

**THE ‘HORIZONTAL DIRECT EFFECT’ OF
EU INTERNATIONAL AGREEMENTS:
IS THE COURT AVOIDING A CLEAR ANSWER?**

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Abstract

This article looks at a less discussed topic in European legal scholarship: the horizontal direct effect of EU international agreements and the Court of Justice’s apparent reluctance to expressly confirm it. It is argued that the direct effect of EU international agreements has been confirmed in proceedings involving private individuals/professionals against the private regulatory bodies of a profession or a State owned and controlled entity. However, direct effect has not yet been expressly confirmed in cases involving veritable horizontal relationships, between private parties of equal positions and with equal functions. Whilst, the choice for this reluctance was understandable three decades ago, the time feels right to expressly acknowledge it and keep up with international trends.

I. INTRODUCTION

In the process of defining the relationship between EU law and Member State law, the ‘direct effect’ of EU norms took centre stage and it soon became obvious that two major factors have an influence on the direct effect outcome.¹ *First*, the Court differentiates between the direct effect of the Founding Treaties, general principles, regulations, directives and decisions. Therefore, the type of EU legal instrument being invoked is essential to the direct effect analysis. The *second* factor the Court takes into consideration is the nature of the party against whom the EU rule is being invoked. This results in the difference between *vertical* and *horizontal* direct effect (hereinafter ‘HDE’) and an area of law with ‘diminishing coherence’,² with a special focus on the lack of HDE of directives.

Whilst the direct effect of EU international agreements which are binding³ on the EU (EU international agreements) is subject to abundant and novel legal literature,⁴ there is less focus on their application in proceedings between private parties. Such a choice is understandable as most contentious issues, such as the lack of direct effect of the GATT/WTO, the Ankara Agreement, the UNCLOS and the Aarhus Convention arose in vertical proceedings involving private parties and Member States or EU institutions. Cases which involve reliance on international agreements by a private party against another private party are fairly rare⁵ and less discussed in legal literature.⁶ Given the increasing number of legal relationships governed by international agreements, the traditional view according to which international agreements only create rights and obligations for

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¹ Alan Dashwood, Michael Dougan, Barry Rodger, Eleanor Spaventa and Derrick Wyatt, *Wyatt and Dashwood’s European Union Law*, 253 (6d ed., Hart 2011).

² Anonymous, Editorial Comments, *Horizontal Direct Effect – A Law of Diminishing Coherence*, 43 C.M.L.R. 1 (2006).

³ The EU can become bound by an international agreement, even when it is not a party to it, through ‘functional succession’ or the ‘doctrine of delegation’. See Joined Cases 21 to 24/72, *International Fruit Company*, [1972] ECR 1219, paras 14-18 and Case C-439/01, *Libor Cipra*, [2003] ECR I-745, paras 23-24. See R. Van Rossem, *The EU at Crossroads: A Constitutional Inquiry into the Way International Law is received within the EU Legal Order*, 78 in *International Law as Law of the European Union* (Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel eds., Brill/Nijhoff 2012).

⁴ Sz. Gáspár-Szilágyi, *EU International Agreements through a US lens: Different Methods of Interpretation, Tests and the Issue of ‘Rights’*, 39(5) E.L.R. 601 (2014); F. Martinez, *Direct Effect of International Agreements of the European Union*, 25(1) E.J.I.L. 129 (2014); H. Ruiz Fabri, *Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations*, 25(1) E.J.I.L. 151 (2014); Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law – Text, Cases and Material*, Chapter 7 (Cambridge 2014); Mario Mendez, *The Legal Effects of EU Agreements – Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford 2013); Cannizzaro et al., *supra* n. 3;

⁵ Handled extensively in Part II. Case 270/80, *Polydor v. Harlequin*, [1982] ECR 329; Case C-438/00, *Deutsche Handballbund v. Kolpak*, [2003] ECR I-4135; Case C-265/03, *Simutenkov*, [2005] ECR I-02579; Case C-152/08, *Kahveci*, [2008] ECR I-6291.

⁶ Some of the authors who have touched upon this issue are: Robert Schütze, *European Constitutional Law*, 341-342 (Cambridge 2012) and Mendez, *supra* n. 4, 153.

the contracting parties is rapidly changing. Private parties in the EU need to be given a clear answer whether it is possible for them to have rights under international agreements, which they can enforce against other private parties and whether they are also liable to carry out certain international obligations for the benefit of other private parties.

With this in mind, the present article focuses on two major issues. *First*, it has to be seen how the afore-mentioned two factors, the type of legal instrument and the party against whom the international norm is invoked, influence the enforcement of international agreements in proceedings between private parties. *Second*, building on these findings, it is then necessary to take a closer look at the reasons behind the Court's reluctance to expressly confirm the HDE of international agreements and whether such reluctance is understandable. The article will refer to 'veritable/true' horizontal relationships in order to describe proceedings between private parties, which occupy similar levels of hierarchy and do not exercise State-like or regulatory powers.

In order to answer the first question, Part II shall first look at how the HDE of international agreements can be influenced by the international origin of such agreements. It then provides a thorough analysis of the existing cases in which private parties have relied on international agreements against each other. As shall be seen, it is not always readily discernible whether HDE has occurred. Based on these findings, Part III will then focus on the second question, the apparent reluctance of the Court to openly acknowledge the HDE of international agreements. This part will also provide examples of how other major jurisdictions apply international agreements in proceedings between private parties in order to prove that the Court should not hesitate to expressly acknowledge the HDE of EU international agreements. Part IV is meant for conclusions.

II. THE FACTORS INFLUENCING THE HDE OF EU INTERNATIONAL AGREEMENTS

The type of legal instrument containing the legal norm and the party against whom the legal norm is invoked are just as important when the direct effect of EU international agreements in the EU/Member State legal orders is concerned. *First*, even though agreements which are binding on the EU form an "integral part" of the EU legal order⁷ and have primacy over secondary EU legislation and Member State laws,⁸ the Court takes into consideration their "international origin"

⁷ Case 181/73, *Haegeman v. Belgium*, [1974] ECR 449, paras 5-6; Case 12/86, *Demirel*, [1987] ECR 3719, para 7; Case C-93/02 P, *Biret v. Council*, [2003] ECR I-10497, para 60; Case C-240/09, *Lesoochránárske Zoskupenie, (Slovak Brown Bear)* [2011] 2 CMLR 43, para 30.

⁸ Case 104/82, *Kupferberg*, [1981] ECR 3644, para. 17; *Biret v. Council*, *supra* n. 7, para 60; Joined Cases C-120/06 P and C-121/06 P, *FIAMM and Fedon v. Council and Commission*, [2008] ECR I-06513, para 108. On the interplay between the 'primacy' and 'direct effect' of EU international agreements, see Sz. Gáspár-Szilágyi, *The 'primacy' and 'direct effect' of EU international agreements*, 21(2) European Public Law (2015, forthcoming).

when granting them effects.⁹ This ‘outside’ origin can explain why the conditions needed for the direct effect of EU norms may not always apply to international agreements¹⁰ and why the Court is known to favour domestic policy concerns over the EU’s international obligations.¹¹ *Second*, international agreements create inter-State, private party-State (vertical) and private party-private party (horizontal) relationships.¹² Recent research has shown that domestic courts are more willing to directly apply treaty provisions that regulate relationships between private actors,¹³ such as those found in the Montreal Convention or the Warsaw Convention, because they do not create significant new duties for governments. However, they are less willing to do so when international agreements regulate *vertical* situations, because such agreements implicate the public functions of government.¹⁴ Therefore, the nature of the parties involved in the proceedings and the obligations arising under the agreement are also crucial to the HDE analysis.

1. The First Factor: EU International Agreements as a Source of EU Rights and Obligations

Some authors argue that EU international agreements can either be applied without the need of any further implementing measures, just as regulations, or with subsequent implementing measures, the method of which is left to the contracting parties, just as in the case of directives.¹⁵ With this in mind, one might be inclined to draw a parallel between the HDE of directives and the possible HDE of international agreements. However, such parallels should be handled with caution.

First, international agreements do not appear under Article 288 TFEU as acts enacted by the EU institutions. Whilst it is true that international agreements are concluded by the Council through decisions, which are acts of an EU institution, the agreements themselves are the result of international negotiations with other States or international organisations and are not adopted through the internal EU legislative procedures. As mentioned, even if the Court considers international agreements to be an ‘integral part’ of EU law, it will take into consideration their

⁹ Case C-61/94, *Commission v. Germany*, [1996] ECR I-3989, para 52; Case C-286/02, *Bellio*, [2004] ECR I-3465, para 33; Case C-308/06, *Intertanko v. Secretary of State*, [2008] ECR I-4057, para 42; *Kadi v. Council and Commission (Kadi I)* (C-402/05 P and C-415/05 P) [2008] ECR I-6351, para 307; Case C-366/10, *Air Transport Association of America*, [2011] ECR I-13755, para 50.

¹⁰ B. De Witte, *Direct Effect, Primacy and the Nature of the EU legal Order* in *The Evolution of EU Law*, 336 (Paul Craig and Grainne De Búrca eds., 2d ed., Oxford 2011).

¹¹ T. Cottier, *International Trade Law: The Impact of Justiciability and Separations of Powers in EC Law*, 5(2) European Const. L.R. 307 (2009).

¹² D. Sloss, *Domestic Application of Treaties*, 377-378 in *The Oxford Guide to Treaties* (Duncan B. Hollis ed., Oxford 2012).

¹³ For a discussion on this, see Sloss, *supra* n. 12 and André Nollkaemper, *National Courts and the International Rule of Law*, 134 (Oxford 2011).

¹⁴ S. D. Murphy, *Does International Law Obligate States to Open Their National courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?*, 62 in *The Role of Domestic Courts in Treaty Enforcement* (D. Sloss ed., Cambridge 2010).

¹⁵ S. Marsden, *Invoking Direct Application and Effect of International Treaties by the European Court of Justice: Implications for International Environmental Law in the European Union*, 60 Int. and Comp. L.Q. 737, 744 (2011).

‘international origin’ when granting them direct effect. *Second*, Article 288 TFEU differentiates between the ‘direct applicability’ of regulations and the obligation of Member States to transpose directives in their legal orders. On the other hand, Article 216(2) TFEU only refers to the binding character of EU international agreements, but is silent on their application within the EU and Member States’ legal orders. This gives the Court more freedom to decide whether an international agreement is capable of direct application, as there are no constraints such as the ones faced by directives under Article 288 TFEU. *Third*, it is known that the Court allows for the vertical direct effect of directives in cases of incorrect or non-implementation, even if directives are not directly applicable in the Member State legal orders. On the other hand, if the Court decides that by its nature and structure an international agreement is not capable of direct application, neither vertical nor horizontal direct effect is possible.¹⁶ *Fourth*, directives lay down a period in which Member States have to implement them and bring their legislation in conformity with the directive. Due to this temporal element, a private party has the right to rely on a directive against the Member State only if the deadline for implementation of the directive has passed and the Member State did not implement the directive.¹⁷ On the other hand, in general, no temporal factor is attached to the enforcement of international agreements and contracting parties will rarely include anything about their domestic application. One exception is the Ankara Agreement, the objectives of which were meant to be achieved in several stages.¹⁸

Turning back to more pertinent issues, it must be remembered that the HDE debate of directives had as its starting the difference Article 288 TFEU makes between the general and direct application of regulations and the obligation of Member States to transpose directives. From this, it followed that directives could not impose obligations directly on individuals,¹⁹ but they could do so indirectly through the means of the national implementing legislation. It also means that there are *two sets of obligations* that need to be differentiated when applying a ‘foreign’ norm to internal horizontal situations. The *first* type of obligation refers to the duty of the domestic authorities to transpose the ‘foreign’ norm into their legal order. The *second* type of obligation refers to the duties contained in specific provisions of the legal instrument, based on which individuals can claim rights.

¹⁶ One could argue that the *Fediol* (Case 70/87, [1989] ECR 1781) and *Nakajima* (Case C-69/89, [1991] ECR 1689) exceptions are in a way similar to the vertical direct effect of directives. The author is currently looking into this possibility during his research visit at the TMC Asser Institute.

¹⁷ Case 148/78, *Ratti*, [1979] ECR 1629. See also Wyatt and Dashwood, *supra* n. 5, 248 with reference to Case C-14/02, *ATRAL*, [2003] ECR-4431; Case C-422/05, *Commission v. Belgium*, [2007] ECR I-4749. See Sacha Prechal, *Directives in EC Law*, 18-23 (2d ed., Oxford 2005).

¹⁸ *Demirel*, *supra* n. 7, para 23.

¹⁹ Case 152/84, *Marshall* [1986] ECR 723, para 48.

a. The obligation to ‘transpose’

The obligation to transpose the ‘outside’ norm into the internal legal order is envisaged by Article 288 TFEU for directives, but is not included in Article 216(2) TFEU. According to the Court, EU international agreements form an ‘integral part’ of the EU legal order, without the need of transposing measures. In other words, there is no general primary EU law obligation for the EU institutions or the Member States to transpose EU international agreements into their legal orders. Generally, EU international agreements should be capable of direct enforcement by the judiciary. However, the Court’s case-law does not always point in this direction.

In order to prove the direct effect of international agreements several *external* and *internal* restrictions need to be passed. First, the EU has to be bound by the agreement.²⁰ Second, the agreement must form an integral part of EU law. Third, if the parties have not decided on the effects, it is up to the Court to decide on the effects of the agreement.²¹ Once the Court is satisfied with these *external* conditions, it will turn to the actual analysis of the international agreement. The Court, to various degrees will employ a ‘two-tier direct effect test’,²² during the course of which it looks at the overall nature and objectives of the international agreement and the sufficiently clear, precise and unconditional character of the specific provision being invoked. The Court either commences the analysis with the overall nature and objectives of the agreement, in the course of which purposive interpretation takes the centre role; or it starts the analysis with the wording of the specific provision invoked by the claimant, with textual interpretation dominating the analysis.²³

Recent research shows that the Court seems to favour domestic EU policy objectives over international obligations²⁴ and is keener on enforcing international agreements against Member State measures.²⁵ Moreover, the Court uses either judicial avoidance techniques or maximalist enforcement techniques when faced with the enforcement of certain international agreements.²⁶ In case of the GATT,²⁷ the WTO Agreement,²⁸ the UNCLOS²⁹ and the Kyoto Protocol³⁰ the nature

²⁰ Joined Cases 21 to 24/72, *International Fruit Company*, [1972] ECR 1219, para 7; Case C-377/98, *Netherlands v. Parliament and Council*, [2001] ECR I-7079, para 52; *Intertanko*, *supra* n. 9, para 44; *Air Transport Association of America*, *supra* n. 9, para 52.

²¹ *Kupferberg*, *supra* n. 8, para 17; *Simutenkov*, *supra* n. 5, para 20; *Air Transport Association of America*, *supra* n. 9. Some of the new free trade agreements concluded by the EU contain provisions denying these agreements or parts of them direct effect. See A. Semertzi, *The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements*, 51(4) CMLR 1125 (2014).

²² See Panos Koutrakos, *EU International Relations Law*, 241-244 (Hart 2006), Schütze, *supra* n. 6, 339.

²³ Gáspár-Szilágyi, *EU International Agreements through a US lens*, *supra* n. 4, at 607.

²⁴ *Cottier*, *supra* n. 11, 313-316.

²⁵ Case C-61/94, *Commission v Germany*, [1996] ECR I-4006 (*International Dairy Agreement*); Case C-13/00, *Commission v Ireland*, [2002] ECR I-02943 (*Berne Convention*); Case C-239/03, *Commission v France (Étang de Berre II)*, [2004] ECR I-9328.

²⁶ See M. Mendez, *The Legal Effects of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, 21(1) E.J.I.L. 83 (2010).

²⁷ *International Fruit Company*, *supra* n. 20.

²⁸ Case C-149/96, *Portugal v Council*, [1999] ECR I-8395.

²⁹ *Intertanko*, *supra* n. 9.

and structure of these agreements were found not to be able to confer rights on individuals and they could not be used as a benchmark for the review of secondary EU law for their compatibility with these agreements, even if some of the provisions being relied on were sufficiently clear, precise and unconditional to allow for the creation of individual rights.³¹ Thus, when the Court decides to act in a fashion similar to certain national constitutional courts and employs protectionist measures to shield EU law and policy from international obligations, the possibility for any type of direct effect, be it vertical or horizontal, diminishes. Still, even in horizontal proceedings, the Court will try to a great extent to harmonize the interpretation of the domestic norm with the non-directly-effective international agreement, in order to protect the rights of private parties.³² On the other hand, the Court seems to favour maximalist enforcement techniques when confronted with the effects of association, partnership and cooperation agreements,³³ which act as a venue through which the EU projects its *acquis* on applicant or associate countries.³⁴ By directly enforcing such agreements, the possibility of tension between domestic EU policy objectives and international agreements is low.

In conclusion, when looking at cases between private parties that involve international agreements, it has to be borne in mind that it is not enough to look at the nature of the parties, but also the context in which the agreement was concluded,³⁵ the different domestic and foreign interests involved as well as the policy followed by the Court when enforcing certain agreements. If the Court decides that the nature, structure and purpose of an agreement do not allow for direct application, then the EU political bodies have to take further steps in order to implement the agreement and neither horizontal nor vertical direct effect of the agreement are possible.

b. The obligation contained in a specific provision

The *second* type of obligation refers to the duties contained in specific provisions of the legal instrument, based on which individuals can claim rights. Thus, if the Court concludes that an international agreement is capable of direct application, it will need to ask two further questions in order to conclude that it can have direct effect between two private parties. *First*, does the

³⁰ *Air Transport Association of America*, *supra* n. 9.

³¹ Lenaerts and Courthaut admit that the provisions of the GATT are as clear, precise and unconditional as those of other agreements concluded by the EU, the provisions of which may have direct effect. See K. Lenaerts and T. Courthaut, *Of Birds and Hedges: the role of primacy in invoking norms of EU law*, 31(3) ELR 287, 299 (2006).

³² An example is Article 50 TRIPS Agreement, which does not have direct effect, but the Court in several horizontal proceedings directed national courts to interpret their laws in light of this provision in order to protect the rights of private parties arising under EU trade mark law. See Case C-53/96, *Hermès*, [1998] ECR I-3603, Joined Cases C-300/98 and C-392/98, *Dior and Others*, [2000] ECR I-11307 and C-89/99, *Schieving-Nijstad v. Groeneveld*, [2001] ECR I-5851. See also G. A. Zonnekeyn, *The Hermès Judgment. Reconciling the Principles of Uniform and Consistent Interpretation*, 2(4) *The Journal of World Intellectual Property* 495 (1999).

³³ Mendez, *Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, *supra* n. 26, at 91-93.

³⁴ Ch. Hillion, *The EU's Neighbourhood towards Eastern Europe*, 311 in *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Alan Dashwood and Marc Maresceau eds., Cambridge 2008).

³⁵ Koutrakos, *supra* n. 22, 232-236.

agreement contain obligations which one of the private parties has to carry out? *Second*, is the other private party the beneficiary of the correlative right?

Answering the *first question* is not easy as the traditional view is that international agreements rarely set forth obligations and provide rights for private parties. Finding provisions which specifically address private parties is rare and much of the outcome will depend on the nature and type of the international agreement. Take for example the Montreal Convention on international air carriage,³⁶ which *expressly* provides a set of unconditional and precise duties of the parties under such contracts.³⁷ Such an agreement clearly and unconditionally lays down the rights and obligations of private parties and it is no wonder that in *IATA and ELFAA* the Court in one paragraph concluded that three articles of the Montreal Convention “appear, as regards their content, to be unconditional and sufficiently precise” in order to allow for the validity review of acts of the EU institutions.³⁸ Therefore, acknowledging the HDE of such international agreements should not pose a challenge to the Court.

The *first question* becomes more difficult to answer when the international agreement is not clearly meant to govern private contractual relationships and it becomes difficult to define who owes the obligation. For example the former Association Agreement with Slovakia provided in Article 38(1) that Slovakian workers “shall be free from any discrimination based on nationality”; Article 38(2) then provided that the Slovak Republic “shall” accord the same treatment to Member State nationals. These two articles read together seem to suggest that only the contracting States had the obligation not to discriminate on grounds of nationality. However, in *Kolpak*³⁹ the Court extended this obligation to the German Handball Federation (DHB), a private-law sports organization charged with the task of regulating a specific sport. Still, one could argue that this is logical as non-discrimination based on nationality should apply to any entity, private or public that regulates working conditions. But would the Court extend such a prohibition found in association agreements to purely contractual, private party relations? Suppose a private undertaking, not controlled by the State or vested with regulatory functions, stipulates in its employment contract that it does not hire nationals from the associate country.

Turning now to the *second question*, the Court also needs to define the beneficiary of the right correlative to the obligation owed by the other private party. This will not pose problems in the case of agreements, such as the Montreal Convention, which lay down *expressis verbis* the rights that individuals may enjoy under the agreement. However, what happens when the agreement does not mention rights in an express manner? The Court in *Van Gend en Loos* held that EU rights “arise not

³⁶ Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 1999) to which the EU is also a party. The Convention is a follow-up of the Warsaw Convention, which is *not* binding on the EU. See Case C-301/08 *Bogiatzi*, [2009] ECR I-10185, paras. 27-33.

³⁷ For e.g. arts. 12, 13, 17 and 18 Montreal Convention.

³⁸ C-344/04, *IATA and ELFAA v. Department of Transport*, [2006] ECR I-00403, para. 39. However, these proceedings were vertical.

³⁹ *Kolpak*, *supra* n. 5. The case is discussed in detail in Part II.1.b.

only where they are expressly granted by the Treaty [TFEU], but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the [EU].”⁴⁰ It seems that when defining the existence of EU rights, the Court took a Hohfeldian approach.⁴¹ Thus, the correlative of an EU duty or obligation is an EU right. Because the Treaty imposes obligations on private parties as well as EU institutions and Member States, private parties can enjoy the correlative rights to those obligations as against other individuals and public institutions. Thus, the TFEU provisions are capable of both horizontal and vertical direct effect.⁴² Given that EU international agreements form an ‘integral part’ of EU law, they also become a source of EU obligations and correlative EU rights.⁴³

However, the Hohfeldian approach has two drawbacks. *First*, it does not provide for the means of determining who is the beneficiary of the right correlative to an obligation.⁴⁴ *Second*, while rights imply a correlative duty, a duty does not always imply the existence of a correlative right.⁴⁵ This is most evident in *L’Étang de Berre I*,⁴⁶ a case brought by a French fishermen’s syndicate, which sought to shut down the operations of a local power plant run by *Electricité de France* (EDF) for its alleged breach of Article 6(3) of the Athens Protocol to the Barcelona Convention.⁴⁷ Interestingly, the Court does not mention rights at all in its direct effect analysis⁴⁸ and a simple right/duty approach does not seem to provide an answer for why the Court allowed a private association to rely on this agreement. The duty was to subject the discharge of certain substances to prior authorization, but what was the correlative right? Was it the right to a clean environment? And if so, how should one know *who* is the intended beneficiary of this right? The Court offers a hint, that in certain cases a valid *interest* might suffice, when it states that the provisions of the Protocol have direct effect, “so that any *interested* party is entitled to rely on those provisions”.⁴⁹ In the case of directives, Hilson and Downes have already proven that certain “effective interests” suffice for the purposes of proving direct effect.⁵⁰ Such interests do not amount to rights and are in line with the objectives of the directive, thus enhancing its *effet utile*.

⁴⁰ Case 26/62, *Van Gend en Loos*, [1963] ECR 1, page 12.

⁴¹ Wesley Newcomb Hohfeld (1879-1918) noticed that the term ‘right’ was sometimes indiscriminately used to refer to other concepts such as a privilege, immunity or a power. In his analysis he developed jural ‘opposites’ and jural ‘correlatives’. The jural opposites were: right/non-right; privilege/duty; power/disability; immunity/liability. The jural correlatives were: right/duty; privilege/no-right; power/liability; immunity/disability. See Wesley N. Hohfeld, *Fundamental legal conceptions as applied in judicial reasoning: and other legal essays*, 36 (Yale 1923).

⁴² Ch. Hilson and T.A. Downes, *Making sense of rights: Community rights in E.C. law*, 24(2) E.L.R. 121, 124 (1999).

⁴³ For a detailed discussion see Gáspár-Szilágyi, *EU International Agreements through a US lens*, *supra* n. 4, at 620-621.

⁴⁴ Hilson and Downes, *supra* n. 42, 123.

⁴⁵ Howard P. Kainz, *Natural Law: An Introduction and Re-examination*, 113 (Carus Publishing 2004).

⁴⁶ Case C-213/03, *L’Étang de Berre I*, [2004] ECR I-07357.

⁴⁷ Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources (Athens, 1996) attached to the Convention for the protection of the Mediterranean Sea against Pollution (Barcelona, 1976).

⁴⁸ *L’Étang de Berre I*, *supra* n. 46, paras 40-45.

⁴⁹ *Ibid.*, para 47.

⁵⁰ Hilson and Downes, *supra* n. 42, 132.

In conclusion the HDE of EU international agreements will depend a lot on knowing whether an agreement prescribes obligations to one private party, based on which the other party can claim a right or at least which gives rise to an “effective interest”. However, even if an agreement provides for such obligations and rights, a lot will depend on the willingness of the Court to consider the agreement as directly applicable in the EU legal order.

2. The Second Factor: The Party against Whom the Provision is Invoked

The application of EU law in proceedings between private parties has seen situations which on the face of it presented themselves as horizontal, but in reality one of the private parties enjoyed certain prerogatives and functions similar to that of the State. In an effort to bridge the gap between the application of the ‘free movement of persons’ provisions of the TFEU to private parties⁵¹ and the application of EU competition rules to Member State conduct,⁵² the Court turned away from the old private/public law distinction, and favoured an approach based on the nature of the functions carried out by the entity.⁵³ The Court also tried to remedy the lack of HDE of directives, by introducing the ‘emanation of the State’ doctrine,⁵⁴ indirect effect, or by granting HDE to general principles of EU law to which directives gave expression.⁵⁵ With this in mind, the following sections will group the existing cases concerning the effects of EU international agreements in proceedings between private parties, according to the nature of the passive party and the functions it carries out, as well as the source of law to which HDE is granted.

a. Private Party v. an ‘Emanation of the State’

Over the years the Court has gradually expanded the scope *ratione personae* of the EU Treaties and secondary EU legislation. In order to obtain the uniform application of EU law, the obligation to give full effect to the Treaties and secondary EU legislation was not confined to the Member State *stricto sensu*, but was extended to all organs of the State, regional authorities as well as public bodies.⁵⁶ In *Foster*,⁵⁷ the Court laid down a set of criteria, based both on *functional* factors as well

⁵¹ S. Van Den Bogaert, *Horizontality: The Court Attacks?*, 134-138 in *The Law of the Single European Market – Unpacking The Premises* (Catherine Barnard and Joanne Scott, Hart 2002).

⁵² *Ibid.*, 123.

⁵³ O. Odudu, *The Public/Private Distinction in EU Internal Market Law*, 46(4) *Revue Trimestrielle de Droit Européen* 826, 830-834 (2010).

⁵⁴ Case C-188/89, *Foster v. British Gas*, [1990] ECR I-3313.

⁵⁵ Case C-144/04, *Mangold v. Helm*, [2005] ECR I-9981; Case C-555/07, *Küçükdeveci*, [2010] ECR I-365.

⁵⁶ J. Tomkin, ‘Breaches of Union Law by Private Parties: The Consequences of Such Breaches and the Circumstances in Which They May Give Rise to State Responsibility’, European Network on Free Movement of Workers, September 2012, <http://ec.europa.eu/social/BlobServlet?docId=10942&langId=en>, 5 (accessed 21 October 2014). *Marshall*, *supra* n. 19, para 49.

⁵⁷ *Foster*, *supra* n. 54.

as the *control* exercised by the State, under which a specific body “whatever its legal form”⁵⁸ can be classified as an ‘emanation of the State’.⁵⁹ It held that a sufficiently precise and unconditional provision of a directive can be relied on against a body, regardless of its form, which has been set up pursuant to State measures in order to provide a public service under the control of the State and has for that purpose special powers, beyond those applicable to private relations.⁶⁰

Turning now to international agreements, in the previously discussed *L’Étang de Berre I*, the Court gave direct effect to Article 6(3) of the Athens Protocol. At a first glance this case might present itself as the recognition of the HDE of a provision found in an EU international agreement, since it concerned a claim brought by a French association of fishermen against EDF, an energy company. However, as mentioned, the quality of the party against whom a legal norm is invoked plays an important role in the HDE debate. In this case, the defendant electricity company could be seen as an emanation of the French State at the time the judgment was handed down. Up until 19 November 2004 (the judgment was handed down on 15 July 2004) EDF was a state-owned corporation.⁶¹ It was furthermore in the privileged position of enjoying a national service, through an agreement with the French Government,⁶² and its facilities near the *L’Étang de Berre* marshland were not only meant to generate electricity at a regional level, but also to contribute to the security of electricity generation.⁶³ In other words EDF constituted an ‘emanation’ of the French State and the relationship between the fishermen’s syndicate and the undertaking cannot be regarded as truly horizontal.

Still, it is peculiar that nowhere in the judgment does the Court discuss the emanation of the State doctrine, makes no reference to such cases like *Foster* and neither does it expressly mention HDE. This might signal the unwillingness of the Court to create a parallel between the HDE of directives and the HDE of international agreements, including its case-law on the ‘emanation of the State’ doctrine. Such a choice is understandable since the ‘emanation of the State’ doctrine was developed in the specific context of providing an exception to the no-HDE of directives. Extending this exception to EU international agreements would imply that such agreements, just as directives, are also generally precluded from having HDE. However, as previously discussed, no such rule exists concerning EU international agreements (*See Part III*). Another explanation might be that the Court is known to only answer the questions which are specifically referred to it, when a case

⁵⁸ *Ibid.*, para. 20.

⁵⁹ The Court uses the terms ‘State’, ‘organ of the State’, ‘emanation of the State’, ‘State authority’ and ‘public authority’ interchangeably. *See* S. Prechal, *Directives in EC Law*, *supra* n. 17, 58-61.

⁶⁰ *Foster*, *supra* n. 54, para 20. *See also* Joined Cases C-253/96 to C-258/96, *Kampelmann*, [1997] ECR I-6907, para 46; Case C-157/02, *Rieser*, [2004] ECR I-1477, paras 24-28.

⁶¹ Official EDF website, <http://www.edfenergy.com/about-us/about-edf-energy/who-owns-us.shtml> (accessed 21 October 2014). Currently EDF is set up as a *société anonyme* and 84.49% of its shares are owned by the French Government. <http://shareholders-and-investors.edf.com/edf-share/shareholding-structure-42691.html>, (accessed 21 October 2014).

⁶² *L’Étang de Berre II*, *supra* n. 25, page 9335.

⁶³ *Ibid.*, page 9337.

comes before it in the form of a preliminary reference. In *L'Étang de Berre I* the national court raised a question concerning the direct effect of Article 6(3) of the Protocol, but did not refer any questions regarding HDE or the 'emanation of the State' doctrine;⁶⁴ neither did the Court find it necessary to address this issue. Whatever the reasons might be, this case illustrates that an international agreement can have direct effect in a case brought by a private association against a company, which is owned and controlled by the State.

b. Professional v. a Private Regulatory Body of a Profession

It is not uncommon that many professions in different fields, such as sports or the profession of attorney are regulated by private bodies. Besides private regulatory bodies, certain Member States also allow the social partners to reach collective agreements that regulate remuneration, conditions of employment, etc. Furthermore, in most jurisdictions trade unions are allowed to organize collective actions.⁶⁵ The Court over the years took into consideration these realities and adopted a 'functional' approach, through which it extended the free movement of persons articles of the TFEU to international cyclist federations,⁶⁶ football associations,⁶⁷ national bar associations,⁶⁸ and collective actions taken by trade unions.⁶⁹ More recently, the Court held that a private body entrusted with the certification of certain goods can also restrict the free movement of goods.⁷⁰

With regard to EU international agreements, most cases involving a private party and a private regulatory body arose in the last decade, with one exception. In *Razanatsimba*⁷¹ a Madagascan national relied on Article 62 of the Lomé Convention in order to challenge a rule adopted by the Lille Bar, which restricted the access of non-French nationals, even if the law degree was obtained in France. Interestingly, the Court did not discuss the direct effect of the agreement, but simply went on to interpret the relevant provision and came to the conclusion that the wording contained an exception to the rule on equal treatment in matters of establishment. Thus, the international provision did not "purport to provide equality of treatment" between the nationals of the signatory parties.⁷² This case is part of a set of cases in the late '70s and early '80s in which the Court provided an interpretation of the relevant international provisions, but did not discuss their direct effect (*See* Part II.2.c).⁷³ One explanation for this silence might be that neither did the national

⁶⁴ Case C-213/03, *L'Étang de Berre I*, [2004] ECR I-07357, para. 25.

⁶⁵ M. Karayigit, *The Horizontal Effect of the Free Movement Provisions*, 18(3) Maastricht J. 303, 311-317 (2011).

⁶⁶ Case 36/74, *Walrave and Koch*, [1974] ECR 1405.

⁶⁷ Case C-415/93, *Bosman*, [1995] ECR I-4921.

⁶⁸ Case C-399/99, *Wouters*, [2002] ECR I-1577.

⁶⁹ Case C-341/05, *Laval*, [2007] ECR I-117671 Case C-435/05, *Viking*, [2007] ECR I-10779.

⁷⁰ Case C-171/11, *Fra.bo SpA*, [2012] Not yet published, paras 31-32.

⁷¹ Case 65/77, *Razanatsimba*, [1977] ECR 2229.

⁷² *Ibid.*, para 13.

⁷³ Mendez, *supra* n. 4, 96. *See Polydor v. Harlequin*, *supra* n. 5 and Case 52/77, *Cayrol v Rivoira*, [1977] ECR 2261. *See* the commentary in Part II.2.c.

courts ask about, nor did the Advocate Generals discuss, the direct effect of the international agreements. Therefore, the Court preferred to confine itself to these parameters.⁷⁴ This case also illustrates that direct effect is not always needed in order for a private professional to rely on the provisions of an international agreement in a case against a private regulatory body; the direct effect question can be left aside by referring a question on the substantive interpretation of a specific provision of the EU international agreement.

Looking at more recent years, in *Kolpak*, a Slovakian national (before accession) relied on Article 38(1) of the Association Agreement with Slovakia, relating to non-discrimination on grounds of nationality as regards the working conditions, remuneration and dismissal of Slovakian nationals. He sought to challenge the “federal regulations”⁷⁵ laid down by the German Handball Federation (DHB), which restricted the number of non-EU players. The Court granted the international provision direct effect by first looking at the wording of the specific provision being relied on and only in a secondary manner, taking into consideration the objectives of the agreement and the context in which its provisions were adopted.⁷⁶ The Court then drew a parallel with the *Bosman*⁷⁷ case, in which it held that the prohibition of discrimination against working conditions applies also to rules laid down by sports associations.⁷⁸ According to the Court, the realities of certain professions have to be taken into consideration, the regulation of which is not restricted to rules enacted by public authorities.⁷⁹ The last argument dealt with the scope of the non-discrimination principle set down by the association agreement. Contrary to the objections of the DHB and several governments, the Court held that the principle of non-discrimination based on nationality applied in the case, because it referred to equal working conditions, once the foreign nationals were legally employed in a Member State.⁸⁰

Several observations are needed. *First*, it is remarkable that the Court drew a parallel between *Bosman*, concerning the direct effect of provisions of the TFEU, and the direct effect of an EU international agreement. As seen in the previous section, the Court avoided such parallels when the ‘emanation of the State’ doctrine was concerned. One explanation might be that the general rule for directives is the lack of HDE, and the emanation of the State doctrine is a specific exception to this rule. On the other hand, no general rule exists prohibiting the HDE of provisions of the TFEU or EU international agreements, which rank above EU directives. Another explanation might be that this case involved free movement provisions and the principle of non-discrimination based on nationality. Knowing the importance of this principle in the overall EU *acquis* and given that part of this *acquis* was exported through the Europe Agreements, the Court might have been more willing

⁷⁴ Mendez, *supra* n. 4, 97.

⁷⁵ *Kolpak*, *supra* n. 5, page 4158, para 8.

⁷⁶ *Ibid.*, paras 24-26.

⁷⁷ Case C-415/93, *Bosman*, [1995] ECR I-4921.

⁷⁸ *Ibid.*, paras 32-33.

⁷⁹ *Ibid.*, para 33.

⁸⁰ *Ibid.*, paras. 42-46.

to enforce these provisions.⁸¹ *Second*, the Court took into account the ‘realities’ of sporting professions, which often exhibit a sort of dependency⁸² between sports professionals and sports federations enjoying quasi-State regulatory functions. If the Court were to follow a strict approach based on the public or the private law character of a rule-making entity, private parties could be denied the right to challenge the measures of private regulatory bodies, simply because of their private law character. Instead, the Court favours a functional approach based on the tasks and responsibilities carried out by regulatory bodies. *Third*, these situations cannot be classified as truly horizontal, but exhibit more the characteristics of quasi-vertical direct effect. In other words, whenever *Bosman*-type direct effect occurs, caution should be taken before concluding that actual HDE was granted.

Whilst one might think that such a positive outcome was also partially due to the agreement’s ultimate objective of accession, the Court followed a similar approach in a case involving a cooperation agreement, which did not set accession to the EU among its goals. In *Simutenkov*⁸³ a Russian football player legally employed by a Spanish football team relied on the non-discrimination provision of the EC-Russia Partnership and Cooperation Agreement in order to challenge a rule of the Royal Spanish Football Federation, which restricted the number of non-EU players. Compared to the Europe Agreements,⁸⁴ the agreement with Russia set a more modest agenda. It too contained a provision (Article 23(1)) on equal treatment for Russian nationals legally employed in the territory of the Member States. However, Article 27 of the Agreement provided that the implementation of this article would be done through recommendations made by the Cooperation Council, set up by the agreement. Contrary to what some might have expected, this provision did not affect the Court’s reasoning.

The Court commenced the direct effect analysis by first looking at the wording, purpose and nature of the agreement.⁸⁵ According to the Court the wording of the specific provisions were clear, precise and unconditional on the prohibition of discrimination.⁸⁶ Next, the Court succinctly argued that Article 27 of the Cooperation Agreement did not make the applicability of Article 23 in its implementation and effects subject to the adoption of any subsequent measures.⁸⁷ This latter argument of the Court seems to be at odds with *Demirel* in which one of the factors for denying direct applicability to the Ankara Agreement was the need to implement the free movement provisions of the agreement through the decisions of the Council of Association.⁸⁸ The Court then

⁸¹ Gáspár-Szilágyi, *EU International Agreements through a US lens*, *supra* n. 4, at 618.

⁸² For this observation I thank one of the commentators from Legal Issues of Economic Integration.

⁸³ *Simutenkov*, *supra* n. 5.

⁸⁴ See European Commission, *Enlargement – Europe Agreement*, http://ec.europa.eu/enlargement/policy/glossary/terms/europe-agreement_en.htm (accessed 21 October 2014).

⁸⁵ *Simutenkov*, *supra* n. 5, para 21.

⁸⁶ *Ibid.*, para 22.

⁸⁷ *Ibid.*, para 25.

⁸⁸ *Demirel*, *supra* n. 7, para 20.

looked at the objective of the agreement, which was to set up a partnership for promoting the development of trade and political ties between the parties as well as the “gradual integration” of Russia.⁸⁹ The fact that the Agreement was limited to establishing a partnership, “without providing for an association or future accession” could not prevent the provisions from having direct effect.⁹⁰

At a first glance it seems strange that the Court offers the same treatment to a partnership agreement as it offers to Europe Agreements, knowing that the former does not set out such ambitious goals as the possible accession to the EU. However, a closer look at how the European Neighbourhood Policy (ENP)⁹¹ is carried out shows that the pre-accession methodology is not only used to prepare countries for EU membership but it is now extensively relied upon to transform the eastern and southern neighbours into a “ring of EU friends”.⁹² Even though the agreement with Russia was signed before the creation of the ENP and Russia is currently not included in the ENP, a lot of the objectives and methods⁹³ used in the EC-Russia agreement were the same as the ones used in the Europe Agreements.⁹⁴ Thus, partnership agreements also serve as a means of channelling the EU *acquis* towards States which are not potential EU candidates, and a favourable direct effect ruling will not create significant tensions between the policies pursued by the EU’s political institutions and the objectives of the partnership agreements. Moreover, the case also involved the non-discrimination principle based on nationality, which as mentioned, takes a prominent role in the Court’s jurisprudence. Furthermore, just as in the case of *Kolpak*, it seems difficult to argue that true HDE occurred, since the case involved the rules enacted by the regulatory body of the football profession. It seems more logical to argue that quasi-vertical direct effect was involved.

More recently in *Kahveci*,⁹⁵ a Turkish national and a Spanish football team relied on Article 37 of the Additional Protocol to the Ankara Agreement, which prohibits discrimination as regards working conditions and remuneration in order to challenge a rule of the Spanish Royal Football Federation. Contrary to the previous two cases, the Court first interpreted the non-discrimination provision and only afterwards did it discuss its direct effect. Reiterating *Kolpak* and *Simutenkov*, the Court held that the provisions on non-discrimination found in such association and partnership agreements prohibit in “clear, precise and unconditional terms” discrimination between Member State and non-Member State nationals as regards working conditions,

⁸⁹ *Simutenkov*, *supra* n. 5, para 27.

⁹⁰ *Ibid.*, para 28.

⁹¹ See European Commission, Economic and Financial Affairs, *European Neighbourhood Policy*, http://ec.europa.eu/economy_finance/international/neighbourhood_policy/index_en.htm, (accessed 21 October 2014).

⁹² Hillion, *supra* n. 34, 310.

⁹³ M. Cremona, *The European Neighbourhood Policy – More than a Partnership?*, 264-293 in *Developments in EU External Relations Law* (Marise Cremona eds., Oxford 2008).

⁹⁴ In 2010 the negotiations for a new agreement were stopped and no progress was made. See European Commission, Trade Policy, *Russia*, available at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/russia/>, (accessed 21 October 2014).

⁹⁵ *Kahveci*, *supra* n. 5.

remuneration and dismissal.⁹⁶ Moreover, this prohibition of discrimination was in line with the purpose of the Ankara Agreement, which allowed for the recognition of its direct effect.⁹⁷

Interestingly, even though the case concerned the Ankara Agreement, the Court did not refer to any of the prior cases concerning this Agreement. In *Demirel* the Agreement was denied direct effect mainly due to its programmatic nature, which required the Council of Association to lay down detailed rules for the progressive attainment of freedom of movement.⁹⁸ Later on in *Sevince*,⁹⁹ the Court partially remedied *Demirel* by holding that the decisions of the Association Council were capable of “direct application”.¹⁰⁰ Several explanations might exist for the Court’s silence in *Kahveci* on these prior cases. *First*, Article 10(1) of Decision No 1/80 of the Association Council also contained a provision on non-discrimination drafted in similar words as Article 37 of the Additional Protocol and Association Council Decisions are capable of having direct effect. However, the Court argued that the article of the Additional Protocol, a part of the Agreement, had direct effect¹⁰¹ and it did not refer to the direct effect of the Association Council’s Decision. *Second*, this case seems to signal the maturity of the Court’s approach to the direct effect of the Ankara Agreement. In the post-*Sevince* era, the Court did not bother anymore to analyse the object and purpose of the Ankara Agreement. When faced with the interpretation of a specific provision, it referred straight to the “general and unconditional” wording of the provision, which confers rights on Turkish workers.¹⁰²

With the above in mind the following conclusions can be drawn. *First*, the willingness of the Court to grant direct effect to these different international provisions may be explained by the importance of the principle of non-discrimination based on nationality in the Court’s jurisprudence. *Second*, the Court was willing to extend its *Bosman* holding, concerned with the direct effect of primary EU law, to EU international agreements. *Third*, the Court favours following a functional approach, even when EU international agreements are concerned. Thus, the determining factor in the vertical/horizontal debate is the regulatory function exercised by the entity and not the entities’ private or public law character. In other words, these cases cannot be seen as a confirmation of veritable HDE, but more as a type of vertical direct effect.

⁹⁶ *Ibid.*, para 28.

⁹⁷ *Ibid.*, para 30.

⁹⁸ *Demirel*, *supra* n. 7, paras 20-21. See also Article 36 second sentence of the 1977 Protocol – “The Council of Association shall decide on the rules necessary to that end.”

⁹⁹ Case C-192/89, *Sevince*, [1990] ECR I-3461.

¹⁰⁰ *Ibid.*, para 19.

¹⁰¹ *Kahveci*, *supra* n. 5, para 30.

¹⁰² See *Mendez*, *supra* n. 4, 121 with reference to Case C-237/91, *Kus v Landeshauptstadt Wiesbaden*, [1992] ECR I-6781, para 21; Case C-1/97, *Birden*, [1998] ECR I-7747, para 38; Case C-262/96, *Sürül*, [1999] ECR I-2685, para 60 and beyond; Case C-383/03, *Ergül Dogan*, [2005] I-6237, para 13; Case C-187/10, *Unal*, [2011] ECR 9045, para 44.

c. Private Undertaking vs. Private Undertaking

Another situation concerns proceedings which arise between two private parties,¹⁰³ situated at an equal level of hierarchy with none of them exercising State-like or regulatory functions. Even in such circumstances, whether HDE occurred is questionable.

With regard to EU international agreements two such cases were handed down over three decades ago, which arose between private traders, but the Court did not discuss the agreements' HDE. In *Cayrol v Rivoira*,¹⁰⁴ an Italian court referred a set of questions to the Court on the interpretation of various provisions on quantitative restrictions found in the Agreement between the EEC and Spain, regarding a dispute that arose between two traders over a consignment of fraudulently labelled Spanish grapes.¹⁰⁵ It is interesting to note that the referring national court did not in any way include a question on the direct effect of the agreement, and the Court did not tackle the issue of direct effect. Instead it went on to interpret Article 11 of the Annex to the Agreement, and favoured the narrower interpretation suggested by the Commission as it was "more in accordance with both the general scheme and the objectives of the Agreement".¹⁰⁶ As mentioned earlier, this case is part of a line of cases including *Razanatsimba*, in which the Court does not discuss direct effect, but prefers to interpret the international provision in question.

Several years later in *Polydor*,¹⁰⁷ the Court was faced with a dispute that arose between two record companies regarding the parallel import of a popular Bee Gees album into the United Kingdom from Portugal, which was not yet an EU member. Interestingly, even though the referring national court specifically asked about the direct enforceability of Article 14(2) of the EEC-Portugal Agreement by private parties,¹⁰⁸ the Court followed a similar approach to the one in *Cayrol v. Rivoira* and did not tackle the direct effect question. Instead, it looked at whether the said conduct could amount to a measure having an equivalent effect under the Agreement, as under EC law prevention of a parallel import from another Member State constituted a measure having equivalent effect.¹⁰⁹ Even though the wording of the relevant provisions of the Agreement was similar to those of the EEC Treaty, the Court did not find this similarity to be a "sufficient reason" for transposing to the agreement the existing EC case-law.¹¹⁰ The main argument was that the

¹⁰³ For a discussion on *direct* horizontal effect and *indirect* horizontal effect see A. Hartkamp, *The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary community Law*, 18(3) *European Rev. of Priv. L.* 527, 529 (2010)

¹⁰⁴ *Cayrol v. Rivoira*, *supra* n. 73.

¹⁰⁵ *Ibid.*, paras 1-7.

¹⁰⁶ *Ibid.*, para 14.

¹⁰⁷ *Polydor v Harlequin*, *supra* n. 5.

¹⁰⁸ *Ibid.*, page 333.

¹⁰⁹ *Ibid.*, para 7.

¹¹⁰ *Ibid.*, paras 14-15.

Agreement and the EEC pursued different objectives and the Agreement did not have the same purpose as the EEC treaty.¹¹¹

With the above in mind, several observations are warranted. *First*, whether HDE actually occurred is debatable. One might argue that the mere fact that the parties were allowed to invoke the agreement, even though no discussion on direct effect was present, already constitutes direct effect. However, it seems that the Court avoided the direct effect question altogether and instead preferred to interpret the relevant international provisions. Such an approach might come as an aid to private parties. Direct effect can either function as a ‘sword’, by allowing the foreign norm to penetrate the domestic legal order or it can function as a ‘shield’, and protect domestic policy interests.¹¹² By not tackling the direct effect question, the Court circumvents the possibility that the lack of direct effect might stop private parties from reaching their goal.

Second, both *Cayrol* and *Polydor*, as well as *Razanatsimba* appeared in a period of a five year long silence on direct effect, following the Court’s judgment in *Bresciani*,¹¹³ in which it granted direct effect to the Second Yaoundé Convention.¹¹⁴ This silence then ended several months after *Polydor*, when the Court affirmed the direct effect of the Agreement with Greece in *Pabst*¹¹⁵ and the Agreement with Portugal in the textbook case of *Kupferberg*.¹¹⁶ One explanation to this silence might be that following *Bresciani* the Court was wary to extend the direct effect of EU international agreements beyond vertical situations. This was a time when *Defrenne II*¹¹⁷ and the HDE of the EEC Treaty had barely been affirmed and *Marshall*¹¹⁸ and the no-HDE of directives were not yet born. In this context it would have been too ambitious for the Court to clearly confirm the HDE of EU international agreements. Both *Pabst* and *Kupferberg* point in this direction; the Court reaffirmed direct effect since both cases presented vertical situations and not horizontal ones.

Third, these cases belong to a set of cases in which the Court did not want to extend the EU interpretation of barriers to free trade to similarly worded provisions of free trade agreements, even if in later cases it has done so.¹¹⁹ The *fourth* observation is influenced by certain arguments used in the US. In US legal literature and federal court cases it has been argued that the self-executing character of a ‘treaty’ need not be proven, when the agreement is relied on by the defendant as a

¹¹¹ *Ibid.*, paras 16-19.

¹¹² A comparison used by Prechal in S. Prechal, *Does Direct Effect Still Matter?* 37 C.M.L.R.1047(2000).

¹¹³ Case 87/75, *Bresciani v Amministrazione Italiana delle Finanze* [1976] ECR 129.

¹¹⁴ Between the EEC and 19 African States (1971).

¹¹⁵ Case 17/81, *Pabst & Richarz v Hauptzollamt Oldenburg* [1982] ECR 1331, paras 26-27.

¹¹⁶ Case 104/82, *Kupferberg*, [1982] ECR 3644.

¹¹⁷ Case 43/75, *Defrenne v. Sabena* [1976] ECR 455.

¹¹⁸ Case 152/84, *Marshall* [1986] ECR 723.

¹¹⁹ Koutrakos, *supra* n. 22, 228-229.

defence.¹²⁰ Whether such an argument would hold in Europe is difficult to say, but in both cases the agreements were invoked by the defendants in their defence.¹²¹

*Fifth, in Faccini Dori*¹²² the Court held that by granting direct effect to directives in relations between private parties, a new power of the EU would be recognised to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.¹²³ By allowing private parties to rely on international agreements against other private parties, it seems that in some contexts such a power now appears possible via EU international agreements as well.¹²⁴

d. Direct effect is granted to a general EU principle, but not the legal instrument

More recently in *Mangold*¹²⁵ and *Küçükdeveci*¹²⁶ the Court has shown that even though directives do not have HDE, in case they “gave expression”¹²⁷ to a general principle of EU law (non-discrimination on grounds of age), the general principle can have HDE. Some authors argue that the Court makes a fairly artificial distinction between the effects of directives and the effects given to directives which give expression to general principles.¹²⁸ Other authors have observed that only a relative few principles will meet the triple threshold needed in order for the *Küçükdeveci* doctrine to apply.¹²⁹ The Court gave a new twist to this doctrine in the very recent *AMS*¹³⁰ judgment, faced with a set of questions referred by the French *Cour de Cassation* on the effects of Article 27 of the Charter of Fundamental Rights of the EU in a dispute between private parties. The Court looked at whether Article 27 of the Charter could be applied horizontally in a similar fashion as the principle of non-discrimination on grounds of age was applied in *Küçükdeveci*.¹³¹ Contrary to what some might have expected, the Court concluded that the ‘right’¹³² enshrined in Article 27 of the Charter and the principle of non-discrimination on grounds of age were different. Whilst the latter principle was “sufficient in itself to confer on individuals an individual right which they may

¹²⁰ *United States v. Duarte-Acero*, 132 F.Supp. 2d 1036 (2001), at 1040, note 8. See also D. Sloss, *Self-executing Treaties and Domestic Judicial Remedies*, 98 Am. Soc’y Int’l. L. Proc 346, 348 (2004).

¹²¹ *Polydor v Harlequin*, *supra* n. 5, page 332; *Cayrol v Rivoira*, *supra* n. 73, paras 1-7.

¹²² C-91/92, *Faccini Dori*, [1994] ECR I-3325.

¹²³ *Ibid.*, para. 24.

¹²⁴ *Mendez*, *supra* n. 4, 153.

¹²⁵ *Mangold*, *supra* n. 55.

¹²⁶ *Küçükdeveci*, *supra* n. 55.

¹²⁷ *Ibid.*, para. 50.

¹²⁸ P. Cabral and R. Neves, *General Principles of EU Law and Horizontal Direct Effect*, 17(3) European Pub. L. 437, 448 (2011).

¹²⁹ E. Muir, *Of Ages In – And Edges Of – EU Law*, 48 C.M.L.R. 39, 61 (2011).

¹³⁰ Case C-176/12, *AMS* [2014] Not yet reported.

¹³¹ *Ibid.*, para. 41.

¹³² Whilst the Court de Cassation and the Court refer to the ‘rights’ of workers under Article 27 of the Charter, AG Villalón classified this ‘right’ as a ‘principle’ under the Charter. He argued that in the case of principles the obligation is a lot more general than in the case of rights. The public authorities, and in particular the legislature are called upon to transpose such a ‘principle’ into a judicially cognisable reality.

invoke as such”,¹³³ Article 27 of the Charter could only be fully effective if it was given “more specific expression” in EU and national law.¹³⁴ The Court thus concluded that Article 27 of the Charter could not apply in proceedings between private parties.

Whilst, this judgment is meant to enhance legal certainty as to the horizontal application of EU law, it also raises new questions such as which fundamental rights/principles of EU law are “legally perfect” to grant rights to individuals and how is that to be determined?¹³⁵ This means that certain provisions found in international agreements, which reflect a general principle of EU law, might be capable of HDE if they are legally perfect, but other provisions which encapsulate such general principles might not be capable of operating without being given further expression by EU or Member State law. These cases also make a potential reader ask the question, whether a specific legal instrument was granted HDE or whether a general principle of EU law, which the legal instrument gives expression to, enjoyed such effect.

In the field of international agreements, *Kolpak*, *Kahveci* and *Simutenkov* all concerned the principle of non-discrimination based on nationality and one could argue that it was this principle that was granted direct effect and not the international agreements. However, such a conclusion is unwarranted for several reasons. *First*, principles in general have a gap-filling function and will only be relied on when a written legal rule contains certain *lacunae*.¹³⁶ The relevant association and partnership agreements all contained the principle of non-discrimination based on nationality. Whilst it is true that the directives in *Mangold* and *Kücükdeveci* also contained a general principle of EU law, the Court resorted to the afore-mentioned mechanism due to the no-HDE rule of directives. However, in the case of international agreements no such rule exists. Thus, it seems pointless to grant HDE to a general principle when the legal instrument in which it is contained has the possibility to have HDE. *Second*, whilst Article 18 TFEU contains the general prohibition of discrimination on the grounds of nationality, it is only relevant within the ‘scope of application’ of the TFEU.¹³⁷ Compared to the ambitious objectives of the Treaties, most international agreements pursue more modest aims.¹³⁸ Thus, just because a principle is contained in an international agreement, which is similar to an EU principle, does not yet mean that it will be given the same meaning. *Razanatsimba* has shown that the scope of the non-discrimination principle found in association, partnership or free trade agreements can be different than the scope of the similar principle in the EU context. Moreover, the *Bananas* case¹³⁹ concerning the preferential tariffs

¹³³ *Ibid*, para. 47.

¹³⁴ *Ibid*, para. 45.

¹³⁵ On a more general discussion see N. Lazzarini, ‘Case C-176/12, *Association de médiation sociale v. Union locale des syndicats CGT and Others*, Judgment of the Court of Justice (Grand Chamber) of 15 January 2014’, 51(3) C.M.L.R. 907 (2014).

¹³⁶ Takis Tridimas, *The General Principles of EU Law*, 17 (2d ed., Oxford 2006).

¹³⁷ *Ibid.*, 123.

¹³⁸ G. Bebr, *Agreements Concluded by the Community and their Possible Direct Effect: From International fruit Company to Kupferberg*, 20 C.M.L.R. 35, 37 (1983).

¹³⁹ Case C-280/93, *Germany v Council* [1994] ECR I-4973.

applied to banana imports coming from ACP countries is a good example that the EU institutions have a wide margin of discretion when applying the non-discrimination provisions contained in an international agreement.¹⁴⁰

III. THE COURT SHOULD NOT BE SHY TO CONFIRM IT

1. Reasons behind the Court's 'shyness'

Based on the analysis provided in Part II some interesting observations can be made. It seems that the Court is not willing to make any express statements on the HDE of EU international agreements, but prefers a cautious, almost case-by-case approach. The 'emanation of the State' doctrine is an exception specifically created in order to circumvent the general rule on the lack of HDE of directives. Therefore, it is no surprise that the Court in *L'Étang de Berre I* was not willing to mingle the issues concerning this exception with the direct enforcement of an international agreement against a state owned and controlled company. Instead, it preferred to simply grant direct effect to the agreement without stirring up a full-fledged debate on whether exceptions applying to the no-HDE of directives should be applied to the direct effect of EU international agreements.

The Court, however, made a surprising move in *Kolpak* and applied the *Bosman* doctrine to a Europe Agreement. As previously mentioned, such a result is explainable, since the principle of non-discrimination based on nationality holds a prominent position in the Court's case-law and association agreements are a venue through which the EU *acquis* is exported. However, the willingness to extend the *Bosman*-type of direct effect from the Founding Treaties to EU international agreements might be a sign that, unlike in the case of the hierarchically inferior EU directives, there is no general prohibition regarding the HDE of EU international agreements. This conclusion is in line with the conclusions reached in Part II.1. The no-HDE of directives was a result of Article 288 TFEU and the obligation of the Member States to transpose directives. However, no such general obligation exists under EU primary law for the EU institutions and the Member States to transpose binding international agreements into their legal orders.

Still these cases do not present themselves as veritable horizontal relationships. They involved private actors which were either owned and controlled by the State, or exercised quasi-State regulatory functions. True horizontal relationships involve private parties at equal hierarchical positions, carrying out similar functions and are mostly concerned with private contractual relationships. *Polydor* and *Cayrol* both involved such veritable horizontal relationships, but the Court shied away from expressly confirming HDE. As explained, this outcome is also understandable, since the Court was asked to deliver these judgments in a time, when the HDE of

¹⁴⁰ Tridimas, *supra* n. 136, 84-85.

different internal EU legal instruments was not yet fully settled. It would have been too risky for the Court to confirm the HDE of EU international agreements in such delicate times.

Some suggestions, however, are offered to the Court to finally, clearly acknowledge the HDE of international agreements. It is time to leave behind this apparent shyness.

2. Time to move on

As discussed, *L'Étang de Berre I* and the *Bosman*-type direct effect are not a result of veritable horizontal relationships, even though the Court has confirmed such quasi-vertical direct effect. However, the *Polydor* and *Cayrol* type of horizontal relationships are still in need of an express confirmation of HDE. The times have moved on since the late '70s and early '80s and by now the Court has consolidated the EU legal order as a separate legal order, with its own internal constitutional mechanisms. Now we know that certain articles of the Founding Treaties and regulations can have HDE. The no-HDE of directives has especially seen an intricate array of exceptions and alternatives attached to it. Moreover, the Court has consolidated the primacy of international agreements, and has been fairly generous in granting direct effect to most international agreements, with notable exceptions. I am of the opinion that in this new legal climate, acknowledging direct effect in veritable horizontal relationships would not stir up too much opposition from Member States or EU institutions. After all, the private, mainly contractual relations between private parties with equal functions would not touch upon the policies and powers of government actors. A good example for this would be the Montreal Convention, to which the Court in *IATA and ELFAA* has already granted vertical direct effect, without causing any controversies.

3. Other jurisdictions do not seem to have a problem with it

This section is meant to provide an example of how other major and complex jurisdictions (mainly the United States) apply international agreements in proceedings between private parties, in order to prove that the application of such agreements in horizontal proceedings do not cause particular problems to courts. Therefore, the Court should not hesitate to expressly acknowledge the HDE of EU international agreements.

Recent research focusing on the domestic application of international agreements in a dozen countries has shown that domestic courts are more willing to directly apply treaty provisions that regulate relationships between private actors, because they do not create significant new duties for governments. However, they are less willing to do so when international agreements regulate

vertical situations, because such agreements implicate the public functions of government.¹⁴¹ In a different study, Professor Nollkaemper found that courts are willing to apply international agreements in horizontal proceedings, even in countries in which vertical direct effect of an international agreement is a “non-starter”. For example, in *Lu v. United States Inc*, a Shanghai court applied the Warsaw Convention in horizontal proceedings.¹⁴² As he notes, domestic courts will routinely enforce mainly private international law governing interactions between private persons, such as the Treaty Establishing the Organization for the Harmonization of Business Laws in Africa or the International Convention on the Sale of Goods (CISG).¹⁴³

Looking at the US, a system that directly incorporates international agreements (*treaties*) in its legal order,¹⁴⁴ the following can be said. Even though the Supreme Court¹⁴⁵ and federal courts¹⁴⁶ have been favouring protectionist measures for the past decades in cases which involve international agreements, the situation is more nuanced. Recent empirical research has shown that in private party proceedings, opposed to vertical proceedings against the government, US courts are a lot more willing to apply tools that enhance treaty enforcement, such as the cannon of good faith, liberal interpretation or holding that the treaty is self-executing. The Supreme Court has successfully applied different types of international agreements, such as the Warsaw Convention,¹⁴⁷ the Shipowner’s Liability Convention¹⁴⁸ and the FCN Treaty between the US and Japan,¹⁴⁹ in proceedings between private parties. On the other hand, in vertical proceedings there is a higher incidence of protectionist techniques, such as the presumption against judicially enforceable rights or holding that a treaty is non-self-executing.¹⁵⁰ In private party proceedings there was also a significantly higher percentage of cases in which the party invoking the international agreement

¹⁴¹ *The Role of Domestic Courts in Treaty Enforcement* (D. Sloss ed., Cambridge 2010). The research focused on the following countries: Australia, Canada, Germany, India, Israel, The Netherlands, Poland, Russia, South Africa, United Kingdom, and United States.

¹⁴² A. Nollkaemper, *The Duality of Direct Effect of International Law*, 25(1) EJIL 105 (2014), 109.

¹⁴³ André Nollkaemper, *National Courts and the International Rule of Law* (Oxford 2011), 134.

¹⁴⁴ The Supremacy Clause (Article VI.2 US Constitution) declares *all treaties* concluded under the authority of the United States to be “supreme law of the land”. However, this does not mean that all treaties may be judicially enforceable in the US legal order. See M. P. van Alstine, *Summary and Conclusions*, 578 in *The Role of Domestic Courts in Treaty Enforcement* (D. Sloss ed., Cambridge 2010).

¹⁴⁵ *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Medellín v. Texas*, 552 U.S. 491(2008) – The Supreme Court held that Article 94 UN Charter is non-self-executing.

¹⁴⁶ *Cornejo v. County of San Diego*, 504 F.3d 853 (2007) – the Ninth Circuit applied the presumption against enforceable private rights granted by treaties. The presumption against privately enforceable rights is also present in other Circuit Court cases: *United States v. Emuegbunam*, 268 F.3d 377, 389 (C.A.6 2001); *United States v. Jimenez–Nava*, 243 F.3d 192, 195 (C.A.5 2001); *United States v. Li*, 206 F.3d 56, 60–61 (C.A.1 2000). An exception to this is the 7th Circuit in *Jogi v. Voges (Jogi I)*, 425 F.3d 367 (2005) and *Jogi v. Voges (Jogi II)*, 480 F.3d 822 (2007).

¹⁴⁷ *Air France v. Saks* 470 U.S. 392 (1985), *Eastern Airlines v. Floyd* – 499 U.S. 530 (1991), *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), *Olympic Airways v. Husain*, 540 U.S. 644 (2004).

¹⁴⁸ *Vella v. Ford Motor Co.* – 421 U.S. 1 (1975).

¹⁴⁹ *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982). Only a succinct overview is provided. The application of international agreements in horizontal proceedings by US courts is part of the author’s much larger PhD project.

¹⁵⁰ D. Sloss, *The United States in The Role of Domestic Courts in Treaty Enforcement* (D. Sloss ed., Cambridge 2010).

won the case. The explanation lies in the interest involved in such cases. In private party proceedings the risk of creating friction between the objectives of an international agreement and the domestic objectives of the legislative and the executive is fairly small. However, in cases when private parties challenge government action, the potential friction between international obligations and domestic policy objectives is a lot higher and courts will favour protectionist measures.¹⁵¹ The same holds true for the EU as well, as the Court is known to sometimes favour domestic EU policy objectives over international obligations.¹⁵² A further explanation for the willingness of US courts to apply international agreements to proceedings between private parties could be that the US does not have a legal instrument similar to EU directives, which in the EU caused most of the controversies surrounding the application of EU norms in proceedings between private parties. As explained, this might be one of the reasons for the apparent reluctance of the Court to clearly confirm the HDE of EU international agreements.

V. CONCLUSION

The title of this article asked whether the Court is avoiding a clear statement on the HDE of EU international agreements. The answer has to be a nuanced one.

The Court has affirmed the *Bosman*-type quasi-vertical direct effect of provisions found in EU international agreements relating to free movement and non-discrimination based on nationality. It was, however, not willing to start a debate on whether the ‘emanation of the State’ doctrine could be applied to EU international agreements. It simply confirmed direct effect without causing much fuss. So it can be concluded that EU international agreements can have direct effect in proceedings between private individuals/professionals and private regulatory bodies of a profession or a private entity owned and controlled by the State. On the other hand, the Court was faced with veritable horizontal situations in a time when it was not the most opportune moment to confirm the HDE of international agreements. Whilst this approach is understandable, given the specific historical context, the time has come to move on and clearly confirm HDE in such situations as well. As we have seen, other jurisdictions, which in general are adverse towards the vertical direct effect of international agreements, apply such agreements in veritable horizontal proceedings. The main explanation is that such cases involve the provisions of international agreements which create rights

¹⁵¹ *Ibid.*, at 505.

¹⁵² For a discussion on the Court’s preference of domestic EU policy objectives over international obligations, see Cottier, *supra* n. 11, at 314-317. According to Cottier, the Court tends to grant direct effect to preferential agreements which are essentially in line with domestic laws and do not result in clashes with the EU’s political branches. The situation is different in the realm of WTO law, where tensions were created between for e.g. the EU’s policy objectives surrounding the banana market and hormone treated beef, and the EU’s WTO obligations. For a further discussion, involving other agreements, see also Gáspár-Szilágyi, *EU International Agreements through a US lens*, *supra* n. 4, at 613-614 and 618.

and obligations between private parties. Therefore, they do not imply the public functions of the government, and no potential friction is created between the judiciary and the political bodies.