<http://www.diva-portal.org>

This is the published version of a paper published in *Europarättslig tidskrift*.

Citation for the original published paper (version of record):

Öberg, J. (2007)

Horizontal Direct Effect of Article 39 of the EC Treaty.

Europarättslig tidskrift, (4): 777-802

Access to the published version may require subscription.

N.B. When citing this work, cite the original published paper.

Permanent link to this version:

<http://urn.kb.se/resolve?urn=urn:nbn:se:oru:diva-38689>

HORIZONTAL DIRECT EFFECT OF ARTICLE 39 OF THE EC TREATY

Jacob Öberg*

1. INTRODUCTION

The concept of direct effect in the Community legal order has since the inception of the European Community played an arguably important role in maximising the integration of Community law into the national legal systems, the principle of *effete utile*.¹ It has indeed been accepted that most of the provisions of the EC Treaty can be invoked by individuals directly before the national courts of the Member States against the Member States. Nevertheless there have been doubts whether the same reasoning could be applied in the situation where private parties endeavoured to assert the rights that are derived directly from the provisions of the EC Treaty against other private parties, horizontal direct effect.² There have thus been proposals that unlike the rules on competition in the EC Treaty (which expressly are directed against private parties), the provisions in the Treaty concerning the four freedoms are primarily targeted

* Jacob Öberg (1982) is presently a student at the faculty of law at Stockholm University, notably specialised in European Law. He has studied International as well as European Law at Ghent University (2006-2007). He has been working on a voluntary basis for LAWLINE HB as a legal consultant (2006-2007). Since September 2006 he is also working on a part-time basis for CASELEX S.A.R.L, Luxemburg, a company, which is specialized in compiling national case law that is related to European Law from the highest courts of the Member States. He is currently working there as a legal correspondent for Sweden. His article is primarily based on his master thesis, "The doctrine of horizontal direct effect in EC law and the case of *Angonese*". He will graduate from Stockholm University in January 2008.

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

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

against the Member States.³ In accordance with this view the Court of Justice of the European Communities⁴ has held that the provisions concerning free movement of goods cannot have horizontal direct effect among private parties.⁵

In the year of 2000, the ECJ delivered a well-known judgement among European lawyers, *Angonese*, which indeed recognised horizontal direct effect of community law among private parties in the field of free movement of workers.⁶ The ECJ thus held that a job applicant could sue a private bank before the national court on the basis of the prohibition of discrimination in Article 39 of the EC Treaty.⁷ Commentators argue that this is a landmark judgment and that “Mr Angonese will now join the annals of community law pioneers,”⁸ Nevertheless as will be seen below if one takes a narrow view of the legal rationale of *Angonese* one could make an argument that the legal and practical importance of *Angonese* should not be overestimated.⁹

Although the practical importance and implications of this interpretation from ECJ of Article 39 still remains unknown one could assert that the recognition of horizontal direct effect arguably strengthen the integration and enforcement of EC law in the Member States which are one of the central aims that underlines the concept of direct effect.¹⁰ On the other hand it is also material to note down that the introduction of horizontal direct effect of Article 39 also could impose arguably unforeseen obligations on private employers. In particular because of this policy conflict it is an interesting topic to examine whereas it illustrates the ECJ’s role in striking a balance between the rights and the obligations that are derived from the EC Treaty and the criticism that could be launched against ECJ’s activities.

The essential purpose: – of this article is to provide for an examination and critical analysis of the concept of horizontal direct effect in the field of free movement of workers, in particular to analyse in what manner the ECJ legally justified the recognition of this concept in relation to Article 39. To be able to achieve this purpose I will examine several different areas relating to the concept of horizontal direct effect of Article 39. Hence, there are in this respect several questions that have to be answered in the context of this article. For example,

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

⁴ Hereinafter referred to as ECJ

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

⁶ See *Roman Angonese v Cassa di Risparmio di Bolzano SpA*. C-281/98, [2000] ECR I-04139. For an analysis of this case and a description of facts, see Section 3.4.

⁷ See R.Lane and N.Nic Shuibhne, CMLR 37 2000, p.1237,1243. The authors are in general critical to ECJ’s line of reasoning.

⁸ *Ibid.*, 1244–45 1247.

⁹ See Section 4.5.

¹⁰ See Craig, n. 1, (2003), 185 and Steiner n. 1, 112.

is it possible to more generally define the legal scope of this doctrine as a general legal principle in community law or is the rationale of *Angonese* restricted to the facts of the case? What could be the legal and practical implications of this case law? Which is the legal base for the recognition of this doctrine? And finally could the introduction of horizontal direct effect of Article 39 be justified in legal and political terms?

The outline of this article will be structured in the following way. Section 2 will deal with basic legal concepts in the community law, notably direct effect and horizontal direct effect of community law. Although these issues could arguably be considered as somewhat irrelevant and immaterial for the main topic of this article I consider that this background is necessary for the logical consistency and cognisance of the main topic of this article. Section 3 will thereafter outline the jurisprudence from ECJ with respect to the question of horizontal direct effect of the provisions of the EC Treaty concerning free movement of workers. This section will provide for a careful and critical analysis of the case law from ECJ that is concerned with the origin, the limits and the legal basis for the introduction of horizontal direct effect of Article 39. As the reader will notice I will criticise ECJ's jurisprudence on the basis of the methodology that arguably is used by the court itself in order to judge the activities of ECJ from its own methodological prerequisites.¹¹

In the final section I will provide for a broad analysis of the subject matter of this article and I will deal with the legal and policy considerations that arguably induced ECJ to give horizontal direct effect to Article 39 in the *Angonese* case. I will also discuss the practical implications of the *Angonese* case, notably for the future development in this area of law. The main reason for taking a broad view, arguably a political perspective on the rationale of *Angonese*, is that I do not believe that one can entirely grasp the reasoning of ECJ without considering the case from a broader perspective. Although the reader of this article might be more interested of the legal examination of the concept of horizontal direct effect I consider that it is necessary to set out the broader perspective since this perspective will provide impetus for a more general discussion whether ECJ has taken the right legal path in its jurisprudence concerning horizontal direct effect.

¹¹ See Kutscher, Hans. *Methods of interpretation as seen by a judge at the Court of Justice, in Judiciell and Academic Conference 27–28 September 1976, Luxemburg*, 36.

SECTION 2 – THE CONCEPT OF HORIZONTAL DIRECT EFFECT

2.1 Direct effect of community law- theory and The European Court of Justice's jurisprudence

As a preliminary point it is clear that the legal concept of direct effect is one of the most discussed and arguably most important legal doctrines that has been created by ECJ.¹² However it is material to first ask the question why this concept is important for individuals and what are the reasons for giving direct effect to community law?

The underlying reasons for the development of this concept were arguably practical. Member States had to comply with their obligations according to the loyalty principle.¹³ This in its turn entailed that the national courts were obliged according to the principle of supremacy to give precedence to community law in a conflict with national law and apply the community law directly in a legal dispute. The realization of the fundamental aims of the Treaty would otherwise be seriously hindered unless individuals could invoke the provisions of the Treaty before the national courts.

It is also argued that the underlying reason for introducing direct effect in the community sphere was that the uniform application of community law in the Member States would be jeopardized if Treaty provisions were denied direct effect before the national courts.¹⁴ The rationale of this argument is that the policy goals of the EC would be rendered virtually meaningless if community law would have different legal effects depending on which Member State it was applied.

It must be admitted that there still today exists doubts and disagreements among commentators about the legal scope of this concept.¹⁵ Nevertheless I will provide for a narrow definition of this concept, which implies that direct effect is "*the capacity of a provision of EC law to confer rights on individuals which they may enforce before national courts*".¹⁶ In this respect it is material to recall that there were some essential questions in the beginning of the community relating to which legal effect community law should have in the national legal orders. These questions had to be answered in an authoritative manner by ECJ

¹² See Prinssen, J.M, Schrauwen.A, Direct Effect-Rethinking a Classic of EC Legal Doctrine, hereinafter Prinssen. See also Steiner, n. 1, 112 and Craig, n. 1, (2003), 182, 184.

¹³ See Article 10 of the EC Treaty.

¹⁴ See Craig, n.1, (2003), 185.

¹⁵ Ibid., 179–182 and S.Prechal, "Does Direct Effect Still Matter"? (2000) 37 CMLRev.1047. See also Prinssen, n. 12, 3.

¹⁶ See Craig, n. 1, (2003), 180.

since the EC Treaty itself did arguably not provide for answers to these questions.

The core issue in the earlier days of the community was hence which legal effect the community law had or ought to have in the national legal orders of the Member States? The question was in particular whether individuals could invoke the EC Treaty and its provisions directly before the national courts of the Member States? Or could on the contrary the Treaty provisions only be invoked before the national courts following the transposition and incorporation of the community law into the national legal orders of the Member States?¹⁷ Is the national judge under an obligation to protect individual rights under community law in a legal dispute against the Member State?

The ECJ answered these questions in a clear manner in the landmark judgment of *Van Gend en Loos* and held that community law had direct effect and that individuals could rely upon the rights that originated from the EC Treaty directly before the national courts. The ECJ considered that if a provision of the Treaty contained a clear and unconditional obligation that was not qualified by any reservation on the part of the Member State this obligation was enforceable by individuals against the Member State. In this regard it did not matter that the Member State was the subject of the obligation. Since Article 25 of the EC Treaty fulfilled these conditions it was ideally adapted to produce legal effects between the Member States and individuals and had therefore direct effect in accordance with the definition that was proposed earlier.¹⁸

This judgement gives at first sight clearly the answer to the question put forward in the beginning in so far as it pronounces that individuals can invoke a Treaty provisions even in the case where the Member State has not implemented the obligations arising from community law in their national legal order.¹⁹ In order to ensure the effectiveness of community law the provisions of the EC Treaty must be given direct effect. Otherwise the essential aim of the community, the creation of an internal market would be seriously hindered and jeopardized. Moreover the ECJ does not consider that the wording of the treaty itself is a hinder for giving direct effect to the provisions of the EC Treaty.²⁰ Finally ECJ also stress the need for a uniform application of community law all over the community even where the Member States have failed to implement community legislation.

¹⁷ See Craig, n1, (2003), 179. The author describes the problem that is concerned with the dualistic approach to the legal effects of international treaties that certain states uphold.

¹⁸ See C-26/62, n. 1, paras. 12–13.

¹⁹ I will not deal here with the conditions for direct effect, which implies that the provisions must be “*clear, negative and unconditional, containing no reservation on the part of the Member State and not dependent on any national implementing measure*”. See Craig, n. 1, (2003), p185.

²⁰ See Craig, n. 1, (2003), 96–102, 184. It would take us too far to analyse the methodology of ECJ. Nevertheless it is argued that ECJ employed the teleological approach in the landmark judgment of *Van Gend en Loos*.

2.2 Horizontal direct effect or vertical direct effect- An essential distinction in legal theory and the case law of the European Court of Justice

In order to systematize and comprehend the jurisprudence of the ECJ commentators and scholars have developed legal concepts with the intention to describe which subjects that are the targets of community law.²¹ After one has reached the conclusion that a provision has direct effect the next question is hence if this provision could be invoked before the national courts merely against the Member States, vertical direct effect or if it also is applicable to private parties, horizontal direct effect. This distinction has arguably been helpful to explain the different legal approaches that ECJ have departed on with respect to the legal effects of community law. The basic problem with this distinction is that, apart from some provisions of the EC Treaty relating to *inter alia* the competition rules,²² the Treaty itself is arguably silent on the question whether it's provisions only applies to the Member States, private parties or both categories?

In an attempt to define these concepts one could argue that commentators have traditionally been speaking of vertical direct effect when the measure or the rule in question originates from the Member State or a public body. This implies accordingly that in a legal dispute the individual will sue the state or the public body for not complying with its obligation under EC law. The failure to fulfil the obligation normally consists of the fact that a public body may apply a national law contrary to community law on the reason that the Member State has failed to implement community legislation.²³ Thereto the failure may consist of the fact that a national court or public body applies a national law, which is contrary to the EC Treaty, a directive or a directly applicable regulation. The concept of vertical direct effect consequently suggests that the individual is entitled to and will invoke community law against the Member State or a public body.

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

In a strict sense I will define the concept of horizontal direct effect as the situation where a private party invokes community law against rules or measures of a private party that arguably are in breach of community law with the qual-

²¹ See Craig, n. 1, (2003), 202,207–208.

²² See Article 81 and 82 of the EC Treaty.

²³ Which it is required to do according to Article 10 of the EC Treaty.

ification that these rules or measures do not regulate the exercise and access of free movement in a collective manner.²⁴ I will use the concept of semi-horizontal effect where the contested rules or measures stems from an individual or an organization but with the modification that the rules regulate access and exercise of a free movement in a collective manner. Although these definitions are not entirely clear it is helpful and illustrating to consider these definitions when analysing the jurisprudence of ECJ below.

As implied above the distinction between vertical and horizontal direct effect is crucial for the topic of this article and for understanding the nature and legal effects of community law.²⁵ The primary reason for this is that ECJ has given different interpretations of the concept direct effect depending not only of the type of community legislation at stake but also depending on the nature of the provision itself. The most central example concerns the question whether a community law directive has vertical direct effect or horizontal direct effect? The answer on the question is affirmative if the private party invoke the directive against a public body but negative if the individual invoke the directive against a private party.²⁶

The ECJ thus denied in a decisive manner the horizontal direct effect of directives in *Marshall* and *Faccini Dori*. The Court considered that Article 249 of the EC Treaty was only addressed to the Member States and thus that the community was unable to impose obligations on individuals. ECJ's main argument in *Marshall* was in a pure sense textual since it put emphasis on the wording of the EC Treaty. The last point is important to remember for the following analysis concerning ECJ's textual faithfulness in other cases.²⁷ In *Faccini Dori* ECJ added to the reasoning of *Marshall* that the community did not have an express competence to impose obligations on individuals by the means of directive and therefore the horizontal direct effect of directives was dismissed.

The concealed reasoning that arguably could explain ECJ's conclusions in *Faccini Dori* and *Marshall* is not easy to extract but in my opinion the argument is based on the rule of law and legal certainty.²⁸ It is thus recognized that an individual may be affected by legal obligation and burdens deriving from a directive despite that he is acting in accordance with national law. This will

²⁴ See Prechal, S. In Prinssen, n. 11, 26. The author is on the other hand using the concept "*genuine horizontal direct effect*".

²⁵ See Steiner, n. 1, 97.

²⁶ See C-41/74, *Van Duyn v Home Office*, [1974] ECR 1337, C-152/84 *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)*, [1986] ECR 723 and Case 91/92, *Faccini Dori v Recreb Srl* [1994] ECR I-3325, [1995] CLMR 665.

²⁷ See the analysis in Section 3. It is also argued among commentators that ECJ's method of interpretation is more concerned with the purpose, spirit and the spirit of the Treaty in conjunction with the contextual interpretation. See Craig, n.1, (2003), 96–102 and Steiner, n. 1, 36–37.

²⁸ See the defense for the denial of horizontal direct effect of directives put forward by Edward, D, in Prinssen, n. 11, 10–11.

thence lead to severe difficulties for individuals when they have to deal with two different legal systems, which are contrary to each other. The counter argument here is that the primacy of community law also imposes a burden on individuals as well as Member States to comply with community law in the case of a conflict with national law.²⁹ The practical effectiveness of community law and the supremacy doctrine would accordingly be endangered if directives were not given horizontal direct effect.

The most convincing argument to not give direct effect to directives is nevertheless that the burden of a directive is not foreseeable for individuals assuming that the directive has been published and the period of transposition has expired.³⁰ For reasons of legal certainty it is also clear that individuals would be confused by the fact that contrary to the express wording of the provisions of the Treaty, they would impose burdens on them on the basis of obligations that seemingly are addressed to the Member States. In this respect it is material to put forward the question whether the same considerations apply in the situation where individuals are acting in accordance with national law but contrary to provisions of the EC Treaty that primarily are directed against the Member States?

Since I have now described the principal arguments and theory behind the legal justification to not give horizontal direct effect to directives it is now time to face the question of horizontal applicability of the treaty freedom relating to free movement of workers beginning with the Walrave case.³¹

SECTION 3 – APPLICATION OF ARTICLE 39 OF THE EC TREATY TO PRIVATE PARTIES

3.1 Introduction:

My general theory with regard to the introduction of horizontal direct effect by ECJ in *Angonese* is that ECJ has had a consistent approach to the application of Article 39 to private parties. Thus the legal result of the *Angonese* case was in a rational sense no surprise. There existed thus a firm legal base for the rationale of *Angonese*.

This account of the jurisprudence of the ECJ will follow a historical path and carefully analyse the jurisprudence of the Court beginning with the Walrave case.³² I will nevertheless not restrict myself only to cases, which are related to

²⁹ See Case 6/64, *Costa (Flaminio) v Ente Nazionale per l'Energia Elettrica*, [1964] ECR 585, [1964] CMLR 425.

³⁰ See *Steiner*, n.1, 97.

³¹ See C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale*, [1974] ECR 1405.

³² See C-36/74, n. 19.

free movement of workers since an examination of these cases will not be sufficient for the legal analysis. Moreover as will be seen below ECJ did not consistently base its judgement in *Angonese* concerning the horizontal direct effect of Article 39 to jurisprudence concerning free movement of workers.³³ This could imply that the ECJ did not find it legally sufficient to base its judgement in *Angonese* on the reasoning of *Walrave* and *Bosman*.³⁴ This account will also despite the historical outline attempt to pursue a systematic account of the legal characteristics in the concept of horizontal direct effect.

Some remarks should be done in order to explain my selection of cases. As a first point I selected these cases since they illustrate the development and the elaboration of the legal framework of horizontal direct effect in relation to free movement of workers, which finally was affirmed in *Angonese*. Another reason to choose this jurisprudence is that ECJ clearly employed this case law as support its reasoning and conclusions in *Angonese*.³⁵ Thus ECJ used this jurisprudence as the legal base for the decision in *Angonese*.

Nevertheless one could question why I did restrict my material to this jurisprudence and chose to not include a legal analysis of the case law of *Bosman* and *Dona* since this jurisprudence also relates to horizontal or semi-horizontal application of Article 39.³⁶ My reason is simple. I consider that the jurisprudence of *Bosman* and *Dona* hardly provided for any clarification or refinement of the legal scope of the judgement in *Defrenne* and *Walrave* whereas *Bosman* and *Dona* merely recalled and reiterated the paragraphs and quotations from *Walrave* and *Defrenne*. Hence *Dona* and *Bosman* did not in my point of view alter or modify the legal framework of horizontal direct effect with respect to free movement of workers.

3.2 Semi-horizontal direct effect of Treaty Provisions -The *Walrave* case³⁷

The background of the litigation of *Walrave* was the following. Union Cycliste Internationale (UCI) was a non-governmental association governed by private law. It laid down general rules, which governed the cycling profession. The disputed rules had been enacted with respect to the medium distance World Cycling Championship behind motorbikes. The rules of UCI set out that the pacemaker and the stayer must be of the same nationality. Since *Walrave* and *Koch*, two dutch cyclists, normally both performed the task of pacemakers in

³³ See C-281/98, n. 6, para 34.

³⁴ See C-415/93, *Union Royale Belge des Sociétés de Football Association v Bosman*, [1995] ECR I-492, [1996] 1 CMLR 645.

³⁵ See C-281/98, n. 6, paras. 31–34.

³⁶ See C-13-76, *Gaetano Donà v Mario Mantero*, [1976] ECR 1333.

³⁷ See C-36/74, n. 19.

other races this rule in fact implied that one of them had to refrain from taking part in the race.³⁸ Thus there existed according to them an obstacle to the free movement of workers and free movement of services. The national court referred *inter alia* to ECJ the question whether the rules of UCI were caught by Article 39 and 49 of the EC Treaty?

ECJ held that Article 12, 39 and Article 49 was applicable to rules that in a collective manner regulated working conditions and the provision of services.³⁹ ECJ considered that if this was not the case the fundamental aims of the Treaty with respect to the free movement of workers and freedom to provide services would be seriously hindered.⁴⁰ There to ECJ stressed that equality in the conditions for competition required that the application of the provisions of the Treaty could not be dependent upon whether the rules were of private or public origin.⁴¹ ECJ considered consequently that Article 12, 39 and 49 of the EC Treaty was applicable to the rules of UCI.⁴²

In order to understand this judgement a brief analysis is required. First I want to argue that according to ECJ this organisation, the UCI, is in fact functioning as a substitution for a state body since it in a comprehensive and collective manner regulates working conditions, semi-horizontal direct effect.⁴³ This kind of organisation has thus a regulatory power over its members that correspond to a public authority.⁴⁴ This reasoning does nevertheless not clarify whether the same rationale could be used when the rules in question does not in a collective manner regulates working conditions, horizontal direct effect. It is doubtful therefore if the reasoning of Walrave applies to individual employers.

Secondly it is material to consider the approach taken by ECJ with regard to the question which significance that can be attributed to the exact wording of the Treaty provisions when deciding upon the legal effects of the four freedoms.⁴⁵ With respect to which subject that is caught by Article 39 one could easily infer that this provision does not mention particularly acts enacted by Member States but is silent on which subject this provision is applicable to. There exists thus hardly a direct textual support in the explicit wording of Article 39 that speaks against an application of this provision to private parties. On the other hand the wording of Article 39 does neither in an expressed manner prescribe that Article 39 does in fact apply to private parties. The conclusion is that it is a painstaking task to decide only on the basis of the

³⁸ Ibid., paras. 1–3.

³⁹ Ibid., para. 18.

⁴⁰ Ibid, para. 19.

⁴¹ Ibid., para. 19.

⁴² Ibid., para. 25.

⁴³ See also C-13/76, Gaetano Dona v Mario Mantero, [1976] ECR 1333, paras. 17–18.

⁴⁴ See C-415/93, n. 34, para. 83.

⁴⁵ The Four freedoms are Free movement of goods, person, services and capital. See Steiner, n. 1, 309.

wording of Article 39 whether this provisions has or has not horizontal direct effect.

In order to proceed in the analysis it is required to make some conclusions on the legal scope of this judgement. The first conclusion from the Walrave case is that it clearly reveal that ECJ consider that the wording of Article 39 does not prevent the provisions to be applied to associations which are governed by private law. Moreover, with the aim of enforcing the legal integration of EC law and notably Article 12, 39 and 49 of the Treaty in the national legal orders of the Member States the ECJ holds that rules of private organisation have to fall within the scope of these provisions.⁴⁶ Finally ECJ consider that community law must be applied in an equal manner and thus the fundamental free movement of workers cannot be dependent upon whether working conditions are regulated by law or by private agreements.⁴⁷ These conclusions are all important to keep in mind for the following analysis of the jurisprudence of ECJ. After concluding that rules from private organisations and associations are caught by Article 39 and 49 it is now time to consider whether other Treaty articles that are formally addressed to Member States nevertheless could be applied in private litigation. The most important judgement concerning this question is the Defrenne II case which I now turn to examine.⁴⁸

3.3 The Defrenne II case- Could provisions of the EC Treaty have horizontal direct effect?

The background to the legal dispute in Defrenne II was that Defrenne, an air hostess claimed compensation from her employer, Sabena SA, on the ground that she had been treated in a discriminatory manner in comparison to her male colleagues. According to Defrenne the discriminatory treatment consisted in that the male cabin stewards had received higher salary for allegedly the same work performed by her as an air hostess and thus that her employer had acted contrary to Article 141 of the EC Treaty. It is for our purposes merely relevant to examine whether ECJ would recognise horizontal direct effect of Article 141.

The ECJ held that Article 141 could have direct effect and went on to pronounce that this provision also was applicable in horizontal relations. ECJ considered that even though Article 141 was formally addressed to the Member

⁴⁶ It is argued that the underlying reason from ECJ to give this semi-horizontal effect to Article 39 and 49 lies in the fact that "much employment and provision of services takes place in the service sector. If these provisions would not be applied to private parties they would be deprived most of their practical meaning." See M.Quinn and N.McGowan, "Could Article 30 impose obligations on Individuals?" (1987) 12 *Elrev*.163, p.165.

⁴⁷ See C-36/74, n. 19, para. 19 and C-415/93, n. 34, para. 84.

⁴⁸ See C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, [1976] ECR 455.

States this did not hinder the conferment of rights on individuals. In this regard it was of no significance whether an application of Article 141 would modify existing agreements that had been concluded privately. Since moreover Article 141 was a mandatory provision ECJ considered that it had to be extended to private employers and private employment contracts ECJ accordingly held that Defrenne could invoke Article 141 against her employer, Sabena SA.⁴⁹

The first remark that is necessary to make is that paragraph 31 in the Defrenne judgement was evidently introducing direct effect of Article 141 despite that this provision only expressly mentioned the Member States and was thus formally addressed to the Member States.⁵⁰ On the basis of the arguments mentioned above for giving direct effect to community law, notably the principle of *effet utile* of community law and uniform application of community law, it is nevertheless not a surprise that ECJ gave direct effect to Article 141 of the EC Treaty. It could be argued that the practical effectiveness and legal integration of community law requires that individuals can take action and enforce their rights under community law before the national courts even though the relevant obligation under community law is expressly directed against the Member State.

It is in this regard however significant to stress that the reasoning given in paragraph 31 was principally in my point of view applied to justify the direct effect of this provision and thus not aimed to justify the horizontal direct effect of this provision.⁵¹ On the other hand it is nevertheless material to remember for purposes of the following analysis that the argument in paragraph 31 in Defrenne was one of the arguments that ECJ availed itself in *Angonese* to justify horizontal direct effect.⁵² The second point is that one could on the basis of the reasoning in para. 38 in Defrenne argue that ECJ will not be hindered by private law regulations of the Member States in pursuing the policy of giving practical effect to community law. Thus ECJ is arguably hinting that private contracts and rules can be subject for a legal scrutiny by the Court if they allegedly are contrary to community law.

My next remark is that that even though ECJ might have come to the right conclusion in Defrenne it is nevertheless surprising that a “jump” from a semi-horizontal direct effect in *Walrave and Dona* to a horizontal direct effect of the provisions of the EC Treaty take place with remarkably meagre legal argu-

⁴⁹ Ibid., paras. 31, 38–40.

⁵⁰ See Article 141(1): “*Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied*”. See for the different approach by ECJ to the wording of the treaty with respect to directives in C-152/84 and C-91/92, n. 26.

⁵¹ See C-43/75, n. 48, paras. 31–37. It is clear that ECJ first had to deal with the question whether Article 141 at all could have direct effect before it turned to the question of horizontal direct effect.

⁵² See C-281/98, n. 6, para. 34.

ments. This is even more so since Article 141, as mentioned above, is targeted against the Member State. It is indeed possible to argue that the Cycling association in Walrave was assuming the same role as the state in their task of regulating working conditions. This is nevertheless not the case in Defrenne. Thus one has to draw a distinction between the situation in Walrave and Defrenne since the judgement in the former case arguably legally justified the private application of Article 39 on the assumption that the Cycling association had similar functions and characteristics as a public body. In Defrenne on the other hand the employer did not assume the functions and responsibilities of a public body and did neither regulate working conditions in a collective manner. Consequently it is not legally convincing to draw an analogy between these cases in order to justify the legal outcome in Defrenne. Thus there exists considerable doubts and uncertainties on how and on what legal basis ECJ came to the conclusion that Article 141 also applied to private parties.⁵³

As to the legal scope of the judgement it is now clear that Treaty provisions, notably Article 141, can under certain circumstances be invoked before national courts by individuals against other individuals. Thus Article 141 has horizontal direct effect in accordance with the definition proposed earlier. Whether horizontal application of the Treaty provisions extends beyond Article 141 remains however still unclear. Now it is nevertheless time to turn to the most essential judgement delivered by ECJ in relation to the main topic of this article and the horizontal application of Article 39, notably the Angonese case.

3.4 The Angonese Case- Application of Article 39 of the EC Treaty to private parties

The context of the litigation in Angonese was that during 1997, the applicant, Roman Angonese responded to a notice in the local Italian newspaper in which he notified his intent to apply for a job at Cassa di Risparmio, a private bank in Bolzano. The problem in this case was that in order to participate in the competition for the post at Cassa di Risparmio all applicants had to provide a certain certificate, the B-certificate (which was the exclusive way that the applicants could prove that they were bilingual in German and Italian). Since Angonese could not provide for this certificate the Cassa di Risparmio sent him a letter where it informed him that he was not permitted to take part in the competition for the employment in the bank.⁵⁴ Subsequently Angonese brought an action before the national Italian Court and argued that Cassa di

⁵³ See however TRABUCCHI AG in C-43/75, n. 48, which consider that the prohibition of discrimination although addressed primarily to the Member States is concerned with the relation between individuals.

⁵⁴ See C-281/98, n. 6, paras. 5–7,9.

Risparmio had acted contrary to Article 39 of the EC Treaty. The ECJ was asked several questions but for our purposes the only material question is whether Article 39 could be invoked by Angonese against Cassa di Risparmio.

The ECJ declared in a decisive manner that Article 39 had horizontal direct effect. ECJ first referred to the relevant paragraphs of *Walrave and Bosman* and held that the prohibition of discrimination applied to rules that regulated working conditions in a collective manner, semi-horizontal application. Thereupon ECJ reiterated the conclusions in *Defrenne II* and underlined that provisions of the Treaty that like Article 141 were of a mandatory nature could have horizontal direct effect independently whether they were formally directed against the Member States. ECJ considered that the same considerations applied to Article 39 since this provision was a specific application of the essential prohibition of discrimination in Article 12 of the Treaty and was thus like Article 141 aimed at ensuring that there was no discrimination on the labour market. ECJ accordingly concluded that Article 39 had horizontal direct effect and that therefore Angonese could invoke this provision against Cassa di Risparmio.⁵⁵

The first remark that is material with respect to the legal analysis of Angonese is that ECJ applies the argument from paragraph 31 in *Defrenne II* here in the line of thinking that lead to the conclusion that Article 39 has horizontal direct effect. Nevertheless as I previously concluded the reasoning in paragraph 31 in *Defrenne* was essentially employed by ECJ to explain why Article 141 of the EC Treaty had direct effect. ECJ had thus primarily the intention in *Defrenne* to declare that Article 141 had vertical direct effect despite that the wording in itself of this article did not support that individuals could be granted rights on the basis of this provision. It is hence hardly controversial to accept that Article 141 could be invoked against the Member State since this provision is as such capable of having direct effect.⁵⁶ According to ECJ it is consequently clear that Article 141 pass the legal test for direct effect in *Van Gend en Loos*. It is however, which I implied above, another thing to accept that the same reasoning should be applied in horizontal relations. It is accordingly problematic to accept that Treaty provisions applies to private parties since neither Article 141 or Article 39 expressly provides that private rules or measures are caught by these provisions.

The same textual argument that was put forward to criticise the legal reasoning of ECJ in *Defrenne* is relevant with respect to the Angonese case. The argument is simple and straightforward. The rationale is that Article 40–42 of the EC Treaty concerning free movement of workers could be interpreted in the manner that it is the Member States that are responsible to ensure that the aim

⁵⁵ Ibid., paras. 31–36.

⁵⁶ Even though the direct effect of Article 141 was disputed by the Member States. See Craig., (2003), n. 1, 188 and C-43/75, n. 48, where the ECJ is denying the relevance of the arguments put forward by the Member States in paras. 28–36.

of free movement of workers is accomplished by the process of enacting regulations and directives. It is consequently not unreasonable to envisage that Article 39 in the same manner as Article 141 is primarily targeted against the Member States. It is difficult to conceive from the structure and the wording of these provisions that they were intended to put obligations on private parties.

Thereto the scheme and the construction of Article 39–43 supports the conclusion that these provisions are primarily targeted against the Member States. Thus from my point of view one could assert that because of the wording and the structure of Article 39–43 there exists a textual disincentive against giving horizontal direct effect to Article 39. Against this textual argument one could contend that one has to examine the whole structure of the Treaty, the preamble and the policy goals in Article 3 of the Treaty to answer the question of horizontal direct effect of the Treaty provisions.⁵⁷ Accordingly it is at this point sufficient to conclude that it is desirable if there exists other legal arguments beyond the textual argument in order to justify an application of Article 39 to private parties.

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

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

But do this argument really bear scrutiny after a strict legal examination? The answer according to my opinion is negative. In contrast it is more reasonable to

⁵⁷ See note 26 and see inter alia for some examples of this methodology of interpretation: C-3, 4 and 6/76, *Kramer*, [1976] ECR 1279, para. 19 and C-22/70, *Commission v. Council*, [1971] ECR 263, and several cases in competition law: para. 15, and C-68/94 and 30/95, *France v. Commission*, [1998] ECR I-1375, paras. 166–172 and C-6/72, *Euroemballage Corporation and Continental Can Co. Inc. v. Commission*, [1973] ECR 215, para. 22–27 and C-27/76, *United Brands Company and United Brands Continental BV v. Commission*, [1978] ECR 207, para. 183 and C-6 and 7/73, *Istituto Chemicoterapio Italiano SpA and Commercial Solvents v. Commission*, [1974] ECR 223, para. 25 and C-249/81, *Commission V Ireland*, [1982] ECR 4005, para. 28 and C-53/81, *Levin v. Staatssecretaris van Justitie*, [1982] ECR 1035, para. 15.

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

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

Nonetheless it must be acknowledged that the application of Article 39 to private parties is consistent with the jurisprudence of Defrenne. The reason for this is that Angonese as well as Defrenne concerned a situation where a private person had a claim against an undertaking. It is in this regard immaterial that Defrenne was concerned with an employee and Angonese with a job applicant. Since ECJ in Defrenne clearly had pronounced horizontal direct effect in an essentially similar situation as Angonese it is in this respect not surprising that ECJ recognised horizontal direct effect of Article 39. There existed thus a firm legal basis for making an analogy between Angonese and Defrenne since both cases involved similar factual situations.⁵⁸

Furthermore it is clear that Article 39 as well as Article 141 concerned the prohibition against discrimination which is outlined in these provisions as well in a general manner in Article 12. This is important to emphasise since the decisive reason for ECJ to give direct effect to Article 39 and 141 in Defrenne and Angoneses is arguably that the prohibition of discrimination in these provisions is apparently of essential significance in the community legal order and that it therefore is mandatory in nature.⁵⁹ The notion of “mandatory in nature” is thus

⁵⁸ See AG Fennelly in C-281/98, n. 6, para. 40. Nevertheless it must be noted that he does not really delve into the question whether Article 39 should have horizontal direct effect.

⁵⁹ See note 27.

decisive for the outcome of this case. Nevertheless one has to ask what ECJ actually means with "mandatory in nature"? And which provisions of the Treaty are mandatory in nature? Is the legal meaning of a mandatory provision that it applies to all legal subjects independently whether it is a state or an individual?

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

As a general conclusion one could also emphasise that the reasoning in *Angonese* is an example of the teleological approach from ECJ.⁶⁰ Although it is clear that this line of reasoning will further the aims and objectives of the EC Treaty it is still doubtful if this argument is sufficient to put obligations on individuals? Could for example the jurisprudence in *Angonese* and *Defrenne* be criticized from a perspective of legal certainty and foreseeability?⁶¹

In sum the textual argument for giving horizontal direct effect is not entirely convincing. It is accordingly not controversial to argue that the text and the wording of the Article 39 does not answer the question whether this provisions should have horizontal direct effect. There is nevertheless several policy arguments that could be advanced in favour of the rationale in *Angonese* to give horizontal direct effect to Article 39. The general policy considerations that ECJ put forward in *Angonese* with respect to *effet utile* and uniform application of community law is thus feasible to defend.⁶² The legal integration of community law would be put in danger if the national courts could deny horizontal direct effect of community law. Moreover it is in accordance with the principle of *effet utile* that the Treaty provisions take precedence over conflicting national law and also applies in horizontal relations. It could thereto be argued that it is desirable to reinforce the notion that community law is a part of the national law and that community law's superiority in the hierarchy of legal norms put courts under an obligation to apply community law in private law relations. Otherwise, put in a more psychological sense, individuals would never recognise or accept community law and therefore not assume the rights and obligations which could be inferred from the EC Treaty.

⁶⁰ See note 27.

⁶¹ See the discussion in Section 4.1–3.

⁶² This arguments was put forward by ECJ already in the landmark judgement C-6/64, n. 26.

My argument, which will be discussed further down, is that the question whether horizontal direct effect should be given to a Treaty provision, depends on the interpretation one gives to the aims and objectives of the EC Treaty. It must be emphasized that this question is not only a question that is concerned with a strict legal analysis but also a question on which policy considerations that are most convincing in the analysis whether the provisions of the EC Treaty should apply in horizontal relations. Nevertheless it is now time for the final analysis of the main topic of this article and thus an examination of why and how ECJ justified horizontal direct effect of Article 39 of the EC Treaty.

SECTION 4 – LEGAL CONCLUSIONS AND DISCUSSION WITH RESPECT TO THE ANGONESE CASE AND THE CONCEPT OF HORIZONTAL DIRECT EFFECT

4.1 Which are the essential arguments that supports the conclusion in the Angonese case and which are the underlying legal and policy considerations behind these arguments?

If we turn back to the beginning of this article and consider the policy aims behind the introduction of the doctrine on direct effect one could draw some conclusions. Recalling that the doctrine of direct effect was introduced to ensure the practical effectiveness of community law one has to consider the implications of this argument. Assuming that the contracting parties to the EC Treaty, the Member States, voluntarily subjected themselves to a special legal order which granted supranational powers to certain institutions established by this treaty the Member States are allegedly obliged to accept and assume the legal and political consequences of this decision.⁶³ This implies *inter alia* that the Member States have decided to abandon a part of their legislative sovereignty in favour of the community.⁶⁴ One of the most important political consequences of this transfer of sovereignty is that the legislation and policy that are enacted by this community have to be given practical effectiveness in the Member States of the Community, the principle of *effet utile*.⁶⁵ The political aims

⁶³ See C-6/64, n. 26 and C-26/62, n. 1.

⁶⁴ This assumption of supremacy is not undisputed: J. Weiler *The Community System: The Dual Character of Supranationalism* (1981) I YBEL 267, 275–76 and B. De Witte, “Community Law and National Constitutional Values” (1991) 2 LIEI 1, 4 and also “Direct Effect, Supremacy and the Nature of the Legal Order”, in P. Craig and G. De Burca (eds.), *The Evolution of EU law* (Oxford University Press, 1999).

⁶⁵ See C-41/74, n. 26, para. 12 and C-11/70, *Internationale Handelsgesellschaft MbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125, [1972], CMLR 255, para. 3.

and objectives of the Treaty would accordingly be seriously hindered and meaningless if their effectiveness was not ensured in a proper manner.⁶⁶

But this line of thinking does not stop here. One could contend that it is not sufficient to give practical effectiveness of the Community legislation but one has to give community law full effectiveness.⁶⁷ This policy of *effet utile* derived from *Costa* entails logically two significant implications, which are deduced from the principle of supremacy. The first is that in the situation where the Member States in a certain field have transferred their sovereignty they are no longer entitled to create policy that is inconsistent with the policy of the Community. Moreover the Member States have to avoid to apply legislation that is not in conformity with the legislation enacted by the Community. If these considerations were not taken into account by the Member States they could easily render the rules enacted by the Community meaningless in practice simply by enacting a new law which according to the principle of *lex posterior* took precedence over a law decided by the Community.

The second consequence of *effet utile* is arguably that it is not sufficient to ensure that policy decided by the community is superior and takes precedence in all conflicts with national law. In order to guarantee the full effectiveness of community law it is thus required to ensure that community legislation is applied by the national courts of all the Member States, the principle of direct effect. This logic demand that individuals can enforce their rights derived from community law in any Member States of the Community. Moreover this principle obviously require that national courts of the Member States admit the action from the private party and indeed apply community law in the situation where community law has to be applied.⁶⁸ National courts are hence under an obligation according to the principle of *effet utile* to protect individual rights that are derived from community law where community law is applicable to the facts of the case and give precedence to community law if it is contrary to the national law of the Member State concerned.

But is this really enough to ensure that policy enacted by the community has full impact in the Member States? One could argue that it is not. If community law thus should have full effectiveness in the Member States national courts cannot dismiss it's application merely on the reason that community law is invoked by a private party against another private party. Courts of the Member States are consequently obliged to ensure that community law could be invoked by a private party against another private party, the principle of horizontal

⁶⁶ See Steiner, n. 1, 73.

⁶⁷ See C-6 and 9/90, *Francovich v Italy*, [1991] ECR I-5357, [1993] 2 CMLR 66, [1992] IRLR 84 and C-46/93, and C-48/93 *Brasserie du Pecheur SA v. Germany*, and *R. v. Secreratary of State for Transport, ex parte Factortame Ltd. And others*, [1996] ECR I-1029, para. 20 and Kutscher, n. 11, 41.

⁶⁸ C-26/62, n. 1, paras. 12–13.

direct effect. If this was not the case the full efficiency of community law would be put at danger.⁶⁹

In the light of these foregoing policy considerations the outcome of *Angonese* could be justified since the horizontal direct effect of Article 39 is just the logical implication of a policy decision taken earlier by ECJ in its previous jurisprudence, notably to give full effectiveness to community law.⁷⁰ This implies that the fundamental freedom concerning free movement of workers has to be protected to the utmost possible extent. In my point of view the argument of *effet utile* is the most significant and convincing policy argument put forward by ECJ when it decided to give horizontal direct effect to Article 39.

Another strong policy consideration concerns the uniform application of community law. It would of course be problematic and disturbing if individuals had different rights dependent on whether they were exercising their rights against a state body or a private individual. There could as Prechal has pointed out arise difficult situations where by example an employee are employed by a private company and a public company.⁷¹ It would in this case be upsetting if community law was not applied in a uniform manner since no obvious reason could explain a disuniform treatment of the employee. This distinction with respect to the direct effect of the Treaty provisions could hence lead to discrimination and inequality in the conditions for competition. It is in this respect clear that the EC Treaty has the manifest objective of creating an internal market without any obstacles. This objective could nevertheless only be obtained if obstacles that originates from private parties are also caught by Article 39 of the EC Treaty.⁷² In order to ensure the uniform application of Article 39 this provision has consequently to be applied independently whether the hindrance to the free movement of workers could be derived from a measure enacted by a private party or a state body.

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

The essential argument against giving horizontal direct effect to the provisions of the EC Treaty is concerned by legal certainty.⁷³ The main rationale of this

⁶⁹ See C-36/74, n. 19, para. 18, C-415/93, n. 34, para. 83 and C-281/98, n. 6, para. 32.

⁷⁰ P.Pescatore, "The Doctrine of Direct Effect": An infant disease of Community Law, (1983) 8 *ELRev.* 155, 158.

⁷¹ Prechal, (2005), 301.

⁷² See on the argument of uniform application of community law: AG JACOBS in C -316/93 *Vaneetveld v Le Foyer*, [1994] ECR I-770, para. 29 and AG Lenz in C-91/92, n. 26, paras. 51-53.

⁷³

argument is that despite that some provisions of the Treaty expressly provide for a horizontal application, e.g. the rules on competition, it could be argued that the Treaty itself does not put obligations on individuals. It is consequently clear that the citizens of Europe were not a contracting party to the Treaty and has arguably had little influence on the community legislation process. Is it then under these circumstances reasonable to impose legal obligations on private parties? And could a normally reasonable individual predict that the Treaty itself would impose legal obligations on them?⁷⁴

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

In the light of the foregoing considerations one could grasp that it is not an easy task for a private party to ascertain whether he or she is bound by a provision of the EC Treaty. It is thus fairly convincing to contend that a private party will act on the reliance that his behaviour will not be assessed according to the Treaty provisions concerning free movement of workers. One could moreover assert from a methodological perspective that the denial of the textual basis in favour of the overriding aims of the Treaty cannot be justified with a teleological interpretation since there exists considerable doubts whether the authors of the EC Treaty without a textual basis intended it to impose obligations on individuals.⁷⁵ The recognition of horizontal direct effect is accordingly contrary to the spirit of the Treaty since the effectiveness of community law was not envisaged to take precedence over the individual's legitimate expectations and legal protection.

The confusion for the private party becomes even larger if he or she examines the jurisprudence of ECJ with respect to the direct effect of directives.⁷⁶ In this regard a private party may arguably get the impression that ECJ on the basis of legal certainty will not lightly impose obligations on individuals where the private party has painstaking problem to assess whether his behaviour is in accordance with national and community law.⁷⁷ One could in the same manner allege

⁷⁴ See for a general discussion of legal certainty and horizontal direct effect of directives: AG Lenz in C-91/92, n. 26, paras. 63–68, 72–73.

⁷⁵ It must here be emphasised that “the will of the authors of the Treaty” is not a subjective teleological approach, but is concerned with an objective teleological approach. See the radical teleological method, PO Ekelöf, *Rättegång, första häftet*, seventh edition, 1990, and Craig, n. 1, (2003), 98–99 for the general discussion on the conception of the teleological method with further references.

⁷⁶ See C-152/84, and C-91/92, n. 26.

⁷⁷ See for a general description of the argument against horizontal direct effect of directives: S. Prechal, *Directives in European Community Law- A study of directives and their enforcement in national courts*, (1995, Oxford University Press), 297–98.

that the obligations imposed by Article 39 are burdens which are not reasonable foreseeable. Therefore one should on the basis of principle of legal certainty dismiss the horizontal application of Article 39 of the EC Treaty.

4.3 Final analysis- which policy arguments are most convincing?

For reasons of completeness I will analyse if the preceding arguments bears scrutiny in the light of the considerations put forward in favour of horizontal direct effect of Article 39. My first remark is concerned by the legal fiction that is arguably produced by the argument concerning legal certainty. My argument is that it is unlikely that private parties in general are aware of the exact formulation of the law. This could depend on several reasons, which are more or less morally acceptable. Independently on the reasons why the private party was ignorant of the law he still has to face the legal obligations under the law. With respect to criminal liability the usual legal test for determining whether the perpetrator had an intention is if he or she actually was aware of the factual circumstances that constituted the crime.⁷⁸ It is accordingly not required that the perpetrator is aware of the fact that the factual circumstances legally constituted the crime. The main purpose of the law is also generally to ensure that it is applied in an efficient manner. Consequently it could be argued that in order to govern people's behaviour in the manner that the law is intended to do it has to be applied even in situations where individuals are not fully aware of its content.

Moreover it could be argued that it is not sufficient to only take into account the legal certainty of the defendant. It is accordingly also required that regard is paid to the legal interest of the applicant.⁷⁹ Individuals should consequently be able to act in reliance on their rights according to community law. One could hence argue that it would be disturbing and upsetting for the legal certainty of Roman Angonese or Gabrielle Defrenne if they could not act in reliance on the rights that they acquired under community law. It is nevertheless difficult to assess and decide whose rights should be protected.

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

⁷⁸ See the comment under Chapter 1 (2) Brottsbalken. En Kommentar på Internet, Berggren, NO, Bäcklund, A, Holmqvist, L Leijonhufvud, M, Munck, J, Träskman, P, Wennberg, Wersäll, F, Victor, D, Uppdaterad per den 1 januari 2007.

⁷⁹ See Prechal, (2005), on horizontal direct effect and legal certainty, 304.

should have been aware of the problem of acting in accordance with national law but contrary to community law.

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

The counterargument is here again that it has been recognised in the jurisprudence of ECJ and the academic literature that Treaty provisions could have vertical as well as horizontal direct effect.⁸⁰ Nevertheless it still seem to exist uncertainties and doubts among commentators whether all Treaty provision given that they fulfil the Van Gend en Loos-test applies in a horizontal and vertical manner.⁸¹

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

⁸⁰ See C-36/74, n. 31 and C 43/75, n. 48 Defrenne and Lenaerts, Koen and Van Nuffel, Piet and Bray, Robert editor, *Constitutional law of the European Union*, (2005), Thomson/Sweet & Maxwell, London, n. 109, 702. Lennaerts arguably considers that if a community provision is recognised as having direct effect it should apply in a vertical manner as well as in a horizontal manner. This could be questioned on the basis of Article 28 and the jurisprudence in C-311/85, n. 5. See also note 41.

⁸¹ See Craig, n. 1, (2003), 771.

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

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

The first implication from the Angonese case is the argument that this case could be considered as a proof of ECJ's renewed judicial activism since the court is arguably again asserting its identity and fleshing their muscles. This means more clearly pronounced that ECJ once again by introducing horizontal direct effect impose the supranational character of community law on the national legal systems and accordingly gives preference to the effectiveness of community law, uniform application of community law over private law of the Member States. If the Member States are unable to accomplish the aims of the Treaty by the means of legislation ECJ will take steps and act as the motor of integration.⁸²

The second remark with respect to the scope of the Angonese rationale concerns which implications the conclusions of Angonese may have on the other free movements. It could be argued that ECJ is now reinforcing in a more general sense the horizontal application of the provisions of the Treaty freedoms, notably freedom of establishment and free movement of services. The four freedoms have arguably similar objectives and similar scope of application. The important characteristics that are similar to all these freedoms are that they are all concerned with the overriding aim of abolishing all restrictions against cross-border movement of persons and thus creating an internal market.⁸³ Moreover the concept of restriction has arguably been elaborated and framed in a similar manner in the jurisprudence of ECJ. In this respect I argue that the court has outlined a broad notion of restriction that not only applies to discriminatory measures but also to indistinctly applicable measures.⁸⁴

More importantly perhaps is that all these freedoms have been given direct effect in the jurisprudence of ECJ.⁸⁵ Assuming that also the provisions in Article 43, 48 and 49 of the EC Treaty are sufficiently clear, precise and unambiguous there is no logical argument why they should not also apply in horizontal relations. Moreover the arguments of the *effete utile* of community law and uniform application of community law should have the same value and importance with respect to the free movement of services and freedom of establishment in relation to the free movement of workers. Since I now have outlined a broad

⁸² See Craig, n. 1, (2003), 97.

⁸³ See Article 14 of the EC Treaty and Steiner, n. 1, 309–319.

⁸⁴ See Steiner, n. 1, 315–316.

⁸⁵ See F.Jacobs, "Is the Court of Justice of the European Communities a Constitutional Court", in D.Curtin, D.O. Keefe (eds.), *Constitutional Adjudication in European Community and National Law* (1992, Butterworth), 25–33.

interpretation of the Angonese case I will now turn to consider the more narrow construction of this case.

4.5 Practical and legal scope of Angonese- Narrow construction

By proposing a narrow interpretation of the implications of Angonese I will consequently deal with the arguments that was put forward in the preceding section. The most important criticism of the broad construction of the Angonese case lies in the assumption that ECJ in fact based its decision in this case essentially on account of the circumstances and facts of the case. With this perspective one could argue that the facts of the case put forward a strong incentive for ECJ to adopt this solution and to give horizontal direct effect to Article 39.

Moreover the argument that is based on the assumption that the underlying reason for ECJ to give horizontal direct effect was to impose supranational policies is also fairly speculative. The reasons to introduce concept as direct effect and supremacy were arguably pragmatic and the basic intention was accordingly to resolve practical conflicts between national law and community law and give legal guidance on the question of the legal effects of community law.⁸⁶ The supranational and federalist approach of the ECJ is moreover extremely difficult to verify and assess in a scientific manner. It is arguably difficult to measure whether a court is creating law and not interpreting law. It is sufficient to recall that ECJ is seized with practical legal disputes that it is required to resolve in the light of a meagre and half empty legal material, notably the EC Treaty.⁸⁷ Moreover the competence of the community and ECJ is attributed and ECJ has in theory only jurisdiction when it is expressly provided for in the EC Treaty or secondary legislation.⁸⁸ Where the Member States have not transferred their sovereignty there is no claim for the community to intervene in the internal legislative affairs of the Member States.⁸⁹

Finally with regard to the narrow understanding of Angonese I have to deal with the proposed application of the Angonese reasoning on the other treaty freedoms. It is here important to recall that the extension of the Treaty freedoms

⁸⁶ See however Steiner, n. 1, 47–48. Here the author describe the complex ECJ doctrine of implied powers.

⁸⁷ See Craig, n. 1, (2003), on the principle of subsidiarity, 132–138.

⁸⁸ See the statement from Charlie McCreevy Commissioner for Internal Market and Services Statement on the Revised Proposal for the Services Directive European Parliament Plenary Session Strasbourg, 4 April 2006, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPE ECH/06/220&format=HTML&aged=0&language=EN&guiLanguage=en>, Reference: SPE ECH/06/220 Date: 04/04/2006.

⁸⁹ See C-275/92, Customs and Excise v. Schindler [1994] ECR I-1039, C-159/90, SPUC v. Grogan, [1991] ECR I-4865, C-263/86, Belgium v. Humbel, [1988] ECR 5365.

into the areas of private law of the Member States is arguably a political sensitive question. In this regard it is significant to put emphasis on the discussion that took place before the adoption of the new Service's directive.⁹⁰ The political sensitivity of the fields of free movement of services and freedom of establishment could also be perceived in the jurisprudence of ECJ. One could consequently argue that on the basis of similar facts the Angonese case would have been decided in another manner if it had concerned freedom to provide services or freedom of establishment.

For reasons of clarity I could provide for some examples. If a credit institution established in a Member State of the European Union would outright prohibit a citizen of another Member State to make a withdrawal of money with his credit card it is doubtful whether this action by the credit institution could be considered to be a measure that constitutes an obstacle to the free provision of services. Moreover if a certain bank machine merely recognise credit cards that are issued by the bank that is the owner of this bank machine I think it is controversial to assert that this is an obstacle to the free movement of services.

Obviously it is important for a tourist to be able to withdraw money from bank machines. The described measures from the credit institutions could accordingly be considered to be disincentives for the cross-border movement of tourist services. Nevertheless I consider that one would go too far if the Treaty freedoms were given a horizontal application in these situations. It would consequently be too much cost and burdens involved for the commercial operators in order to fully comply with the obligations arising under community law. It is thus not reasonable to envisage that ECJ will give horizontal direct effect to Article 39, 43 or 48.

⁹⁰ With respect to freedom of establishment it could be argued that the competition rules in Article 81–82 will apply instead in horizontal relations.