# Concurrence in European Private Law

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# 5 Concurrence in Primary Union Law

## 5.1 Introduction

The body of primary Union law consists of the founding Treaties and the Charter, and includes the general principles read into these texts by the Court of Justice of the European Union.[1] A substantial number of these norms may be relied upon in relationships between private individuals. As the previous chapter has demonstrated, private conduct may, under certain circumstances, be assessed against the general prohibition of discrimination on grounds of nationality, against certain free movement provisions, and against competition rules.[2] These rules each have their own field of application. They are not, however, wholly self-contained. On the face of it, a single set of facts might fall within the scope of several rules, resulting in the availability of multiple claims and defences.

Of course, not every set of facts will necessarily be governed by multiple treaty provisions. It is for the law of non-discrimination to determine whether there is an unlawful difference in treatment between persons with different nationalities, for the law of free movement to determine whether access to the market is restricted, and for the law of competition to determine whether there is a cartel or an abuse of a dominant position. Much can be said about the construction of each of these concepts, as to which this chapter seeks to remain neutral. Instead, this chapter examines the question of whether, in principle, these treaty provisions might apply concurrently to the same set of facts. May the interested party rely upon the rule of his choice, notwithstanding the applicability of another treaty provision? Or does the applicability of one treaty provision necessarily exclude the applicability of the other treaty provision?

This chapter examines how Union law answers these questions. It focuses on the three sets of treaty provisions that are most relevant when assessing legal relationships between private parties: the general prohibition of discrimination on grounds of nationality, the provisions concerning the free movement of persons and services, and the provisions pertaining to competition law. Within these broad categories, three examples will be singled out. Firstly, the chapter will analyse the relationship between Article 18 TFEU, which prohibits any discrimination on grounds of nationality, on the one hand, and the treaty provisions pertaining to the free movement of

1 De Witte & Smulders 2018, p. 193-198.
2 *Supra* section 4.3.

persons and services on the other hand (section 5.2). Secondly, the chapter will investigate the relationship between Article 101 TFEU, which deals with collusion between undertakings, and Article 102 TFEU, which deals with the market conduct of dominant undertakings (section 5.3). Thirdly, the chapter will examine the relationship between these free movement rules and the competition rules laid down in Articles 101 and 102 TFEU (section 5.4).

With the exception of Article 18 TFEU, these treaty provisions do not make any comment about their mutual relationship.[3] Even Article 18 TFEU merely mentions that it is 'without prejudice to any special provisions' contained in the Treaties. It is the question what this statement actually means. The case law is of crucial importance if we want to know the answers to such questions. For this reason, this chapter devotes much attention to judgments delivered by the Court of Justice. The reader should be aware that a number of these judgments concern 'vertical' relationships between a public body and one or more individuals, including judgments delivered in first instance proceedings before the General Court and in appeal proceedings before the Court of Justice.[4] These judgments are nonetheless discussed because they are important to find the appropriate answers in 'horizontal' relationships between individuals.

Before we continue with our enquiry, it should be explained why this chapter does not examine the relationship between the various free movement provisions, considering that the chapter does examine the relationship between Articles 101 and 102 TFEU. It will be recalled that only some free movement provisions, governing persons and services, may be relied upon in order to assess certain conduct of private parties, bringing them within the scope of this book.[5] But it appears that the question as to which of these free movement provision is applicable to the case at hand is rather a question of qualification than a question of concurrence. Unlike the free movement of workers, which concerns employment activities,[6] the freedom of establishment and the freedom to provide services concern self-employed activities.[7] The essential difference between the latter two freedoms, moreover, is that Article 49 TFEU governs activities performed on a 'stable and

3 This chapter refers to the provisions as they are currently numbered in the Treaties.

4 Formerly known as the Court of First Instance, the General Court hears actions brought by individuals and Member States against acts or omissions of the institutions, bodies, offices or agencies of the EU (Art. 256 TFEU). Its decisions may be subject to an appeal before the Court of Justice. This book refers to the General Court when discussing cases decided by the Court of First Instance.

5 See section 4.3.

6 Case C-268/99, *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*, ECLI:EU:C:2001:616, at 34. See further, on the definition of 'worker' within the meaning of Art. 45 TFEU, Craig & De Búrca 2015, p. 748-758.

7 Craig & De Búrca 2015, p. 796.

continuous basis',[8] whereas Article 56 TFEU governs activities performed 'on a temporary basis'.[9] This means that the provisions will not be applicable concurrently to a single set of facts. For this reason, their relationship will not be considered in this chapter.

## 5.2 Article 18 TFEU and free movement law

### 5.2.1 Introduction

The natural starting point for any enquiry into the relationship between overlapping rules of primary Union law is the principle of equality or non-discrimination. Article 2 of the Treaty on European Union solemnly declares that this principle is one of the core values, if not the core value, upon which the Union is founded:

> 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

The principle of equality or non-discrimination finds its expression in a wide range of separate treaty and Charter provisions,[10] some of which may be applicable, as we have seen, to private conduct.[11] It is not uncommon for a single set of facts to fall within the scope of application of multiple non-discrimination rules. In fact, as soon as one non-discrimination rule is applicable, there is a good chance that another non-discrimination rule is applicable too, given the substantial number of discriminatory grounds bricked into the building of primary Union law.

To begin with, Article 157 TFEU deals with the right of male and female workers to equal pay for equal work of equal value. Articles 18 of the TFEU and 21 (2) of the Charter focus on discrimination on grounds of nationality. This form of discrimination is also prohibited by provisions pertaining to the free movement of citizens[12] and workers,[13] to the freedom of establishment,[14] and to the freedom to provide services.[15] In addition, the

8 Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, at 25.
9 Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, at 26.
10 See also Muir 2019, p. 817-839.
11 See *supra* section 4.3.
12 Art. 21 TFEU.
13 Art. 45 et seq. TFEU.
14 Art. 49 et seq. TFEU.
15 Art. 56 et seq. TFEU.

free movement rights of citizens of the Union are protected by the Charter.[16] Underpinning all these rules is the general principle of equal treatment or non-discrimination conceived and fostered by the Union Courts as part of the unwritten body of primary Union law.[17] This general principle may, in turn, be subdivided into more specific principles of equality related to grounds such as sex, age, religion or belief.[18] These unwritten principles have also made their way to Article 21 (1) of the Charter, which forbids *any* discrimination on *any* ground, and lists several examples.[19]

This subsection will not consider all the possible scenarios of concurrence between these non-discrimination rules and principles. Many scenarios are simply not that thrilling. No particular problems are, for instance, caused by the concurrence of the general and specific principles of equality and the identical Charter rights. Since *Åkerberg Fransson*, we know that both sources of Union law have the same field of application: they apply as soon as the facts come 'within the scope of European Union law' on account of another treaty provision, regulation or directive.[20] And if the facts do fall within the scope of a non-discrimination rule contained in the Treaties, we may safely assume that the interpretation and application of the general and specific principles of equality and the identical written Charter rights will not lead to different outcomes. It is quite clear, for instance, that Article 21 (2) of the Charter must be interpreted and applied in accordance with Article 18 TFEU.[21]

For these reasons, this section will not pay attention to the general principles and the Charter, but will only examine the corresponding treaty provisions. Our attention will be fixed on the relationship between the general prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU on the one hand, and the treaty provisions governing the free movement of workers (Art. 45 TFEU), the freedom of establishment (Art. 49 TFEU), and the freedom to provide and receive services (Art. 56 TFEU) on the other hand. It is often assumed that Article 18 TFEU applies only to situations which are not governed by these free movement provi-

16 Article 15 (2) of the Charter.

17 Case C-144/04, *Werner Mangold v. Rüdiger Helm*, ECLI:EU:C:2005:709, at 78; Case C-176/12, *Association de médiation sociale*, ECLI:EU:C:2014:2, at 47; Case C-555/07, *Kücükdeveci v. Swedex*, ECLI:EU:C:2010:21, at 56; Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung*, ECLI:EU:C:2018:257, at 76-79.

18 As explained by Tobler 2013, p. 449-454.

19 Sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age and sexual orientation.

20 Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, at 16-23, as explained by Dougan 2015, p. 1205-1207.

21 As emphasised in Art. 52 (2) of the Charter, explained in the Explanations relating to the Charter of Fundamental Rights, and confirmed by the Court in Case T-452/15, *Andrei Petrov and Others v. European Parliament*, ECLI:EU:T:2017:822, at 39; Case T-618/15, *Udo Voigt v. European Parliament*, ECLI:EU:T:2017:821, at 80; Case C-703/17, *Krah v. Universität Wien*, ECLI:EU:C:2019:850, at 18.

sions. Baquero Cruz, for instance, submits that Article 18 TFEU 'steps back' in the presence of a more concrete free movement provision.[22] This section subjects this conclusion to closer scrutiny. When, if at all, do the free movement provisions affect the scope of application of Article 18 TFEU?

Firstly, a brief overview of the provisions and their relationship will be provided (subsection 5.2.2). The section then explains that the Court of Justice of the European Union has, gradually yet firmly, widened the scope of application of the free movement provisions (subsection 5.2.3), raising the question of whether the scope of Article 18 TFEU has been extended too. This question is worth revisiting now, in the light of the Grand Chamber judgment in the case *International Jet Management* (subsection 5.2.4). Having argued that this judgments demonstrates that the free movement provisions do not qualify as *leges speciales* in relation to Article 18 TFEU, the section considers the situation where the provisions do overlap. To what extent, if at all, should Article 18 TFEU be excluded (subsection 5.2.5)?

### 5.2.2 General and specific prohibitions of discrimination

As far as discrimination on grounds of nationality is concerned, Article 18 TFEU is the most general provision contained in the Treaties. It reads as follows:

> 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. (…)'[23]

This rule applies on its own terms to any situation in which a person holding the nationality of one of the Member States is treated differently – either directly or indirectly[24] – compared with persons holding the nationality of another Member State.[25] Two further limitations do apply. In order for Article 18 TFEU to be applicable, the situation must fall within 'the scope of application of the Treaties'. Moreover, the provision only applies to cross-

22 Baquero Cruz 1999, p. 613.

23 The second paragraph reads: 'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.'

24 This is settled case law, see e.g. Case 152/73, *Giovanni Maria Sotgiu v. Deutsche Bundespost*, ECLI:EU:C:1974:13, at 11; Case C-29/95, *Eckehard Pastoors and Others*, ECLI:EU:C:1997:28, at 16; Case C-411/98, *Angelo Ferlini v. Centre Hospitalier de Luxembourg*, ECLI:EU:C:2000:530, at 57; Case C-224/00, *Commission v. Italy*, ECLI:EU:C:2002:185, at 15; Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 64. On the development of indirect discrimination through case law: Tobler 2005, p. 101-278.

25 With regard to companies, the place of the corporate seat is decisive, see Barnard 2016, p. 208, and Case C-330/91, *The Queen v. Inland Revenue Commissioners* ex parte*: Commerzbank AG*, ECLI:EU:C:1993:303 and Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, ECLI:EU:C:2008:723, at 106-110.

border situations and not to situations of a 'purely internal' nature.[26] The same limitations apply in the context of the free movement of workers, the freedom of establishment, and the freedom to provide and receive services. Only if the persons concerned have sought to exercise their rights of free movement does the case fall within the scope of application of these treaty provisions.[27]

On one point, the free movement rights are more narrow in scope. Whereas Article 18 TFEU, in principle, covers all activities falling within the scope of application of the Treaties, the free movement provisions under consideration here only govern 'economic' activities. Article 45 TFEU, for instance, applies to workers, that is to persons performing services 'for and under the direction of another person' in return for 'remuneration'.[28] Consider also Article 49 TFEU, which applies to economic activities performed by self-employed persons and companies 'in return for remuneration',[29] and Article 57 TFEU, which makes clear that 'services' must normally be provided 'for remuneration' in order to fall within the scope of Article 56 TFEU.[30]

As far as their substance is concerned, the free movement provisions seem to contain the same prohibition as the one laid down in Article 18 TFEU. Article 45 (2) TFEU even uses the same terms. It explicitly prohibits 'any discrimination based on nationality between workers of the Member States'. The language of Articles 49 and 56 TFEU is different. These provisions prohibit 'restrictions' on the freedom of establishment and the freedom to provide services respectively. But in both cases, the nationality of the person in question remains the distinguishing criterion: Article 49 TFEU protects 'nationals' of a Member State wishing to establish themselves in the territory of another Member State, and Article 56 TFEU protects 'nationals' of a Member State wishing to provide services to persons established in another Member State.[31] Indeed, the general prohibition of discrimination on grounds of nationality is considered to form the conceptual foundation

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26 As explained by Van der Mei 2011, p. 63-64. It must be noted that the Court has somewhat loosened the interpretation of this condition under the impact of the provisions on citizenship of the Union (see e.g. Craig & De Búrca 2015, p. 865-871, with references to case law).

27 Barnard 2016, p. 209-211. See e.g. Joined Cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen*, ECLI:EU:C:1997:285, at 16; Case C-212/06, *Government of the French Community and Walloon Government v. Flemish Government*, ECLI:EU:C:2008:178, at 33-39; Case C-84/11, *Marja-Liisa Susisalo, Olli Tuomaala, Merja Ritala*, ECLI:EU:C:2012:374, at 18, with references to earlier judgments.

28 Case 66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, ECLI:EU:C:1986:284, at 17.

29 Case C-268/99, *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie*, ECLI:EU:C:2001:616, at 71, on the interpretation of the corresponding provisions contained in the Association Agreements between the Communities and Poland and the Czech Republic).

30 The concept of 'economic activity' is examined in detail by Odudu 2009.

31 Consider also Art. 61 TFEU, which mentions 'restrictions without distinction on grounds of nationality or residence'.

upon which the provisions concerning the free movement of persons and services are based.[32]

It does not come as a surprise, therefore, that the Court of Justice takes the view that Article 18 TFEU has been 'implemented' and has been given 'specific expression' by the free movement provisions in the areas of work, establishment, and services.[33] In some judgments, the Court has added that the violation of one of these free movement rights implies that the general prohibition of discrimination on grounds of nationality has been violated too.[34] Equally, the Court has sometimes concluded that Article 18 TFEU has *not* been violated because the free movement right at issue has

32 See e.g. Bernard 1996, p. 97; Baquero Cruz 1999, p. 614; Van den Bogaert 2005, p. 121-124; Craig & De Búrca 2015, p. 796, referring to Opinion A-G Mayras, Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, ECLI:EU:C:1974:121; Barnard 2016, p. 217.

33 These and similar formulations are used in Case 2/74, *Jean Reyners v. Belgium*, ECLI:EU:C:1974:68, at 16; Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140, at 32; Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115, at 6; Case 251/83, *Eberhard Haug-Adrion v. Frankfurter Versicherungs-AG*, ECLI:EU:C:1984:397, at 14; Case 186/87, *Ian William Cowan v. Le Trésor public*, ECLI:EU:C:1989:47, at 14; Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218, at 12; Case C-10/90, *Maria Masgio v. Bundesknappschaft*, ECLI:EU:C:1991:107, at 13; Case C-246/89, *Commission v. United Kingdom*, ECLI:EU:C:1991:375, at 18; Case C-1/93, *Halliburton Services v. Staatssecretaris van Financiën*, ECLI:EU:C:1994:127, at 12; Case C-379/92, *Matteo Peralta*, ECLI:EU:C:1994:296, at 18; Case C-131/96, *Carlos Mora Romero v. Landesversicherungsanstalt Rheinprovinz*, ECLI:EU:C:1997:317, at 11; Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des Services Fiscaux du Bas-Rhin*, ECLI:EU:C:1998:221, at 38; Case C-311/97, *Royal Bank of Scotland v. Elliniko Dimosio (Greek State)*, ECLI:EU:C:1999:216, at 20-21; Case C-55/98, *Skatteministeriet v. Bent Vestergaard*, ECLI:EU:C:1999:533, at 17; Case C-251/98, *C. Baars v. Inspecteur der Belastingen Particulieren*, ECLI:EU:C:2000:205, at 24; Joined Cases C-397/98 and C-410/98, *Metallgesellschaft Ltd and Others* (C-397/98), *Hoechst and Hoechst UK* (C-410/98) *v. Commissioners of Inland Revenue and H.M. Attorney General*, ECLI:EU:C:2001:134, at 39; Case C-289/02, *AMOK Verlags v. A & R Gastronomie*, ECLI:EU:C:2003:669, at 26; Case C-387/01, *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg*, ECLI:EU:C:2004:256, at 58; Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, at 55; Case C-105/07, *Lammers & Van Cleeff v. Belgische Staat*, ECLI:EU:C:2008:24, at 14; Case C-94/07, *Andrea Raccanelli v. Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, ECLI:EU:C:2008:425, at 45; Case C-222/07, *UTECA v. Administración General del Estado*, ECLI:EU:C:2009:124, at 38; Case C-269/07, *Commission v. Germany*, ECLI:EU:C:2009:527, at 99; Case C-91/08, *Wall v. Stadt Frankfurt am Main, Frankfurter Entsorgungs- und Service (FES)*, ECLI:EU:C:2010:182, at 32; Case C-137/09, *Marc Michel Josemans v. Burgemeester van Maastricht*, ECLI:EU:C:2010:774, at 52; Case C-474/12, *Schiebel Aircraft v. Bundesminister für Wirtschaft, Familie und Jugend*, ECLI:EU:C:2014:2139, at 21; Case C-470/13, *Generali-Providencia Biztosító v. Közbeszerzési Hatóság Közbeszerzési Döntőbizottság*, ECLI:EU:C:2014:2469, at 31; Case C-703/17, *Krah v. Universität Wien*, ECLI:EU:C:2019:850, at 19.

34 Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218, at 12 (referring to Case 2/74, *Jean Reyners v. Belgium*, ECLI:EU:C:1974:68; Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115; Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101); Case C-246/89, *Commission v. United Kingdom*, ECLI:EU:C:1991:375, at 18; Case C-311/97, *Royal Bank of Scotland v. Elliniko Dimosio (Greek State)*, ECLI:EU:C:1999:216, at 20.

*not* been violated either.[35] And there is one phrase that turns up in nearly every judgment, namely that Article 18 TFEU 'applies independently only to situations governed by [Union] law in regard to which the Treaty lays down no specific prohibition of discrimination'.[36] It is on this firm basis that writers characterise Article 18 TFEU as the *lex generalis* and the free movement provisions as *leges speciales*.[37]

### 5.2.3 From a discrimination approach to a restriction approach

If the general prohibition of discrimination on grounds of nationality forms the conceptual basis of the free movement of workers, the freedom of establishment, and the freedom to provide and receive services, then it is tempting to conclude that these free movement provisions only prohibit conduct which qualifies as direct or indirect discrimination. This impression is confirmed in early judgments such as *Walrave and Koch*, where the Court of Justice held that the free movement provisions in the areas of

35 Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101, at 27; Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron*, ECLI:EU:C:1991:161, at 36; Case C-112/91, *Hans Werner v. Finanzamt Aachen-Innenstadt*, ECLI:EU:C:1993:27, at 20; Case C-222/07, *UTECA v. Administración General del Estado*, ECLI:EU:C:2009:124, at 39.

36 These and similar formulations are used in Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218, at 13; Case C-10/90, *Maria Masgio v. Bundesknappschaft*, ECLI:EU:C:1991:107, at 13; Case C-179/90, *Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli*, ECLI:EU:C:1991:464, at 11; Case C-246/89, *Commission v. United Kingdom*, ECLI:EU:C:1991:375, at 17; Case C-1/93, *Halliburton Services v. Staatssecretaris van Financiën*, ECLI:EU:C:1994:127, at 12; Case C-379/92, *Matteo Peralta*, ECLI:EU:C:1994:296, at 18; Case C-131/96, *Carlos Mora Romero v. Landesversicherungsanstalt Rheinprovinz*, ECLI:EU:C:1997:317, at 10; Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des Services Fiscaux du Bas-Rhin*, ECLI:EU:C:1998:221, at 37; Case C-311/97, *Royal Bank of Scotland v. Elliniko Dimosio (Greek State)*, ECLI:EU:C:1999:216, at 20; Case C-55/98, *Skatteministeriet v. Bent Vestergaard*, ECLI:EU:C:1999:533, at 16; Case C-176/96, *Jyri Lehtonen and Castors Braine v. FRBSB*, ECLI:EU:C:2000:201, at 37; Case C-251/98, *C. Baars v. Inspecteur der Belastingen Particulieren*, ECLI:EU:C:2000:205, at 23; Case C-411/98, *Angelo Ferlini v. Centre Hospitalier de Luxembourg*, ECLI:EU:C:2000:530, at 39; Joined Cases C-397/98 and C-410/98, *Metallgesellschaft Ltd and Others* (C-397/98), *Hoechst and Hoechst UK* (C-410/98) *v. Commissioners of Inland Revenue and H.M. Attorney General*, ECLI:EU:C:2001:134, at 38; Case C-100/01, *Ministre de l'Intérieur v. Aitor Oteiza Olazabal*, ECLI:EU:C:2002:712, at 25; Case C-289/02, *AMOK Verlags v. A & R Gastronomie*, ECLI:EU:C:2003:669, at 25; Case C-387/01, *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg*, ECLI:EU:C:2004:256, at 57; Case C-40/05, *Kaj Lyyski v. Umeå universitet*, ECLI:EU:C:2007:10, at 33; Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, at 54; Case C-105/07, *Lammers & Van Cleeff v. Belgische Staat*, ECLI:EU:C:2008:24, at 14; Case C-222/07, *UTECA v. Administración General del Estado*, ECLI:EU:C:2009:124, at 37; Case C-269/07, *Commission v. Germany*, ECLI:EU:C:2009:527, at 98; Case C-137/09, *Marc Michel Josemans v. Burgemeester van Maastricht*, ECLI:EU:C:2010:774, at 51; Case C-385/12, *Hervis Sport- és Divatkereskedelmi*, ECLI:EU:C:2014:47, at 25; Case C-474/12, *Schiebel Aircraft v. Bundesminister für Wirtschaft, Familie und Jugend*, ECLI:EU:C:2014:2139, at 20; Case C-703/17, *Krah v. Universität Wien*, ECLI:EU:C:2019:850, at 19.

37 See e.g. Böhning 1973, p. 82; Baquero Cruz 1999, p. 613-614; Davies 2003, p. 188-189; Van den Bogaert 2005, p. 121; Hartkamp 2011, p. 164-165; Krenn 2012, p. 193; Veldhoen 2013, p. 370-371; Barnard 2016, p. 217; McDonnell 2018, p. 438.

work and services 'prohibit any discrimination based on nationality in the performance of the activity to which they refer'.[38] In later judgments, the Court has also suggested that the freedom of establishment had not been restricted because there was no direct or indirect discrimination.[39] Against this background, one may be inclined to conclude that only directly and indirectly discriminatory measures could amount to a restriction of the free movement provisions.

This conclusion may have been true in the days of Bruno Walrave and Norbert Koch, when paced races still kept audiences enthralled, but it is not true anymore. Gradually yet firmly, the Court has widened the scope of application of the free movement provisions. Nowadays, free movement law does not only target any 'discrimination' – either directly or indirectly – between nationals engaging in economic activities, but also any 'restriction' which prevents or substantially hinders their access to the market. In the words of Barnard, the Court has shifted 'from a discrimination approach to a restriction approach'.[40] This shift can be seen in judgments as early as *Säger*, where the Court held:

> 'It should first be pointed out that Article [56 TFEU] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.'[41]

This is not a word game. Adopting the restriction approach instead of the discrimination approach actually makes a difference. Take the *Bosman* case as an illustration. Jean-Marc Bosman, a professional football player employed by a Belgian first division club, wanted to play for a French football club. His efforts to find a new club were frustrated by the transfer rules adopted by several professional football associations. These rules obliged the new club to pay the former club a fee to recoup part of the investments

38 Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140, at 6. See also Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, ECLI:EU:C:1974:131, at 25: 'The provisions of [Article 56 TFEU] abolish all discrimination against the person providing the service by reason of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided.'

39 Case 182/83, *Robert Fearon and Company Limited v. The Irish Land Commission*, ECLI:EU:C:1984:335, at 10-11; Case 221/85, *Commission v. Belgium*, ECLI:EU:C:1987:81, at 11-12.

40 Barnard 2016, p. 225. See also Barnard 2001, p. 48-52; Van den Bogaert 2005, p. 124-130; Schepel 2012, p. 180-181; Van den Bogaert, Cuyvers & Antonaki 2018, p. 551-552.

41 Case C-76/90, *Manfred Säger v. Dennemeyer & Co.*, ECLI:EU:C:1991:331, at 12. The Court repeats the same formulations in Case C-43/93, *Raymond Vander Elst v. OMI*, ECLI:EU:C:1994:310, at 14.

in the player. This transfer system applied to all players, irrespective of their nationality and irrespective of the place of residence of the clubs involved. This made it hard to plead a case of direct or indirect discrimination. After all, the nationality of the player was not relevant and the rules did not have, or were likely to have had, a particularly detrimental effect on players wishing to move to another Member State as compared to players wishing to move to another club within the same Member State.

Nevertheless, the Court agreed with Bosman that the transfer rules 'are likely to restrict the freedom of movement of players' by 'preventing or deterring them from leaving the clubs to which they belong' upon expiry of their employment contracts.[42] Even though the transfer rules applied to all clubs and all players in the same manner, the Court found that they nonetheless constituted an obstacle to the freedom of movement for workers:

> 'It is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. (…).'[43]

The same line of reasoning was followed in *Alpine Investments*, a case about the compatibility of a prohibition of cold-calling with the free movement of services.[44] In fact, numerous judgments confirm that Article 56 TFEU requires the abolition of 'any restriction' that is 'liable to prohibit, impede or render less advantageous' the exercise by service providers of their rights of free movement, even if the restriction applies 'without distinction'.[45]

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42 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 99.

43 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 103.

44 Case C-384/93, *Alpine Investments v. Minister van Financiën*, ECLI:EU:C:1995:126, at 34-39.

45 See e.g. Case C-272/94, *Michel Guiot and Climatec*, ECLI:EU:C:1996:147, at 10; Case C-3/95, *Reisebüro Broede v. Gerd Sandker*, ECLI:EU:C:1996:487, at 25; Case C-222/95, *Parodi v. Banque H. Albert de Bary et Cie*, ECLI:EU:C:1997:345, at 18; Joined Cases C-369/96 and C-376/96, *Arblade* (C-369/96) and *Leloup* (C-376/96), ECLI:EU:C:1999:575, at 33; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte and Others*, ECLI:EU:C:2001:564, at 28; Case C-165/98, *André Mazzoleni and Inter Surveillance Assistance*, ECLI:EU:C:2001:162, at 22; Case C-164/99, *Portugaia Construções*, ECLI:EU:C:2002:40, at 16; Case C-279/00, *Commission v. Italy*, ECLI:EU:C:2002:89, at 31; Case C-168/04, *Commission v. Austria*, ECLI:EU:C:2006:595, at 36; Case C-244/04, *Commission v. Germany*, ECLI:EU:C:2006:49, at 30; Case C-433/04, *Commission v. Belgium*, ECLI:EU:C:2006:702, at 28; Case C-250/06, *United Pan-Europe Communications Belgium and Others*, ECLI:EU:C:2007:783, at 29; Case C-350/07, *Kattner Stahlbau v. Maschinenbau- und Metall- Berufsgenossenschaft*, ECLI:EU:C:2009:127, at 78; Case C-458/08, *Commission v. Portugal*, ECLI:EU:C:2010:692, at 83; Case C-577/10, *Commission v. Belgium*, ECLI:EU:C:2012:814, at 38; Case C-475/11, *Kostas Konstantinides*, ECLI:EU:C:2013:542, at 44; Case C-49/16, *Unibet International v. Nemzeti Adó- és Vámhivatal Központi Hivatala*, ECLI:EU:C:2017:491, at 32.

Similar formulations have been used in judgments about the interpretation of Articles 45 and 49 TFEU.[46]

The Court's shift from a discrimination approach to a restriction approach has attracted considerable attention from commentators. Some of them reject the restriction approach altogether. Davies, for instance, argues that it is impossible to take free movement law beyond discrimination without coming into conflict with the 'foundational legal, political and economic principles of the internal market'.[47] In his view, entirely non-discriminatory restrictions simply cannot exist, because the application of free movement law to such restrictions amounts to positive action.[48] However, it cannot be denied that the objective to realise an internal market is 'functionally broad'.[49] It may be recalled that the Treaty itself speaks of 'restrictions' to free movement[50] and defines the internal market as 'an area without internal frontiers'.[51] For these reasons alone, it is arguable that restrictions can be caught by the free movement provisions, whether or not they discriminate.[52]

The real difficulty, of course, is to determine where the outer boundaries lie. Surely not every non-discriminatory restriction should be subjected to scrutiny.[53] In the present context we are not, however, concerned with drawing these lines. For our purposes, it is sufficient to observe that the Court has repeatedly confirmed that genuinely non-discriminatory restrictions may, in principle, breach the free movement rules, and that this approach differs from, and is broader in scope than, an approach which focuses exclusively on directly and indirectly discriminatory restrictions. This observation naturally raises a follow-up question which does concern us: what, if any, are the consequences of this development for the interpretation of Article 18 TFEU?

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46 Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*, ECLI:EU:C:1993:125, at 32 (concerning Art. 45 and 49 TFEU); Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, at 37 (Art. 49 and 56 TFEU); Case C-190/98, *Volker Graf v. Filzmoser Maschinenbau*, ECLI:EU:C:2000:49, at 18 (Art. 45 TFEU); Case C-387/01, *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg*, ECLI:EU:C:2004:256, at 51 (Art. 45 TFEU); Case C-464/02, *Commission v. Denmark*, ECLI:EU:C:2005:546, at 45 (Art. 45 TFEU).

47 Davies 2011, p. 9. See also Davies 2003, p. 93-115.

48 Davies 2011, p. 7 and 9.

49 Weatherill 2017, p. 43.

50 Art. 49 and 56 TFEU.

51 Art. 26 (2) TFEU.

52 See e.g. Opinion A-G Jacobs, Case C-384/93, *Alpine Investments v. Minister van Financiën*, ECLI:EU:C:1995:15, at 47-50; Van den Bogaert 2005, p. 124; Wollenschläger 2011, p. 7-8; Tryfonidou 2014, p. 396.

53 Van den Bogaert 2005, p. 130-135; Barnard 2016, p. 228-232.

### 5.2.4 Consequences for the interpretation of Article 18 TFEU?

What does the shift from a discrimination approach to a restriction approach mean for the interpretation of Article 18 TFEU and, consequently, for its relation to the provisions pertaining to the free movement of workers, the freedom of establishment, and the freedom to provide and receive services? Has the restriction approach worked its way up to Article 18 TFEU?

If we assume that a violation of any of these free movement provisions 'automatically and inevitably' constitutes a violation of Article 18 TFEU,[54] as the Court has occasionally done,[55] then we may be inclined to conclude that Article 18 TFEU requires not only the elimination of all discrimination but also the abolition of any non-discriminatory restriction which prevents or substantially hinders access to the market. Along these lines, Schepel has suggested that the interpretation of Article 18 TFEU keeps pace with the interpretation of the free movement provisions:

> 'It seems arguable, then, that rather than Article 18 limiting the horizontal application of free movement provisions to discriminatory measures, the free movement provisions have stretched the horizontal application of Article 18 to any restriction of free movement.'[56]

It must be admitted that the Court has, at times, created the impression that Article 18 TFEU governs any restriction of free movement. Schepel referred to *Ferlini*, where the Court held that Article 18 TFEU applies to actions 'which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty'.[57] Another, more recent example can be found in the judgment *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, where the Court reviewed the rules adopted by the German athletics association both against the general prohibition of discrimination on grounds of nationality and against Article 21 TFEU.[58] The latter provision is commonly considered to be the *lex generalis* in relation to the provisions governing the free

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54 Van den Bogaert 2005, p. 121.

55 Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218, at 12 (referring to Case 2/74, *Jean Reyners v. Belgium*, ECLI:EU:C:1974:68; Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115; Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101); Case C-246/89, *Commission v. United Kingdom*, ECLI:EU:C:1991:375, at 18; Case C-311/97, *Royal Bank of Scotland v. Elliniko Dimosio (Greek State)*, ECLI:EU:C:1999:216, at 20.

56 Schepel 2012, p. 189.

57 Case C-411/98, *Angelo Ferlini v. Centre Hospitalier de Luxembourg*, ECLI:EU:C:2000:530, at 50, referring to Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140; Case 43/75, *Gabrielle Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena*, ECLI:EU:C:1976:56; Case C-415/93, *Union Royale Belge des Societes de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463.

58 It must be noted that the Court has read these provisions in conjunction with Article 165 TFEU, which determines that the Union 'shall contribute to the promotion of European sporting issues' and that Union action in this area shall be aimed at 'promoting fairness and openness in sporting competitions'.

movement of persons, as it generally protects the right of Union citizens to move and reside freely within the territory of the Member States.[59] Having found that the athletics association had restricted freedom of movement as protected by Article 21 TFEU,[60] the Court examined whether this restriction could be justified in the light of Articles 18 and 21 TFEU.[61] The application of Article 18 TFEU in this context may lead one to believe that the general prohibition of discrimination on grounds of nationality applies to any restriction of free movement, even though the nationality requirement at issue was clearly discriminatory and not merely restrictive.[62]

The reasoning expressed by the Grand Chamber in *International Jet Management*, however, makes clear that the substance of Article 18 TFEU has not been extended beyond discrimination.[63] International Jet Management is an airline company based in Austria. It operates private flights from Russia and Turkey to Germany without having obtained permission to enter German airspace. Unlike airline companies registered in Germany, foreign airline companies are required to obtain such permission in advance, even if they possess a valid operating licence issued in another Member State. Because International Jet Management did not have the permission to enter German airspace, the company is prosecuted and fined. On appeal, the company relies upon Article 18 TFEU. The distinction between airline companies registered in Germany and airline companies registered in Austria would violate the general prohibition of any discrimination on grounds of nationality. The *Oberlandesgericht Braunschweig* decides to refer several questions concerning the interpretation of Article 18 TFEU to the Court of Justice.

The key question is whether Article 18 TFEU is applicable at all.[64] It is important to observe, in this regard, that International Jet Management possessed a valid operating license, issued by the Austrian Ministry of Transport in accordance with Regulation (EC) No 1008/2008.[65] The Court observes that this Regulation does not only cover flights made within the European Union, but also flights between a third country and a Member State.[66] In fact, the Regulation prohibits undertakings such as International Jet Management to transport air passengers without possessing a valid

59 E.g. by Davies 2003, p. 189; Wollenschläger 2011, p. 30; Tryfonidou 2014, p. 386.

60 Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:497, at 47.

61 See, explicitly, Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:497, at 65.

62 As noted in Opinion A-G Tanchev, Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:181, at 85.

63 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171.

64 Opinion A-G Bot, Case C-628/11, *International Jet Management*, ECLI:EU:C:2013:279, at 28.

65 Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community.

66 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 41-46.

operating license.[67] Because the facts of the case are governed by secondary legislation, the Court holds that the situation falls within the scope of Union law within the meaning of Article 18 TFEU.[68] This conclusion cannot, in the view of the Court, be called into question by the fact that the Union legislature has not harmonised the provision of air transport services between the Member States and third countries as such.[69]

Does this mean that Article 18 TFEU is applicable to the case at hand? The French and German governments object. They draw attention to Article 58 (1) TFEU, which determines that transport services are governed by Title VI of the TFEU. It is trite law that transport services are not, therefore, governed by Article 56 TFEU.[70] Title VI, for its part, only applies to transport by rail, road, and inland waterway.[71] Sea and air transport are not, therefore, subject to the general rules contained in Title VI,[72] but can only be regulated by the Union legislature in accordance with the ordinary legislative procedure.[73] If the general prohibition of discrimination on grounds of nationality were to be applied to air transport services, so the French and German governments contend, the freedom to provide services laid down in Article 56 TFEU would effectively be applied through the backdoor of Article 18 TFEU. This would deprive the derogation provided for in Article 58 (1) TFEU of 'any useful effect'.[74]

In other words, the French and German governments argue that if the specific prohibition of discrimination on grounds of nationality is not applicable, the general prohibition of discrimination on grounds of nationality should not be applicable either. The Court does not buy this argument. It first explains the meaning of the prohibition laid down in Article 56 TFEU:

> 'According to the Court's settled case-law, Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than

67 Art. 3 (1), Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community.

68 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 53. See also Opinion A-G Bot, Case C-628/11, *International Jet Management*, ECLI:EU:C:2013:279, at 42-56.

69 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 39.

70 Joined Cases 209/84 to 213/84, *Asjes and Others*, ECLI:EU:C:1986:188, at 37; Case 4/88, *Lambregts Transportbedrijf v. Belgian State*, ECLI:EU:C:1989:320, at 9; Case C-49/89, *Corsica Ferries France v. Direction générale des douanes*, ECLI:EU:C:1989:649, at 10; Case C-17/90, *Pinaud Wieger v. Bundesanstalt für den Güterfernverkehr*, ECLI:EU:C:1991:416, at 7; Case C-467/98, *Commission v. Denmark ('Open Skies')*, ECLI:EU:C:2002:625, at 123; Case C-382/08, *Michael Neukirchinger v. Bezirkshauptmannschaft Grieskirchen*, ECLI:EU:C:2011:27, at 22.

71 Art. 100 (1) TFEU.

72 Case 167/73, *Commission v. France*, ECLI:EU:C:1974:35, at 32; Joined Cases 209/84 to 213/84, *Asjes and Others*, ECLI:EU:C:1986:188, at 44; Case C-178/05, *Commission v. Greece*, ECLI:EU:C:2007:317, at 52; Case C-382/08, *Michael Neukirchinger v. Bezirkshauptmannschaft Grieskirchen*, ECLI:EU:C:2011:27, at 21.

73 Art. 100 (2) TFEU.

74 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 55.

> that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (…).'[75]

The Court then explains that this prohibition is wider in scope than the prohibition laid down in Article 18 TFEU:

> '[Article 56 TFEU] therefore has a scope which exceeds the prohibition of discrimination provided for in Article 18 TFEU.'[76]

Responding to the arguments raised by the French and German governments, the Court submits that Article 58 (1) TFEU retains its intended effect. This provision may not exclude the application of the general prohibition of discrimination on grounds of nationality, but it does deprive air carriers of the possibility to challenge entirely non-discriminatory restrictions to free movement:

> 'Therefore, while the Member States are entitled, under Article 58(1) TFEU, to impose certain restrictions on the provision of air transport services in respect of the routes between third countries and the European Union in so far as (…) the EU legislature has not exercised the power conferred upon it by Article 100(2) TFEU to liberalise that type of service, those States nevertheless remain subject to the general principle of non-discrimination on grounds of nationality enshrined in Article 18 TFEU.'[77]

Importantly, the foregoing demonstrates that we should not take the statement, expressed so often by the Court,[78] that Article 18 TFEU 'applies independently only to situations governed by Union law in regard to which the Treaty lays down no specific prohibition of discrimination' to mean that Article 18 TFEU can never be applied to cross-border activities employed by workers, by self-employed persons and companies, and by providers of services. Proceeding from the assumption that Article 18 TFEU is applicable as soon as the facts fall within the scope of Union law, the Court only accepts its exclusion if the authors of the Treaties have expressly provided for a derogation.[79] The mere fact that transport activities are excluded from the scope of application of the freedom to provide services does not, therefore, imply that they are also excluded from the scope of application of the

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75 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 57, referring to Case C-475/11, *Kostas Konstantinides*, ECLI:EU:C:2013:542, at 44.

76 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 58.

77 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 59.

78 See *supra* section 5.2.2.

79 See also the Opinion A-G Bot, Case C-628/11, *International Jet Management*, ECLI:EU:C:2013:279, at 40.

general principle of non-discrimination on grounds of nationality.[80] This line of reasoning has also been followed in earlier judgments, in which the Court decided that transport activities remain subject to the free movement rules in the area of work[81] and the competition rules.[82]

For present purposes, it is important to observe, moreover, that the Court has expressly distinguished the prohibitions laid down in Article 18 TFEU and in Article 56 TFEU. After *International Jet Management*, it is clear that entirely non-discriminatory restrictions of the right to provide services are governed only by Article 56 TFEU, and not by Article 18 TFEU. We may safely conclude that the same reasoning applies when it comes to the relationship between Article 18 TFEU and the free movement of work and the freedom of establishment. Contrary to what Schepel has suggested, the substance of the general prohibition of discrimination on grounds of nationality has not been extended beyond discrimination. Not every restriction of free movement is directly or indirectly discriminatory within the meaning of Article 18 TFEU.[83] In some respects, free movement law is broader in scope than the general prohibition of discrimination on grounds of nationality.

In the light of these findings, we must conclude that the free movement provisions cannot, in all situations, be characterised as the *leges speciales* and that the general prohibition of all discrimination on grounds of nationality cannot, in all situations, be characterised as the *lex generalis*.[84] It has become impossible, therefore, to maintain the view that a violation of one of the free movement rights automatically and inevitably constitutes a violation of Article 18 TFEU.[85] Nor can it be said that the absence of a violation of one of the free movement rights necessarily implies that Article 18 TFEU has not been violated either.[86] It is advised that the Court does not create these impressions in its judgments anymore.

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80 Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 59.

81 Case 167/73, *Commission v. France*, ECLI:EU:C:1974:35, at 28-33.

82 Joined Cases 209/84 to 213/84, *Asjes and Others*, ECLI:EU:C:1986:188, at 40-45; Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 5.

83 Already observed by Baquero Cruz 1999, p. 614.

84 As many writers assume, e.g. Böhning 1973, p. 82; Van den Bogaert 2005, p. 121; Hartkamp 2011, p. 164-165; Krenn 2012, p. 193; Veldhoen 2013, p. 370-371; McDonnell 2018, p. 438.

85 Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218, at 12 (referring to Case 2/74, *Jean Reyners v. Belgium*, ECLI:EU:C:1974:68; Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115; Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101); Case C-246/89, *Commission v. United Kingdom*, ECLI:EU:C:1991:375, at 18; Case C-311/97, *Royal Bank of Scotland v. Elliniko Dimosio (Greek State)*, ECLI:EU:C:1999:216, at 20.

86 As the Court has concluded in Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101, at 27; Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron*, ECLI:EU:C:1991:161, at 36; Case C-112/91, *Hans Werner v. Finanzamt Aachen-Innenstadt*, ECLI:EU:C:1993:27, at 20; Case C-222/07, *UTECA v. Administración General del Estado*, ECLI:EU:C:2009:124, at 39.

### 5.2.5 Concurrence of Article 18 TFEU and free movement law?

In view of the foregoing analysis we will, for now, assume that the facts of a case do, on the face of it, fall within the scope of application of both Article 18 TFEU and one of the free movement provisions in the areas of work, establishment, and services. In other words, we will focus on directly and indirectly discriminatory restrictions to free movement, and leave aside entirely non-discriminatory restrictions. The question to consider is whether the free movement provisions affect the scope of application of the general prohibition of discrimination on grounds of nationality, so that the latter cannot be relied upon.

Once again, it seems that the approach of the Court has developed over time. Initially, the Court did not shy away from examining all the relevant rules simultaneously. In *Walrave and Koch*, for instance, the Court reviewed the rules of the *Association Union Cycliste Internationale* both against the general prohibition of all discrimination on grounds of nationality and against the provisions governing the free movement of work and services.[87] In later judgments, however, the Court did not insert Article 18 TFEU in the operative part anymore.[88] Sometimes, the Court added that it would be 'unnecessary' to give a ruling on the interpretation of Article 18 TFEU.[89]

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87 Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140. The same approach has been followed by the Court in Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115, concerning Art. 18, 45 and 56 TFEU; Case 90/76, *Henry van Ameyde v. UCI*, ECLI:EU:C:1977:101, concerning Art. 18, 49 and 56 TFEU; Case 251/83, *Eberhard Haug-Adrion v. Frankfurter Versicherungs-AG*, ECLI:EU:C:1984:397, concerning Art. 18, 45 and 56 TFEU; Case 186/87, *Ian William Cowan v. Le Trésor public*, ECLI:EU:C:1989:47, concerning Art. 18 and 56 TFEU; Case C-10/90, *Maria Masgio v. Bundesknappschaft*, ECLI:EU:C:1991:107, concerning Art. 18 and 45 TFEU; Case C-379/92, *Matteo Peralta*, ECLI:EU:C:1994:296, concerning, *inter alia*, Art. 18, 45 and 56 TFEU.

88 Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218; Case C-419/92, *Ingetraut Scholz v. Opera Universitaria di Cagliari and Cinzia Porcedda*, ECLI:EU:C:1994:62; Case C-105/07, *Lammers & Van Cleeff v. Belgische Staat*, ECLI:EU:C:2008:24; Case C-269/07, *Commission v. Germany*, ECLI:EU:C:2009:527.

89 These and similar formulations are used in: Case 305/87, *Commission v. Greece*, ECLI:EU:C:1989:218, at 28; Case C-131/96, *Carlos Mora Romero v. Landesversicherungsanstalt Rheinprovinz*, ECLI:EU:C:1997:317, at 12; Case C-336/96, *Mr and Mrs Robert Gilly v. Directeur des Services Fiscaux du Bas-Rhin*, ECLI:EU:C:1998:221, at 39; Case C-55/98, *Skatteministeriet v. Bent Vestergaard*, ECLI:EU:C:1999:533, at 17; Case C-100/01, *Ministre de l'Intérieur v. Aitor Oteiza Olazabal*, ECLI:EU:C:2002:712, at 26; Case C-289/02, *AMOK Verlags v. A & R Gastronomie*, ECLI:EU:C:2003:669, at 26; Case C-387/01, *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg*, ECLI:EU:C:2004:256, at 59; Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, at 55; Case C-91/08, *Wall v. Stadt Frankfurt am Main, Frankfurter Entsorgungs- und Service (FES)*, ECLI:EU:C:2010:182, at 32; Case C-470/13, *Generali-Providencia Biztosító v. Közbeszerzési Hatóság Közbeszerzési Döntőbizottság*, ECLI:EU:C:2014:2469, at 31; Case C-474/12, *Schiebel Aircraft v. Bundesminister für Wirtschaft, Familie und Jugend*, ECLI:EU:C:2014:2139, at 22.

Sometimes, the Court even concluded that the general prohibition of discrimination on grounds of nationality did not apply at all because the facts fell within the scope of one or more free movement rules.[90] Against this background, Baquero Cruz has suggested that the free movement provisions automatically exclude the application of Article 18 TFEU:

> 'In the presence of a more concrete provision Article [18 TFEU] steps back, or more precisely, its normative substance is applied through the more concrete provision.'[91]

One may wonder whether it is necessary to exclude the general prohibition of discrimination on grounds of nationality altogether as soon as, and for the very reason that, a dispute is governed by a free movement provision. In many situations, the application of these rules will not lead to different outcomes. In some respects, however, the rules do differ, which may lead to different results. This becomes clear if we adopt the perspective of the defendant. He may take comfort from the fact that the free movement provisions expressly allow for justification defences based on grounds of public policy, public security, and public health.[92] Take Article 52 (1) TFEU as an illustration:

> 'The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions 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.'

These written derogations can be relied upon in respect of any conduct breaching the free movement right at issue, whether the restriction is directly or indirectly discriminatory.[93] In addition, indirectly discriminatory restrictions may be 'objectively' justified on the basis of unwritten derogations developed by the Court of Justice under the so-called 'rule of reason' doctrine.[94] In proceedings concerning legal relationships between private individuals, the Court has recognised several objective justifications

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90 E.g. Case C-1/93, *Halliburton Services v. Staatssecretaris van Financiën*, ECLI:EU:C:1994:127, at 12; Case C-311/97, *Royal Bank of Scotland v. Elliniko Dimosio (Greek State)*, ECLI:EU:C:1999:216, at 21; Case C-251/98, *C. Baars v. Inspecteur der Belastingen Particulieren*, ECLI:EU:C:2000:205, at 25; Joined Cases C-397/98 and C-410/98, *Metallgesellschaft Ltd and Others* (C-397/98), *Hoechst and Hoechst UK* (C-410/98) *v. Commissioners of Inland Revenue and H.M. Attorney General*, ECLI:EU:C:2001:134, at 40; Case C-137/09, *Marc Michel Josemans v. Burgemeester van Maastricht*, ECLI:EU:C:2010:774, at 52.

91 Baquero Cruz 1999, p. 613.

92 Art. 45 (3), Art. 52, and Art. 62 TFEU. Given the focus of this book on private relationships, we will not examine the public service and the official authority exceptions provided for in Art. 45 (4) and Art. 51 TFEU respectively.

93 Non-discriminatory restrictions are not discussed here, for the reasons explained above.

94 Van den Bogaert 2005, p. 149-152.

of 'general interest', such as maintaining a balance between sports clubs,[95] encouraging the recruitment and training of young players,[96] and the right to take collective action for the protection of workers against possible social dumping.[97] In order for such an objective justification defence to enliven, it must be demonstrated that the conduct is suitable for achieving an imperative requirement in the general interest and does not go beyond what is necessary for that purpose.[98]

Conduct which indirectly discriminates on the basis of nationality can also be objectively justified on the basis of Article 18 TFEU.[99] Crucially, however, Article 18 TFEU does not contain any written justification grounds. Unlike the free movement provisions, it does not expressly allow for justification defences based on grounds of public policy, public security, and public health. Does this mean that direct discrimination on grounds of nationality can never be justified in the context of Article 18 TFEU?

This question is deeply controversial, no doubt because direct discrimination conflicts sharply with the very principle of equal treatment. The general understanding is that direct discrimination can only ever be justified on the basis of the derogation grounds expressly mentioned in the Treaties or in secondary legislation.[100] It has sometimes been suggested that the justification of direct discrimination should be allowed in exceptional situations,[101] and there are some judgments in which it appears as if the

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95 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 106; Case C-176/96, *Jyri Lehtonen and Castors Braine v. FRBSB*, ECLI:EU:C:2000:201, at 53-54.

96 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 106; Case C-325/08, *Olympique Lyonnais v. Olivier Bernard and Newcastle United*, ECLI:EU:C:2010:143, at 39.

97 Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, at 103.

98 See e.g. Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*, ECLI:EU:C:1993:125, at 32; Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, at 37; Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 104; Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 75.

99 See e.g. Case C-274/96, *Horst Otto Bickel and Ulrich Franz*, ECLI:EU:C:1998:563, at 27; Case C-224/98, *Marie-Nathalie D'Hoop v. Office national de l'emploi*, ECLI:EU:C:2002:432, at 36; Case C-148/02, *Carlos Garcia Avello v. État belge*, ECLI:EU:C:2003:539, at 31; Case C-209/03, *The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills*, ECLI:EU:C:2005:169, at 54; Case C-382/08, *Michael Neukirchinger v. Bezirkshauptmannschaft Grieskirchen*, ECLI:EU:C:2011:27, at 35; Case C-628/11, *International Jet Management*, ECLI:EU:C:2014:171, at 68, and in the context of a dispute between an individual and a national sports association, Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:497, at 67.

100 Prechal 2004, p. 545; Van den Bogaert 2005, p. 156; Ellis & Watson 2012, p. 172-174; Tobler 2013, p. 460; Craig & De Búrca 2015, p. 938.

101 Notably by A-G Van Gerven, in Opinion A-G Van Gerven, Case C-132/92, *Birds Eye Walls Ltd. v. Friedel M. Roberts*, ECLI:EU:C:1993:868, at 12-14, concerning the possibility of justifying discrimination directly based on sex.

Court has accepted this possibility.[102] In *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, it may be recalled, the Court first concluded that the nationality requirement imposed by the German athletics association constituted a restriction of free movement and then examined possible objective justification defences,[103] even though the association clearly treated foreign athletes differently because of their nationality.[104] By adopting a restriction-based approach instead of a discrimination-based approach, however, the Court formally dodged the question. Apparently, the Court is not yet prepared to expressly confirm that directly discriminatory conduct can be justified. At this stage we must, therefore, conclude that Article 18 TFEU does not allow for justification defences in cases concerning direct discrimination.

For this reason, it is important to know that the application of the general prohibition of discrimination on grounds of nationality is excluded if the facts of the case fall within the scope of application of the free movement provisions governing workers, self-employed persons and companies, and service providers. In such situations, the alleged infringer may rely upon the express derogations available under these free movement provisions, even if his conduct appears to be directly discriminatory and would, for that reason, not be justifiable under Article 18 TFEU. This is not to say that the principle of non-discrimination has no role to play at all. The fact that the conduct is directly discriminatory must be taken into account when considering whether the means chosen were necessary and appropriate for attaining the stated objective.[105] But it is not impossible to justify the conduct from the outset. Even though the free movement provisions can no longer be characterised as the *leges speciales* in relation to Article 18 TFEU, they clearly do have priority once the facts fall within their scope of application.

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102 Case 106/83, *Sermide v. Cassa Conguaglio Zucchero and Others*, ECLI:EU:C:1984:394, at 28: 'It is appropriate in the first place to point out that under the principle of non-discrimination between Community producers or consumers, which is enshrined in the second subparagraph of [Article 40 (3) TFEU] and which includes the prohibition of discrimination on grounds of nationality laid down in the first paragraph of [Article 18 TFEU], comparable situations must not be treated differently and different situations must not be treated in the same way *unless such treatment is objectively justified*' (emphasis added); Case C-122/96, *Stephen Austin Saldanha and MTS Securities Corporation v. Hiross Holding*, ECLI:EU:C:1997:458, at 29: 'Suffice it in this regard to point out that, even though the object of a provision such as that at issue in the main proceedings (…) *is not as such contrary to* [Article 18 TFEU]' (emphasis added). See also Case C-408/92, *Smith and Others v. Avdel Systems*, ECLI:EU:C:1994:349, at 30, in a statement concerning today's Art. 157 TFEU: 'Even assuming that it would, in this context, be possible *to take account of objectively justifiable considerations* (…)' (emphasis added).

103 Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:497, at 42-47 and 55-67 respectively. The same approach is adopted in Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 116-137.

104 As noted in Opinion A-G Tanchev, Case C-22/18, *TopFit and Daniele Biffi v. Deutscher Leichtathletikverband*, ECLI:EU:C:2019:181, at 85.

105 See Van den Bogaert 2005, p. 158; Craig & De Búrca 2015, p. 759.

### 5.2.6 Interim conclusion

This section has examined the relationship between the general prohibition of discrimination on grounds of nationality enshrined in Article 18 TFEU and the treaty provisions pertaining to the free movement of persons and services. Importantly, the section has demonstrated that Article 18 TFEU cannot, in all situations, be considered the *lex generalis* and that the free movement provisions cannot, in all situations, be considered *leges speciales*. The reason is that the Court of Justice of the European Union has replaced the concept of discrimination with the concept of restriction in the context of the law of free movement. The precise content of the latter concept may not always be entirely clear, but its scope is evidently broader than the concept of discrimination. Crucially, the Court has so far refused to adopt the concept of restriction in the context of Article 18 TFEU. In fact, it has explicitly confirmed that the scope of the general prohibition of discrimination on grounds of nationality does not extend beyond discrimination. In the light of these developments, we must conclude that not every restriction is governed by Article 18 TFEU anymore. Consequently, Article 18 TFEU can no longer be considered the all-embracing *lex generalis* as compared with the free movement provisions.

As soon as the facts of the case do fall within the scope of application of one of the free movement provisions, however, the Court tends to exclude the application of the general prohibition of discrimination on grounds of nationality altogether. This section has questioned whether this solution is necessary. After all, the application of the two regimes will not necessarily lead to different outcomes. Yet the section has also discussed one example of a situation in which it does matter that recourse to Article 18 TFEU is excluded. Contrary to Article 18 TFEU, the free movement provisions expressly allow for justification defences based on grounds of public policy, public security, and public health. In cases concerning directly discriminatory restrictions to free movement based on nationality, the defendant may take comfort from the fact that he can rely upon such defences in order to justify conduct which would not escape scrutiny under Article 18 TFEU.

## 5.3 Articles 101 and 102 TFEU

### 5.3.1 Introduction

Whereas the previous section has examined the relationship between the general prohibition of discrimination on grounds of nationality and the free movement provisions governing persons and services, the current section will focus on the area of competition law. We will investigate the relationship between Article 101 TFEU, which deals with collusion between undertakings, and Article 102 TFEU, which deals with the market conduct of dominant undertakings. Before analysing the case law of the Court to see

whether a single set of facts may fall within the scope of application of both provisions (subsection 5.3.5), we will briefly examine the legal framework within which the provisions operate (subsection 5.3.2) and highlight their most important similarities and differences (subsections 5.3.3-5.3.4).

### 5.3.2 A brief overview of the provisions

Articles 101 and 102 TFEU focus on different forms of anticompetitive conduct. Article 101 TFEU prohibits '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'. In other words, Article 101 TFEU deals with collusion between several independent market operators. By contrast, Article 102 TFEU prohibits any 'abuse' by 'one or more undertakings' of a 'dominant position', that is a position of economic strength which enables the undertakings to influence the conditions of competition on the market.[106] So, Article 102 TFEU does not deal with collusion but with dominant undertakings which, separately or collectively,[107] are in a position to hinder the development of competition on the market.

Both rules form part of the only section within the TFEU that is explicitly addressed to undertakings.[108] This section also contains several institutional provisions: one rule conferring a power on the Council to adopt secondary legislation in this field (Art. 103 TFEU), and two rules concerning the competence of the national authorities (Art. 104 TFEU) and of the European Commission (Art. 104 TFEU) to investigate suspected infringements of Articles 101 and 102 TFEU. The section is rounded off with Article 106 TFEU. The first and third paragraphs of this provision are not relevant in the present context, as they concern the actions by which the Member States intervene in the market, either through public undertakings or by granting undertakings exclusive or special rights. But the second paragraph of Article 106 TFEU is relevant, because it provides a derogation to

106 Case 27/76, *United Brands v. Commission*, ECLI:EU:C:1978:22, at 65; Case 85/76, *Hoffmann-La Roche v. Commission*, ECLI:EU:C:1979:36, at 38-39.

107 On several occasions, the Court has held that two or more independent economic entities may together hold a dominant position towards other operators on the same market (see e.g. Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro and Others v. Commission ('Flat Glass')*, ECLI:EU:T:1992:38, at 357-360; Case C-393/92, *Gemeente Almelo and Others v. Energiebedrijf IJsselmij*, ECLI:EU:C:1994:171, at 41-43; Case C-96/94, *Centro Servizi Spediporto v. Spedizioni Marittima del Golfo*, ECLI:EU:C:1995:308, at 32-33; Joined Cases C-140/94, C-141/94 and C-142/94, *DIP and Others v. Comune di Bassano del Grappa and Others*, ECLI:EU:C:1995:330, at 25-26; Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, at 35-45).

108 Title VII, Chapter 1, Section 1, titled: 'Rules applying to undertakings'.

'undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly'. On this basis, certain undertakings may be exempted from scrutiny on the basis of Articles 101 and 102 TFEU.[109]

### 5.3.3 Similarities between Articles 101 and 102 TFEU

Before we arrive at the justification stage, however, we will focus on the content of the two substantive norms that govern the anti-competitive conduct of undertakings: Articles 101 and 102 TFEU. There are important similarities between these provisions. To begin with, the interpretation of the concept of 'undertaking' is identical, as the Court has made clear:

> 'The Court considers that there is no legal or economic reason to suppose that the term "undertaking" in Article [101] has a different meaning from the one given to it in the context of Article [102].'[110]

The meaning of the term 'undertaking' is not defined in the TFEU, but has been worked out by the Court. By now, it is trite law that this term encompasses 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way it is financed'.[111] Importantly, the Court has ruled that the same definition applies when determining which undertaking is liable to pay compensation in respect of losses resulting from an infringement of EU competition rules.[112]

Ultimately, the definition of the term 'undertaking' – and indeed, the very scope of EU competition law – depends on the definition of the term 'economic activity'.[113] The Court has determined that, within the context of competition law, this term refers to 'any activity consisting in offering

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109 Jones & Sufrin 2016, p. 623-643.

110 Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro and Others v. Commission ('Flat Glass')*, ECLI:EU:T:1992:38, at 358.

111 Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron*, ECLI:EU:C:1991:161, at 21; Joined Cases C-159/91 and C-160/91, *Christian Poucet v. Assurances générales de France en Caisse mutuelle régionale du Languedoc-Roussillon and Daniel Pistre v. Cancava*, ECLI:EU:C:1993:63, at 17; Case C-327/12, *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture v. SOA Nazionale Costruttori – Organismo di Attestazione*, ECLI:EU:C:2013:827, at 27.

112 Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204, at 47.

113 If an organisation does not carry out economic activities, it is not considered to be an undertaking within the meaning of competition law. See e.g. Joined Cases C-159/91 and C-160/91, *Christian Poucet v. Assurances générales de France en Caisse mutuelle régionale du Languedoc-Roussillon and Daniel Pistre v. Cancava*, ECLI:EU:C:1993:63, at 19; Case C-309/99, *Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98, at 112.

goods and services on a given market'.[114] It is not necessary that the undertaking makes a profit or intends to make a profit by offering the goods and services.[115] What is required is that the activity is 'economic in nature',[116] meaning that the activity 'has not always been, and is not necessarily, carried out by public entities'.[117] As Odudu writes, the central issue under Articles 101 and 102 TFEU appears to be 'whether the potential to make a profit without state intervention exists'.[118] This basic test applies across the range of EU competition rules.[119]

A second point of similarity is that both Article 101 and 102 TFEU only govern anticompetitive conduct which 'may affect trade between Member States'. This element is interpreted in the same way under both provisions.[120] It determines the dividing line between national and EU competition law, confining the scope of the latter to conduct that is capable of having a minimum level of effect on cross-border trade. In the words of the Court, EU competition law only enters the picture if the actual or potential effect of the conduct in question on the trade between Member States is 'appreciable'.[121] The meaning of this concept for the purposes of both Article 101 and Article 102 TFEU is explained in the 'Guidelines on the effect on trade concept', in which the European Commission sums up the relevant case law.[122]

A third point of similarity that is relevant in the present context is that both Article 101 and 102 TFEU may serve as a basis to claim compensation from the infringer. In a range of leading judgments, the Court has explained

114 Case 118/85, *Commission v. Italy*, ECLI:EU:C:1987:283, at 7; Joined Cases C-180/98 to C-184/98, *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten*, ECLI:EU:C:2000:428, at 75; Case C-465/99, *Ambulanz Glöckner v. Landkreis Südwestpfalz*, ECLI:EU:C:2001:577, at 19; Case C-327/12, *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture v. SOA Nazionale Costruttori – Organismo di Attestazione*, ECLI:EU:C:2013:827, at 27.

115 Odudu 2009, p. 232; Jones & Sufrin 2016, p. 116.

116 Case T-155/04, *SELEX Sistemi Integrati v. Commission*, ECLI:EU:T:2006:387, at 77.

117 Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron*, ECLI:EU:C:1991:161, at 22; Case T-155/04, *SELEX Sistemi Integrati v. Commission*, ECLI:EU:T:2006:387, at 89.

118 Odudu 2009, p. 231-232. See also Opinion A-G Jacobs, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband and Others v. Ichthyol-Gesellschaft Cordes and Others*, ECLI:EU:C:2003:304, at 28: 'the basic test appears to me to be whether [the activity] could, at least in principle, be carried on by a private undertaking in order to make profits'; and Wendt 2013, p. 91: '(…) the question is whether a particular activity, in principle, can be carried out under market conditions, i.e. by a private actor with a view to profit'.

119 Wendt 2013, p. 91-95, 173; Jones & Sufrin 2016, p. 116, 263, and 595.

120 Wendt 2013, p. 154-155, 173; Jones & Sufrin 2016, p. 171-173, 270-271.

121 E.g. Case 22/71, *Béguelin Import Co. and Others v. S.A.G.L. Import Export and Others*, ECLI:EU:C:1971:113, at 16; Case C-49/07, *MOTOE v. Elliniko Dimosio*, ECLI:EU:C:2008:376, at 41.

122 European Commission Notice, 'Guidelines on the effect on trade concept contained in Arts. 81 and 82 of the Treaty'.

that any person is entitled to claim compensation for losses resulting from an anti-competitive agreement or practice prohibited under Article 101 TFEU.[123] In *Cogeco Communications*, the Court has added that Article 102 TFEU may serve as a basis to claim compensation for the harm suffered as a result of the abuse of a dominant position.[124] The latter judgment confirms that the claimant must satisfy the same set of constitutive conditions, regardless of whether he claims compensation for losses resulting from a collusion or from an abuse of a dominant position.[125]

A fourth point of similarity concerns the rules that are relevant if consumers and customers wish to enforce their claims against one or more undertakings. Several of these rules have been harmonised, as the result of the adoption of Council Regulation (EC) No 1/2003 and of Directive 2014/104/EU.[126] Although the Regulation largely focuses on the cooperation between the competition authorities and the national courts, some of its rules are also relevant in civil proceedings between private parties. The division of the burden of proof, for instance, is subject to the same rules, regardless of whether the case concerns an infringement of Article 101 (1) or of Article 102 TFEU. The burden of proving an infringement 'shall rest on the party or the authority alleging the infringement',[127] and the burden of proving the conditions for applying 'a defence against a finding of an infringement' shall lie with the undertaking or association invoking the benefit of the defence.[128]

The Directive, for its part, also applies equally to claims resulting from an infringement of Article 101 TFEU and to claims resulting from an infringement of Article 102 TFEU. It harmonises several incidental issues such as evidence disclosure, joint and several liability, and the range of available defences. The underlying purpose has been to create a level

123 Case C-453/99, *Courage v. Crehan*, ECLI:EU:C:2001:465, at 26; Joined Cases C-295/04 to C-298/04, *Manfredi and Others*, ECLI:EU:C:2006:461, at 61; Case C-557/12, *Kone and others v. ÖBB-Infrastruktur*, ECLI:EU:C:2014:1317, at 22; Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204, at 26.

124 Case C-637/17, *Cogeco Communications v. Sport TV Portugal and Others*, ECLI:EU:C:2019:263, at 40.

125 Rousseva 2010, p. 443-445, also points out that a 'similar right to damages' exists in both situations. See also Opinion A-G Wahl, Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:100, at 34-45.

126 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

127 Art. 2, Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

128 Recital 5 and Art. 2, Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. See also Recital 39, Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, on the burden of proving the passing-on of losses.

playing field for undertakings and to improve the conditions under which consumers can enforce their rights.[129] As a result of the introduction of the Directive, the private enforcement of EU competition law – and in fact, also of national competition law[130] – has become subject to the same harmonised regime.

### 5.3.4 Differences between Articles 101 and 102 TFEU

In addition to these similarities, there are also differences between Articles 101 and 102 TFEU. It will be recalled that Articles 101 and 102 TFEU focus on different forms of anticompetitive conduct. Whereas the first provision focuses on cooperation between undertakings, the latter provision focuses on unilateral behaviour of one or several undertakings.[131]

It does not come as a surprise, therefore, that the treaty provisions differ considerably in terms of their structure. Under Article 101 TFEU, the starting point is that any agreement, decision and concerted practice which has as its 'object or effect the prevention, restriction or distortion of competition within the internal market' shall be prohibited (paragraph 1) and shall be automatically void (paragraph 2). The Court, for its part, has added that agreements, decisions and practices which have an 'insignificant effect on the markets' fall outside the scope of the prohibition altogether (the *de minimis* doctrine).[132] As such conduct does not 'appreciably' restrict competition under Article 101 (1) TFEU it should only be assessed, if at all, on the basis of the national competition laws.[133] The reader must be aware that the concept of 'appreciability' used here is different from the concept of 'appreciability' used for determining the effect of the anticompetitive conduct on cross-border trade explained in the previous section.[134]

The structure of Article 102 TFEU is different. The starting point is that dominant positions on the market are allowed and that only the abuse of

129 Recitals 9-10, Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

130 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union also applies to infringements of national competition laws.

131 Wendt 2013, p. 34 and 36.

132 Case C-226/11, *Expedia v. Autorité de la concurrence and Others*, ECLI:EU:C:2012:795, at 16-17, with references to several judgments, including Case 5/69, *Franz Völk v. Établissements J. Vervaecke*, ECLI:EU:C:1969:35, at 7. See also Communication from the 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).

133 Jones & Sufrin 2016, p. 171.

134 Jones & Sufrin 2016, p. 170-177, 235-237.

such positions is forbidden.[135] Dominant undertakings do, however, have a 'special responsibility' not to allow their conduct to impair 'genuine undistorted competition' on the market.[136] Consequently, some actions will be considered permissible if they are committed by a non-dominant undertaking, but abusive if they are committed by one or several dominant undertakings.[137] Indeed, any abuse committed by a dominant undertaking 'is, by its very nature, liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates'.[138] This means that there is no threshold of 'appreciability' for the purpose of determining whether there is an abuse of a dominant position.[139] Finally, it must be noted that Article 102 TFEU does not declare agreements automatically void. It is subject to debate whether, and in what way, the existence of an abusive practice might affect the validity of any agreements imposed by the dominant undertaking on its customers.[140] According to the Court, this issue should be resolved on the basis of the applicable national law.[141]

Several other differences can be recognised if we examine the provisions from the point of view of the alleged infringer. Once it is established that there is an infringement of Article 101 (1) TFEU, the conduct in question may nonetheless escape scrutiny if it satisfies the four conditions listed in Article 101 (3) TFEU. In order for this exemption to apply, the conduct must (1) improve 'the production or distribution of goods' or promote 'technical or economic progress' and (2) allow consumers 'a fair share of the resulting benefit', provided that it (3) does not impose restrictions 'which are not indispensable to the attainment of these objectives' and (4) does not eliminate competition 'in respect of a substantial part of the products in question'. The application of this derogation requires a balance to be struck between the interests of the undertakings involved and those of the direct and indirect users of the products or services covered by the anti-competitive conduct.[142]

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135 Wendt 2013, p. 336-337. A concentration of two or more previously independent undertakings may nonetheless be prohibited on the basis of the Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation).

136 Wendt 2013, p. 342-343.

137 Wendt 2013, p. 342 and 348.

138 Case C-23/14, *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2015:651, at 73.

139 But there is a threshold of 'appreciability' for the purpose of determining whether the conduct 'may affect trade between Member States'. This threshold applies in the context of Articles 101 and 102 TFEU. See section 5.3.3.

140 Devroe, Cauffman & Bernitz 2017, p. 90-96, with references.

141 Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 45: '(…) the competent national administrative or judicial authorities must draw the inferences from the applicability of [Article 102 TFEU] and, where appropriate, rule that the agreement in question is void on the basis, in the absence of relevant Community rules, of their national legislation'.

142 Wendt 2013, p. 451-453.

An agreement is considered to satisfy the conditions under Article 101 (3) TFEU if it is covered by a Block Exemption regulation adopted by the Council or the Commission.[143] These regulations aim at improving the efficiency of the decision-making process and at providing legal certainty to firms operating on certain markets. In the view of the Court, they should not be given a broad interpretation. Consequently, an agreement must fall squarely within the scope of the Block Exemption Regulation in order to benefit from the exemption.[144] It must be noted, however, that where the conditions of a block exemption are not satisfied, the agreement may nonetheless benefit from an individual exemption on the basis of Article 101 (3) TFEU, provided, of course, that the alleged infringer relies upon this provision and puts forward sufficient arguments and evidence.[145]

In addition to the system of exemptions based on Article 101 (3) TFEU, the Court has recognised another possibility for exempting anticompetitive conduct, one that allows for a broader enquiry into the objectives served by the conduct in question, and its necessity and proportionality. The first example is the *Wouters* case, which concerned a regulation adopted by the Dutch Bar Association prohibiting multidisciplinary partnerships between members of the Bar and accountants. The Court admitted that the regulation had certain restrictive effects, but concluded nevertheless that Article 101 (1) TFEU had not been violated since the Dutch Bar Association 'could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession'.[146] In subsequent case law, the Court has recognised several objectives which may be relied upon in order to exempt certain restrictive effects, such as the proper conduct of competitive sport,[147] the quality of the services offered by chartered accountants,[148] and the quality of the work of geologists.[149] It has also stressed the importance of verifying

143 E.g. Council Regulation (EC) No 169/2009 applying rules of competition to transport by rail, road and inland waterway; Commission Regulation (EC) No 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia); 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.

144 Case C-439/09, *Pierre Fabre Dermo-Cosmétique v. Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, ECLI:EU:C:2011:649, at 56-57.

145 Case T-168/01, *GlaxoSmithKline Services Unlimited v. Commission*, ECLI:EU:T:2006:265, at 233-236.

146 Case C-309/99, *Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98, at 110.

147 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 42-56.

148 Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência*, ECLI:EU:C:2013:127, at 93-100.

149 Case C-136/12, *Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato and Autorità garante della concorrenza e del mercato v. Consiglio nazionale dei geologi*, ECLI:EU:C:2013:489 at 53-57.

whether the restrictions of competition 'are limited to what is necessary to ensure the implementation of legitimate objectives'.[150]

Unlike Article 101 TFEU, Article 102 TFEU does not contain any written justifications. It may be recalled that the existence of an abuse is already an exception to the general rule that dominant positions are allowed. Apparently, the drafters of the Treaties did not deem it necessary to provide for any further exemptions.[151] The Court has, however, developed a concept of 'objective justification' in order to absolve abusive practices which seek to achieve a legitimate objective. In the words of the Court, it is 'open to a dominant undertaking to provide justification for behaviour that is liable to be caught by the prohibition under Article [102 TFEU]'.[152] In the same judgment – *Post Danmark I* – the Court mentions two examples: (a) the situation that the conduct is 'objectively necessary', and (b) the situation that the conduct is justified 'by advantages in terms of efficiency that also benefit consumers'.[153]

The conditions for applying the second category of justification defence have been explained by the Court. They show resemblance to,[154] but are not entirely consistent with, the conditions of Article 101 (3) TFEU mentioned above:

> '[With regard to the advantages in terms of efficiency], it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.'[155]

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150 Case C-136/12, *Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato and Autorità garante della concorrenza e del mercato v. Consiglio nazionale dei geologi*, ECLI:EU:C:2013:489, at 54; Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, *API — Anonima Petroli Italiana v. Ministero delle Infrastrutture e dei Trasporti and Ministero dello Sviluppo economico*, ECLI:EU:C:2014:2147, at 48; Joined Cases C-427/16 and C-428/16, *CHEZ Elektro Bulgaria v. Yordan Kotsev and FrontEx International v. Emil Yanakiev*, ECLI:EU:C:2017:890, at 55. See also Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 54, where the Court determined that 'it does not appear that the restrictions which that threshold [contained in the anti-doping rules] imposes on professional sportsmen go beyond what is necessary in order to ensure that sporting events take place and function properly'.

151 See also Rousseva 2010, p. 22.

152 Case C-209/10, *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2012:172, at 40, referring to Case 27/76, *United Brands v. Commission*, ECLI:EU:C:1978:22, at 184; Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission*, ECLI:EU:C:1995:98, at 54-55; Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige*, ECLI:EU:C:2011:83, at 31 and 75.

153 Case C-209/10, *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2012:172, at 41.

154 As noted by Nazzini 2011, p. 305.

155 Case C-209/10, *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2012:172, at 42; Case C-23/14, *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2015:651, at 49.

It is less clear which test should be applied when assessing the first category of justification defence mentioned by the Court in *Post Danmark I*. When is the abuse of a dominant position 'objectively necessary'? Some writers suggest that a *Wouters*-like proportionality test also applies in the context of Article 102 TFEU.[156] At the same time, it appears that dominant undertakings have less room for manoeuvre. In its rare case law on the matter, the Court has emphasised that, in principle, it is up to the public authorities, and not to dominant undertakings, to eliminate products from the market because of health or safety concerns.[157] This suggests that it is more difficult to justify an abuse of a dominant position than it is to justify a concerted practice.[158] Such an approach makes sense, as it takes into account the special responsibility dominant undertakings have, given their position of economic strength on the market.

### 5.3.5 Concurrence of Articles 101 and 102 TFEU?

The existence of difference prompts the question of whether the same situation may fall within the scope of Article 101 and Article 102 TFEU. Is it conceivable that an undertaking has violated Article 101 TFEU, because it has collaborated with other competitors, and has also violated Article 102 TFEU, because it has abused its dominant position on the market? This question may not only arise in proceedings between private individuals,[159] but also in proceedings between alleged infringers and competition authorities. For this reason, we should not only pay attention to preliminary rulings, but also to judgments in administrative proceedings between alleged infringers and the European Commission. Do the General Court and the Court of Justice of the European Union permit a choice between Article 101 and Article 102 TFEU as a basis for establishing anticompetitive conduct?

The case *Hoffmann-La Roche* is important in this regard. Hoffmann-La Roche had concluded so-called 'fidelity agreements' with its purchasers. In order to enjoy a fidelity rebate the purchasers had to buy all or most of their requirements exclusively, or in preference, from Hoffmann-La Roche. The Commission found that Hoffmann-La Roche had abused its dominant position on the relevant markets by imposing these terms on its

156 E.g. Rousseva 2010, p. 268; Mataija 2016, p. 96.

157 As observed in Case T-30/89, *Hilti AG v. Commission*, ECLI:EU:T:1991:70, at 118; Case C-333/94 P, *Tetra Pak International v. Commission*, ECLI:EU:C:1996:436, at 36.

158 In a similar vein, see Monti 2007, p. 203; Lianos 2009, p. 28-29; Jones & Sufrin 2016, p. 370.

159 According to Art. 6 and Recitals 7 and 21 of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, national courts have the power to apply the entirety of Articles 101 and 102 TFEU, also when deciding disputes between private individuals. No prior finding of an infringement is necessary (see also Case C-595/17, *Apple Sales International and Others v. MJA*, ECLI:EU:C:2018:854, at 35).

purchasers. Before the Court of Justice, the question was raised whether the fidelity agreements might also fall within the scope of Article 101 TFEU and whether this would exclude Article 102 TFEU as a legal basis for fining the company. The Court held that:

> '(...) the fact that agreements of this kind might fall within Article [101 TFEU] and in particular within paragraph (3) thereof does not preclude the application of Article [102 TFEU], since this latter article is expressly aimed in fact at situations which clearly originate in contractual relations so that in such cases the Commission is entitled, taking into account the nature of the reciprocal undertakings entered into and to the competitive position of the various contracting parties on the market or markets in which they operate to proceed on the basis of Article [101] or Article [102].'[160]

In the view of the Court, the treaty provisions are not mutually exclusive, but complementary. Consequently, the Commission may elect to proceed on the basis of Article 101 or on the basis of Article 102 TFEU, or – it must be added – on the basis of both provisions.

The case *Ahmed Saeed* provides support for this conclusion. The *Bundesgerichtshof* asked the Court according to which criteria it should review price fixing agreements concluded between air carriers. The Court first determined under what conditions such agreements are void on the basis of Article 101 (2) TFEU.[161] The Court then spelled out the criteria according to which the national court should apply Article 102 TFEU to the case at hand.[162] Clearly, the Court was not prepared to exclude the possibility that one of the air carriers might actually have imposed the tariffs on its competitors. In the words of the Court, it 'cannot be ruled out' that Articles 101 and 102 TFEU 'may both be applicable'.[163] The Court also explicitly rejected the argument, put forward by the Commission and by the United Kingdom, that the assessment under Article 102 TFEU should be substantially similar to the one carried out under Article 101 TFEU. At least one important difference exists between the rules, the Court noted: whereas a concerted practice may qualify for exemption under Article 101 (3) TFEU, 'no exemption may

160 Case 85/76, *Hoffmann-La Roche v. Commission*, ECLI:EU:C:1979:36, at 116.

161 Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 19-29.

162 Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 38-46.

163 Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 37. In a similar vein: Joined Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line and others v. Commission*, ECLI:EU:T:2003:245, at 610; Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, at 33 and 130; Case T-65/98, *Van den Bergh Foods v. Commission*, ECLI:EU:T:2003:281, at 153; Case T-712/14, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v. Commission*, ECLI:EU:T:2017:748, at 94.

be granted, in any manner whatsoever, in respect of abuse of a dominant position'.[164]

Several other examples demonstrate that the Union Courts recognise that the treaty provisions might apply concurrently, but are careful not to conflate the legal tests. According to the General Court, the treaty provisions seek to achieve the same objective – maintaining effective competition within the internal market – but nonetheless constitute 'two independent legal instruments addressing different situations'.[165] The existence of an agreement, a decision of an association of undertakings or a concerted practice is neither necessary nor sufficient to establish a dominant position under Article 102 TFEU.[166] The Commission may not, therefore, 'recycle' the facts constituting a violation of Article 101 TFEU in order to establish a violation of Article 102 TFEU.[167] The converse is true as well. The fact that certain conduct is permissible under Article 101 TFEU does not mean that the same conduct is also permissible under Article 102 TFEU.[168]

This does not mean that the existence of an agreement, a decision of an association of undertakings or a concerted practice should be disregarded when interpreting Article 102 TFEU. The nature and terms of an agreement may support the conclusion that a collective dominant position exists:

> 'The existence of a collective dominant position may (…) flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it. Nevertheless, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question.'[169]

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164 Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 32; repeated in Joined Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line and others v. Commission*, ECLI:EU:T:2003:245, at 1112.

165 Case T-51/89, *Tetra Pak Rausing v. Commission*, ECLI:EU:T:1990:41, at 22. See also Case 6/72, *Europemballage Corporation and Continental Can Company v. Commission*, ECLI:EU:C:1973:22, at 25: 'Articles [101] and [102] seek to achieve the same aim on different levels (…)'; Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, at 33: 'the objectives pursued by each of those two provisions must be distinguished'.

166 Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, at 43 and 45; Case C-413/06 P, *Bertelsmann and Sony Corporation of America v. Commission*, ECLI:EU:C:2008:392, at 119.

167 Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro and Others v. Commission ('Flat Glass')*, ECLI:EU:T:1992:38, at 360.

168 Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, at 131; Case T-712/14, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v. Commission*, ECLI:EU:T:2017:748, at 94.

169 Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, at 45.

Likewise, the fact that certain conduct does *not* have anticompetitive effects under Article 101 (1) TFEU can be an 'indication' that the same conduct does *not* constitute a violation of Article 102 TFEU either.[170] At the end of the day, the outcome might not be different, because the content of one competition rule might affect the content of the other competition rule. However, it must be stressed that such an outcome can only be reached through an interpretation of each individual competition rule, given the fact that the Court is clearly not prepared to conclude that Article 101 TFEU subsumes Article 102 TFEU, or *vice versa*.[171]

### 5.3.6 Interim conclusion

The foregoing analysis has demonstrated that the same set of facts may fall within the scope of application of both Article 101 and Article 102 TFEU. In other words, it is possible to engage in an anticompetitive concerted practice and also abuse a dominant position on the market. The dividing line between these two situations becomes particularly thin in the event of anticompetitive contractual arrangements entered into by undertakings which together hold a dominant position on the relevant market.[172] In such situations, both treaty provisions may have been violated. It flows from this reasoning that the aggrieved party may have a good claim for compensation with respect to any of the infringements, provided that there is a causal relationship between the infringement in question and the harm suffered. It is fair to assume, then, that this party will have a choice to claim compensation for any of the infringements, subject to a prohibition of double recovery for the same losses.

This does not mean that one applicable competition rule cannot impact upon the interpretation of another applicable competition rule. In fact, we have seen some convergence in the interpretation of the separate treaty texts. For instance, similar arguments run through the written and unwritten justification defences which may be relied upon in order to challenge the finding that either Article 101 or Article 102 TFEU has been violated.[173] Meanwhile, it is clear that the provisions cannot be wholly equated. In principle, the Union Courts consider each competition rule on its own merits and do not exclude one of them from the outset. Articles 101 and 102 TFEU are not mutually exclusive, but complementary.

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170 Case T-712/14, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v. Commission*, ECLI:EU:T:2017:748, at 96.

171 Cf. Wendt 2013, p. 386.

172 E.g. in Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro and Others v. Commission ('Flat Glass')*, ECLI:EU:T:1992:38, in Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, ECLI:EU:C:2000:132, and in Case T-712/14, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v. Commission*, ECLI:EU:T:2017:748, the Commission considered that the same behavior constituted a concerted practice as well as an abuse of a collective dominant position.

173 Mataija 2016, p. 102-103.

## 5.4 Articles 101 and 102 TFEU and free movement law

### 5.4.1 Introduction

The third topic is situated at the crossroads of the previous two topics. Having examined competition laws and free movement laws, this section will consider the interface between them. It will be recalled that anticompetitive conduct of private undertakings is governed by Articles 101 and 102 TFEU. We have also seen that several free movement rules – although traditionally associated with controlling Member States' behaviour – govern certain actions of individuals.[174]

This subsection examines whether these regimes may be applicable to a single set of facts. Are private parties, for instance, obliged to comply with both sets of rules if they impose their terms and conditions on market players? And if that is the case, may the interested party then rely upon the rule of his choice, for instance when claiming compensation for the losses sustained, notwithstanding the applicability of another treaty provision? Before analysing the case law of the Court (subsection 5.4.4), we will take a step back and examine the most important similarities and differences between the competition laws and free movement laws at issue (subsections 5.4.2-5.4.3).

### 5.4.2 Similarities and differences between the provisions

At the very outset, it must be noted that both the free movement provisions and the competition rules are aimed at establishing the internal market and ensuring its proper functioning.[175] Their overall objective is to create and maintain 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.[176] Protecting individuals against restrictions on their free movement rights is a necessary first step in order to achieve this objective. But removing such restrictions will not be enough to ensure a proper functioning of the internal market. Even if access to a particular market is secured, economic activity can still be hindered when undertakings or associations of undertakings restrict or prevent competition on that market.[177]

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174 Mortelmans 2001, p. 781-803, has called this development the 'privatisation' of free movement law. A comparable development has taken place in the field of competition law. Under certain circumstances, these rules – although addressed to undertakings – can also be applied to Member States' behavior. This development – the 'publicisation' of competition – will not be dealt with in detail here, given the focus of this book on the relationships between individuals.

175 Which is one of the aims of the Union, according to Art. 3 (3) TEU.

176 As expressed in Art. 26 (2) TFEU.

177 Swaak & Van der Woude 2018, p. 715.

For this reason, the internal market also 'includes a system ensuring that competition is not distorted'. This statement, laid down in one of the Protocols annexed to the TFEU, underlines that free movement law and competition law are complementary counterparts.[178] The Court has also emphasised that both regimes contribute to achieving the same ultimate goal: to accomplish economic integration and even to contribute to the process of creating an ever closer union among the peoples of Europe.[179] Against this background, scholarship stresses that the two regimes are part of a 'seamless web' promoting cross-border competition.[180]

However, the two sets of rules cannot be fully understood by reference to one overarching principle of free trade and competition only. Both regimes also pursue their own particular aims.[181] Free movement law is traditionally directed at the conduct of public authorities and involves general interests. It targets restrictive measures and scrutinises the proportionality of these measures. By contrast, competition law is traditionally directed at the conduct of private undertakings and associations of private undertakings who pursue their own interests. It focuses on the economic effects of the conduct of these undertakings and associations on the state of competition on a particular market. The underlying objective is to promote the efficient operation of these markets.[182]

The differences between the two regimes come to light when we examine the criteria according to which a restriction of either free movement or competition must be established.[183] Under Article 101 (1) TFEU, it is necessary to analyse the economic and legal context in which the agreements or practices occur and to assess their actual and potential effects on competition on the relevant market.[184] Likewise, Article 102 TFEU requires the person alleging a breach to define the relevant market and to assess the economic position of the undertaking or undertakings on this market.[185]

178 Protocol No. 27 on the internal market and competition. A similar conclusion is drawn by Baquero Cruz 2002, p. 90; Krenn 2012, p. 204; Mataija 2016, p. 116-117.

179 This connection is made by the Court in its Opinion 1/91, at 17-18. The Court has also remarked that Art. 101 TFEU 'constitutes a fundamental provision which is essential (…) for the functioning of the internal market' (in Case C-126/97, *Eco Swiss China Time v. Benetton International*, ECLI:EU:C:1999:269, at 36; Case C-453/99, *Courage v. Crehan*, ECLI:EU:C:2001:465, at 20).

180 See especially Gyselen 1996, p. 242; Mortelmans 2001, p. 622. See also Prechal & De Vries 2009, p. 5-24; Mataija 2016, p. 116-119.

181 Baquero Cruz 2002, p. 90-91.

182 Mataija 2016, p. 119-120.

183 Mortelmans 2001, p. 630-632, and Mataija 2016, p. 144.

184 Case C-345/14, *SIA 'Maxima Latvija' v. Konkurences padome*, ECLI:EU:C:2015:784, at 26-30, with references to earlier judgments, and especially to Case C-234/89, *Stergios Delimitis v. Henninger Bräu*, ECLI:EU:C:1991:91, at 15-26.

185 Case 27/76, *United Brands v. Commission*, ECLI:EU:C:1978:22, at 65.

By contrast, economic analysis does not play an important role in the field of free movement.[186] Unlike the competition rules, which require that the effect of the anticompetitive conduct on cross-border trade is 'appreciable' in economic terms,[187] the free movement provisions prohibit *any* restriction that is liable to prevent or hinder access to the market in respect of persons who have sought to exercise their rights of free movement.[188]

The same difference can be seen if we adopt the perspective of the defendant.[189] If the aggrieved party alleges a restriction of free movement, the defendant may respond that the restriction served a legitimate objective, such as public policy, public security or public health,[190] the protection of fundamental rights,[191] or some other objective of 'general interest',[192] and that the means chosen were necessary and appropriate for attaining the stated objective.[193] Again, economic analysis does not play an important role in this context. In fact, it is settled case-law that restrictions to free movement cannot be justified by objectives of a 'purely economic nature'.[194] The underlying idea is that economic concerns of Member States should not stand in the way of the realisation of the internal market.[195] By contrast, the competition rules typically allow for purely economic justifications, such as

186 Mortelmans 2001, p. 636-637.
187 See *supra* section 5.3.3.
188 See *supra* section 5.2.2.
189 Mortelmans 2001, p. 635-645.
190 See, with regard to the free movement of workers, explicitly Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 86; Case C-350/96, *Clean Car Autoservice GmbH v. Landeshauptmann von Wien*, ECLI:EU:C:1998:205, at 24. The exceptions, and their interpretation, may differ depending on the fundamental freedom at issue.
191 Such as the right to take collective action for the protection of workers: Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 77; Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, at 103.
192 Such as the recruitment and training of young players (Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 106; Case C-325/08, *Olympique Lyonnais v. Olivier Bernard and Newcastle United*, ECLI:EU:C:2010:143, at 39).
193 See e.g. Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*, ECLI:EU:C:1993:125, at 32; Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, at 37; Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 104; Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 75.
194 See already Case 7/61, *Commission v. Italy*, ECLI:EU:C:1961:31, where the Court held that quantitative restrictions on importation can only be justified by 'eventualities of a non-economic kind'. See also Case C-109/04, *Karl Robert Kranemann v. Land Nordrhein-Westfalen*, ECLI:EU:C:2005:187, at 34; Joined Cases C-52/16 and C-113/16, *SEGRO* (C-52/16) *and Günther Horváth* (C-113/16), ECLI:EU:C:2018:157, at 123.
195 See e.g. Babayev 2016, p. 992.

the existence of efficiency advantages that benefit the consumer[196] and the protection of legitimate business interests.[197]

The approach followed under free movement law has, it is true, softened over the years. Even though the Court is clearly not prepared to depart openly from the principle that purely economic reasons cannot justify a restriction of a fundamental freedom, the Court does accept certain economic reasons as justifications, provided that they serve the achievement of a non-economic objective in the public interest. It must be noted, however, that this path towards justification is straight and narrow. It is generally reserved to public authorities who wish to maintain the financial balance of a particular national security system.[198] The statements issued by the Court should, moreover, be treated with 'circumspection', as Advocate General Jacobs has argued.[199] They contain a 'double derogation', as they derogate both from the prohibitions and from the exceptions written down in the free movement provisions.[200]

It is nonetheless arguable that some public interest justifications which have been expressly recognised by the Court are essentially based on economic considerations.[201] In *Bosman*, for instance, the Court admitted that transfer rules may be justified by the objective of maintaining a financial and competitive balance between football clubs.[202] However, it must be observed that the Court was ultimately motivated not by purely economic reasons but by the 'considerable social importance of sporting activities and in particular football in the Community'.[203] Such cases do not, therefore, appear to have altered the default position adopted within the fabric of free movement law, namely that economic reasons can only be advanced as justifications if they serve the achievement of a non-economic objective in the public interest.

196 See Art. 101 (3) TFEU and, in the context of Art. 102 TFEU, Case C-95/04 P, *British Airways v. Commission*, ECLI:EU:C:2007:166, at 85-86; Case C-209/10, *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2012:172, at 40-41).

197 In the context of Art. 102 TFEU: Case 27/76, *United Brands v. Commission*, ECLI:EU:C:1978:22, at 189-190; Opinion A-G Colomer, Joined Cases C-468/06 to C-478/06, *Sot. Lélos kai Sia and Others v. GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE*, ECLI:EU:C:2008:180, at 99-105.

198 See e.g. Case C-158/96, *Raymond Kohll v. Union des Caisses de Maladie*, ECLI:EU:C:1998:171.

199 Opinion A-G Jacobs, Case C-147/03, *Commission v. Austria*, ECLI:EU:C:2005:40, at 31.

200 See also Opinion A-G Sharpston, Case C-73/08, *Nicolas Bressol and Others v. Gouvernement de la Communauté française*, ECLI:EU:C:2009:396, at 92.

201 Barnard 2009, p. 280.

202 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 105-107.

203 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 106.

Has this position been changed since the Charter of Fundamental Rights has been endowed with binding force? Indeed, some writers have suggested that the Charter creates more room for private parties to advance economic reasons as justifications. They argue that Article 16 of the Charter, which protects the freedom to conduct a business, may serve as a counter mechanism to the fundamental freedoms.[204] It remains to be seen, however, to what extent the freedom to conduct a business may effectively be relied upon in order to justify a restriction of a free movement right. Surely not every economic interest will be protected as a fundamental right under Article 16 of the Charter. The Court, for its part, has chosen to assess the relationship between fundamental freedoms and fundamental rights within the framework of the free movement provisions.[205] In spite of Article 16 of the Charter, it is quite unlikely, therefore, that the Court will confirm that restrictions of free movement rights can generally be justified by economic arguments.

What about competition law? Here too, it seems that the approach has softened over the years. It will be recalled that the Court has recognised several objectives of general interest which may be relied upon in order to exempt certain effects restrictive of Article 101 (1) TFEU that are inherent in the pursuit of a legitimate objective in the general interest.[206] In fact, *Meca-Medina and Majcen* confirms that such objectives cannot be purely economic in nature. Responding to the argument raised by Meca-Medina and Majcen that the anti-doping rules at issue also protected the economic interests of the International Olympic Committee and could not, therefore, be regarded as inherent in the proper conduct of competitive sport, the Court confirmed that the rules could only be exempted if their restrictive effects did not go beyond what is necessary in order to ensure that legitimate objective in the general interest.[207] We have seen, moreover, that a broader enquiry into the objectives served by the anti-competitive conduct in question, and its necessity and proportionality, is also possible in the context of Article 102 TFEU.[208]

Still, the question can be raised whether the acceptance of these exemptions has really caused competition law to drift away from its core objective, which is to promote the efficient operation of the internal market. It is telling, in this regard, that some writers have sought to reformulate the unwritten exemptions introduced by the Court in terms of the written treaty provisions. Wendt, for instance, argues that non-market objectives can and

204 See e.g. Babayev 2016, p. 997-1005.

205 See e.g. Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 77-90; Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, ECLI:EU:C:2007:809, at 90-111.

206 See *supra* section 5.3.4.

207 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 47, responding to the argument raised by the appellants that the anti-doping rules also protected the economic interests of the International Olympic Committee.

208 See *supra* section 5.3.4.

should be taken into account either under Article 101 (3) TFEU, to the extent that the anti-competitive conduct yields economically beneficial effects for consumers,[209] or under Article 106 (2) TFEU, which provides for a general justification avenue in respect of services in the general interest.[210] Such statements show that economic considerations are still central to competition law, just as non-economic considerations are still at the heart of free movement law.

A final point of divergence between the two regimes is important to consider in the present context. It may be recalled that the infringement of both Article 101 and Article 102 TFEU entitles the aggrieved party to claim compensation, directly on the basis of Union law, provided that there is a causal relationship between the harm suffered and the infringement.[211] The Union legislature has also harmonised the rules on issues such as evidence disclosure, joint and several liability, and the range of available defences in the field of competition law.[212] Such an enforcement regime does not exist in the field of free movement law. As the case law stands, it will be up to national law to provide the aggrieved party with a claim for compensation, subject only to compliance with the requirements of equivalence and effectiveness.[213]

### 5.4.3 Concurrence of competition law and free movement law?

For the reasons stated above, the aggrieved party may or may not prefer to proceed on the basis of competition law rather than on the basis of free movement law.[214] The question to consider is whether the law permits such a choice. May the aggrieved party plead that the other party has violated free movement law if the conduct at issue is also governed by one or more competition rules? Will the argument raised by the defendant that the competition rules govern the case exclusively be successful? As the treaty provisions themselves do not provide any guidance, we will have to analyse the case law. Do the Union Courts recognise the possibility that free movement law and competition law may be applicable concurrently to a single set of facts?

In principle, the Court examines each rule on its own terms. Consider *Meca-Medina* as an example. In this case about the compatibility of anti-doping rules with the rules on competition and the freedom to provide services, the Court stressed that sport is only subject to Union law 'in so

209 Wendt 2013, p. 451-519.
210 Wendt 2013, p. 519-546.
211 *Supra* section 4.3.
212 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.
213 *Supra* section 4.3.
214 Mataija 2016, p. 149-150.

far as it constitutes an economic activity'.[215] The Court then pointed out that free movement law only applies if the activity 'takes the form of gainful employment or the provision of services for remuneration',[216] and does not apply to 'rules concerning questions which are of purely sporting interest'.[217] At the same time, the Court underlined that the mere fact that the rules fall outside the scope of free movement law does not mean that they also fall outside the scope of the other treaty provisions.[218] According to the Court, sporting rules must satisfy all the relevant requirements flowing from the rules relating to the freedom of movement for workers, the freedom to provide services, and competition.[219] If the rights to free movement have not been restricted, competition law may still apply:

> '(…) even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity (…), that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles [101 and 102 TFEU] nor that the rules do not satisfy the specific requirements of those articles.'[220]

So, the mere fact that an activity is not governed by free movement law does not mean that competition law does not apply. This approach is in line with earlier judgments, in which the Court confirmed that transport activities are governed by competition law, even though such activities are not subject to the general rules relating to the freedom to provide services, because of the derogation provided for in Article 58 (1) TFEU.[221]

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215 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 22, with references to Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, ECLI:EU:C:1974:140, at 4; Case 13/76, *Gaetano Donà v. Mario Mantero*, ECLI:EU:C:1976:115, at 12; Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 73; Joined Cases C-51/96 and C-191/97, *Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL and others*, ECLI:EU:C:2000:199, at 41; Case C-176/96, *Jyri Lehtonen and Castors Braine v. FRBSB*, ECLI:EU:C:2000:201, at 32.

216 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 23.

217 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 25.

218 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 26-28.

219 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 29-30.

220 Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492, at 31. Along the same lines: Case T-144/99, *Institute of Professional Representatives before the European Patent Office v. European Commission*, ECLI:EU:T:2001:105, at 66-67; Case C-49/07, *MOTOE v. Elliniko Dimosio*, ECLI:EU:C:2008:376, at 22; Case T-23/09, *Conseil national de l'Ordre des pharmaciens (CNOP), Conseil central de la section G de l'Ordre national des pharmaciens (CCG) v. European Commission*, ECLI:EU:T:2010:452, at 81.

221 Joined Cases 209/84 to 213/84, *Asjes and Others*, ECLI:EU:C:1986:188, at 40-45; Case 66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:1989:140, at 5. See *supra* section 5.2.4.

The converse is true as well. The fact that a situation escapes competition law scrutiny does not mean that the same situation also falls outside the scope of free movement law. Take *Viking Line* as an illustration. This Finnish ferry operator sought to reflag one of its vessels – the loss-making *Rosella* – to Estonia, so as to take advantage of the possibility of concluding a new collective bargaining agreement. During legal proceedings, the question was raised whether a strike called by the trade unions would unlawfully restrict the freedom of establishment of the ferry operator. Before the Court, the trade unions relied on the *Albany* case, in which the Court had held that collective bargaining agreements fall outside the scope of Article 101 TFEU because they pursue important social policy objectives.[222] The trade unions argued that the same exception should be made for collective actions in the context of the freedom of establishment and the freedom to provide services. The Court did not buy this argument:

> '[T]he fact that an agreement or an activity are [sic] excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances (…).'[223]

Once again, these examples illustrate that, in the absence of express derogations, situations falling within the scope of Union law are governed by all the requirements resulting from free movement law and from competition law. It flows from this reasoning that the same situation might fall both within the scope of free movement law and within the scope of competition law.[224] This conclusion was drawn by A-G Lenz in the *Bosman* case:

> 'No reason can be seen why the rules at issue in this case [the transfer rules and nationality clauses adopted by the football associations, RdG] should not be subject both to Article [45 TFEU] and to [EU] competition law. The [TFEU] at various places regulates the inter-relationship of the various fields in which its provi-

222 Case C-67/96, *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430, at 59-60.

223 Case C-438/05, *International Transport Workers' Federation v. Viking Line*, ECLI:EU:C:2007:772, at 53, referring to Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECLI:EU:C:2006:492. Along the same lines: Case C-271/08, *Commission v. Germany*, ECLI:EU:C:2010:426, at 46-48.

224 E.g. Baquero Cruz 1999, p. 619: '(…) their joint application should not be seen as a systemic misconstruction (…), but rather as the natural effect of their overlapping and yet autonomous fields of application'; Krenn 2012, p. 205: '(…) in fact the Court applies competition law and fundamental freedoms cumulatively'; Mataija 2016, p. 127: '(…) it is possible that the same conduct is subject to and infringes both the competition and free movement rules'.

> sions apply. For Article [45] on the one hand and Article [101] et seq. on the other hand there is no such provision, so that in principle both sets of rules may be applicable to a single factual situation.'[225]

Having examined both regimes in detail, A-G Lenz found that the rules adopted by national and international football associations did not only restrict the right to free movement of workers, but also violated the current Article 101 TFEU.[226] The Court, for its part, decided not to deal with the competition provisions in detail. Having concluded that the football associations had violated the right to free movement of workers, the Court did not find it necessary to embark upon an examination of today's Articles 101 and 102 TFEU:

> 'Since both types of rule [the transfer rules and nationality clauses adopted by the football associations, RdG] to which the national court's question refer [sic] are contrary to Article [45 TFEU], it is not necessary to rule on the interpretation of Articles [101 and 102 TFEU].'[227]

This was not an isolated incident.[228] On occasion, the Court has also decided to skip the analysis of the free movement provisions after having examined the conduct on the basis of the relevant competition rules.[229] This approach is surprising, given the Court's own position that the two sets of rules are to be distinguished.

This is not to say that the outcome will necessarily be different, depending on whether the case is assessed on the basis of free movement law or on the basis of competition law. Indeed, it has been argued that the two sets of rules should be interpreted harmoniously. A-G Lenz, for instance, argued that a 'uniform result' should be reached in *Bosman*.[230] The same approach has been advanced by A-G Kokott, who submitted that 'conflicting assessments of the fundamental freedoms and competition law are to be avoided in principle'.[231] Consider also the position of Weatherill, who has argued that 'there is and should be an ultimate functional

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225 Opinion A-G Lenz, Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:293, at 253.

226 Opinion A-G Lenz, Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:293, at 287.

227 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463, at 138.

228 Mortelmans 2001, p. 640-641; Van den Bogaert 2005, p. 194-198; Mataija 2016, p. 128-130.

229 Case C-309/99, *Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98, at 119-123; Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, *API — Anonima Petroli Italiana v. Ministero delle Infrastrutture e dei Trasporti and Ministero dello Sviluppo economico*, ECLI:EU:C:2014:2147, at 59.

230 Opinion A-G Lenz, Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:293, at 278.

231 Opinion A-G Kokott, Cases C-403/08 and C-429/08, *Football Association Premier League and Others v. QC Leisure and Others*, ECLI:EU:C:2011:43, at 249.

comparability between the inquiries conducted under these economic law provisions'.[232] To some extent, this approach has been followed by the Court. As the previous section has demonstrated, both free movement law and competition law nowadays take account of factors other than those expressly mentioned in the relevant treaty provisions. There clearly is some convergence in the interpretation of the two sets of rules.

However, the previous section has also demonstrated that free movement law and competition law cannot be wholly equated. Differences between them continue to exist. What is more, the Court itself has occasionally refused to answer preliminary questions concerning the interpretation of competition law, because a lack of sufficient factual and legal information, but has nonetheless chosen to answer the preliminary questions concerning the interpretation of free movement law asked by the same court.[233] Against this background, it is submitted that it is unwelcome if the Court skips the analysis of one of the applicable treaty provisions if it does have sufficient factual and legal information available. After all, it cannot be ruled out that the application of the treaty provisions may lead to different outcomes. In any event, the Court's own position that free movement law and competition law are complementary implies that a convergence in outcome can only be reached through an interpretation of each set of rules, and only to the extent that the outcome can be accommodated within that framework, having regard to the underlying objectives of free movement law and competition law respectively.

### 5.4.4 Interim conclusion

This subsection has considered the interface between the laws of competition and free movement. It has discussed the similarities and differences between these regimes and has examined whether they may be applicable to the same set of facts. Even though the Court has acknowledged that both regimes contribute to achieving similar objectives, and in spite of the fact that both regimes take account of factors other than those expressly mentioned in the underlying treaty provisions, differences between them continue to exist. For this reason, it might be preferable for the aggrieved party to proceed on the basis of either competition law or free movement law. In view of the principled position taken by the Court, which is that the

232 Weatherill 2013, p. 414.

233 Joined Cases C-51/96 and C-191/97, *Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL and others*, ECLI:EU:C:2000:199, at 28-40; Case C-176/96, *Jyri Lehtonen and Castors Braine v. FRBSB*, ECLI:EU:C:2000:201, at 22-29; Case C-134/03, *Viacom Outdoor v. Giotto Immobilier SARL*, ECLI:EU:C:2005:9421-33; Case C-380/05, *Centro Europa 7 v. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni, Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, ECLI:EU:C:2008:59, at 57-71; Case C-384/08, *Attanasio Group v. Comune di Carbognano*, ECLI:EU:C:2010:133, at 32-35; Case C-234/12, *Sky Italia v. Autorità per le Garanzie nelle Comunicazioni*, ECLI:EU:C:2013:496, at 30-33.

regimes are not mutually exclusive but complementary, it is submitted that the interested party may indeed rely upon the rule of his choice, notwithstanding the applicability of another treaty provision. As there exists no order of priority between free movement law and competition law, any convergence in outcome must be reached through an interpretation of the rule at issue, and can only be attained to the extent that such an outcome can be accommodated within the framework governing free movement and competition respectively.

## 5.5 Conclusion

This chapter has examined how the Union Courts approach situations of concurrence of rules belonging to the body of primary Union law. It has discussed the relationship between equal treatment and free movement rules, between competition rules, and between free movement and competition rules respectively. Having discussed their similarities and differences, each section has considered the question of whether, if at all, Union law permits the aggrieved party to rely upon the rule of his choice, notwithstanding the applicability of another treaty provision.

The analysis of the case law demonstrates that the Union Courts have chosen familiar solutions when dealing with overlaps between rules belonging to the body of primary Union law. They assume that each rule must be considered on its own merits and that no rule should be excluded in advance. In the absence of express derogations, situations falling within the scope of Union law are governed by all the requirements resulting from the treaty provisions governing non-discrimination, free movement, and competition law respectively. The applicability of one treaty provision does not, in principle, affect the scope of application of another treaty provision. In fact, the Union Courts assume that each rule ought to have its intended legal effect if the necessary elements have been established. It flows from this reasoning that concurrently applicable rules may, in principle, be applied cumulatively, so as to realise the objectives underlying each rule to the greatest possible extent.

The fact that each applicable rule should be considered on its own terms does not mean that one rule cannot impact upon the interpretation of another rule. In fact, we have seen some convergence in the interpretation of the different sets of rules. For instance, similar arguments run through the written and unwritten justification defences which may be relied upon in order to challenge the finding that either Article 101 or Article 102 TFEU has been violated. Likewise, both free movement law and competition law nowadays takes account of factors other than those expressly mentioned in the treaty provisions themselves. This does bring the sets of rules closer together. Meanwhile, it is clear that the Union Courts are careful not to exclude one of the rules from the outset. The violation of one provision does not imply the violation of another provision. Likewise, the permissibility

of certain conduct under one branch of primary Union law does not imply that the same conduct must also be considered permissible under another branch of primary Union law. As the rules continue to exist side by side, any convergence between them must be realised through interpretation, to the extent that each separate rule accommodates a convergence in outcome.

Although concurrence is principally allowed, an exception must be made when the treaty provisions dictate that one of the rules applies exclusively. This chapter has examined one such example, namely the relationship between the general prohibition of discrimination on grounds of nationality and the free movement provisions governing persons and services. Importantly, the analysis has demonstrated that the general prohibition of discrimination on grounds of nationality does not embrace all the cases falling within the scope of the free movement provisions. This chapter has submitted that it is impossible, therefore, to maintain the view that a violation of one of the free movement rights automatically and inevitably constitutes a violation of Article 18 TFEU. Nor can it be said that the absence of a violation of one of the free movement rights necessarily implies that Article 18 TFEU has not been violated either. Consequently, we should proceed with caution if we want to use the principle *lex specialis derogat legi generali* in order to find the appropriate answers. As soon as the facts do fall within the scope of application of one of the free movement provisions, however, the Court tends to assess the case only in the light of these provisions. To that extent, the scope of application of Article 18 TFEU is affected by the free movement provisions.

The next chapter shifts the attention to the body of secondary Union law. It examines the relationship between Union rules contained in directives and regulations, and their relationship to the applicable national law. Can we see the same principles at work when we analyse the statements made by the Union legislature and by the Court of Justice of the European Union?