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Contractual Discretion and the Limits of Free Movement Law

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Abstract: The article explores the interplay between the principle of freedom of contract and free movement law. The former is not only expressed in the freedom to choose with whom to enter into a contract and shape its content, but it is also manifested in the freedom to decide whether or not to *opt out* of non-mandatory contract law rules. In this regard, the article examines the extent to which the boundaries of free movement law in a contractual context could be considered to be essentially defined by the reach of such forms of contractual discretion. In addressing this query, it draws a distinction in the role of contractual discretion in the context of individual ways of coordination of contractual relationships in the form of individual contractual preferences and national ones in the form of non-mandatory contract law rules. Unlike the former, it is submitted that contractual discretion should not be taken as a decisive factor in determining the scope of free movement law as regards non-mandatory contract law rules. In particular, it is suggested to consider these rules to fall outside the scope of free movement law because of them themselves not having an effect on free movement as such, rather than due to contracting parties' discretion over their applicability.

Résumé: Cet article explore les interactions entre le principe de la liberté contractuelle et celui de la liberté de circulation. La première ne s'exprime pas seulement à travers la liberté de choisir avec qui contracter et de déterminer le contenu du contrat mais elle se manifeste également par la liberté de décider d'être assujetti ou non aux règles non impératives de droit des contrats. À cet égard, cet article étudie la mesure dans laquelle les limites à la liberté de circulation dans un contexte contractuel pourraient être considérées comme étant essentiellement définies par la portée de ces formes de pouvoir discrétionnaire contractuel. Au cours de cette analyse, il établit une distinction entre le rôle du pouvoir discrétionnaire contractuel dans le contexte des modalités individuelles de coordination des relations contractuelles sous la forme de préférences contractuelles individuelles et des modalités nationales sous la forme de règles non impératives de droit des contrats. À l'opposé, il est soumis que le pouvoir discrétionnaire contractuel ne devrait pas être vu comme un facteur décisif dans la détermination de l'étendue de la liberté de circulation en ce qui concerne les règles non impératives de droit des contrats. Plus particulièrement, il est proposé de considérer que ces règles ne relèvent pas de la législation sur la liberté de circulation parce qu'elles n'ont pas en elles-mêmes un effet sur la liberté de circulation en tant que telle, mais plutôt en raison du pouvoir discrétionnaire des parties contractantes sur leur applicabilité.

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Zusammenfassung: Der Aufsatz befasst sich mit dem Zusammenspiel von dem Grundsatz der Vertragsfreiheit und dem Recht auf Freizügigkeit. Ersteres findet seinen Ausdruck nicht nur darin, dass jedermann frei ist sich seinen Vertragspartner auszusuchen und den Vertrag mitzugestalten, sondern auch darin, dass darüber entschieden werden kann, ob die Normen des dispositiven Vertragsrechts zur Anwendung gelangen oder nicht. Diesbezüglich setzt sich der Aufsatz damit auseinander, inwieweit in einem vertraglichen Kontext davon auszugehen ist, dass die Grenzen des Freizügigkeitsrechts im Wesentlichen von der Reichweite des vertraglichen Ermessens definiert werden. Innerhalb dieser Fragestellung wird ein Unterschied gemacht zwischen dem vertraglichen Ermessen von natürlichen Personen, die mittels individualvertraglicher Präferenzen ihre vertraglichen Beziehungen gestalten und den nationalstaatlichen Rahmenbedingungen in Form des dispositiven Vertragsrechtes. Im Unterschied zu Ersterem, wird vertreten, dass vertragliches Ermessen kein entscheidender Faktor bei der Bestimmung des Umfangs des Freizügigkeitsrechtes darstellen sollte, jedenfalls soweit es das dispositive Vertragsrecht betrifft. Im Besonderen wird vorgeschlagen, dass diese Normen des dispositiven Vertragsrechts nicht in den Bereich des Freizügigkeitsrechtes fallen, da sie selbst keine Auswirkungen auf die Freizügigkeit als solches haben. Vielmehr liegt es im Ermessen der Vertragsparteien, ob die Normen zur Anwendung kommen sollen oder nicht.

1. Introduction

Freedom of contract can be defined as the liberty of an individual to arrange its legal relationships with others according to its own consideration and interest.[1] It is expressed in the freedom to choose whether or not and with whom to enter into a contract, as well as decide its content.[2] It is also manifested in the ability of contracting parties to self-determine whether or not to *opt out* of the scope of non-mandatory contract law rules.[3] Freedom of contract constitutes an inherent aspect of carrying out an economic activity and, accordingly, is the necessary pre-requisite for the exercise of free movement rights. The extent of the interplay between freedom of contract and free movement law, however, could also be considered from a different angle, particularly taken in the context of determining the reach of the latter in a contractual context. The question that arises here essentially concerns the extent to which the scope of the free movement provisions within the framework of contractual relations is delineated by the ambit of contractual discretion.

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1 D. Coester-Waltjen, 'Constitutional Aspects of Party Autonomy and Its Limits – The Perspective of Law', in *Party Autonomy and the Role of Information in the Internal Market*, eds S. Grundmann, W. Kerber & S. Weatherill (Berlin: Walter de Gruyter 2001), p 41.

2 Article II-1:102 of the Draft Common Frame of Reference (C. von Bar et al. (eds), *Principles, Definitions and Model Rules of European Private Law* (Online edition, Munich: Sellier 2009).

3 Its importance has been acknowledged in the Commission's project to harmonize national contract law rules. See, for instance, Communication from the Commission to the European Parliament and the Council, a More Coherent European Contract Law: An Action Plan COM (2003) 68 final, para. 27.

According to the Court's jurisprudence, so far only the scope of the prohibition of discrimination on grounds of nationality under Article 45 of the Treaty on the Functioning of the European Union (hereafter 'TFEU') has been explicitly extended to include private contracts.[4] The Court, however, has refused to apply, for instance, Article 34 TFEU to a contractual clause agreed by two private parties.[5] The conclusion one could draw in this regard is that the applicability of free movement law in a contractual context is essentially delimited by the reach of contractual discretion. Generally, contractual decisions in the form of preferences of contracting partners and contractual obligations expressed in the internal market are not such to restrict free movement. This could be explained by the fact that there is no obligation to comply with them, as others, exercising contractual discretion, are free to have recourse to other opportunities in the market. The need for regulatory intervention only arises when the ability to effectively exercise contractual discretion by others is not possible or significantly limited – i.e., instances involving employees. Considered this way, contractual discretion itself operates as a central factor in defining the reach of free movement law in a contractual context.

However, does this also extend to non-mandatory contract law rules? The predominant view so far, in fact, has been that these rules are compatible with free movement law, because there is no obligation to comply with them pursuant to contracting parties' discretion. Such presumption of compatibility of these essentially national rules, nevertheless, seems problematic from a conceptual point of view. There are several reasons for this, an important one being the fact that non-mandatory rules entail an actual duty to comply with them when parties have not contracted around them. It is therefore argued that whether or not these rules fall within the scope of the free movement provisions should ultimately be decided following the traditional orthodoxy of looking first and foremost at their effect, irrespective of whether their scope can be avoided by a rational choice of contracting parties. In particular, it is proposed to consider these rules to fall outside the scope of the free movement provisions due to them themselves not having an effect on free movement as such, rather than due to contracting parties' discretion per se.[6]

The article first briefly outlines the place of freedom of contract within the Union *acquis*. It then looks at the role of that freedom in the assessment of

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4 Case C-281/98, *Angonese* [2000] ECR I-4139, paras 34 and 35. This is not to mention the prohibition of discrimination imposed on the contractual discretion exercised by public authorities. See, for instance, Case 45/87, *Commission* v. *Ireland* [1988] ECR 4929.

5 Case C-159/00, *Sapod Audic* [2002] ECR I-5031, para. 74.

6 This specifically concerns these rules themselves and not their diversity, which has been the premise for the Commission's endeavour to harmonize national contract law rules. See Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011) 635 final.

individual contractual preferences and non-mandatory contract law rules in light of the free movement provisions. It concludes by distinguishing the effect of contractual discretion on the reach of free movement law in the context of, on the one hand, individual ways of coordination of private contractual relations in the form of individual contractual preferences and, on the other hand, national ones in the form of non-mandatory contract law rules.

2. Freedom of Contract in the Union *Acquis*

Freedom of contract is one of the essential principles that the internal market is built on. The treaties themselves do not contain provisions that explicitly refer to freedom of contract. Notwithstanding this fact, however, it can be considered as being part of Union law based on two different premises.

On the one hand, it is necessary to mention Article 16 of the Charter of Fundamental Rights, which enshrines freedom to conduct business as a fundamental right. In particular, it reads that 'the freedom to conduct a business in accordance with Union law and national laws and practices is recognised'.[7] Even though the wording of Article 16 does not explicitly set out freedom of contract as a right enshrined in the Charter, it is nevertheless considered to be protected by that provision.[8] As pointed out by the Court in *Sky Österreich* and reiterated in *Alemo Herron*, 'the protection afforded by Article 16 of the Charter covers the freedom to exercise an economic or commercial activity, *the freedom of contract* and free competition'.[9]

According to the Explanations relating to the Charter,[10] Article 16 is based on the Court's jurisprudence, which contains references to the principle of freedom of contract. The Court, for instance, has recognized freedom of contract as a 'general principle of civil law' and has also acknowledged several specific aspects related to the exercise of contractual freedom.[11] In particular, according

7 Article 16 of Charter of Fundamental Rights of the European Union [2010] OJ C83/389.

8 S. Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of 'Freedom of Contract', 10(1). *ERCL* (*European Review of Contract Law*) 2014, p (167) 171.

9 Case C-283/11, *Sky Österreich*, 22 Jan. 2013, n.y.r., para. 42; Case C-426/11, *Alemo-Herron*, 18 Jul. 2013, n.y.r., para. 32.

10 Explanations relating to the Charter of Fundamental Rights (2007/C303/02) [2007] OJ C-303/17, p 23.

11 Case C-277/05, *Société thermale d'Eugénie-les-Bains* [2007] ECR I-6415, para. 28; Case C-412/06, *Hamilton* [2008] ECR I-2383, para. 42. See also Case C-240/97, *Spain* v. *Commission* [1999] ECR I-6571, para. 99; Case C-489/07, *Pia Messner* v. *Firma Stefan Krüger* [2009] ECR I-7315, para. 26. In addition, see Opinion of AG Geelhoed in Case C-334/00, *Tacconi* v. *Heinrich Wagner* [2002] ECR I-7357, para. 55; Opinion of AG Trstnjak in Case C-331/05, *Internationaler Hilfsfonds* v. *Kommission* [2007] ECR I-5475, para. 93.

to the Court, individuals are free 'to choose whom to do business with',[12] 'to define the terms of their legal relationship',[13] 'to amend contracts concluded by them'[14] and 'to dispose of one's property'.[15] Furthermore, the principle of freedom of contract encompasses not only the freedom to conclude contracts but also the freedom to decide against entering into a contract.[16] As held by the Court, an obligation to contract constitutes 'a substantial interference in the freedom to contract which economic operators, in principle, enjoy'.[17] Apart from the right to contractual self-determination embraced in the principle of freedom of contract, the individual responsibility under a contract has also been highlighted in the case law. The Court, for instance, has acknowledged that, once a contract is agreed, 'each contracting party is bound to honour the term of its contract and to perform its obligations thereunder'.[18] As a result, according to the Court, the 'full performance of a contract results, as a general rule, from discharge of the mutual obligations under the contract or from termination of that contract'.[19]

On the other hand, however, the principle of freedom of contract may also be derived from the Treaty free movement provisions.[20] Freedom of contract underpins the process of involvement in a cross-border economic activity,[21] as it lays the foundation of legal relations that parties typically enter into in the course of the exercise of free movement rights.[22] One can hardly imagine, for instance, the ability to sell goods or provide services across borders without the possibility

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12 Case C-91/90, *Jean Neu* [1991] ECR I-3617, para. 13. See also Opinion of AG Jacobs in Case C-7/97, *Bronner* [1998] ECR I-7791, para. 56.

13 *Société thermale d'Eugénie-les-Bains* (n. 11), para. 28.

14 *Spain* v. *Commission* (n. 11), para. 99.

15 Opinion of AG Jacobs in *Bronner* (n. 12), para. 56.

16 Opinion of AG Kokott in Case C-441/07 P, *Commission* v. *Alrosa* [2010] ECR I-5949, para. 227.

17 Case C-518/06, *Commission* v. *Italy* [2009] ECR I-3491, para. 66. See also Case T-24/90, *Automec Srl* v. *Commission* [1992] ECR II-2223, para. 51; Joined Cases C-215/96 and C-216/96, *Bagnasco* [1999] ECR I-135, para. 45; Case T-41/96, *Bayer* [2000] ECR II-3383, para. 180.

18 *Société thermale d'Eugénie-les-Bains* (n. 11), para 24.

19 *Hamilton* (n. 11), para. 42.

20 More on this, see P.-C. Müller-Graff, 'Basic Freedoms – Extending Party Autonomy across Borders', in: *Party Autonomy and the Role of Information in the Internal Market*, eds S. Grundmann, W. Kerber & S. Weatherill (Berlin: Walter de Gruyter 2001) ; C. Herresthal, 'Constitutionalisation of Freedom of Contract in European Union law', in *Current Problems in the Protection of Human Rights*, eds K.S. Ziegler & P.M. Huber (Oxford: Hart Publishing 2013). For an opposite opinion see, J.W. Rutgers, 'The European Economic Constitution, Freedom of Contract and the DCFR', 5(2). *ERCL* 2009. G. Davies, 'Freedom of Movement, Horizontal Effect, and Freedom of Contract', 3. *ERPL* (*European Review of Private Law*) 2012.

21 S. Whittaker, 'The Optional Instrument of European Contract Law and Freedom of Contract', 3. *ERCL*, p (371) 373.

22 P. Verbruggen, 'The Impact of Primary EU Law on Private Law Relationships: Horizontal Direct Effect under the Free Movement of Goods and Services', 2. *ERPL* 2014, p (201) 202.

to choose contracting partners, design and shape the content of a contract, and decide on the law governing it. In other words, the right to freedom of contract is the required pre-condition for the exercise of these free movement rights,[23] as the 'movement' of goods and services across borders does not happen by itself but essentially by means of a contract.[24]

Considering their inherent link, one could in fact construe the free movement provisions to enshrine the *qualified* right to freedom of contract.[25] This is premised not only on the fact that restrictions of free movement rights could be seen as tantamount to limitations of the exercise of freedom of contract,[26] but also, there is no doubt that the actual interference with freedom of contract can amount to a restriction on the exercise of free movement rights prompting objective justification. For instance, in *Omega*,[27] the Court held that the prohibition by the German police to operate a laserdrome was 'capable of restricting the future development of contractual relations between the two parties'.[28] In *Commission* v. *Italy*,[29] in turn, the Court found that the obligation to contract imposed on undertakings offering third-party liability motor insurance was contrary to freedom of establishment and freedom to provide services.[30] Similarly, in *Caixa-Bank*,[31] it was held that the rule prohibiting banks to conclude contracts related to remunerated sight accounts and requiring to rescind the existing ones was incompatible with freedom of establishment.[32] From a conceptual point of view, therefore, the free movement provisions could be understood as a set of rules that presupposes the right to freedom of contract in the internal market, however, save to the extent that it is constrained by national regulatory regimes and Union harmonization measures.[33]

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23 C-W. Canaris & H.C. Grigoleit, 'Interpretations of Contracts', in *Towards a European Civil Code* eds A. S. Hartkamp (Nijmegen: Ars Aequi Libri 2004), p 446.

24 N. Reich, C. Goddard & K. Vasilyeva, *Understanding EU Law: Objectives, Principles and Methods of Community Law* (Antwerp: Intersentia 2003), p 255.

25 This in a way finds support in Opinion of AG Maduro in Case C-446/03, *Marks & Spencer* [2005] ECR I-10837, para. 40. See also Opinion of AG Tizzano in Case C-442/02, *Caixa-Bank* [2004] ECR I-8961, para. 45; Opinion of AG Maduro in Joined Cases C-158/04 and C-159/04, *Alfa Vita* [2006] ECR I-8135, para. 37; Opinion of AG Tesauro in Case C-292/92, *Hünermund*, para. 28.

26 See the Court's reasoning in Case C-390/12, *Pfleger*, 30 Apr. 2014, n.y.r. para. 57. See also G. Davies, *ERPL*, p 810 (n. 20).

27 Case C-36/02, *Omega* [2004] ECR I-9609.

28 *Ibid*., para. 21.

29 Case C-518/06, *Commission* v. *Italy* [2009] ECR I-3491.

30 *Ibid*., para. 71.

31 *Caixa-Bank* (n. 24).

32 *Ibid*., para. 12. See also Case C-94/04, *Cipolla* [2006] ECR I-11421, para. 56.

33 For the former, see for instance the approach developed in Joined Cases C-267/91 and C-268/91, *Keck and Mithouard* [1993] ECR I-6097. For the latter, see for instance early rulings in Case 4/73, *Nold* [1974] ECR 491; Case 44/79, *Hauer* [1979] ECR 3727.

3. Individual Contractual Preferences and Contractual Discretion

Within the internal market setting, the exercise of freedom of contract can take different forms, ranging, for instance, from a preference for contracting with a specific market participant to the decision to include different contractual terms depending on the other contracting party. It is questionable, in this respect, whether and to what extent such individual contractual preferences are also bound by the free movement provisions, given the fact that it is now established that they are also applicable to private bodies.[34]

3.1. Horizontal Application of Free Movement Law

The possible application of the free movement provisions to a private contractual relationship has been specifically considered by the Court on three occasions. First, in *Angonese*, the Court held that the prohibition of discrimination on grounds of nationality under Article 45 TFEU also applied to private bodies.[35] The issue in that case concerned the refusal by a private bank to consider an application for employment without a certificate of bilingualism issued by the local public authorities. The finding in *Angonese* was reiterated in *Raccanelli*,[36] which concerned the practice of the Max Planck Institute, a research institute established as a private law association, to offer doctoral grants and employment contracts to junior researchers. The Court found that 'the prohibition of discrimination [on grounds of nationality under Article 45 TFEU] applies equally to all agreements intended to regulate paid labour collectively, as well as to *contracts between individuals*'.[37] In contrast, in the context of the free movement of goods, the Court has refused to extend the scope of Article 34 TFEU to include private contracts. In *Sapod Audic*, the Court held that 'a contractual provision cannot be regarded as a barrier to trade for the purposes of [Article 34 TFEU] since it was not imposed by a Member State but agreed between individuals'.[38] It thus follows that while private employers exercising their contractual discretion are under an obligation not to discriminate on grounds of nationality, the contractual preferences of, for instance, a seller of goods are not as such subject to a similar requirement. However, what is the actual rationale behind such distinction?

The answer, in essence, might lie in the underlying reasoning followed in the rulings that extended the scope of free movement law with respect to private

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34 N.N. Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (New York: Oxford University Press 2013), p 100.

35 *Angonese* (n. 4), paras 34 and 35.

36 Case C-94/07, *Raccanelli* [2008] ECR I-5939.

37 *Ibid.*, para. 45 (italics added).

38 *Sapod Audic* (n. 5), para. 74. See however Case 58/80, *Dansk Supermarked* [1981] ECR 181, para. 17.

bodies. The Court, so far, has ruled that free movement law applies to bodies, such as national and international sports associations, trade unions, lawyers associations, national insurers' bureaux, private banks, private law associations, and recently, private standardization bodies.[39] Amidst the ambiguity as regards the actual extent of the horizontal direct effect of the free movement provisions,[40] one could, nevertheless, identify a common element that generally seems to underpin the Court's approach. In particular, it appears that in most of the instances so far the trigger for the direct horizontal application of the free movement provisions has been the possession of some form of 'dominance' by a private body over others.[41] The word 'dominance' here is not merely used in the sense of a private body holding a dominant position in the market. But rather, in a more general sense, it refers to a private body exerting power or being in a position to do so over other private individuals, the outcome of which they are not in a position themselves to avoid. The importance of this factor is evident in the reasoning provided by the Court in *Ferlini*, where it found that Article 18 TFEU applied to a group of healthcare providers. The Court explained it pointing out the fact that such group or organization 'exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty'.[42]

Forcing others to accept certain conditions and, more importantly, the actual non-existence of viable ways to avoid them seem particularly significant in the present context. This is what, in essence, amounts to the 'dominance' of a given non-public/private body, which accordingly is bound by the free movement provisions. Extending the scope of these provisions to encompass this type of non-public/private bodies ensures that others are not put in a situation where there is no recourse but to accept the conditions imposed, which in turn prevents or makes it difficult to exercise free movement rights. This is quite apparent in

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39 See Case 90-76, *Van Ameyde* [1977] ECR 1091; Case 36-74, *Walrave* [1974] ECR 1405; Case C-176/96, *Lehtonen* [2000] ECR 2681; Joined Cases C-51/96 and C-191/97, *Deliège* [2000] ECR I-2549; Case C-309/99, *Wouters* [2002] ECR I-1577; Case C-415/93, *Bosman* [1995] ECR I-4921; Case C-438/05, *Viking* [2007] ECR I-10779; C-341/05, *Laval* [2007] ECR I-11767; *Angonese* (n. 4); *Raccanelli* (n. 35); C-171/11, *Fra.bo,* 12 Jul. 2012, n.y.r. For detailed analysis of *Fra.bo*, see H. VAN HARTEN & T. NAUTA, 'Towards Horizontal Direct Effect for the Free Movement of Goods? Comment on *Fra.bo*', 5. *ELR* (*European Law Review*) 2003, p 677.

40 See the inconsistence of the Court's reasoning in *Walrave* (n. 39), *Viking* (n. 39), and *Angonese* (n. 4). More on this see H. SCHEPEL, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in the EU Law', 18. *European Law Journal* 2012, p 177.

41 See also S. DE VRIES & R. VAN MASTRIGT, 'The Horizontal Direct Effect of the Four Freedoms: From a Hodgepodge of Cases to a Seamless Web of Judicial Protection in the EU Single Market?', in *General Principles of EU Law and European Private Law*, ed. U. Bernitz (Alphen aan den Rijn: Kluwer Law International 2013), p 264.

42 Case C-411/98, *Ferlini* [2000] ECR I-8081, para. 50.

the case of a non-public/private body having certain regulatory functions: particularly, for instance, a sports association regulating all aspects related to a specific type of sport; a professional association specifying conditions for the exercise of a given profession; a trade union engaged in the regulation of the labour market;[43] the practice of an association of professionals in a specific industry sector.[44] Otherwise, in the absence of this factor, it is rather difficult to establish an impediment to free movement as those who are already or potentially affected by such conditions can avoid them by exercising their discretion of opting for other available possibilities.

This seems clear in the reasoning of the Court in *Fra.bo*. In that case, to establish the applicability of Article 34 TFEU to a private standardization body, the Court looked at whether the certification offered by it was the only available procedure or whether there were other alternative ways to obtain a confirmation of compliance with a national technical standard. It was held that the other available procedure was 'of little or no practical use'.[45] This essentially meant that manufacturers from other Member States could not enter the national market unless they complied with the conditions imposed by the private standardization body.[46] The Court's emphasis on this particular factor appears to suggest that the outcome would be rather different had there been an alternative procedure available to manufacturers. Indeed, if they were required to comply with the specific requirements laid down by the private standardization body but could, in fact, themselves avoid them by resorting to other available equivalent options, there would not be a barrier to the free movement of goods as such to prompt the scrutiny under Article 34 TFEU. In this respect, one could, thus, agree with AG Maduro, who noted in his Opinion in *Viking* that the free movement provisions essentially apply to 'private action that, by virtue of its general effect on the holders of rights to freedom of movement, is capable of restricting them from exercising those rights, by raising an obstacle that they cannot reasonably circumvent'.[47]

3.2. Freedom of Contract and Individual Contractual Preferences

Now, translating this into a contractual context, this suggests that the scrutiny under the free movement provisions generally does not extend to individual

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43 T. Papadopoulos, *EU Law and the Harmonization of Takeovers in the Internal Market* (Alphen aan den Rijn: Kluwer Law International 2010), p 167.

44 See the case law in n. 39. This reasoning could also, in a way, explain the Court's ruling in C-265/95, *Commission* v. *France* [1997] ECR I-6959; Case C-112/00, *Schmidberger* [2003] ECR I-5659.

45 *Fra.bo* (n. 39), para. 29.

46 Opinion of AG Trstesjnak in *Fra.bo* (n. 39), para. 50.

47 Opinion of AG Maduro in *Viking* (n. 39), para. 48.

contractual preferences. In the internal market context, contractual preferences expressed by a market participant could favour some and disadvantage others, particularly, for instance, out-of-state providers of goods or services. For example, one could mention a shop that only sells locally produced fruits and vegetables or those that are produced in a specific country; or a newspaper or magazine that mainly advertises the providers of a particular service that are based in the vicinity of a specific geographic area and charges different rates to those established outside that area; or an insurance company that only insures goods that are produced in a specified region under specific terms and conditions.[48] However, as a general rule, individual contractual preferences that reflect such practices do not fall within the scope of free movement law.

There are several reasons for this. First, this is, in essence, premised upon the fact that the liberty to express individual contractual preferences is paramount for the exercise of free movement rights. To impose on a market participant a requirement to engage in some kind of equal treatment of, for instance, products regardless of their origin or other market participants regardless of their place of establishment would amount to an interference with freedom of contract and essentially negate the very right to it that the free movement provisions themselves presuppose. Second, to expand the scope of the free movement provisions to such an extent would, in a way, create a burden for market participants to justify their rational decisions: whether it is, for instance, giving preference to contract over a specific product or to contract with a specific contracting party.[49] This kind of contractual preferences constitutes an inherent aspect of a normal market setting. They are normally motivated by the desire to make a profit without any intention to treat local and other products or local and other parties differently.[50] Otherwise, there is a small step from subjecting individual contractual preferences to scrutiny to extending it to customers' selection of different products, for instance, in a supermarket or restaurant.

Third, more importantly, even if they may disadvantage some, such individual contractual preferences are not as such capable of restricting free movement. They are not sufficient to create a barrier to access the market in a Member State, considering the fact that there is no obligation to contract with the market participant at issue nor accept any conditions put forward. In other words, out-of-state counterparts would not be put in a situation where their ability to sell

48 G.R. Milner-Moore, 'The Accountability of Private Parties under the Free Movement of Goods Principle', 5. *Harvard Jean Monnet Working Paper* 1995 (http://www.jeanmonnetprogram.org/archive/papers/95/9509ind.html), p 1.

49 D. Wyatt, 'Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold, and the Implications for Community Competence', 4. *Croatian Yearbook of European Law and Policy* 2008, p (1) 24.

50 G. Marenco, 'Competition between National Economies and Competition between Businesses – a Response to Judge Pescatore', 10. *Fordham International Law Journal* 1986–1987, p (420) 425.

goods or provide services across borders is precluded or restricted. Exercising their discretion to decide with whom to enter into a contract and what contractual obligations to undertake, they could make a rational choice simply opting for other available alternative possibilities in the market that are more favourable to their interests. Contractual discretion, substantiated by national contract law rules, could therefore be construed to operate as a primary means in the coordination of private relationships, only complemented by the Treaty's regulatory regimes. It thus takes a central role in defining the reach of free movement law in a contractual context.

3.3. When the Ability to Effectively Exercise It Is Not There

However, the ability to effectively exercise contractual discretion is not always guaranteed. In instances where its effective exercise is impossible or significantly limited, it on its own might not be sufficient to avoid any discriminatory or disadvantageous treatment by other market participants in the internal market. This, in turn, might explain the rationale that lies behind the recognition of the horizontal direct effect of the prohibition of discrimination on grounds of nationality in the context of contractual employment relationships.[51] Such relationships are also essentially built on the voluntary exercise of freedom of contract.[52] Not only employees but also employers are free, to a certain extent, to decide whether and with whom to enter into an employment contract and what terms and conditions of employment to agree to. This was acknowledged by the Court in *Alemo-Herron*, where it emphasized the importance of an employer's ability to 'assert its interests effectively in a contractual process [and] negotiate the aspects determining changes in working conditions for its employees'.[53] In exercising contractual discretion, however, private employers similar to public ones are obliged not to discriminate (directly or indirectly) on grounds of nationality in relation to, for instance, access to or conditions of employment.

Such an obligation imposed on an employer in a contractual context would not appear unreasonable, if one focuses on the actual ability of employees to effectively exercise contractual discretion. It is true that they are not obliged to enter into a contract with a particular employer nor accept any conditions of employment that they are not in favour of. Exercising contractual discretion, they

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51 However, this could also be explained by a combination of factors. For the analysis from the fundamental rights perspective, see S. PRECHAL & S. DE VRIES, 'Seamless Web of Judicial Protection in the Internal Market?', 34(5). *ELR* 2009 5, p 15 From the perspective of ensuring consistency between primary and secondary Union laws, see G. DAVIES, 'Freedom of Contract and the Horizontal Effect of Free Movement Law', in *The Involvement of EU Law in Private Law Relationships*, eds D. Leczykiewicz & S. Weatherill (Oxford: Hart Publishing 2013), p 66.

52 C-499/04, *Werhof* [2006] ECR I-2397, para. 23.

53 C-426/11, *Alemo-Herron*, 18 Jul. 2013, n.y.r., para. 33. For criticism of this ruling, see S. WEATHERILL, *ERCL* 2014, p 167 (n. 8).

could explore other alternatives in the labour market. However, the effective exercise of such discretion is often not feasible in reality. To secure an alternative employment or change a professional qualification is certainly more complex than choosing an alternative product or service available in the market.[54] Furthermore, it would not be an overstatement to suggest that the termination of employment would have more far-reaching consequences on employees than employers. While an employer can advertise and hire new personnel, finding a new place of employment could be rather challenging as it often leads to consequences like changing the place of residence.[55] Therefore, the ability to exercise contractual discretion would not always be a sufficient solution to avoid disadvantageous terms in the context of a contractual employment relationship.[56]

Similarly, this is also likely to occur if a market operator holds a monopolistic position in the market. In this respect, the ability to choose a contracting partner and, more importantly, to decide which contractual obligations to comply with may be substantially impaired if not eliminated. Such an economic operator is capable of imposing obligations on others, for example, by dictating disadvantageous contractual terms and conditions. The same effect could also be observed if a contractual preference that treats others unfavourably is, in fact, a common practice in the market.[57] Here, the decisive factor is not the mere unfavourable contractual term, but more the fact that an out-of-state market participant could be compelled to comply with it. However, under the system established by the Treaty, these instances will most likely trigger the provisions under Articles 101 and 102 TFEU rather than those on free movement law.[58]

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54 Opinion of AG Maduro in *Viking* (n. 39), para. 47.

55 T. Donaldson, *Corporations and Morality* (Englewood Cliffs: Prentice-Hall 1982), p 137.

56 This could also be relevant as regards consumers. See the analysis by D. Wyatt, *Croatian Yearbook of European Law and Policy*, 2008 (n. 49). According to the author, private operators should also be under an obligation not to depart from their normal terms and conditions of sale with respect to non-nationals or non-residents, unless it is part of normal market behaviour. Establishing this, however, may not be an easy task in practice. Rational choices made by private operators can be shaped by several market factors that are not necessarily dependent on them. See, for instance, the reasons provided by businesses in EP Study 'Discrimination of Consumers in the Digital Single Market' (DG Internal Policies, IP/A/IMCO/ST/2013-03, November 2013), p 15.

57 M. Schillig, 'The Interpretation of European Private Law in the Light of Market Freedoms and EU Fundamental Rights', 15. *Maastricht Journal of European and Comparative Law* 2009, p (285) 300.

58 J. Snell, 'Private Parties and the Free Movement of Goods and Services', in *Services and Free Movement in EU Law*, eds M. Andenas & W-H. Roth (Oxford: Oxford University Press 2002), p 228. However, see *Bosman* (n. 39), *Lehtonen* (n. 39), and *Deliège* (n. 39), which seem to suggest that both could be applied to the same issue. More on this see C. Krenn, 'A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods', 49. *CMLR* (*Common Market Law Review*) 2012, p (177) 205.

4. Non-Mandatory Contract Law Rules and Contractual Discretion

One could thus agree that, as a general rule, the applicability of free movement law in a contractual context is essentially delimited by the reach of contractual discretion.[59] However, it is not clear whether this also encompasses non-mandatory contract law rules, which constitute the majority of rules applicable to relationships between businesses.[60] These rules are usually designed to fill the gaps of incomplete contracts and reduce costs by saving time and expenses needed to negotiate specific contractual terms.[61] These are, for instance, rules that detail reasons why a party may terminate a contract or rules that determine the consequences of a late delivery.[62] These rules are non-mandatory in nature in a sense that they apply to a contractual relationship so long as parties have not contracted around them.[63] That is to say, they are free to *opt out* of the scope of these rules by replacing them with specifically designed contractual terms.[64]

4.1. Approach Based on Alsthom Atlantique

There is not much jurisprudence on this type of national rules. One of the relevant rulings is *Alsthom Atlantique*,[65] where the issue related to the French rule that imposed a strict liability on manufacturers and traders for the supply of goods with latent defects. It was argued that the rule was contrary to Article 35 TFEU, since it was capable of distorting competition and the free movement of goods as there was no similar rule applied in other Member States. The Court, however, did not agree. It held that the rule applied to all without distinction and did not have the purpose or effect of restricting the patterns of export and, thereby, favouring domestic production or domestic market.[66] In *obiter dictum*, the Court also added that contracting parties were generally free to determine the

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59 G. Davies, *ERPL*, p 819 (n. 20).

60 H.M. Watt & R. Sefton-Green, 'Fitting the Frame: an Optional Instrument, Party Choice and Mandatory/Default Rules', in *European Private Law after the Common Frame of Reference*, eds H-W. Micklitz & F. Cafaggi (Cheltenham: Edward Edgar 2010), p 207.

61 U. Mattei, 'Efficiency and Equal Protection in the New European Contract Law: Mandatory, Default and Enforcement Rules', 39. *Virginia Journal of International Law* 1998–1999, p (527) 538.

62 M.W. Hesselink, 'The Principles of European Contract Law: Some Choices Made by the Lando Commission', 1. *Global Jurist Frontiers* 2001, p (1) 54.

63 E. McKendrick, 'Harmonisation of European Contract Law: The State We Are in', in *The Harmonisation of European Contract Law: Implications for European Private Law, Business and Legal Practice*, eds S. Vogenauer & S. Weatherill (Oxford: Hart Publishing 2006), p 16.

64 M.E. Storme, 'Freedom of Contract: Mandatory and Non-Mandatory Rules in European Contract Law', 15. *ERPL* 2007, p (233) 237.

65 Case C-339/89, *Alsthom Atlantique* [1991] ECR I-107.

66 *Ibid.*, para. 15.

law applicable to their contract and could therefore avoid being subject to French law.[67]

Alsthom Atlantique is the only instance so far where the Court specifically mentioned contracting parties' freedom to choose the applicable law while looking at the compatibility of a national rule with the free movement provision. More importantly, the Court's *obiter dictum* appears to refer to that freedom as a means to circumvent national rules that contracting parties are not in favour of. Opinions as regards its possible implication vary considerably. Some have raised doubts about its significance in relation to scrutiny of national rules,[68] premised upon the fact that the *obiter dictum* has never been reiterated by the Court in the subsequent case law.[69] In contrast, others have attributed a considerable degree of importance to it.[70] In particular, it has been taken as a basis to argue that the scrutiny under the free movement provisions varies depending on the type of national contract law rules at issue.[71] According to this approach, only national rules that are mandatory in nature can constitute a barrier to free movement and would, therefore, require objective justification.[72] This is, however, not the case with non-mandatory rules.[73] The difference lies in the fact that non-mandatory rules are not considered to restrict free movement premised upon the fact that contracting parties are free to avoid their scope by drafting their contract otherwise.[74] If they have not done so, their applicability to a given contract is, thus, deemed to be the consequence of the choice made.[75] The advocates of this approach exclude the possibility to invoke the free movement provisions to

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67 *Ibid*. It is not clear from the facts of the case whether the contract at issue included a choice-of-law clause.

68 See C. Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversies in Law* (2nd edn, London: Routledge 2013), p 25; S. Weatherill, 'Recent Developments in the Law Governing the Free Movement of Goods in the EC's Internal Market', 3. *ERCL* 2006, p (90) 96; J. Smits, *The Making of European Private Law: Toward a Ius Commune Europaeum as a Mixed Legal System* (Antwerp: Intersentia 2002), p 10.

69 A. Gkoutzinis, 'Free Movement of Services in the EC Treaty and the Law of Contractual Obligations Relating to Banking and Financial Services', 41. *CMLR* 2004, p (119) 128.

70 See S. Leible, 'Fundamental Freedoms and European Contract Law', in *Constitutional Values and European Contract Law*, ed. Stefan Grundmann (Alphen aan den Rijn: Kluwer Law International 2008), p 65; H.M. Watt, 'The Challenge of Market Integration for European Conflicts Theory', in *Towards a European Civil Code*, eds A.S. Hartkamp & E.H. Hondius (Nijmegen: Ars Aequi Libri 2004), p 199; S. Grundmann, 'The Structure of European Contract Law', 4. *ERPL* 2001, pp (505) 513–514.

71 S. Grundmann, 'European Contract Law(s) of What Colour?', 1. *ERCL* 2005, pp (185) 188–189; H.M. Watt, 'Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy', 9. *Columbia Journal of European Law* 2002–2003, p (383) 391.

72 Grundmann, *ERPL*, pp 188–189 (n. 71).

73 Although *Alstom Atlantique* is about rules that are mandatory in a domestic context.

74 S. Leible, in: *Constitutional Values and European Contract Law*, p 69 (n. 70).

75 S. Grundmann, *ERPL*, p 505 (n. 70).

correct the outcome of parties' choice or the absence of it.[76] Otherwise, it is argued that it would run counter to the aim of these provisions, which is to extend freedom of contract and choice-of-law freedom across borders.[77]

Inasmuch as the presumption of compatibility of non-mandatory rules pursuant to contracting parties' discretion might seem apparent, such an approach is not without uncertainty, particularly from a conceptual point of view. It is not clear, in general, as to whether the assessment of these rules against the free movement provisions should necessarily be linked to the discretion available to contracting parties and not *their effect* on free movement in the internal market. This essentially stems from the difficulty one might have in conceptualizing such presumption of compatibility within the scope of free movement law. Should it be understood to mean that non-mandatory rules are not subject to scrutiny under free movement law simply by virtue of contracting parties' discretion? If not, should they essentially be considered to fall outside the scope of free movement law, as irrespective of their effect, they cannot be a barrier to free movement solely because of the discretion available to contracting parties? If that is also not the case, should it be construed to imply that these rules actually come within the scope of free movement law, although any effect on free movement pursuant to them is justified based on contracting parties' discretion?

4.2. Non-Mandatory Contract Law Rules as Residual Rules

Focusing primarily on the specific nature of non-mandatory rules, one could certainly question whether they can also be affected by free movement law. Conventionally, it is accepted that non-mandatory rules fulfil a facilitative role rather than have a regulatory function.[78] As pointed out earlier, these rules are designed in the interest of contracting parties, as they fill gaps in agreements that are not covered by mutually agreed contractual terms or clauses.[79] However, despite their nature being distinct from other types of national rules, this fact alone does not seem sufficient to play a role as such with respect to delimiting the boundaries of the scope of free movement law. As the Court has reiterated on several occasions, 'the effectiveness of [Union] law cannot vary according to the

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76 *Ibid*., p 514.

77 *Ibid*.

78 On the potential regulatory role of non-mandatory rules, see S. CLAVEL, 'Regulatory Function of Choice of Law Rules Applying to Contracts for Services in the European Union', in *The Regulatory Function of European Private Law*, eds F. Cafaggi & H.M. Watt (Cheltenham: Edward Elgar 2009), p 67. On their complete neutrality, see H. COLLINS, 'Regulating Contract Law', in *Regulating Law*, eds C. Parker et al. (New York: Oxford University Press 2004), p 23.

79 C.A. RILEY, 'Designing Default Rules in Contract Law: Consent, Conventionalism, and Efficiency', 20. *Oxford Journal of Legal Studies* 2000, p (367) 370.

various branches of national law which it may affect'.[80] It is an established maxim that national rules come within the scope of free movement law by virtue of their actual or possible effect on cross-border movement, irrespective of their nature, origin, or domestic classification.[81] Therefore, the specific nature of a national rule in itself is immaterial as regards its possible scrutiny under free movement law.[82]

If non-mandatory rules are indeed reviewed against the free movement provisions such as Article 34 or 56 TFEU, how would one characterize their effect on free movement in the internal market? It is clear that, unlike mandatory contract law rules, parties have a say over what non-mandatory rules a given cross-border contract is subject to. In particular, out-of-state providers of goods or services, for instance, who are more likely to come across this type of rules due to the contractual nature of their activity, would themselves be able to avoid those that disadvantage them or those that they simply are not in favour of. Based on their own preference, they are free to design specific individual terms in a contract that address the matters at issue. Thus, by an analogy to terms included in a contract, one could indeed consider non-mandatory rules as having no effect as such on the ability to sell goods or provide services across borders to prompt the scrutiny under the free movement provisions. In both instances, a contracting party possesses comparable contractual discretion. In particular, it essentially depends on its rational decision, whether it is agreeing to be bound by a given term in a contract or *opting out* of a given non-mandatory rule. Out-of-state providers of goods or services are, therefore, under no obligation to comply with this type of rules and, consequently, be subject to any disadvantage they would otherwise be placed at.

At the same time, however, one may question whether the answer would be any different, if, for instance, the effect of non-mandatory rules on the exercise of free movement rights is actually assessed, for a moment, without a reference to the discretion available to contracting parties as such.[83] For instance, in the context of the free movement of goods, Article 34 TFEU prohibits quantitative restrictions and measures having an equivalent effect to quantitative restrictions

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80 See Case 82/71, *SAIL* [1972] ECR I-119, para. 5; Case 106/77, *Simmenthal* [1978] ECR 629 para. 17; Case 238/84, *Röser* [1986] ECR 795, para. 15; Case C-20/92, *Hubbard* [1993] ECR I-3777, para. 19.

81 M. Tison, 'Unravelling the General Good Exception: The Case of Financial Services', in: Andenas & Roth, *Services and Free Movement in EU Law*, p 102 (n. 58). See also Joined Cases C-92/92 and C-326/92, *Phil Collins* [1993] ECR I-5145, para. 22; Case C-43/95, *Data Delecta* [1996] ECR I-4661, paras 14-15.

82 J. Israël, *European Cross-Border Insolvency Regulation: A Study of Regulation 1346/2000 on Insolvency Proceedings in Light of a Paradigm of Co-operation and a Comitas Europaea* (Antwerp: Intersentia 2005), p 100.

83 This could be observed even in the sequence of the Court's reasoning in *Alsthom Atlantique.*

(MEQR). What rules constitute an MEQR pursuant to the *Dassonville* definition have been further clarified and altered.[84] As it stands, according to the Court's jurisprudence,[85] to find whether a given rule constitutes an MEQR for the purpose of Article 34 TFEU, different tests are applied depending on the category it belongs to. Thus, first, those imposing requirements to be met by goods themselves (or product requirements) always fall within the scope of Article 34 TFEU and require objective justification.[86] Second, pursuant to *Keck*,[87] those that constitute 'selling arrangements' fall outside the scope of Article 34 TFEU, provided that they are not discriminatory in law or fact.[88] Finally, any other rules that cannot be classified under either of the above-mentioned categories breach Article 34 TFEU if they hinder the access to the market in a Member State.[89]

Non-mandatory rules would most likely belong to the last category (also referred to as residual rules).[90] On the one hand, they can hardly be regarded as rules that lay specific characteristics to be met by goods imported from other Member States, where they are lawfully produced and marketing. The closest rules that have been suggested so far are those on non-conformity of goods or hidden defects in goods.[91] This type of rules, however, cannot be defined as 'product requirements' per se for the purpose of Article 34 TFEU. Unlike rules that generally define what characteristics imported goods should have, these rules, in turn, merely concern the characteristics of the goods that form the subject of a contract. They essentially deal with the compliance of contracted goods with the description and quality specified in a contract. As such, this type of rules does not distinguish goods based on their origin. Similarly, on the other hand, contract law

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84 Case 8/74, *Dassonville* [1974] ECR 837, para. 5.

85 Case C-108/09, *Ker-Optika* [2010] ECR I-12213, paras 49–51. This concerns non-directly discriminatory rules. For detailed analysis of the case, see P.C. De Sousa, 'Through Contact Lenses, Darkly: Is Identifying Restrictions to Free Movement Harder than Meets the Eye? Comment on Ker-Optika', 1. *ELR* 2012, p 79.

86 E. Spaventa, 'The Outer Limit of the Treaty Free Movement Provisions: Some Reflections on the Significance of *Keck*, Remoteness and *Deliège*', in *The Outer Limits of European Union Law*, eds C. Barnard & O. Odudu (Oxford: Hart Publishing 2009), p 247. This will also be the case with directly discriminatory rules.

87 *Keck and Mithouard* (n. 33).

88 *Ibid*., para. 16.

89 This seems to replace the test based on *Dassonville* formula previously applied. For previous test, see Case C-189/95, *Franzén* [1997] ECR I-5909, para. 69; Case C-120/95, *Decker* [1998] ECR I-1931, para. 31; Case C-265/06, *Commission* v. *Portugal* [2008] ECR I-2245, para. 31; Case C-573/12, *Ålands Vindkraft,* 1 Jul. 2014, para. 66. For the new test, see Case C-639/11, *Commission* v. *Poland*, 20 Mar. 2014, para. 52; Case C-61/12, *Commission* v. *Lithuania*, 20 Mar. 2014, para. 57. More on this category see T. Horsley, 'Unearthing Buried Treasure: Art. 34 TFEU and the Exclusionary Rules', 37. *ELR* 2012, p 734.

90 E. Spaventa, 'Leaving *Keck* behind? The Free Movement of Goods after the Rulings in *Commission* v. *Italy* and *Mickelsson and Roos*', 34. *ELR* 2009, p (915) 919.

91 M.W. Hesselink, 'Non-Mandatory Rules in European Contract Law', 1. *ERCL 2*005, p (44) 74.

rules also do not seem to fit into the description of 'selling arrangements'.[92] Although the concept of 'selling arrangements' lacks a precise definition, it is considered by the Court to include 'provisions concerning *inter alia* the place and times of sale of certain products and advertising of those products as well as certain marketing methods'.[93] By comparison, however, contract law rules do not regulate such modalities of sale. They relate to the process at the final stage of sale – the actual completion of the sale of goods, specifically the transfer of the ownership of goods that takes place through the medium of a contract.

Under the category of residual rules, non-mandatory rules (and contract law rules in general applicable to relationships between businesses, for that matter) essentially appear to fall outside the scope of Article 34 TFEU.[94] In particular, it is rather difficult to envisage whether the effect these rules produce can trigger Article 34 TFEU. For that to happen, these rules must either be discriminatory or hinder the access to the market in a Member State.[95] Whether this could indeed be the case, however, is rather questionable. This is illustrated, for instance, in the reasoning provided by the Court in *Motorradcenter*.[96] The issue in this case concerned the German contract law rule on the duty of information disclosure in a contractual context (*culpa in contrahendo*). The Court first held that 'the obligation to provide information prior to contract (. . .) applies without distinction, at least as regards products coming from the [Union], to all contractual relationships covered by that law and that its purpose is not to regulate trade'.[97] Furthermore, according to the Court, 'the restrictive effects which the said obligation to provide information might have on the free movement of goods are *too uncertain and too indirect* to warrant the conclusion that it is liable to hinder trade between Member States'.[98] The criterion of 'too uncertain and indirect effect' has been repeatedly invoked by the Court in the context of the free movement of goods and other free movement provisions with

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92 Some have considered contract law rules as 'selling arrangements', see P. Nebbia, 'Internal Market and the Harmonisation of European Contract Law', in *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*, eds T. Tridimas & P. Nebbia (Volume 2, Oxford: Hart Publishing 2004), p 94. L. Miller, *The Emergence of EU Contract Law Exploring Europeanisation* (New York: Oxford University Press 2011), p 31. For an opposite view, see P. Oliver & W-H. Roth, 'The Internal Market and the Four Freedoms', 44. *CMLR* 2004, p (407) 414.

93 Case 7/02, *Karner* [2004] ECR I-3025, para. 38. See also Opinion of AG Maduro in *Alfa Vita* (n. 25), para. 13.

94 The assessment of this type of rules against other free movement provisions, for instance Art. 56 TFEU, would, in essence, lead to a similar outcome based on identical grounds. See Case C-483/12, *Pelckmans*, 8 May 2014, para. 25.

95 *Ker-Optika* (n. 85), para. 50.

96 Case C-93/92, *Motorradcenter* v. *Baskiciogullari* [1993] ECR I-5009.

97 *Ibid*., para. 10.

98 *Ibid*., para. 12 (italics added).

respect to non-discriminatory rules such as a ban on the use of certain products, authorization requirements, registration requirements, and licence requirements.[99] Accordingly, it seems to follow that non-mandatory rules are not deemed to be directly or indirectly discriminatory,[100] nor are themselves sufficient to prevent imported goods to enter the market in a Member State to fall within the scope of Article 34 TFEU.

4.3. The Effect of Rules Rather than Parties' Contractual Discretion

If this is the case, then one's doubt over the correct choice of a decisive factor in the assessment of non-mandatory rules in light of free movement law becomes even more apparent. In particular, it further adds to the query as to whether these rules fall within the scope of the free movement provisions should, in fact, be decided based on their *effect* on free movement, as opposed to a reference to the discretion available to contracting parties. In contrast to the assessment of individual contractual preferences in the previous part, the presumption of compatibility essentially based on the latter alone in the present context seems to raise several conceptual issues.

On the one hand, as mentioned earlier, non-mandatory rules are national rules that offer specific solutions to contracting parties in situations when there is a gap in a contract on any given matter.[101] Unlike individual contractual preferences, these are essentially national ways to coordinate private contractual relationships.[102] As such, they cannot be considered to be the direct consequence of individuals exercising their contractual freedom. On the other hand, it is certainly true that contracting parties are not obliged to comply with them and are free to *opt-out* of their scope. However, it is necessary to emphasize that such obligation actually exists, if contracting parties have not done so. Thus, although contractual discretion over contractual terms and that over the applicability of non-mandatory rules are indeed comparable, they can still be substantially

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99 See Case 69/88, *Krantz* [1990] ECR I-583, para. 11; Case C-379/92, *Peralta* [1994] ECR I-3453, para. 24; Case C-266/96, *Corsica Ferries* [1998] ECR I-3949, para. 31; Case C-412/97, *Fenocchio* [1998] ECR I-3845, para. 11; Case C-44/98, *BASF* [1999] ECR I-6269, para. 16; Case C-190/98, *Graf* [2000] ECR I-493, para. 25; Case C-211/08, *Commission* v. *Spain* [2010] ECR I-5267, para. 72; *Pelckmans* (n. 94), para. 25.

100 See however *Econoler* v. *GEC Alsthom*, unreported 16 Apr. 1999 QBD, where the compatibility of s. 26 of the UK Unfair Contract Terms Act 1977 with Art. 18 TFEU was pleaded by one of the parties. More on that see P. Burbidge, 'Black Holes at the Heart of European Contract Law? Exclusion Clauses in International Supply Contracts under Sections 26 and 27 Unfair Contract Terms Act 1977', 23. *International Company and Commercial Law Review* 2012, p 105.

101 Mattei, *Virginia Journal of International Law*, p 538 (n. 61).

102 More on the division between public and private responsibilities as regards the breaches of the free movement provisions, see B. Van Leeuwen, 'Private Regulation and Public Responsibility in the Internal Market', 33. *Yearbook of European Law* 2014, p 277.

distinguished nonetheless. In particular, the discretion over non-mandatory rules involves a rather different paradigm, where contracting parties are free to decide whether or not to *opt-out* pursuant to their rational consideration. Whereas with regard to terms contained in a contract, in contrast, the discretion is essentially exercised in the form of a preference as to whether or not to *opt in*. Unlike the latter, in the former case, therefore, the failure to successfully exercise contractual discretion essentially leads to an obligation to abide by a given non-mandatory rule.

This, in turn, appears to be a rather significant difference. If the contractual discretion in the instance involving non-mandatory rules is about *opting out* of an otherwise applicable rule, then surely that rule should, in essence, be in compliance with free movement law before contracting parties get to decide. This is the very point that seems the most appropriate for the assessment of the effect of non-mandatory rules against the free movement provisions. Otherwise, focusing solely on contracting parties' discretion appears to lead to a rather peculiar situation, where the primary issue is not the obligation of Member States to enact and maintain rules in line with free movement law,[103] but the actual duty of those, potentially affected by those rules, to deal with them irrespective of their actual or potential effect on free movement in the internal market. This, in turn, is clearly reflected in the jurisprudence of the Court concerning the definition of 'State measures' for the purpose of free movement law. In the infamous *Buy Irish* case,[104] for instance, the Court held that:

> A [national] practice cannot escape the prohibition laid down by [Article 34] of the Treaty solely because it is not based on decisions which are binding upon undertakings. Even measures adopted by the government of a Member State which do not have binding effect may be capable of influencing the conduct of traders and consumers in that State and thus of frustrating the aims of the [Union set out in the Treaty].[105]

In a similar vein, the mere maintenance of a given legislative act can be contrary to free movement law regardless of whether it is actually applicable. In *Commission* v. *Greece*,[106] for instance, the Court found that by not expressly revoking a memorandum, which although not valid, was contrary to Article 34 TFEU, as it was sufficient enough to create 'an ambiguous and uncertain situation

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103 A. Hartkamp, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal effects of Primary Community Law', 3. *ERPL* 2010, p (527) 533.

104 Case 249/81, *Commission* v. *Ireland* [1982] ECR I-4005.

105 *Ibid*., para. 28. For the extent of such on obligation, see also Case C-470/03, *A.G.M.-COS.MET Srl* v. *Suomen valtio and Tarmo Lehtinen* [2007] ECR I-2749.

106 Case 192/84, *Commission* v. *Greece* [1985] ECR 3967.

to the detriment of' imported products.[107] In *Commission* v. *France*,[108] in turn, the Court held that not only the actual application in practice but also the maintenance of an unamended national provision contrary to Article 45 TFEU constituted an obstacle, since it '[gave] rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on [Union] law'.[109] According to the Court, the mere administrative practice to waive the application of a national rule cannot be regarded as constituting the proper fulfilment of Treaty obligations by Member States.[110]

Furthermore, the presumption of compatibility of non-mandatory rules pursuant to contractual discretion is premised upon the assumption of its effective exercise by contracting parties. In other words, any probability of these rules to create a barrier to free movement is essentially excluded based on the fact that parties can themselves avoid any disadvantage arising from them. One might agree with this 'as a matter of legal principle', although its actual effective exercise in practice may be rather challenging.[111] First of all, having to make a choice in their best interests would require out-of-state sellers of goods or providers of services to be fully aware of all the relevant non-mandatory rules applicable to a given contract. This, however, seems overly optimistic, particularly considering the difficulties out-of-state sellers of goods or providers of services face finding out about the provisions of foreign law, if they wish to enter the market in a different Member State.[112] Therefore, contracting parties, realistically, may not in fact be aware of the existence of certain applicable non-mandatory rules.[113] Second, even assuming that that is indeed the case, there is no guarantee that contracting parties would actually be able to act effectively upon them. This would require them to reach a consensus to exclude them by including specific contractual terms that they have to mutually agree upon.[114] This, in turn, is another hurdle that contracting parties have to overcome when dealing with this type of national rules.[115]

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107 *Ibid.*, para. 17.

108 Case 167/73, *Commission* v. *France* [1974] ECR 359.

109 *Ibid.*, para. 41. See also Case 159/78, *Commission* v. *Italy* [1979] ECR 3247, para. 22.

110 *Commission* v. *France* (n. 108), para. 42; see also Case C-80/92, *Commission* v. *Belgium* [1994] ECR I-1019, para. 20; Case C-381/92, *Commission* v. *Ireland* [1994] ECR I-215, para. 7.

111 Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversies in Law*, p 25 (n. 68).

112 The Gallup Organization, *Flash Eurobarometer No. 320, European Contract Law in Business-to-Business Transactions: Analytical Report 2011*, http://ec.europa.eu/public_opinion/flash/fl_320_en.pdf (last accessed 10 Feb. 2015), pp 6–7.

113 Hesselink, *ERCL*, p 74 (n. 91).

114 Riley, *Oxford Journal of Legal Studies*, p 370 (n. 79).

115 Flash Eurobarometer No. 320, pp 6–7.

In addition, the presumption of compatibility based on the discretion available to contracting parties essentially implies that not only they have to bear the burden of dealing with non-mandatory rules regardless of their effect on free movement but also in a way accept all the consequences of not managing to exclude them. For the purpose of free movement law, however, the mechanism leading to the application of national rules, in principle, should not make a difference as such.[116] In particular, it would not matter whether the applicable rule is designed and imposed by a Member State or actually designed by a Member State but applied based on the absence of parties' contractual clause excluding it. In either scenario, it would not make the rule itself any less contrary to the relevant free movement provision, if it is, in fact, the case. Regardless of contracting parties' discretion over the scope of a national rule, the failure to exercise it cannot, in itself, be taken as a sufficient ground for applying the rule at issue irrespective of its effect on free movement in the internal market.

5. Conclusion

In light of the Commission's recent initiative to harmonize national contract law rules, this article revisited the interplay between the freedom of contract and free movement law. The aim was essentially to examine the role that could be attributed to contractual discretion in the context of defining the reach of the free movement provisions in a contractual context. As a general rule, the ambit of contractual discretion could be construed to delineate the scope of the free movement provisions within the framework of contractual relations. Contractual decisions in the form of individual preferences of contracting partners and contractual obligations are not bound by free movement law. This is premised upon the fact that they are not deemed to constitute a restriction of free movement in the internal market as there is no obligation to comply with them. Others can avail themselves of other possibilities in the market by exercising contractual discretion. The need for the additional regulation of private contractual relations under the free movement law (and also competition law) provisions essentially arises only in instances where the effective exercise of contractual discretion by others is not possible or significantly limited. Considered this way, contractual discretion itself operates as a central factor in determining the reach of free movement law in a contractual context.

However, the article has provided a different perspective in the understanding of its role as regards non-mandatory contract law rules. Despite the fact that their applicability is also very much subject to the discretion of contracting parties, it is submitted that whether or not these rules fall within the

116 J-J. KUIPERS, *EU Law and Private International Law: The Interrelationship in Contractual Obligations* (Leiden: Martinus Nijhoff 2012), p 314.

scope of free movement law should ultimately be decided based on their effect as such. In particular, it has been suggested to consider these rules to fall outside the scope of the free movement provisions, because they themselves are not discriminatory and are not sufficient to hinder the access to the market in a Member State, as opposed to a mere reference to the discretion available to contracting parties.