

EUROPEAN INSTITUTIONS, LAW AND MARKETS 3

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DIRECT APPLICABILITY AND DIRECT EFFECT

REQUIREMENTS

- NOT all EU law could be enforced by national courts.
- **The norm has to be justiciable and executable:** capable to being applied by a public authority.
- **When a EU provision leave a margin of discretion to the MS, that provision has not direct effect.**

DISTINCTION

DIRECT APPLICABILITY

- WIDER – internal effect: Direct applicability of a European norm within domestic legal orders without the need of an internal act
- NATIONAL AUTHORITIES HAVE TO APPLY EU LAW

DIRECT EFFECT

- Individual effect of a binding norm in specific cases
- THE NORM CAN BE INVOKED IN FRONT OF A DOMESTIC COURTS.

THE ROLE AND POWER OF EU WITHIN MS

TREATIES

ECJ confirmed some Treaties provision have DIRECT APPLICABILITY AND EFFECT within domestic laws.

SECONDARY LAW

E. Treaties are framework Treaties: envisage the adoption of E. secondary law.

- Art. 288 TFUE: union's legal instruments.
- What effect in the national legal order?

ART. 288 TFUE: UNION'S LEGAL INSTRUMENTS

1. REGULATION

2. DIRECTIVE

3. DECISION

4. RECOMMENDATIONS AND OPTIONS

- 1 and 3 contain direct effect legal norms

PRIMARY AND SECONDARY EUROPEAN LAW

PRIMARY LAW

- A. FROM STRICT TO LENIENT TEST
- B. VERTICAL AND HORIZONTAL EFFECT

SECONDARY LAW

- A. DIRECT EFFECT OF DIRECTIVE
- B. THE NO HORIZONTAL DIRECT EFFECT RULE
- C. LIMITATION TO THE RULE
- D. EXCEPTION TO THE RULE

PRIMARY LAW

A. FROM STRICT TO LENIENT TEST

B. VERTICAL AND HORIZONTAL EFFECT

QUESTION

- **STARTING POINT:** Treaties as primary law offer a constitutional skeleton.
- **Would this “constitutional skeleton” itself have direct effect?**
- **Would there be Treaties provisions that were sufficiently precise to give rise to rights or obligations that national court could apply in specific situations?**
- **SEE AGAIN VAN GEND AND LOOS CASE**

ECJ: PRIMARY LAW HAS DIRECT EFFECT

1. CLEAR:

2. UNCONDITIONAL:

2 a. AUTOMATIC: it would not depend on subsequent positive legislation

2 b. ABSOLUTE: not qualified by any reservation on the part of the State

3. NOT DEPENDENT ON ANY NATIONAL IMPLEMENTING MEASURE

VAN GEND EN LOOS CRITERIA FOR DIRECT EFFECT

The EU provision must:

- **be clear**
- **be a negative, rather than positive obligation**
- **unconditional**
- **containing no reservation on the part of the member state**
- **not dependent on any national implementing measure.**

EXAMPLE

Thus, a regulation that allows Member States to privatise roads would not have direct effect and could not be enforced in the courts, because it provides **that States *may* privatise roads, not *must* privatise roads.**

VERTICAL AND HORIZONTAL DIMENSIONS

- In **Van Gend en Loos** it was decided that a citizen was able to enforce a right granted by European Community legislation against the State - **the question of whether rights could be enforced against another citizen** was not addressed.
- In **Defrenne v. SABENA**, the European Court of Justice decided that there were two varieties of direct effect: vertical direct effect and horizontal direct effect, the distinction drawn being based on **the person or entity against whom the right is to be enforced**.



DEFRENNE V. SABENA, 1976

READ THE CASE

FACTS

- A woman named **Gabrielle Defrenne** worked as a flight attendant for the Belgian national airline Sabena.
- Under Belgian law, **female flight attendants** were **obliged to retire at the age of 40**, unlike their male counterparts. Defrenne had been forced to retire from Sabena in 1968.
- Defrenne complained that the **lower pension rights** this entailed violated her **right to equal treatment on grounds of gender** under article 119 TEC, (now Art. 157 TFEU)

JUDGEMENT

- The ECJ held that article 119 TEC was of such a character as to have **horizontal direct effect** and **therefore enforceable** not merely between individuals and the government, but **also between private parties**.
- Article 157 TFEU (119 TEEC, 141 TEC) was invoked which stated "Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied"

TWO TYPES OF DIRECT EFFECT

There are two types of direct effect:

- **vertical direct** where the European law creates individual rights against the state;
- **horizontal direct effect** where the European law creates individual rights against other individuals.



FAMILIA EXPRESS V. BAUER

READ THE CASE

FROM STRICT TO LENIEST TEST

- The ECJ loosened the test considerably in a lot of cases (art. 34: **measures having equivalent effect**; art. 157: **indirect discrimination**; art. 49: **right of establishment**; art. 18: **discrimination on ground of nationality**).
- The Treaties could be vertically and horizontally effective.

THE LENIENT TEST

A PROVISION HAS DIRECT EFFECT WHEN IT IS CAPABLE OF BEING APPLIED BY A NATIONAL COURT.

DIRECT EFFECT SIMPLY MEANS THAT A NORM CAN BE INVOKED IN AND APPLIED BY A COURT.

CASE LAW MANGOLD

Also an

UNWITTEN AND VAGUE

GENERAL PRINCIPLE OF EUROPEAN LAW

could have direct effect (rule of law).