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Direct Effect and Covert Integration:  
A Critical Review of the Liberalization of Port Cargo  
Handling Services through the Spanish Case

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## **Abstract**

Article 49 of the Treaty on the Functioning of the European Union contains the principle of freedom of establishment. Discrimination based on nationality was prohibited when freedom of establishment was involved. That was the only EU law provision invoked by the Commission to monitor a reform of Spanish Port Law, which concluded in May 2017. No secondary EU regulations were enacted, yet, the reform led to the overruling of the staff recruitment system for cargo-handling services in Spanish docks. The new recruitment system was already designed by the Commission and transposed by an Act of the Spanish Parliament as if it was derived from a Directive. An infringement action and a ruling of the European Court of Justice were the formal mechanisms to make the design of the Commission enforceable. Notwithstanding the apparent simplicity of this reform, there were indirect normative and institutional mechanisms working through well-known dynamics of supranational integration. This paper presents an analysis of those mechanisms, paying particular attention to the role of direct effect in the ECJ infringement decision and to the use of soft law and institutional cooperation as covert integration strategies.

## **Keywords**

Freedom of establishment; European Commission; European Court of Justice; Direct Effect; Infringement procedure; Covert integration.



## 1. Introduction: direct effect and covert integration in collusion\*

A year ago, the European Union succeeded in overruling the Spanish stevedores recruitment system as established by the Spanish Ports Act (2011). The national statute law had created a kind of especial corporations named SAGEP (Spanish acronym for Limited Company for Stevedore Management), empowering them with absolute control over labor conditions and staff selection for dock work. After a controversial infringement procedure, the Spanish Ports Act was amended and SAGEP were replaced by temporary employment companies, which meant a liberalization of this labor market. An analysis of the actions taken by the EU institutions to force such an amendment, pursuing the objectives of integration, reveals that the firm determination of the Commission towards the reform worked together with a series of concealed mechanisms. Among those mechanisms, two different courses of action were crucial to transform the objectives of the Commission in enforceable legal rules, overcoming difficulties linked to the action of Spanish trade unions, strike calls for cargo-handling port workers, delays in ECJ ruling implementation and a strong parliamentary opposition to the first Spanish Government measures.

The first of those courses of action has a legal nature, which involved a very open or flexible understanding of direct effect of EU Treaty principles, rooted in the traditional hermeneutics of EU legal principles by the European Court of Justice. In our case of study, article 49 of the Treaty on the Functioning of the European Union was the object of such hermeneutics, as invoked by the Commission against Spanish dock labor system. It was first mentioned in the reasoned opinion sent to the member state Government on September 27th 2012 and then, a second time, in the infringement demand<sup>1</sup>. As a consequence of the combined action of direct effect and primacy of EU Law in non-compliance judgements, if a state rule or practice is found to be an obstacle to EU economic freedoms such rule or practice should not be applied anymore. But, if necessary, it may also be modified or obliterated. In this case, the non-compliance declaration by the ECJ at the instance of the European “executive” gave birth to an amendment mandate as a normative result of direct effect interpretation<sup>2</sup>.

The second course of action was clearly linked with the first, but it was focused on an institutional analysis. It involved the dynamics of implementation of EU scopes of competence by the supranational institutions out of Treaty formal provisions<sup>3</sup>. Sometimes informal instruments or objective-oriented uses

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<sup>1</sup> See the related documents in [http://europa.eu/rapid/press-release\\_IP-12-1022\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-12-1022_en.htm?locale=en) (visited 22/02/2018) and in [http://europa.eu/rapid/press-release\\_IP-13-559\\_EN.htm](http://europa.eu/rapid/press-release_IP-13-559_EN.htm) (visited 22/02/2018). See the European Court of Justice ruling of December 11th 2014 in case C-576/13, *Commission vs. Spain* (ECLI:EU:C:2014:2430), paragraph 1.

<sup>2</sup> It is detailed in first statement of the ECJ ruling C-576/13, *cit.* The designation of the European Commission as an executive is highlighted because, as it is known, it is not an exactly an executive in a state identification of the division of powers.

<sup>3</sup> Taking into account that, even though the different reforms of the Treaties that have led to the incorporation of new scopes of competence to the EU action, still there are dissimilarities between competences related to economic and market integration and other scopes, as the foreign and security police. It is also the case, although in a lower degree, with other fields of competences which have been incorporated to supranational dynamics, like some specificity in the scope of justice and home affairs. Genshel, P., Jachtenfusch and M., “Introduction: Beyond Market Regulation. Analyzing the European Integration of Core State Powers” in P. Genshel y M. Jachtenfusch, *Beyond the Regulatory Polity?: The European Integration of Core State Powers*, Oxford Scholarship On Line, 2014, pp. 1-23, p. 3 ([www.oxfordscholarship.com](http://www.oxfordscholarship.com)). This fact can be verified, even after Lisbon, through corroborating the maintenance of especial requirements within decision making procedures, the different role of EU institutions or the creation of new and specific ones, like committees in charge of preparing decisions and recommendations. Genshel, P. and Jachtenfusch, M., “More integration, less federation: the European integration of core state powers”, *EUI Working Papers*, RSCAS 2015/33, 2015, p. 4, (<http://cadmus.eui.eu/>)

of legal procedures are the main mechanisms to develop specific EU actions. Some of those actions may be explained within the parameters of EU governance. Therefore, within the context of this dock work Spanish case, a second course of action was based on the concept and methods known as covert integration. Indeed, this is the case of a shift in the nexus of decision-making procedure, through which the Commission and the ECJ take the place of the EU legislative, Council and Parliament. The reform of the stevedore management system was fulfilled without an explicit legislative mandate and as an indirect solution to the blockage of the legislative procedure. In other words, as the proposals of the Commission to regulate cargo-handling in ports would not be approved, covert integration would make those proposals work through indirect mechanism of normative creation<sup>4</sup>.

This paper aims to present a detailed review of how both courses of action worked in the Spanish cargo handling service reform. The singularities of this section of the labor market<sup>5</sup> and the strong impact of maritime transport in economy, commerce and distribution justify the singular attention to the case. As an additional objective, this paper will confirm that market integration still functions with the same mechanisms of former periods of EU construction<sup>6</sup>, notwithstanding the financial crisis, and regardless of the changes included in the Lisbon Treaty for decision making procedures and institutional design.

The paper will pay attention to the reasons of this concrete reform: why was the Commission determined to attain it? It will also focus on former failed attempts by the Commission to achieve the reform through ordinary procedures. The first section (2) of the study will start with the topic of EU action within the scope of maritime and fluvial transport and dock work. Then it will turn to a general analysis of the impact of the two courses of action, direct effect interpretation and covert integration mechanisms, on this field. A description of port labor work regulation by EU law will be presented, highlighting its relation to freedom of establishment. This preliminary approach will help us explain why the Commission decides to demand Spain before the ECJ and the terms of its complaint. The importance of a full understanding of those terms was deeply related to the former case law of the ECJ on the topic, which will be studied, in the second section (3), through two preliminary references. Both preliminary reference cases were referred to the recruitment system of stevedore workers in other member states. EU regulation and case law description will lead to a new focus on the dynamics of covert integration and on the legal hermeneutics of the Spanish case. In the third section, there will be a complete analysis of the infringement procedure against Spain (4). After that, and in the fourth section (5), the joint action of direct effect and covert integration will be presented as the engine of the reform of the Spanish dock labor system (5). Finally, some brief conclusions will be drafted (6).

## 2. Dock work and free provision of services in European Union law

### 2.1. The permanent exclusion of port cargo handling from secondary EU legislation

The reform of dock work by the EU comes together with the principles of freedom of establishment and free provision of services as worded in article 49 TFEU. Indeed article 49 makes quite a general formulation of this freedom, so it is not so evident that a Member state should be obliged to restructure a concrete segment of labor market as it is port cargo handling. Nevertheless, the source of the mandate has already been anticipated and it is not related to detailed secondary EU regulation. On the one hand,

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<sup>4</sup> Héritier, A., "Covert integration of core state powers. Renegotiating incomplete contracts" in P. Bursens, C. De Landtsheer, L. Braeckmans y B. Seggaert, *Complex Political Decision-Making*, Routledge, London, 2017, pp. 15-30, p. 15.

<sup>5</sup> A complete study of the subject can be found in Rodríguez Ramos, P., *La relación laboral especial de los estibadores portuarios*, Trotta, Madrid, 1997.

<sup>6</sup> Indeed, and as an example, for the culmination of the objectives of the internal market between the last eighties and the nineties of the past century. See Snyder, F., "The effectiveness of European Community Law: institutions, processes, tools and techniques", *The Modern Law Review*, n° 56-I, 1993, pp. 19-54, p. 27.

it is related to covert integration dynamics and on the other hand to an uncritical understanding of direct effect connected to economic freedoms.

Obviously, neither covert integration strategies nor direct effect of article 49 TFEU would have been called into action if secondary legislation on dock work cargo handling services had been enacted. The TFEU, as well as the former ECT, confers competences to the EU to adopt measures in the scope of transports, including maritime transport. The competence is established in article 4.2.g) of the TFEU as a shared competence. Freedom of establishment in article 58.1 TFEU also refers to the “transports” section of the Treaty. Article 100.2 TFEU foresees that the Council and the Parliament, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport after consulting the Economic and Social Committee and the Committee of the Regions<sup>7</sup>.

As a result of the implementation of those competences the EU issued the Ports Regulation, approved on February 2017 by the Council and the Parliament<sup>8</sup>. This Regulation did not apply to the infringement procedure against Spain as it was issued well after the beginning of the conflict with the Commission. Its approval was almost co-terminus to the reform of the Spanish stevedore management system, as will be explained. Yet this Regulation was important for the current analysis as long as its provisions confirmed that cargo handling labor in ports was not specifically regulated in EU law. In the statement of reasons, prior to the Regulation articles, there was a general reference to the ECJ case law, which was a reminder that contracts in that field of activity would be subjected to the principles of transparency and non-discrimination. Then it was established that chapter II of the Regulation, related to port services, would not be applicable to cargo handling services –article 10 of the Regulation–, notwithstanding the possibility that those provisions could be enforceable in that field if member states so wish and so decide. Therefore, cargo handling in docks was an activity not regulated by EU secondary law, strictly meaning that the EU has not made use of its part of the shared competence. But, in a wider and not strict meaning, yes, the EU made use of its part of the competence. Article 1.2 of the Regulation included cargo handling among its defined scope of application. As a result, there was not a specific regulation, but it was included in the scope of application of EU law. Transport remains a shared competence. Member states can still rule within their part of it, not only because of the wording in article 2.2 of the TFEU, but especially because the Regulation confirmed that the states are free to apply it or not to that segment of activity. But the hermeneutics of the conferral system never were literal. On the contrary, the ECJ encouraged an understanding of the scopes of application of EU law that prioritizes the goals of integration<sup>9</sup>. The exemption was not such.

The cargo handling exemption included in 2017 Regulation was not new to EU secondary law. Former EU regulations and directives linked to freedom to provide services and to staff recruitment had already made the same exemption. The Services Directive, dated 2006, excluded transport, making specific reference to port services<sup>10</sup>. To-date, there has not been a clear legislative agreement or consensus in the EU regarding dock labor, not even in the Ports Regulation<sup>11</sup>. The most evident proof

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<sup>7</sup> The ECT included the same competence and legal basis in the joint lecture of articles 50 and 80.2. The difference, and the innovation introduced by the Treaty of Lisbon, is that decisions regarding maritime transport should be adopted by the Council, exclusively, through qualified majority. Lisbon includes sea transport issues, among many others, in the field of action of the ordinary legislative procedure.

<sup>8</sup> Regulation (EU) 2017/352 of the European Parliament and the Council of February 15th 2017 on port services and financial transparency of ports (OJEU 3/03/2017).

<sup>9</sup> We speak about this teleology of integration, as defined by De Búrca, G., “The principle of subsidiarity and the Court of Justice as an Institutional Actor”, *Journal of Common Market Studies*, vol. 36, 1998, pp. 217-235. See also the classic study by Weiler, J. H. H., “The transformation of Europe” *Yale Law Journal*, 1991, 100, 8, pp. 2403-2483.

<sup>10</sup> Article 2.2.d) of the Directive 2006/123/CE of the European Parliament and the Council, December 12th 2006, of services in the internal market (OJEU 27/12/2006).

<sup>11</sup> This is also evident in other exemptions included in EU secondary law. The Commission explains this and makes reference to former Directives of common provisions on concessions in the field of transport and other services. It is all explained in the Commission Communication on a European Ports Policy COM (2007) 616 final of 18/10/2007. The document refers

of this lack of consensus is the proposal for a Directive of the European Parliament and of the Council on market access to port services, launched by the Commission in 2001. The proposal went through all the stages of the legislative procedure, including the conciliation committee, but was finally rejected by the European Parliament in Third Reading. The Commission withdrew the proposal in March 2005<sup>12</sup>.

The Commission proposal of 2001 made clear that free access to the European ports by service providers was a priority. A liberalization of cargo handling labor was one important objective of the proposal. Cargo handling companies should be free to work in any European port, with the only exemption of those ports with poor infrastructures or small size. Even in those cases, at least two different cargo handling companies should be authorized as a minimum. In this regard, cargo handling companies, as service providers, should be free to hire workers and staff at their convenience. This specific condition contradicted some of the stevedores' recruitment national systems, working in several European ports. Among those ports were the Spanish ones, many of which had a very especial and strategic situation. One just has to think of Algeciras, Barcelona, Las Palmas in the Canary Islands, Bilbao or Valencia<sup>13</sup>.

## 2.2. The actions of the Commission: dock work and soft law

The EU law's limited impact on dock work issues was counterbalanced by soft law. A significant amount of references to port cargo handling services can be found in several reports and Communications, introducing the topic of covert integration dynamics as will be described in a following section to this paper<sup>14</sup>. EU Commission Communications were the main soft law sources on port services until the enactment of the Ports Regulation in 2017. Consistently, the fundamental arguments of the Commission were those of the failed Directive of Port Services: freedom of establishment was a priority for dock work and cargo handling services.

The first of these soft law documents was a Green Paper on Sea Ports and Maritime Infrastructure in 1997<sup>15</sup>. At the time, the Commission announced its intention to apply EC Treaty provisions to port services and in particular competition rules. Member states would be in charge of regulating and organizing such services at local, regional or national level, regarding subsidiarity. After a decade, the references to EC Treaty rules in soft law were shifted. Competition law was not referenced anymore and freedom of establishment emerged as the main Treaty principle governing port services objectives. The influence of the ECJ ruling in *Becu* was a clue to this shift, as will be explained in the following section. Indeed, more recent Commission Communications, of 2007 and 2013, already focused on freedom to provide cargo handling and other port services, a freedom based on two principles: one prohibiting nationality based discrimination; and, just in case of necessary restrictions to freedom of establishment, which could only be of an indirect kind, a proportionality principle.

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to the exclusions made by the Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. The Communication is available in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0616&from=EN> (visited 15/05/2018).

<sup>12</sup> The European Parliament would have rejected the final proposal on support of sectoral trade unions. Molina Navarrete, C, "Competitividad, empresa flexible y estiba en los muelles: ¿Qué sí exige y qué no la Comisión por boca del TJUE?", *Revista de Trabajo y Seguridad Social*, vol. 409, 2017, p. 5 (<http://www.ceflegal.com/revista-trabajo-seguridad-social.htm>). COM (2001) 35 final — 2001/0047(COD). A report about the proposal and the legislative procedure stages it went through can be found in [http://eur-lex.europa.eu/procedure/EN/2001\\_47](http://eur-lex.europa.eu/procedure/EN/2001_47) (visited 15/05/2018).

<sup>13</sup> COM (2001) 35 final — 2001/0047(COD), articles 7.2 y 6.5 of the proposal.

<sup>14</sup> Soft law is one of the mechanisms working in covert integration dynamics. See *infra* & 5.2.

<sup>15</sup> COM (97) 678 final.

Economic freedoms would rule over cargo handling services, including staff recruitment systems. The model of staff recruitment effective in each member state, free or submitted to *pools* conditions, should be adapted to comply with non-discrimination rules. Wherever the recruitment system was conditioned by *pools*, mainly sorts of stevedores associations, Member states should remove obstacles to freedom to provide services. Any qualified provider, either a private or a company, should be free to offer cargo handling services in European ports. Wherever the hiring of particular dock workers or a determinate amount of them was established as an obligation for service providers, that would be considered an obstacle to economic freedoms<sup>16</sup>. Even if social dialogue and agreements on port labor conditions were obviously necessary, both, dialogue and agreements, would consider the objectives of liberalization<sup>17</sup>. These soft law recommendations and strategies would obviously have a greater impact on *pools* based recruitment systems, which was the case in Spanish ports. Dock workers associations usually held privileged positions in collective bargaining processes and were hard social activist. The Commission was aware that liberalization of cargo handling services would mean a loss of influence for those associations. That loss could be counterbalanced with those references to social dialogue, but a dialogue framed within the new criteria -freedom of establishment, non-discrimination and flexible recruitment conditions- would never be the same in some member states, Spain among others.

However, soft law was not enough to achieve the desired reform of cargo handling services, especially in ports with strong *pools* and well rooted workers organizations. The decision to reform the sector was still up to the member states and, as obvious as it may seem, some member states would not be willing make changes that could lead to tensions, social protests and strikes. Maritime transport and goods distribution would be certainly affected and national markets damaged. Therefore, the Commission needed an enforceable rule beyond soft law and its legislative proposals on port services had not been successful. At that moment, covert integration dynamics shifted and soft law strategies led to enforcement of Treaty principles. The Commission activated an infringement procedure against Spain. The ECJ was the only EU institution that could create an enforceable rule from soft law and Treaty provisions, a rule compelling the Spanish authorities to reform port cargo handling staff recruitment system. The intervention of the ECJ would certainly be conditioned by previous case law on the topics: port services, cargo handling and stevedore recruitment systems. The Commission had to be sure that judicial precedents available were suitable for the case and sufficient to succeed in the cause against Spain.

### **3. Ports and stevedores in the case law of the European Court of Justice**

An ECJ ruling of December 2014 declared that Spanish cargo handling staff recruitment system was contrary to freedom of establishment as provided in article 49 of the TFEU. The infringement was mainly related to the kind of especial companies, named SAGEP, which were empowered to intermediate in the stevedore labor market. These companies were entitled to settle the conditions for staff recruitment by cargo handling service providers and the service providers had to be members, as shareholders, of each port SAGEP as a condition for access. The ECJ judgement against Spain was delivered by a Chamber of three judges; it was a very concrete ruling and without an Advocate General's previous conclusions. Notwithstanding the apparent simplicity of the ruling, up to 2014 there had never been either an infringement procedure on the topic or a case in which freedom of establishment was the key to decide about cargo handling issues. The Court of Justice had only delivered two sentences referred to port cargo handling services, both within the framework of preliminary reference procedures. Although the different characteristics of infringement and preliminary reference procedures imply

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<sup>16</sup> COM (2007) 616 final de 18/10/2007, *cit.*, p. 13.

<sup>17</sup> See the EU Commission Communication in which it is confirmed that the future Ports Regulation will not apply directly to cargo handling issues: COM/2013/0295 final, p. 12, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0295&from=EN> (visited 16/05/2018).

different approaches to a subject, the study of those precedents is helpful and necessary to understand the ruling of the ECJ against the Spanish SAGEP system.

The first of those two preliminary references was raised by an Italian court: *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli*, C-179/90<sup>18</sup>. The company *Siderurgica Gabrielli* had sued the company *Merci Convenzionali*. This second one had obliged *Siderurgica Gabrielli* to hire workers for the download of German goods, although *Siderurgica* already had qualified staff for the task. Italian legislation conferred a monopoly for cargo handling in favor of some companies working in ports and established that workers should be members of those companies. Also only Italian nationals could join them.

The demand of *Siderurgica Gabrielli* was received and admitted by the ECJ. The Italian judge asked if EC Treaty provisions related to free market competition, as well as those related to the prohibition of discrimination by reasons of nationality, applied to those privileged port companies. The answer of the ECJ was conclusive: Italian regulations were contrary to European law. The exclusive hiring of Italian workers for cargo handling services was contrary to freedom of movement and the privileged companies' monopoly was contrary to the rules of competition. There was no way to justify the monopoly on a general interest of the Italian state. The ECJ explained that competition rules were entirely enforceable on those cargo handling companies. The legal monopoly allowed them to fix abusive salary prices and staff hiring conditions, sometimes beyond the reasonable demands of the service providers. As a result, extra charges and distortions of free competition were damaging internal market rules and objectives.

The ruling in *Merci Convenzionali* contained some relevant issues for the ruling in *Commission vs. Spain* of 2014. The SAGEP system was somehow similar to the Italian staff recruitment model. The Spanish SAGEP were companies which monopolized the labor conditions and hiring procedures. Just like the Italian system, the Spanish one allowed the SAGEP to establish a minimum amounts of workers to be hired, even if the demanding companies would not need as many although there were also differences. Spanish SAGEP were not real companies like the Italian ones and no discriminatory conditions hindered any qualified EU national from being admitted in a SAGEP for recruitment. Both differences may explain why the Commission did not invoke free competition rules against Spain in the infringement procedure before the ECJ. The complaint only referred to freedom of establishment. Further reasons for this may be found in the analysis of a later case.

The second preliminary reference was raised by a Belgian court at the end of the same decade. Case C-22/98, *Becu*<sup>19</sup>, was a consequence of criminal proceedings against Mr. *Becu*, the *Smeg* company and others. The defendants had hired stevedores for cargo handling labors who were not members of the Belgian *pools*. Belgian legislation provided that only certified workers could be hired for dock labors. Criminal punishments would apply on those who contravened such legal prohibitions. The Belgian judge decided to ask the ECJ whether those criminal law provisions were contrary to competition law.

The Court of Justice answered in an evasive way. The judgment declared that Treaty provisions related to free competition would not apply to *Becu* facts. Firstly, even if Belgian dock workers were acting through *pools*, that kind of associations could not be treated as companies because they did not act as such. Treaty rules on free competition were meant for business companies and would not be enforceable against *pools* of workers. Nevertheless, and somehow off the record, the ECJ explained something more: Belgian regulations on cargo handling services could be contrary to freedom of establishment rules included in the ECT. Of course, there was not a problem of discrimination based on nationality as in the Italian precedent. The clue was how Belgian law obliged the demanding service

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<sup>18</sup> ECJ ruling of December 10th 1991, case C-179/90, *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli* (ECLI:EU:C:1991:464).

<sup>19</sup> ECJ ruling of September 16th de 1999, case C-22/98, Criminal Proceedings against Jean Claude Becu, Annie Verweire, Smeg NV y Adia Interim NV (ECLI:EU:C:1999:419).

providers to hire only certified workers. The Court of Justice confirmed that this was a restrictive condition and, as such, it could mean an infringement of the freedom of establishment for EU companies wanting to provide services in Belgian ports. The argument was a repetition of a former ECJ doctrine, namely that even without a direct discrimination issue, obstacles to economic activities of other Member states nationals had to be removed<sup>20</sup>. As it was not the answer to the Belgian court's question, the argument was not included as a part of the final conclusion.

Importantly, the link between cargo handling staff monopolies and obstacles to freedom of establishment was understood and deployed by the Commission. As detailed in the former section to this paper, that was precisely the fundament of the Communications issued after the rejection of the proposal for a Directive of port services. The fundamental view of both institutions, the Commission and the ECJ, was that legal monopolies protecting dock labor staff recruitment might be in contradiction with freedom of establishment. Service providers not belonging to those privileged *pools* would find additional difficulties in the access to port labor. It was not a problem related to competition law, but to free movement. Here was also the reason for the Commission's approach in the Spanish case, an approach based on the normative elements of freedom of establishment: a non-discrimination principle and the direct effect of the subsequent rules. The joint action of both elements should be enough to fight closed and exclusive cargo handling labor markets. The support of the ECJ, with an equivalent view of the matter, helped the dynamics of covert integration through the activation of an infringement procedure.

#### **4. The Spanish Stevedores and the European Union**

Well after the late nineties and in the context of the financial crisis, any obstacle to free trade and free movement within the internal market became more than a delicate issue. The Commission was responsible of rebalancing competitive disadvantages for service providers within the EU. A *pool* system for port cargo handling labor certainly caused competitive disadvantages, so the Commission had a strong economic argument to act against Spanish dock labor recruitment system. International downward price corrections was a real problem for European companies at Spanish ports, as cargo handling expenses were not subject to negotiations and that meant increases in transport cost. In addition, the Spanish stevedores recruitment system was not transparent enough. In a word: it was not efficient. Nothing was more evident that a company obliged to hire dock workers beyond its needs would suffer a decrease in labor productivity. In addition, the *pool* system legally empowered sectoral trade unions, an empowerment which created more difficulties to negotiate for more efficient cost structures<sup>21</sup>. As up to 2012 legislative EU proposals to regulate port services had all been unsuccessful, the Commission chose an alternative strategy, making use of its institutional position and of the enforcement procedures established in the Treaties.

##### **4.1. The action against Spanish state ports law**

The conflict arose with the coming into force of the Spanish Act for state ports in 2011. The Act gave legal support to the SAGEP system, through which dock workers should be certified, registered and hired. Cargo handling service providers should become SAGEP shareholders to have access to a particular port. Therefore, the Act confirmed a monopoly for the SAGEP scope of action, although those societies would not have commercial nature or business activity. SAGEP would be entitled to select and

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<sup>20</sup> Schmidt, S. K., "The shadow of case law. The Court of Justice of the European Union and the policy process" in J. Richardson y S. Mazey (ed.), *European Union. Power and policy making*, Routledge, New York, 2015, pp. 159-187, p. 181.

<sup>21</sup> Molina Navarrete, C, "Competitividad, empresa flexible y...", *op. cit.*, p. 4.

offer cargo handling workers and would establish hiring and labor conditions regardless of the factual needs of the service providers.

It was then when the Commission demanded the reform of the Spanish cargo handling recruitment system. The instruments in the hands of the Commission have already been enumerated: several soft law documents, unsuccessful legislative proposals, article 49 of the TFEU, two ECJ rulings and the infringement procedure. As in the Belgian *Becu* case, competition law would not apply to the SAGEP system. SAGEP were not companies, not for competition law. But, just the same as in *Becu*, the faculties of the SAGEP regarding staff recruitment and labor conditions could mean an obstacle to freedom of establishment. That was the infringement reason suggested by the ECJ. Article 49 TFEU was the only legal basis to proceed against this kind of monopolies. The Commission opened two procedures against Belgium and Spain.

In the case of Belgium, the Commission sent a preliminary notice to the Member state government and it opened a series of negotiations. The situation was similar to the Spanish SAGEP controversy and the Commission was equally concerned with restrictions to freedom of establishment as a result of the cargo handling staff recruitment conditions. Then Belgian authorities agreed to a progressive reform of dock work conditions towards a more transparent and competitive model, having especial regard to port labor security and quality controls. The Commission could succeed without raising an infringement demand to the Court and the case was closed without sanctions in May 2017. It was possible that the increasing tension between the Commission and the Spanish authorities for the similar situation and the ruling of the ECJ in 2014 pushed Belgium to come to internal agreements and conclude negotiations<sup>22</sup>.

Returning to the Spanish case, a preliminary notice and a reasoned opinion preceded the Commission's infringement demand, following article 258 TFEU. In the reasoned opinion, the Commission repeated the guidelines of those former soft law documents, particularly the recommendations included in 2007 Communication. Freedom of establishment and restrictions caused by the SAGEP system were the main arguments against Spain, as well as the lack of proportionality of the measures preserving security and certifying quality. Even if the SAGEP were designed as a guarantee of technical qualification and security labor conditions for dock workers, the Commission understood that the very same guarantees could be attained with some other staff recruitment models. In addition, cargo handling service providers had to become SAGEP shareholders and recruit workers without bargaining, sometimes even beyond their needs, which meant alterations in cost structures and employment expenses. Alterations may have a shilling effect for those companies, maybe pushing them to keep away from Spanish ports<sup>23</sup>.

The formal notice of the Commission was dated September 12th 2012. In subsequent stages of the proceedings the Commission just repeated those arguments. The Commission gave Spain two months to propose a reform of the SAGEP system. As Spain failed to present a plan for the reform, the Commission appealed to the Court of Justice in June 2013.

The national government kept on defending the design of the Spanish ports Act. From the government point of view, the SAGEP intermediation system was an adequate mechanism to fulfill de obligations of Convention 137 of the International Labor Organization, which required guarantees for security in dock work and qualified staff registration. However, a Member state International obligation was not as a justification to avoid compliance with EU law. Moreover, the Court of Justice had already declared in *Becu* that article 49 TFEU was the clue to a conflict of this kind. That precedent and all the

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<sup>22</sup> See the references of the case: Infringement procedure number 20142088 (opened 28/03/2014). See the closing conclusions in the report of the Commission on Mai 2017 in [http://europa.eu/rapid/press-release\\_MEMO-17-1280\\_EN.htm](http://europa.eu/rapid/press-release_MEMO-17-1280_EN.htm) (visited 26/02/2018).

<sup>23</sup> Infringement procedure number 20094052. For the preliminary notice arguments, see the press release published in [http://europa.eu/rapid/press-release\\_IP-12-1022\\_EN.htm](http://europa.eu/rapid/press-release_IP-12-1022_EN.htm) (visited 26/02/2018).

soft law documents produced by the Commission in the first decade of the century would work together and lead to the reform of the Spanish cargo handling recruitment system.

#### **4.2. The Court of Justice ruling: supporting the Commission's claim**

A decision contrary to the Commission's claim was almost impossible. Although it was not unthinkable that the ECJ would reject an infringement demand of the Commission<sup>24</sup>, somehow this one was almost designed to succeed. Firstly, the Court had already drafted the main guidelines for a ruling of this kind in *Becu*: pools of workers could be an obstacle to freedom of establishment. Secondly, the Commission had understood perfectly and had produced a sufficient amount of soft law to support its position. The decision in case C-576/13, *Commission v. Spain*, must have seemed so evident that the Advocate General was not even asked for Conclusions and the Spanish government did not make efforts to deny obstacles to freedom of establishment<sup>25</sup>. The Spanish government defense was mainly based on practical reasons: the political difficulties of a reform, the economic and social cost of a change of system, as well as the referred contradictions with Convention 137 of the ILO. The dock work Convention established an obligation to register and certify the qualifications of port cargo handling workers and to have a priority for the recruitment of registered workers; not a single defense was admitted by the Court.

The first of the ECJ assumptions was that SAGEP monopoly was an obstacle to freedom of establishment provided in article 49 TFEU. The Court would try to justify this assertion. *Becu* could be used as a precedent or, if not exactly, as a previous decision that would apply to the case<sup>26</sup>. In the Spanish situation, as in *Becu*, there were no discriminatory rules regarding the nationality of the workers. The European cargo handling service providers could all become SAGEP shareholders under the same conditions and with the same consideration as a Spanish company. But, using *Becu*'s doctrine, the Court found the evidence of a chilling effect for the freedom of establishment of European companies. When a service provider was obliged to become SAGEP shareholder, it was obliged to modify its cost structures. When a service provider was obliged to hire a particular number of workers, regardless of the factual needs of the business, it was obliged to assume inefficient expenses. The chilling effect especially affected European non Spanish companies which was the second assumption of the ECJ ruling<sup>27</sup>.

Then the Court considered that such a kind of chilling effect, linked to the SAGEP staff recruitment system, was not directly but indirectly discriminatory. Direct discrimination measures were completely forbidden by EU law, but indirect ones could be admitted as long as they could be justified by a reason of general interest. The ECJ agreed that security in dock work and guarantees of continuity for cargo handling service were objectives of general interest. Stevedore activity was crucial for goods distribution and goods distribution was crucial for the internal market. The restriction to freedom of establishment could be thus justified, but an additional scrutiny was necessary: the proportionality of the restriction causing the chilling effect had to be tested.

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<sup>24</sup> Following the studies on infringement procedure practice, the Court of Justice almost always confirms the Commission demand. Infringement procedures are finally raised to the Court when all previous attempts to come to agreements between the Commission and the Member state have failed. See Falkner, G., Treib, O., Hartlapp, M. y Leiber, S., *Complying with Europe: EU Harmonization and Soft Law in the Member States*, pp. 207 y 208.

<sup>25</sup> Molina Navarrete, C, "Competitividad, empresa flexible y...", *op. cit.*, p. 9.

<sup>26</sup> Following the suggestions of Komárek, J. "Reasoning with Previous Decisions: Beyond the Doctrine of Precedent", *The American Journal of Comparative Law*, Volume 61, Issue 1, 2013, pp. 149–172. See also Jacob, M. *Precedents and Case-Based Reasoning in the European Court of Justice*, Cambridge University Press, Cambridge, 2014.

<sup>27</sup> The requirements to become SAGEP shareholders were exactly the same for Spanish cargo handling service providers and for foreign companies. That was not under discussion. Belintxon Martin, U., "Derecho europeo, estiba y liberalización: algunas cuestiones clave sobre el conflicto de los estibadores", *Ars Iuris Salmanticensis*, vol. 5, 2017, pp. 25-38, p. 34 (<http://revistas.usal.es>).

This third issue about proportionality needed more than an assumption. As a part of the test, the ECJ checked the availability of any less damaging measure to achieve the same objective of general interest. The Commission had already proposed one: the use of temporary employment companies, instead of SAGEP, for the same purposes. Temporary employment companies could mediate in the cargo handling labor market, could help the regularity of the service and could control quality and security in dock work. Cargo handling service providers could be in charge of the management of those temporary employment companies, but they might also be managed by private and independent services.

The Court agreed with the Commission. There were alternative measures to avoid the chilling effect on freedom of establishment. As a conclusion, yes, Spain legislation was contrary to article 49 of the TFEU. The direct effect of this Treaty provision, without secondary EU law enacted, was supposed to be enough to create the enforceable rule that was missing. But a declaration of infringement by the ECJ does not self-execute. The authorities of the Member states must intervene to execute an ECJ ruling. In this case, a reform of the Spanish states ports Act was required but the political situation of the country delayed this. That is the reason why in July 2016 a new stage of the infringement procedure was opened by the Commission.

#### 4.3. Enforcement and fines

The Commission had the objective of a liberalization of the staff recruitment system for port cargo handling services. As negotiations with the Spanish authorities were unsuccessful, the infringement ruling of the ECJ meant an order of derogation and reform of the ports regulations, making it necessary to organize a new recruitment system. Obstacles to freedom of establishment should be overruled while security in dock work should be maintained with the high level of qualification of the stevedores as a requirement of the difficulties of the task. The Spanish government had to consider additional aspects, for instance the impact of the changes on the organization and financial structures of the national goods distribution system or the agreements needed with social actors and trade unions. In addition, the reform could not be enacted without parliamentary agreement, as the government of the Popular party had lost the absolute majority in 2015. There had to be a second general elections in 2016, as the 2015 result did not allow the forming a new government. The final reelection of President Rajoy was achieved without a firm majority. Any legislative proposal launched by the government needed parliamentary agreement, even if the measures came from an ECJ ruling in an infringement procedure.

By July 2016, Spain had failed to make the necessary reforms in port cargo handling sector. The Commission appealed to the Court of Justice for enforcement measures invoking article 260 of the TFEU and asking the Court to order a coercive fine- case C-388/16, *Commission v. Spain*<sup>28</sup>. This subsequent procedure worked as a pressure tool, forcing the Spanish government to act. A first Act of amendment of state ports regulations was presented in February 2017, but the Spanish Low Chamber, the Congress of Deputies, rejected it<sup>29</sup>. After several strike announcements by the sectoral trade unions and some partial collapse of cargo handling services, the *Decreto-ley* 8/2017 was approved in May 2017,

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<sup>28</sup> Case C-388/16, *Commission vs. Spain*, ECJ Judgement of July 13th 2017, (ECLI:EU:C:2017:548). See the press release by the Commission in [http://europa.eu/rapid/press-release\\_IP-16-1455\\_EN.htm](http://europa.eu/rapid/press-release_IP-16-1455_EN.htm) (visited 26/02/2018). A recent academic commentary on the sentence, its precedents and the final result of all the process can be found in Menéndez de la Cruz, C., “La controvertida solución al modelo de la estiba y desestiba portuaria español. Comentarios a la Sentencia del Tribunal de Justicia de la Unión Europea de 13 de julio de 2017, relativa al procedimiento de condena al Reino de España”, *Revista General de Derecho Administrativo*, núm. 47, 2018, [www.iustel.com](http://www.iustel.com). The article includes a critical view on the executive means and procedure used by the Spanish authorities for infringement rulings by the ECJ.

<sup>29</sup> *Real Decreto-ley* 4/2017 of February 24th for a reform of labor conditions and recruitment system for port cargo handling services as ordered in the ECJ Judgement of December 11th 2014 in case C-576/13 (infringement procedure 2009/4052), BOE 25/02/2017.

giving effect to the reform of the SAGEP system<sup>30</sup>. The enacted regulation gradually ended with SAGEP hegemonic position and privileges, as they were to be replaced by temporary employment companies. Cargo handling service providers would be free to hire workers. Following the ECJ ruling, the new regulation foresaw the creation of employment offices in state ports, to manage the free recruitment of dock workers. Those offices would act as temporary employment companies.

The speedy coming into force of the reform, the day after its official publication, was not enough to discourage the Commission nor the Court of Justice from punishing the Spanish delay to fulfill the first ECJ judgment of 2014<sup>31</sup>. Spain tried to justify the late execution of the ECJ ruling by appealing to internal issues: the national parliament had to be re-elected twice between 2014 and 2016 and the provisional government was not empowered to conclude agreements on the subject. However, the ECJ does not accept justifications based on internal proceedings to avoid EU law compliance as a fundamental economic freedom was at stake<sup>32</sup>. The fine would have a chilling effect, not only on the Spanish state regarding future delays in some other ECJ judgement implementation, but also on any other Member state that might have similar staff recruitment systems for stevedore labor. Indeed, as formerly explained, Belgium closed a negotiated reform of the national regulations on port cargo handling in the very same period<sup>33</sup>.

## **5. The reform of cargo handling services in Spain, BETWEEN DIRECT effect and covert integration**

After all of these stages, the port cargo handling system was ultimately reformed in Spain. The Commission was the main driver, but the reform was also a consequence of two joint courses of action: a normative creation process guided by the principle direct effect of EU law and a policy making strategy linked to EU governance mechanisms and covert integration. Both courses of action are frequent means for indirect harmonization of Member state regulations and they are accepted with no further criticism. Both remain unquestioned even after the Lisbon reform, which confirmed the ordinary legislative procedure as the main and formal course of action for market regulation. Both seem to have been reinforced by the economic crisis period. On the one hand, political fragmentation in Member states has led to weaker national governments, weaker in their relation with the EU as well as in the internal and parliamentary perspective. On the other hand, financial and economic stability requirements are under the Commission and ECB control, making it more difficult for Member states to object to a Commission's objective, which is clearly in the scope of market integration.

### ***5.1. The hermeneutics of direct effect in cases of non-compliance***

The first mechanism under scrutiny was direct effect of EU law. In particular, the analysis was focused on EU Treaty principles, as general mandates, and how a concrete and applicable rule is deduced from them through the action of direct effect.

In the final stages of internal market construction, in the late nineties, direct effect of Treaty provisions was decisive to remove obstacles to economic freedoms even without legislative agreements

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<sup>30</sup> *Real Decreto-ley* 8/2017 of May 12th for a reform of labor conditions and recruitment system for port cargo handling services as ordered in the ECJ ruling of December 11th 2014 in case C-576/13 (infringement procedure 2009/4052), BOE 13/05/2017.

<sup>31</sup> The Commission abandoned the claim related to a coercive fine and requested a lump-sum fine of 27 552 euros per day from the date of the first ruling until the coming into force of the Act of amendment, reforming the SAGEP system. The ECJ finally ordered a three million euros fine.

<sup>32</sup> Case C-388/16, *cit.*, paragraphs 41 a 43.

<sup>33</sup> See note 22 *supra* &.

by the Council, the main legislator at the time<sup>34</sup>. Although such understanding of direct effect of general principles remains almost uncontested, a critical review of the Commission's use of general principles to achieve specific objectives would introduce some aspects of legal interpretation that remain unexplained. Those aspects become especially relevant when addressing scope of competence where no secondary EU regulations directly apply. Legal interpretation in those cases was based on three assumptions: the first assumption was that a political decision, as formulated by the Commission, can be unconditionally projected onto unregulated scopes of a shared competence; the second assumption was that the political decision turns into a normative one when it was linked to a Treaty principle; the third assumption was that such transformation stems from direct effect or, at least, from that general principle of efficacy that Pescatore identified with the judicial hermeneutics of direct effect<sup>35</sup>.

### 5.1.1. Mutations of direct effect rules

It is the moment for a short reference to the legal nature of direct effect, first revisiting *Van Gend* ECJ ruling. In *Van Gend* the ECJ established that EC Treaty provisions could have direct effect, meaning that they could be invoked by individuals against a Member state action, practice of regulation. Direct effect is born within the scope of the preliminary reference procedure. In such a context, direct effect is deduced to support the cause of individuals when appealing to national courts by reasons of EU law and Treaty provisions. Direct effect's original role was to contradict the assumption that EC Treaty rules were only a Member state issue<sup>36</sup>. Individuals could claim the effectivity of Treaty rules and secondary regulations. If a Member state, through law or practice, was impeding the efficacy of European law in detriment of the right or interest of an individual, a national court could decide about the enforceability of a Treaty provision<sup>37</sup>. Within that framework, individual claims would have especial consideration whenever they were in coincidence with the objectives of integration. Functionalism, as a feature of the ECJ legal interpretation, helped a federal vision of European law. The link between individual interests and the aims of integration was the first reason of direct effect, which was reinforced thanks to primacy, in *Costa Enel*, as a rule of preference for European law application.

Based on such premises, the understanding of direct effect was progressively enhanced in the context of the preliminary reference procedure and related to individual claims<sup>38</sup>. Among some other developments<sup>39</sup>, the meanings of direct effect unfolded. As a result, direct effect is not actually reduced to protection of individuals' interests and rights as invoked before national courts. It extended its scope of application to the general conformity of state law in contradiction with EU law<sup>40</sup>. Its efficacy in infringement declarations is somehow logical. When direct effect is admitted as a general principle, linked to the nature of European law system, when it goes beyond individuals claims and when it is used

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<sup>34</sup> Schmidt, S. K., "The shadow of...", *op. cit.*, p. 172.

<sup>35</sup> Pescatore, P., "The Doctrine of "Direct effect": an infant disease of Community Law", *European Law Review*, 2015, pp. 135-153.

<sup>36</sup> A former resolution considering that individuals are entitled to invoke provisions of an international Treaty is the famous Permanent Court of International Justice Opinion of March 3<sup>rd</sup> 1928 (B series, num. 15) on the jurisdiction of Dantzing courts.

<sup>37</sup> About the relationship between individuals claims and direct effect rules see and principles see Winter, J. A. "Direct applicability and Direct Effect. Two distinct and different concepts in Community Law", *Common Market Law Review*, Vol.9-4, 1972, pp. 425-438, in particular p. 438.

<sup>38</sup> Craig, P. y de Búrca, G., *EU Law, Text, Cases and Materials*, Oxford University Press, Oxford, 2015, pp. 186 to 188.

<sup>39</sup> The methodological requirements of this paper do not allow reviewing all those developments. For instance: how direct effect and primacy were initially linked and how they were differentiated through parallel doctrines like the effectiveness doctrine. See Dougan, M., "When worlds collide! Competing visions of the relationship between direct effect and supremacy", *Common Market Law Review*, vol. 44, 2007, pp. 931-963; y Claes, M., *The National Courts' mandate in the European Constitution*, Hart Publishing, Oxford-Portland, Oregon, 2006, pp. 100 to 102.

<sup>40</sup> Prechal, S., "Does direct effect still matter?", *Common Market Law Review*, Vol.37, 2000, pp. 1047-1069, p. 1050.

a tool to review state law conformity, it is somehow logical that it can also be invoked against a Member state rule or practice in the course of an infringement procedure. The Commission does not represent individuals, but the ECJ understands that individual interests, which may be protected by EU principles or rules, have to find a guarantee. For instance, in the case of Spanish stevedores, the Commission would be taking the defense of port cargo handling service providers wanting free access to Spanish ports<sup>41</sup>. Even so, an infringement procedure pretends to protect or achieve an objective of the integration program, quite a different thing than an individual or private interest.

Therefore, the Commission takes advantage of what might be identified as a mutation of direct effect rules. This mutation allows invoking direct effect against state law or actions that may be contrary to the Treaty principle without an individual interest at stake. This first mutation goes together with an additional and earlier one: the assumption that general provisions of the Treaty, even principles, are directly applicable and produce enforceable rules in contradiction with state law or practice. If the original requirement of direct effect was the existence of a clear and unconditional directly enforceable rule, with no further development needed<sup>42</sup>, EU Treaty principles would have never been considered as directly effective without a mutation. The direct effect of a general rule or principle is conceived as direct applicability and it can be enforced either in preliminary reference or in infringement rulings<sup>43</sup>. There can be no other consequences: when the Commission invokes a general rule or principle of EU law, that rule or principle becomes enforceable against the Member state<sup>44</sup>.

That is the way the Commission finds, and the ECJ produces, a federal coercion tool with a normative nature. Integration results can be achieved with no need of EU legislation, outside the formal legislative procedure. Direct effect is the instrument to produce that coercive tool. And once the ECJ confirms the rule, the rule is invincible. A third or subsequent mutation of direct effect rules is revealed when it becomes evident that it does not require an individual interest justification but just an institutional and political Commission proposal<sup>45</sup>.

### 5.1.2. Complementary aspects

The three mutations of direct effect rules are very relevant aspects of the ECJ interpretation of article 49 TFEU in *Commission vs. Spain*, C-576/13. The ruling creates a directly effective rule from freedom of establishment principles. That rule is enforceable on the particular situation but on similar ones. It also goes beyond direct nationality based discrimination, which could be considered as the only clear and

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<sup>41</sup> And in fact the Commission also initiates infringement procedures as a consequence of individual claims. See [https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/how-make-complaint-eu-level/submit-complaint\\_es](https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/how-make-complaint-eu-level/submit-complaint_es) (visited 06/03/2018).

<sup>42</sup> Hartley, T., *The foundations of European Union Law*, Oxford University Press, Oxford, 2010, p. 210.

<sup>43</sup> On the mixed comprehension of direct effect and direct applicability, see Winter, J. A., "Direct applicability and...", *op. cit.*, p. 425. International law understands that both principles have a different function and legal nature: direct effect refers to the possibility of being invoked by individuals while direct applicability means an original integration in the Member state legal system. The ECJ does not make a distinction between both principles as the Court understands European law as the rule of law of a Community. Nevertheless, the ECJ sometimes has differentiated direct effect and direct applicability, explaining that a EU law provision can be invoked –direct effect- even if it is not directly applicable. Again, Winter, J. A., "Direct applicability and...", *op. cit.*, p. 437. Lenaerts explains that the ECJ makes use of the traditional International Law conception when International Treaties have to be applied within the scope of EU law. Lenaerts, K., "Direct applicability and direct effect of International law in the EU legal order" in I. Govaere, E. Lannon, P. van Elsuwege, S. Adamen, *The European Union in the World. Essays in Honor of Marc Maresceau*, Martinus Nijhoff Publishers, Leiden, 2014, pp. 45-64, in particular p. 64.

<sup>44</sup> Direct effect is reduced to a matter of enforceability, taking into account the characteristics of the situation and those of the discussed applicable norm. Pescatore, P., "The Doctrine of...", *op. cit.*, p. 153-154.

<sup>45</sup> Sobre el espíritu de los Tratados como pretexto, de nuevo Winter, J. A., "Direct applicability and...", *op. cit.*, p. 433.

unconditional prohibition in article 49<sup>46</sup>. This is an important aspect of this direct effect principle, as it ignores the clear and unconditional requirements of the original direct effect doctrine. Yet it does require additional measures, as the reform of a recruitment system cannot be done without. As long as a norm of principle, like article 49 TFEU, cannot reform a labor system, the normative acting principle seems to be closer to effectiveness than to strict direct effect. Still it produces an enforceable rule. How does it?

The general Treaty provision is presented in its link, in the sense of material competence, to a particular EU policy and to a specific state regulation. The second one is the obstacle to the realization of the first. The connection between both is easy when a general rule or principle of EU law, like freedom of establishment, is decisive. Article 49 TFEU applies to cargo handling services. Those are market service and transport issues. It is more than justified. Then, in an infringement procedure, effectiveness works this way: the general rule or principle stemming from a Treaty provision precludes the state regulation or practice, which creates the conflicting obstacle to integration projects. To avoid a non-compliance ruling, the defendant, the Member state, must prove that there is no such obstacle. If that is not the case, the Member state must justify the impeding measures either within a margin of appreciation or by an exception. Nevertheless, neither margins of appreciation nor exceptions are enough as non-compliance justifications whenever a general rule or principle applies. The ECJ has repeatedly explained that margins of appreciation and exceptions must also comply with Treaty objectives. Even in those situations an infringement of EU law can be declared<sup>47</sup>.

To sum up, a general rule or principle of EU law is always perfectible, especially when it defines objectives of integration. Obstacles to a general rule or principle would always be easy to be identified and difficult to be justified. In the end, justifications would be tested through a proportionality scrutiny. Proportionality would be measured but not from a state interest perspective. It would have to comply with an EU law perspective. Only if a state interest goes with EU law objectives, as announced in the general rule or principle, the Member state action would pass the proportionality test. But, even so, the plaintiff, usually the Commission, could claim that there are other mechanisms to achieve the same result and that those alternative measures are less damaging for the general rule or principle objectives. Then the state action would fail the proportionality test and an infringement would be declared.

Those complementary aspects were all in the ECJ legal reasoning on the Spanish port cargo handling case. The main final argument of the ECJ, following the Commission's Communications on ports services policies of 2007 and 2013, was that cargo handling services were within the scope of application of freedom of establishment, even if secondary EU law had failed to produce harmonization rules for the sector. The paradox is that regulatory exclusions and failed legislative proposals confirm the projection of economic freedoms on stevedores' activities and give the Commission, with the help of soft law and the connivance of the ECJ, legitimation to fight Member states' staff recruitment systems. Article 49 TFEU has direct effect, or effectiveness, and produces particular enforceable rules through the action of soft law, Commission proposals and ECJ rulings.

## **5.2. Covert integration and institutional action**

This normative course of action, referred to direct effect, is linked to a chain of previous institutional and procedural actions. In this particular case, the Commission begins with legislative proposals, turns to soft law and then opens an infringement procedure. The ECJ final intervention produces the enforceable rule. The Commission and the Court are the institutional actors that, in absence of secondary EU law, achieve a regulatory result through a strategy frequently identified as a covert integration mechanism. Covert integration is framed within a conceptual analysis that points to different mechanism

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<sup>46</sup> Direct effect of this prohibition, nationality based discrimination, had already been declared by the ECJ, due to the unconditional nature of the rule. Pescatore, P., "The Doctrine of...", *op. cit.*, p. 140.

<sup>47</sup> Prechal, S., "Does direct effect...", *op. cit.*, p. 1063.

working in a sphere parallel to the formal design of the Treaties. As a result of such covert integration mechanisms, integration is enhanced through indirect ways. And these indirect ways frequently happen to be more effective than formal decision making procedures<sup>48</sup>. Spanish cargo handling reform shows at least two covert integration mechanisms: the first one refers to *soft law* as a primary source of enforceable rules; the second one refers to coordinated institutional action as a means to make incomplete regulations enforceable.

### 5.2.1. Integration through soft law

*Soft law* is the first of the strategies to produce coercive results whenever a legislative proposal of the Commission has failed to be enacted<sup>49</sup>. In particular, the cargo handling service case is framed within the Green Paper on Sea Ports and Maritime Infrastructure of 1997 and two port services Commission's Communications, dated 2007 and 2013. These documents include guidelines and proposals for cargo handling services and staff recruitment methods. In doing so, they confirm that cargo handling services are within the scope of application of EU law. That is a traditional inclusive function conferred to *soft law* in academic analysis<sup>50</sup>.

There is a clear link between the transport EU scope of competence and dock work, so *soft law* tools are not suspicious of being enacted *ultra vires*. On the contrary, Commission proposals have a promotional function. The Commission drafts and offers guidelines for future formal regulation of these services<sup>51</sup>. Finally, the promotional and the preparatory functions of *soft law* lead to a third one: to be a complement for *hard law* regulations wherever a leak could mean an obstacle to integration. *Soft law* would help to complement either Treaty provisions or secondary EU law. Even though *soft law* is not coercive, and not enforceable, its interpretative efficacy is not under discussion. Spanish cargo handling case is a good example. *Soft law* recommendations become enforceable when a general Treaty rule, freedom of establishment, is found to be directly effective and decisive to conclude an infringement procedure<sup>52</sup>.

### 5.2.2. Institutional action: specifying incomplete contracts

The second covert integration mechanism is related to the joint institutional action of the Commission and the ECJ. The model of joint action has already been described in academic works: although there is an incomplete regulation of a particular issue, the Commission acts to have it enforced. As a consequence, at the Commission request, a Member state can agree to the demands of the EU and negotiate the ways to implement the requested measures. If the Member state does not cooperate, the Commission appeals to the ECJ through the infringement procedure. The ECJ frequently supports the Commission claim. By that means, an ECJ ruling creates a mandate from a non-enforceable recommendation. The incomplete regulation becomes complete. Specific rules then work in favor of integration objectives without the need of enacted EU legislation<sup>53</sup>. Indeed, this mechanism consists on simple judicial adjudication of objective based rules<sup>54</sup>.

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<sup>48</sup> Following Héritier, A. "Covert integration in the European Union" in J. Richardson y S. Mazey (ed.), *European Union. Power and policy making*, Routledge, New York, 2015, pp. 351-369, p. 352.

<sup>49</sup> Even though *soft law* is not always as effective when Member states fail to reach an agreement. Héritier, A. "Covert integration in...", *op. cit.*, p. 362.

<sup>50</sup> "Europeization" as a function: Peters, A. "Soft law as a new mode of governance" in U. Diedrichs, W. Reiners y W. Wessels, *The Dynamics of Change in EU Governance*, Edward Elgar, Cheltenham, 2011, pp. 21-, p. 34.

<sup>51</sup> Peters, A. "Soft law as...", *op. cit.*, p. 35.

<sup>52</sup> Peters, A. "Soft law as...", *op. cit.*, p. 36.

<sup>53</sup> Héritier, A. "Covert integration in...", *op. cit.*, p. 358.

<sup>54</sup> Héritier, A., "Covert integration of core...", *op. cit.*, p. 19.

As explained, the mechanism takes advantage of the infringement procedure established in the Treaty. The possibility of imposing coercive fines to non-compliant Member states, which is available since the Maastricht Treaty reform, has reinforced the virtues of this procedure, still dependent on state authorities' actions to implement ECJ judgements. If the non-compliant Member state disregards the ECJ ruling, the amount of the fine increases. Therefore, individuals also have legitimacy to invoke an ECJ ruling of the kind if the Member state persistent infringement affects his rights or interests. In this case, EU cargo handling companies could have appealed to Spanish courts to make the ECJ ruling enforceable. Even if article 49 TFEU and *Becu* precedent would have been enough to open the discussion for a preliminary reference, the ECJ infringement ruling makes it unnecessary. The ECJ mandate was clear and unconditional and a cargo handling service provider could have confirmed his right of free access to Spanish ports, hiring dock workers at his convenience. One way or another, the Member state would be obliged to implement the ECJ ruling.

In the Spanish cargo handling case, the collusion, Commission and ECJ working in the same direction, was guaranteed. The covert integration strategy is, somehow contradictory, transparent. In the first ruling against Spain, C-576/13 of 2014, the ECJ follows that hermeneutics of effectiveness, scope of application of EU law and proportionality explained in the previous subsection, all of it referred to freedom of establishment as a Treaty principle. Then, the ECJ offers a solution to the infringement situation, which has already been proposed by the Commission: temporary employment companies. Spanish reform of the state ports Act, through *Decreto-ley* 8/2017, makes an enforceable rule of the Commission's proposal. Direct effect and covert integration work together to compel a Member state to harmonize its ports legislation without secondary EU law enacted.

## 6. Conclusions

The main conclusion of this paper was already announced in the introduction: cargo handling system reform in Spain became an issue of EU law and was enforced without specific EU formal regulation. It was not the first case of joint action of direct effect and covert integration mechanisms and it will not be the last. But there is more to say in relation to the reform. Even if the EU scope of action finished with the ECJ rulings, both the declaration of infringement and the establishment of coercive fines, Spanish authorities still had to find a way to implement the ECJ mandate. The reform took three years as a first attempt to approve the reform failed when the new staff recruitment measures were firmly rejected by the stevedores. Trade unions considered that the Spanish government was overlooking the position of Spanish collective bargaining labor system and their own role as negotiators. The opposition parties took advantage of the situation to punish the government in the Parliament. As a second conclusion, then, this case proves how EU normative and institutional action can extend its impact beyond integration objectives.

In the one hand, this case shows how market integration dynamics keep on working with the same mechanisms as in the final eighties and nineties. Neither the institutional and procedural amendments of the Treaty of Lisbon -with a definite inclusion of the European Parliament as co-legislator or with a European Council preponderance to the detriment of the Commission-, nor the normative ones -with a more precise definition of the conferral competence system- seem to have altered such dynamics. Financial crisis has not modified the project for unification of market rules either. EU law economic freedoms still remove national obstacles to free trade and free competition.

In the other hand, and nevertheless, social and political situation of Member states after the crisis show different reactions to coercive reforms like this, coming from EU action. Constitutional internal issues might have become more relevant, or more visible, when the time comes to implement EU obligations. It is precisely the example of collective bargaining constitutional position. The stevedores trade unions were unwilling to let the government act without their agreement and the opposition parties supported that protest in Parliament, regardless of the EU law infringement ruling. From the EU point of view, the joint action of direct effect and covert integration might be considered apolitical as tools for

integration; they are just a technical principle of EU law and a frequent mechanism of institutional cooperation. But from the Spanish state perspective, the political aspects of the conflict were crucial and unavoidable. It is the point where the shadow of the democratic deficit appears. Covert integration mechanisms keep working outside a strictly formal understanding of the legislative procedure and the competence system<sup>55</sup>. Direct effect is not an unambiguous rule. The teleology of integration had always moved in silent ways<sup>56</sup>, but in this case the social, political and media repercussions became evident for Spanish public opinion. It could have been a simple exception or it could mean the first of forthcoming objections to the requirements of EU integration objectives.

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<sup>55</sup> De Bièvre, D., Bursens, P., “Patterns of covert integration in EU governance” in P. Bursens, C. De Landtsheer, L. Braeckmans y B. Seggaert, *Complex Political Decision-Making*, Routledge, London, 2017, pp. 31-39, p. 38.

<sup>56</sup> Weiler, J. H. H., “A Constitution for Europe? Some hard choices”, *Journal of Common Market Studies*, vol. 40, 2002, pp. 563-580, p. 572.

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