

ESTABLISHING DIRECT EFFECT

The principle of **direct effect** allows individuals to rely on the rights conferred upon them through **Treaty provisions, Regulations and Directives** in national courts. They are all capable of having direct effect, subject to certain conditions.

Treaty provisions are Primary Union law, whereas Regulations and Decisions are Direct Union law. Directives, on the other hand, are Indirect Union law. We will examine each instrument in turn.

Treaty provisions (*Case 26/62 Van Gend en Loos*)

- At first, the Court imposed a very **strict test** to show direct effect. However, following the further development of cases (e.g. *Defrenne*, *Reyners*, etc.), we see that this test has now become much more **lenient**.
- There are **three criteria** (Textbook, 84)

- Provision has to be clear (sufficiently clear and precise)
- Unconditional in the sense of being an automatic prohibition
- Needs to be absolute, i.e. not allow for reservations.

- Treaty provisions can have both **vertical and horizontal** direct effect (see Textbook, 88 – Figure 3.3)

Regulations and Decisions

- Regulations are acts of direct and general application to all Member States, whereas Decisions are addressed to certain people.
- Due to the open nature of Regulations, they are referred to as **legislative instruments** whereas Decisions are called **executive instruments** since they are only applicable to whom it addresses.
- REGULATIONS:
 - o *Case 9/70 Grad v Finanzamt Traunstein* [1970] ECR 825:
“Unconditional and sufficiently clear and precise to be capable of producing direct effects in the legal relationships between the Member States and those subject to their jurisdiction” (at para 9)
- DECISIONS:
 - o The conditions are the same as Treaty provisions and Regulations, except that they need to be addressed to the applicant.

Directives

- Directives are indirect Union law as they set an objective to be achieved, but leave national authorities to choose its form and methods of implementation. (see Art 288 TFEU)

- Although Directives are capable of having direct effect (Case 41/74 *Van Duyn v Home Office*), there are slightly stricter conditions for establishing direct effect of Directives:

- Provision has to be sufficiently clear and precise, as well as unconditional (*Van Duyn*)
- The implementation deadline of the Directive must have passed (Case 148/78 *Ratti* [1979] ECR 1629, para 22)

- There is **only** vertical direct effect for Directives, and **no horizontal direct effect** (Case 152/84 *Marshall*; Case 91/92 *Faccini Dori v Recreb* [1994] ECR I-3325). This means individuals can only rely on the Directive against the state or public authorities. This makes sense, considering the nature of Directives whereby its implementation is dependent on national authorities.
- **However**, there are **exceptions** to this rule (see Textbook, 100-101):
 - A wide definition of State (Actions)
 - Incidental horizontal direct effect.