

European Legislation

Lecture Title: Direct Effect, Indirect Effect,
State Liability and the Freedoms

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Part I: Direct effect, Indirect Effect and State Liability



Art. 258 TFEU - Ineffective means of enforcement

- Mechanism initiated by the Commission against defaulting Member States to ensure that a state complies with Union law obligations
- A penalty may also be imposed against the MS

BUT

INDIVIDUALS HAD NO REMEDY



Problem solved

CJEU developed principles whereby an aggrieved national of a *MS* would be afforded rights which could in certain circumstances, be enforced in the courts of *MSs*

3 principles

- Indirect effect
- Direct Effect
- State Liability



Direct effect

- National courts may be unable to interpret national law to avoid a conflict with Union law
- Principle that an EU citizen may invoke European law before courts
- Ensures application and effectiveness of EU law in EU countries
- Effective supervisory mechanism – by individuals
- Enhance uniformity



Van Gend en Loos v Nederlandse (C-26/62)

- Developed the principle of direct effect
- Could the claimant rely on a treaty article in the national court?
 - CJEU held that Union law is meant to provide obligations but also rights
 - Therefore a claimant may invoke EU law before the national court to challenge a national legislation
 - Therefore not only the Commission may now challenge Member States for incorrect application of EU law but **ALSO CITIZENS**.



Tests for Direct Effect

- Provisions which are:
 - 1. Sufficiently precise – a provision is to be sufficiently precise in order to have direct effect – *Van Duyn v Home Office & Defrenne v SABENA*
 - 2. Unconditional – not subject, in its implementation or effects, to any additional measure by the Union or the Member States.



Do Treaty articles have direct effect?

- Treaty provisions typically do not impose an obligation or a commitment
- *Van Gend en Loos* – Had found that former article 12 of EC Treaty was directly effective against the State. Therefore Treaties are directly effective



Can an EU citizen invoke Treaty article against another citizen or undertaking

- *Defrenne v Sabena – C-43/75*

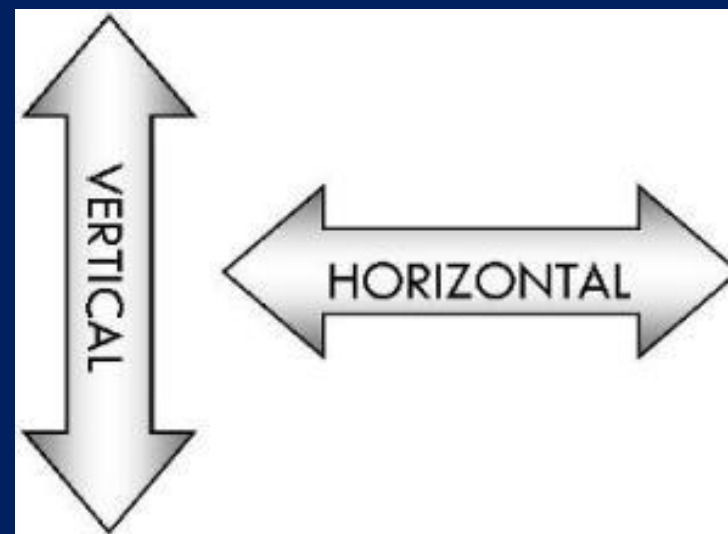
- Claim by an air stewardess against her employer for equal pay on basis of Art 119 EC Treaty

- “.... *the prohibition on discrimination between men and women applies not only to the action of public authorities but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals*”



Vertical effect vs Horizontal Effect

- Private Individuals / Undertakings vs Member State – Van Gend en Loos (Vertical Direct effect)
- Private Individuals/ Undertakings vs Private Individuals vs Undertaking – Defrenne vs Sabeena (Horizontal Direct Effect)



Are Regulations Directly Effective?

YES!

BUT

- Depends on the terms of the regulation
 - Are they sufficiently clear?
 - Are they unconditional?
- If they are then a regulation has **HORIZONTAL** and **VERTICAL** direct effect



What about Directives?

- First interpretation – not directly effective since they are always conditional on *Member States* transposition
- But this was a problem!
- Member States were not implementing directives and private citizens had no effective remedy



Van Duyn v Home Office C-41/74

- Van Duyn not allowed to enter UK due to being a member of an undesirable organisation
- Van Duyn argued that this was in violation of Directive 64/221
- UK Government argued that Directive 64/221 was not yet implemented

- *“.... It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned.”*



Sufficiently precise and unconditional Directives

- *Francovich v Republic of Italy – C-6/90*

In order to be sufficiently precise and unconditional, it is necessary to be able to:

- Identify the persons who are entitled to the right;
- Ascertain the content of that right
- Identify the person / body liable to provide that right



Are Directives enforced against private individuals?

- *Marshall v Southampton Area C-152/84*
- A directive cannot be relied upon as such against a person because it cannot impose obligations upon individuals
- *Paola Faccini Dori v Recreb SRL – C-91/92*



What is the definition of a 'State'

- *Foster v British Case C-188/89*
- A body is an 'emanation of the state' where:
 - Provides a public service
 - Under state control
 - Having special powers



Indirect effect

- Interpretation by national courts of national law in the light of the wording and the purpose of the directive.
- *Harz v Deutsche Tradax (C-79/83)*
- *Marleasing SA v La Comercial SA (C-106/89)*
 - Courts may also interpret a provision of national law that preceded a directive



Principle of State Liability

- State's legal responsibility for damages suffered by individual due state's failure to act or implement a measure
- Treaty did not create a mechanism of remedying state liability
- *Francovich and Bonifaci v Italy (C-6/90 and 9/90)*
 - Was the Directive directly effective?
 - Could compensation be given by the State for failure to implement a Directive?



Conditions for liability

- 1. Directive must necessarily contain rights conferred on individuals
- 2. Rights could be identified from the provisions of the directive
- 3. Causal link between the failure to implement legislation and the damage suffered by the person affected

Other judgments developed further on the principle of state liability





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Part II: The Four Freedoms



Free movement of persons

- Study, work, settle in any of the Member States without discrimination
- Requires mutual recognition of qualifications
- Originally focused on the free movement of employees but then developed to travel



Directive 2004/38/EC

- Consolidated the various rights towards citizens of *Member States* in relation to free movement of persons
- Included the rights towards family members of EU nationals
- Right to reside for up to 3 months which can be extended upon valid reasons



Free movement of Goods

- Key element for an internal and single market
- Once a product has been produced and marketed in a Member State it can be sold in the whole EU
- Developed by the European Customs Union in 1958 – removed customs barriers and applied common customs policy for third countries



Abolition of Customs Duties and Charges

- Article 28
 - To prohibit MS from establishing custom duties including charges having equivalent effect
 - To create a Common Customs Tariff in relation to third countries
- Focus is on the effect of a charge not the its purpose. Charges having equivalent effect are equally prohibited.
- *Commission vs Italiy (1968)* – Tax on export of artistic, historic and archaeological items



Charges having equal effect

- *Case 2/69 – Diamtarbeiders case* – 0.33% of the value of imported diamonds to be paid into a social fund
- Criteria for CHEE
 - Charge must be imposed at time of importation
 - Imposed on a product imported from another Member State in exclusions of a similar national product
 - Results in the variation in the price of the product



Quantitative Restrictions

- Article 34 TFEU: *'quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'*
- What are Quantitative Restrictions?
- *Geddo case – 1973 – 'measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit'*
- Relating to limitation of quantity



Measures of equivalent effect

- *Dassonville judgment (1974)* – validity of a Belgian law requiring importers to acquire possession of a certificate of origin of goods
- *Dassonville formula*: “all trading rules enacted by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade”



Other barriers to trade

- Import and export restrictions
- Promotion or favouring of domestic products
- Price fixing
- Measures which make imports more difficult or costly



Cassis de Dijon – 1979

- Developed further the Dassonville formula
- Once goods have been lawfully marketed in one Member State, they should be admitted into any other state without restriction.
- Rule of reason



Defences to Discriminatory measures

- Article 36 TFEU – number of grounds on which a discriminatory rule may be saved from the prohibitions of article 34 and article 35
 - *Public morality*
 - *Public policy*
 - *Public security*
 - *Protection of health and life of humans, animals or plants*



Free movement of capital and payments

- Includes elements such as purchase of currency, buying of real estate, company shares and loans, foreign direct investment
- Considered as supplementary to the
- three other freedoms
- The Treaty of Maastricht consolidated this freedom



Free movement of services

- Hard to distinguish from other freedoms
- Article 57 TFEU: *'Services mean those activities which are provided for remuneration and are not governed by the rules relating to freedom of movement of goods, capital and persons'*
- A person can offer his services in another EU country without setting up a company or a branch there





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