not directly mentioned in the Article 102, but the Court has brought them into the scope of the Article through teleological interpretation of the Treaty and its Articles: in the Continental Can case the Court refers to the provisions of the Treaty Articles 2 and 3 that state the overall tasks of the community and objectives of the Treaty. The Court refers to the Article 3 statement providing that the 'Community's activity shall include the institution of a system ensuring that competition in the Common Market is not distorted' and points out that this requires *a fortiori* that the competition must not be eliminated.[193] The court has maintained its approach also in the later cases, but its approach has got gradually closer to the guideline provided by the Commission in 2008 through its Guidance Paper endorsing approach that would take the economic effects of the undertakings actions more into account. In the Post Danmark case[194] the Court, that was earlier blamed for too formalistic approach to abusive competition restrictions[195], summarized the guidelines it had given in the earlier cases and provided that when evaluating whether actions are abusive i) each case needs to be evaluated based on its unique circumstances and not by any predefined criteria or *de minimis* threshold and ii) the criteria for evaluation are to be chosen so that it shows whether the action of an undertaking in a dominant position may cause anticompetitive effects that iii) must be *probable* but there is no

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[189] 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR 461; Case 219/99 *British Airways plc v Commission of the European Communities* [2003] ECR II-05917, paras 8, 241-243; Case 155/06 *Tomra Systems ASA v Commission of the European Communities* [2010] ECR II-4361.
[190] Paul Craig, Gráinne de Búrca, EU Law – Text, Cases, and Materials (7th edn, OUP 2020), 1101.
[191] Paul Craig, Gráinne de Búrca, EU Law – Text, Cases, and Materials (7th edn, OUP 2020), 1104.
[192] Case 23/14 *Post Danmark A/S v Konkurrencerådet* [2015] EU:C:2015:651, para 69.
[193] Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 215, paras 20-27.
[194] Case 23/14 *Post Danmark A/S v Konkurrencerådet* [2015] EU:C:2015:651.
[195] Alison Jones and Christopher Townley, 'Competition Law' in Catherine Barnard, Steve Peers (eds), *European Union Law* (3rd edn, OUP 2020), 576.

need to show that they are of *a serious or appreciable nature* in order the actions to fall under the scope of the Article 102[196].

In general, the case law provides that the forbidden actions can consist for example of structural arrangements leading to weakening or fading competition[197], refusal to supply[198], price discrimination[199], tying and bundling[200], predatory pricing[201], or selective pricing[202].[203]

The effects of the abuse are not always caused to the market where the undertaking is holding its dominant position: the Article 102 may still be applicable as provided in the *Aéroports de Paris* case[204] where the airport authority in a dominant position engaged in discriminatory pricing when in control of access to the catering services. Managing the essential facilities provide special flavour to the evaluation of the applicability of the Article 102: in these cases, the one managing the access to the market is not necessarily competing in market at all by itself. This is the case for example when a party operates airports or harbours and is therefore in a position to operate and provide facilities and services necessary to enter specific markets, i.e. acting as a gatekeeper for the markets whose access is dependent of the facility in question. The Court has developed an essential facilities doctrine for cases where the party is operating also in the submarket which entry it controls: the party owning the facility that is necessary for entering the market and that cannot be re-established by other parties by ordinary process of innovation and investment, must share it with rivals, in case the competition in the submarket does not otherwise exist.[205] This was the case for example in the

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[196] Case 23/14 *Post Danmark A/S v Konkurrencerådet* [2015] EU:C:2015:651, paras 73-74.
[197] Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 215.
[198] Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* [1974] ECR 223; Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 207; Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-03601.
[199] Case T-286/09 *Intel Corp. v European Commission* [2014] EU:T:2014:547 ; Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission of the European Communities* [2003] ECR II-04071.
[200] Case T-30/89 *Hilti AG v Commission of the European Communities* [1991] ECR II-01439; *Elopak Italia Srl v Tetra Pak* (Case IV/31043) Commission Decision 92/163/EEC [1992] OJ L72.
[201] Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-03359; Case C-333/94 *Tetra Pak International SA v Commission of the European Communities* [1996] ECR I-05951; Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-09555, paras 175-204 and 250-261.
[202] Case T-228/97 *Irish Sugar plc v Commission of the European Communities* [1999] ECR II-02969, paras 6-9; Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission of the European Communities* [2000] ECR I-01365.
[203] Paul Craig, Gráinne de Búrca, EU Law – Text, Cases, and Materials (7th edn, OUP 2020), 1102-1118; Kuoppamäki, *Markkinavoiman Sääntely EY:n ja Suomen Kilpailuoikeudessa* (Gummerrus Kirjapaino Oy, 2003), ch 6.
[204] Case T-128/98 *Aéroports de Paris v Commission of the European Communities* [2000] ECR II-03929.
[205] Paul Craig, Gráinne de Búrca, EU Law – Text, Cases, and Materials (7th edn, OUP 2020), 1107.

case RTE[206]. Here the RTE, authority providing broadcasting services in Ireland, was considered preventing new product, weekly magazine delivering the information on the television programs of different channels, to enter the market, due to its decision not to provide the rights to publish its program information. This constituted a breach of the Article 102. Later, the Court has held that three conditions do have to be present, in order the party in dominant position to be required to grant compulsory license to a facility which intellectual property rights it has: i) the party requesting the right must be aiming to provide new product or service that is having consumer demand and is not provided by the dominant firm, ii) there is no objective justification for the refusal to provide the right to utilize the essential facility, and iii) the refusal to grant the right required for utilizing the essential facility eliminates all competition in the given market.[207]

3.2.3 Defences

The third part of the evaluation concerning the applicability of the Article 102 TFEU concerns possible defences. Unlike the Article 101, the Article 102 does not mention possibility to declare the provisions of the Article inapplicable. The Court and the Commission have, however, provided that flexibility can be brought into the evaluation through utilization of the concepts of objective justification and proportionality.[208]

The Court has provided the possibility for an undertaking to save its activity from the scope of the Article 102 prohibition by relying on objective justification in case United Brands[209] in 1978. It has reaffirmed its view also in several other cases after United Brands.[210] The Commission, on the other hand, provided its view on the justifications regarding exclusionary abuses in its Discussion Paper in 1995. In the paper the Commission refers to earlier case law and provides that '[e]xclusionary conduct may escape the prohibition of Article 82 (current Article 102) in case the dominant undertaking can provide an objective justification for its behaviour, or it can demonstrate that its conduct produces efficiencies which outweigh the

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[206] Joined Cases 76, 77 and 91/89 *R Radio Telefis Eireann and Others v Commission of the European Communities* [1989] EU:C:1989:192.
[207] Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-05039, para 52; Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2004] ECR II-04463.
[208] Paul Craig, Gráinne de Búrca, EU Law – Text, Cases, and Materials (7th edn, OUP 2020), 1118.
[209] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities. Chiquita Bananas.* [1978] ECR 207.
[210] Case T-65/89 BPB *Industries Plc and British Gypsum Ltd v Commission of the European Communities* [1993] ECR II-00389, para 94; Case T-30/89 *Hilti AG v Commission of the European Communities* [1991] ECR II-01439; Case C-209/10 Post Danmark A/S v Konkurrencerådet, [2012] EU:C:2012:172, para 44.

negative effect'.[211] In the same paragraph, the Commission provides that the burden of proof is nevertheless on the dominant company resorting on the justification. The commission brings up that there are two different sorts of justifications available: justifications of first type are referred to as 'objective necessity defence' and the second ones as 'meeting competition defence', in the paper. The 'objective necessity' based defence can come to question in situations where the company in dominant position is behaving in a way looking abusive but carries out actions 'for instance because of reasons of safety or health related to the dangerous nature of the product in question'.[212] The taken actions need to be necessary based on objective factors that apply 'in general for all undertakings in the market'. The 'meeting competition defence' is applicable only in cases where the behaviour of an undertaking would constitute a pricing abuse: the justification provides possibility for an undertaking to response to competitors' actions in a manner indispensable for minimising the undertakings short term losses. The chosen measure needs to be proportionate, necessary, and suitable for achieving the justified objective. For example, in cases involving pricing below average avoidable cost, the given defence cannot normally be applied. In addition to the given two types of justifications enabling otherwise abusive measures to escape from the scope of the Article 102 prohibition, the Discussion Paper provides that also a conduct that produces efficiencies that outweigh the negative effects can allow the measure to escape the prohibition. In order this 'efficiency defence' to be applicable, the undertaking must show 'i) that efficiencies are realised or likely to be realised as a result of the conduct concerned; ii) that the conduct concerned is indispensable to realise these efficiencies; iii) that the efficiencies benefit consumers; [and] iv) that competition in respect of a substantial part of the products concerned is not eliminated.'[213] To summarize, the efficiency defence provided in the Discussion Paper seems very similar to the Treaty provisions guiding the inapplicability of the Article 101 prohibition, thus provisions of Article 101(3). Also, the earlier mentioned justifications, seem to correspond to some extent to the rules and principles derived from the free movement law related Treaty articles and case law: they have some similar elements to the justifications that are based on the public policy, public security, and public health or other

[211] Commission, DG Competition Discussion Paper on the application of article 82 of the treaty to exclusionary abuses [2005] para 77 < https://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> accessed 7 January 2023.
[212] Ibid, para 80.
[213] Ibid, para 84.

overriding public interest when protecting general interests like consumers health or competition through saving also party's own capabilities to compete.

3.2.4 Gatekeepers in the scope and summary of the key findings

It seems obvious that the primary gatekeepers aimed to belong to the scope of the competition law – especially Article 101 and 102 TFEU - are companies, thus mainly private parties, undertakings, carrying out economic activities.[214] The applicability is in practise, nevertheless, quite a lot wider as shown in the chapter 3.1. The Member States and related public entities are brought into the scope of the Articles in cases where these parties are either taking part into economic activities or when they are in charge of activities related for example to monopolies allowed through the Treaty provisions. Only public or other actors whose exclusive purpose is to fulfil social objective, without economic activity are out scoped. According to the Article 106 TFEU, the ones operating to provide services of general economic interest or having the character of a revenue-producing monopoly are in the scope of the Articles if the application of the rules does not 'obstruct the performance, in law or in fact, of the particular tasks assigned to them.' According to the Article 106 Member States are not allowed to enact or maintain in force any measures that are contrary to the competition law rules when it comes to public undertakings and undertakings to which Member States grant special or exclusive rights. For example, parties concluding collective agreements are not considered undertakings in the scope of the competition law Articles – at least Article 101 - for the reasons related to the purpose of their existence: social objectives of the agreements would not be reached if the actions were considered belonging to the scope of the Article 101.[215] These kinds of actors and actions do in any case belong to the scope of the free movement laws and are therefore in the scope of the EU internal market related laws through other Articles.

The summary of the key aspects relating to the application of the Competition law is presented in the following table.

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[214] European Parliament, 'Competition Policy' (Fact Sheets on the European Union, 2022) <https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.6.12.pdf> accessed 13 January 2023.
[215] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751.

Rule	Substantial object	What is forbidden?	When forbidden?	Who is the primarily targeted 'gatekeeper'?	Main consideration when evaluating the applicability
Art 101 TFEU	Cartel actions - agreements, decisions, concerted practices affecting competition negatively	Agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market	Forbidden, unless contributes to: - improving the production or distribution of goods, - to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and the action in question does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question	Undertakings engaging in an economic activity, private or public. The parties whose social objective would be undermined if were subject to the rules (e.g. labour unions) are not in scope. Exceptions in sector laws (e.g. agriculture)	Is the gatekeeper in the scope of the rule? - does the undertaking take part to economic activity? - is the social objective of the action undermined if the Article provisions are applied? - are sector specific rules preventing the application? - do the parties belong to the same economic unit? Is the activity in the scope of the rule? - affects the trade btw Member States? - is the objective to limit trade or are *de minimis* conditions fulfilled? - is the action in the scope of the exceptions delivered in Art 101(3) or in block exemption regulations?

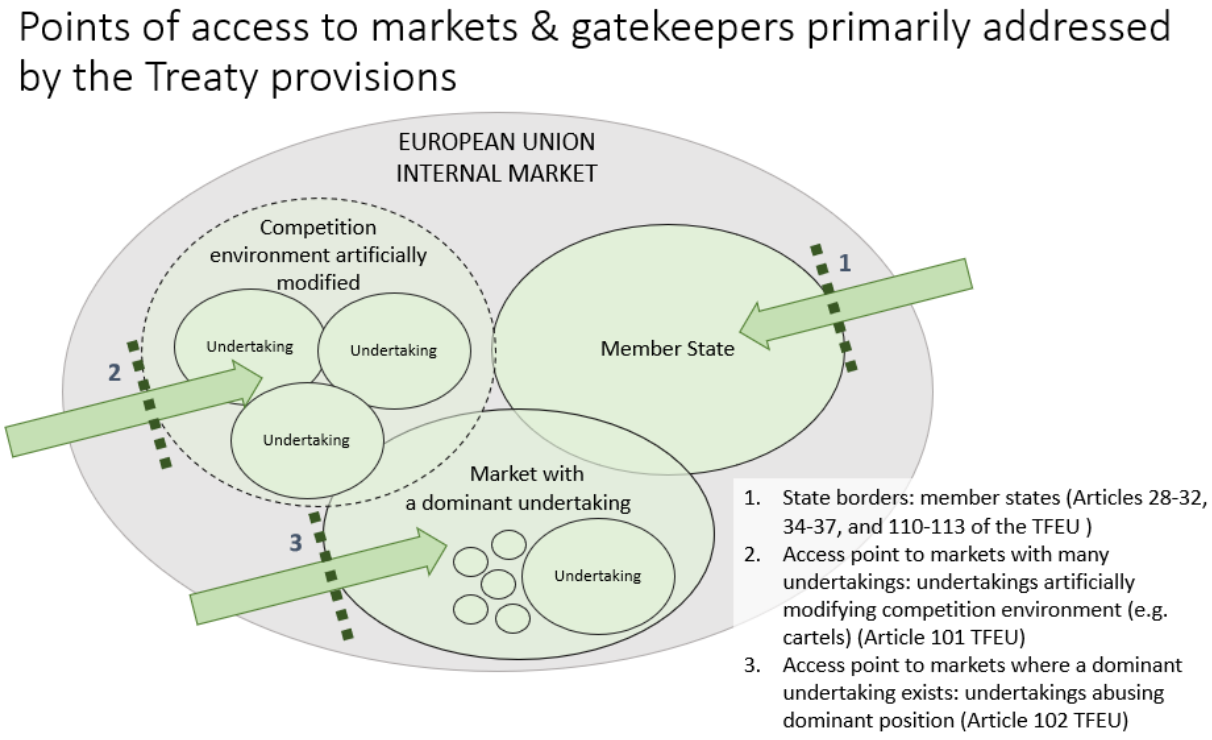
Art 102 TFEU	Abuse of dominant position	Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it in so far as it may affect trade between Member States.	Forbidden always in so far as it may affect trade between Member States unless objective justification available (measures to reach the objective have to be proportionate and necessary). (Principles for justifications provided in case law and Commissions discussion paper and guidance on commissions enforcement priorities)	Undertakings in dominant position	Is the gatekeeper in the scope of the rule? - What is the relevant market (taking the product dimension, geographical dimension, and temporal factor into consideration)? - What is the party/parties responsible for the abusive action? - Does its market power constitute a 'dominant position'? Is the activity in the scope of the rule? - Can the trade btw Member States be affected? - is the behaviour 'abusive'? (Action either 'exploitative' and therefore directly harmful to consumers, or exclusionary and therefore weakening the competition) - justification available? If yes, are the means to reach the objectively justified objective proportionate and necessary?

Table Key Competition law related Articles and rules that guide the gatekeepers' actions related to access to markets in the EU.

4 The ‘gatekeepers’ relevant to the market access within the EU

Now, when the core rules enabling barrier free market environment within the EU internal market are gone though and collected into tables, it is time to step back and look at the bigger picture: does it seem that the rules do cover the actions of all relevant gatekeepers being possibly able to hinder the access to markets?

When looking at the treaty Articles that are setting the guidelines for the gatekeepers regarding the actions related to limiting access to market, the logic seems to be quite clear: while the free movement related Articles of the TFEU are set to control primarily the possibilities of Member States to create barriers for the integration of the internal market, free trade, and the free movement of commodities within it, the Articles 101 and 102 are trying to prevent creating barriers with similar effects when the operators are ‘undertakings’ that are initially considered being companies. The below picture represents the points of access to the EU markets and the gatekeepers initially targeted by the Treaty provisions.



Picture The gatekeepers initially targeted through the EU free movement law and competition law and the points of access to markets they control.

Like pointed out in the earlier parts of this work, the Member States may sometimes be regarded as undertakings: when the public bodies carry out economic activities in a manner

fitting to the definition of 'undertaking' developed in the ECJ case law they become a subject of the competition rules. It is a bit more open whether companies can belong to the scope of the free movement Articles. Even if this possibility is also taken into consideration, the picture is still not whole yet. In addition to member states and companies, also other gatekeepers have emerged in the EU markets over the years. I see there a need for at least two types of additions in the picture: first concern other parties than member states or companies operating in the field, while the other has to do with the companies operating only with the methods of access to the market. I will elaborate this in the following, by starting from actors that are not member states nor companies.

4.1 Gatekeepers other than Member States or companies

When looking at the ECJ case law, it becomes clear that the member states and companies have not been the only actors included into the scope of the free movement law and competition law related treaty Articles by the ECJ: four examples of the cases where the Articles were applied to other types of gatekeepers hindering the market access are the Viking case[216], Laval case[217], Walrave case[218], and Bosman case[219]. In the Viking and Laval cases the ECJ takes trade unions into the scope of the application of the free movement laws, while in the Walrave case and Bosman case the same happens with Sport Organizations.

In the Viking case the question is about the applicability of the Article 43 EC (current Art 49) concerning right of establishment. The case concerns situation where labour unions utilized their collective rights by trying to pressure Viking Line ABP to refrain from reflagging its Finnish vessel to Estonia: Viking Line was aiming to register the vessel in Estonia to lower the labour costs and thus to avoid operating Helsinki-Tallin route at loss. The collective bargaining agreement with the Finnish Seaman's Union that was to be followed when the vessel was registered in Finland, required paying higher wages compared to the level normally required when vessels were registered in Estonia. The labour union was, however, successfully blocking the practical possibilities of Viking Line to register the vessel in

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[216] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.
[217] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.
[218] Case 36-74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 01405.
[219] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-04921.

Estonia: it asked the International Transport Workers' Federation to request its affiliates to refrain from negotiations with Viking Line, and at the same time threatened Viking Line with strike actions if the new agreement under negotiation would not be made valid also for the situation of reflagging the vessel. The agreement was to include clauses watering down the benefits of the vessel reflagging.

In the case the ECJ provided that the trade unions collective actions inextricably linked to the collective agreement do fall into the scope of the Article 43 TEC (current 29 TFEU). The Court points out that taking this standpoint is necessary to guarantee that similar approach is applied for similar situations resulted by different parallelly acceptable ways of operating: the action can be intervened not only when the member state is responsible for the rules applied to working conditions but also when labour unions are responsible for providing the corresponding legally binding conditions. In practice the court brings up that action of hindering the rights provided in the Treaty is in core when considering the applicability of the rules, and not the type of gatekeeper being able to hinder applying the rights: the member states are not the only parties addressed by the free movement laws. In the case the Court concluded that the trade unions had restricted the freedom of establishment, and it considered whether this action could be objectively justified: the action needed to be in line with the Treaty and justified with the overriding reasons of public interest in order it to be acceptable. In addition, the action needed to be proportionate to its objectives. The ECJ brought up that 'the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty'[220]. Further the ECJ states that 'the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective'[221]. In practice, the ECJ provided that also other parties than member states can be addressees of the free movement related rules of the Treaties and that the competing rights provided by the Treaties need to be balanced against each other by taking the circumstances of each specific case into account. Restricting rights need to have an objective justification and the actions need to be proportionate to their object – exactly like when the Member States are involved.

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[220] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 para 74.
[221] Ibid para 90.

In the Laval case Swedish labour unions prevented the employees of Latvian construction company, Laval un Partneri Ltd, not belonging to the scope of Swedish collective agreements, to enter the working sites in Sweden. Laval appealed on the Article 49 TEC (current Art 56 TFEU) concerning the right of the free movement of services and Article 12 TEC (current Art 18 TFEU) containing the prohibition of discrimination on the grounds of nationality. Laval had signed a collective agreement with Latvian building sector's trade union but was not in the scope of any other collective agreement. Laval was not bound by Swedish collective agreements as there was no universally binding collective agreement in Sweden in the field, and as negotiations to reach a collective agreement between Laval and Swedish labour union, Byggettan, had not been successful. The core of the friction, the minimum wage, was not defined in the Swedish legislation either. In the case the Court, first of all, pointed out that the prohibition of discrimination comes to question only when the principle is not expressly provided in another applicable rule. In the Article concerning the freedom to provide services it was, however, given specific expression and effect, and therefore there was no reason to rule on the Article 12 TEC. The Court provided that the host state is allowed to set minimum conditions for the employment and require the undertakings from other member states to meet these requirements when their employees are working in the given host member state. This is firstly, to guarantee undertakings an equal stand for competition in a specific country, and secondly to guarantee the sent workers similar minimum conditions than what the local workers do have. However, Sweden did not have minimum wage defined in the legislation, and the question was now about the trade unions right to require the foreign company, Laval, to sign a collective agreement to make minimum wage requirement applicable also for it. In the judgement the court brings up that according to Swedish legislation the trade unions could utilize collective actions like blockade when the company did not have valid collective agreement available. Laval, however, had an agreement with the Union in Latvia. The Court stated that using collective action of blockade to force Laval to sign a collective agreement in Sweden constituted a discriminatory action that could be justified only on grounds of public policy, public security, or public health. The court could not find such justification in the case and therefore ruled that the actions of the labour unions were not to be considered legitimate.

Even though the judgements in Viking case and Laval case are based on different grounds, the cases show that the decisions on the cases with non-state parties are decided according to similar logic than the "standard cases" with Member States involved. The free movement

laws are applied in a similar manner despite the type of gatekeeper hindering the access to markets.

Case Walrave[222] and case Bosman[223] are examples of taking again different type of operator into the scope of EU internal market laws: in these cases, sport organisations are in question. In rather early case, Walrave in 1974, two Dutch nationals brought an action against Union Cycliste Internationale and the Dutch and Spanish Cycling Federations regarding discriminatory rules preventing them to act as pace keepers in part of the cycling competitions due to the rules setting requirements for the nationality of the pace keepers. The Court was asked a preliminary ruling regarding several questions related to discrimination, but the main question was about the applicability of the Treaty articles: can the rules of an international sporting federation be regarded as incompatible with the Treaty? The answer was yes. The Court provided that the practice of sports is in the scope of Treaty articles as far as it constitutes economic activity. The prohibition of discrimination 'does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at collectively regulating gainful employment and services'[224]

In the Case Bosman[225] sports club was the party hindering the free movement of workers. The case concerns football player, Jean-Marc Bosman, who had played in Belgian football club. When his contract ended, he wanted to move to play in another football club in France. The Belgian football club, however, prevented him playing in the aimed football club in France for reasons related to the transfer fee that the French club was supposed to pay to Belgium club for the transfer. The Belgian football club followed the international football transfer rules in the case. Bosman took the case before the court by arguing that the Article 48 TEC (current 45 TFEU) concerning the free movement of workers was breached. The Court found that despite the fact that the transfer rules were not discriminatory, they were able to impede the free movement of workers and were therefore to be considered breaching the Article 48 TEC. The Court also brought up that as it was clear that the Article 48 TEC was breached

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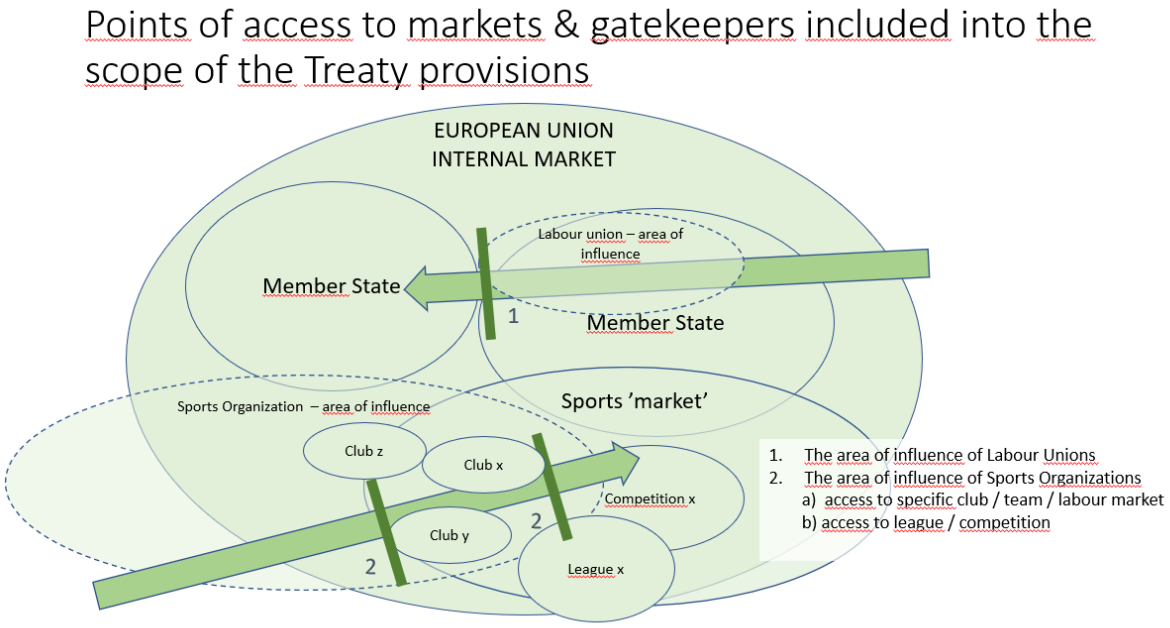
[222] Case 36-74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 01405.
[223] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-04921.
[224] Case 36-74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 01405 para 3.
[225] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-04921.

there was no need to consider whether the Articles 85 TEC (current 101 TFEU) and 86 TEC (current 102 TFEU) were breached.[226]

In addition to the Viking and Laval cases, also cases like Walrave and Bosman seem to indicate that the internal market related rules are to be applied similarly to different gatekeepers. The ECJ does not seem to concentrate on the quality of the gatekeepers in its judgements, but it rather concentrates on providing decisions targeting to implement the purpose of the rules: to prevent hindering the free movement of commodities without justified reasons and proportionate and non-discriminatory means.



Picture The gatekeepers included into the scope of the EU free movement law and competition law by the Court, and points of access to the markets they control.

4.2 Actors in new roles and the response of the EU (DMA)

In addition to situations of new type of gatekeepers 'breaking' into the scope of the internal market laws, also new types of gatekeeping roles have emerged in the area during last decades. To clarify the rules regarding these new roles, also new regulation, Digital Markets

[226] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-04921 para 138.

Act (DMA), has been enacted in a record high speed. The new regulation came into force on 1st of November 2022.

Market environment has changed drastically over the latest decades due to IT and digital development. Not only a big part of the products and services sold, but also a big part of the actions related to managing the demand supply chains have become electric. This development has changed the idea of business and communications infrastructure, markets, and marketplaces: a new term – or maybe rather a whole new way of operating - platform economy[227], has been introduced. In relation to this type of operation new 'gatekeepers' have come to existence: the parties, often big private companies, who created and maintain different platforms have consequently become gatekeepers for many types of markets operated on or via their platforms. For example, search engine operators, parties providing electronic platforms for different kinds of web shops, or companies operating with diverse business logics for providing necessary services and access points to reach even worldwide markets, have emerged. Part of these companies can steer and control any part of the demand-supply chains: they may affect the market access of customers as well as market access of suppliers. These parties have naturally not been traditionally targeted by the provisions of the Treaties but are relevant actors in the scope of the Treaty provisions nowadays. Or to be more precise, as these parties are mainly companies, they do, as such, traditionally belong to the scope of the laws concerning companies but they are acting in a new type of positions nowadays when it comes to market access: the parties act as gatekeepers for gates standing at the totally new types of highways to markets.

A good example of a situation where a gatekeeper can control access to markets in platform economy can be provided through reviewing one of the latest and largest court cases in the area: Google Shopping case[228]. The General Court gave its judgement in the case in November 2021 and the case is currently pending for handling in the Court of Justice. The case concerns a decision adopted by the European Commission, according to which Google has violated Art 102 TFEU by abusing its dominant position as a search engine operator in 13 countries in the European Economic Area. Google offers both general search services and comparison-shopping services (CSS) i.e. specialized search services. When providing general

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[227] Martin Kenney, and John Zysman. 'The Rise of the Platform Economy.' [2016] Vol 32 (3), Issues in Science and Technology <https://issues.org/rise-platform-economy-big-data-work/> accessed 19 November 2022.
[228] Case T-612/17 *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission* [2021] EU:T:2021:763.

search services, Google displayed the product search results related to competing CSSs and their customers less eye-catchingly and less favourably positioned compared to the ones related to its own CSS and its customers. As a result, the Commission of the European Union has imposed a pecuniary penalty of €2 424 495 000 on Google, of which EUR 523 518 000 jointly and severally with its parent company, Alphabet, in respect of the abuse of the dominant position. Google took the case before the General Court of the European Union to annul the decision of the Commission (principal claim). In the alternative, it petitioned/requested the Court to annul or reduce the fine.

The main legal question was whether self-favouring in given circumstances can constitute an abuse of a dominant market position under Art 102 TFEU. In addition, the question was about the factors that should be taken into consideration when carrying out the evaluation. The Court held that Google abused its dominant market position in the given 13 countries. It violated Art 102 TFEU by favouring its own CSS at the expense of competing CSSs when displaying search results in its general search service. The Court did not annul or reduce the fine. The Court determined that favouring own products or services at the expense of competing services can constitute a standalone abuse. It stated that as provided in the earlier case law, it is not forbidden to operate in a dominant position. However, limiting competition is forbidden. Favouring own CSS and relegating other CSSs in the search results by means of ranking algorithms had to be considered a departure from competition on the merits. Thus, the action was anticompetitive by nature. The court also reminded that the action is considered forbidden when it hinders or is capable of hindering competition or growth of competition in the market. The court found that Google distorted competition by putting its CSS competitors into weaker position than its own CSS: as the competitors had no means to bridge the caused gap in the given market, the action had harmful effects on the competition. The Court did not find any objective justification for the actions either: Google was not able to demonstrate efficiency gains that would have resulted in benefits counteracting the negative impacts on competition. Finally, the Court noted that competition was affected only in the CSS market, and that actions related to infringement of Art 102 TFEU did not have effects on the general search service market in the given 13 countries.

Even though the TFEU competition law related articles – like the Art 102 TFEU in the given case, - have been successfully relied on when rooting out anti-competitive actions in the EU internal market, the EU institutions have, however, realized the need and possibilities to intensify the rules and processes related to gatekeepers emerging in the platform economy

further. To codify the principles developed in the case law, to skip the rather heavy process of evaluating the market position separately for each case – as required when the competition law related rules are in question, – and to take a proactive grasp on the undesired behaviour in the markets, new digital market rules guiding the actions related to different platforms have been introduced: both, Digital Services Act and Digital Markets Act (DMA)[229], came into force in November 2022.[230] Especially the latter one regulates the gatekeepers' possibilities to hinder access to markets in digital environment. First, it provides the objective and rather clear-cut criteria for the gatekeepers that are in the scope of the Act. Second, it provides obligations and prohibitions for the gatekeepers. The gatekeepers in the scope of the Act are big companies that provide 'core platform services'[231] in minimum three member states and have a strong economic position and significant impact on the internal markets. They link high number of users with high number of businesses and have maintained their position by fulfilling the given criteria for three last financial years in row. The criteria are supposed to be interpreted in a narrow way.[232] It is worth noting that the companies in the scope of the rules do not need to operate in the dominant position like when utilizing only the traditional competition rules: I believe that even only this change to the earlier where rather heavy – and to be honest –sometimes rather unpredictable results delivering process is required for discovering the market dominance, is intensifying, and clarifying the area greatly. The parties that do belong into the scope of the new rules are delivered rather clear set of obligations and prohibitions. They for example are required to allow users to uninstall the pre-installed apps in operating systems, to allow thirds parties to inter-operate with their services, allow business users to do business and conclude contracts with their customers outside of the platform, and to provide business users an access to the data generated by these users' actions on the platform. On the other hand, gatekeepers in the scope of the rules are prohibited for example

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[229] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277; Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ L265.

[230] European Commission, 'The Digital Services Act package' <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> accessed 6 December 2022.

[231] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ L265 paras 2, 14.

[232] European Commission, 'Digital Markets Act: rules for digital gatekeepers to ensure open markets enter into force' [2022] <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6423> accessed 05 December 2022; European Commission, 'The Digital Markets Act: ensuring fair and open digital markets' [2022] <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en> accessed 5 December 2022.

to favour their own products or services compared to competitors ones when ranking them in their platform, require using their other services, like payment services, when offering products for sales through their platform, or to allow track end users for the purposes of directed advertisement outside of the platform without user's consent.[233]

It is stated in the given regulation that it aims to protect different legal interest from that protected by the Articles 101 and 102 of the TFEU. The paragraph 11 of the given new regulation enlightens the targeted relation of the regulation and the competition law related Treaty articles by providing that the given Articles 'have as their objective the protection of undistorted competition on the market. This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market.' The regulation also provides that it should apply without prejudice to application of the given Treaty articles. I see this as a regulation that regulates the 'markets of gatekeeping'. It sets rules for the entities that have made business not only out of digital products and services but also out of the digital roads to markets. It prevents the ones able to act as gatekeepers on those roads to abuse their possibilities. I see there a close connection to cases where essential facilities are in question.

Examples of market access points controlled by the gatekeepers included into the scope of the Digital Markets Act are illustrated in the following picture.

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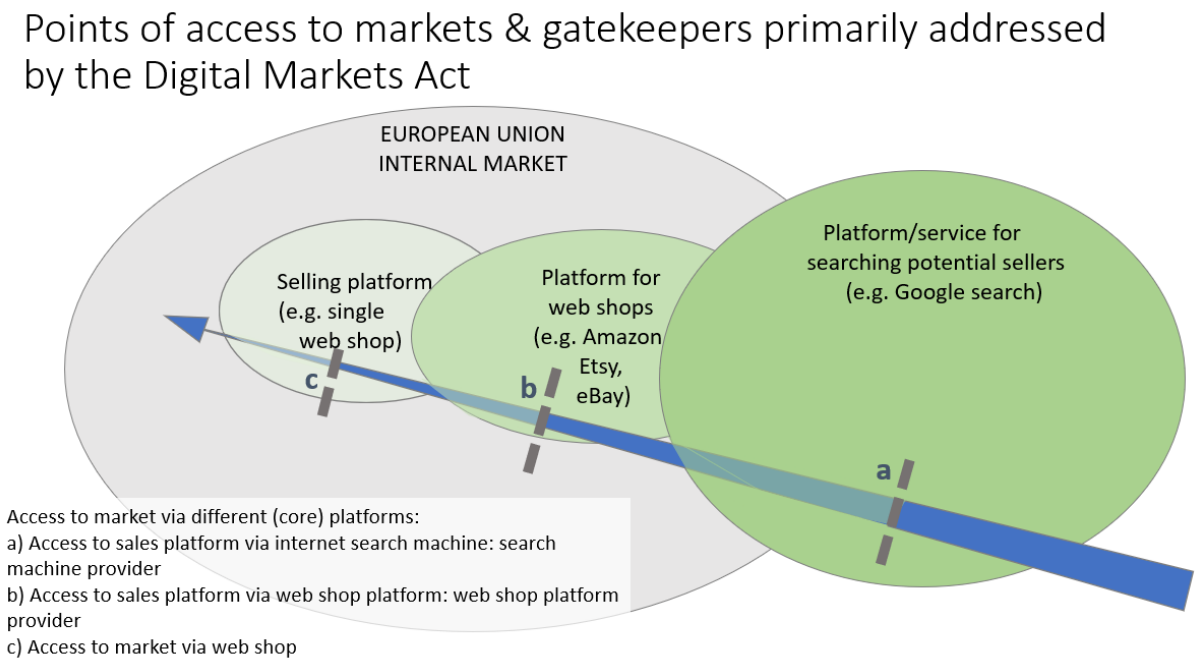
[233] 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ L 265; EU, 'Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets' <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349> accessed 7 December 2022.



Picture Examples of the gatekeepers included into the scope of the Digital Markets Act, and points of access to the markets they control.

5 Consistency of the rules and principles, treatment of different gatekeepers

Now, when both, the key rules guiding the gatekeepers that can prevent access to markets, and the gatekeepers in the scope of those rules have been discussed separately by subject area, it is time to look whether the rules of different areas are in line with each other and treat the gatekeepers equally. In this part of the work, I will answer to the question: 'do the different rules and principles impose consistent guidelines for the different parties that are able to set barriers for the market access within the EU' by comparing the application logic of the different free movement law and the competition law Articles. Also, the Digital Markets Act is included into the considerations when seen relevant.

As a result of a review of key rules that guide gatekeepers' possibilities to hinder access to markets presented in the earlier parts of this work, it can be said that created framework steering the application of the rules seems to follow the same formula regardless of the key TFEU Article in question. This is mainly not due to similar approach and logic provided in the Treaty text, but rather thanks to interpretation principles provided by the Court – and, sometimes also by the Commission. Regardless of specific key provision in question, the applicability consideration seems to follow the common logic: first it is to be evaluated, whether the gatekeeper is in the scope of the provisions, then whether the implications and actions are in the scope of the provision, and finally whether there are objective justifications available for escaping from the scope of the provision in question. The measures taken to reach the given objective need to be proportionate and necessary, to be acceptable, regardless of the rule in question. It is hard to say yet how the details related to application of Digital Markets Act provisions will be in the future, but I do not see a reason why the above-mentioned logic would not apply for its provisions too – especially, as the text of the Regulation seems to support similar approach.

As the logic of evaluating applicability of the Article provisions seems to follow the same path regardless of the key Article or substantial area in question, so do I: the key rules are compared against each other utilizing similar steps in the following. I call the areas handled in the steps 'gatekeeper -based applicability', 'activity and effect -based applicability', and 'justification and measures to escape from the application'. Application related details are collected into a summary table (Appendix I). Since the Digital Markets Act incorporated into the work in the previous chapter, belongs only to secondary level legislation, unlike the

Articles of the TFEU that are naturally part of the primary legislation, I will leave it out of the table. It is nevertheless considered in the text covering the different aspects, below.

5.1 Gatekeeper based applicability

The primary gatekeepers belonging to the scope of different handled TFEU Articles and substantive law have been repeatedly mentioned in the previous parts of this work – now it is time to consider how is the logic for including or out scoping the gatekeepers into or from the scope of the rules by comparing the logic of different key rules against each other.

The customs duties and taxation related Articles 28-32 TFEU and 110-113 TFEU are clearly targeted to guide Member States who are the parties responsible for these areas. As the definition of Member State – given that the definition now includes also possible other public parties responsible for taxation and customs related actions - is clear enough, there is no need to consider the applicability to different gatekeepers regarding these articles. For the rest of the free movement Articles the question of applicability to different type of gatekeepers is more open. It is obvious that Member States are the primary addressees of the provisions, but even after decades of utilization of the Articles, the applicability in horizontal relations, and especially the logic behind it, is not totally clear yet. I see there two reasons for this: first, it seems that there is not comprehensive enough set of court cases to make firm conclusions on the logic applied in them (reason for this is equally unclear - this naturally has a connection to the logic), and secondly, the Court has changed its view on the applicability over the years[234].

As defined in the earlier parts of this work, the Article 45 concerning the free movement of workers, the Article 49 concerning right or establishment, and the Article 56 concerning the free movement of services, have all been applied in horizontal relations too.[235] The use has mostly been explained and justified on the grounds of *effect utile*: the application in horizontal relation is grounded on the need to maintain and fulfil the purpose of the Treaty Articles – to reach the objective they are set for. In the existing judgements, the Court has not put too much effort on evaluation of the qualities of the gatekeepers: in cases where Member States have acted as gatekeepers, the applicability has been presumed without further comments, while when the sports organizations or labour unions have been in question, referring to the fact that they are able to impact on the matter that is aimed to be regulated has been enough – issues

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[234] Jukka Snell, *Goods and Services in EC Law: A Study of the Relationship Between the Freedoms* (OUP 2002).
[235] Christoph Krenn, 'A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods' [2012] Vol.49 (1) Common Market Law Review 177, 192.

related to the quality or size of the gatekeeper have not been handled more profoundly. In the Viking Line case the Advocate General Maduro nevertheless scrutinizes the logic of horizontal application of the free movement rights rather thoroughly.[236] He proposes that even though the competition rules are normally applied in horizontal relations and the free movement laws in vertical relations when pursuing effectively working common market, the other dimension of application should not be categorically excluded either. The colliding rights must be in focus and evaluated against each other, regardless of the players in the field. He points out that the purpose of the rules has been the decisive factor in several earlier court cases: there is no difference in substance whether the horizontal application is direct or indirect. In Schmidberger case[237] the Court concludes that the Member State did not breach the community law (the free movement related Articles) even though the authorities did not prevent environmental protesters from stopping traffic when using their right to demonstrate. Maduro provides that in the case the direct horizontal application could have come to question equally well – the substantial outcome should have been the same even if the traffic company and the protesters were the parties in the court case. Equally, in the Viking Line case, the Member State could be the party in the proceeding instead of labour unions: the substantial outcome should again be the same as now when the main parties are labour unions and the private company whose action is restricted.

So, Maduro seems to support the idea of *effect utile* interpretation of the Articles. He further clarifies his ideas for applying the Article provisions in horizontal relations by pointing out that impact that a specific party is able to cause in the community markets through restricting specific freedom rights varies: there is a difference in impact that an action of a small private party can cause compared with the one that Member States are capable of causing and this should be taken into account when evaluating the parties' responsibility or a breach of the free movement Articles. He brings up that the fact that the private parties are driven by economic objectives, also fixes part of the situations without external parties intervening – customer preferences necessarily steer the priorities of businesses. If customers want foreign products, they move to purchase them from the one importing them and do not stick to utilize services of a company not selling them. Actions of Member States need intervention more easily – due to their size but also due to other types of objectives and drivers affecting to their actions.

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[236] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, Opinion of AG Poiares Maduro, para 31-56.
[237] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-05659.

Maduro also proposes that there are differences between freedom rights: some of them are more sensitive for small scale barriers than others. The Opinion of Maduro is very interesting and would be capable of providing answers to open questions around applicability of freedom right related Article provisions. Unfortunately, it seems that the Courts position on the given proposals has not been stated very clearly in the following judgements.

For the Article 34 concerning quantitative restrictions and Article 63 concerning the free movement of capital the situation regarding horizontal application is still unclear. It seems that for the purposes of coherence, predictability and clarity, the horizontal application should be available option also regarding these Articles – possibly with case-by-case considerations on the aspects proposed by Maduro in his Opinion in Viking Line case. Or alternatively, there should be other logical and openly communicated reasons, why horizontal application does not come to question regarding these free movement Articles. The logic behind such partial application does not seem to be generally known now. The lack of horizontal applicability has been explained for example through the need to maintain principle of freedom of contracts and giving the preference for company laws and contract laws of Member States in relation to the free movement of capital.[238] The utilization of *effect utile*, on the other hand, has restrictions as well: it can be utilized i) only as far as the text of the norms enables the aimed *effect utile* interpretation, and ii) in a manner fitting to the systematic framework of using it (suitable use when considering the Treaty level context where it is used for other Articles as well) by iii) following the principle of proportionality.[239] These restrictions, however, do not, as such, seem to give clear reasons for not to utilize it for Articles 34 and 63 in horizontal relations.

For me it looks that the proposals Advocate General Maduro has provided in the above-mentioned Opinion in Viking Line case get closest to some way functioning solution on application questions in the area of free movement laws. Especially as he brings into the consideration also the view that not only different operators can cause impact of different levels on the market, but also different freedom rights are differently sensitive to restrictive actions. Without these additions, the general applicability debate that seems to be mainly moving around the axis of the application (horizontal vs vertical), does not seem to bring any

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[238] Vladimir Savković, 'The fundamental freedoms of the single market on the path towards horizontal direct effect: the free movement of capital – lex lata and lex ferenda' [2017] Vol.7 (2) Juridical tribune 208.
[239] Christoph Krenn, 'A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods' [2012] Vol.49 (1) Common Market Law Review 177, 198.

comprehensive answers or solutions to the issue. I will in any case look at the possible solutions and give my proposals for the set up in the following chapter of this work. Now I will continue with scrutinizing the status of other than the free movement related rules.

When it comes to rules derived from the competition law, the 'gatekeeper-based' applicability is in much stronger focus compared to the free movement law side. In the competition law side, the rules are applicable to 'undertakings'. The definition of the term has been made rather clear: it is used for parties taking part to economic activity regardless of the legal form of the party, and it therefore naturally includes different types of gatekeepers in the scope of the rules without 'aberrations' or too big unclarities. The applicability is in any case limited by other means: there are requirements set for the size of the parties or their activities and effect of the actions in order the Articles to be applicable – given that the clear-cut *purpose* of the party is not to limit competition which brings the actor always into the scope of the rules. For me it seems that the idea is not only to balance between the applicability and non-applicability for purposes of balancing possibilities of undertakings to create and maintain their businesses in maximally free but still fair environment, but also to leave undertakings some 'free space' for operating without continuously evaluating actions against competition rules, and on the other hand also to coordinate and limit the case load that the ECJ and different competition authorities do face in practice. The gatekeeper related size limits are set in two ways within the area of the competition law: the Article 102 is clearly set to guide companies in a dominant market position, while the limitations concerning the applicability of the Article 101 are carried out by providing additional market share based *de minimis* and type of operation -based block exemption rules. These do exclude smaller undertakings or groups of them and specific sectors out of the scope of application of the Articles, in a rather formal manner. As pointed out, any size or sort of undertakings are nevertheless in the scope of the Article 101 prohibitions in case their purpose is to limit competition.

Comparing the 'gatekeeper-based' applicability limitations between the free movement laws and Competition laws, it can be said that the key difference is the consideration of the size of the operator: while in the free movement law side there has been no major need to limit the applicability based on the size of operator so far, as the key operators in the focal point of the cases have been Member States, in the competition law side the size and power consideration has been in a focus. In court cases, rather remarkable effort has been put on considering sizes of operators to decide whether these are big enough and strong enough within the respective market to belong to the scope of the rules. I dare to say that there are so many uncertainties in

the evaluation processes that in many cases the outcome of the applicability evaluation is not clear beforehand and therefore the predictability of the applicability is not very high. The uncertainties well up from almost endless possibilities to define the parts of undertaking or undertakings in question, market in question, and market power in question. As mentioned, both, the Court and the Commission, have created further guidelines to help here – most probably to increase the predictability but also to limit the workload caused by the required evaluation: now smaller companies and predefined activities can be out scoped in a formal manner. The earlier mentioned question still prevails: is the aim to out scope parties whose impact on the markets would most probably not rise above the required threshold – possibility to harm competition – anyway? Or is it only to categorically leave out some sort of actions and gatekeepers to make it possible to concentrate on the cases that are seen more important? Either or, the commission has decided to get rid of the evaluation of the dominant market position in digital markets by implementing clear definition for gatekeepers addressed by the provision in the Digital Markets Act.

The purpose of the Digital Markets Act is said to be different to the one of competition law. It nevertheless seems to pull such cases out of the 102 TFEU based market power evaluation process that are related to undertakings operating essential facilities in digital environment. Big undertakings are incorporated into the field of application of Act rules by the substance of their business and by their size: size is considered indicating their impact on markets. The qualities of businesses and operations of concerned kind are listed in the regulation, and adequate size is determined by the existence and size of business, and country borders. The required qualities are clearly defined, and quantitative when possible. Thus, there is no need to start building the facts of cases from the scratch: the gatekeepers are excluded of included in the application field of the rules without a need to define relevant context for their activities first - for example rather demanding phase of defining ‘relevant market’ can be avoided. It is brought up in the text of the regulation that only quantitative facts matter when considering the applicability of the rules for a specific gatekeeper – there are no justifications available for the gatekeeper to escape from the field of application if the quantitative requirements are met.[240] The activities can be justified in exceptional circumstances, though. All in all, the DMA is covering not only part of the undertakings that can belong to the scope of the

[240] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ L265, para 23.

competition law Articles as well but possibly also other big players since the Regulation does not require undertakings to occupy ‘dominant position’ the rules to apply.

To conclude, it seems that there are some open questions regarding the gatekeeper-based applicability within the law areas. Especially, the availability of horizontal application within the free movement laws raises questions: when can other parties than Member States be included in the field of application of the rules? Why does there not seem to be similar type of size or market power -based limitations in application than on the competition law side? In the field of competition laws, for example the evaluation of big enough market power that is required the gatekeeper to belong to the scope of the competition rules (Art 102) seems to be rather ambiguous. Also, the knowledge of the details required to be able to evaluate the possibilities to escape from the scope of the Article 101 provisions in cases where the main purpose of companies is not to harm competition (but this is in any case resulted by the actions taken to reach the desired outcomes), is so high that it may be hard to be handled by small companies.

Despite the highlighted challenges, and the questions waiting for answers, the rules mainly seem to treat different gatekeepers fairly: as long as Member States remain the main addressees of the free movement laws, big undertakings expect them to be considered possibly occupying dominant market positions (so that this does not come as a surprise), and small companies know that all concerted practices which aim is to limit competition are forbidden, the parties can recognize themselves as possible gatekeepers regulated by the Articles. The DMA with rather clear gatekeeper definition also helps in this for its part. The ambiguous parts of the application of the rules are only a side show bringing possible inefficiencies in the processes but also flexibility for the decisions. The inefficiencies could be avoided by defining (simplifying) and understanding the logic behind the application. Understanding the logic for selecting the gatekeepers into the field of application of the rules is needed also for further statements concerning the coherence of the rules. I come back these topics in the following parts of the work.

5.2 Provisions’ applicability to different activities

In addition to requirements set for the gatekeepers the Articles to be applicable, also the activities under review do need to ‘fit’ into the scope of the Articles in order them to be applicable. Two different aspects may have to be considered when evaluating whether a specific activity is in scope of the Articles: first one concerns quality of the activities and the

second one effect or possible effect of the activities. I will look at the requirements that the Articles set for the quality and impacts of the activities, and see if the requirements vary by a gatekeeper, in the following. The DMA provisions are again brought into considerations when seen relevant.

The free movement of goods related Articles providing prohibition to impose customs duties or taxes to goods have very wide applicability: they do cover all mentioned charges and any other charges with similar effects. The purpose of the charge does not matter – all payments triggered by the border crossing that are potentially able to hinder trade between Member States are in the scope of the prohibition. For taxes, also the charges that are imposed to goods later are in the scope in case they are directly or indirectly discriminatory. Even though for example the Article 28 does not have restrictive reference to duties levied by Member States only, as it refers to 'customs duties on imports and exports and of all charges having equivalent effect', I expect the tax and customs related Articles to concern only charges levied by Member States or parties to whom the States have provided authority to levy these. Therefore, like when the gatekeeper-based applicability was under review, there is no point of considering differences in the applicability when different gatekeepers are in question regarding the given Articles.

When it comes to quantitative restrictions, very wide range of different activities belong to the sphere of the Article influence: any activity capable of hindering trade between Member States is in the scope of the prohibitions of Articles unless export side is in question – here only discriminatory actions are in the scope. Mutual recognition is required: if product is accepted in one Member State, it must be accepted also elsewhere within the Union (again, the requirement affects exports only if the action is discriminatory). Also selling arrangements need to be discriminatory in order them to belong to the scope of the Article prohibition. The provisions related to the free movement of capital seem to follow the open category logic familiar from the free movement of goods prohibitions. Activities targeted by provisions are not defined exhaustively - prohibited restrictions may be related to wide range of activities: as pointed out earlier, the case law around the free movement of capital has concerned for example mortgages, taxation of different type of property, investments in shares and real property, usufruct, administration, leasing and sale of real property, granting credit on commercial basis, guarantees granted by residents of different countries, and inheritances and

gifts.[241] In case of free movement of capital Articles, also the activities hindering the free movement through external border of the EU are under observation.

In addition to the free movement of goods and capital provisions, also the rest of the freedom rights seem to have similar type of open category policy regarding the activities caught by the provisions. The difference between above mentioned freedom rights and the rest of them rises from the gatekeeper-based applicability discussed in the previous part of the work: within the areas of the free movement of goods and the free movement of capital, the comparison of treatment of gatekeepers cannot be done due to too limited number of cases where others than Member States are involved as addressees of the prohibitions.

The provisions related to the free movement of workers, right of establishment and the free movement of services have all been utilized for challenging activities also in horizontal relations. The requirements for application have been similar, regardless of whether the gatekeeper has been Member State or private party: the activity has hindered using freedom right. Activities related to employment in public sector and exercise of public authority do not belong to the area of application regarding the given rights. As provided in the part viewing the application limitations that are based on the gatekeepers' qualities, the cases do not provide very clear information on the applicability from the quality of the gatekeeper viewpoint - either do they provide very clear guidance on the applicability to different activities: as provided already earlier, in Walrave the Courts states that prohibition defined in the Articles '[..] does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.' [242] In the light of case law, it in any case seems that the Articles are applicable not *only* to activities through which legally binding provisions are brought to different parties – like contracts of labour unions or binding rules provided by the sports organizations – but also other type of activity hindering the free movement or right of establishment can be in the scope as well. Agonese case[243] indicates that also such activities that are taken by single private company, and that cannot be considered constituting legally binding rules, can belong to the scope of the prohibition – at least when it involves

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[241] Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms* (7th edn, OUP 2022), 520; Case C-235/17 *Commission v. Hungary* [2019] EU:C:2019:432.

[242] Case 36-74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 01405, para 17.
[243] Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139

discrimination. This raises questions on the impact that activities need to be able to impose on the markets the rules to apply: does any type of activity come to question or is some potential minimum impact on the market required for an activity to belong to the field of application of the rules? Is the Agonese case finally only about discrimination and values, and not about the free movement of workers at all? If thought only as an independent occurrence, the impact caused on markets in the case is not high: the question was only about one detail in a recruitment process of one private company. The overall impact of the action is not considered in the case, but if the case is seen to set guidelines for the discriminatory actions in private companies in general, the impact of it is great also at the community level.

All in all, it seems that the size and impact related questions have not been in major focus in the free movement rights related cases. The reason may be related to the fact that the Article provisions have been primarily applied to activities taken by Member States: the activities in the scope have been remarkable enough by default. Or the reason may as well be the one brought up in relation to Agonese case: the question is about weighting profound principles of the Union - the outcome is remarkable as the decisions provide guidelines that will be applied throughout the Union after single judgement. If Agonese case was judged differently, it would not affect only the single applicant and company in question, but also all the other applicants and companies acting within the EU area ever after. The question is more about defining and communicating general principles than seeking justice or giving judgements in a single case. The main question remains the same brought up already in the previous part of the work: what is the reason for not seeing more activities of private parties in the field of applying the free movement laws? Whatever is the reason, more detailed comparison of the treatment of different gatekeepers within the area of the free movement laws is difficult due to too small number of cases involving other parties than Member States as addressees of the rules. To continue with comparisons, the competition law needs to be incorporated into consideration.

The activities which purpose is to harm competition are always in the scope of the competition Articles. The activities need to be such that they may have a negative impact on trade between Member States in order the Articles to apply on them. The Article 101 concentrating on cartels forbids practices that take place between separate economic units: therefore, the activity needs to take place between more than ‘one party’. Part of the activities are left out of the field of application as they belong to the scope of sector specific regulation (for example agriculture) or block exemptions, again given that their purpose is not to limit competition. In order an activity to belong to the field of application of the Article 102, the

action must be abusive: it must affect negatively on consumers or weaken the competition. The effect must be *probable* but there is no need to show that it is of *a serious or appreciable nature* in order the activity to fall under the scope of the Article 102. In case the activities otherwise in the scope of the competition law Articles would lose their social objective related purpose, they are excluded from the field of application.

When comparing the activity related requirements set for the applicability of the competition law Articles and the free movement articles, the biggest difference is raising out the idea of 'purpose'. When it comes to activities clearly related to Member States, like imposing customs duties, taxes, and charges with equivalent effect, there is no need or space for considering the purpose of the activity: related activities are always considered forbidden and being in the scope of the respective the free movement of goods related Articles, regardless of the purpose behind them. For the rest of the free movement Articles, the situation is the same regarding the actual purpose of the activity, but there is more space for evaluating whether a specific activity can have negative effect on the free movement – especially where the horizontal application is brought under consideration on the *effect utile* basis. There is in any case no way for an activity to escape from the scope of further evaluation 'automatically' based on specific quality of the activity regarding any of the free movement Articles (except of course activities that are not belonging to the scope of the EU law at all). For the competition law side, only activities which *purpose* is to limit competition are always forbidden and in the scope of the Articles. For the rest of the activities, possible implications matter. In specific cases where the negative impact on the competition environment is not big enough, the activity can be left out of the field of application of the Articles. The required circumstances are defined in *de minimis* rules and block exemption regulations.

The activities covered by the Digital Markets Act are defined in the rules in very different manner to those covered by the free movement laws or competition law. The definition of the qualities of the gatekeepers that do belong to the field of application of the Act provisions includes not only facts related to gatekeeper's size and impact on the market, but also the qualities of the activities i.e. business they are engaged in. Both aspects are represented in rather practical terms. Also, the provisions concerning the actual activities are clear: they are often referred to as a list of 'do's' and 'don'ts'[244]. Therefore, without having an understanding

[244] European Commission, 'The Digital Markets Act: ensuring fair and open digital markets' [2022] <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en> accessed 5 December 2022.

about the practical problems that will appear and become generally known along with the first court cases related to the DMA, the DMA applicability seems very clear - both, in terms of its applicability to different gatekeepers and different activities. It is interesting to see how the provisions of the DMA will be utilized in relation to the competition Articles: the DMA provides that it is without prejudice to Articles 101 and 102 TFEU.[245] I believe its purpose to complement the competition articles works well: in addition to the fact that it applies to parties not necessarily belonging to the scope of the competition laws, it also enables easier and smoother evaluation of the activities in scope of it. Time will tell whether it eventually turns out to be so overlapping with the competition law Articles that both, the DMA and the competition Articles, are utilized in same cases. As stated earlier, at least in cases where the company is in a dominant position and operates essential facility in the field where DMA is applicable, both sets of rules can come to question.

When it comes to the free movement laws, the connection with the DMA provisions depends on the outcome of the question on horizontal application: in the DMA the rules are addressed to gatekeepers that are undertakings. In case the free movement of data becomes part of the free movement laws at some point, for example through the fact that data is to be considered equal or comparable commodity to products (as I think it already in many cases is) the application of the free movement laws could come to question in the same cases than the application of the DMA provisions – activities hindering the free movement of data are in focus of the DMA. The relation of the DMA provisions and the free movement law Articles are not brought up in the DMA – therefore possible conflicts between the provisions would need to be judged by the courts by utilizing general principles of application. Most probably the approach would be similar to the one to be used regarding the DMA and the competition Articles. However, as the court cases have not yet revealed possible challenges in any DMA related areas, I will leave more detailed comparison of the treatment of the gatekeepers, as well as more detailed evaluation on the coherence of the field for now - guessing possible forthcoming problems does not bring additional value in the context of this work.

To conclude, there are no situations where activities would be automatically excluded from the scope of the free movement laws due to the nature of activity (except the activities not belonging to the scope of the EU law at all, of course). Any action possibly hindering the free

[245] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ L265, Art 1(6).

movement of commodities requires further evaluation. It is hard to know whether different gatekeepers are treated in an equal manner within the free movement laws, as there are only few cases where other parties than Member States have been involved as addressees of the given rules. In these cases, the treatment seems equal. The fact that majority of activities never got into the scope of the application for a reason or another, can be considered a possible distortion as per se. On the side of the competition laws excluding activities from the scope of the Articles is a normal procedure for activities which primary purpose is not to distort competition. The guidelines for excluding certain activities from the application of Articles are written in regulations and guidelines and are thus rather transparent. This nevertheless does not mean that the logic would be clear. The reasons behind the rules could – and to my understanding, should – be clearer. It should not only be clear *how* specific activities are scoped out from the application of the competition Articles, but it should be equally clear *why* they are scoped out. If this was clear, it would be easier to look whether the gatekeepers are treated equally, and rules are coherent though out the scene. As for the DMA, the logic utilized in the regulation is different: the activities that are to be included in the scope of the provisions are listed in the regulation in rather detailed and practical manner. Therefore, I do not think that rules or instructions will be needed to deliver further information on the activities that are to be left out of the application, even in the future. As a summary: logic applied for including or excluding activities in or from the field of application of the rules in each of the areas under examination is so different that it is hard to assess whether they impose consistent and equal guidelines to different gatekeepers. It is equally difficult to consider the coherence of the rules. These are issues that need to be further evaluated, when looking at the objectives of the legal areas in the later phases of the work.

5.3 Justification and measures to escape from the application

The justifications that can be validly utilized for escaping from the area of application of the prohibitions provided in the Treaty text vary a bit by Article, but it seems that the guidelines provided by the ECJ for utilizing justifications are more or less the same regardless of the area in question. The situation is the same regarding the measures used to reach the justified objectives: the general guidelines seem to be similar for all areas. The text of the DMA seems

to provide similar possibilities to utilize justifications to escape from the provisions of the Act than what is available for the free movement law and competition law Articles.[246]

When looking at the guidelines provided through the ECJ case law, it seems clear that for all the free movement related Articles the activities can escape from the Article provisions if they can be objectively justified on the grounds of public policy, public safety, or public health. In case the activity is not discriminatory, justification on the grounds of any overriding public interest may come to question. The treaty text is not this consistent: the Member States are not provided any justifications when it comes to customs duties or taxes or charges with equivalent effect in the related Articles.

For the quantitative restrictions the justification given based on the public health is replaced with one based on public morality, and health is included in a separate list including many objects of legal protection constituting valid justifications. The given list provided in the Article 36 consists of protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; and the protection of industrial and commercial property. The Articles related to the free movement of Capital provide activity related exceptions as defined in the previous part of this work, but also a possibility to utilize public policy or public security -based justifications. In any case, regardless of what exactly is written in the Treaty text, the ECJ's interpretation of the Treaty provides that the basis for justifications is similar for all the free movement law areas, as provided in the earlier parts of this work in more details. The case law also shows that the measures taken for pursuing the justified objectives must be similarly proportionate and necessary to be acceptable, regardless of the freedom area in question. Interesting question around the justifications concern the availability of them when Article provisions are applied in horizontal relations: to what extent other addressees than Member States can utilize the justifications since for example, the Article 65 TFEU providing justifications regarding the free movement of Capital is addressed only to Member States. In addition, the nature of the justifications in many other parts of the Treaty is such that it clearly relates to Member States. The cases related to sports organizations and labour unions visited in the previous chapter of the work, seem to indicate that the justifications are in any case available to other parties too. Also, in the Agonese case the Court brings up a possibility of having an objective factor -

[246] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ L265, para 67.

based justification that should be 'in proportion to the aim legitimately pursued'.[247] It did not find the company having such available in the case, though. It seems that the gatekeepers are treated similarly within the area of freedom rights when it comes to justifications – all gatekeepers have possibility to escape from the scope of the prohibitions in case objective justification is found, regardless of whether the option is provided in the Treaty text or not.

When moving to look at the situation in the field of competition law, it must again be reminded that in case the purpose of a party is to limit competition, there is no way out of the prohibition: no justification applies. Otherwise, the logic of the justifications for escaping the Articles' prohibitions is like the one applicable for the free movement Articles, in high level: first, there are requirements for justifications and then, for measures taken to pursue the justified objectives. The Article 101 and the case law related to both Articles 101 and 102 provide that the positive impacts reached through forbidden activities can nullify the possible negative impacts imposed to competition, and therefore also the need to apply the prohibition. It seems that competition is seen to enable community to develop in efficient way: in case the prohibition to hinder competition is breached for the purposes that do help to develop the community and society and thus benefit consumers more than what is taken off from them through the hindrance of the competition, the activity is to be accepted. If this logic applies, the competition is not seen as an intrinsic value, but just a manner to reach development. The above logic for allowing cases to escape from the field of application of the competition Articles constitutes a kind of 'public interest' based justification for the field of competition law. The Commission has provided in its guidelines related to application of the Article 102 the possibility to utilize justification that is based on safety or health reasons. This can be seen to correspond to public safety and public health related justifications. Also, the requirements set for the measures that are taken to pursue the justified objectives are familiar from the free movement law side: they need to be proportionate and necessary.

When it comes to the DMA, the Commission can grant exemptions in exceptional circumstances on the grounds of public health, public security or public interest if 'cost to society as a whole of enforcing a certain obligation is, in a specific exceptional case, too high and thus disproportionate'.[248] Commission is obligated to review its decision every year, when it accepts a limited and duly justified suspension or exemption regarding the rules.

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[247] Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139, para 42.
[248] Ibid, para 67.

To conclude, even though the texts of the Articles seem rather different at a first glance when it comes to justifications in the free movement laws and competition law, I do not finally see very big differences in the logic of the justifications in practice. As also the justification related provisions in the DMA seem to follow the same logic, I consider the requirements set for justifications and for measures for pursuing the justified objectives being similar in practice, regardless of the area of law, Article, or gatekeeper in question.

Different application aspects handled in this chapter are summarized in Appendix 1.

6 Construction of a coherent big picture

I have gradually moved from details of the free movement law and competition law rules to higher level conclusions throughout the work – now it is time to take the final step further and look at the situation from the most generalized level – and to see how the big picture looks, from the top down. In the following I will present my conclusion of the situation, highlight the points of unclarity, and above all, try to provide possible solutions for maintaining the coherence within the field. To do this efficiently, I do not only build the big picture out of the parts that are made known in the earlier parts of the work, but I try to organize the parts, and incorporate some new parts and especially logic into the picture, so that it looks coherent.

To walk through the different areas related to the big picture in a logical manner, I create a framework for that. Since the work has been built around the idea of moving from down to top when looking at different parts and aspects finally constituting the big picture, I will now need to jump between topics that are incorporated into the work only now, and topics that are derived from the earlier parts of the work. The framework for handling the topics consist of two main parts: the first handling the objectives of the laws, and the second handling a two-phase model created for simplifying and analysing the Court's logic for applying the laws still further. The consistent big picture and the logic making it as coherent as possible is built through these parts. The idea is to answer the questions that have raised when handling the previous parts of the work, as well as the ones coming up only now when taking the final step towards generalized level description.

6.1 Objective(s)

I want to utilize an imaginary picture of a building to illustrate how I see the logic of the legal system of the EU being built. In the picture, there is a building which ridge – a high level objective - is defined in the Treaty of European Union (TEU), and which bricks – practical rules and principles necessary for pursuing the objective - are provided in the Articles of the Treaty on Functioning of the European Union (TFEU), enhanced through different rules and regulations, and refined and patched by the Court in the case law. No matter what the sub objective of each legal area is, the overall aim of reaching the ridge level objective must lead the activities.

I think that building an ideally functioning and coherent system – no matter whether it is a company, project, any organization, or public structure – requires a good understanding of its

overall purpose: what is the ultimate objective it is built for. For the EU the objective is provided in its 'highest level' in the Article 3 TEU. The Article 3(1) TEU states: '[t]he Union's aim is to promote peace, its values and the well-being of its peoples'. I think, that together with other parts of the Article 3 TEU providing framework for the overall objective (e.g. in the form of common values of the peoples) and commonly agreed high level means to pursue it, the objective can be summarized to be *welfare* within the EU and among its citizens. Therefore, I see the interpretation of all laws under review being based on the idea of pursuing *welfare* within the EU and among its peoples and citizens. This objective is the one to be pursued even by cost of sub objectives: barriers to the free movement and trade are forbidden within the EU internal market unless the barrier in question is necessary for purposes of creating more welfare than what is expected to be lost through the negative impacts caused by the given barrier. So, I think that it is finally always a question of measuring benefits against negative impacts regardless of the area of legislation in question. Purpose is to reach the ridge and not to suboptimize.

The ambiguity of the concept of 'welfare' can naturally cause difficulties in the way – what is bringing welfare to one party does not necessarily bring it to another. The aim is in any case to optimize the overall welfare within the EU in a commonly agreed manner. Building and maintaining consensus on the overall objective and purpose of the EU, selecting procedures for pursuing the objective out of the ones proposed by scientists and other specialists, finding ways to handle the contradictions, and finally reasoning the logic very clearly to people, are traditional tasks for politicians. The challenges concerning the common target do not disappear by not discussing it and the ways to pursue it – even quite an opposite. For example, the discussions during Brexit seemed to bring up the fact that when the clear big picture and overall objective disappears out of sight, new partial pictures are used to create a new one.[249] I think it is totally appropriate that a Member State that does not see itself benefiting from pursuing the common objective together with other Member States at community level, leaves the Union. However, what is not ok is the chain of events happening on the grounds of inadequate understanding about the big picture. Either is it ok the Court to try to optimize the big picture without clear objective, or clear understanding about the logic of the means to pursue it. The task of the Court should be to keep the walls of the building

[249] Duncan Shawa, Chris M. Smith, Judy Scully, 'Innovative Applications of O.R. Why did Brexit happen? Using causal mapping to analyse secondary, longitudinal data' [2017] 263 European Journal of Operational Research 1019, 1031.

straight over the times – not to tell how and where the ridge of the building should be, or to find logic for the methods selected by the politicians to reach the objective.

To move on, I consider the overall objective of the EU, welfare, to be clear enough the Court to be able to make logical judgements based on it. I understand that it is challenging as the means to pursue the overall objective defined in the Art 3(3) TEU include measures like 'a highly competitive social market economy' that do not provide a lot of real guidance for the work - vague terms do not help to evaluate whether a specific activity really supports reaching the overall objective in commonly agreed manner. The Court nevertheless needs to come up with judgements and firm reasoning for them. The above undoubtedly results in some inconsistencies and vagueness in the reasoning of the Court.[250] I will, nevertheless, leave more detailed handling of these challenges aside as possible solutions to these problems cannot be provided within the scope of this work anyway, and continue to construct the big picture and possible solutions needed to make is coherent.

6.2 Model and logic for applying the rules

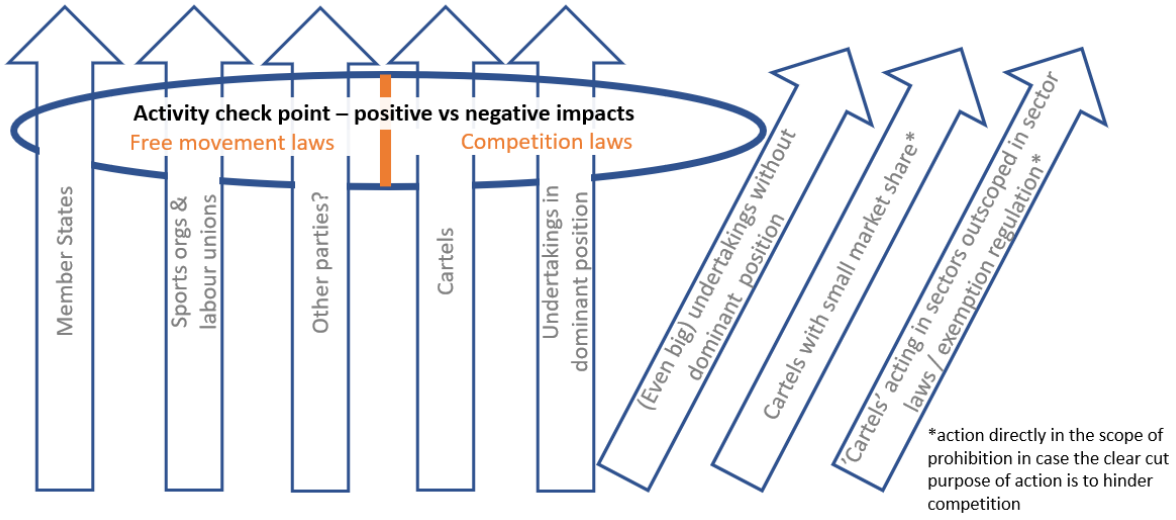
I try to build a simplest possible model for expressing the evaluation approaches that the Court utilizes when evaluating cases that belong to different legal areas. This is done to make the differences of the evaluation processes related to different law areas as apparent as possible. Along with highlighting the differences once more, I try to incorporate the idea of the common high-level objective to the picture. To make the picture coherent I try to find and present logic explaining the law area related differences in application of the rules, giving answers to open questions, and bringing light to the application of the rules in situation where rules from more than one legal area could come to question.

6.2.1 Two-phase model for applying the rules

I think that the application of all the handled laws can finally be split into two high level phases: the first concerns applicability and the second one measuring the benefits vs negative impacts of the activity under evaluation. The first phase includes both, gatekeeper and activity -based applicability evaluation defined in the previous chapter of the work. When the free movement laws are in question, the first phase appears minimal: there is no need to evaluate

[250] Jukka Snell, 'The Notion of Market Access: a Concept or a Slogan?' [2010] 47 Common Market Law Review 437; Pınar Akman, 'The role of 'freedom' in EU competition law' [2014] Vol.34 (2) Legal studies (Society of Legal Scholars) 183.

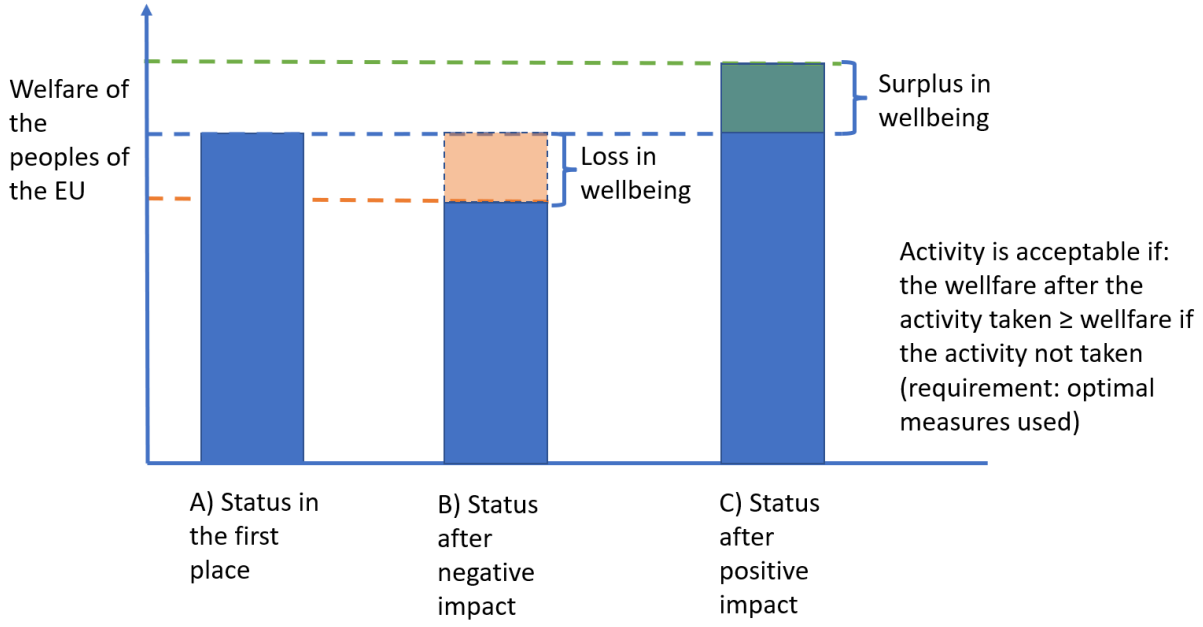
the qualities or impacts of the gatekeepers or their activities - all cases are brought to the second phase evaluation (apart from public authority related activities that are excluded from the application of the free movement of workers and services, and right of establishment related provisions). In the competition law side, the first phase evaluation comes to question: both gatekeeper and activity -based applicability evaluations do take place. The evaluation differs when it comes to Article 101 (cartels) and Article 102 (abuse of dominant position). For cartels the activities with purpose to limit competition are always forbidden. For the rest of the cases the applicability of the rules needs to be reviewed: cases are dropped off from the scope of the 'actual' evaluation through *de minimis* regulation providing market share -based threshold for the applicability and through sector specific regulation and exemption rules that provide sector or activity specific 'exceptions' on the applicability. The Article 102 based first stage 'out scoping' requires large and partly even ambiguous evaluation that does provide whether the market power of the undertaking or undertakings is adequate it to be considered dominant in the market and therefore belonging to the scope of the provisions. Out scoping gatekeepers from the actual evaluation of whether they fulfil their obligation to support the welfare objective in the EU is illustrated in the picture below.



Picture Illustration of out scoping gatekeeps from the evaluation of them fulfilling their obligation to support the welfare objective in the EU.

In the next phase, those gatekeepers' activities still in the scope of the Articles provisions (either the free movement law or competition law related), are evaluated regarding their implications to overall objective, wellbeing of the peoples of the EU. Unless a Member State, undertaking, or any other party in the scope of the Article provisions, is able to provide

convincing proof of positive impact of its action that is forbidden in the Treaty – or to provide that the negative impact of not taking the given action would be even greater when looking at the welfare aspect – there is no valid objective justification, and the action is to be considered forbidden. If valid justification is found, the measure to pursue the justified objective still needs to be evaluated: it must be proportionate and necessary.



Picture Evaluation of the benefits vs negative impacts to welfare of the peoples of the EU.

When it comes to DMA, the phases can be considered similar. The actual process of evaluation is in any case simpler due to very detailed level rules provided in the Regulation. Not only the gatekeepers and actions to which the rules can be applied are defined in detail but also the obligations delivered in the Act do not seem to leave much room for actual evaluation. Justifications can in any case come into question in exceptional cases. As stated earlier, here the above logic applies, and the second phase evaluation can be performed normally. The Act provides that accepted justifications must be reviewed at regular intervals – therefore the second phase evaluation will be regularly repeated if the justification is accepted.

It is obvious that the above-described model with two phases, and evaluation activities taking place in them, is highly generalized, and the underlying steps and actions are much more complicated than presented here. In any case, the bird eye perspective makes it easier to identify the parts that raise questions regarding the coherence of the logic between the areas of law under evaluation. I think that questions raise out of both phases, the applicability of the

rules, and matching benefits and harms caused by the activities in the actual evaluation phase. Also, selection of Articles raises questions: can the application of both, the free movement Articles and competition Articles, come to question in the same situation or even in the same case? The questions are gone through in the following.

6.2.2 Building logic for the first phase

The two-phase evaluation model was created to simplify the actual evaluation process carried out by the Court in different cases to its utmost. The differences and similarities of the approaches that the Court applies when handling cases involving rules belonging to the different legal areas become visible through the model. The first phase of it shows the logic of including or excluding gatekeepers and activities to or from the further evaluation phase. The differences between different legal areas and rules under evaluation was presented in the previous part of the work. Now it is time to continue with the questions raising out of the applicability.

It seems that not only Member States, but also other types of gatekeepers brought into the Court for breaching the free movement rules have all been taken under further evaluation that is carried out in the phase two. Neither qualities of the gatekeeper, nor the size or impact of the activities have been in focus. On the other hand, on the side of competition law, only undertakings are in the scope of the rules in the first place, and still even part of these is excluded from the further evaluation happening in the second phase. What is the logic behind these differences? Why it seems that companies that are multiple times bigger compared to smallest Members States can be left out from the application of rules set to guide their possibilities to set barriers to markets, while the Member States are always in the scope of such rules?

On the free movement law side, the Court has brought into scope not only Member States and related institutions, but also Sports Organizations and Labour Unions, even companies. As pointed out earlier in the work, it is not totally clear what is the criteria for utilizing the free movement laws in horizontal relations. It seems clear that the parties who can provide legally binding rules are in the scope, but it also seems that this authority is not an absolute prerequisite. According to the Court, limiting application of the provision related to freedom rights only to acts of a public authority ‘risks creating inequality in its application’ since ‘conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by

private persons'.[251] This was provided for example in Agonese case[252] in which the Court concluded that a company is not allowed to expect specific language certificate available only in one region of a Member State from job applicants as this is discriminatory and hinders the free movement of workers. I think that the idea is that even through an action with hindering effect would be taken by a small party and the created barrier would concern only one individual person in a specific case, allowing the specific procedure to hinder the free movement rights would make the welfare impact negative in general. Therefore, neither the size of parties nor the actual impact on a market in a specific case matter: the question is purely about the idea, not about the actual features of a certain case - of course, granted that the possible effect would take place between Member States which is a precondition for the EU law applicability in general. As stated earlier, the guidelines provided by the Court through its judgements are supposed to guide all similar type of activities in the Union ever after – therefore also the impact on the markets can be big, eventually. When it comes to the competition rules the market power of the parties does matter, unless in case of Article 101 the question is about clear purpose to hinder trade. For the Article 101 the actions which purpose is to hinder trade are always forbidden. For the rest of the cases, market share based *de minimis* rules are used. In the rules the biggest market share allowed for a party to 'automatically' escape from the further evaluation of impacts is 15%. On the other hand, when it comes to applicability of the Article 102 concerning the abuse of dominant position, the key is the market power measured by party's independence of its stakeholders: the dominance is present if the party is able define the trade conditions without others having real possibilities to effect on them – if the dominance is not found, the gatekeeper is not in the scope of the prohibition.

It seems that the different approach in the free movement side and competition side can be derived from the actual aim of the areas of law. It seems that the selection of the parties into the scope of the competition side rules is related to their possibilities to ruin competition. So, the competition – or rather, competitive environment - as such is protected: competition is a means to reach welfare and is therefore protected as such. In the free movement side, on the other hand, the free movement itself is the 'object of a legal protection'. This explains the

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[251] Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139, para 33; Case 36-74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 01405, para 19; Case 43-75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455, para 39.
[252] Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139.

different approaches for out scoping gatekeepers from the scope of the rules: the free movement of commodities in specific area either exists or it does not exist – only a small barrier makes it not to exist to its full extent, while in competition side, the nature of competition requires different approach. Competition, to exist, requires occupying markets by figuring out optimal set of features in the offering. The objective is to create an environment where the competitors do develop themselves and their products further, to be able to provide better and better products and offerings – and thus welfare - to consumers. In the competition, "barriers" are key to success and a natural part of the activities – companies aim to create better products and offerings than others in order these to act as barriers preventing others from occupying markets from them. Therefore, unlike in the free movement side, the question is not whether there is a barrier or not, but whether the barriers are such that necessarily exclude the possibilities of competition or not. If an undertaking or more undertakings is in a position where it has been able to create so big barriers into a specific market that it can ruin the possibilities of others to enter the market in any feasible manner, its activities naturally do belong to the scope of further evaluation when someone so requests. This is the case when a company is in a dominant position – its market power is such that makes it capable of ruining the welfare by optimizing only its own profits instead of its offering, and by stopping development of products and offerings rather than contributing to development, if it so decides. The same goes for cartels: in case they occupy big enough market share, outcomes of their actions are to be further evaluated. The activities which only purpose is to hinder competition are naturally always forbidden, regardless of the market power – these barriers are not created by or for developing better products and better processes required for better offerings but only to stop others to be able to take part to competition and thus contribute to development. Regardless of the area, there is zero tolerance for actions whose idea is clearly against the objective set in the area to reach the overall objective of welfare: the free movement or free competition. The rules provided in the DMA support seeking the same objectives: the provided requirements are such that could be derived from the free movement laws or competition laws as well, but as applicability related requirements and obligations set for gatekeepers in the scope are defined in more practical manner, they make the evaluation process more efficient.

Now, after finding the logic behind the rules, the approach used in each of the legal area summarized in the previous part of the work looks reasonable. The gatekeepers are not to be left out from the scope of the free movement rules by their nature, size or the size of possible

impact they are capable of making to market, but the activity itself is always to be evaluated - against the welfare objective. This guarantees that the cases where barriers are set on markets cannot escape from the rules even though they would not belong to the scope of the competition laws. On the competition law side, the addressees of the rules are undertakings. Actions which primary purpose is to act against guidelines (prohibition to restrict competition) are always forbidden. Otherwise, gatekeepers are excluded from the application if their market power is so small that they cannot ruin the competition by their actions.

The practical difficulty concerning the logic utilized on the competition law side is related to the fact that there is no clear-cut figure that could be used for measuring market power – market share that has been used for defining thresholds in *de minimis* rules is providing the indication of a foothold that undertaking has gained in the market and therefore works when it is low enough to guarantee that undertakings with that small grasp on the market cannot ruin the competition in it, in any case. As the highest market share allowed in *de minimis* rules the company to escape from the scope of the Article 101 provisions is 15%, this is definitely the case. It can be expected that the companies covering 85% or more of the market have possibilities to compete in the market regardless of the actions of the "cartel companies" occupying the rest of the market. The consumers can trust that the business drivers make others to offer them competitive products if cartel companies are not willing to do so – and if the consumers move to purchase products from those other companies, the cartel companies lose customers and business, eventually. There is no similar threshold defined for the applicability of the Article 102 that delivers the abuse of dominant position related prohibition. The market power has been evaluated based on party's independence from its stakeholders: the dominance is present if the party is able to define the trade conditions without others having real possibilities to effect on them. As provided in the earlier parts of the work, big enough market power has in some case been reached with 45% market share. As stated, this nevertheless is not a key here: the existence of dominance – or big enough market power that I consider being more precise definition of the searched quality – is to be traced through multi-dimensional evaluation. If the company is not in a dominant position, it is not seen to be big enough threat to competition, and it and its actions are thus out scoped from the further evaluation. Nevertheless, even if the company is not found possessing the dominant position, it may still be in the scope of rules preventing it from hindering free trade within the EU markets. Namely, the platform companies operating in digital environment are

addressees of the rules provided in the Digital Markets Act that does not require dominance from the party, it to belong in its field of application.

I believe that rather quickly changing and multi-dimensional market environment in the digital sphere has been a driver for developing Digital Markets Act (DMA): a clear and quick to apply approach is necessary in the area, it to work efficiently in practice. I see the DMA supporting the above-mentioned areas of legislation and possibly patching the shortcomings of the older laws in current market circumstances. Even though it is said to have different purpose than the competition laws, I see clear connections to the Articles. DMA helps to maintain free competition by setting responsibilities for companies that may be acting alone and are therefore not in the scope of Article 101. The companies regulated by the DMA need to be big but not necessarily in the dominant position. The applicability evaluation seems far easier (and quicker) than the one required for proving the Article 102 to be applicable. On the other hand, there is no need to evaluate the impacts or possible impacts of specific activity to market as the forbidden actions (capable of having big impact on the market by their nature combined with the size of the gatekeeper) have been defined in more details in the rules. As the DMA is a *lex specialis*, it seems to take precedence over application of the competition laws. It, however, does not preclude the application of the competition law Articles.

I want to conclude the logic prevailing in the applicability evaluation phase, as follows:

1. **Free movement laws:** applicability evaluation is not needed - all parties and cases are included in the second phase evaluation (except the ones involving activity that does not belong to the scope of the rules at all, non-EU cases etc)

   Logic: objective is to reach the free (natural) movement of commodities, the free movement cannot be partial – all cases count.

2. **Competition laws:** cases in which a party/parties is/are capable of harming competition in a manner that cannot be fixed by normally functioning business environment (i.e. without external interference) are to be further evaluated and thus included in the second phase.

   Logic: the purpose of the competition laws is to reach sub objective of well working competition.

Notice: Activities which **purpose is to limit** competition do not need any evaluation – they are **always considered forbidden** as per se – this is a clear signal to all undertakings: the prevailing principal rule orders not to harm competition. Flexible area is only to allow such activities whose main purpose is to reach positive impact on welfare, and whose side effect the negative impact on competition may be.

3. **Digital Markets Act:** cases in which the gatekeeper and its activities fulfil the predefined qualities are captured.

   Logic: DMA enables effectively catching gatekeepers that can bias business environment in or hindering access to remarkable parts of EU markets in digital environment (manage 'essential facilities' type of platforms).

Now, when it is clear what are the reasons and logic for out scoping part of the gatekeepers already before the actual benefits versus costs evaluation, it is time to look at that, and thus, to move to handle the second phase. It is good to notice that I will leave the out scoping done through block exemption regulation to the following part of the work only, as I see it having closer relation to justifications than to market power of a specific undertaking.

6.2.3 Building logic for the second phase

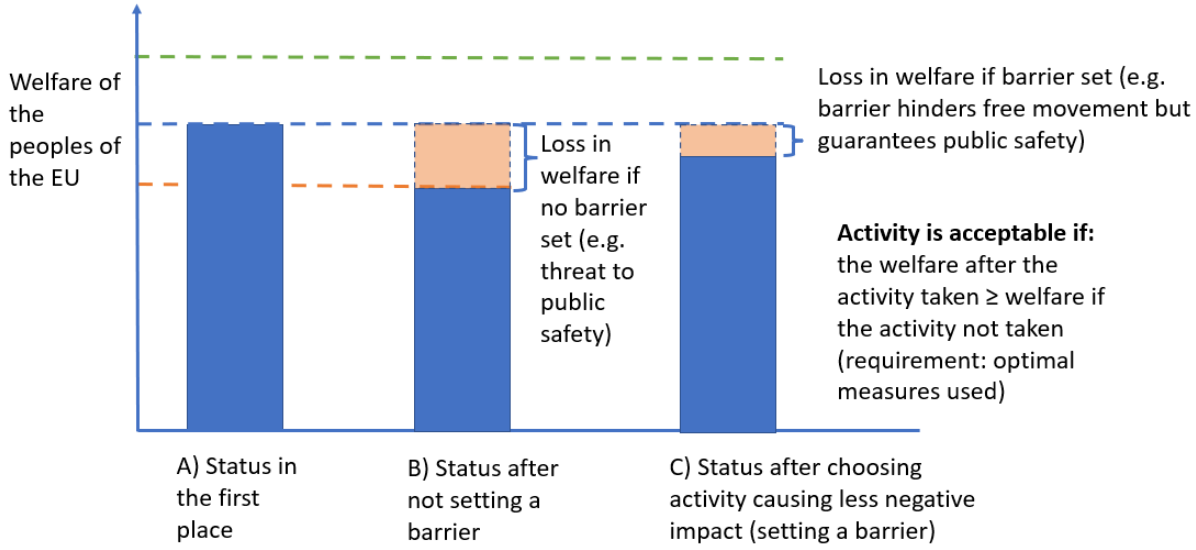
The second phase of the model consists of comparison of negative and positive implications of a specific activity. This is done to figure out whether it is to be considered acceptable. Even though the evaluation is in close relation with the justifications, and the previous chapter of the work indicates that the approach related to justifications seems rather similar regardless of the legal area, I want to look at the phase two evaluation in more details. There are two reasons for this: first, the split that I decided to use when creating two phase evaluation process requires adding also other aspects to the scope of the evaluation than only the ones belonging purely to the group of justifications as understood traditionally. Second, I want to incorporate the overall objective of welfare into the evaluations. Also, by going through issues related to the second phase evaluation, we can proceed smoothly to the next topic that concerns finding procedures to cope with possible overlapping areas of the rules.

The phase two concerns measuring whether a specific (possibly otherwise forbidden) action can be justified as it results in higher welfare than what would be resulted of not taking the action. In practice, the welfare objective equals to 'public interest' that is the term used more commonly in relation to the justifications derived for example from the Articles. I consider

using the term ‘welfare’ better in the context of phase two, as the comparisons are not related only to justifications as traditionally understood. I think that the term ‘welfare’ works better for example in cases where rights related to the different legal areas are weighed against each other and the term describes the variable used as a yardstick for finding an optimal outcome and judgement.

As the justifications available in different legal areas have been handled profoundly in the previous parts of the work, and it seems that similar rather unproblematic high-level logic applies regardless of the area, there is no point of repeating it all here. Instead, I deliver pictures illustrating evaluation of welfare impacts resulted by two different ways to proceed in cases related to the free movement law and competitions law. I will also provide information on the block exemption rules as they are best related to this second phase of the model.

The below picture visualises the evaluation logic related to the free movement laws.



Picture Example of evaluation of the benefits vs negative impacts to welfare of the peoples of the EU in case related to the free movement laws.

In the competition law side, the process for measuring the gained welfare benefits against losses in welfare has been intensified by excluding part of the cases from further evaluation in a formal manner, still in this phase. The block exemption regulations provide framework for excluding specific type of activities from the application of the laws without further evaluation. It seems that the grounds for scoping formally part of the activities out of application of the rules is based on the criteria set in the Article 101 TFEU – thus, the block exemption rules aim to exclude such activities that contribute to improving the production or

distribution of goods or to promoting technical or economic progress, in a manner allowing consumers a fair share of the resulting benefit, by their nature. In other words, the situations included in the block exemptions are seen automatically bringing more benefits to welfare than what the harm caused to competition can take off from it.

The block exemption regulations are formulated to provide further instructions on different Article 101 application situations and to limit the number of cases brought under evaluation: for example the Commission Regulation No 1217/2010[253] provides that the 'Article 101(1) of the Treaty shall not apply to research and development agreements'[254] for a given time period when the primary purpose of the agreement is not to limit competition, and when given criteria is fulfilled. The criteria include for example maximum market share related threshold of 25%. The undertakings are responsible for evaluating their possibilities to utilize block exemption rules by themselves – the final evaluation on the applicability of the rules will be provided by the competition authorities or courts only in case the activities taken by the undertakings are taken under investigation of these parties due to doubts on lawfulness of their activities. However, if the 'instructions' provided through block exemption rules are clear enough they do make the work of competition authorities, courts, and undertakings able to utilize the exemptions easier and more efficient. Therefore, also the regulation can be seen to contribute to overall welfare of the peoples of the EU by its part: there is no reason for putting effort and money on pointless evaluation activities. The block exemption regulations should in any case enable blocking out of the further evaluation only such cases and activities that obviously bring more gains to welfare than what can be lost through weakened competition caused by the activities. Evaluation of actual impacts on welfare of cases that can be excluded from the application of rules through block exemption regulation would require detailed analyses that cannot be carried out in the scope of this work. Unfortunately, as it would be very interesting to understand how the threshold levels, for example, have been formulated: why the development agreements are allowed 10% higher market share compared with other co-operation agreements, for them to be automatically out scoped from further evaluation.

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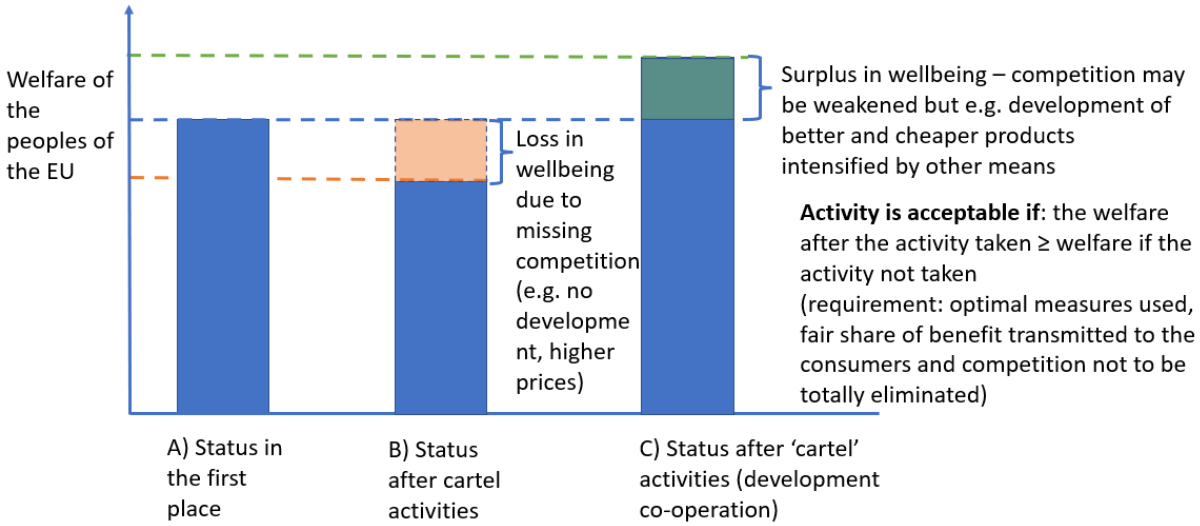
[253] Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements Text with EEA relevance [2010] L335/36.
[254] Ibid, Article 2(1).

The overall logic of welfare evaluation in the area of competition law is illustrated in the following picture.



Picture An example of evaluation of the benefits vs negative impacts on the welfare of the peoples of the EU in case related to competition laws.

To conclude the logic of the evaluation done in the second phase, it can be said that the comparison is similar in all areas under review: the ultimate aim is to find out whether a specific activity benefits the overall welfare more than it harms it, and thus has a valid justification. The measures used to pursue the objective need to be necessary and proportionate. It can be said that the rules and procedures in the free movement law and competition law areas, as well as in the area of the DMA, are logical and in line with each other, when looking at the big picture: differences in the areas are resulted by the fact that the areas have different role and sub objectives when pursuing the common overall objective of welfare.

Even though the area seems coherent and there are no problems with the logic in general level, further questions raise. These concern the selection of rules: what rules to use if the areas of application overlap? This is handled next.

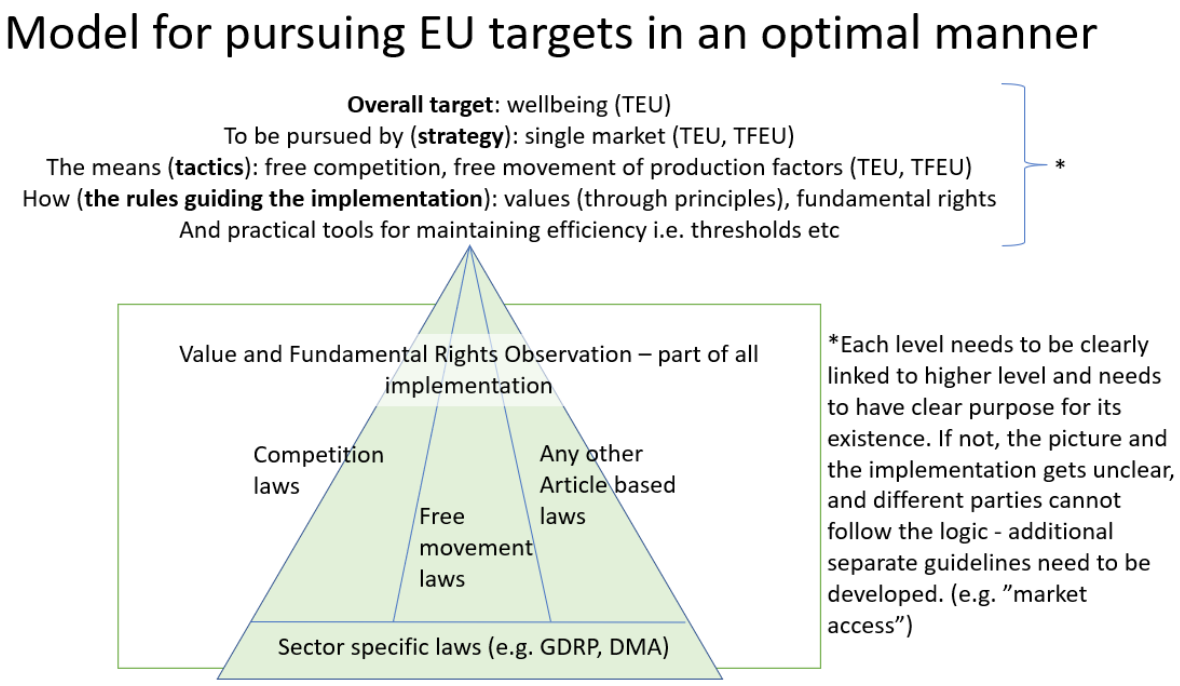
6.2.4 Maintaining the coherence – what rules to use?

It seems that the free movement rules, the competition rules, and the DMA rules constitute a consistent big picture now when the logic behind different approaches related to application has been revealed. The coherence to be unbroken some more work with the logic is in any case still needed. Namely, the picture turns out to have areas of overlap: if the free movement

rules can be applied in horizontal relations, as proposed by the logic derived from the Court cases, the same gatekeepers can belong to the scope of the free movement laws, the competition laws and even the DMA, in the same situation. Thus, further logic needs to be described for applying the rules in efficient and coherent manner.

I will dig into the issue by looking first the situation in general level, handling then the applicability of the free movement articles, and moving finally to look at the possible simultaneous application of Articles of both areas, also taking the DMA into consideration.

As a result of drawing the high-level outlines out of details of Articles and Court judgements, it seems clear that the sub objectives of the free movement laws and competition laws are different although the overall highest-level objective is the same – welfare, and even the common strategy for pursuing it – single market – connects the areas. Even though the next level objective set for the free movement laws for making its contributions to pursue the idea of a single market – prevention of hindering the free movement and thus market access – looks similar to the aim of competition laws, it is not. The primary aim of the competition laws is to prevent hindering the *functioning of competition* and not hindering market access – or not even hindering the competition itself. Competition laws forbid undertakings to prevent other parties to access the market only when this causes serious harm to competition. So, the fact that the welfare is pursued through internal market without barriers does not mean that the sub objectives of different areas contributing to functioning of the market could not be different. This is a fact that must be taken into consideration when looking at the usability or even “interchangeability” of the rules in specific cases. To make the big picture clear and the system functioning efficiently, the purpose of each part of the system needs to be clear. My illustration on the optimally functioning system is visible in the following.

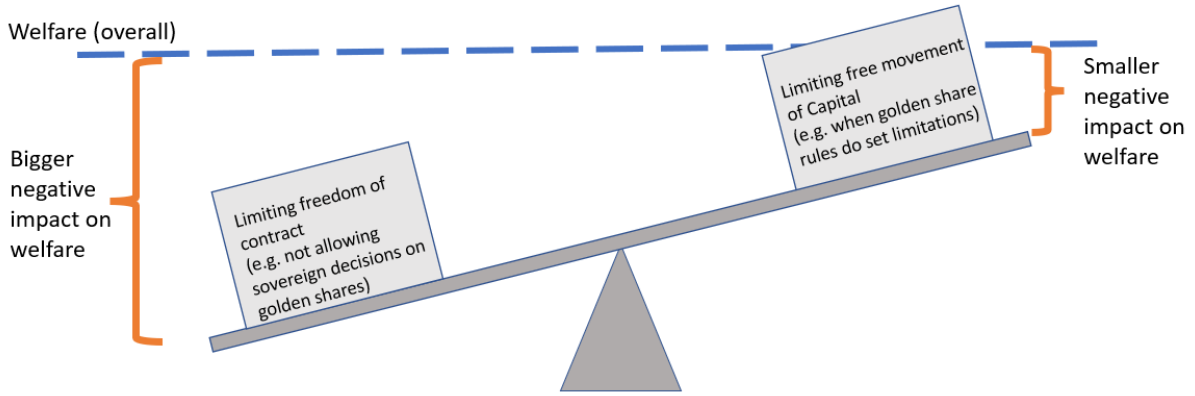


Picture The model for pursuing EU targets in an optimal manner.

Now, the question is: in which cases the rules of each of the law areas can be utilized? Are they automatically available for cases that may belong to the scope of either, or how is the selection done? How should the issue concerning a potential rush be solved: it seems untenable for the legal system to handle all possible horizontal cases raising out of the possibility to utilize the free movement articles against any gatekeeper?

When looking at the ECJ case law, a clear answer is not provided into the question concerning the scope of the applicability of the free movement articles. If it really is so that the free movement Articles can be used for any vertical or horizontal case where ´the free movement is hindered as the set barrier might directly harm the overall welfare of the peoples of the EU as such, regardless of the size of parties, type of gatekeeper, or the size of possible impact in the actual case, the number of case law is extremely low in comparison with the potential pouring out of the Articles. In other words, if the conclusions made in the previous parts of the work are valid, the Articles seem to be either totally underused, or seen useless as the outcome of the evaluation is so clear that the Court is not needed for solving related issues. If the Articles at some point of time become used more in horizontal relations, the workload of different courts can increase remarkably. I see the current situation being in any case an indication of one of the following: i) either there are no remarkable barriers that would need rules of this to be used (or the outcome of the evaluation is so clear that there is no need for that), ii) there are other tools for tackling the problems related to barriers, iii) the parties do

not know about or realize the availability of the rules, or iv) the use of the free movement articles is too uncertain to be tested in real cases, specially, as there is no similar public authority supported system for bringing up the cases than on the competition law side. Only two first ones are not indications of problems in the EU legal system. Further research that is not possible to be included into the scope of this work would be needed to clarify two aspects: firstly, the logic for utilizing the Articles in horizontal relations should be properly revealed and connected to practical level through profound analyses, and secondly, the real reasons behind the phenomenon of not utilizing the articles more at the moment should be figured out if relevant considering the first point. This would be important for both, increasing predictability of application of the EU law but also for the EU legal system to function properly: the fact that the legal system of the EU is built on the logic of also the citizens of the EU guarding the legality of actions of different parties requires that they know their rights and obligations.



Picture Low number of court cases with private parties utilizing the free movement rules in horizontal relations may indicate that there is no need to weigh rights against each other as the outcome is so obvious.

The next wide question concerns the overlapping area of applying the free movement Articles and the competition Articles: is the application of the articles overlapping or is there maybe some hierarchy between them? It is obvious that the DMA is to be considered *lex specialis* and therefore its application comes to question in the first place. It is nevertheless provided in the regulation that it should apply without prejudice to the competition Articles. The fact that the free movement and the competition Articles are used for pursuing different sub objectives supports the idea of utilizing them as independent agents for pursuing the common target: they should be used independently of each other, meaning that in specific cases the

simultaneous implementation of rules derived from both type of articles could come to question. Still, the order of evaluation could and maybe should be defined: if a specific case can be evaluated based on the competition rules and the free movement rules, for the sake of efficiency one of these areas should be evaluated first. If the activity is then considered forbidden already here, there is no point of carrying out the evaluation based on the secondary area. As the area of application is narrower in the competition law side, this might be a good side to start with. If specific case is found not to belong to the scope of the competition articles, the evaluation could be continued by looking at the free movement law side. The question raising out of this procedure is that would it not be possible to utilize the free movement laws as a 'back up' for each an every case coming to the scope of the competition rules? And to take it further: is there finally any need for utilizing the competition law if all cases in the scope of the competition law could be more easily caught by utilizing the free movement Articles directly? I must take the questions to more practical level to elaborate the idea further.

If dominant position is not found or de minimis rule is letting companies participating concerted practice to escape from the scope of the competition Article in a specific case, the secondary possibility, application of the free movement articles could still come to question. On the other hand, if the first level evaluation is not excluding specific case from the scope of the competitions rules, but that happens only as a result of evaluation of activities – thus, evaluation of positive and negative impacts on the welfare of the peoples of the EU, the case could and should not be taken back to first square, applicability evaluation of the free movement Articles, anymore. The reason for this is that the activity was already taken into the scope of the Articles, and the second level evaluation should include similar measures regardless of the area: possible justifications and possible weighing is not dependent on the area, but in the second phase the scale and yardstick used are the same. If specific activity is acceptable, it is acceptable in both sides – the impact on the overall welfare is the same, no matter for what purpose it is measured.

Jukka Snell has come to similar type of conclusion regarding the selection of relevant Articles.[255] According to Snell, the competition rules should be considered *lex specialis* and therefore taking precedence over the application the free movement articles when they come to question. I think this sounds the most feasible available solution to the question at hand.

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[255] Jukka Snell, *Goods and Services in EC Law: A Study of the Relationship Between the Freedoms* (OUP 2002).

This also leads to the same outcome as presented above, as long as the applicability evaluation includes all the elements defined belonging to the 'first phase' evaluation in previous. So, for example the preliminary split between 'undertakings' and other type of gatekeepers cannot be determining factor for selecting the Articles that are to be applied, but also the parts requiring further evaluation, like existence of dominance or high enough market share when concerted practices are in question need to be considered, before the applicability of the *lex specialis* i.e. Articles 101 or 102 can be determined.

Good example of the case where both sets of Articles could be possibly used is the European Super League case currently pending the ECJ preliminary ruling. The case concerns lawfulness of the activities and rules of global and European football federations (FIFA, UEFA) that do maintain exclusive power to organise international club competitions. The rules of the given parties set them rights to prevent their member organizations organizing or participating competitions organized by third parties without their prior permission. Some of the European top clubs were nevertheless aiming to take part on organizing and participating in a new European Super League. This idea was hampered by FIFA and UEFA who told that the clubs and players taking part into this are to be expelled from competitions organised by UEFA and FIFA and its confederations. As the given parties dominate all activities related to global or European professional football, setting up a new European league by part of the clubs would exclude them in practice from the global football scene. The case was taken to Spanish court for challenging FIFA and UEFA actions based on both competition Articles (101 and 102 TFEU) and the free movement Articles (45, 49, 56 and/or 63 TFEU). The Advocate General Rantos already delivered his Opinion[256] on the case. He provides arguments both on the applicability of the competition Articles and on the free movement law Articles, by putting more effort on the firstly mentioned ones, and handling the free movement Articles related question in shorter manner. I think this was mostly because the same reasoning could be used for both sets of Articles, and he could only refer to earlier arguments when handling the free movement part. In any case, the opinion seems to show green light for my view on the topic: the competition law and the free movement laws need to be handled separately despite their similar overall purpose as they still aim at different sub objectives. They in any event have the similar justification basis, and therefore it is possible to rely on the same justification in the European Super League case regarding both sets of

[256] Case C-333/21 *European Superleague Company SL v Unión de Federaciones Europeas de Fútbol (UEFA), Fédération internationale de football association (FIFA)* [2022] EU:C:2022:993.

Articles. It is naturally the ECJ who gives the final view on the topic: it is more than interesting to see whether they shed more light on the alternative applicability of the Articles. In the best case, they will provide a clear order of priority for the Articles.

If the court at some point provides that the competition Articles can be seen to constitute *lex specialis* while the free movement Articles constitute *lex generalis*, the 'baseline' for all activities, the provision does shed light also to wider picture and application of new rules brought into the scene: it is rather obvious that the Digital Markets Act type of regulation providing further guidance to new types of gatekeepers and business models is needed also in the future. When these new rules and guidelines are brought in, the order of priority, purpose and link to other already existing rules needs to be extremely clear them to help and clarify the logic more than to confuse. In order this to be possible, the 'old' set up needs to be clear.

Finally, to answer the question of whether it would be easier to challenge any activity based on the free movement Articles right away, instead of testing the applicability of the competition Articles first, I would say: it depends on the situation. As the market area included in the scope of the competition law -based evaluation may be smaller than the whole EU market, it may be easier to point out big enough negative impacts on competition and thus welfare within that limited area. If the competitive environment is not potentially harmed within that area in a manner imposing negative effect on welfare, it is hard to see how the normally functioning competition environment would not be seen to fix the bias in the community level also. On the other hand, if a company starts to utilize a new mode of operation that limits both, competition and the free movement of goods, for example, but it is obvious that the company is not powerful enough to be considered occupying a dominant position, and thus, belonging to the field of application of the competition Articles. But instead, as the mode of operation the company utilizes could have remarkable impact on the free movement of goods, if also other companies would start to use it, it is probably more efficient to directly apply the free movement Articles.

So, the answer is: it is worth considering both sides of the presented two-phase model to decide what rules to utilize.

7 Conclusions

Market access is a key to barrier free single market that is chosen to be the model for pursuing welfare within the EU. The system of rules and regulations composing the ensemble governing the market access within the EU is multi-dimensional. In order it to work well, it must in any case be coherent, logical, and easy enough to understand: the gatekeepers acting in the field have to be able to identify themselves as such, and to understand what is expected of them, while the citizens of the EU have to be able to understand what they can expect of others. If these features do not exist, the system is broken.

When looking at the big picture of the rules and regulations composing the framework for governing the market access, the logic is clear: regulatory areas of the free movement laws and competition laws have their own roles in the set up. The picture seems coherent even when it is drawn from down to top - out of details derived from single Articles and rules, by following the guidelines provided by the ECJ. Having said that, there are clear points that should be explained: biggest unclarities raise out of the horizontal applicability of the free movement laws and out of the implementation logic when both the competition law Articles and the free movement Articles can be applied at the same time.

I propose that the application of the free movement laws should not be limited through any type of thresholds or through applying it to specific gatekeepers' activities only. The reason for this is that the free movement Articles support pursuing the overall welfare target through sub objective that cannot hold any limitations: the sub objective of the free movement of commodities is either met or not met – there is not halfway. For the competition law side, the approach is different: these rules contribute to welfare and the single market through guarding the competition environment. They enable environment where undertakings can enter the market when being competitive enough. Such parties that are not capable of ruining the competitive environment can be out scoped from the application of the rules right in the beginning. I suggest that the same parties can, however, still become subjects of the free movement rules, as the application of the Articles and rules is not limited on the grounds of gatekeepers' quality or impact of activities in a specific case, on this side. I consider this important as it is a prerequisite for the flexible use of the Articles which is essential for the system to be able to respond quickly to changing market circumstances.

To solve challenges caused by the defined set up, I propose utilizing a priority order for applying the Articles. This can be done by following Snell's idea of considering the competition law Articles *lex specialis*. This would help to avoid excessive case load that could be resulted from allowing the free movement articles to be applied to any hindering activities between any vertical or horizontal parties, and at the same time to solve the problem related to the overlapping applicability of the Articles. When allocating the cases under correct Articles in the first evaluation phase defined in this work, the activities are evaluated against correct sub objectives – these sub objectives are different in the areas of competition laws and the free movement laws. At the same time, the activities cannot escape from the higher-level objectives of either legislation area as this overall objective is to be included in the consideration in the second phase of the evaluation. The second phase evaluation is done by using common welfare objective as a basis for it: the scale and an ultimate yard stick for making the final judgements is the same regardless of the area of law.

I think that no matter how the possible problems are finally solved, the hazy areas must be clarified and the logic leading the activities has to be made crystal clear. The chosen approach must be easily available and visible for different internal market stakeholders. The wider the EU gets and the more dimensions and speed the development of markets and business models get, the stronger and clearer the existing framework must be, the system to function. If there are incoherence and open questions in the basis of the system, all the rules built on top of the previous ones are untenable. All unclear concepts have a chance to multiply the mess when connected to new contexts. Earlier, for example the question concerning the concept of 'market access' could be considered within the area of the free movement laws only: now when the digital markets are part of everyday life, the question does not concern any more whether the aim is to seek economic freedom or anti-protectionism in the traditional set up only – the term or concept will be most probably faced in a new digital market context as well. If the concept was not clear earlier, it most probably will not be it either when transformed to new context. Fixing the later provisions with additional guidelines and instructions does not help when the cake is already so big that the ones who should be able to follow the rules – gatekeepers and guardians – cannot follow them anymore. They must be able to trust the logic when pieces are missing. Their focus should be on the contents, their business, not on the framework, after all. Otherwise, the European market loses not only the clear framework and direction but also the businesses heading somewhere.

APPENDIX I

	FMI of **goods - Customs** (Art 28-32TFEU)	FMI of **goods - Quantitative restrictions** (Art 34-37 TFEU)	FMI of **goods - Taxes** (Art 110-113 TFEU)	FMI of **workers** (Art 45 TFEU)	FMI - **establishment** (Art 49-55 TFEU)	FMI of **services** (Art 56-62 TFEU)	FMI of **capital and payments** (Art 63-66 TFEU)	Competition - **Cartels** (Art 101 TFEU)	Competition - **abuse of dominant position** (Art 102 TFEU)
Gatekeepers in the scope	MS	MS & private?	MS	MS & Private	MS & Private	MS & Private	MS & Private?	Private & MS (undertakings)	Private & MS (undertakings)
The quality of the gatekeeper - how is the scope limited?	-	- ?	-	-	- ?	- ?	- ?	(actions which purpose is to hinder competition are always forbidden) - Every entity engaged in an economic activity, regardless of legal status and the way it is financed' in the scope - Participants' separate economic units - Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are in the scope of the given rules 'in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.* - de minimis threshold (turnover), block exemptions, sector specific rules (e.g. agriculture)	Dominant position within internal market or substantial part of it required (dominance determined by market power)
Quality of activities - how is the scope limited?	Required impact: possibly affects trade btw Member States All payments triggered based on the border crossing in scope (the scope is wide - all actions possibly hindering trade in the scope, the purpose does not matter) **-> requires all parties capable of setting additional 'fee' to products based on border crossing not to do this?**	Required impact: possibly affects trade btw Member States For imports: all actions capable of hindering trade between Member States are in scope, for exports only discriminatory actions in scope Mutual recognition requirement - for selling arrangements only discriminatory arrangements in the scope (the scope is wide - all actions possibly hindering trade in the scope, the purpose does not matter) **-> requires all parties capable of setting such measures to products that hinder trade btw Member States?**	Required impact: possibly affects trade btw Member States All payments triggered based on the border crossing in scope, after that all that are discriminatory (directly or indirectly) in scope (the scope is wide - all actions possibly hindering trade in the scope, the purpose does not matter)	Required impact: possibly affects movement btw Member States Actions related to employment in public service outscoped. (the scope is wide - actions affecting nationals of Member States or their family members are in scope, cases where worker pursues 'effective and genuine' employment activities that are not only 'purely marginal and ancillary' and that involve economic activity are in the scope)	Required impact: possibly affects movement btw Member States Actions connected to exercise of official authority outscoped. (the scope is wide - all actions restricting establishments between Member States by hindering the access to markets or making it less attractive, or by discriminating (directly or indirectly) in the scope)	Required impact: possibly affects trade btw Member States Actions connected to exercise of official authority outscoped. Mutual recognition requirement - scope? (the scope is wide - all actions restricting establishments between Member States by hindering the access to markets or making it less attractive, or by discriminating (directly or indirectly) in the scope)	Required impact: possibly affects movement btw Member States or btw these and 3rd countries Not applicable when Member States apply their national tax rules that distinguishes the taxpayers by place of residence or by place of investment or take 'measures to prevent infringements of national law and regulations Some additional exceptions to applicability regarding 3rd countries.	Required impact: possibly affects trade btw Member States - the benefits do not overweight the negative effects (fair share to consumers) - Economic activity requirement - The objective is to limit trade, or de minimis conditions fulfilled Application exceptions delivered in Art 101(3) and in block exemption regulations - *Parties that conclude collective agreements in the name of management and labour are not in scope	Required impact: possibly affects trade btw Member States - the benefits do not overweight the negative effects (fair share to consumers) Actions affecting negatively on consumers or weakening the competition in the scope. Effect must be probable but there is no need to show that it is of a serious or appreciable nature.
Justifications? - possibility to escape from the scope?	-	Public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; and the protection of industrial and commercial property. -> no arbitrary discrimination or a disguised restriction on trade between Member States	-	Public policy, public security or public health or other overriding public interest based objective justifications can be utilized. Means to pursue the objectively justified objective have to be proportionate and necessary.	Public policy, public security or public health or other overriding public interest based objective justifications can be utilized. Means to pursue the objectively justified objective have to be proportionate and necessary.	Public policy, public security or public health or other overriding public interest based objective justifications can be utilized. Means to pursue the objectively justified objective have to be proportionate and necessary.	Public policy, public security or other overriding public interest based objective justifications can be utilized. Means to pursue the objectively justified objective have to be proportionate and necessary. -> no 'arbitrary discrimination or a disguised restriction on the free movement of capital and payments'.	Justified if the conduct contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit -> measures to be proportionate and necessary. Competition not allowed to be eliminated in respect of a substantial part of the products in question	Justified if 'abusive' conduct produces efficiencies which outweigh the negative effect - 'objective necessity' defence (e.g. for safety reasons) - for pricing abuse: 'meeting competition defence' measures need to be proportionate, necessary, and suitable for achieving the justified objective. benefit consumers and competition in respect of a substantial part of the products concerned is not eliminated.