9

DIRECT EFFECTS AND INDIRECT EFFECTS OF UNION LAW

*Robert Schütze**

I. Introduction

Classic international law holds that each state can choose the relationship between its 'domestic' law and 'international' law. Two—constitutional—theories thereby exist: monism and dualism.[1] Monist states make international law part of their domestic legal order. International law will here *directly apply* as if it was domestic law.[2] By contrast, dualist

* This is a significantly revised and restructured version of Chapter 3 of my 'European Constitutional Law' (2nd edn, Cambridge University Press 2015).

[1] The choice between monism and dualism is a 'national' 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, that is: through a constitutional incorporation, become part of the national legal order. Each international treaty here demands a separate legislative act 'incorporating' the international norm into domestic law. The difference between monism and dualism thus boils down to whether international law is incorporated via 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.

[2] Article VI cl 2 of the United States Constitution (emphasis added) states: '[A]ll 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'.

Robert Schütze, 9 Direct Effects and Indirect Effects of Union Law In: Oxford Principles of European Union Law. Volume I. Edited by: Professor Robert Schütze and Professor Takis Tridimas, Oxford University Press (2018). © The several contributors 2018 DOI: 10.1093/oso/9780199533770.003.0011

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. International law needs to be 'transposed' or 'incorporated' into domestic law; and it can therefore only have *indirect effects* through the medium of national law. For dualist states, all European law would need to be 'incorporated' into national law before it could have domestic effects.[3] Individuals would here never come into direct contact with European law; and where a Member State violated European law, individuals could not invoke 'their' European rights in the national courts.[4]

Would the Union legal order leave the choice between monism and dualism to its Member States? And what would this mean for the doctrine(s) of (in)direct effect? This Chapter explores these questions in five substantive sections. Section II analyses the general principles governing the doctrine of direct effect in European law, while Section III explores some special rules applicable to 'ordinary' (direct) Union law. Sections IV and V will subsequently focus on two special secondary sources of European law: directives and international agreements. The former originally appeared to be the international 'dualist' law instrument of the Union that would—as such—be incapable of producing direct effects in the national legal orders. International agreements, by contrast, constitute an external source of Union law and the problem here arises whether the principles developed in the Union's internal sphere apply, mutatis mutandis, to its external sphere. Section VI will finally look at the various indirect effects that Union law can have on national and—other—European law. We shall see there that the doctrine of indirect effect holistically complements and interacts with the doctrine of direct effect.

II. Direct Effect(s): General Principles

A. Direct Applicability and Direct Effect

What is the status of European law in the national legal orders? In *Van Gend en Loos*,[5] the Court was famously asked whether a private party could enforce the EU Treaties in a national court. The Netherlands government heavily disputed that an individual could enforce a European Treaty provision against its own government in a national court. Alleged infringements had to be submitted to the European Court by the Commission or a Member State

[3] For this dualist technique, with regard to the United Kingdom, 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 also the 2011 European Union Act cl 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'.

[4] A Member State' s breach of European law could, according to dualist principles, only be established and remedied at the European level; and the European Treaties do indeed contain such an 'international' remedial machinery in the form of enforcement actions before the Court of Justice. On this point see Chapter 29 by L. Prete in this volume.

[5] Case 26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR (English Special Edition) 1.

under the 'international' procedures set out in Articles 258 and 259 TFEU.[6] 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'.[7] Conversely, the Commission argued 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'.[8]

Two views thus competed before the Court. According to the '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'.[9] According to the 'constitutional' view, by contrast, European law was capable of directly creating individual rights. The Court famously favoured the second view and implicitly 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:

> The objective of the E[U] Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the [Union], implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States. This view is confirmed by the preamble to the Treaty which refers not only to the governments but to peoples. It is also confirmed *more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens*. Furthermore, it must be noted that the nations of the States brought together in the [Union] are called upon to cooperate in the functioning of this [Union] through the intermediary of the European Parliament and the Economic and Social Committee.
>
> In addition the task assigned to the Court of Justice under Article [267 TFEU], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the States have acknowledged that [European] law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the [Union] constitutes a *new legal order of international law* for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. *Independently of the legislation of Member States, [European] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage*.[10]

All judicial arguments marshalled here to justify a monistic reading of European law are debatable.[11] But, with a stroke of the pen, the Court confirmed the independence of the European legal order from classic international law; and, therefore, unlike ordinary international law, the European Treaties were more than agreements creating mutual obligations between Member States. Individuals were subjects of European law and their rights and obligations would derive directly from European law. *All* European law—including the EU Treaties[12]—would thus be *directly applicable* in the national legal orders.

---

[6] Ibid 6.
[7] Ibid.
[8] Ibid.
[9] This was the view of the German government (ibid 8).
[10] Ibid 12 (emphasis added).
[11] For a critical overview see T. Arnull, *The European Union and its Court of Justice* (Oxford University Press 2006) 168 ff.
[12] The direct applicability of the European Treaties is, at first sight, harder to justify, as many legal orders seem to 'transpose' them into national law. However, from a European constitutional perspective, the national ratification of a draft (!) EU Treaty (amendment) is not transposing EU primary law into national law. Indeed, after *Van Gend en Loos*, a fundamental distinction must be made between the individual national decision to ratify the (amendment to the) EU Treaties, and their coming into effect once all (!) the Member States have ratified them. For it is, importantly, solely the *collective* decision of all the Member States to agree to Treaty

Importantly, because European law is directly applicable law, the European legal order can itself determine the nature of its law; in particular, its direct and indirect effects. Direct applicability and direct effect are thus distinct legal concepts. The former refers to the *normative validity* of European law within a national legal order. Direct applicability simply means that no 'validating' national act is needed for European law to have effects within the domestic legal orders. Direct effect, on the other hand, refers to the ability of a norm to execute itself. Direct applicability thus makes direct effect possible, but the former will not automatically imply the latter. Direct effect is therefore narrower than direct applicability: all provisions of European law are directly applicable, whereas not all provisions of European law will have direct effect.[13]

B. Direct Effect: From Strict to Lenient Test

Direct effect refers to the *individual effect* of a binding norm in specific cases.[14] The question of direct effect concerns the capacity of a—valid—European norm to be applied in a specific case, that is, to be the basis of an individual decision. When will a European provision have such an effect? The Court provided an early answer in *Van Gend en Loos*. Examining ex-Article 12 EEC,[15] it held:

> 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.[16]

The test for direct effect is here defined as follows: wherever the Treaties contain a 'prohibition' that is 'clear' and 'unconditional', that prohibition would have direct effect. To be an unconditional prohibition thereby required two things. First, a European norm had to be an

(amendments) that establishes the validity of the EU Treaties. Not the individual (national) ratification act but the collectivity of the Member States ratifying the Treaties underpins the validity of EU primary law; and once that primary law exists, it is directly applicable in all the national legal orders. With the Lisbon Treaty, the distinction between the validity of EU primary law and national ratification(s) has gained further strength by means of the introduction of the simplified revision procedures set out in TEU art 48(7). According to the latter, the European Union may—admittedly only for a small part of primary law—change its constitutional Treaties if backed up by the *tacit* consent of national *parliaments*. This route allows for constitutional change through parliamentary *inaction*. The validity and direct applicability of primary Union law is here clearly independent of any national transposition.

[13] See Case 230/78 *SpA Eridania-Zuccherifici nazionali and SpA Societa Italiana per l'Industria degli Zuccheri v Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades and SpA Zuccherifici Meridionali* EU:C:1979:216; Case 137/80 *Commission v Belgium* EU:C:1981:237; and Case 72/85 *Commission v Netherlands* EU:C:1986:144.

[14] 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.

[15] The provision stated: '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 provision has been repealed. Strictly speaking, it is not correct to identify art 30 TEU as the successor provision, for the latter is based on ex-arts 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.

[16] Case 26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration* (n 5) 13 (emphasis added).

automatic prohibition, that is, it should not depend on subsequent positive legislation by the European Union. And second, 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; and 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 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: '[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'.[17] 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, early on, admitted the open-ended nature of the concept and offered some early semantic help;[18] and yet, despite all the uncertainty involved, the Court found that the provision had direct effect.[19] The same lenient interpretation of what 'clear' meant was soon applied to even wider prohibitions. In *Defrenne*,[20] the Court analysed the following Treaty article: '[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'.[21] 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';[22] yet in respect of direct discrimination, the prohibition was found directly effective.[23]

What about the second part of the direct effect test? When was a prohibition automatic? Would this be the case where the EU 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,[24] the subsequent Article 50 states: 'In order to attain

[17] TFEU art 34.

[18] Directive 70/50/EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, [1970] OJ English Special Edition 17.

[19] Case 74/76 *Iannelli & Volpi SpA v Ditta Paolo Meroni* EU:C:1977:51, para 13: 'The prohibition of quantitative restrictions and measures having equivalent effect laid down in Article [34] of the [FEU] 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 must protect'.

[20] Case 43/75 *Defrenne v Sabena* EU:C:1976:56.

[21] TFEU art 157(1).

[22] Case 43/75 *Defrenne v Sabena* (n 20) para 19.

[23] Ibid para 24. However, the Court subsequently held the prohibition of indirect pay discrimination to be also directly effective; cf Case 262/88 *Barber v Guardian Royal Exchange Assurance Group* EU:C:1990:209, 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 on 'any discrimination on grounds of nationality'; see Case C-85/96 *Martínez Sala v Freistaat Bayern* EU:C:1998:217, para 63.

[24] TFEU art 49(1) 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 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 such establishment is effected, subject to the provisions of the Chapter relating to capital'.

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 *Reyners*,[25] 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,[26] the Court declared the European right of establishment in Article 49 to be directly effective. Nor did the Court have any qualms about giving direct effect to a general prohibition on 'any discrimination on grounds of nationality'—despite the fact that Article 18 TFEU expressly called on the Union legislator to adopt rules 'designed to prohibit such discrimination'.[27]

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'.[28] Was this 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 deal with exceptional cases which are clearly defined and which do not lend themselves to any wide interpretation'.[29] 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'.[30]

What, then, is the test for the direct effect of EU Treaty provisions in light 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;[31] but on the contrary, the subjective right is a result of a directly effective norm.[32] 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*,[33] the Court even held that an—unwritten 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.[34]

---

[25] Case 2/74 *Reyners v Belgian State* EU:C:1974:68. For an excellent discussion of this question see P. Craig, 'Once Upon a Time in the West: Direct Effect and the Federalisation of EEC Law' (1992) 12 *Oxford Journal of Legal Studies* 453, 463–70.

[26] Case 2/74 *Reyners* (n 25) para 32.

[27] Case 85/96 *Martínez Sala v Freistaat Bayern* (n 23).

[28] TFEU art 36.

[29] Case 13/68 *Salgoil v Italian Ministry of Foreign Trade* [1968] ECR 453, 463.

[30] Case 41/74 *Van Duyn v Home Office* EU:C:1974:133, para 7.

[31] For the opposite view see K. Lenaerts and T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU' (2006) 31 *European Law Review* 287, 310: direct effect 'is the technique which allows individuals to enforce a subjective right which is only available in the internal legal order in an instrument that comes from outside that order, against another (state or private) actor'.

[32] M. Ruffert, 'Rights and Remedies in European Community Law: a Comparative View' (1997) 34 *Common Market Law Review* 307 at 315.

[33] For a long discussion of this case see section VI.C below.

[34] P. Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 *European Law Review* 155.

C. Addressees: Judicial and Executive Authorities

Which national authorities are 'addressed' to apply directly effective European Union norms? We saw above that direct effect is often identified with the 'justiciable' character of a norm, that is: its ability to be applied by a court in a specific case. However, the doctrine of direct effect is undoubtedly also addressed to the (national) executive branch. Where a provision of Union law has direct effect, it is 'binding on *all the authorities of the Member States*, that is to say, not merely the national courts but also *all administrative bodies*'.[35]

This view was explained in *Costanzo*,[36] where the European Court found it 'contradictory to rule that an individual may rely upon the provisions of a [Union act] 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 [Union act] and refrain from applying provisions of national law which conflict with them'.[37] The constitutional duty of national administrations to apply European law indeed constitutes the very backbone of the Union's executive federalism.[38] It requires national administrations to apply directly effective EU law of their own motion,[39] and to 'disapply'—conflicting—national law.[40] These executive duties extend to 'all organs of the administration, including decentralised authorities, such as municipalities',[41] and even 'constitutionally independent' authorities.[42]

The recognition of an 'administrative direct effect' within EU law has been critiqued as a 'constitutional enormity'.[43] However, it is unconvincing to argue that 'the position of administrative bodies is fundamentally different from that of national courts'.[44] (For while it is of course true that 'executive authorities are normally subordinate to the legislator',[45] in most national legal orders courts are as subordinate to parliamentary legislation as is the executive branch.) For 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, would it not be absurd *not* to require national administrations to apply European law, yet to allow for judicial challenges of the resulting administrative acts? If a

[35] Case C-243/09 *Fuß* EU:C:2010:609, para 61 (emphasis added).

[36] Case 103/88 *Fratelli Costanzo SpA v Comune di Milano* EU:C:1989:256.

[37] Ibid para 31.

[38] On the Union's executive federalism see R. Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union' (2010) 47 *Common Market Law Review* 1385.

[39] See in particular Case C-432/92 *Commission v Germany* EU:C:1995:260.

[40] See Case C-224/97 *Ciola v Land Vorarlberg* EU:C:1999:212, especially para 30. For the duty of national competition authorities to disapply national legislation that contravenes TFEU art 101 see Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorita Garante della Concorrenza e del Mercato* EU:C:2003:430, para 50: 'Since a national competition authority such as the Authority is responsible for ensuring, inter alia, that Article [101 TFEU] is observed and that provision, in conjunction with Article [4(3) TEU], imposes a duty on Member States to refrain from introducing measures contrary to the [European] competition rules, those rules would be rendered less effective if, in the course of an investigation under Article [101 TFEU] into the conduct of undertakings, the authority were not able to declare a national measure contrary to the combined provisions of Articles [4(3) TEU and 101 TFEU] and if, consequently, it failed to disapply it'.

[41] Case 103/88 *Fratelli Costanzo SpA v Comune di Milano* (n 36) para 31.

[42] Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206, para 49.

[43] In this sense see, however, B. de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order' in: P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 177–213 at 193; as well as—more recently: B. de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 323 at 333.

[44] S. Prechal, *Directves in EC Law* (Oxford University Press 2005) 72.

[45] de Witte, 'Direct Effect, Primacy' (n 43) 333: 'In domestic law, executive authorities are normally subordinate to the legislator and cannot set aside, of their own motion, legislative norms conflicting with the constitution; only the appropriate (constitutional) courts can do so, if at all'.

European norm has the capacity to execute itself, that is, to apply without the need for concretizing legislation, this should be so in a judicial as well as an administrative context. This solution has been confirmed in the context of state liability, where the Court has held that a (sufficiently serious) misapplication of European law by a national administration will give rise to a secondary right to damages under Union law.[46]

D. Dimensions: Vertical and Horizontal

Where a European norm is directly effective, an individual can invoke it before a national court (or administration). This will normally be as against the state. This situation is called 'vertical' effect, since the state is seen to stand 'above' its subjects. The legal effect of a norm between private parties is, by contrast, called 'horizontal' effect because it takes place between two formally equal parties.

Should it make a difference whether European law is invoked in proceedings against the Inland Revenue or in a civil dispute between two private parties? Ever since *Van Gend en Loos* the Court has accepted the theoretical possibility of horizontal direct effects;[47] and, indeed, a good illustration of the horizontal direct effect of Treaty provisions can be found in *Familiapress v Bauer*.[48] The case concerned the interpretation of Article 34 TFEU prohibiting restrictions 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 prize crossword puzzles—a sales technique that was deemed unfair under Austrian law. Bauer defended itself in the national court by invoking Article 34—claiming that the directly effective European right to free movement prevailed over the Austrian law. While ultimately holding the national law in the specific case to be justified, the Court of Justice nevertheless confirmed that a national law that constituted an unjustified restriction of trade would have to be disapplied in civil proceedings between private parties.

The question whether a European norm has horizontal direct effect must, however, be distinguished from the question whether it prohibits public as well as private actions. Fundamentally, the question of whether a European prohibition covers state measures as well as private acts or contracts is not a question of the *effect* of the EU provision, but rather of its personal scope. (Thus, in the case of *Familiapress*, we must distinguish between the horizontal effect of the *state* law, and the question whether a private body—not the state—could adopt a rule that prohibited the publication of prize crossword puzzles.)

Many Treaty prohibitions seem solely addressed to the state;[49] yet should the 'equal pay for equal work' principle—for example—not also apply to private associations and their actions? With regard to the (fundamental) right to equal pay, the European Court of Justice has indeed held that: '[t]he 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*'.[50] This extension

[46] Case C-118/00 *Larsy* EU:C:2001:368. For the principles governing state liability see Chapter 32 below.

[47] Case 26/62 *Van Gend en Loos* (n 5) 12: '[European] law therefore not only imposes obligations on individuals …'.

[48] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Bauer Verlag* EU:C:1997:325.

[49] Eg TFEU art 157 states (emphasis added) that '*[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'; and TFEU art 34 prohibits restrictions on the free movement of goods 'between Member States'.

[50] Case 43/75 *Defrenne v Savena* (n 20) para 39 (emphasis added).

to private party actions has been confirmed in the context of the EU fundamental freedoms, and even with regard to EU fundamental rights. However, the Court has nonetheless severely restricted the application of state-addressed Treaty provisions in this context by insisting that only those actions by private parties that were 'regulating' a given situation 'in a collective matter' would be caught.[51] And this collective-regulation-test has been applied—time and time again—by the Court in the context of its free movement jurisprudence.[52] It comes close to the public-function-test applied by the American Supreme Court;[53] and it also shares a family resemblance with the *Foster* rule (see Section IV.C below) in the context of directives. Private party actions will thus only be caught by state-addressed prohibitions when the private bodies concerned exercise public—regulatory—functions.

III. Direct European Law: Special Principles

A. Primary Law: EU Treaties and Charter

The previous section explored the general principles governing the doctrine of direct effect in the context of EU Treaty law. Yet there are two areas within the EU Treaties that appear to contain special rules, namely the TEU Chapter on the Common Foreign and Security Policy (CFSP) and the EU Charter of Fundamental Rights.

The nature of the Union's CFSP chapter has been a legal problem ever since its inception. According to an early view, all CFSP law was 'classic' international law that contrasted with the supranational European law developed or found within the 'ordinary' parts of the Union ('Community').[54] A second view, by contrast, argued that CFSP law was part of one and the same Union legal order.[55] The Lisbon Treaty has reinforced this second view. While recognizing that the CFSP 'is subject to specific rules and procedures',[56] the Treaty on European Union and the Treaty on the Functioning of the European Union have confirmed that the two Treaties 'have the same legal value'.[57] This includes

[51] Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* EU:C:1974:140, para 17.

[52] Cf Case 415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* EU:C:1995:463, para 82: 'Article [45 TFEU] not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner'; and, more recently, Case C-438/05 *International Transport Workers' Federation an Others v Viking Line ABP and Others* EU:C:2007:772, paras. 33-37: '[A]ccording to settled case-law, Articles [45, 49, and 56 TFEU] do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services. Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application… It follows that collective action such as that described in the first question referred by the national court falls, in principle, within the scope of Article [49 TFEU]'.

[53] American constitutionalism has extended the application of its Bill of Rights to 'the exercise by a private entity of powers traditionally exclusively reserved to the State' (cf *Jackson v Metropolitan Edison Co*, 419 US 345 (1974) 352). This 'public function test' has broadened the application of fundamental rights to acts of private parties.

[54] M. Pechstein and C. Koenig, *Die Europäische Union* (Mohr Siebeck 2000) 5 ff. The thesis that Union law differed from Community law had gained support from ex-Article 47 (old) EU, and Case C-402/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461, para 202: 'integrated but separate legal orders'.

[55] K. Lenaerts and T. Corthaut, 'Of Birds and Hedges' (n 31) 288.

[56] TEU art 24(1).

[57] TEU art 1 and TFEU art 1.

CFSP law; yet unlike 'ordinary' Union law, the direct effect of CFSP law appears to be exceptional.[58]

A second area in which the EU Treaties qualify—at least semantically—the generous attribution of direct effect is the EU Charter of Fundamental Rights. For in contrast to the European Court's recognition that general principles of Union law may have direct effect,[59] the Charter makes an express distinction between 'rights' and 'principles'; and only Charter rights will have direct effect and can, as such, be invoked before a court. Principles, by contrast, are characterized as orienting objectives, which 'do not however give rise to direct claims for positive action by the Union institutions'.[60] They are not conceived as individual rights but constitute objective guidelines that need to be observed.[61] In the words of Article 52 of the Charter: 'The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions[.]' 'They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.'[62] Unlike the EU Treaties, the general principles of the Charter should thus never have direct effect.

B. EU Secondary Law: Regulations and Decisions

The European Treaties are framework treaties in that they envisage the adoption of European secondary law. This secondary law may take various forms. These forms are defined in Article 288 TFEU.[63] The provision acknowledges three binding legal instruments—regulations, directives, and decisions—and two non-binding instruments.[64] 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. Regulations and decisions were considered Union acts that—like the EU Treaties—could directly establish legal norms, while directives appeared to be designed as indirect forms of Union legislation.

Article 288 defines a 'regulation' as 'binding in its entirety and *directly* applicable in all Member States'.[65] By making regulations directly applicable, the Treaties thus recognized from the very beginning a monistic connection between that Union act and the national legal orders. Regulations would be automatically binding *within* the Member States—a characteristic that

[58] C. Eckes, 'The CFSP and other EU Policies: A Difference in Nature?' (2015) 20 *European Foreign Affairs Review* 535 at 536: 'Post-Lisbon it is unclear whether the CFSP forms part of an integrated "Union *acquis*" and whether it enjoys the same features that vest Community law with effectiveness, i.e. primacy'.

[59] See Case C-144/04 *Mangold v Helm* EU:C:2005:709 and more recently, Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen* EU:C:2016:278, para 36: '[T]he principle prohibiting discrimination on grounds of age confers on private persons an individual right which they may invoke as such and which, even in disputes between private persons, requires the national courts to disapply national provisions that do not comply with that principle'.

[60] See 'Explanations' to the EU Charter [2007] OJ C303/17, 35.

[61] Article 51(1) of the Charter: 'respect the rights, observe the principles'.

[62] Article 52(5) of the Charter.

[63] The institutional practice of Union decision-making has created a number of 'atypical' acts. For a discussion of atypical acts see J. Klabbers, 'Informal Instruments before the European Court of Justice' (1994) 31 *Common Market Law Review* 997. But see also now TFEU art 296—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'.

[64] Logic would dictate that non-binding acts are not binding. Yet, the European Court has accepted the possibility of their having some 'indirect' legal effect. In Case 322/88 *Grimaldi v Fonds des maladies professionelles* EU:C:1989:646, para 18, the Court held that recommendations 'cannot be regarded as having no legal effect' as they 'supplement binding [European] provisions'. 'Non-binding' Union acts may, therefore, have legal 'side effects'. For an interesting overview see L. Senden, *Soft Law in European Community Law: Its Relationship to Legislation* (Hart Publishing 2004).

[65] TFEU art 288(2) (emphasis added).

distinguished them from ordinary international law. Regulations were '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'.[66]

Would the direct application of regulations imply their direct effect? Direct applicability and direct effect are, as we saw above,[67] distinct concepts. The former refers to the *normative* validity of regulations within the national legal orders. Direct applicability here 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'.[68] Direct effect, on the other hand, refers to the ability of a norm to execute itself. Direct applicability 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'.[69] This has been expressly recognized by the Court.[70] In *Azienda Agricola Monte Arcosa,* the Court thus stated:

> [A]lthough, 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 for 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.[71]

Legislative discretion left to the national level will thus prevent provisions within regulations from having direct effect, 'where the legislature of a Member State has not adopted the provisions necessary for their implementation in the national legal system'.[72] Regulations indeed often explicitly call for the adoption of implementing measures.[73] But even if there is no express provision, Member States are under a general duty to implement non-directly effective provisions within regulations.[74]

---

[66] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* EU:C:1978:49, paras 14-15 (emphasis added).

[67] See section II.A above.

[68] Case 34/73 *Fratelli Variola Spa v Amministrazione delle Finanze dello Stato* EU:C:1973:101, para 10.

[69] P. Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (Sijthoff 1974) 164.

[70] See Case 230/78 *SpA Eridania-Zuccherifici nazionali and SpA Societa Italiana per l'Industria degli Zuccheri v Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades and SpA Zuccherifici Meridionali* (n 13); Case 137/80 *Commission v Belgium* (n 13); and Case 72/85 *Commission v Netherlands* (n 13).

[71] Case C-403/98 *Azienda Agricola Monte Arcosa Srl* EU:C:2001:6, paras 26, 28.

[72] Ibid para 29.

[73] Article 2(5) of Regulation 797/85 and Article 5(5) of Regulation 2328/91—at issue in *Azienda Agricola Monte Arcosa Srl* (n 71)—indeed stated: 'Member States shall, for the purposes of this Regulation, define what is meant by the expression "farmer practising farming as his main occupation". This definition shall, in the case of a natural person, include 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 subparagraph, 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. Král, 'National Normative Implementation of EC Regulations: An exceptional or rather common matter' (2008) 33 *European Law Review* 243.

[74] For an implicit duty to adopt national implementing measures see Case C-177/95 *Ebony Maritime and Others v Prefetto della Provincia di Brindisi and Others* EU:C:1997:89, para 35: '[T]he Court has

What about decisions? Article 288(4) 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.'[75] Depending on whether the addressee(s) are private individuals or Member States, European law distinguishes between individual decisions and state-addressed decisions. Individual decisions are administrative acts. They are designed to execute a Union norm by applying it to an individual situation. 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.[76]

State-addressed decisions constitute a second group of decisions specifically applicable to the addressee(s).[77] Binding on the Member State(s) addressed, may it give direct rights to individuals? In *Grad v Finanzamt Traunstein,*[78] the Court answered this question positively. State-addressed decisions could create rights for private citizens. The Court here held that the direct effect of a provision depended on 'the nature, background and wording of the provision'.[79] And, indeed, a provision needed to be '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'.[80] 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? Doubts are in order, as state-addressed decisions here seem to follow the legal character of directives—to be discussed in Section IV below.[81]

Finally, Article 288(4) also recognizes non-addressed decisions (previously: decisions *sui generis*), which have become a widespread constitutional phenomenon within the European Union.[82] In the past, the Union thereby had recourse to these decisions—instead of regulations—to have an instrument that was directly applicable yet lacked direct effect.

consistently held that where a [Union] regulation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article [4(3) 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'[.]

[75] TFEU art 288(4).

[76] Indeed, the European legal order expressly recognizes that decisions addressed to one person may be of 'direct and individual concern' to another. TFEU art 263(4): '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'.

[77] On this type of decision see U. Mager, 'Die Staatengerichtete Entscheidung als supranationale Handlungsform' (2001) 36 *Europarecht* 661.

[78] Case 9/70 *Grad v Finanzamt Traunstein* EU:C:1970:78.

[79] Ibid para 6.

[80] Ibid para 9. See also Case C-18/08 *Foselev Sud-Ouest* EU:C:2008:647, para 11.

[81] See Case C-80/06 *Carp v Ecorad* EU:C:2007:327, paras 19 ff, especially 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 considerations 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 as against an individual.'

[82] For a historical and systematic analysis see the ground-breaking work by J. Bast, *Grundbegriffe der Handlungsformen der EU: entwickelt am Beschluss als praxisgenerierter Handlungsform des Unions- und Gemeinschaftsrechts* (Springer 2006).

IV. Indirect European Law: Directives

According to Article 288(3) TFEU, '[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 methods'. This formulation suggested two things. First, directives appeared to be binding *on* states—not *within* states. And on the basis of such a 'dualist' reading, directives would have no validity in the national legal orders: they were not directly applicable, and would therefore need to be 'incorporated' or 'implemented' through national legislation. This dualist view was—secondly—underlined by the fact that Member States were only bound as to the result to be achieved, since obligations of result are common in classic international law.[83] Directives have consequently been described as 'indirect legislation',[84] because they appeared incapable of constituting a direct source of European rights or obligations for individuals.

This traditionalist international law reading, however, received a first blow in *Van Gend en Loos*—which declared, as we saw above, that all EU law was directly applicable in the national legal orders.[85] But could directives have direct effects? In a courageous line of jurisprudence, the Court indeed found that directives may—under certain circumstances—have direct effect and would 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 section. Suffice to state here that the direct effect of directives is subject to two special limitations—one temporal, one normative—that are generally unknown to the other sources of European law. First, direct effect only arises after a Member State has failed properly to 'implement' a directive; and, secondly, only in relation to the Member State authorities themselves.

A. Direct Effect: Conditions and Limits

That directives can directly give rise to rights that individuals could invoke in national courts was accepted in *Van Duyn v Home Office*.[86] 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 Church of Scientology. Britain had tried to justify this limitation on the free movement of workers by reference to an express Treaty derogation that allowed such restrictions on grounds of public policy and public security.[87] However, in an effort to harmonize national derogations from free movement, the Union had adopted a directive according to which '[m]easures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned'.[88] This outlawed national measures that limited the free movement of workers for generic reasons, such as membership in a disliked organization. Unfortunately, the United Kingdom had not 'implemented' the directive into national law. Could Van Duyn nonetheless directly invoke the directive against the British authorities?

[83] For this view see L.-J. Constantinesco, *Das Recht der Europäischen Gemeinschaften* (Nomos 1977) 614.
[84] See Pescatore, 'The Doctrine of "Direct Effect" ' (n 34) 177.
[85] On this point see ssection II.A above.
[86] Case 41/74 *Van Duyn v Home Office* (n 30).
[87] TFEU art 45(1) and (3).
[88] Article 3(1) Directive 64/221 on the co-ordination 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.

The Court of Justice found that this was indeed possible:

> [B]y virtue of the provisions of Article [288] regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by Article [288] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the [Union] authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if the individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of [European] law. Article [267], which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the [Union] institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts.[89]

The Court here—rightly—emphasized 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.[90] 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 generically refers to all 'acts of the institutions', it could be argued that only those acts that are directly effective can be referred.

The lack of a convincing legal argument to justify the direct effect of directives soon prompted the Court to propose a fourth argument. 'A Member State which has not adopted the implementing measures required by the Directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails'.[91] This fourth reason has become known as the 'estoppel argument': 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

[89] Case 41/74 *Van Duyn* (n 30) para 12.

[90] Cf Prechal, *Directives in EC Law* (n 44) 92 and 229: 'The fundamental choice made by the Court of Justice in *Van Gend en Loos* and *Costa v ENEL* as to the relationship between [Union] law and national law in general also determines the place of directives within the legal orders of the Member States. The [Union's] own legal system is an integral part of the legal systems of the Member States. This means that the whole body of [Union] law (including directives, which are a component of this law) is as such incorporated within the national legal orders, without measures of transformation, incorporation—or whatever else the terminology might be— being necessary.… Thus, if the term "directly applicable" in Article [288(2)] is understood to refer to the automatic incorporation of regulations into the domestic legal order, directives are also directly applicable in this sense.' For the same conclusion see also J. Steiner 'Direct Applicability in EEC Law: A Chameleon Concept' (1982) 98 *Law Quarterly Review* 229, 234: 'How can a law be enforceable by individuals within a Member State if it is not regarded as incorporated in that State?').

[91] Case 148/78 *Ratti* EU:C:1979:110, para 22.

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—special—limitations on the direct effect of directives. 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 it fails to implement the directive correctly'.[92] This direct effect test for directives 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 Member 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.[93] And even once this temporal condition had been satisfied, the direct effect would operate only as against the Member State. This second—normative—limitation on the direct effect of directives has become famous as the 'no-horizontal-direct-effect rule'.

B. 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 Member State that had failed to implement it into national law. This situation was one of 'vertical' direct effect. But 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*.[94] The Court here based its negative conclusion on a textual argument:

> [A]ccording to Article [288(3) 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 may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.[95]

The absence of horizontal direct effect was confirmed in *Dori*.[96] A private party 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,[97] 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:

> [A]s 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

[92] Case 80/86 *Kolpinghuis Nijmegen BV* EU:C:1987:431, para 7 (emphasis added).
[93] Cf *Becker v Finanzamt Münster-Innenstadt* Case 8/81 EU:C:1982:7.
[94] Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* EU:C:1986:84.
[95] Ibid para 48.
[96] Case C-91/92 *Faccini Dori v Recreb* EU:C:1994:292.
[97] Directive 85/577 concerning protection of the consumer in respect of contracts negotiated away from business premises ([1985] OJ L372/31).

> 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.[98]

This denial of a direct effect of directives in horizontal situations was grounded in three arguments.[99] 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 Member 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.[100] In order to bolster its reasoning, the Court added a fourth argument in subsequent jurisprudence: legal certainty.[101] Since directives were not published (at the time), they must not impose obligations on those to whom they are not addressed. This argument has lost some of its force,[102] but continues to be very influential today.

All these arguments may be criticized.[103] But the Court of Justice has stuck to its conclusion: directives cannot directly impose obligations on individuals.[104] They lack horizontal direct effect. This constitutional rule of European law has nonetheless been qualified by one limitation and one exception.

C. Vertical Effects: The Wide Definition of State (Actions)

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

The best formulation of the maximalist definition to the 'State' was given in *Foster*.[105] Was 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

[98] Case C-91/92 *Dori* (n 96) paras 22–25.

[99] The Court silently dropped the 'useful effect argument', as it would have worked towards the opposite conclusion.

[100] On this point see R. Schütze, 'The Morphology of Legislative Power in the European Community: Legal Instruments and Federal Division of Powers' (2006) 25 *Yearbook of European Law* 91.

[101] See Case C-201/02 *The Queen v Secretary of State for Transport, Local Government and the Regions, ex parte Wells* EU:C:2004:12, para 56: 'the principle of legal certainty prevents directives from creating obligations for individuals'.

[102] The publication of directives is now, in principle, required by TFEU art 297.

[103] For an excellent overview of the principal arguments see P. Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 *European Law Review* 349.

[104] See Case C-30/14 *Ryanair Ltd v PR Aviation BV* EU:C:2015:10, para 30: 'As a preliminary point, it must be recalled that, according to settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual'.

[105] Case C-188/89 *Foster and Others v British Gas* EU:C:1990:313.

rules applicable in relations between individuals'.[106] This wide definition of the state consequently covers private bodies endowed with public functions.[107]

This functional definition of the state, however, suggested that only 'public acts', that is, acts adopted in pursuit 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*,[108] the plaintiff argued that the United Kingdom had not properly implemented the Equal Treatment Directive. But could an employee of a local Health Authority invoke the direct effect of a directive against this Member 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', because '[a]s 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'.[109] This was indeed 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 Member State, 'regardless of the capacity in which the latter is acting, whether employer or public authority'.[110]

Vertical direct effect would thus not only apply to *private parties exercising public functions*, but also to *public authorities engaged in private activities*.[111] This double extension of the doctrine of vertical direct effect can be criticized for treating similar situations dissimilarly, for it creates a discriminatory limitation to the no-horizontal-direct-effect rule.

D. (Incidental) Horizontal Direct Effect: An Exception to the Rule

Strangely, in some cases, 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,[112] be seen as an exception to 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 two cases: *CIA Security* and *Unilever Italia*.

In *CIA Security v Signalson and Securitel*,[113] 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 orders requiring Signalson and Securitel to cease libel. The defendants had alleged that the plaintiff's alarm system did not satisfy

[106] Ibid para 20. For a recent and excellent discussion of what the 'Foster test' means, and especially the relationship between its various elements, see the Opinion of Advocate General Sharpston in Case C-413/15 *Farrell v Whitty* EU:C:2017: 492.

[107] See now in particular Case C-425/12 *Portgás* EU:C:2013:829; see also Case-46/15 *Ambisig* EU:C:2016:530, especially para 22.

[108] Case 152/84 *Marshall* (n 94).

[109] Ibid para 43.

[110] Ibid para 49.

[111] Ibid para 51: 'The argument submitted by the United Kingdom that the possibility of relying on provisions of the Directive against the respondent qua 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'.

[112] This phenomenon has been referred to as the: 'incidental' horizontal effect of directives (P. Craig and G. de Búrca, *EU Law* (Oxford University Press 2011) 207 ff); 'horizontal side effects of direct effect' (Prechal, *Directives in EC Law* (n 44) 261–70); and the 'disguised' vertical effect of directives (M. Dougan, 'The "Disguised" Vertical Direct Effect of Directives' (2000) 59 *Cambridge Law Journal* 586).

[113] Case C-194/94 *CIA Security v Signalson and Securitel* EU:C:1996:172.

Belgian security standards. This was indeed the case, but the Belgian legislation itself violated a European notification requirement established by Directive 83/189.[114] Yet 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 indeed implicitly rejected the no-horizontal-direct-effect rule by holding the notification requirement to be 'unconditional and sufficiently precise' and finding that '[t]he effectiveness of [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'.[115] CIA Security could thus rely on the directive as against its private competitors, because a national court 'must decline to apply a national technical regulation which has not been notified in accordance with the directive'.[116] What else was this but horizontal direct effect?

The Court confirmed the decision in *Unilever Italia v Central Food*.[117] 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 of itself impose obligations on individuals and cannot therefore be relied on as such against them'.[118] 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.[119]

What did this mean? Could a 'substantial procedural effect' lead to the horizontal direct effect of the directive? And can a directive 'neutralize' 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 Signalson and Central Food not 'lose' the right to have national law applied?[120] It seems impossible to deny that the directive did directly

[114] Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations [1983] OJ L109/8.

[115] Case C-194/94 *CIA Security v Signalson and Securitel* EU:C:1996:172, para 48.

[116] Ibid para 55.

[117] Case C-443/98 *Unilever Italia v Central Food* EU:C:2000:496.

[118] Ibid para 35.

[119] Ibid paras 50–51 (emphasis added). This has recently been confirmed in Case C-95/14 *Unione Nazionale Industria Conciaria (UNIC) and Unione Nazionale dei Consumatori di Prodotti in Pelle, Materie Concianti, Accessori e Componenti (Uni.co.pel) v FS Retail and Others* EU:C:2015:492.

[120] The Court has emphatically denied this, see Case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam* EU:C:2015:386, para 108: 'In that regard, it is apparent from the case-law that, although Directive 98/34 is intended to ensure the free movement of goods by organising a preventive control the effectiveness of which requires the disapplication, in the context of a dispute between individuals, of a national measure adopted in breach of Articles 8 and 9 thereof, that directive does not in any way define

affect the rights and obligations of individuals. It imposed an obligation on the defendants to accept forfeiting their national rights; and the Court thus created an exception to the principle that a directly effective directive 'cannot of itself apply in proceedings exclusively between private parties'.[121]

However, the exception to the no-horizontal-direct-effect rule has remained an exceptional exception. Nonetheless, there are—strong—arguments for the Court to abandon its constitutional rule altogether.[122] And, indeed, the Court may simply be discussing a 'false problem': for if it 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 Member State actions.[123]

V. External European Law: International Agreements

With regard to international agreements concluded by the Union, Article 216(2) TFEU states that: '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States'.[124] This definition suggested two things. First, international agreements were binding *in* the European legal order; and, indeed, the Court has expressly confirmed that international agreements 'form an integral part of the [Union] legal system' from the date of their entry into force without the need for internal acts of 'incorporation'.[125] Secondly, these international agreements would also be binding on the Member States. For in treating international agreements as acts of the European institutions,[126] they would be regarded as European law; and as European Union law, they would be directly applicable 'in' the Member States;[127] and as directly applicable sources of European law, international agreements would have the capacity to contain directly effective provisions. But when would Union agreements be directly effective; and would the doctrine of direct effect be different when compared with the internal sphere?

the substantive scope of the legal rule on the basis of which the national court must decide the case before it. Thus, that directive creates neither rights nor obligations for individuals (judgment in *Unilever*, C-443/98, EU:C:2000:496, paragraph 51)'.

[121] Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut* EU:C:2004:584, para 109.

[122] See Opinion of Advocate-General Jacobs in Case C-316/93 *Vaneetveld v Le Foyer* EU:C:1994:32, para 31: '[I]t might well be conducive to greater legal certainty, and to a more coherent system, if the provisions of a directive were held in appropriate circumstances to be directly enforceable against individuals'; as well as: Craig, 'Legal Effect of Directives' (n 103) 390: 'The rationales for the core rule that Directives do not have horizontal direct effect based on the Treaty text, legal certainty and the Regulations/Directives divide are unconvincing.'

[123] This—much—simpler reading of the substance of the case law would bring directives close to the normative character of TFEU art 107—prohibiting state aids. For while the provision can be invoked as against the state, as well as against a private party, it cannot prohibit private aids by private companies.

[124] This chapter will not specifically analyse the doctrine of direct effect with regard to decisions of international organizations of which the Union may be a member. The Court has here traditionally found that they may form an integral part of the Union legal order 'in the same way as the agreement itself', where 'they are directly connected with the agreement to which they give effect' (Case 192/89 *Sevince v Staatssecretaris van Justitie* EU:C:1990:322, para 9). The same principles therefore apply, mutatis mutandis, to the direct effect of a decision taken by an international body on the basis of an international agreement.

[125] Case 181/73 *Haegemann v Belgium* EU:C:1974:41.

[126] Case C-192/89 *Sevince* (n 124) para 10.

[127] For a different definition of 'direct applicability' in the context of international agreements see however K. Lenaerts, 'Direct Applicability and Direct Effect of International Law in the EU Legal Order' in I. Govaere and others (eds), *The European Union in the World* (Martinus Nijhoff 2013) 45.

A. Direct Effect: Legal and Political Conditions

Even within a monist legal order, not all international treaties will be directly effective.[128] Particular treaties may lack direct effect: '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 Court'.[129]

The question whether a Union agreement has direct effect has—unsurprisingly—been centralized 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 cannot 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'.[130]

What are the conditions for direct effect? Will they be similar to those developed for internal Union law? The Court here defers—in the first place—to the express wishes of the contracting parties to the international agreement:

> In conformity with the principles of international law, EU institutions which have power to negotiate and conclude such an agreement are free to agree with the non-member States concerned what effects the provisions of the agreement are to have in the internal legal order of the contracting parties.[131]

Where the parties have not expressly decided on the question of direct effect, the Court will apply a two-stage test for identifying whether an international agreement has direct effect.[132] In a first stage, it examines whether the Union agreement *as a whole* is capable of containing directly effective provisions. The Court here employs a 'policy test' that analyses the nature, purpose, spirit, or general scheme of the agreement;[133] and only where the international agreement as a whole is considered to be legally capable of direct effects in the Union legal order, will the Court turn to examining the direct effect of a specific provision of the agreement.[134] The second stage of the test thereby reproduces the classic direct effect analysis known in the internal sphere. Individual provisions must represent a 'clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures'.[135] While the second stage of the test is thus identical to that for internal legislation,

[128] Cf L. Henkin, *Foreign Affairs and the US Constitution* (Clarendon Press 1996) 198 ff.

[129] *Foster v Neilson*, 27 US (2 Pet) 253 at 314 (1829).

[130] Case 104/81 *Hauptzollamt Mainz v Kupferberg & Cie* EU:C:1982:362, para 14.

[131] Joined Cases C-401/12 P to C-403/12 P *Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* EU:C:2015:4, para 53. The express exclusion of direct effect in many contemporary international agreements of the Union has been described as 'one of the most remarkable features of the post-2008 trade agreements, marking a departure from the traditional approach in the EU's bilateral agreements so far by "breaking the silence" with regard to their effects in the domestic legal orders of the contracting parties' (A. Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) 51 *Common Market Law Review* 1125).

[132] For an excellent analysis see A. Peters, 'The Position of International Law within the European Community Legal Order' (1997) 40 *German Yearbook of International Law* 9–77, 53–54 and 58–66.

[133] See Joined Cases 21–24/72 *International Fruit Company NV and Others v Produktschap voor Groenten en Fruit* EU:C:1972:115, para 20, as well as Case 280/93 *Germany v Council* EU:C:1994:367, para 105.

[134] The two prongs of the test can be clearly seen in Case 104/81 *Kupferberg* (n 130). In paras 18–22, the Court undertook the global policy test, while in paras 23–27 it looked at the conditions for direct effectiveness of a specific provision.

[135] Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:400, para 14. See now also, in the context of the Aarhus Convention, Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125, especially para 45: 'It must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals'.

the actual results may vary: identically worded provisions in internal and external legislation may not necessarily be given the same effect.[136]

In the past, the European Courts have generally been 'favourably disposed' towards the direct effect of Union agreements, and they have thus created an atmosphere of 'general receptiveness' to international law.[137] The classic exception to this constitutional rule is the WTO agreement.[138] The Union is of course a member of the World Trade Organization, and as such formally bound by its constituent agreements. Yet the Union Courts have persistently denied these agreements 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)*;[139] yet, it is a later judgment that clarified the constitutional rationale for the Union's refusal to grant direct effect. In *Portugal v Council*, the Court found it crucial to note:

> 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 disuniform application of the WTO rules. *To accept that the role of ensuring that [European] law complies with those rules devolves directly on the [Union] judicature 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*.[140]

In light of the economic consequences of a finding of direct effect, the granting of such an effect to the WTO agreement was here seen as a political question not for the Court to decide. Not only was the agreement too 'political' in that it contained few hard and fast legal rules,[141] 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 shown by the ECJ thus acknowledged that the political prerogative for external relations lay primarily with the legislative and executive branch. Surprisingly, the Court's cautious approach to the WTO agreements, and their progeny,[142] has recently been extended into

[136] J. H. J. Bourgeois, 'Effects of International Agreements in European Community Law: Are the Dice Cast?' (1983–84) 82 *Michigan Law Review* 1250–73, 1261.

[137] P. Eeckhout, *External Relations of the European Union* (Oxford University Press 2005) 301.

[138] P. Eeckhout, 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems' (1997) 34 *Common Market Law Review* 11.

[139] Case C-280/93 *Germany v Council* (n 133).

[140] Case C-149/96 *Portuguese Republic v Council of the European Union* EU:C:1999:574, paras 43–46 (emphasis added).

[141] For the GATT Agreement see Joined Cases 21–24/72 *International Fruit Company* (n 133) 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 characterised by the great flexibility of its provisions[.]'.

[142] For the lack of direct effect of WTO rulings in the Union legal order see Case C-377/02 *Van Parys* EU:C:2005:121. On the relationship between the European Courts and decisions by international tribunals see M. Bronckers, 'The Relationship of the EC Courts with other International Tribunals: Non-committal, Respectful or Submissive?' (2007) 44 *Common Market Law Review* 601.

other fields.[143] It also seems likely that this less receptive approach will apply to agreements concluded within the Union's 'Common Foreign and Security Policy'. For in light of the latter' s specificity,[144] the Court might well find that the 'nature and broad logic' of CFSP agreements generally prevent their having direct effect within the Union legal order.

B. Dimensions: Vertical and Horizontal

What are the dimensions of direct effect for the Union's international agreements? Will a directly effective provision in a 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—horizontal—situation.

The Court has never expressly decided which option to follow. Yet, in *Polydor v Harlequin* it seemed tacitly to assume the possibility of a horizontal direct effect of international agreements.[145] Doubts remained;[146] and the Court did not dispel them in *Sevince*.[147] However, the acceptance of the horizontal direct effect thesis has gained ground. In *Deutscher Handballbund eV v Kolpak*,[148] 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 from a (then) non-Member State—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

[143] The Court dealt with the United Nations Convention on the Law of the Sea (UNCLOS) in Case C-308/06 *Intertanko and Others v Secretary of State for Transport* EU:C:2008:312 and found (paras 64–65): '[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'.

[144] On this point see M. Cremona's chapter in this volume (ch 34).

[145] Case 270/80 *Polydor and Others v Harlequin and Others* EU:C:1982:43.

[146] These doubts inevitably gave rise to a good degree of academic speculation. In 1985, the following questions was put to H. J. Glaesner, the then Director General of the Legal Service of the Council, by the House of Lords Select Committee on the European Communities: 'You are well acquainted with the direct effect doctrine of internal provisions of the Treaty of Rome. As regards external provisions, [European] case law only supports direct effects which can be invoked against Member States. Is there any likelihood of it being extended to relations between private individuals …?' 'Would the distinction be likely to be that the Court would be more ready to grant an individual's right arising out of an external treaty … but would they hesitate to impose obligations on individuals arising out of those external treaties?' The Director-General could only answer: 'That is my feeling; it is not a philosophical consideration but a feeling of mine' (see Select Committee on the European Communities, 'External Competence of the European Communities' [1984–85] Sixteenth Report (Her Majesty's Stationery Office 1985) 154 (emphasis added)). For an excellent overview of the horizontal direct effect question today see S. Gáspár-Szilágyi, 'The "Horizontal Direct Effect" of EU International Agreements: Is the Court Avoiding a Clear Answer?' (2015) 42 *Legal Issues of Economic Integration* 93.

[147] Case C-192/89 *Sevince* (n 124).

[148] Case C-438/00 *Deutscher Handballbund eV v Maros Kolpak* EU:C:2003:255.

had 'effects vis-à-vis third parties inasmuch as it does not apply solely to measures taken by the authorities but also extends to rules applying to employees that are collective in nature'.[149] The Court thought that this could indeed be the case;[150] and in allowing the rules to apply directly to private parties, the Court also 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.[151] Therefore, in the absence of any mandatory constitutional reason to the contrary, and 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'.[152]

C. Beyond Treaties: Customary International Law

International treaties are not the only source of public international law. They are complemented by custom and general principles of law.[153] But unlike the express provision in Article 216(2) TFEU, no equivalent Union commitment exists for customary international rules. It nonetheless is uncontested that the European Union, endowed with international legal personality—and as such subject to international law—'must respect international law in the exercise of its powers' including internationally recognized custom.[154]

What, then, is the *internal* legal status of customary rules in the Union legal order? After a period of sibylline ambiguity on the issue,[155] the European Courts were asked to deal with the issue squarely in *Opel Austria*.[156] The General Court was here requested to annul a Union act

[149] Ibid para 19.

[150] Ibid paras 32 and 37.

[151] See Case C-265/03 *Simutenkov v Ministerio de Educacion y Cultura and Real Federacion Espanola de Futbol* EU:C:2005:213, where the Court confirmed *Deutscher Handballbund* (n 148) in the context of the Partnership and Cooperation Agreement between the EC and the Russian Federation.

[152] S. A. Riesenfeld, 'International Agreements' (1989) 14 *Yale Journal of International Law* 455–67, 463 (emphasis added).

[153] For the concepts of international custom and general principles of law see I. Brownlie, *Principles of Public International Law* (Oxford University Press 2003) 6–12, 15–18.

[154] Case C-286/90 *Poulsen and Diva Navigation Corp.* EU:C:1992:453, para 9. In Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* EU:C:2011:864, the Court pointed to TEU art 3(5) as the constitutional foundation as to why the Union is bound by customary international law (ibid para 101).

[155] In one of the first cases dealing with the status of customary international in the Union legal order, the Court found that 'it is a principle of [customary] international law, which the [EU] Treaty cannot be assumed to disregard in the relations between Member States, that a state is precluded from refusing its own nationals the right of entry or residence' (Case 41/74 *Van Duyn v Home Office* (n 30) para 22). In Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström Osakeyhtiö and Others v Commission of the European Communities* (Wood Pulp) EU:C:1988:447, non-Union undertakings had challenged the validity of a Commission decision on the ground that it breached the international legal principles limiting the jurisdiction of the Union. It was argued that 'the application of the competition rules in this case was founded exclusively on the economic repercussions within the common market of conduct restricting competition which was adopted outside the [Union]' (ibid para 15). The ECJ did not analyse the substance of the customary rules on territorial jurisdiction. It was content in finding that 'the [Union's] jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law' (ibid para 18). For a panoramic survey of the European Court's references to general principles of international law until 1998 see J.-P. Puissochet, 'La Place du Droit international dans la Jurisprudence de la Cour de Justice des Communautés Européennes' in *Scritti in onore di Giuseppe Federico Mancini* (Giuffrè 1998) 781–88.

[156] Case T-115/94 *Opel Austria GmbH v Council* EU:T:1997:3.

on the ground that it violated the customary international law principle of good faith. The Court held that 'the principle of good faith is a rule of customary international law whose existence is recognized by the International Court of Justice' and it 'is therefore binding on the [Union]'.[157] A violation of the international law principle, however, seemed not sufficient a ground for invalidation. For the Court still considered it necessary to add: 'the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which, according to the case-law, forms part of the [Union] legal order'.[158] And in its subsequent analysis, the Court exclusively refers to the *Union* general principle of legitimate expectations in its review of the Union act. Customary international law did therefore not operate directly but it was applied indirectly *via the medium* of Union law. Customary international norms were 'channelled' into a Union principle;[159] and this 'transformation approach' did not answer the question whether international custom could have direct effects within the Union legal order.[160]

The status and effect of customary international norms was again at issue in *Racke*.[161] The Union had concluded a Cooperation Agreement with the Federal Republic of Yugoslavia for an unlimited period of time, which nonetheless allowed either party to terminate the agreement six months after having notified the other party of its unilateral denouncement. Claiming that the war in the Federal Republic constituted a radical change in the conditions under which the agreement had been concluded, the Union had adopted a series of measures to suspend the agreement without having complied with the six-months rule. The questions posed in this preliminary reference from the German Federal Finance Court related, thus, to the validity of the EU legislation suspending the agreement. Was the Union entitled to terminate unilaterally the agreement by reference to the customary international rule of *rebus sic stantibus*?

The European Court of Justice affirmed its jurisdiction to examine the EU measure against international custom binding on the Union: 'rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the [Union] institutions *and form part of the [Union] legal order*'.[162] The Court here, confirmed the monist relationship between the EU legal order and customary international rules binding on the Union. But once more, it tried to evade the question of direct effect.[163] It acknowledged that Article 62(1) of the Vienna Convention

[157] Ibid para 90. The General Court referred to PCIJ judgment of 25 May 1926, *German Interests in Polish Upper Silesia*, CPJI, Series A, No 7, 30 and 39. Article 18 of the Vienna Convention on the Law of Treaties reads: 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or; (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed'.

[158] Case T-115/94 *Opel Austria GmbH* (n 156) paras 123–24.

[159] P. Eeckhout, *External Relations of the European Union* (Oxford University Press 2005) 327.

[160] J. Wouters and D. van Eeckhoutte, 'Giving Effect to Customary International Law through European Community Law' in J. M. Prinssen and A. Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Europa Law 2002) 183–234, 210.

[161] Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* EU:C:1998:293.

[162] Ibid para 46.

[163] How difficult the question of direct effect of customary international law would have been can be seen in the Opinion of Advocate General Jacobs (EU:C:1997:582). Pointing out that 'most rules of customary international law do not create rights for individuals and therefore do not have direct effect', the Advocate General turned to the law of treaties: 'In the light of those principles, there must also be limits to the effect of rules of customary international law relating to treaties. The overall nature and purpose of the law of treaties is to lay down rules applying in the relations between States (and international

codified international custom,[164] but referred to the 'complexity' of the customary rules that would allow the Union a margin of discretion in applying these rules. Hence, only where the Union had made 'manifest errors of assessment concerning the conditions for applying those rules' would the Court invalidate the (suspending) Union measure.[165] The Court thus reconciled—at least rhetorically—two contradictory wishes: while on the one hand accepting that an individual can 'invoke[,] in order to challenge the validity of the suspending regulation, obligations deriving from rules of customary international law which govern the termination and suspension of treaty relations',[166] it nonetheless wished to recognize a discretionary power of the Union to (mis-)interpret the meaning and scope of international custom.

This solution has been confirmed and clarified in *Air Transport Association of America*;[167] and from this, we may conclude the following: while customary international law 'form[s] part of the [Union] legal order', the European Courts have yet to provide a clear dogmatic response to the question of direct effect.

organisations). The law of treaties is clearly not intended to create rights for individuals. It is true that its application may have the effect of creating such rights, namely in those cases where a domestic legal system accepts that international agreements concluded in conformity with the law of treaties are capable of conferring rights on individuals. However, that is but an indirect effect, by no means intended at the level of international law. It is the provision of the agreement (lawfully concluded) which has direct effect. The overall nature and purpose of the law of treaties would therefore seem not to be conducive to direct effect. (It may be noted in passing that there may be other types of rules of customary international law which do intend to confer rights on individuals, for example rules of international humanitarian law.) In addition, the particular rules at issue must contain clear and precise obligations. In the circumstances of the present case, it is not obvious that that condition is satisfied. The notion of *rebus sic stantibus* is notoriously difficult and contested; indeed it has often been described as the *enfant terrible* of international law. Its scope has perhaps been formulated more clearly in Article 62 of the Vienna Convention, but even that provision contains concepts which easily lend themselves to widely diverging interpretations. What is a fundamental change of circumstances? What are circumstances which constituted an essential basis of the consent of the parties? And when does the change in circumstances radically … transform the extent of obligations still to be performed? It may therefore be doubted whether the conditions for the application of the doctrine of *rebus sic stantibus* are sufficiently clear and precise to confer rights on individuals' (ibid paras 80, 84–85).

[164] The provision reads: 'A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty'.

[165] Case C-162/96 *Racke* (n 161) para 52. As regards the procedural rules laid down in Article 65 of the Vienna Convention, the Court simply held that 'the specific procedural requirements there laid down do not form part of customary international law' (ibid para 59).

[166] Ibid, para 51.

[167] Case C-366/10 *Air Transport Association of America and Others* (n 154), especially paras 109–10: 'Therefore, even though the principles at issue appear only to have the effect of creating obligations between States, it is nevertheless possible, in circumstances such as those of the case which has been brought before the referring court, in which Directive 2008/101 is liable to create obligations under European Union law as regards the claimants in the main proceedings, that the latter may rely on those principles and that the Court may thus examine the validity of Directive 2008/101 in the light of such principles. However, since a principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles (see, to this effect, *Racke* [n 161] paragraph 52)'. For an analysis of the case see E. Denza, 'International Aviation and the EU Carbon Trading Scheme: Comment on the Air Transport Association of America Case' (2012) 37 *European Law Review* 314.

VI. Indirect Effects: General Principles

Norms may have direct and indirect effects. The lack of direct effect simply means that the Union norm cannot itself—that is directly—be invoked. A European norm lacking direct effect may however still have certain indirect effects. These indirect effects of Union law have been predominantly developed in the context of directives, but the European Courts apply the constitutional doctrines developed in that context to all sources of European law.[168] Thus, all non-directly effective provisions within the European Treaties, regulations, decisions, and international agreements may be indirectly effective.[169]

The indirect effect of Union law thereby expresses itself in the form of a duty of consistent interpretation on national and European authorities. In the past, this duty of consistent interpretation has been primarily understood as a duty to interpret national law in line with European law; and like the doctrine of direct effect, it imposes an obligation on all executive and judicial organs of a state,[170] and it will be applied in vertical and horizontal situations alike.[171] However, the doctrine of consistent interpretation has also been applied to the interpretation of European law itself. This final section explores each aspect of the doctrine in turn.

A. Indirect Effects of European on National Law

The European Court has created a general duty on national courts (and administrations) to interpret national law as far as possible in light of all European law. The doctrine of consistent interpretation was thereby given an elaborate definition in *Von Colson*:

> [T]he Member States' obligation arising from a Directive to achieve the result envisaged by the Directive and their duty under Article [4(3) TEU] to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law in particular the provisions of a national law specifically introduced in order to implement [a Directive], national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in the third paragraph of Article [288].[172]

[168] Case C-60/02 *Criminal proceedings against X* EU:C:2004:10, paras 61–63, especially para 62 (emphasis added): 'Even though in the case at issue in the main proceedings the [Union] rule in question is a regulation, which by its very nature does not require any national implementing measures, and not a directive, Article 11 of Regulation No 3295/94 empowers Member States to adopt penalties for infringements of Article 2 of that regulation, *thereby making it possible to transpose to the present case the Court's reasoning in respect of directives*'.

[169] Advocate-General Tizzano in Case C-144/04 *Mangold* EU:C:2005:420, para 117: '[T]he duty of consistent interpretation is one of the "structural" effects of [European] law which, together with the more "invasive" device of direct effect, enables national law to be brought into line with the substance and aims of [European] law. Because it is structural in nature, the duty applies with respect to all sources of [European] law, whether constituted by primary or secondary legislation, and whether embodied in acts whose legal effects are binding or not'.

[170] Cf Case C-218/01 *Henkel v Deutsches Patent- und Markenamt* EU:C:2004:88.

[171] Case C-32/93 *Webb v EMO Air Cargo (UK) Ltd* EU:C:1994:300.

[172] Case 14/83 *Von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* EU:C:1984:153, para 26. Because this paragraph was so important in defining the duty of consistent interpretation, it is sometimes referred to as the '*Von Colson* Principle'. For an excellent analysis of the case law here see L. Daniele, 'Vingt-Cinq Ans D'Interprétation Conforme: Un Principe Encore en Quête de Définition?' in B. Nascimbene and F. Picod (eds), *L'Italie et le Droit de l'Union Européenne* (Bruylant 2010) 181.

Where European law is not sufficiently precise, it is—primarily—addressed to the national legislator. It is (at first) in the latter's prerogative to 'concretise' the European norm's indeterminate content in line with its own national views. But where the legislator has failed to do so, this task is (after the expiry of the implementation period[173]) transferred to the national judiciary. The duty of consistent interpretation thereby applies regardless of 'whether the [national] provisions in question were adopted before or after the [European act]'.[174] The duty to interpret national law as far as possible in light of European law indeed extends to all national law—irrespective of whether or not the latter was intended to implement the former. (However, where domestic law has been specifically enacted to implement a European act, the national courts must even operate under the presumption 'that the Member State, following its exercise of the discretion afforded to it under that provision, had the intention of fulfilling entirely the obligations arising from [it]'.[175]) This duty of consistent interpretation also applies 'notwithstanding any contrary interpretation which may arise from the *travaux préparatoires* for the national rule'.[176]

Are there limits to the indirect effect of European law through the doctrine of consistent interpretation? The duty is very demanding: national courts are required to interpret their national law '*as far as possible*, in the light of the wording and the purpose of the [Union act]'.[177] But what will 'as far as possible' mean? Should national courts be required to behave as if they were the national legislature? This might seriously undermine the (relatively) passive place reserved for judiciaries in the constitutional orders of some Member States; and the European legal order has consequently only asked national courts to adjust the interpretation of national law 'in so far as [they are] given discretion to do so *under national law*'.[178] The European Court thus accepts that there exist established national judicial methodologies and has permitted national courts to limit themselves to 'the application of interpretative methods recognised by national law'.[179] National courts are thus not obliged to 'invent' or 'import' novel interpretative methods.[180] However, within the discretion given to the

[173] National authorities are not required to interpret their national law in light of Union law before the expiry of the implementation deadline. After Case C-212/04 *Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* EU:C:2006:443, there is no room for speculation on this issue: '[W]here a directive is transposed belatedly, the general obligation owed by national courts to interpret domestic law in conformity with the directive exists 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 Case C-129/96 *Inter-Environnement Wallonie ASBL v Region Wallonne* EU:C:1997:628, para 45; and Case C-138/05 *Stichting Zuid-Hollandse Milieufederatie* EU:C:2006:577, para 42. This obligation is independent of the doctrine of indirect effect.

[174] Case C-106/89 *Marleasing v La Comercial Internacional de Alimentacion* EU:C:1990:395, para 8.

[175] Joined Cases C-397/01 to C-403/01, *Pfeiffer* (n 121) para 112. Where the national law reproduces, word for word, the content of a European provision, the discretion of the national court may even be further reduced. For a possible case in point see Case C-306/12 *Spedition Welter GmbH v Avanssur SA* EU:C:2013:650, especially para 31; and for a panoramic discussion of the case see C. N. K. Franklin, 'Limits to the Limits of the Principle of Consistent Interpretation? Commentary on the Court's Decision in *Spedition Welter*' (2015) 40 *European Law Review* 910.

[176] Case C-371/02 *Björnekulla Fruktindustrier* EU:C:2004:275, para 13. See now also Case C-441/14 *Dansk Industri* EU:C:2016:278, para 33, where the Court confirmed that this obligation also applies to "settled" national case law: '[T]he requirement to interpret national law in conformity with EU law entails the obligation for national courts to change [their] established case-law'.

[177] Case C-106/89 *Marleasing* (n 174) para 8 (emphasis added).

[178] Case C-14/83 *Von Colson* (n 172) para 28 (emphasis added).

[179] Joined Cases C-397/01 to C-403/01 *Pfeiffer* (n 121) para 116 (emphasis added).

[180] See M. Klammert, 'Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots' (2006) 43 *Common Market Law Review* 1251, 1259. For the opposite view see Prechal, *Directives in EC Law* (n 44) 213.

judiciary under national law, the European doctrine of consistent interpretation requires the referring court 'to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law'.[181]

Are there also European Union limits to this duty? The Court of Justice has clarified that the duty of consistent interpretation 'is limited by the general principles of law which form part of [European] law and in particular the principles of legal certainty and non-retroactivity'.[182] This has been taken to imply that the indirect effect of Union law cannot aggravate the criminal liability of a private party, as criminal law is subject to particularly strict rules of interpretation.[183] But, more importantly still, the Court recognizes that the clear and unambiguous wording of a national provision constitutes an absolute limit to its interpretation.[184] National courts are thus not required to interpret national law *contra legem*.[185] The duty of consistent interpretation would find a boundary in the clear wording of a provision. National courts are therefore not required to stretch the medium of national law beyond breaking point. They are only required to interpret the text—and not to amend it—because textual amendments continue to be the task of the national legislatures. The duty of consistent interpretation is therefore a milder incursion on the legislative powers of the Member States than the doctrine of direct effect.[186]

B. Indirect Effects of Primary on Secondary Union Law

The doctrine of consistent interpretation has also been developed *within* the body of European law.[187] For the Court has—early on—confirmed a duty to interpret all European *secondary* law in conformity with EU *primary* law. The doctrine of Treaty-consistent interpretation thereby demands that 'when the wording of secondary [Union] law is open to more than one interpretation, preference should be given to the interpretation which renders the

[181] Joined Cases C-397/01 to C-403/01 *Pfeiffer* (n 121) para 118.

[182] Case 80/86 *Kolpinghuis* (n 92) para 13.

[183] In Case C-168/95 *Arcaro* EU:C:1996:363, the Court claimed that '[the] obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed' (ibid para 42). This ruling should, however, be interpreted restrictively. Indeed, Paul Craig ('Directives: Direct Effect, Indirect Effect and the Construction of National Legislation' (1997) 22 *European Law Review* 519–38, 527) has sceptically pointed out: 'If this is indeed so then it casts the whole doctrine of indirect effect into doubt'. In fact: '[t]his was the whole point of engaging in the interpretive exercise. Greater rights for the plaintiff will almost always mean commensurately greater obligations of the defendant'. The post-*Arcaro* jurisprudence appears to recognize this logical necessity (see S. Drake, 'Twenty Years after *Von Colson*: the Impact of "Indirect Effect" on the Protection of the Individual's Community Rights' (2005) 30 *European Law Review* 329–48, 338).

[184] Case C-555/07 *Kücükdeveci v Swedex* EU:C:2010:21, para 49. See also Case C-176/12 *Association de Médiation sociale* EU:C:2014:2, para 39.

[185] Case C-212/04 *Adeneler* (n 173) para 110: 'It is true that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem'.

[186] For a recent restatement of this central idea see Case C-282/10 *Dominguez v Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre* EU:C:2012:33, para 23: 'It should be stated at the outset that the question whether a national provision must be disapplied in as much as it conflicts with European Union law arises only if no compatible interpretation of that provision proves possible'. And see als Schütze, 'The Morphology of Legislative Power in the European Community (n 100) 126: 'While the doctrine of consistent interpretation is a method to avoid conflicts, the doctrine of supremacy is a method to solve—unavoidable—conflicts'.

[187] For an analysis of this technique in the context of free movement law see K. Engsig-Sorensen, 'Reconciling Secondary Legislation with the Treaty Rights of Free Movement' (2011) 36 *European Law Review* 339.

provision *consistent with the Treaty* rather than the interpretation which leads to its being incompatible with the Treaty'.[188] This principle was refined in subsequent jurisprudence,[189] where the Court not only clarified that '*all* [Union] acts must be interpreted in accordance with primary law as a whole';[190] it equally insisted that '[a]ccording to a general principle of interpretation, a provision must be interpreted, *as far as possible*, in such a way as not to detract from its validity'.[191]

The extent to which the Court may go to (consistently) interpret secondary Union law when faced with—seemingly—conflicting primary law can be seen in *Vatsouras*.[192] Wishing to limit the equal treatment principle between nationals of a Member State and all other Union citizens, the Union legislator had adopted the following provision in Article 24 of Directive 2004/38: '[T]he host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, [a] longer period[.]'[193] The problem with this legislative limitation of the right to free movement was that it—undoubtedly—conflicted with the interpretation given by the Court to Article 45 TFEU. (For in *Collins*,[194] the Court had held that Article 45(2) TFEU covered benefits of a financial nature intended to facilitate access to the employment market of the host Member State.) Nonetheless, the Court did not invalidate Article 24 of the Directive but instead interpreted the normative tension between secondary and primary Union law away. For in the opinion of the Court, '[b]enefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market *cannot be regarded as constituting "social assistance" within the meaning of Article 24(2) of Directive 2004/38*'.[195] This semantic scholasticism rendered the intentions of the Union legislature sacred,[196] and—arguably—significantly distorted the clear wording and structure of this piece of secondary Union law.[197] However, the indirect effect of EU primary law here saved the life of EU legislation.

C. Indirect Effects of Secondary on Primary Union Law?

From the perspective of a hierarchy of norms, a duty of consistent interpretation can only apply in one direction: the hierarchically 'higher' norm will inform the interpretation of the hierarchically 'lower' norm. Does this not mean that 'lower' rank European law cannot have any indirect effects on the 'higher' ranking European law? Surprisingly, the Court of Justice has rejected this view and accepted that a secondary law norm may also be used to interpret EU primary law.

[188] Case 218/82 *Commission v Council* EU:C:1983:369, para 15.

[189] Cf Case C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH* EU:C:1994:34, para 12: 'As the Commission has correctly pointed out, however, that directives must, like all secondary legislation [sic], be interpreted in the light of the Treaty rules on the free movement of goods'. See also Case C-61/94 *Commission v Germany (IDA)* EU:C:1996:313, para 52: 'When the wording of secondary [Union] legislation [sic] is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the Treaty'.

[190] Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* EU:C:2009:716, para 48. On this point see Case C-427/93 *Bristol-Myers Squibb v Paranova* EU:C:1996:282, para 17.

[191] Case C-403/99 *Italy v Commission* EU:C:2001:507, para 37.

[192] Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* EU:C:2009:344.

[193] Directive 2004/38 art 24(2).

[194] Case C-138/02 *Collins v Secretary of State for Work and Pensions* EU:C:2004:172.

[195] Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* (n 192) para 45.

[196] A. Dashwood and others, *European Union Law* (Hart Publishing 2011) 508.

[197] For an extended ciritcism of *Vatsouras* see E. Fahey, 'Interpretive Legitimacy and the Distinction between "Social Assistance" and "Work Seekers' Allowance"' (2009) 34 *European Law Review* 933.

In *Mangold*,[198] the German law on 'Part-Time Working and Fixed-Term Contracts' permitted fixed-term employment contracts if the worker had reached the age of fifty-two. However, the German law seemed to violate a 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 Mr Mangold, then aged fifty-six, on a fixed-term employment contract. A few weeks after commencing employment, Mangold brought proceedings against his 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) of the relevant Directive.[199] 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,[200] the Court was out to create a new way to review the legality of the German law. Instead of using the Directive as such—directly or indirectly—it found a *general principle of European constitutional law* that stood behind the Directive: the principle of non-discrimination on grounds of age.

But could that general principle be directly effective? The Court found that it could and thereby derived its substantive content from the wording of the Directive. This indirect effect of secondary law on the interpretation of primary law has been severely criticized. For the generalized use of (directly effective) primary law as the medium for (non-directly effective) secondary law is dangerous 'since the subsidiary applicability of the principles not only gives rise to a lack of legal certainty *but also distorts the nature of the system of sources, converting typical [Union] acts into merely decorative rules which may be easily replaced by the general principles*'.[201] Put succinctly: if a special directive is adopted to make a general principle sufficiently precise, how can the latter have direct effect while the former has not?

To the chagrin of some, the *Mangold* ruling was confirmed and consolidated in *Kücükdeveci*.[202] This time, Germany was said to have violated Directive 2000/78 by having discriminated against younger employees. The bone of contention was Article 622 of the German Civil Code, which established various notice periods depending on the duration of the employment relationship. However, the provision only started counting the duration after an employee had turned twenty-five.[203] After ten years of service to a private company, Ms Kücükdeveci had been sacked. Having started work at the age of eighteen, her notice period was calculated on the basis of only a three-year period. Believing that this shorter

[198] Case C-144/04 *Mangold v Helm* (n 59).

[199] On the no-horizontal-direct effect rule governing norms within directives see Section IV.B above.

[200] Case C-144/04 *Mangold v Helm* (n 59) para 65.

[201] Joined Cases C-55 and C-56/07 *Michaeler and Others v Amt für sozialen Arbeitsschutz Bozen* EU:C:2008:248, para 21.

[202] Case C-555/07 *Kücükdeveci v Swedex* (n 184).

[203] 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'.

notice period for young employees was discriminatory, she brought an action before the Industrial Tribunal. On reference to the Court of Justice, that Court found the German law to violate the Directive.[204] 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 through the interpretation of national law now 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'.[205] 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 at issue in the main proceedings'.[206] And where this general principle—as concretized by Union secondary law—had been violated, it was the obligation of the national court to disapply any provision of national legislation contrary to that principle.[207]

This constitutional logic has nonetheless been qualified in *Association de Médiation Social*.[208] Dealing with French legislation that implemented a Union Directive on the right to information and consultation of employees in undertakings, the question arose whether the French measure not only violated the Directive but also Article 27 of the EU Charter of Fundamental Rights. (The second source of review had become necessary as, in line with settled case law, even a directly effective directive could not affect 'proceedings exclusively between private parties'.[209]) Article 27 EU Charter thereby states: 'Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices'. In light of this wording the Court found the fundamental right *not* to be directly effective;[210]and subsequently insisted that while Union secondary law could indeed be used to shed light on the substantive content of a general principle, the relevant provision of primary Union law could only be applied if it 'is sufficient in itself to confer on individuals an individual right which they may invoke as such'.[211] Union secondary law may thus inform the *substance* of a general principle or fundamental right; yet it apparently cannot transfer direct effect to conditional or imprecise primary Union law that itself lacks direct effect.

[204] Case C-555/07 *Kücükdeveci* (n 184) para 43.
[205] Ibid para 49.
[206] Ibid para 27 (emphasis added); see also para 50.
[207] Ibid para 51. For a more recent confirmation see Case C-441/14 *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen* EU:C:2016:278, especially para 23: 'The EU legislature intended by the adoption of the directive to establish a more precise framework to facilitate the practical implementation of the principle of equal treatment and, in particular, to specify various possible exceptions to that principle, circumscribing those exceptions by the use of a clearer definition of their scope'.
[208] Case C-176/12 *Association de Médiation Sociale* EU:C:2014:2.
[209] Ibid para 36.
[210] Ibid para 45.
[211] Ibid para 47. The Court found that this was not the case here (ibid paras 48-49): 'Accordingly, Article 27 of the Charter cannot, as such, be invoked in a dispute, such as that in the main proceedings, in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied. That finding cannot be called into question by considering Article 27 of the Charter in conjunction with the provisions of Directive 2002/14, given that, since that article by itself does not suffice to confer on individuals a right which they may invoke as such, it could not be otherwise if it is considered in conjunction with that directive'.

D. Indirect Effects of External on Internal Union Law

The Union legal order is not only 'open' to international agreements by granting them direct applicability and allowing for their having direct effect. It also has—unlike some national legal orders—granted international treaties a *higher* normative rank than internal legislation.[212] While below the EU Treaties, international agreements may thus be used to challenge the validity or influence the interpretation of any internal secondary Union law. In order to avoid normative clashes between external and internal Union law, the Court has thus developed a number of doctrines allowing for the indirect effect of international agreements on internal Union law.

What types of indirect effects of Union agreements have been recognized by the European Courts?[213] Two constitutional principles have been developed in this context. First, there is the principle of 'consistent interpretation'.[214] In *Commission v Germany (IDA)*,[215] the Court defined the principle in the following terms:

> When the wording of secondary [Union] legislation is open to more than one interpretation… the primacy of international agreements concluded by the [Union] over provisions of secondary [law] means that such provisions must, *so far as possible*, be interpreted in a manner that is consistent with those agreements.[216]

In parallel to the doctrine of consistent interpretation in the internal sphere, the internal Union act interpreted need not necessarily be designed to implement the international agreement;[217] yet where EU legislation is specifically intended to implement an international agreement, this presumption is particularly strong.[218] All international law binding on the Union should—where relevant—be used to interpret a particular piece of Union *secondary* law,[219] and this might even include an international convention to which the Union is not a party.[220]

---

[212] Cf Joined Cases 21–24/72 *International Fruit* (n 133); as well as Case C-61/94 *Commission v Germany* (n 189) para 52: 'primacy of international agreements concluded by the [Union] over provisions of secondary [law]'. For an interesting discussion of the primacy doctrine see M. Mendez, *The Legal Effects of EU Agreements* (Oxford University Press 2013) 71 ff.

[213] This section only explores the indirect effects of international agreements on secondary Union law. However, Union agreements—as Union law—will of course also have indirect effects on national law. National courts will thus be obliged to interpret national law also as far as possible with the international agreements of the Union. This obligation equally extends, albeit to a more limited extent, to mixed agreements (cf Case 53/96 *Hermes* EU:C:1998:292; as well as Joined Cases C-300/98 and C-392/98 *Dior* EU:C:2000:688).

[214] Cf Case 92/71 *Interfood GmbH v Hauptzollamt Hamburg* EU:C:1972:30; and Case 70/94 *Werner v Germany* EU:C:1995:328. For a discussion of the principle see P. Eeckhout, *EU External Relations Law* (Oxford University Press 2011) 355 ff.

[215] Case C-61/94 *Commission v Germany (IDA)* EU:C:1996:313.

[216] Ibid para 52 (emphasis added).

[217] See in general F. Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation' in E. Cannizzaro and others (eds), *International Law as Law of the European Union* (Nijhoff 2012) 395.

[218] Case C-341/95 *Bettati v Safety Hi-Tech Srl* EU:C:1998:353, para 20.

[219] Owing to the higher hierarchical status of primary Union law over ordinary Union agreements, the duty of consistent interpretation will not apply in the interpretation of the European Treaties themselves; cf Case T-201/04 *Microsoft v Commission* EU:T:2007:289, para 798: 'The Court holds that the principle of consistent interpretation thus invoked by the Court of Justice applies only where the international agreement at issue prevails over the provision of [Union] law concerned. Since an international agreement, such as the TRIPS Agreement, does not prevail over primary [Union] law, that principle does not apply where, as here, the provision which falls to be interpreted is Article [102 TFEU]'.

[220] Cf *Intertanko* (n 143). In this case, the duty of consistent interpretation was however rooted in the customary international law principle of good faith and—owing to the fact that all the Member States were a party to the international convention at issue—in TEU art 4(3) (ibid para 52).

Secondly, there is the 'principle of implementation'.[221] In two exceptional circumstances an international agreement that lacks direct effect—typically, an agreement relating to the WTO—can still provide an indirect standard of review for the validity of Union legislation. This indirect review occurs whenever the Union adopts internal legislation 'intended to implement a particular obligation assumed in the context of the WTO, or where the [Union] measure refers expressly to the precise provisions of the WTO agreements'.[222] This implementation principle has thus two prongs. According to the first prong, established in *Nakajima*,[223] an international agreement prevails over inconsistent European *implementing* legislation. The Court thereby pointed out that it was 'not relying on the direct effect' of the international agreement as such.[224] But since the Union measure had been adopted in order to comply with the international obligations of the Union, the Court was entitled 'to examine whether the Council went beyond the legal framework thus laid down'.[225]

We encounter the second prong of the implementation principle in *FEDIOL*.[226] A Union regulation had been adopted, whose Article 2(1) prohibited all 'illicit commercial practices' defined as 'any international trade practices attributable to third countries which are incompatible with international law or with the generally accepted rules'. The specific reference to international law in the Union act, so the Court claimed, did entitle it to review the actions of the Commission in light of the WTO rules. And as the Union legislator had instructed the Commission to let its action be guided by international norms, judicial review of these actions would involve the interpretation and indirect application of these international rules.[227]

In the past, the European Courts have however given an extremely restrictive reading of both prongs of the implementation principle. The latter was 'designed, *exceptionally*, to allow individuals, in an indirect manner, to plead infringement by the [Union] or its institutions, of GATT rules or WTO agreements'; and '[a]s an exception to the principle that individuals may not directly rely on WTO provisions before the [Union] judicature, *that rule must be interpreted restrictively*'.[228] This very restrictive reading was confirmed in *Vereniging Milieudefensie*.[229] The Court here found that the two prongs of the implementation principle 'were justified solely by the particularities of the agreements that led to their application';[230] and it clarified that the *Nakajima* exception was solely intended to guarantee the implementation of 'specific'—as opposed to general—obligations within an international agreement, while the *FEDIOL* exception was limited to situations where the internal Union act 'makes direct reference to specific provisions' of an international agreement.[231]

This establishes an extremely high burden of proof that the Union indeed wished to implement an international agreement. Thus, the fact that the Aarhus (Union) Regulation had

[221] Eeckhout, *EU External Relations Law* (n 214) 357.
[222] Case C-149/96 *Portugal v Council* EU:C:1999:574, para 49.
[223] Case C-69/89 *Nakajima All Precision v Council* EU:C:1991:186.
[224] Ibid para 28.
[225] Ibid para 32.
[226] Case 70/87 *FEDIOL v Commission* EU:C:1989:254.
[227] Ibid para 20.
[228] Case T-19/01 *Chiquita Brands v Commission* EU:T:2005:31, para 117 (emphasis added). See also Case C-377/02 *Van Parys* (n 142).
[229] Joined Cases C-401/12 P to C-403/12 P *Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* EU:C:2015:4.
[230] Ibid para 57.
[231] Ibid paras 58–59.

clearly been adopted to implement the Aarhus (international) Convention was in itself not sufficient to generate the latter's controlling indirect effect on the Union Regulation. The Court has reconfirmed this solution in *Commission v Rusal Armenal*,[232] where it insisted that 'it is not sufficient' for an internal Union act generally to defer to a 'due regard for international obligations entered into by the Union'. What was necessary was a clear intention 'deduce[d] from the specific provision of EU law contested that it seeks to implement into EU law a particular [international] obligation'.[233] Even a reference in EU secondary law that the Union had wished 'as far as possible' to comply with the international agreement was not enough to trump the contrary presumption that the intention of the EU legislature had been to adopt an approach 'specific to the EU legal order'.[234]

VII. Conclusion

Having cut the umbilical cord to the international legal order early on,[235] the doctrine of direct effect of European Union law has nonetheless been an (extended) 'infant disease' of a young legal order.[236] 'But now that [European] law has reached maturity, direct effect should be taken for granted, as a normal incident of an advanced constitutional order'.[237] The evolution of the doctrine of direct effect, discussed in this Chapter, demonstrated this maturation. The test for the direct effect of European law is today an extremely lenient test. A provision has direct effect, where it is 'unconditional' and thus 'sufficiently clear and precise'. These two legal conditions probe whether a norm can (or should) be applied in an individual case or whether it still needs legislative concretization. Importantly, direct effect does not depend on a European norm granting a (metaphysically defined) subjective right; but on the contrary, the subjective right is a result of a directly effective norm.[238] Direct effect simply means that a norm can be 'invoked' and applied by a national court (or executive authority); and, as we saw above, these European norms will typically apply in vertical and horizontal situations.

The two continuing—major—exceptions to the general constitutional principles governing direct effect relate to two special sources of European secondary law: Union directives and international agreements. The former were originally seen as the 'international' law instrument of the Union that would—as such—be incapable of producing direct effects in the national legal orders. Yet, the Court has insisted on the direct effect even for this Union instrument, albeit in a way that formally denies directives an immediate or horizontal direct effect. The legal fabric of international agreements has, by contrast, been almost completely assimilated to that of 'ordinary' Union law. The major exception here in place is that the European Courts subject each Union agreement to a 'policy test' before examining whether specific provisions have direct effect or not.

Every European norm—regardless of its direct effect—can be indirectly effective. The doctrine of consistent interpretation was originally developed in the context of directives; yet indirect effects are a normative characteristic of all European law. It can thereby operate

[232] Case C-21/14 P *Commission v Rusal Armenal ZAO* EU:C:2015:494.
[233] Ibid para 46.
[234] Ibid paras 48 and 52.
[235] *Van Gend en Loos* (n 5).
[236] See Pescatore, 'The Doctrine of "Direct Effect"' (n 34) 155.
[237] A. Dashwood, 'From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity' (2006/07) 9 *Cambridge Yearbook of European Legal Studies* 81.
[238] M. Ruffert, 'Rights and Remedies in European Community Law: a Comparative View' (n 32) 315.

in various directions. European law will typically influence the interpretation of national law. However, the doctrine of consistent interpretation will equally apply where there is a tension between a higher and lower European norm. European primary law will thus influence the meaning of European secondary law (including international agreements); and because of their higher normative status, Union agreements will also impact on the interpretation of (internal) secondary Union law. Surprisingly, the Court has also accepted that secondary law can sometimes provide interpretative assistance to general principles of—primary—European law; yet this indirect effect cannot generate, as we saw above, direct effects in EU primary law.[239]

[239] See text to nn 208 ff.