

European constitutional law problem question assignment

Law



At the outset, Freda has relied upon her understanding of the E. IJ. 's Fossil Fuels Directive of 2009 to compensate her installation of solar powered electricity generating system at the cost of €10,000. However, based on the British Parliament's Solar Power Act 2011 provision which requires that she must live in 'an urban area with a population of 10,000 or more people', the Northern Ireland Housing Executive declined her receipt for the installation. Consequently, Freda's circumstances expose conflict in the legal relationship between the U.

K. and the E. IJ. on the implementation of an E. IJ. directive. The European Communities Act of 1972 served to make all European Community Treaties directly applicable in the British legal system. This is best captured in Lord Denning's description of the Act: 'any rights or obligations created by the Treaty... legal effect in England without more ado'.² It is in this context that E. IJ. law has traditionally always taking precedence over domestic law.

This notion of the supremacy isn't specified in any of the Treaties, but rather it emerged as a legal principle from the European Court of Justice (ECJ) in its 1964 landmark ruling on the *Falminio Costa v ENEL* case³. The court held that due to the particular nature of Community (now Union) legal order that domestic provisions of Member States must give way to European law. The Court also upheld the precedence of secondary legislation, which would encompass the E. IJ. 's Fossil Fuels Directive, on similar grounds.

Furthermore, national powers have been further restricted by the subsequent ECJ ruling on the 1978 *Simmenthal II* case in which Member States were duty-bound to avoid adopting any national measure which conflicts with Union law. The Court specified that: "every national court
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must, in a case within its Jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule. 5 Freda is therefore advised to appeal the primacy of the E. IJ. 's Fossil Fuel Directive over the Solar Power Act 2011 via the national courts in her attempt to ensure her receipt is fully reimbursed by the Northern Ireland Housing Executive. She can attempt to rely upon the existence of three separate E. IJ. principles to contest this: direct effect, indirect effect and state liability. The principle of direct effect was developed in the initial stages of the ECJ's Jurisprudence to ensure that E. IJ. provisions would have legal effect in the Member States without the need for national implementation. This was first realised during the Van Gend en Loos case in which it was discussed whether a Treaty Article had ' direct application in national law in the sense that nationals of Member States may... claim to rights which the national court must protect'. 7 The court held that in the parameters of ' a new legal order' and independent of domestic law, the Union confers rights onto their citizens Which become part of their legal heritage'. 8 It must be duly noted at this stage that Freda is relying upon a Directive as opposed to any other European provision.

Initially, in European law, distinction was drawn between Treaty Provisions and Regulations, and Article 288 TFEU which defines a Directive as: ' binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. ' 9 However, the applicability of Directives was proven beyond

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questionable doubt in the case of Van Duyn. In this case the claimant was unable to gain entry into the U. K. to avail of secretarial post in the Church of Scientology owing to a ban on foreign Scientologists entering the country.

Her defence was reliant upon a breach of Directive 64/221 which limited such bans to those based on personal conduct. The courts' justification for siding with Mrs Van Duyn was based upon its belief that the Directive would be diluted if citizens were unable to rely upon it before their national courts. It therefore remains that the Fossil Fuels Directive may be directly operative.

Whether it will or not relies upon three qualifications that must be satisfied in the context of all provisions which fall under the ambit of direct effect.

These were succinctly set out by Advocate General Mayras in response to the *Reyners v Belgian State* as: clarity and precision for judicial application; bearing an unconditional obligation; and not being reliant on further action being taken by either the Union or national bodies. It is commonly the case that E. U. measures must be unclear and imprecise to fulfil their purpose. The ECJ can therefore only instigate direct effect to a provision when it presents unequivocal objectives or policy to be met and the means by which to obtain it. Otherwise further statutory instruments will be required to give effect to the provision.

In *Defrenne v SABENA*, the Court presented a case to differentiate direct and explicit discrimination from the insufficient phrase 'indirect and disguised discrimination'. Article 1 of the Fossil Fuel Directive clearly dictates that 'Member States' themselves are charged with the costs of entirely compensating 'householders', of which Freda is one, for the installation of

solar powered system. The Directive resultantly gratifies the requirement for clarity and precision. Following this the Directive must also be completely free from conditionality in its operation.

This is perhaps best highlighted in the previously mentioned case of *Van Duyn v Home Office*, in which it was held that because the challenged Directive was directly enforceable and provided Mrs Van Duyn with enforceable individual rights which the I-JK had to protect. As Freda met the sole condition of installing the solar powered system to 'generate electricity in her home in her capacity as a 'householder', the British courts cannot claim she did not meet the standards needed for reimbursement. While the E. IJ. maintains that the rights provided by a Directive do not have to be reliant on further legislative action for enactment.

In the *Defrenne* case, the necessity of further action failed to halt the Directive coming into direct effect afterward. In practice, all Union provisions incur a time frame for their implementation which somewhat attenuates this rule. It is therefore necessary to consider another a further condition: the deadline for the Directive must have passed. In *Ratti v Pubbico Ministero*, the owner of an Italian firm concerned with the marketing of solvent products was accused of failing to comply with an Italian law in relation to packaging and labelling.

However, Mr Ratti held that his company's method was compatible with Directive 73/173 and Directive 771728, the latter of which had not yet been implemented by the Italian state. Upon reference to the European Court it was ruled that because the timeframe for the enforcement of econd had no

passed, it could not be relied upon as a valid legal instrument. The ECJ later stated that: “ A member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. In Freda’s case, the Fossil Fuels Directive came into effect as of the 31st December 2011 and as she had not availed of local workmanship to install the solar powered system until at least January 2012 the time limit for the implementation of the Directive had passed and was therefore enforceable. By extension, in *Inter- Environnement Wallonie v Région Wallonne* the Court maintained that a State cannot adopt domestic legislation overlapping the substance of a Directive between its introduction and expiry which could seriously breach the terms of that Directive.

It could be argued in Freda’s defence that as the Solar Power Act 2011 was only espoused after the introduction of the Fossil Fuels Directive two years previous, and as it jeopardised the Directive by significantly limiting its first Article’s measure to only include those residing in urban areas with a population of 10, 000 or more’, it can be suspended based on the same grounds as the aforementioned ruling.

Before detailing one final further standard that must be met, it is worthy to denote a necessary division between the forms of direct effect and eligibility in the Courts. Much of the previously mentioned cases, such as *Van Duyn* and *Ratti*, involved individual European citizens invoking a Directive against the State or one of its many manifestations to protect their individual rights. This has been coined ‘Vertical’ direct effect.

Whether Directives can also confer rights in this way was comparatively termed 'horizontal' direct effect, and remained controversial among E. IJ. legal scholars until the emergence of the 1984 ruling during the Marshall v Southampton and South West Hampshire Area case that: With regard to the argument that a Directive may not be relied upon against an individual, it must be emphasised that according to Article [288 TFEU], the binding nature of a Directive before a national court, exists only in relation to 'each Member State to which it is addressed'.

It follows that a Directive may not of itself impose obligations on an individual and that a provision of a Directive may not be relied upon as such against such a person. 'It therefore remains to establish whether Northern Ireland Housing Executive falls under the criteria of a 'state' body by which Freda can take legal action against via vertical direct effect. Defining what exactly defines emanations or organs of the State has long proven to be a contentious issue between British and European courts. In Marshall, Mrs Marshall wanted to continue her work at the Southampton Teaching

Hospital, a public body, based on what she believed to be the discriminatory grounds of holding female employees to retire at sixty, and male employees at sixty-five, a breach of the Equal Treatment Directive. The Court ruled that she could rely on the Directive 'regardless of the capacity in which the latter is acting, whether employer or public authority. 'However, Freda is taking her discrepancy to the British courts', whose approach can differ from that of the EC] as illustrated in the case of Rolls- Royce plc v Doughty.

Yet in most cases, the Courts rely on a more ' broad' definition of the manifestations of a State. In contrast neither Recommendations nor Opinions can be subject to direct effect against public bodies. The Northern Ireland Housing (Northern Ireland)¹⁰ and therefore ' has been made responsible, pursuant to a measure adopted by the State', thus satisfying the final standard to be met in order for Freda to avail of the principle of direct effect on the Directive in the national courts.

Additionally, as any response received from the European Commission concerning its interpretation of the circumstances would take the form of a Recommendation or Opinion and consequently of a mere persuasive authority, it would have no significant legal weighing in British Courts. It can also be deliberated whether Freda can also be able to rely upon the alternative doctrine that is indirect effect. In the case that a Directive fails to meet the criteria of vertical direct effect, it may rely on national courts to interpret it in light of existing domestic law. This can be sourced back to the ECJ case of Von Colson and Kamann v Land Nordrhein- Westfalen where the court ruling on a Directive concerning sex discrimination said, ' It is for the national court to interpret and apply the legislation adopted for the implementation of the Directive in conformity with the requirement of Union law, in so far as it is given discretion to do so under national law.. The Court was relying upon the harmonious nature of Article 10 of the European Community Treaty which required the U. K. to take all available actions in order to fulfil its E. U. obligations to reach this decision.

Moreover, the same conditions apply to national legislation employed prior to the introduction of a Directive, as seen in the case of *Marleasing* here the ECJ called upon the Spanish courts to take the wording of the Spanish law in the wording of a Directive so as to meet the endpoints desired by the Directive. The ECJ focused the principle to a greater extent in *Wagner Miret v Fondo de Garantira* when it found that when interpreting domestic provisions to align with Directives, national courts must establish whether the national legislature aimed to comply with the measures of the Directive or not.

Application of the principle may see the national courts align themselves with the procedure undertaken in the *Marleasing* case and interpret the Fossil Fuels Directive in line with the Home Energy Act of 1986 under the circumstance that she was improving her 'home insulation' and thus entitling her to compensation for the cost of the installation. However, the highest court in the UK at the time, the House of Lords, did not accept the Marshall finding in the case of *Webb v EMO Air Cargo* in 1993. Hence *Freda* may not be able to fully rely on the implications of the doctrine in British courts.

Inadequacies of both direct and indirect effect in relation to the administration of directives have led the ECJ to develop a third and final principle sanctioning individuals' rights to damages against public bodies in their national courts when they come to disadvantageous conditions as a result of their nation's failure to implement a Directive, known as state liability. Like both previous principles, state liability came into being as a result of an ECJ ruling: *Francovich and Bonifaci v Italy*.

In this case, a group of ex-employees were calling for two demands. While failing to achieve their first claim that the substantive rights granted to them under a Directive were breached by the Italian state, they did attain entitlement to compensation from the State due to their inability to instigate the relevant Directive. The reaching of this decision was based upon the same as that of direct effect: E. IJ. law would be significantly undermined if such a rule did not exist. The Court then went on to set out the criteria, all of which P???? cheur v.

Bundesrepublik Deutschland and Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 4): “ The rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. ” The only EC] case yet to fail the first condition in which the rule of law infringed must be intended to deliberate rights on individuals was that of Peter Paul v Germany.

The failure of compliance can be pinpointed to the fact a German financial authority was not bestowed an independent right to compensation based upon its obligation to supervise a bank. Freda can safely rely upon meeting this obligation as the Directive explicitly identifies householders’, of which Freda is one, as the exclusive right-holders of the Fossil Fuels Directive’s guarantee to a refund. The assessment of whether a breach is significantly is ‘ sufficiently serious’ must also be reached by the national courts under a number of elements established by the EC].

The validity of this clause was tested in *R v Her Majesty's Treasury, ex parte British Telecommunications plc* in which the Directive concerned was referred to as 'imprecisely worded and was reasonable' and therefore the U.K. error was rendered excusable and consequently the principle was fulfilled. ** The Solar Power Act override the openness of the Fossil Fuels Directive by restricting it based upon the population density of the surrounding area.

This could perhaps be construed to be an infringement of the Directive on the grounds it was 'intentionally altered by British Parliament and thus falls within the connotations of being 'sufficiently serious'. ** Finally, causation is the last of measures to be satisfied before the principle of state liability can come into play. In *Schmidberger v Austria*, Schmidberger fought the State on the notion that he had come under financial dismay following a blockade on a motorway in Austria in the form of a public protest lasting the duration of twenty-eight hours.

His claim that the loss of profit could be dissected as 'damage' had not successfully meet the criteria as he could not prove in indisputable terms that loss was guaranteed. Freda could, on the other hand, easily prove a link between the U. K. 's obligation to enforce the Directive in its full terms and that she had fallen victim to a loss of £10, 000 based on the pretences that she followed the Directive guidelines as detailed in its first Article.