

EUROPEAN ECONOMIC COMMUNITY—DIRECT APPLICATION OF COMMUNITY LAW—ARTICLE 119 OF THE TREATY OF ROME REQUIRING EQUAL PAY FOR EQUAL WORK HAS DIRECT EFFECT UPON NATIONAL LAW OF MEMBER STATES.

On October 1, 1963, plaintiff Gabrielle Defrenne was promoted from “air hostess” to the position of “cabin steward, air hostess/principal cabin attendant” with defendant Belgian airline, the Société Anonyme Belge de Navigation Aérienne (hereinafter referred to as Sabena). The new contract signed at the time of the promotion contained a clause requiring all female members of the cabin crew to cease work at age 40. Pursuant to this contract, plaintiff was required to stop work on February 15, 1968, and receive severance pay of one year’s salary. Plaintiff brought proceedings against Sabena before the Tribunal du Travail in Brussels claiming compensation¹ for (1) the difference in the salary she received and the salary to which a male employee with the same position and seniority would have been entitled and (2) the disparity in pension and severance pay accorded to male and female employees.² The Tribunal du Travail dismissed the claim and appeal was brought before the Labor Court at Brussels. Finding that disposition of the case required interpretation of article 119 of the Treaty of Rome,³ the Labor Court referred the case to the Court of Justice

¹ Ms. Defrenne claimed compensation on the grounds that:

(1) The salary paid to her during the period between February 15, 1963 and February 1, 1966 was 12,716 Bfrs. less than that to which a male steward with the same seniority would have been entitled;

(2) She ought to have been recognized as entitled to a higher pension up to a maximum of 334,000 Bfrs.

On February 1, 1966, “Sabena, of its own accord placed ‘hostesses’ and ‘stewards’ on the same basic rates of pay.” *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] 2 COMM. MKT. REP. (CCH) ¶ 8346 at 7295.

² Ms. Defrenne, at the same time she filed the instant suit, applied to the Belgian Conseil d’Etat for annulment of the Royal Decree of November 3, 1969. The Court of Justice held that a retirement pension formed part of a system of social security provided for by law and was not included within the concept of pay as contemplated by article 119 of the EEC Treaty, even if the employer contributed to the financing of the scheme since this is done for reasons of social policy rather than as payment for work done. *Defrenne v. Belgium* (80/70) 1970.

³ Treaty Establishing the European Economic Community, done March 25, 1957, 298 U.N.T.S. (unofficial English version) [hereinafter cited as EEC Treaty]. The treaty may also be found in [1973] 1 COMM. MKT. REP. (CCH) ¶ 151. Article 119 provides:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

of the European Communities⁴ for a preliminary ruling pursuant to article 177⁵ of the treaty.⁶ *Held*, reversed. Article 119 of the Treaty of Rome introduces into the national law of the original Member States the concept of equal pay for equal work among men and women and thereby directly confers the right to bring suit in the national courts, regardless of whether or not the State has taken any action to incorporate the treaty provision into its domestic law. *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] 2 COMM. MKT. REP. (CCH) ¶ 8346.

Article 119, which requires the application of the principle that men and women should receive equal pay for equal work, was incorporated into the EEC treaty⁷ with a dual purpose. Economically, article 119 was intended to minimize the possibility of distorted competition thereby preventing one State's implementation of "equal pay for equal work" from adversely affecting intra-Community competition in the job market and work force.⁸ Socially, article 119 was one of the numerous provisions in the treaty designed to promote improvement of the living and working conditions of the European peoples.⁹ Although the Member States had ratified article 119 as an integral part of the Treaty of Rome, the question of to what extent the integral articles of the treaty created rights and obligations directly enforceable within the legal systems of the Member States remained.¹⁰

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

⁴ For the convention establishing the Court of Justice, *see generally*, SWEET & MAXWELL, EUROPEAN COMMUNITY TREATIES, 105-09 (2d ed. 1975) [hereinafter cited as SWEET].

⁵ Article 177 of the EEC Treaty provides:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

⁶ [1976] 2 COMM. MKT. REP. (CCH) ¶ 8346 at 7295.

⁷ Note 3 *supra*.

⁸ The *travaux préparatoires* indicate that this was a primary purpose in incorporating article 119 into the EEC Treaty. R. Van Lint, [1969] *Cashiers de Droit Européen* 373, 383.

⁹ [1976] 2 COMM. MKT. REP. (CCH) ¶ 8346 at 7289.

¹⁰ There is considerable authority, in the form of case law in both the Community Court of Justice and in many national courts recognizing that certain provisions of the treaty have this broad impact. *See generally* CAMPBELL, COMMON MARKET LAW, (Vol. III, 1973) §

The extent to which the provisions of the treaty are to be given direct effect within the Member States in the absence of implementation through national legislation has been a recurring question for the Court. In *N.V. Algemene Transport-en Expeditie Onderneming, van Gend & Loos v. Nederlandse Tariefcommissie*,¹¹ which has been referred to as "the most important decision ever handed down by the court dealing with individual rights,"¹² the Court established the principle that the Treaty of Rome not only created a set of rules to govern the international relationships of the Member States,¹³ but also established rights and obligations directly enforceable in national courts by citizens of Member States, who are also subjects of the treaty.¹⁴ However, this holding was limited in its application; the treaty provision had direct legal effect upon national law only if it (1) laid down a clear and unconditional prohibition which invokes a *negative* rather than a *positive* duty and (2) did not require implementing legislation by the Member State in order to be performed.¹⁵ If these criteria were met, the treaty article "by its very nature, lends itself perfectly to producing direct effects in legal relations between the Member States and persons under their jurisdiction."¹⁶ It has been noted that the *van Gend* decision "abrogates for the community the traditional approach whereby each Treaty partner itself determines the effect and applicability of a treaty to private parties."¹⁷ The practical result was that any individual could interpose treaty provisions before national courts and obtain an additional hearing before the Court of Justice under article 117.¹⁸

The first of these limitations was partially removed by *Salgoil S.p.A. v. Ministry of Foreign Trade of the Republic of Italy*,¹⁹ in which the Court held that articles 33(1) and 32 of the treaty²⁰ were not directly effective

1.83 [hereinafter cited as CAMPBELL].

¹¹ [1963] 2 COMM. MKT. REP. (CCH) ¶ 8008. Article 12 of the Treaty of Rome, in issue here, places a duty on Member States to refrain from introducing among themselves any new customs on imports or exports or any increases in those customs already applied.

¹² Gormley, *The Procedural Status of the Individual Before the Supranational Judicial Tribunals*, 41 U. DET. L.J. 405, 433 (1964); [hereinafter cited as Gormley]. The importance of the *van Gend* decision was compared to that of *Marbury v. Madison* in the United States system and that of the *Lawless* and *DeBecker* decisions in the Council of Europe. *Id.* at 428.

¹³ Comment, 4 N.Y.U. J. INT'L L. & POL. 134, 136 (1971).

¹⁴ *Van Gend en Loos v. Nederlandse Tariefcommissie*, [1963] 2 COMM. MKT. L.R. 105, 129.

¹⁵ Thus, the Court rejected the traditional standard of treaty interpretation. For the traditional view see the conclusions of Advocate General Karl Roemer which were rejected by the Court. Gormley, *supra* note 15, at 434.

¹⁶ Comment, 4 N.Y.U. J. INT'L L. & POL. 134, 137 (1971).

¹⁷ Hay, *Federal Jurisdiction of the Common Market Court*, 12 AM. J. COMP. L. 21, 37 (1963).

¹⁸ Gormley, *supra* note 15, at 433.

¹⁹ [1968] 2 COMM. MKT. REP. (CCH) ¶ 8072.

²⁰ SWEET, *supra* note 4, at 71.

because these articles involve an affirmative duty to act on the part of the State. However, the Court noted that had these articles been sufficiently specific and had they left little discretion to the States regarding compliance, the provisions would have been given direct effect, even though affirmative in nature. This holding significantly expanded the *van Gend* criteria for direct applicability.²¹ Continuing in this vein, the Court ruled in *Reyners v. Belgian State*²² that article 52 of the treaty,²³ imposing an affirmative duty, "constituted an obligation to attain a precise result, the fulfillment of which was to be made easier by, but *not be dependent upon*, the implementation of a programme of progressive measures . . ." by the Member States.²⁴

In *Defrenne v. Sabena* the Court of Justice is asked for an interpretation of a specific article of the treaty to determine its impact upon the domestic law of the original Member States in the absence of implementing legislation. The Court faces the question of whether article 119 has direct effects and creates personal rights for individuals,²⁵ which the national courts are bound to recognize and protect.²⁶ An affirmative answer to this question requires the Court to go further and make recommendations to the referring court²⁷ regarding the time limit imposed on the States for recognition of the equal pay principle.

Following the rationale of these cases, the Court reiterates the criteria by which the direct applicability of a treaty provision must be determined. The standard it uses is that, in order for a provision to directly confer on

²¹ See also *Firma Alfons Lütticke v. Hauptzollamt Saarlouis*, [1974] 2 COMM. MKT. REP. (CCH) ¶ 8045 at 7611:

To date you have considered directly applicable only those articles which contain an obligation to refrain from acting. The Federal Republic of Germany, however, erroneously infers from this that there is a general and exclusive rule. The truth is simply that, because of its nature and content, an obligation to act fulfills the conditions for being considered directly applicable much less often and less easily.

²² *Reyners v. Belgian State*, [1975] 2 COMM. MKT. REP. (CCH) ¶ 8256. *Reyners* involved a suit against the Belgian state based on article 52 of the EEC Treaty. The plaintiff claimed that he was subjected to discriminatory conditions for admission to the profession of *avocat* which were not applied to Belgian nationals, in violation of article 52. Article 52, imposing an affirmative duty, provides in part: "[R]estrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period." (emphasis added).

²³ See note 3 *supra*.

²⁴ Wyatt, *Directly Applicable Provisions of EEC Law-I*, 125 NEW L.J. 458 (1975).

²⁵ Prior to the instant case, the predominant view had been that article 119 did not create rights directly enforceable in the courts of Member States. Blaise Knapp, 'L' Egalité des travailleurs masculins et féminins dans la CEE et en Suisse' in (1968) *Rapports du Centre d' Etudes juridiques européennes* (Geneva).

²⁶ [1976] 2 COMM. MKT. REP. (CCH) ¶ 8346 at 7289.

²⁷ SWEET, *supra* note 4, at 107.

individuals the right to enforce it in the national courts, the provision: (1) must be clear and sufficiently precise in its content; (2) must not contain any reservation; and (3) must be complete in itself, such that neither the States nor the Community need to take any steps of subsequent implementation to assure its application by national courts. The Court finds that article 119 meets these requirements.²⁸

The Court then makes a recommendation concerning the time limit or effective date for the application of article 119.²⁹ Generally, article 8(7)³⁰ and specifically, the wording of article 119,³¹ provided that the right of equal pay was to be ensured by the end of the first transitional period, January 1, 1962. Just before this date, the Member States adopted a resolution extending the time limit to December 31, 1964.³² The Court faces the question of whether this joint resolution is effective to extend the time for the direct application of article 119. If this question is answered affirmatively, the provision should not be deemed to have been in direct effect at the time the plaintiff entered into her new contract with Sabena on October 1, 1963. The Court, relying on two prior cases,³³ rules that the Member States were powerless to alter the clear provisions of article 119 of the treaty and declares that the resolution was nothing more than a political act expressing concern for the implementation of the article.³⁴

Due to the impossibility of ascertaining with certainty the general level at which pay would have been fixed at any time prior to the decision in *Sabena*, the Court further limits the effect of the judgment so as to exclude claims based on pay periods prior to the date of the decision, April 8, 1976, except where workers had already filed such claims.³⁵ In limiting the retroactive effect of its ruling, the Court demonstrates that it recognizes the possible economic consequences for companies that are subject to the ruling, and it safeguards these businesses against possible bankruptcy by this limitation on applicability.³⁶

²⁸ For a contrary view see Campbell, *supra* note 10. Campbell claims that article 119 specifically envisages legislative or administrative implementation by Member States, and that prior to an action in a national court the Member States must have taken the action required of it by the treaty.

²⁹ [1976] 2 COMM. MKT. REP. (CCH) ¶ 8346 at 7291.

³⁰ SWEET, *supra* note 4, at 64.

³¹ *Id.* at 97: "Each Member State shall during the first stage ensure"

³² See also Council Directive 75/117 adopted on Feb. 10, 1975, which was mooted by the *Defrenne* ruling. This directive gave the States until August 10, 1975, to enact legislation implementing article 119.

³³ *Ministero v. Manghera*, [1976] 2 COMM. MKT. REP. (CCH) ¶ 8342 and *Reyners v. Belgian State*, [1974] 2 COMM. MKT. REP. (CCH) ¶ 8256.

³⁴ *Ministero v. Manghera*, [1976] 2 COMM. MKT. REP. (CCH) ¶ 8342 at 7224.

³⁵ [1976] 2 COMM. MKT. REP. (CCH) ¶ 8346 at 7293.

³⁶ EUROMARKET NEWS, COMM. MKT. REP. (CCH) April 27, 1976, No. 380, at 2. However, Commission attorneys maintain that this restriction severely impedes the impact of the judgment. *Id.* at 2.

Pursuant to the recent trend in the Court of Justice, the holding in *Sabena* extends the effect of article 119 directly into the national law of the Member States, giving individuals the right to base suits upon this provision as of January 1, 1962, the end of the first transitional period imposed by the Treaty of Rome. In so declaring, the Court demonstrates that it is a powerful, autonomous entity, which does not succumb to pressures placed on it by the Member States, the Council of Ministers, or the Commission of the European Communities.³⁷ The decision establishes definite criteria for the determination of whether a certain provision of the treaty is to be given direct effect; article 119 successfully meets these criteria and becomes, in effect, a part of the domestic law of all Member States.

While most Member States either enacted equal pay legislation or relied on a constitutional provision which allowed employees to sue employers, some had given the task of negotiating equal pay conditions to the unions and employers. Under the *Sabena* ruling it seems rather doubtful whether these practices will be permissible any longer as the equal pay principle is now a directly enforceable legal right.³⁸

The holding in *Sabena* and the language of article 119 are not broad mandates against the many forms of sex discrimination which exist in society. *Sabena* is limited to sex discrimination in the area of equal pay for equal work³⁹ and has no direct application to such areas as discriminatory hiring and promotional policies.⁴⁰ The ruling is, however, an additional step in the movement to decrease the social and economic inequities resulting from discrimination based upon the sex of the worker.

Recognition of basic personal rights is one of the general principles of law which the Court of Justice must safeguard. "The protection of these rights, while it was inspired by the Constitutional traditions common to all Member States, must be carried over to the structure and goals of the Community."⁴¹ In the line of cases culminating with the decision in *Sabena*, the Court is developing a system of European law which is absolutely

³⁷ EUROMARKET NEWS, COMM. MKT. REP. (CCH), April 27, 1976, No. 380, at 2.

³⁸ *Id.* at 3.

³⁹ The Advocate General stated that beyond the partial definition of "equal work" in article 119 (see para. 3, note 3 *supra*), it has been observed that article 119 "does not try to determine when men and women are doing the same work but only to ensure that the sex of the worker is in no way taken into account in decisions on pay. Whether the work is the same or different is a question of fact to be determined in every individual case in accordance with the responsibilities assigned to each person concerned. . . ." [1976] 2 COMM. MKT. REP. (CCH) ¶ 8346 at 7297.

⁴⁰ For example, the clause in the plaintiff's contract which required women to retire at age forty could not be attacked under article 119, as well as the decision with respect to pension and retirement pay.

⁴¹ *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratssteleer für Getreide und Futtermittel*, [1972] 2 COMM. MKT. REP. (CCH) ¶ 8126 at 1134.

necessary if the European nations are to become a united economic institution.⁴² As one commentator indicated:

An organic Europe would hardly remain viable for long if it rested on a fragmentary legal system, composed of many varied and contradictory laws, and applying this or that law indiscriminately, as the occasion seemed to demand. Nor can one conceive of a United Europe without the gradual establishment of not only public, but also private, Community law, applicable to all matters covered by the Treaties.⁴³

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⁴² Gormley, *supra* note 15, at 427.

⁴³ Le Court, *Community's Court of Justice Builds European Law*, EUROPEAN COMMUNITY No. 65 (Sept. 1963) at 6.