Introduction

Classic international law holds that each State can choose the relationship between its domestic law and international law. Two—constitutional—theories thereby exist: monist and dualism. Monist States make international law part of their domestic legal order. International law will hence directly apply as if it were domestic law.³ By

³ Art. VI, Clause 2 of the United States Constitution (emphasis added): 'All Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'
contrast, dualist States consider international law separate from domestic law. International law is viewed as the law between States; national law is the law within a State. While international treaties are thus binding ‘on’ States, they cannot be binding ‘in’ States. International law needs to be 'incorporated' or 'incorporated into domestic law and will thus only have indirect effects through the medium of national law. The dualist theory is therefore based on a basic division of labour: international institutions apply international law, while national institutions apply national law.

Did the European Union leave the choice between monism and dualism to its Member States? For dualist States, all European law would need to be 'incorporated' into national law before it could have domestic effects. Here, there is no direct applicability of European law, as all European norms are mediated through national law and individuals will consequently never come into direct contact with European law. Where a Member State violates European law, this breach can only be established and remedied at the European level. The European Treaties indeed contain such an 'international' remedial machinery against recalcitrant Member States in the form of enforcement actions before the Court of Justice. Another Member State or the Commission – but not individuals – could here bring an action to enforce their rights.

Did this not signal that the European Treaties were international treaties that tolerated the dualist approach? Not necessarily, for the Treaties also contained strong signals against the 'ordinary' international law reading of the European legal order. Not only was the Union entitled to adopt legal acts that were to be directly applicable in all Member States, but from the very beginning, the Treaties also contained a judicial mechanism that envisaged the direct application of European law by the national courts. But even if a monist view had not been intended by the founding Member States, the European Court discarded any possible dualist readings of Union law in the most important case of European law: Van Gend en Loos. The Court here expressly cut the umbilical cord with classic international law by insisting that the European legal order was a 'new legal order'. In the famous words of the Court:

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Figure 3.1 Monism and Dualism

2 Under international law, the choice between monism and dualism is a 'rational' choice. Thus, even where a State chooses the monist approach, monism in this sense only means that international norms are constitutionally recognized as an autonomous legal source of domestic law. Dualism, by contrast, means that international norms will not automatically be incorporated into constitutional incorporation, become part of the national legal order. Each international treaty demands a separate legislative act 'incorporating' the international norms into domestic law. The difference between monism and dualism thus boils down to whether international law is incorporated into the constitution, as in the United States, or whether international treaties need to be validated by a special parliamentary command, as in the United Kingdom. The idea that monism means that States have no choice but to apply international law is not accepted in international law.

3 For this dualist technique, see (amended) European Communities Act (1972), s. 2(1): "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies." And see now also the 2011 European Union Act, Clause 18: "Directly applicable or directly effective EU law that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act."
All judicial arguments here marshalled to justify a monistic reading of European law are debatable. But with a stroke of the pen, the Court confirmed the independence of the European legal order from classic international law. Unlike ordinary international law, the European Treaties were more that agreements creating mutual obligations between States. All European law would be directly applicable in the national legal orders; and it was to be enforced in national courts — despite the parallel existence of an international enforcement machinery. Individuals were subjects of European law and individual rights and obligations could consequently derive directly from European law.

Importantly, because European law is directly applicable law, the European Union would also itself determine the effect and nature of European law within the national legal orders. The direct applicability of European law thus allowed the Union entailly to develop two foundational doctrines of the European legal order: the doctrine of direct effect and the doctrine of supremacy. The present chapter deals with the doctrine of direct effect; Chapter 4 deals with the doctrine of supremacy.

What is the doctrine of direct effect? It is vital to understand that the Court’s decision in favour of a monistic relationship between the European and the national legal orders did not mean that all European law would be directly effective, that is: enforceable by national courts. To be enforceable, a norm must be “justiciable”, that is: it must be capable of being applied by a public authority in a specific case. But not all legal norms have this quality. For example, where a European norm requires Member States to establish a public fund to guarantee unpaid wages for insolvent private companies, yet leaves a wide margin of discretion to the Member States on how to achieve that end, this norm is not intended to have direct effects in a specific situation. While it binds the national legislator, the norm is not self-executing. The concept of direct applicability is thus wider than the concept of direct effect. Whereas the former refers to the internal effect of a European norm within national legal orders, the latter refers to the individual effect of a norm in specific cases. Direct effect requires direct applicability, but not the other way around. However, the direct applicability of a norm only makes its direct effect possible.

After all these terminological preliminaries, when will European law have direct effect? And are there different types of direct effect? This chapter explores the doctrine of direct effect across the various sources of European law. It will start with the direct effect of the European Treaties in section 1. The European Treaties however also envisage the adoption of European secondary law. This secondary law may take various forms. These forms are defined in Article 288 TFEU, which defines the Union’s legal instruments and states:

1. To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
2. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

12 In this sense direct applicability is a “federal” question as it relates to the effect of a ‘foreign’ norm in a domestic legal system, whereas direct effect is a “separation-of-powers” question as it relates to the issue whether a norm must be applied by the legislature or the executive and judiciary.

13 The institutional practice of Union decision-making has created a number of “typical” acts. For an account of these acts, see J. Klamer, “Informal Instruments before the European Court of Justice” (1994) 31 GML Rev 997. But see also now Art 265 TFEU — third indent: “When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.”
The provision thus acknowledges three binding legal instruments – regulations, directives, and decisions – and two non-binding instruments. Why was there a need for three distinct binding instruments? The answer seems to lie in their specific – direct and indirect – effects in the national legal orders. While regulations and decisions were considered Union acts that directly established legal norms (section 2), directives appeared to be designed as indirect forms of legislation (section 3).

Sadly, Article 288 TFEU is incomplete, for it only mentions the Union's internal instruments. A fourth binding instrument indeed needs to be 'read into' the list: international agreements. For Union agreements are not only binding upon the institutions of the Union, but also 'on its Member States'. Did this mean that international agreements were an indirect form of external legislation, or could they be binding 'in' the Member States? Section 4 will analyse the doctrine of direct effects for international agreements.

1. Primary Union Law: The Effect of the Treaties

The European Treaties are framework treaties. They establish the objectives of the European Union, and endow it with the powers to achieve these objectives. Many of the European policies in Part III of the TFEU thus simply set out the competences and procedures for future Union secondary law. The Treaties, as primary European law, only offer the constitutional bones. But could constitutional 'skeleton' itself have direct effect? Would there be Treaty provisions that were sufficiently precise to give rise to rights that national courts could apply in specific situations?

The European Court affirmatively answered this question in 

16 Van Gend en Loos. The case concerned a central objective of the European Union: the internal market. According to that central plank of the Treaties, the Union was to create a customs union between the Member States. Within a customs union, goods can move freely without any pecuniary charges levied when crossing borders. The Treaties had chosen to establish the customs union gradually; and to this effect ex-Article 12 EEC contained a standstill obligation:

Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.

The Netherlands appeared to have violated this provision and, believing this to be the case, Van Gend & Loos – a Dutch importing company – brought proceedings in a Dutch court against the National Inland Revenue. The Dutch court had doubts about the admissibility and the substance of the case and referred a number of preliminary questions to the European Court of Justice. Could a private party enforce an international treaty in a national court? And if so, was this a question of national or European law? In the course of the proceedings before the European Court, the Dutch government heavily disputed that an individual could enforce a Treaty provision against its own government in a national court. Any alleged infringements had to be submitted to the European Court by the Commission or a Member State under the 'international' infringement procedures set out in Articles 258 and 259 TFEU. The Belgian government, having intervened in the case, equally claimed that the question of what effect an international treaty had within the national legal order 'falls exclusively within the jurisdiction of the Netherlands court'. Conversely, the Commission countered that 'the effects of the provisions of the Treaty on the national law of Member States cannot be determined by the actual national law of each of them but by the Treaty itself'. And since ex-Article 12 EEC was 'clear and complete', it was 'a rule of law capable of being effectively applied by the national court'. The fact that the European provision was addressed to the Member States did 'not of itself take away from individuals who have an interest in it the right to require it to be applied in the national courts'.

Two views thus competed before the Court. According to the dualist 'international' view, legal rights of private parties could 'not derive from the [Treaties] or the legal measures taken by the institutions, but [solely] from legal measures enacted by Member States'. According to the monist 'constitutional' view, by contrast, European law was capable of directly creating individual rights. The Court famously favoured the second view. It followed from the 'spirit' of the Treaties that European law was no 'ordinary' international law. It would in itself be directly applicable in the national legal orders.

The provision has been repealed. Strictly speaking, it is therefore not correct to identify Art. 30 TFEU as the successor provision, for the latter is based on ex-Art. 13 and 16 EEC. The normative content of ex-Art. 12 EEC solely concerned the introduction of new customs duties and therefore did not cover the abolition of existing tariff restrictions.

17 The Netherlands argued that the cost could be justified by increased competitiveness and lower prices for Dutch citizens. The Court disagreed. It held that the ban on protective measures meant that there could be no national exceptions in the case of a 'moral' or 'political' interest. A 'moral' interest was defined as the interest of the country itself, a 'political' interest was defined as the interest of the individual country. The 'interests' of the Netherlands were neither moral nor political in character. The Court held that the ban on protective measures meant that there could be no national exceptions in the case of a 'moral' or 'political' interest. A 'moral' interest was defined as the interest of the country itself, a 'political' interest was defined as the interest of the individual country. The 'interests' of the Netherlands were neither moral nor political in character.

18 Case 26/62, Van Gend en Loos (n. 7 above). In the Commission, on enforcement action by the Commission, see Chapter 10, section 3(b) below.

19 Case 26/62, Van Gend en Loos (n. 7 above), 6. Ibid., 7. Ibid.

20 This was the view of the German government (ibid., 8).

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But when would a provision have direct effect, and thus entitle private parties to seek its application by a national court? Having briefly presented the general scheme of the Treaty in relation to customs duties, the Court concentrated on the wording of ex-Article 12 EEC and found as follows:

The wording of [ex-Article 12 (EEC)] contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of the States, which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects. The implementation of [ex-Article 12 EEC] does not require any legislative intervention on the part of the States. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.

While somewhat repetitive, the test for direct effect is here clearly presented: wherever the Treaties contain a ‘prohibition’ that was ‘clear’ and ‘unconditional’, that prohibition would have direct effect. To be an unconditional prohibition thereby required two things. First, the European provision had to be an automatic prohibition, that is, it should not depend on subsequent positive legislation by the European Union. And secondly, the prohibition should ideally be absolute, that is, ‘not qualified by any reservation on the part of the States’.

This was a — very — strict test. But ex-Article 12 EEC was indeed ‘ideally adapted’ to satisfy this triple test. It was a clear prohibition and unconditional in the double sense outlined above. However, if the Court had insisted on a strict application of all three criteria, very few provisions within the Treaties would have had direct effect. Yet the Court subsequently loosened the test considerably (see section (a)). And as we shall see below, it clarified that the Treaties could be vertically and horizontally directly effective (section (b)).

2. Direct Effect: From Strict to Lenient Test

The direct effect test set out in Van Gend en Loos was informed by three criteria. First, a provision had to be clear. Secondly, it had to be unconditional in the sense of being an automatic prohibition. And thirdly, this prohibition would need to be absolute, that is: not allow for reservations. In its subsequent jurisprudence, the Court expanded the concept of direct effect on all three fronts.

First, how clear would a prohibition have to be to be directly effective? Within the Treaties’ title on the free movement of goods, we find the following famous prohibition: ‘Quantitative restrictions on imports and all measures having equivalent
effect shall be prohibited between Member States.’ Was this a clear prohibition? While the notion of ‘quantitative restrictions’ might have been — relatively — clear, what about ‘measures having equivalent effect’? The Commission had realised the open-ended nature of the concept and offered some early semantic help. And yet, despite all the uncertainty involved, the Court found that the provision had direct effect.

The same lenient interpretation of what ‘clear’ meant was soon applied to even wider provisions. In Defrance, the Court analysed the following prohibitions: ‘[E]ach Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.’ Was this a clear prohibition of discrimination? Confusingly, the Court found that the provision might and might not have direct effect. With regard to indirect discrimination, the Court considered the prohibition indeterminate, since it required the elaboration of criteria whose implementation necessitates the taking of appropriate measures at [European] and national level. Yet in respect of direct discrimination, the prohibition was directly effective.

What about the second part of the direct effect test? When was a prohibition automatic? Would this be the case where the Treaties expressly acknowledged the need for positive legislative action by the Union to achieve a Union objective? For example, the Treaty chapter on the right of establishment contains not just a prohibition addressed to the Member States in Article 49 TFEU, but the subsequent Article 50 states:

29 Art. 34 TFEU.
28 Case 74/76, Immelkamp & Voge SpA v. Ditta Paole Messori [1977] ECR 357, para. 13: ‘The prohibition of quantitative restrictions and measures having equivalent effect laid down in Article 34 of the [EEC] Treaty is mandatory and explicit and its implementation does not require any subsequent intervention of the Member States or [Union] institutions. The prohibition therefore has direct effect and creates individual rights which national courts may protect’.
31 Case 43/75, Defrance v. Selena (n. 29 above), para. 19.
32 Ibid., para. 24. However, the Court subsequently held the prohibition of indirect pay discrimination to be also directly effective, see Case 262/88, Betzky v. Caudian Royal Exchange Assurance Group [1990] ECR, 1-1989, para. 37 (emphasis added). [Article 157(1)] applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question. This generous reading was subsequently extended to the yet wider prohibition of ‘any discrimination on grounds of nationality’, see Case C-85/96, Martínez Sala v. Finantsbyrån [1998] ECR, 1-2691, para. 63.
33 Art. 49(1) TFEU states: ‘Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in
In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

Would this not mean that the freedom of establishment was conditional on legislative action? In Reynolds, the Court rejected this argument. Despite the fact that the general scheme within the chapter on freedom of establishment contained a set of provisions that sought to achieve free movement through positive Union legislation, the Court declared the European right of establishment in Article 49 TFEU to be directly effective. And the Court had no qualms about giving direct effect to the general prohibition on 'any discrimination on grounds of nationality'—despite the fact that Article 18 TFEU expressly called on the Union legislature to adopt rules 'designed to prohibit such discrimination'.

Finally, what about the third requirement? Could relative prohibitions, even if clear, ever be directly effective? The prohibition on quantitative restrictions on imports, discussed above, is subject to a number of legitimate exceptions according to which it 'shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security'. Was this then a prohibition that was 'not qualified by any reservation on the part of the States'? The Court found that this was indeed the case. For although these derogations would 'attach particular importance to the interests of Member States, it must be observed that they do not affect exceptional cases which are clearly defined and which do not lend themselves to any wide interpretation'. And since the application of these exceptions was 'subject to judicial control', a member State's right to invoke them did not prevent the general prohibition 'from conferring on individuals rights which are enforceable by them and which the national courts must protect'.

What, then, is the test for the direct effect of Treaty provisions? Is it one of these—relaxing developments? The simple test is this: a provision has direct effect when it is capable of being applied by a national court. Importantly, direct effect does not depend on a European norm granting a subjective right, but on particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where the establishment is effective, subject to the provisions of the Chapter relating to capital.

42 Case 2/74, Reynolds (n. 34 above), para. 32.
43 Case 85/96, Martinez Sala v. Freitaskan Bogen (n. 32 above).
44 Art. 36 TFEU.
47 For the opposite view, see K. Leenhardt and T. Courthian, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 EL Rev 287 at 310, direct effect is 'the technique which allows individuals to enforce a subjective right which is only available in the contrary, the subjective right is a result of a directly effective norm'. Direct effect simply means that a norm can be 'invoked' in and applied by a court. And this is the case when the Court of Justice says it is. Today, almost all Treaty prohibitions have direct effect—even the most general ones. In Mangold, the Court thus held that an unenforced and vague—general principle of European law could have direct effect.

Should we embrace this development? We should, for the direct effect of a legal rule 'must be considered as being the normal condition of any rule of law'. The very questioning of the direct effect of European law was an 'infant disease' of the young European legal order. And this infant disease has today—largely—been cured but for one area: the Common Foreign and Security Policy.

b. The Dimensions of Direct Effect: Vertical and Horizontal Direct Effect

Where a Treaty provision is directly effective, an individual can invoke European law in a national court (or administration). This will normally be as against the State. This situation is called 'vertical' effect, since the State is 'above' its subjects. But while a private party is in subordinate position vis-à-vis public authorities, it is in a coordinate position vis-à-vis other private parties. The legal effect of a norm between private parties is thus called 'horizontal' effect. And while there has never been any doubt that Treaty provisions can be invoked in a vertical situation, there has been some discussion about their horizontal direct effects.

Should it make a difference whether European law is invoked in national proceedings against the Inland Revenue or in a civil dispute between two private parties? Should the treaties be allowed to impose obligations on individuals? The Court in Van Gend en Loos had accepted this theoretical possibility. And indeed, the horizontal direct effect of Treaty provisions has never been in doubt for the Court. A good illustration of the horizontal direct effect of Treaty provisions can be found in Familiapress v. Bauer. The case concerned the interpretation of Article 34 TFEU prohibiting unjustified restriction on the free movement of goods. It arose in a civil dispute before the Vienna Commercial Court between Familiapress and a German competitor. The latter was accused of violating the Austrian Law on Unfair Competition by publishing untrue crossword puzzles—a
sales technique that was deemed unfair under Austrian law. Bauer defended itself in the national court by invoking Article 34 TFEU — claiming that the direct effective European right to free movement prevailed over the Austrian law. And the Court of Justice indeed found that a national law that contained an unjustified restriction of trade would have to be disapplied in the civil proceedings.

The question whether a Treaty prohibition has horizontal direct effect must, however, be distinguished from the question of whether it also outlaws private party actions. For example, imagine that the rule prohibiting price crossovers puzzles had not been adopted by the Austrian legislature but by the Austrian Press Association — a private body regulating Austrian newspapers. Would this ‘private’ rule equally breach Article 34 TFEU? The latter is not simply a question of the effect of a provision, but rather of its personal scope.

Many Treaty prohibitions are — expressly or implicitly — addressed to the State.47 However, the Treaties equally contain provisions that are directly addressed to private parties.48 The question whether a Treaty prohibition covers public as well as private actions is controversial. Should the ‘equal pay for equal work’ principle or the free movement rules — both expressly addressed to the Member States — also implicitly apply to private associations and their actions? If so, the application of the Treaty will not just impose indirect obligations on individuals (when they lose their right to rely on a national law that violates European law); they will be directly prohibited from engaging in an activity. The Court has — in principle — confirmed that Treaty provisions, albeit addressed to the Member States, might cover private actions.49 Thus in Defrance, the Court found that the prohibition on pay discrimination between men and women could equally apply to private employers.50 And while the exact conditions remain uncertain,51 the Court has confirmed and reconfirmed the inclusion of private actions within the free movement provisions.52

47 For example, Art. 157 TFEU (emphasis added) that: ‘[w]hich Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied’. And Art. 34 TFEU prohibits restrictions on the free movement of goods ‘between Member States’.48

48 Art. 102 TFEU prohibits ‘all agreements between undertakings’ that restrict competition within the internal market, and it is thus addressed to private parties.


50 Case 43/75, Defrance (n. 29 above), para. 39: ‘in fact, since Article 157 TFEU is a matter of public rights, 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.’

51 The Court generally limits this application to ‘private’ rules that aim to regulate ‘in a collective manner’ (ibid., para. 17). For somewhat more recent case law on the application of the free movement rules to private parties, see Case C-415/93, Union Royale Belge de Sociétés de Football Association ASBL v. Jean-Marc Bosman [1995] ECR 1492.

52 This has been confirmed for all four freedoms, with the possible exception of the provisions on goods. On the application of the free movement provisions in this context, see Chapter 13, section 1(a). For the same question in the context of EU fundamental rights, see Chapter 12, section 4(b).

To distinguish the logical relations between the various constitutional concepts of direct applicability, direct effect — both vertical (VDE) and horizontal (HDE) — and private party actions, Figure 3.3 may be useful.

2. Direct Union Law: Regulations and Decisions

When the European Union was created, the Treaties envisaged two instruments that were a priori directly applicable: regulations and decisions. A regulation would be an act of direct and general application in all Member States. It was designed as the legislative act of the Union. By contrast, a decision was originally seen as the executive instrument of the Union. It would directly apply to those to whom it was addressed.53 Both instruments were presumed to have direct effects in the sense of allowing individuals to directly invoke them before national courts. Nonetheless, their precise effects have remained — partially — controversial. Would all provisions within a regulation be directly effective? And could decisions be generally applicable? Let us look at these questions in turn.

a. Regulations: The ‘Legislative’ Instrument

Article 288 defines a ‘regulation’ as follows:

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.54

53 The original Art. 189 EEC stated: ‘A decision shall be binding in its entirety upon those to whom it is addressed.’

54 Art. 288(3) TFEU.
This definition demands four things. First, regulations must be generally applicable. Secondly, they must be directly applicable, and that — fourthly — in all Member States. This section starts by investigating characteristics one and four. It subsequently analyses the relationship between direct applicability and the question of direct effect.55

aa. General Application in All Member States

Regulations were designed to be an instrument of (material) legislation.56 Their 'general application' was originally meant to distinguish them from the 'specific application' of decisions.

In Zuckerfabrik Warenstift GmbH v. Council57 the European Court defined 'general applicability' as applicable to objectively determined situations and involves legal consequences for categories of persons viewed in a general and abstract manner; yet conceded that a regulation would not lose its general nature 'because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to which it applies at any given time as long as there is no doubt that the measure is applicable as a result of an objective situation of law or of fact which is specific.'58 The crucial characteristic of a regulation — a characteristic that would give it a 'legislative' character — is thus the 'openness' of the group of persons to whom it applies. Where the group of persons is 'fixed in time' the act would not constitute a regulation but a bundle of individual decisions.59

Would all provisions within a regulation have to satisfy the general applicability test? The European Court has clarified that this is not the case. Not all provisions of a regulation must be general in character. Some provisions may indeed constitute individual decisions 'without prejudice to the question whether that measure considered in its entirety can be correctly called a regulation.'60 This latter threshold has also been applied to the geographical scope of regulations. Article 288 TFEU tells us that they must be applicable to all the Member States. However, the European Court sees a regulation's geographical applicability from an abstract perspective: while normatively valid in all Member States, its concrete application can be confined to a limited number of States.61

55 We shall analyse the 'second element in Chapter 4, section 4(a/aa) when dealing with a regulation's pre-enforceable capacity.
59 Case 16 17/62, Confédération Nationale des Producteurs de Fruits et Légumes (n. 56 above), para. 2.
63 See Introduction to this chapter.
65 F. Pecchenino, The Law of Integration: Emergence of a New Phenomenon in International Relations, based on the Experience of the European Communities (Stipholff, 1974), 164.

bb. Direct Application and Direct Effect

By making regulations directly applicable, the Treaties recognised from the very beginning a monistic connection between that Union act and the national legal order. Regulations would be automatically binding within the Member States — a characteristic that distinguished them from ordinary international law. Regulations were thus 'a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under [European] law.'62 In 1958, this was extraordinary; the Union had been given the power to directly legislate for all individuals in the Member States.63

Would the direct application of regulations imply their direct effect? Direct applicability and direct effect are, as we saw above, distinct concepts. The former refers to the normative validity of regulations within the national legal order. Direct applicability indeed simply means that no 'validating' national act is needed for European law to have effects within the domestic legal orders: 'The direct application of a Regulation means that its entry into force and its application in favour of those subject to it are independent of any measure of reception into national law.'65 Direct effect, on the other hand, refers to the ability of a norm to execute itself. Direct applicability thus only makes direct effect possible, but the former will not automatically imply the latter. The direct application of regulations thus 'leave[s] open the question whether a particular provision of a regulation has direct effect or not.'66 In the words of an early commentator:

Many provisions of regulations are liable to have direct effects and can be enforced by the courts. Other provisions, although they have become part of the domestic legal order as a result of the regulation's direct applicability, are binding for the national authorities only, without granting private persons the right to complain to the courts that the authorities have failed to fulfil these binding Union obligations. This is by no means an unrealistic conclusion. In every member State there exists quite a bit of law which is not enforceable in the courts, because these rules were not meant to give the private individual enforceable rights or because they are too vague or too incomplete to admit of judicial application.67
Direct effect is thus narrower than direct applicability. Not all provisions of a regulation will have to have direct effect. This has been expressly recognised by the Court. In *Azizkia Apilatu Monte Anasa*, the Court thus stated:

> [Although, by virtue of the very nature of regulations and of their function in the system of sources of [European] law, the provisions of those regulations generally have immediate effect in the national legal systems without its being necessary or the national authorities to adopt measures of application, some of their provisions may none the less necessitate, for their implementation, the adoption of measures of application by the Member States ... In the light of the discretion enjoyed by the Member States in respect of the implementation of those provisions, it cannot be held that individuals may derive rights from those provisions in the absence of measures of application adopted by the Member States.]


70 Ibid., para. 29.

71 Art. 2(5) of Regulation 797/85 and Art. 4(5) of Regulation 2318/91 – at issue in *Azizkia Apilatu Monte Anasa* at (n. 69 above) – indeed stated: “Member States shall, for the purposes of this Regulation, define what is meant by the expression ‘samer form of activity in its main occupation’.” This definition shall, in the case of a natural person, indicate at least the condition that the proportion of income derived from the agricultural holding must be 50% or more of the farmer’s total income and that the working time devoted to work unconnected with the holding must be less than half the farmer’s total working time. On the basis of the criteria referred to in the foregoing subparagraphs, the Member States shall define what is meant by this same expression in the case of persons other than natural persons.” For an analysis of this practice, see R. Keij, *National Nomination Implementation of EC Regulations: An Exceptional or Rather Common Matter?* (2008) 33 EL Rev 243.

72 For an implicit duty to adopt national implementing measures, see Case C-177/95, *Envy Marine Ltd et al. v. Prefetto della Provincia di Bari* et al. ([1997] ECR I-1111, para. 25). The Court has consistently held that where a Union regulation does not specifically provide any penalty for an infringement or refer for that purpose to national laws, regulations and administrative provisions, Article 4(5) TEU requires the Member States to take all measures necessary to guarantee the application and effectiveness of [European] law. For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of [European] law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

Yet non-directly effective provisions might still have indirect effects. These indirect effects have been extensively discussed in the context of directives, and will be treated there. Suffice to say here that the European Court applies the constitutional doctrines developed in the context of directives – such as the principle of consistent interpretation – also to provisions within regulations.73

### b. Decisions: The Executive Instrument

Article 288 defines a Union ‘decision’ as follows:

> A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.74

The best way to make sense of this definition is to contrast it with that for regulations. Like a regulation, a decision shall be binding in its entirety. And like a regulation it will be directly applicable. However, unlike a regulation, a decision was originally not designed to be generally applicable;75 yet, with time, European constitutional practice developed a non-addressed decision. This development is now recognised in Article 288(4) TFEU that allows for two types of decisions: decisions specifically applicable to those to whom it is addressed, and decisions that are generally applicable because they are not addressed to anybody specifically.

#### a. Specifically Addressed Decisions

Decisions that mention an addressee shall only be binding on that person. Depending on whether the addressee(s) are private individuals or Member States, European law thereby distinguishes between individual decisions and State-addressed decisions.

Individual decisions are similar to national administrative acts. They are designed to execute a Union norm by applying it to an individual situation. A good illustration can be found in the context of competition law, where the Commission is empowered to prohibit anti-competitive agreements that negatively affect the internal market.76 A decision that is addressed to a private party will only be binding on the addressee. However, this will not necessarily mean that it has no horizontal effects on other parties. Indeed, the European legal order

73 Case C-60/02, *Criminal proceedings against X* ([2004] ECR I-653, para. 61, 62, esp. para. 62.

74 Art. 288(4) TFEU.

75 The old Art. 189 EEC stated: ‘A decision shall be binding in its entirety upon those to whom it is addressed.’

76 Art. 101 TFEU.
expressly recognises that decisions addressed to one person may be of "direct and individual concern" to another. In such a situation this 'third person' is entitled to challenge the legality of that decision.

State-addressed decisions constitute the second group of decisions specifically applicable to the addressee(s). We find again a good illustration of this Union act in the context of competition law. Here the Union is empowered to prohibit State aid to undertakings that threaten to distort competition within the internal market. What is the effect of a State-addressed decision in the national legal order? Binding on the Member State(s) addressed, may it give direct rights to individuals? In *Graz v. Finanzamt Traunstein*, the Court answered this question positively. The German government had claimed that State-addressed decisions cannot, unlike regulations, create rights for private persons. But the response of the European Court went the other way:

> [Although it is true that by virtue of Article [288], regulations are directly applicable and therefore by virtue of their nature capable of producing direct effects, it does not follow from this that other categories of legal measures mentioned in that Article can never produce similar effects. In particular, the provision according to which decisions are binding in their entirety on those to whom they are addressed enables the question to be put whether the obligation created by the Decision can only be invoked by the [Union] institutions against the addressee or whether such a right may possibly be exercised by all those who have an interest in the fulfillment of this obligation.

It would be incompatible with the binding effect attributed to decisions by Article [288] to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision. Particularly in cases where, for example, the [Union] authorities by means of a decision have imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness ('perfekt utiliter') of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of [European] law. Although the effects of a decision may not be identical with those of a provision contained in a regulation, this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measures before the courts, may be the same as that of a directly applicable provision of a regulation.

State-addressed decisions could, consequently, create rights for private citizens. They could have direct effect in certain circumstances. What were those circumstances? The Court insisted that the direct effect of a provision depended on 'the nature, background and wording of the provision'. And indeed: the provision in question was a prohibition that was 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. This test came close - remarkably close - to the Court's direct effect test for Treaty provisions. But would this also imply - like for Treaty provisions - their horizontal direct effect? State-addressed decisions here seem to follow the legal character of directives, which will be discussed in section 3 below.

### 3. Indirect Union Law: Directives

The third binding instrument of the Union is the most mysterious one: the directive. According to Article 288 TFEU, a 'directive' is defined as follows:

> A directive shall be 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 method.

This formulation suggested two things. First, directives appeared to be binding on States - not within States. On the basis of such a 'dualis' reading, directives would have no validity in the national legal orders. They seemed not to be directly applicable, and would thus need to be 'incorporated' or 'implemented' through national legislation. This dualist view was underlined by the fact that Member States were only bound as to the result to be achieved - for the obligation of result

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77 Art. 263(4) TFEU: "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

78 For this point, see Chapter 10, section 1(c) below.


80 Art. 107 TFEU.


82 Ibid., para. 5.

83 Ibid., para. 6. 84 Ibid., para. 9.

85 See Case C-80/06, Capo v. Euron [2007] ECR 1-4473, paras. 19 et seq., esp. para. 21: "In accordance with Article [288], Decision 1999/93 is binding only upon the Member States, which, under Article 4 of that decision, are the sole addressees. Accordingly, the consideration underpinning the case-law referred to in the preceding paragraph with regard to directives apply mutatis mutandis to the question whether Decision 1999/93 may be relied upon against an individual."

86 For a historical and systematic analysis, see the groundbreaking work by J. Bast, *Grundzüge der Handlungsfom den der EU: entwickelt am Beispiel der protegenierten Handlungsfom der Unions- und Gemeinschaftsrecht* (Springer, 2000).

87 Art. 288(3) TFEU.
is common in classic international law. Secondly, binding solely on the State(s) to which it was addressed, directives appeared to lack general application. Their general application could indeed only be achieved indirectly via national legislation transforming the European content into national form. Directives have consequently been described as 'indirect legislation'.

But could this indirect Union law have direct effects? In a courageous line of jurisprudence, the Court confirmed that directives could — under certain circumstances — have direct effect and thus entitle individuals to have their European rights applied in national courts. But if this was possible, would directives not become instruments of direct Union law, like regulations? The negative answer to this question will become clearer in this third section. Suffice to say here that the test for the direct effect of directives is subject to two additional limitations: one temporal, one normative. Direct effect would only arise after a Member State had failed properly to 'implement' the directive into national law, and then only in relation to the State authorities themselves. We shall analyse the conditions and limits for the direct effect of directives first, before exploring their potential indirect effects in national law.

a. Direct Effect and Directives: Conditions and Limits

That directives could directly give rise to rights that individuals could claim in national courts was accepted in Van Dyne v. Home Office. The case concerned a Dutch secretary, whose entry into the United Kingdom had been denied on the ground that she was a member of the Churches of Scientology. Britain had tried to justify this limitation on the free movement of workers by reference to an express derogation within the Treaties that allowed such restrictions on grounds of public policy and public security. However, is an effort to harmonise national derogations from free movement, the Union had adopted a directive according to which 'measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned.' This outlawed national measures that limited free movement for generic reasons, such as membership of a disliked organisation. Unfortunately, the United Kingdom had not 'implemented' the directive into national law.

Could Van Dyne nonetheless directly invoke the directive against the British authorities? The Court of Justice found that this was indeed possible by emphasising the distinction between direct applicability and direct effect:

98 For this view, see L.-J. Costantinou, Der Recht der Europäischen Gemeinschaften (Nomos, 1977), 614.
99 Pecoraro, "The Doctrine of "Direct Effect"" (n. 43 above) at 157.
90 Case 41/74, Van Dyne v. Home Office [1974] ECR 1337. 91 Art. 45(1) and (3) TFEU.
92 Directive 64/221 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ (English Special Edition) Chapter 1963-1964/117. Art. 3(1) (emphasis added).

The Court here — rightly — emphasised the distinction between direct applicability and direct effect, yet — wrongly — defined the relationship between these two concepts in order to justify its conclusion. To brush aside the textual argument that regulations are directly applicable while directives are not, it wrongly alluded to the idea that direct effect without direct application was possible. And the direct effect of directives was then justified by three distinct arguments. First, to exclude direct effect would be incompatible with the 'binding effect' of directives. Secondly, their 'useful effect' would be weakened if individuals could not invoke them in national courts. Thirdly, since the preliminary reference procedure did not exclude directives, the latter must be capable of being invoked in national courts.

What was the constitutional value of these arguments? Argument one is a sleight of hand: the fact that a directive is not binding in national law is not 'incompatible' with its binding effect under international law. The second argument is strong, but not of a legal nature: to enhance the useful effect of a rule by making it more binding is a political argument. Finally, the third argument only begs the question: while it is true that the preliminary reference procedure generally refers to all 'acts of the institutions', it could be argued that only those acts that are directly effective can be referred. The decision in Van Dyne was right, but sadly without reason.

The lack of a convincing legal argument to justify the direct effect of directives soon prompted the Court to propose a fourth argument:

93 Case 41/74, Van Dyne (n. 90 above), para. 12.
94 In the words of J. Steiner: 'How can a law be enforceable by individuals within a Member State if it is not regarded as incorporated in that State?' (J. Steiner, 'Direct Applicability in the EEC: A Chameleon Concept' (1967) 98 Law Quarterly Review 229-48 at 234). The direct effect of a directive presupposes its direct application. And indeed, even since Van Gend en Loos, all directives must be regarded as directly applicable (see S. Prechal, Directives in EC Law (Oxford University Press, 2005), 92 and 229. For the same conclusion, see also C. Timmermans, 'Community Directives Revisited' (1997) 17 YEL 1-28 at 11-12.)
A Member State which has not adopted the implementing measures required by the Directive in the prescribed periods may not rely, on against individuals, on its own failure to perform the obligations which the directive entails.95

This fourth reason has become known as the 'estoppel argument'—acknowledging its intellectual debt to English 'equity' law. A Member State that fails to implement its European obligations is 'stopped' from invoking that failure as a defence, and individuals are consequently—and collaterally—entitled to rely on the directive as against the State. Unlike the three original arguments, this fourth argument is 'State-centric'. It locates the rationale for the direct effect of directives not in the nature of the instrument itself, but in the behaviour of the State.

This (behavioural) rationale would result in two important limitations on the direct effect of directives. For even if provisions within a directive were 'unconditional and sufficiently precise'—those provisions may [only] be relied upon by an individual against the State where that State fails to implement the Directive in national law by the end of the period prescribed or where is fails to implement the directive correctly.96 This direct effect test for directives therefore differed from that for ordinary Union law, as it added a temporal and a normative limitation. Temporally, the direct effect of directives could only arise after the failure of the State to implement the directive had occurred. Thus, before the end of the implementation period granted to Member States, no direct effect could take place. And even once this temporal condition had been satisfied, the direct effect would operate only as against the State. This 'normative' limitation on the direct effect of directives has become famous as the 'no-horizontal-direct-effect rule'.

aa. The No-horizontal-direct-effect Rule

The Court's jurisprudence of the 1970s had extended the direct effect of Union law to directives. An individual could claim his European rights against a State that had failed to implement it into national law. This situation was one of 'vertical' direct effect. Could an individual equally invoke a directive against another private party? This 'horizontal' direct effect existed for direct Union law; yet should it be extended to directives?

The Court's famous answer is a resolute 'no': directives could not have horizontal direct effects. The 'no-horizontal-direct-effect rule' was first expressed in Marshall.97 The Court here rejected its negative conclusion on a textual argument:

[A]ccording to Article [288 TFEU] the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each member state to which it is addressed'. It follows that, a directive

96 Case 80/86, Kolpinghaus Nürnberg BV [1987] ECR 3969, para. 7 (emphasis added).

The absence of horizontal direct effect was confirmed in Dori.99 A private company had approached Ms Dori for an English language correspondence course. The contract had been concluded in Milan's busy central railway station. A few days later, she changed her mind and tried to cancel the contract. A right of cancellation had been provided by the European directive on consumer contracts concluded outside business premises,100 but Italy had not implemented the directive into national law. Could a private party nonetheless directly rely on the unimplemented directive against another private party? The Court was firm:

[AS is clear from the judgment in Marshall... the case-law on the possibility of relying on directives against State entities is based on the fact that under Article [288] a directive is binding only in relation to 'each Member State to which it is addressed'. That case-law seeks to prevent 'the State from taking advantage of its own failure to comply with [European] law'... The effect of extending that case-law to the sphere of relations between individuals would be to recognise a power in the [Union] to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations. It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.]

This denial of direct effect of directives in horizontal situations was grounded in three arguments.102 First, a textual argument: a directive is binding in relation to each Member State to which it is addressed. (But had the Court not used this very same argument to establish the direct effect of directives in the first place?) Secondly, the estoppel argument: the direct effect for directives exists to prevent a State from taking advantage of its own failure to comply with European law. And since individuals were not responsible for the non-implementation of a directive, direct effect should not be extended to them. Thirdly, a systematic argument: if horizontal direct effect were given to directives, the distinction between directives and regulations would disappear. This was a weak argument, for a directive's distinct character could be preserved in different ways.103 In order to bolster its reasoning, the Court added a fourth argument in subsequent

101 Case C-91/92, Dori (n. 99 above), paras. 22-6.
102 The Court silently dropped the 'useful effect argument' as it would have worked towards the opposite conclusion.
jurisprudence: legal certainty. Since directives were not originally published, they must impose obligations on those to whom they are not addressed. This argument has lost some of its force, but continues to be very influential today.

All these arguments may be criticised. But the Court of Justice has stuck to its conclusion: directives cannot directly impose obligations on individuals. They lack horizontal direct effect. This constitutional rule of European law has nonetheless been qualified by one limitation and one exception.

**bb. The Limitation to the Rule: The Wide Definition of State (Actions)**

One way to minimise the no-horizontal-direct-effect rule is to maximise the vertical direct effect of directives. The Court has done this by giving extremely extensive definitions to what constitutes the ‘State’, and what constitutes ‘public actions’.

What public authorities count as the ‘State’? A minimal definition restricts the concept to a State’s central organs. Because they failed to implement the directive, the estoppel argument suggested them to be vertically bound by the directive. Yet the Court has never accepted this consequence, and has endorsed a maximal definition of the State. It thus held that directly effective obligations ‘are binding upon all authorities of the Member States’; and this included ‘all organs of the administration, including decentralised authorities, such as municipalities’, even ‘constitutionally independent authorities’.

The best formulation of this maximalist approach was given in *Foster* 109 as the ‘British Gas Corporation’ — a statutory corporation for developing and maintaining gas supply — part of the British ‘State’. The Court held this to be the case. Vertical direct effect would apply to any body ‘whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals’. 110 This wide definition of the State consequently covers private bodies endowed with public functions.


105 The publication of directives is now, in principle, required by Art. 297 TFUE.

106 For an excellent overview of the principal arguments, see P. Craig, *The Legal Effect of Directives: Policy, Rules and Exceptions* (2009) 34 EL Rev 349. But why does Professor Craig concentrate on arguments one and four, instead of paying close attention to the strongest of the Court’s reasons in the form of argument two?


This functional definition of the State, however, suggested that only ‘public acts’, that is: acts adopted in pursuance of a public function, would be covered. Yet there are situations where the State acts horizontally like a private person: it might conclude private contracts and employ private personnel. Would these ‘private actions’ be covered by the doctrine of vertical direct effect?

In *Marshall*, the plaintiff argued that the United Kingdom had not properly implemented the Equal Treatment Directive. But could an employee of the South–West Hampshire Area Health Authority invoke the direct effect of a directive against this State authority in this horizontal situation? The British government argued that direct effect would only apply ‘against a Member State qua public authority and not against a Member State qua employer’. ‘As an employer a State is no different from a private employer’; and ‘[i]t would not therefore be proper to put persons employed by the State in a better position than those who are employed by a private employer’. 111 This was an excellent argument, but the Court would have none of it. According to the Court, an individual could rely on a directive as against the State ‘regardless of the capacity in which the latter is acting, whether employer or public authority’. 112

Vertical direct effect would thus not only apply to private parties exercising public functions, but also to public authorities engaged in private activities. 113 This double extension of the doctrine of vertical direct effect can be criticised for treating similar situations dissimilarly, for it creates a discriminatory limitation to the no-horizontal-direct-effect rule.

**cc. The Exception to the Rule: Incidental Horizontal Direct Effect**

In the two previous situations, the Court respected the rule that directives could not have direct horizontal effects, but limited the rule’s scope of application. Yet in some ‘incidents’, the Court has found a directive directly to affect the horizontal relations between private parties. This ‘incidental’ horizontal effect of directives must, despite some scholastic effort to the contrary, 114 be seen as an exception to

111 Case 152/84, *Marshall* (n. 97 above), para. 43. 112 Ibid., para. 49.

113 Ibid., para. 51: ‘The argument submitted by the United Kingdom that the possibility of relying on provisions of the Directive against the respondent gas organ of the State would give rise to an arbitrary and unfair distinction between the rights of State employees and those of private employees does not justify any other conclusion. Such a distinction may easily be avoided if the Member State concerned has correctly implemented the Directive in national law.’

114 This phenomenon has been referred to as the: ‘incidental’ horizontal effect of directives (P. Craig and G. de Bórcea, *EU Law* (Oxford University Press, 2011), 207 et seq.; ‘horizontal side effects of direct effect’ (Prechtl, *Directives in EC Law* (n. 94 above), 261–70); and the ‘disguised’ vertical effect of directives (M. Dougan, *The “Disguised” Vertical Direct Effect of Directives* (2000) 59 Cambridge Law Journal 586–612). The argumentative categories that have been developed to justify when a directive can adversely affect a private party and when not, have degenerated into ‘a form of sophistry which provides no convincing explanation for apparently contradictory lines of case law’ (Craig and de Bórcea, *ibid.*, p. 226).
the rule. The incidental horizontal direct effect cases violate the rule that directives cannot directly impose obligations on private parties. The two ‘incidents’ chiefly responsible for the doctrine of incidental horizontal direct effects are CIA Security and Unilever Italia.

In CIA Security v. Signalon and Securit,[135] the Court dealt with a dispute between three Belgian competitors whose business was the manufacture and sale of security systems. CIA Security had applied to a commercial court for an order requiring Signalon and Securit to cease label. The defendants had alleged that the plaintiff’s alarm system did not satisfy Belgian security standards. This was indeed the case, but the Belgian legislation itself violated a European notification requirement established by Directive 83/189. But because the European norm was in a directive, this violation could – theoretically – not be invoked in a horizontal dispute between private parties. Or could it? The Court have implicitly rejected the no-horizontal-direct-effect rule by holding the notification requirement to be ‘unconditional and sufficiently precise’ and finding that ‘[the effectiveness of the Union] control will be that much greater if the directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals’.[136] CIA Security could thus rely on the directive as against its private competitors. And the national court must decline to apply a national technical regulation which has not been notified in accordance with the directive. What else was this but horizontal direct effect?

The Court confirmed the decision in Unilever Italia v. Central Food.[137] Unilever had supplied Central Food with olive oil that did not conform to Italian labelling legislation, and Central Food refused to honour the sales contract between the two companies. Unilever brought proceedings claiming that the Italian legislation – like in CIA Security – violated Directive 83/189. The case was referred to the European Court of Justice, where the Italian and Danish governments intervened. Both governments protested that it was ‘clear from settled case-law of the Court that a directive cannot impose obligations on individuals and cannot therefore be relied on as such against them’. But the Court’s strange answer was this:

Whilst it is true, as observed by the Italian and Danish Governments, that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual, that case-law does not apply where non-compliance with Article 8 or Article 9 of Directive 83/189, which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable. In such circumstances, and unlike the case of non-transposition of directives with which the case-law cited by those two Governments is concerned, Directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals.[138]

What did this mean? Could a ‘substantial procedural effect’ lead to the horizontal direct effect of the directive? And can a directive ‘neutralise’ national legislation without affecting the rights and obligations for individuals?

Let us stick to hard facts. In both cases, the national court was required to disapply national legislation in civil proceedings between private parties. Did CIA Security and Unilever Italia not win a right from the directive to have national legislation disapplied? And did Signalon and Central Food not lose the right to have national law applied? It seems impossible to deny that the directive did directly affect the rights and obligations of individuals. It imposed an obligation on the defendants to accept forfeiting their national rights. The Court thus did create an exception to the principle that a directly effective directive ‘cannot of itself apply in proceedings exclusively between private parties’.[139]

However, the exception to the no-horizontal-direct-effect rule has remained an exceptional exception. But, even so, there are – strong – arguments for the Court to abandon its constitutional rule altogether.[140] And as we shall see below, the entire debate surrounding directives might simply be the result of some linguistic confusion.[141]

b. Indirect Effects through National and (Primary) European Law

aa. The Doctrine of Consistent Interpretation of National Law

Norms may have direct and indirect effects. A provision within a directive lacking direct effect may still have certain indirect effects in the national legal orders. The lack of direct effect means exactly that the directive cannot itself – that is directly – be invoked. However, the directive may still have indirect effects on the interpretation of national law. For the European Court has created a general duty on national courts (and administrations)[142] to interpret national law as far as possible in light of all European law.

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The doctrine of consistent interpretation was given an elaborate definition in Van Gogh:
The duty of consistent interpretation is a duty to achieve the result by indirect means. Where a directive is not sufficiently precise, it is – theoretically – addressed to the national legislator. It is in the latter’s prerogative to ‘concretise’ the directive’s indeterminate content in line with its own national views. But where the legislator has failed to do so, the task is partly transferred to the national judiciary. For after the expiry of the implementation period, national courts are under an obligation to ‘implement’ the directive judicially through an ‘European’ interpretation of national law. This duty of consistent interpretation applies regardless of whether the national provisions in question were adopted before or after the directive. The duty to interpret national law as far as possible in light of European law thus extends to all national law – irrespective of whether the latter was intended to implement the directive. However, where domestic law had been specifically enacted to implement the directive, the national courts must operate under the presumption that the Member State, following an exercise of the discretion afforded to it under that provision, had the intention of fulfilling entirely the obligations arising from the directive.

The duty of consistent interpretation may lead to the indirect implementation of a directive. For it can indirectly impose new obligations – both vertically and horizontally. An illustration of the horizontal indirect effect of directives can be seen in Webb. The case concerned a claim by Mrs Webb against her employer. The latter had hired the plaintiff to replace a pregnant co-worker during her maternity leave. Two weeks after she had started work, Mrs Webb discovered that she was pregnant herself, and was dismissed for that reason. She brought proceedings before the Industrial Tribunal, pleading sex discrimination. The Industrial Tribunal rejected this on the ground that the reason for her dismissal had not been her sex but her inability to fulfil the primary task for which she had been recruited. The case went on appeal to the House of Lords, which confirmed the interpretation of national law but nonetheless harboured doubts about Britain’s European obligations under the Equal Treatment Directive. On a preliminary reference, the European Court indeed found that there was sex discrimination under the directive and that the fact that Mrs Webb had been employed to replace another employee was irrelevant. On receipt of the preliminary ruling, the House of Lords was thus required to change its previous interpretation of national law. Mrs Webb won a right, while her employer lost the right to dismiss her.

The doctrine of indirect effect here changed the horizontal relations between two private parties. The duty of consistent interpretation has consequently been said to amount to ‘de facto (horizontal) direct effect of the directive’. Normatively, this horizontal effect is however an indirect effect. For it operates through the medium of national law.

The indirect effect of directives though the medium of national law nonetheless encounters two limits – one temporal, one normative. Temporally, the duty of consistent interpretation only starts applying after the implementation period of the directive has passed. Normatively, the duty to interpret national law as far as possible with European law also finds a limit in the express wording of a provision. Where one of these limits applies, national law cannot be used as a medium for the indirect effects of directives.

**bb. Indirect Effects through the Medium of European Law**

The European Court recently built an alternative avenue to promote the indirect effect of directives. Instead of mediating their effect through national law, it indirectly translates their content into European law. How so? The way the Court has achieved this has been to capitalise on the general principles of European law. For the latter may – as primary Union law – have horizontal direct effect.

This new avenue was opened in Mengold. The case concerned the German law on ‘Part-Time Working and Fixed-Term Contracts’. The national 125 Case 14/83, Von Colron and Elisabeth Kamann v. Land Nordrhein-Westfalen [1984] ECR 1891, para. 26. Because this paragraph was so important in defining the duty of consistent interpretation, it is repeated here in italics: [W]here a directive is transposed belatedly, the general obligation owed by national courts to interpret domestic law in conformity with the directive can only once the period for its transposition has expired (ibid., para. 115). However, once a directive has been adopted, a Member State will be under the immediate constitutional obligation to ‘refrain from taking any measures liable seriously to compromise the result prescribed’ in the directive, see C-129/96, Danske Enviroment Wallonie ASD v. Regie Wallonne [1997] ECR 7411, para. 45. This obligation is independent of the doctrine of indirect effect.

127 Case C-106/89, Marriott v. La Comunidad Internacional de Alimentacion [1990] ECR 1-4135, para. 8 (emphasis added).

128 Joined Cases C-397/01 to C-403/01, Pfleger (o. 121 above), para. 112.
employment law, transposing a European directive on the subject, permitted fixed-term employment contracts if the worker had reached the age of 32. However, the German law seemed to violate a second directive: Directive 2000/78 establishing a general framework for equal treatment in employment and occupation adopted to combat discrimination in the workplace. According to Article 6(1) of the directive, Member States could provide for differences in the workplace on grounds of age only if they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. In the present case, a German law firm had hired Ms Mangold, then aged 56, on a fixed-term employment contract. A few weeks after commencing employment, Mangold brought proceedings against her employer before the Munich Industrial Tribunal, where he claimed that the German law violated Directive 2000/78, as a disproportionate discrimination on grounds of age.

The argument was not only problematic because it was raised in civil proceedings between two private parties, which seemed to exclude the horizontal direct effect of Article 6(1). More importantly, since the implementation period of Directive 2000/78 had not yet expired, even the horizontal indirect effect of the directive could not be achieved through a 'Europe-consistent' interpretation of national law. Yet having found that the national law indeed violated the substance of the directive, the Court was left to create a new way to review the legality of the German law. Instead of using the directive as a such - directly or indirectly - it found a general principle of European constitutional law that stood behind the directive. That principle was the principle of non-discrimination on grounds of age. And it was that general principle that would bind the Member States when implementing European law.

Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age. In these circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of [European] law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law. Having regard to all the foregoing, the reply to be given to the [national court] must be that [European] law and, more particularly, Article 6(1) of Directive 2000/78, must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of an indefinite duration concluded with the same employee, the

136 Ibid., para. 65.
137 On the so-called 'implementation situation', see Chapter 12, section 4(a) below.
employee had turned 25. After ten years of service to a private company, Ms Künzledeviči had been sacked. Having started work at the age of 18, her notice period was thus calculated on the basis of a three-year period. Believing that this shorter notice period for young employees was discriminatory, she brought an action before the Industrial Tribunal. On reference to the Court of Justice, the Court found the German law to violate the directive. And since the implementation period for Directive 2000/78 had now expired, there was no temporal limit to establishing the indirect effect of the directive through national law.

But the indirect effect of the directive via the medium of national law was encountered an insurmountable normative limit. Because of its clarity and precision, the German legal provision was “not open to an interpretation in conformity with Directive 2000/78”. The indirect effect of the directive could thus not be established via the medium of national law, and the Court chose once more a general principle of European law as the medium for the content of the directive. The Court thus held that it was “the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether European Union law precludes national legislation such as that in issue in the main proceedings”. And where this general principle had been violated, was the obligation of the national court to disapply any provision of national legislation contrary to that principle. Yet crucially, the Court remained ambivalent about whether the general principle was violated because the directive had been violated. The better view would here be that this is not the case. From a constitutional perspective, the threshold for the violation of a general principle ought to be higher than that for a specific directive.

4. External Union Law: International Agreements

In the ‘globalised’ world of the twenty-first century, international agreements have become important regulatory instruments. Instead of acting unilaterally, many States realise that the regulation of international trade or the environment requires a multilateral approach. And to facilitate international regulation, many legal orders have ‘opened-up’ to international law and adopted a monist position. The European legal order has traditionally followed this monist approach. With regard to international agreements concluded by the Union, Article 216(2) TFEU states:

Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

This definition suggested two things. First, international agreements were binding under the European legal order. And indeed, the Court has expressly confirmed that international agreements “form an integral part of the European legal system” from the date of their entry into force without the need for legislative acts of ‘incorporation’. Union agreements were external Union law. Secondly, these international agreements would also bind the Member States. And the Court here again favoured a monist philosophy. In treating international agreements as acts of the European institutions, they would be regarded as European law; and as European law, they would be directly applicable ‘in’ the Member States. And as directly applicable sources of European law, international agreements have the capacity to contain directly effective provisions that national courts must apply. When would such direct effects arise?

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145 The last sentence of Art. 622(2) of the German Civil Code states: “In calculating the length of employment, periods prior to the completion of the employee’s 25th year of age are not taken into account.”

146 Case C-555/07, Künzledeviči (n. 144 above), paras. 45, 46, 47, 48, para. 49.

147 Ibid., para. 49.

148 Ibid., para. 27 (emphasis added), see also para. 50.

149 Ibid., para. 51.
a. The Conditions of Direct Effect

Even in a monist legal order, not all international treaties will be directly effective.155 The direct applicability of international agreements only makes them capable of having direct effects. Particular treaties may lack direct effect for ‘when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule for the Courts’.156 Where an international agreement asks for the adoption of implementing legislation it is indeed addressed to the legislative branch, and its norms will not be operational for the executive or the judiciary.

The question whether a Union agreement has direct effect has – again – been centralised by the European Court of Justice. The Court has justified this ‘centralisation’ by reference to the need to ensure legal uniformity in the European legal order. The effects of Union agreements may not be allowed to vary ‘according to the effects in the internal legal order of each Member State which the law of that State assigns to international agreements’.157 Once an agreement has thus been considered by the Court to unfold direct effects, it will be directly effective in the European as well as the national legal orders.

When will an international treaty have direct effects? The Court has devised a two-stage test.158 In a first stage, it examines whether the agreement is a whole is capable of containing directly effective provisions. The signatory parties to the agreement may have positively settled this issue themselves.159 If this is not the case, the Court will employ a ‘policy test’ that analyses the nature, purpose, spirit, or general scheme of the agreement.160 This evaluation is inherently ‘political’, and the first part of the analysis is essentially a ‘political question’. The conditions for the direct effect of external Union law here differ from the analysis of direct effect in the internal sphere. For internal law is automatically presumed to be capable of direct effect.

Where the ‘political question’ hurdle has been crossed, the Court will turn to examining the direct effect of a specific provision of the agreement.161 The second stage of the test constitutes a classic direct effect analysis. Individual provisions must represent a ‘clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure’.162 While the second stage of the test is thus identical to that for internal legislation, the actual results can vary. Identically worded provisions in internal and external legislation may not necessarily be given the same effect.163

In the past, the European Courts have generally been ‘favourably disposed’ towards the direct effect of Union agreements, and thus created an atmosphere of ‘general receptiveness’ to international law.164 The classic exception to this constitutional rule is the WTO agreement.165 The Union is a member of the World Trade Organization, and as such formally bound by its constituent agreements. Yet the Union Courts have persistently denied that agreement a safe passage through the first part of the direct effect test. The most famous judicial ruling in this respect is Germany v. Council (Bananas).166 Yet, it was a later decision that clarified the constitutional rationale for the refusal to grant direct effect. In Petsch v. Council, the Court found it crucial to note that:

Some of the contracting parties, which are among the most important commercial partners of the [Union], have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law. Admittedly, the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the [Union] are of direct application whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement.

However, the lack of reciprocity in that regard on the part of the [Union’s] trading partners, in relation to the WTO agreements which are based on reciprocal and mutually advantageous arrangements and which must ipso facto be distinguished from agreements concluded by the [Union] . . . may lead to a different interpretation of the WTO rules. To accept that the role of ensuring that European law complies with those rules involves directly on the [Union] jurisdictional would deprive the legislative or executive organs of the [Union] of the scope for manoeuvre enjoyed by their counterparts in the [Union’s] trading partners.167

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In light of the economic consequences of a finding of direct effect, the granting of such an effect to the WTO agreement was too political a question for the Court to decide. Not only was the agreement too "political" in that it contained few hard and fast legal rules, a unilateral decision to grant direct effect within the European legal order would have disadvantaged the Union vis-à-vis trading partners that had refused to allow for the agreement's enforceability in their domestic courts. The judicial self-restraint thus acknowledged that the constitutional prerogative for external relations lay primarily with the executive branch. Surprisingly, the Court's cautious approach to the WTO agreements, and, more recently, to commercial agreements, has been extended into a second field. It seems likely that this less receptive approach will also apply to agreements concluded within the Union's Common Foreign and Security Policy. In light of the latter's specificity, the Court might well find that the 'nature and broad logic' of CFSP agreements prevent their having direct effects within the Union legal order.

b. The Dimensions of Direct Effect

What are the dimensions of direct effect for the Union's international agreements? Will a directly effective Union agreement be vertically and horizontally directly effective?

Two constitutional options exist. First, international treaties can have horizontal direct effects. Then international agreements would come close to being 'external regulations'. Alternatively, the Union legal order could treat international agreements as 'external directives' and limit their direct effect to the vertical dimension. European citizens could then only invoke a directly effective provision of a Union agreement against the European institutions and the Member States, but they could not rely on a Union agreement in a private situation.

The Court has not expressly decided which option to follow. Yet, in Polycor v. Hellequin, it seemed tacitly to assume the possibility of a horizontal direct effect of

164 For the GATT Agreement, see Joined Cases 21–24/73, International Fruit Company (r. 180 above), para. 21: 'This agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements" is characterized by the great flexibility of its provisions.'


166 The Court dealt with the United Nations Convention on the Law of the Sea ('UNCLOS'), in Case C-308/06, Interskovo et al. v. Secretary of State for Transport [2008] ECR I-6057 and found (para. 64-5): '[i]t must be found that UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State. It follows that the nature and the broad logic of UNCLOS prevent the Court from being able to assess the validity of a [Union] measure in the light of that Convention.'

167 On this point, see Chapter 8, sections 2(a) and 3(a) below.

168 Doubts remained. Yet the Court did not dispel them in Siemens. However, the acceptance of the horizontal direct effect thesis has gained ground. In Deutscher Handballbund e.V. v. Kolpak, the Court was asked whether rules drawn up by the German Handball Federation—a private club—would be discriminatory on grounds of nationality. The sports club had refused to grant Kolpak—a Slovakian national—the same rights as German players. This seemed to violate Article 38 of the Association Agreement between the Union and Slovakia stipulating that 'workers of Slovak Republic nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.' The question, therefore, arose whether this article had 'effects vis-à-vis third parties inasmuch as it does not apply solely to measures taken by the authorities but also to rules applying to employers that are collective in nature.' The Court thought that this could indeed be the case. And in allowing the rules to apply directly to private parties, the Court presumed that the international agreement would be horizontally directly effective.

This implicit recognition of the horizontal direct effect of Union agreements has been confirmed outside the context of association agreements. And in the absence of any mandatory constitutional reason to the contrary, this choice seems preferable. Like US constitutionalism, the European legal order should not exclude the horizontal direct effect of international treaties. The problems encountered in the context of European directives would be reproduced—if not multiplied—if the European Court were to split the direct effect of international treaties into two halves. Self-executing treaties should thus be able
'to establish rights and duties of individuals directly enforceable in domestic courts.'

**Conclusion**

For a norm to be a legal norm it must be enforceable. The very questioning of the direct effect of European law was indeed an 'infant disease' of a young legal order. But now that [European] law has reached maturity, direct effect should be taken for granted, as a normal incident of an advanced constitutional order.

The evolution of the doctrine of direct effect, discussed in this chapter, indeed mirrors this maturation. Today's test for the direct effect of European law is an extremely liberal test. A provision has direct effect, where it is 'unconditional' and thus 'sufficiently clear and precise'—two conditions that probe whether a norm can (or should) be applied in court or whether it first needs legislative concretisation. All sources of European law have been considered to be capable of producing law with direct effects. And this direct effect normally applies vertically as well as horizontally.

The partial exception to this rule is the 'directive'. For directives, the Union legal order prefers their indirect effects. (Whether a directive is correctly implemented, its effects extend to individuals through the medium of the implementing measures adopted.) The Court even seems to insist on the mediated effect of directives for those parts of a directive that are directly effective. The directive thus represents a form of 'background' or 'indirect' European law, which is in permanent symbiosis with national (implementing) legislation.

But even when directives have direct effect, they generally do not have horizontal direct effects. Why has the Court shown such 'childish' loyalty to the no-horizontal-direct-effect rule? Has that rule not created more constitutional problems than it solves? And is the Court perhaps discussing a 'false problem'? For if the Court simply wishes to say that an (unimplemented) directive may never directly prohibit private party actions, this does not mean that it cannot have horizontal direct effects in civil disputes challenging the legality of State actions.

A final point still needs to be raised. Will the - direct or indirect - effects of European law be confined to the judicial application of European law? This argument has been made. But this narrow view hampers its head against hard empirical facts. It equally raises serious theoretical objections. For why should the recognition of an 'administrative direct effect' represent a 'constitutional monstrosity'? In most national legal orders the courts are subordinate to national legislation as the executive branch. They may 'interpret' national legislation, but must not amend it. And once we accept that European law entitles all national courts — even the lowest court in the remotest part of the country — to challenge an act of parliament or the national constitution, is it really such an enormous step to demand the same of the executive? Would it not be absurd not to require national administrations to apply European law, but to allow for judicial challenges of the resulting administrative act? The conclusions of this chapter indeed extend to the administrative direct effects of European law.

**FURTHER READING**

**Books**


180 This — much simpler reading of the substance of the case law would bring directives close to the normative character of Art. 107 TFEU — prohibiting State aid. For while the provision can be invoked as against the State as well as against a private party, it cannot prohibit private aid by private companies.

181 In this sense, see B. de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order' in P. Craig and G. de Búrca (eds.), The Evolution of European Law (Oxford University Press, 1999), 177 at 193; as well as B. de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in P. Craig and G. de Búrca (eds.), The Evolution of European Law (Oxford University Press, 2011), 323 at 333.

182 Among the myriad judgments, see Case 103/88, Contrace SpA v. Comune di Milano [1989] ECR 1839, para. 31, where the Court found it 'contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration . . . are obliged to apply those provisions.' See also Case C-118/00, Long and Inset (2001) ECR, 500, 186.
Constitutional Foundations

M. Mendez, *The Legal Effects of EU Agreements* (Oxford University Press, 2013)
S. Preechul, *Directors in EC Law* (Oxford University Press, 2008)

**Articles (and Chapters)**

A. Darby, ‘From Von Dospat to Mangel via Marshall: Reducing Direct Effect to Absurdity’ (2006-7) 9 CJEUL 81
B. de Witte, ‘Direct Effect, Precedency and the Nature of the Legal Order’ in P. Craig and G. de Boeck (eds.), *The Evolution of EU Law* (Oxford University Press, 1999), 325

**Cases on the Website**


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