

## Chapter 5

### Direct Effect

#### 1. Direct Applicability and Direct Effect

#### 2. Direct Effect of Primary Law

- (a) Direct Effect: From Strict to Lenient Test
- (b) Vertical and Horizontal Direct Effect

#### 3. Direct Effect of Secondary Law: Directives

- (a) Direct Effect of Directives: Conditions and Limits
- (b) The No-Horizontal-Direct-Effect Rule
- (c) The Limitation to the Rule: The Wide Definition of State (Actions)
- (d) The Exception to the Rule: Incidental Horizontal Direct Effect

#### 4. Indirect Effects: The Doctrine of Consistent Interpretation

#### Conclusion

### 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. Monist States make international law part of their domestic legal order. International law will here directly apply *as if* it were domestic law. By contrast, dualist States consider international law separate from domestic law. International law is viewed as the law *between* States; national law is the law *within* a State. While international treaties are thus binding “on” States, they cannot be binding “in” States. International law here needs to be “transposed” or “incorporated” into domestic law and will here only have *indirect* effects through the medium of national law. The dualist theory is based on a basic division of labour: international institutions apply international law, while national institutions apply national law.

Did the European Union leave the choice between monism and dualism to its Member States? Section 1 examines this question in greater detail, before the remainder of this Chapter explores the doctrine of direct effect for European law. Section 2 starts out with the direct effect of the European Treaties. The European Court indeed confirmed that some Treaty provisions would be self-executing in the national legal orders. Nonetheless, the European Treaties are framework treaties; that is: they primarily envisage the adoption of European *secondary* law. This secondary law may take various forms.

\* All footnotes omitted.

These forms are set out in Article 288 TFEU. The provision defines the Union's legal instruments, and states:

[1] To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

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

[3] 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.

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

[5] Recommendations and opinions shall have no binding force.

The provision acknowledges three binding legal instruments – regulations, directives, and decisions – and two non-binding instruments. Why was there a need for three distinct binding instruments? The answer seems to lie in their specific – direct or indirect – effects in the national legal orders. While regulations and decisions were considered to be Union acts that would contain directly effective legal norms, directives appeared to lack this capacity. Much of the constitutional discussion on the direct effect of European secondary law has consequently concentrated on the direct effect of directives. Section 3 will therefore look at them in much detail. Finally, Section 4 analyses the doctrine of indirect effects within the Union legal order.