ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF CJEU – SECOND PART

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DEFRENNE V SABENA: A LANDMARK CASE WITH UNTAPPED POTENTIAL

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ABSTRACT: Case 43/75 *Defrenne v SABENA* (ECLI:EU:C:1976:56) was handed down by the Court of Justice in 1976. It is the second case of the *Defrenne* trilogy, and today is still cited as the landmark ruling establishing a woman's right to equal treatment in the workplace. However, the recent release of the full *dossier de procédure* shows that the case was about more than that and was influenced by several factors. In this regard, the *dossier* offers valuable insights into the case, including valuable information about the actors involved, the social and political context, and the role of evidence. The opening of the archives also shows that the decision on horizontal direct effect of the provision was not straightforward and that other options were being discussed, notably the vertical direct effect of art. 119 EEC. Finally, the *dossier* offers more clarity regarding the issue of non-retroactivity, which was rapidly concluded in the final decision but takes up a large part of the *dossier*. Using the archives permits us to see that the landmark decision did not come out of the blue but emerged from a series of constituent elements.

KEYWORDS: *Defrenne II* – *dossier de procédure* – art. 119 EEC – preliminary rulings – horizontal direct effect – non-retroactivity.

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I. Introduction

The case 43/75 *Defrenne v SABENA* was handed down by the Court of Justice of the European Union (CJEU) in 1976,[1] and is the second and most celebrated case of the *Defrenne* trilogy. It deals with a Belgian air hostess, Miss Gabrielle Defrenne, who was working for SABENA but was being paid less than men doing the exact same job. Miss Defrenne brought a claim before a Belgian court, which referred two questions to the CJEU pursuant to art. 119 EEC (*e.g.*, currently art. 157 TFEU). One involved the direct effect of the provision, and the other concerned its temporal application. The CJEU stated that art. 119 EEC had horizontal direct effect and that individuals could rely on it before national courts to ensure gender equality. Additionally, the CJEU added a temporal limitation to the judgement so as to prohibit retroactive use of the decision.

Defrenne II is a landmark case that is still taught in EU law classes and is considered a pivotal case that recognised the horizontal direct effect of the principle of equality of pay.[2] It is part of a broader saga, and whilst *Defrenne I* is considered a defeat, *Defrenne II* can be described as a marvellous decision.[3] *Defrenne II* gave the CJEU the opportunity to be involved in the birth of social movement,[4] and the judgment strongly contributed to the transformation of the EU legal order into a European social model.[5] The case emerged in a particular social context in Europe and particularly in Belgium, which was in the midst of a "second-wave" of feminism and the "Herstal Equal Pay Strike" of the Belgian arms production company.[6] Women decided to strike to demand the implementation of the principle of equal pay. This strike was followed by a strike in the service sector in which air hostesses campaigned about their conditions. It is from the air hostess dispute that the famous *Defrenne* saga arose, on which this *Article* is based.

Today *Defrenne II* is remembered as the case that established gender equality in the workplace as a general principle of Community law.[7] To a lesser extent, it is also known for the temporal limitation that the CJEU applied to it. The recent release of the full *dossier de procédure* provides a new take on this landmark judgment. The archives give insight into the reasoning of the decision as well as on the legal actors involved, the sources used and the overall context. The CJEU's decision does not appear out of the blue but emerges from a series of constituent elements. The analysis of the *Defrenne II* presented below intends to show precisely this aspect. In this regard, it starts by analysing the insights brought by the *dossier* to the case to contextualise the landmark judgment (see section

[1] Case 43/75 *Defrenne v SABENA* ECLI:EU:C:1976:56.

[2] E Vogel-Polski, 'Agir pour les droits de femmes' (2003) Raisons politiques 139 ff.

[3] *Ibid*.

[4] R Smith, L Murrell and D Rooks (eds), *Conversion Course Companion for Law: Core Legal Principles and Cases* (Pearson Education 2008) 151-155.

[5] I Ahmed (ed.), *International Labour Review* (International Labour Office 2004).

[6] C Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996) 65.

[7] M Maduro and L Azoulai (eds), *Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 251.

II). This relates specifically to actors' legal representation, the case's context and the prominent role of the observations and evidence in reaching the final judgment. In a second part, the *Article* will go beyond the famous *Defrenne II* judgment and focus on the broader and richer story (see section III). It will do so by highlighting an overlooked issue by the CJEU (horizontal versus direct effect) and by developing further an issue summed up restrictively by the CJEU (non-retroactivity of the decision).

II. Insights into the *Dossier*: towards a contextualisation of the landmark case

A close look into the *dossier* hints at elements that might have influenced the judgment, such as the actors involved and the "hidden" evidence (see section II.1). It also offers insights into its legal, political and social context (see section II.2).

II.1. The actors involved and the "hidden" sources

Four legal parties submitted observations in *Defrenne II*: the Commission, the lawyers of the applicant and two Member States. The two Member States involved are the United Kingdom (UK) and Ireland. Surprisingly, the government of Belgium did not submit any observation, even though it was the "home" Member State of the dispute. Additionally, none of the original six Member States brought submissions.[8] Whilst this can be observed in the final decision, the *dossier* shows the involvement of the Member States in the case, notably through the number of observations and evidence they submitted. In this regard, the government of the UK was the only actor that submitted three written observations and two annexes. Ireland submitted two written observations and one annex.[9] Thus, they actively participated in the debates and brought many arguments to the table.

The fact that only the newly acceded Member States submitted observations is noteworthy. *Defrenne II* was decided three years after the accession of Ireland and the UK to the EU.[10] Since they were still new Member States, it is possible that the Court did not want to frustrate or chastise them by imposing the principle of equality of pay retroactively. In fact, the government of the UK and Ireland strongly argued against the retroactivity of the judgment on the ground that it would result in a high economic burden. It is unclear whether the same decision would have been taken if other governments had submitted observations.

The *dossier* shows that the lawyer of Miss Defrenne was Marie Thérèse Cuvelliez (a name that does not appear in the final judgment). In the literature, the name Eliane Vogel-Polski tends to be linked to *Defrenne II*, because of the work she did in collaboration with

[8] Meaning France, Germany, Italy, Luxembourg and the Netherlands.

[9] As a way of comparison, the applicant only submitted two written observations and added zero annexes.

[10] Ireland and the UK accessed the EU in 1973.

Miss Cuvelliez. However, in the *dossier* this name is nowhere to be found. The *dossier*, by giving the name of Marie-Thérèse Cuvelliez, permits us to go further into the research and see the role she played as a lawyer in the case. She was first contacted by air hostesses to form a separate Union and managed later on to convince Miss Defrenne to use her experience as the basis for a case against SABENA.[11] Thus, the *dossier* sheds lights on this somewhat forgotten actor in the literature.[12] The role of Eliane Vogel-Polski in it is also undeniable. However, this is not reflected in the *dossier*.

When it comes to the "hidden" sources of the case, reference is being made to evidence. Evidence forms 69 per cent of the *dossier*[13] and is used by the actors to support their arguments. 14 annexes have been added, among which seven are European sources, four are international sources and three are national sources. It is interesting to note here that evidence came from various levels, which shows that the debate was not centred solely on the EU. The reasoning was influenced as well by national and international sources. Whilst some annexes were mentioned in the final judgment, such as the Convention n. 100 of the International Labour Organization,[14] the majority of them were not referred to by the CJEU. These "hidden sources" that are to be found in the archives allow for more detailed and specific analysis, and consequently place the final decision in a broader context.

Although the Commission attached eight annexes to its observations in the written as well as oral procedure, none of them were analysed in the final decision. The evidence brought by the Commission was essentially official Commission reports,[15] but also induded studies created by the International Labour Office.[16] All of them were referenced by the Commission to add information and enrich the debate at stake in the case. The most striking and influential report cited by the Commission was the Cornu Report.[17] This report was also used by the lawyers of Miss Defrenne.[18] It offered an extensive analysis of the state of implementation of the principle of equal pay not only in the UK and Ireland but also in Denmark. Another added value of this report is that it distinguished between the public and private sectors.[19] This approach was also used by the Commission, which strongly encouraged the CJEU to distinguish between the public and the private sectors.[20] This report is in many ways very interesting and was used by two of the four parties in the case to support their arguments. It is likely that the CJEU judges also studied it in their deliberations.

[11] C Hoskyns, *Integrating Gender* cit. 69.
[12] When typing online "lawyer of Defrenne II" the name of Eliane Vogel-Polski appears directly.
[13] Meaning of the 1104 pages accessible to the Reader.
[14] International Labour Organisation, Equal Remuneration Convention n. 100 of 1951.
[15] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, Commission annex III OP.
[16] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., Commission annex VII OP.
[17] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., Commission annex V OP.
[18] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., Applicant, OP 10 second observations.
[19] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, Commission annex V OP cit. part 2.
[20] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., Commission WP 5, observations.

A second example can be found in the national sources used by the government of the UK to support its argument against the retroactivity of the judgment. It was essential for the government to avoid the retroactivity of such a landmark decision to prevent a huge economic burden on the country. To support this argument in figures, the UK used sources such as a national survey from 1969.[21] The survey detailed the types of undertakings that would be most likely affected, the number of workers concerned and the margin between rates and pay. It concluded that the UK would assume an economic burden of over £1,000 million if the judgment were made retroactive.[22] This is an argument of an economic nature, justified with statistical numbers that might influence the reasoning of the CJEU. In fact, the figures on the feasibility of retroactivity may have influenced the CJEU's decision.

Consequently, the actors and the "hidden sources" found in the *dossier* shed light on previously unknown factors that may have influenced *Defrenne II*. Insight into the *dossier* also allows for a contextualisation of the case (see section II.2).

II.2. The legal and political context of the case

The *dossier* provides several elements that put the case into context and demonstrate how the principle of equal pay was a topic of interest at the time. *Defrenne II* played a significant role in the evolution of the EU into a European social model, but the story did not start with this case.

Firstly, *Defrenne II* was not the first time an applicant had sought a reference to the CJEU to request the implementation of equal pay. The provision had already been used in two other cases: in the *Sabbatini* case[23] and in *Defrenne I*.[24] Whilst *Sabbatini* was neither mentioned in the final judgment nor in the *dossier,* the final judgment and the conclusion of the Advocate General[25] of *Defrenne I* are found in the *dossier*. In fact, the lawyer of Miss Defrenne and the government of the UK referred to it in their written observations to support their argument. In *Defrenne I*, the CJEU stated that a retirement pension was not included in the concept of "pay" for the purposes of art. 119 EEC.[26] The lawyer of the applicant used the first *Defrenne* case to encourage the CJEU to avoid another instance in which discrimination fell outside the scope of art. 119 EEC and thus to take an innovative stance.[27] It also referred to the conclusions of the Advocate General who at the time was already in favour of the horizontal direct effect of the provision.[28] On the contrary, the government of the UK

[21] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., UK Annex I OP.
[22] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., UK OP 3, answers to questions.
[23] Case 20/71 *Bertoni v Parliament* ECLI:EU:C:1972:48.
[24] Case 80/70 *Defrenne v Belgian State* ECLI:EU:C:1971:55.
[25] Case 80/70 *Defrenne v Belgian State* ECLI:EU:C:1971:43, opinion of AG Dutheillet de Lamothe.
[26] *Defrenne v Belgian State* cit. para 13.
[27] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., applicant WP 6.
[28] *Ibid*.

argued that *Defrenne I* illustrated the lack of clarity of the provision.[29] In any case, these references to the first *Defrenne* judgment place the present one in context and show that the debate was not new but only the continuity of something ongoing. The CJEU in its final decision did not refer to it. With regards to *Defrenne I*, while it is not an added value of the *dossier*, it is interesting to note as well that the composition of the Court was similar in both cases (five of the seven judges were the same). It has been argued that the judges in *Defrenne I* were unhappy with their decision and branded the decision "unfinished business".[30] *Defrenne II* could in this regard be taken as a second chance to make the right call. It is even more surprising that the CJEU did not refer to *Defrenne I* in its final judgment. Thus, access to the *dossier* permits us to see the broader picture and understand that *Defrenne I* had an influence on the final decision.

Secondly, EU policies were evolving to include more social aspects. Evidence of this evolution is present in the *dossier*. The story starts with the Paris Summit of 1972, which highlighted the new emphasis the EU was putting on social policies.[31] Three EU directives were created regarding equal pay,[32] equal treatment at work[33] and equal treatment in social security.[34] The first directive on equal pay was discussed at length in the *dossier,* notably by Miss Defrenne's lawyer and the Commission. It also appears in the case's final judgment. This shows the emphasis the CJEU put on social policies at the time.

Finally, the *dossier* notes the importance of the principle of equality in the Member States. In Miss Defrenne's written observations, her lawyer argued that the principle of equality was part of an ideological background common to the Member States and that it had constitutional value in Belgium.[35] Thus, according to her, the principle of equality of pay was clear and entrenched in the Member States. Therefore, it should have horizontal direct effect.

The landmark decision was taken in a particular context and has thereby been influenced by different factors at both the EU and national levels. The *dossier* of the case hints at this context and permits a broader understanding of the case and the legal reasoning. With regards to the latter point, *Defrenne II* shows that the final decision was far from obvious and that the story is richer and broader than depicted in the final judgment (see section III).

[29] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97 cit., UK WP 7.

[30] C Hoskyns, *Integrating Gender* cit. 74.

[31] Heads of State or Government, Statement from the Paris Summit of 19 to 21 October 1972.

[32] Directive 75/117/EEC of the Council of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

[33] Directive 76/207/EEC of the Council of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

[34] Directive 79/7/EEC of the Council of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

[35] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, applicant WP 6 cit.

III. Behind the famous *Defrenne II*: the debate between horizontal and vertical direct effect and the principle of non-retroactivity

In *Defrenne II*, the CJEU ruled in favour of the direct effect of art. 119 EEC. However, the *dossier* shows that this decision was far from obvious, and sheds lights on a big debate, which was essentially absent in the final decision: horizontal versus vertical direct effect (see section III.1). The landmark case is mainly known for this horizontal direct effect but the non-retroactivity of the decision, whilst equally debated in the *dossier*, received less attention in the final decision (see section III.2) and has consequently been less prominent in subsequent analysis in the academic world.

III.1. Vertical *versus* horizontal direct effect

The *dossier* demonstrates that the debate on the horizontal direct effect of art. 119 EEC went further. In fact, three options were essentially considered: *i)* horizontal direct effect of the provision; *ii)* no direct effect of the provision, and *iii)* only vertical direct effect of the provision. It is the last option, first proposed by the European Commission, that was debated at length by every party involved.[36]

The European Commission stated that art. 119 EEC could be directly applicable between individuals and Member States.[37] In this regard, it distinguished between the public and the private sector, affirming that direct effect could apply only to the public sector. The main justification for this point of view was that civil servants were paid and categorised through classification and it would thus be easier to determine the difference in pay and work. The issues of interpretation and comparison of pay that appeared in the private sector did not exist in the public sphere. As such, the argument is somewhat pragmatic. The other parties in the case did not agree with this public/private distinction. The government of Ireland and the applicant pointed out that distinguishing between the public and private sectors would create further discrimination in an already discriminatory situation.[38]

This innovative argument played a significant role in the *dossier* and influenced not only the observations and answers submitted by the various parties, but also the evidence used to support the legal arguments. In this regard, the European Commission notably referred to the Cornu report to support its argumentation, in which a distinction was made between the public and private sectors.[39] The debate between vertical and horizontal direct effect was included in the *dossier* but the CJEU did not refer to any of it in its final judgment. The CJEU simply ruled it out without offering any clear justification

[36] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, Commission WP 5 cit.

[37] *Ibid*.

[38] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, applicant WP 6 cit. and Government of Ireland WP 8.

[39] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, Commission annex V OP cit.

as to why,[40] and concluded in favour of the horizontal direct effect of a provision with an economic and social aim.

III.2. The non-retroactivity of the judgment

As Hjalte Rasmussen stated, the Court in *Defrenne II* "accepted the responsibility to mould constitutional doctrine in order to make more acceptable the practical effects of judicial decision".[41] The Court took an innovative stance in interpreting art. 119 EEC as giving horizontal direct effect but limiting its temporal effect. This temporal limitation of the judgment was the second legal issue discussed in *Defrenne II*. Whilst the final judgment devotes only seven paragraphs to it, compared to 65 for the first legal issue, both were equally debated in the *dossier*. Thus, the *dossier* offers precision on an issue rapidly summarised in the final decision.

The Commission and Miss Defrenne argued in favour of the retroactivity of the judgment. Even the Advocate General concluded that the decision should be retroactive since the financial consequences were not expected to be excessively high.[42] However, the government of the UK and Ireland argued strongly against it.[43] The CJEU in its final judgment concluded against the retroactivity of the decision, since the parties concerned continued with practices contrary to art. 119 EEC that were at the time not prohibited under national law.[44] Some arguments of the *dossier* regarding the economic burden were however overlooked by the Court. To understand the intentions of the CJEU regarding the temporal limitation of the judgment one must turn to the *dossier*.

First, the government of the UK provided evidence to support its arguments regarding the economic burden. The UK had added numerous tables and surveys to their submission that demonstrated the specific burden that the State would face in the event the judgement was made retroactive.[45] These tables provided information such as: the status of employees in 1973, the basic rates for men and women for identical jobs, and a comparison of rates of pay for men and women during particular time frames. The UK offered a detailed analysis on the financial implications of retroactivity in the hope of influencing the CJEU to decide against this and prevent the economic burden they would face. Whilst it is normal for the CJEU not to refer to all of the evidence, it could have referred to at least one piece of evidence or concretely shown what it believed the anticipated impact of retroactivity would be.

[40] *Defrenne v SABENA* cit. para. 39.

[41] H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff 1986) 29.

[42] Case C-43/75 *Defrenne v SABENA* ECLI:EU:C:1976:39, opinion of AG Trabucchi, 493.

[43] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, UK OP 3 cit. and Government of Ireland OP 7.

[44] *Defrenne v SABENA* cit. paras 69-75.

[45] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, UK annex I OP cit.

Second, and in a similar strain, the government of Ireland added a report[46] to its observations that supported its argument regarding the economic burden of retroactivity by providing an estimate of the costs that would occur when introducing the principle of equal pay in the private sector.[47] This report and the general use of evidence by the Member States, even if left aside by the CJEU in the final decision, clearly influenced decision-making and concretely illustrated the potential financial implications of retroactivity.

Finally, the government of Ireland also referred to the jurisprudence of the CJEU to support its position. It noted that the Court had previously stated that where a provision is equally open to two interpretations, the Court should favour the one which is consistent with the nature of the subject matter in question, namely, the effective working of the Treaty and the achievement of its objectives.[48] Thus, the Court should have tried to take into account the consequences that retroactivity could cause for the Member States. Whilst it probably influenced the decision of the CJEU, this argument was also left aside in the final decision. The argumentation regarding the temporal limitation has been more important in the *dossier* than in the final decision, which can lead authors to overlook the importance of this statement. In fact, the temporal limitation was not a foregone conclusion but a result of lengthy argumentation.

IV. Conclusion

The *dossier* highlights how a CJEU decision did not appear out of the blue but rather emerged and developed from a series of constituent elements, such as legal representation, sources and context. Archival research using the dossier is one way to take an innovative and original approach to more broadly understand landmark EU cases. This has been seen with *Defrenne II* in this *Article*. Whilst the majority of the people remember it mainly for its stand on equality of the sexes, and particularly equality of wages between men and women, the archives do the case more justice. *Defrenne II* is about so much more than wage equality and should be commended not only for the horizontal direct effect it gives to art. 119 EEC but also for the reasoning it offers on non-retroactivity of a decision. Additionally, the *dossier* provides insights into the time and effort that goes into a landmark case. The famous *Defrenne II* decision from the CJEU has potentially been influenced by many factors that can only be uncovered by reading the *dossier.* It was also decided within a specific social and political context. As the expression goes, "the key to success is to be in the right place at the right time". The *dossier* makes the reader even more aware that it is unclear what would have happened if the case had arisen a few years earlier, or if another lawyer had defended Miss Defrenne, or if other Member States

[46] *Dossier de procédure original Defrenne II* HAEU CJUE-1696/97, Government of Ireland annex I OP cit.
[47] *Ibid*. OP 7 and OP 11.
[48] *Ibid*.

had submitted observations, or even if other judges had sat in the chamber. This landmark case is a result of coincidences and seized opportunities that allowed it to be the case that it is still known nowadays for being "a heroine of Community law".[49]

[49] M Maduro and L Azoulai (eds), *Past and Future of EU Law* cit. 251.