The horizontal direct effect of Treaty Articles – Walrave and Koch

A common thread in all of the ECJ’s effet utile case law discussed so far has been that the ‘defendant’ was a governmental body of one sort or another. A potentially more complicated question presented itself to the ECJ in Walrave and Koch v Union Cycliste Internationale.¹ The defendant was a senior official of a private sector organization – the Union Cycliste International. The UCI was the governing body for the sport of cycle racing on roads in France. In formal terms, the UCI had no governmental basis at all. One of the rules which it applied to cycle racing was that cyclists themselves and their motor-cycle pacemakers had to be of the same nationality. The rule was challenged by two Dutch pacemakers who wished to work for non-Dutch teams. There could be no doubt that if the rule had been imposed by a Member State law then the law would breach various directly effective Treaty provisions: the Article 7 prohibition on nationality-based discrimination; the Article 48 presumption of free movement of (employed) workers; and the Article 59 presumption of free movement of (self-employed) workers. (The ICU’s rule would also breach the terms of an important piece of secondary legislation (Reg. 1612/68) which laid down detailed provisions concerning the free movement of workers.) In such circumstances, the Treaty Articles and regulation could be said to be vertically directly effective; ie the legal action is upwards from a citizen against a government body. The question raised in Walrave was whether these provisions were also applicable in legal actions between individuals and/or companies; ie whether the provisions were horizontally directly effective. The ECJ considered that the Treaty Articles and Reg 1612/68 were directly effective in both vertical and horizontal planes;

"[17] Prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.

[18] The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community..., would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law.

[19] Since, moreover, working conditions in the various Member States are governed by means of provisions laid down in law or regulations and sometimes by agreements and other acts concluded by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application".

The teleological basis for this conclusion is readily apparent. One such reason related to the fact that very substantial amounts of economic activity within the Community were carried out in the private sector. If all these activities were placed beyond the

¹ (Case 36/74) [1974] ECR 1405
reach of directly effective EEC law, the substantиве scope of the ‘common market’ would be very tightly constrained. A second reason for according horizontal direct effect to EEC law arose from the differential allocation among the Member States of particular types of economic activity between the public and private sectors. If, for example, railways were run as a governmental concern in Member State A, then relevant EEC laws would affect the operation of the railway system in that country even if the EEC laws were only directly effective in the vertical plane. But if EEC law had only vertical direct effect, it would not affect the operation of railways in Member State B where railways were a private sector responsibility. A third – and obviously related – reason was to remove the possibility that some Member State governments might try to negate the impact of EEC law on some areas of economic activity by formally transferring responsibility for their conduct or supervision from public sector bodies to private sector organizations.

It is notable that the ECJ did not engage at all in Walrave with potentially tortuous arguments as to whether the ICU could be regarded as a ‘governmental body’ for the purposes of EEC law. One could readily offer a plausible rationale to sustain that conclusion; namely that the ICU controlled an important area of economic activity which would presumably have to be regulated by a government body of the ICU did not exist. But the ECJ appeared to assume that the notion that non-governmental bodies were legitimate targets of Community law controls was uncontentious. This seems a logical extension of Van Gend–s principle that the Treaty bestowed rights on individuals. If effective realisation of those rights depended on other individuals respecting reciprocal obligations, it seemed obvious that those individuals should resolve disputes as to the meaning of EEC law in their national courts. Walrave expressly identified horizontal direct effect as a characteristic of Treaty Article and regulations. And it would seem plausible to conclude on the basis of Walrave that any Commission decision that was addressed to a private sector organization would also give rise to horizontal direct effect. If narrowly construed, Walrave is perhaps authority only for the proposition that horizontal direct effect reaches only certain private sector regulatory bodies, and not to individuals or companies. However, the ECJ wasted little time in confirming that horizontal direct effect could reach into the smallest nooks and crannies of private sector economic activity.

The justiciability test and the horizontal direct effect principle reaffirmed and expanded in Defrenne v SABENA

Just as the form which EEC legislation took could not preclude enforcement by national courts, neither does it assure that end. We saw in Chandler v DPP2 that putting a prerogative power into statutory form did not necessarily make it justiciable. In Defrenne v SABENA3, the ECJ drew a similar conclusion regarding

2. See pp------ above.
3 Case 43/75: [1976] ECR 455.
direct effect.

Article 119 required member states to: >ensure and maintain the principle that men and women should receive equal pay for equal work=. Ms Defrenne worked as an air hostess for SABENA, a Belgian airline which was essentially owned and managed by the Belgian government. SABENA paid its hostesses less than male stewards for identical duties. While admitting discrimination, SABENA claimed Article 119 was not directly effective. SABENA contended that Article 119=s principle was too complex an economic concept to be justiciable before national courts; more detailed legislation explaining the meaning of equal pay and equal work would be needed before Article 119=s principle became >unconditional=.

The ECJ was only partly convinced by this argument. It held that gender discrimination could take two forms: >direct and overt= or >indirect and disguised=. Direct discrimination arose where (as for Ms Defrenne) differing wages were paid for exactly the same job, or where discrimination was specifically permitted in legislation or collective labour agreements. Such inequality could be detected by: >purely legal analysis...the court is in a position to establish all the facts which enable it to decide whether a woman is receiving lower pay than a male worker=. However indirect discrimination, involving inequality between different jobs or industries could only be established against more detailed legislative criteria. Not until such legislation had been enacted could the prohibition on indirect discrimination become directly effective. Once again, the ECJ stressed that it is the nature, not the source of the EEC law that determines its enforcability in domestic courts.

An equally important element of Defrenne was the ECJ=s conclusion that Article 119=s justiciable terms were enforceable in national courts in a very expansive horizontal sense. Given that SABENA was in formal terms a public sector body, the case could have been resolved on the basis that Ms Defrenne=s action was vertical in nature. However as in Walrave, the ECJ rejected any need to find a `governmental element' to SABENA=s activities. Rather, the Court concluded that all economic activity – even to the level of contracts between individuals – were controlled by Article 119:

>[39] Since Article 119 is mandatory in nature, 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=.

As we will subsequently see, the horizontal direct effect of directives proved a more contentious issue. But before that question was broached, the ECJ once again underscored the unambiguous nature of the precedence principle.

4 Id, paras 22-23.