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Using a Directive as a "Shield" Rather Than a "Sword" in Horizontal Relations: Does This Concept Make Sense in the Light of the Judgment of the Court of Justice of 18 January 2022 C-261/20 *Thelen Technopark Berlin GmbH v MN*?

Wykorzystanie dyrektywy jako „tarczy", a nie jako „miecza" w relacjach horyzontalnych. Czy w świetle wyroku Trybunału Sprawiedliwości z dnia 18 stycznia 2022 r. w sprawie C-261/20 Thelen Technopark Berlin GmbH v MN ta koncepcja w ogóle ma sens?

ABSTRACT

This study of a scientific and research nature concerns one of the general principles of EU law, namely the principle of direct applicability. The publication contributes to a long-standing discussion on the direct effect of directives as secondary EU legislation. The main objective of the paper is to present the application of directives in the context of horizontal relations. This problem is of fundamental importance for explaining the mechanisms of direct application of the directives that have not been properly implemented in the national legal orders. Although in previous case law the Court of Justice had essentially opted against the concept of direct horizontal effect of directives, the issue in question, for its complexity, was again examined in one of the most recent preliminary rulings, case C-261/20 *Thelen Technopark*. Referring to that judgment, the author analyses the possibility of using a directive as a "shield" in the judicial application of law with an aim to eliminate a national law provision inconsistent with the directive from the rationale of the judicial decision. In particular, it concerns the possibility for directives to act in horizontal relations in such a manner that

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boils down to excluding the application of a provision of national law which is incompatible with it. The question of the possible use of directives as a "shield" is also examined from a slightly different perspective, namely from the point of view of the individual and the possibility to invoke a directive by the individual in the main proceedings where another individual wishes to cause an obligation be imposed on the former under the national law inconsistent with the directive. This problem, as can be argued, is ultimately resolved by the Court of Justice in case C-261/20 *Thelen Technopark*, which states that a national court hearing a dispute between individuals over a claim based on a national provision contrary to a directive is not required to disapply that provision solely on the basis of EU law.

Keywords: EU law; direct effect of directives; effect of directives in horizontal relations; subjective and objective direct effect; application of national provisions contravening a directive

INTRODUCTION

Directives as a source of EU secondary law have no equivalents in the legal systems of the Member States. In the context of Article 288 of the Treaty on the Functioning of the European Union (TFEU), "a directive shall be binding on each Member State to which it is addressed as regards the result to be achieved, but leaves to the national bodies the option to choose its form and means". Unlike a regulation, which is an instrument of legal unification, the directive "only" harmonises national legal systems.[1] As noted by Advocate General Ruiz-Jarabo Colomer in his opinion in case C-463/01 *Commission v Germany*, the directive as an act of EU law is less "specific" than the regulation because a regulation "by definition, as well as constituting a measure of general application binding in its entirety and directly applicable within the territory of the Union, is more specific than a directive, whose provisions are incorporated by the Member States into their respective national legal orders".[2]

Pursuant to the established position of the Court of Justice, the differences in binding force between a regulation and a directive rooted in Article 288 TFEU do not preclude *a priori* the provisions of a directive from being recognised as having direct effect in certain situations. This is so because according to the direction of case law that iriginated in case 41/74 *Yvonne Van Duyn*,[3] "if, by virtue of the provisions of Article 189 EEC Treaty [currently Article 288 TFEU] 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". These directives which, in exceptional sit-

[1] Cf. R. Skubisz, [in:] *System Prawa Prywatnego*, vol. 14A: *Prawo własności przemysłowej*, ed. R. Skubisz, Warszawa 2017, p. 53.

[2] Opinion of Advocate General D. Ruiz-Jarabo Colomer delivered on 6 May 2004, Case C-463/01, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2004:290, point 37.

[3] Judgment of the Court of 4 December 1974, Case 41/74, *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133, point 12.

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uations, can have an effect, not the same, but "similar" to regulations. This means that, as a general rule, directives should be applied in the Member States *via* national provisions adopted through transposition. It is only if the obligation of correct transposition is breached that the provisions of a non-implemented directive can, in certain circumstances, be applied and form the basis for determining the legal situation of individuals.[4] Thus, for directives, unlike regulations, the rule of direct effect is not a natural consequence of the fact of such legal acts being in force. It is rather a means or a kind of "automatic sanction" provided for in case Member States fail to fulfil their implementation duties.[5]

It should be stressed that te principle of direct effect developed in the case law of the Court may, in principle, entail granting an individual entity (an individual),[6] in the process of judicial application of law at the national level, the possibility to challenge a national legal provision by invoking individual's rights resulting directly from a provision of a directive, as well as requesting the national court to examine whether the national legislature exceeded, with regard to the form and means of implementation, the limits of the discretion granted to it by the directive.[7]

As a consequence of the above approach to the rule of direct effect of a directive, it became necessary to clarify the crucial question of the actual meaning of the rule in vertical terms (an individual to the state) and horizontal (an individual to an individual). While in judgments issued over several decades, the Court has explicitly recognised, in vertical relations, both the so-called subjective and objective direct effect of the provisions of directives (as discussed below), the material scope of the rule of direct effect of directives with regard to horizontal relations is still highly controversial.

This issue, reflected in the dispute over the "model for invoking (applying) EU law"[8] and picturesquely referred to as by the scholarly concept of using the

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[4] M. Szwarc-Kuczer, [in:] *Stosowanie prawa Unii Europejskiej przez sądy*, vol. 2: *Zasady, orzecznictwo, piśmiennictwo*, eds M. Szwarc-Kuczer, K. Kowalik-Bańczyk, Warszawa 2007, p. 202.

[5] M. Domańska, *Implementacja dyrektyw unijnych przez sądy krajowe*, Warszawa 2014, p. 252.

[6] As regards individual entity (an individual, a private entity) in the light of the EU law, see M. Szpunar, *Wybrane problemy stosowania prawa Unii Europejskiej w stosunkach cywilnoprawnych*, "Prawo w Działaniu. Sprawy Cywilne" 2014, vol. 20, p. 97.

[7] Judgment of the Court of 1 February 1977, Case 51/76, *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen*, ECLI:EU:C:1977:12, points 23–24.

[8] For the purposes hereof, the terms "invoking" (or "relying on") and "application" of the EU law are in principle used interchangeably, since both terms describe the phenomenon of relying, by an individual or a body, respectively, on EU law in proceedings before a national body. The concept of "invoking" seems appropriate from the point of view of an individual who invokes EU legislation before a body applying the law in the national proceedings. By contrast, the concept of "application of law" stresses the perspective of the national authority applying the law. Similarly A. Sołtys, *Relacja zasady bezpośredniego skutku i zasady pierwszeństwa prawa Unii Europejskiej w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości*, "Europejski Przegląd Sądowy" 2022, vol. 6, p. 7 footnote 31.

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provisions of a directive as a "sword" or a "shield", is addressed herein. The essential purpose of the publication is to answer the question whether, in the event of failure to implement a directive, an individual may, by relying on a directive in a case in the main proceedings in which another individual is the opposite party, seek to disapply national provisions that are contrary to the directive (which would, in essence, mean the use of the directive "as a shield"). The question must be answered on the basis of the most recent case law of the Court, including in particular case C-261/20 *Thelen Technopark*,[9] which seems to lead to the conclusion that it is impossible to use the directive horizontally not only as a "sword" (which would result in the application of the directive's provisions against one individual for the purpose of protecting the rights of another one) but also as a "shield" (against a national provision contravening the directive in order to remove it from the rationale of the ruling).[10]

The article is based on the application to this rule of direct effect of a doctrinal paradigm with a descriptive study. It uses methods of examining the case law of the Court of Justice and legal provisions, based on the literature assessment and examination for qualitative analysis.

FORMS OF PRIVATE ENFORCEMENT FACILITATING COMPLIANCE WITH AND FULL IMPLEMENTATION OF DIRECTIVES

Directives form an instrument of indirect legislation.[11] For this type of legislation, the law-making process is divided into two stages. The first stage consists in the adoption of the directive by EU institutions, and the second is related to the imposition on the Member States of the obligation to implement it[12] into the national legal orders, within the time limit specified in the directive. In particular, the implementation process each time is composed of the phases of adoption

[9] Judgment of the Court (Grand Chamber) of 18 January 2022, Case C-261/20, *Thelen Technopark Berlin GmbH v MN*, ECLI:EU:C:2022:33.

[10] Cf. P.V. Figueroa Regueiro, *Invocability of Substitution and Invocability of Exclusion: Bringing Legal Realism to the Current Developments of the Case-Law of "Horizontal" Direct Effect of Directives*, "Jean Monnet Working Paper" 2002, no. 7, p. 31.

[11] S. Prechal, *Directives in EC Law*, Oxford 2005, pp. 55–58.

[12] Implementation in the broader sense, as a complex and multifaceted process, comprises all the necessary measures that the Member States must take to comply with the obligation imposed by the Treaty in order to achieve the result envisaged by the directive within the time set. In other words, implementation involves the taking by national authorities of actions to ensure the conditions for the effective application and observance of EU law in the Member States. See A. Wróbel, B. Kurcz, *Komentarz do art. 288*, [in:] *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz*, vol. 3: *Art. 223–358*, eds. D. Kornobis-Romanowska, J. Łacny, Warszawa 2012.

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(transposition)[13] and application by national authorities.[14] The very stage of transposition of the directive, consisting in aligning the text of the national regulations with the EU model specified in the directive,[15] will not meet the prerequisites for correct implementation, if the practice of applying national law does not lead to the achievement of the objectives pursued by the directive. Therefore, a broader understanding of the "fulfilment" of EU law (the implementation process) also includes the stage of application (observance) the implementing acts by courts and other bodies of the Member States.[16] This stage is of a secondary nature as compared to the law-making phase. In the law application process, due to the implementation of a directive, its content should "remain for the national authorities applying the law a binding and superior interpretation model of acts of national law that have been adopted in order to implement the harmonization obligation".[17]

Getting back to the lawmaking phase, it should be emphasized that in order to ensure the correct transposition of a directive into national laws, the Member States are required to take appropriate measures to ensure the effectiveness of the directive's provisions in the national legal order. As a rule, this means the necessity to adopt new internal legal regulations that will ensure the validity of the provisions of the directive (the so-called positive obligation) or the amendment or repeal of the existing national regulations contravening the directive's norms (the so-called negative obligation).[18] The most important feature of this process is the change of the addressee of the directive's norms with the expiry of the time limit set for its implementation. The time limit for implementation, as defined in the directive itself, plays an extremely important role, as it basically separates the implementation phase

[13] Transposition is a stage of implementation of a directive which covers law-making activities of the Member State to ensure that the result stated by the directive is achieved. See *ibidem*. On the transposotion of directives, see (instead of many) J. Maśnicki, *Metody transpozycji dyrektyw*, "Europejski Przegląd Sądowy" 2017, vol. 8, p. 4 ff.; M. Schweitzer, W. Hummer, W. Obwexer, *Europarecht*, Wien 2007, p. 73.

[14] E. Całka, *Oznaczenia naturalnych wód mineralnych, wód źródlanych i wód stołowych. Studium z prawa Unii Europejskiej i prawa polskiego*, Warszawa 2019, pp. 21–22.

[15] As an example, see M. Dąbrowski, *Assessment of the Correct Implementation of Article 4 of Directive 2008/52/EC of 21 May 2008 on Some Aspects of Mediation in Civil and Commercial Matters in the Polish Legal System*, "Krytyka Prawa. Niezależne Studia nad Prawem" 2022, vol. 14(3), pp. 5–19.

[16] A. Kunkiel-Kryńska*, Implementacja dyrektyw opartych na zasadzie harmonizacji pełnej na przykładzie dyrektywy o nieuczciwych praktykach handlowych*, "Monitor Prawniczy" 2007, no. 18.

[17] See M. Kamiński, *Bezpośrednie i pośrednie stosowanie dyrektyw unijnych przez polskie sądy administracyjne*, "Przegląd Sądowy" 2011, no. 1, p. 24.

[18] Directives are characterised by their indirect effect. It consists in the fact that, in the Member States, a directive is binding only as to the "result to be achieved". Member States, as direct addressees of a directive, are generally free to choose the forms and means of attaining its objectives, but subject to compliance with the rules developed in the case law of the Court. See A. Wróbel, [in:] *Stosowanie prawa Unii Europejskiej przez sądy*, ed. A. Wróbel, Kraków 2005, p. 56 ff.

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in a broad sense from the directive execution phase, and marks the moment when the state's responsibility for the legal and factual status compliant with the directive begins. As it is known, directive norms are addressed to the Member States and are binding on them. However, after the time limit set for implementation, they should have an effect *erga omnes*. In other words, the norms of the directive should become binding not "for" the Member States but "within" the Member States.[19]

The above model approach to the process of transposition of directives, which by definition rules out their direct effect, is not always the case, because sometimes a Member State does not transpose a particular directive correctly or fails to transpose it at all. In such a situation, it is necessary to carry out private enforcement compliance facilitating compliance with and correct implementation of directives into national law by the courts (or administrative bodies[20]) of a given Member State. Such a review (private enforcement) is initiated by individuals within domestic proceedings in which they assert their rights.[21] Forms of private enforcement, the theoretical and legal basis of which is the primacy of EU law,[22] include: conforming (pro-EU) interpretation of national law, direct effect of directives, and Member State's liability for damages. These forms are mutually complementary.[23] According to the well-settled case law of the Court, the incorrect transposition or failure to transpose a directive leads to a conflict of the national law with the directive. However, before such a contradiction is found, it is the duty of the court of a Member State[24] to attempt to implement the directive using a conforming interpretation of

[19] A. Wróbel, B. Kurcz, op. cit.

[20] See judgment of the Court of 22 June 1989, Case 103/88, *Fratelli Costanzo SpA v Comune di Milano*, ECLI:EU:C:1989:256, points 30–31.

[21] These proceedings are a kind of so-called EU cases (a conventional term which is not a Treaty concept or a concept developed in the case law of the Court of Justice) in which national courts act as EU courts in the functional sense. The very concept of the "EU case" refers to judicial proceedings the facts of which fall within the temporal, personal and material scope of EU law. See D. Miąsik, M. Szwarc, *Stosowanie prawa Unii Europejskiej przez sędziów sądów powszechnych i prokuratorów*, Warszawa 2012, pp. 17–46.

[22] For the principle of primacy, instead of many, see E. Całka, *Zasada pierwszeństwa w prawie Unii Europejskiej. Wybrane problemy*, "Studia Iuridica Lublinensia" 2016, vol. 25(1), pp. 47–58. See also the most recent opinions of Polish scholars in the field: D. Miąsik, *Wkład SN RP w rozwój zasad prawa Unii Europejskiej – próba oceny na przykładzie pytań prejudycjalnych*, [in:] *In Varietate Concordia. Księga Jubileuszowa Profesora Ryszarda Skubisza*, Warszawa 2022, pp. 963–969; A. Sołtys, *Relacja zasadybezpośredniego skutku i zasady…*, pp. 4–16 and the literature cited therein.

[23] J. Maśnicki, *Bezpośredni skutek dyrektyw w relacjach triangularnych*, "Europejski Przegląd Sądowy" 2017, vol. 3, pp. 4–5 and the literature cited therein.

[24] National court is an EU court in the meaning that it is required to ensure that EU law is applied and adhered to in the national legal system. See order of the Court of 6 December 1990, Case C-2/88 Imm., *J.J. Zwartveld and Others*, ECLI:EU:C:1990:440, point 10. As part of this obligation, the court should ensure the necessary effectiveness of the provisions of EU law. Instead of many, see D. Miąsik, M. Szwarc, *op. cit.*, pp. 47–63.

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the provision of national law.[25] More specifically, it involves, in a situation where the national law norm seems to contravene the norm of the directive, an attempt to develop an interpretation of the national law which will be consistent as far as possible with the wording and objectives of the directive, to achieve the result set out herein.[26]

Only when it is not possible to apply a conforming interpretation of the provisions of national law, does the issue of the possible direct effect of the directive and the possibility of departing from the application of the provision of national law due to its inconsistency with the directive arises (which is discussed further on in the article).[27]

However, in a situation where a norm of national law contradicts a norm of EU law resulting from a provision of the directive (devoid of the feature of direct effectiveness), and this contradiction cannot be eliminated by means of a conforming interpretation, the normative basis for the decision of the national court should be the national law.[28] In such circumstances, where the directive cannot be attributed direct effect, individuals may apply – where appropriate – a claim for damages against the Member State concerned.[29]

THE PRINCIPLE OF DIRECT EFFECT OF DIRECTIVES. GENERAL QUESTIONS

In a situation where a directive is correctly implemented, the rights conferred by it on individuals are exercised and enforced not on under the directive itself, but on the basis of the national provisions that implement it. As has already been pointed

[25] E. Całka, *Oznaczenia naturalnych wód mineralnych…*, pp. 37–39 and the literature cited therein.

[26] Instead of many, see judgment of the Court (Grand Chamber) of 5 October 2004, joined cases C-397/01 to C-403/01, *Bernhard Pfeiffer* (C-397/01), *Wilhelm Roith* (C-398/01), *Albert Süß* (C-399/01), *Michael Winter* (C-400/01), *Klaus Nestvogel* (C-401/01), *Roswitha Zeller* (C-402/01) *and Matthias Döbele* (C-403/01) *v Deutsches Rotes Kreuz, Kreisverband Waldshut eV.*, ECLI:EU:C:2004:584 (hereinafter: joined cases C-397/01 to C-403/01 *Pfeiffer and Others*), point 113 and the Court of Justice judgments cited therein.

[27] See opinion of Advocate General Szpunar delivered on 15 July 2021, Case C-261/20, *Thelen Technopark Berlin GmbH v MN*, ECLI:EU:C:2021:620, point 30 and the Court of Justice judgments cited therein.

[28] R. Skubisz, *op. cit.*, p. 62.

[29] Instead of many, see judgment of the Court (Third Chamber) of 23 April 2009, joined cases C-378/07 to C-380/07, *Kiriaki Angelidaki and Others v Organismos Nomarchiakis Autodioikisis Rethymnis* (C-378/07), *Charikleia Giannoudi v Dimos Geropotamou* (C-379/07) *and Georgios Karabousanos and Sofoklis Michopoulos v Dimos Geropotamou* (C-380/07), ECLI:EU:C:2009:250, point 202 and the Court of Justice judgments cited therein.

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out, this is a model situation in which the direct effect of the directive should not take place. However, this principle is breached if the directive is not transposed at all or transposed incorrectly, once the implementation time limit has expired. In that case, individuals who could have claimed certain rights or benefits under the directive are deprived of their legal protection and of the possibility of exercising those rights in the absence of national legislation.[30] The Court of Justice tries in its case law to prevent such situations, in some cases, by attaching the attribute of direct effect to the provisions of directives, as a kind of "minimum guarantee" for the achievement of the objectives of the directive and the protection of the EU claims of individuals.[31] Nonetheless, the direct effect of directives is not an alternative to the obligation to implement EU law, but only in certain situations minimizes the consequences of the failure to correctly transpose the directive into national law.[32]

In view of the judgment in case 41/74 *Yvonne Van Duyn*, the Court essentially inferred from the binding force conferred on directives by Article 288 TFEU[33] that the provisions of directives could be directly effective. The Court also stated that, in certain situations, the direct effect of the provisions of directives is necessary to ensure the effectiveness of EU law.[34] The procedure under Article 267 TFEU for cooperation between the Court of Justice and the national courts with regard to requests for preliminary ruling is also relevant in this case.[35] The TFEU does not exclude directives from the scope of Article 267 TFEU. As a result, national courts may apply to the Court for interpretation or examination of the validity of the provisions of directives, which in turn may mean that in view of particular facts of a case involving an EU component, a national court will have to take into account not only the applicable national provisions but also the directive.[36]

According to the well-settled case law of the Court of Justice, provisions of EU law, may have direct effect in the legal orders of the Member States and may constitute a source of rights protected by national courts for individuals.[37] This position

[30] M. Szwarc-Kuczer, [in:] *Stosowanie prawa…*, p. 192.

[31] Judgment of the Court of 19 January 1982, Case 8/81, *Ursula Becker v Finanzamt Münster-Innenstadt*, ECLI:EU:C:1982:7, point 29.

[32] F. Becker, A. Campbell, *The Direct Effect of European Directives: Towards the Final Act?*, "Columbia Journal of European Law" 2017, vol. 13, p. 405.

[33] Judgment of the Court of 4 December 1974, Case 41/74, *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133, point 12.

[34] Judgment of the Court of 5 April 1979, Case 148/78, *Criminal proceedings against Tullio Ratti*, ECLI:EU:C:1979:110, point 21.

[35] Instead of many, see M. Taborowski, *Procedura orzeczeń wstępnych*, [in:] *Unia Europejska. Prawo instytucjonalne i gospodarcze*, ed. A. Łazowski, Warszawa 2005, pp. 473–561 and the literature cited therein.

[36] M. Szwarc-Kuczer, [in:] *Stosowanie prawa…*, p. 193.

[37] A. Sołtys, *Cechy i charakter prawa Unii Europejskiej*, [in:] *System Prawa Unii Europejskiej*, vol. 1: *Podstawy i źródła prawa Unii Europejskiej*, ed. S. Biernat, Warszawa 2020, pp. 222–232.

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has been conceptualised within the framework of a general definition according to which direct effect means that rules of Union law may be an autonomous source of rights for individuals, which may be relied upon before national authorities for their direct enforcement.[38] In other words, direct effect is essentially expressed in the fact that courts (and other authorities) of the Member States are obliged to apply, in their internal relations, the provisions of EU law by ensuring legal protection to those entitled to the rights conferred by those provisions, and those individuals may rely on them[39] directly.[40] Against the backdrop of the judgment in case 26/62 *Van Gend en Loos*,[41] the doctrine of Union law has further distinguished the criteria determining the direct effect of EU law norms. The norms capable of having direct effect must be: (1) sufficiently clear and precise; (2) unconditional; and (3) complete, i.e. their applicability must not depend on further action by the Union institutions or Member State authorities (directly effective norms do not confer discretion on these entities).[42]

Although the above concept of direct effect applies generally to all legally binding regulations of EU law,[43] it is understood in a peculiar way with regard to directives. As a rule, directives are characterised by a lack of horizontal direct effect, a concept which, as Advocate General Szpunar observes, "is used both to describe the absence of an effect consisting in rights and obligations being created for individuals and to describe the exclusion of the very applicability of a directive in a dispute between individuals".[44]

In view of the foregoing, for directives, the application of direct effect entails significant constraints, and an analysis of these constraints involves, first of all, a distinction between the direct effect of directives in terms of subject (distinguishing between vertical and horizontal levels) and object (taking into account the subjective and objective direct effect).

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[38] Eadem, *Relacja zasady…*, p. 5.

[39] R. Skubisz, *op. cit.*, p. 58.

[40] Directly, that is without the need to demand or expect that relevant national laws be issued (or repealed) through legislative means or in any other constitutional manner.

[41] Judgment of the Court of 5 February 1963, Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

[42] In more detail, instead of many, see M. Szpunar, *Bezpośredni skutek prawa wspólnotowego – jego istota oraz próba uporządkowania terminologii*, "Europejski Przegląd Sądowy" 2005, vol. 2, pp. 14–16; M. Domańska, *op. cit.*, pp. 248–251.

[43] For the direct effect in the context of specific types of EU legal acts, instead of many, see P. Craig, G. de Búrca, *EU Law*, *Text, Cases, and Materials*, Oxford 2020, pp. 217–240.

[44] Opinion of Advocate General Szpunar in case C-261/20 *Thelen Technopark*, point 21.

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VERTICAL AND HORIZONTAL RELATIONS

From the point of view of the subjective scope of the principle of direct effect of directives, it is essential to distinguish two types of relations: between an individual and the state (vertical relations) and between equal individual entities (horizontal relations). Taking into account the above division, in case 152/84 *M.H. Marshall 152/84*,[45] the Court of Justice clearly confirmed the possibility of an individual relying on a directly effective provision of the directive[46] against a member state (vertical plane).[47] The position of the Court, in which it rejects, under the so-called inversely vertical arrangement, the possibility of direct reliance on a directive by the state against a private entity in order to apply a national provision incompatible with the directive or to deny that entity the rights that the directive clearly and unconditionally grants to the entity.[48]

However, the issue of the direct effect of directives and their direct application by the authorities of the Member States in horizontal relations is much more complicated. Although in judgments such as in case 152/84 *M.H. Marshall*, in case C-91/92 *Paola Faccini Dori*, in joined cases C-397/01 to C-403/01 *Pfeiffer and Others*, and in case C-122/17 *Smith*[49] the Court of Justice ruled that a directive cannot, by itself, create obligations on the part of individuals and therefore may

[45] Judgment of the Court of 26 February 1986, Case 152/84, *M.H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1986:84.

[46] All the direct effect preconditions listed in Case 26/62 *van Gend en Loos* are to be used in this case.

[47] Case 152/84 *M.H. Marshall*, points 48 and 49. For more detail, see M. Szwarc-Kuczer, *Zasada bezpośredniej skuteczności prawa wspólnotowego – wprowadzenie i wyrok ETS z 26.02.1986 r. w sprawie 152/84 M.H. Marshall przeciwko Southampton and South-West Hampshire Area Health Autority (Teaching)*, "Europejski Przegląd Sądowy" 2007, vol. 5, p. 48. Both in the judgment in Case 152/84 *M.H. Marshall* and the subsequent case law, the Court expands direct effect thus understood by broadly defining the concept of "the state", which in practice results in classifying a particular relation as a vertical arrangement, not horizontal one. See judgment of the Court of 12 July 1990, Case C-188/89, *A. Foster and others v British Gas plc.*, ECLI:EU:C:1990:313, points 18–19 and the Court's case law referred to therein. See also the subsequent case law of the Court, especially judgment of the Court (Fifth Chamber) of 12 December 2013, Case C-425/12, *Portgás – Sociedade de Produção e Distribuição de Gás SA v Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território*, ECLI:EU:C:2013:829, points 23–24.

[48] Judgment of the Court of 19 January 1982, Case 8/81, *Ursula Becker v Finanzamt Münster-Innenstadt*, ECLI:EU:C:1982:7, point 24. See opinion of Advocate General Ruiz-Jarabo Colomer delivered on 13 February 2007, Case C-374/05, *Gintec International Import-Export GmbH v Verband Sozialer Wettbewerb eV.*, ECLI:EU:C:2007:93, point 54.

[49] Case 152/84 *M.H. Marshall*, point 48; judgment of the Court of 14 July 1994, Case C-91/92, *Paola Faccini Dori v Recreb Srl.*, ECLI:EU:C:1994:292, point 20; judgment of the Court of 5 April 1979, joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, point 108; judgment of the Court (Grand Chamber) of 7 August 2018, Case C-122/17, *David Smith v Patrick Meade and Others*, EU:C:2018:631, point 42.

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not be directly applied in relations between individuals (on a horizontal level), but from the point of view of the entire case law of the Court, its consistency in the matter in question leaves a lot to be desired. On the one hand, the Court denies that the provisions of directives have direct effect in relations between individuals, and on the other hand, in many judgments it directly rules, including in disputes between individuals, that national provisions contravening the directive should not be applied by national courts because of this contradiction.[50] Thus, in practice, the exclusion of direct horizontal effect of a directive does not mean that in a specific dispute between individuals it will be impossible to take into account the directive in such a way that it translates into the legal position of another entity. In its case law, the Court pointed out various situations in which such consideration may take place.[51]

The literature has formulated various concepts concerning the scope of application of the doctrine of direct effect of directives in the horizontal plane. While, according to the position of most authors, it was manifest that in disputes between individuals one should not derive directly from directives the rights that could be asserted against the other party,[52] it remained unclear whether it was possible in disputes between individuals to abandon the application of the provision the national law that supposed to be the rationale for the resolution of the case because of its inconsistency with the directive, without conferring on the individual any subjective right and a claim for his protection.

This problem was expressed as the debate around the model of direct effectiveness of directives based on the concepts of subjective and objective effect. In this context, the key issue seems to be the purpose for which, in a horizontal manner, individuals intend to rely on the directive. Indeed, this purpose may be related to the desire of an individual against another individual to use the provisions of the directive as a "sword" (which in fact corresponds to the scholarly subjective direct effect) or as a "shield", when the individual's purpose is "solely" to exclude the application of the national legislation which imposes on individual obligations towards other entities in breach of EU law[53] (in the sense of an objective direct effect).

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[50] As an example, see judgment of the Court of 12 March 1996, Case C-441/93, *Panagis Pafitis and others v Trapeza Kentrikis Ellados A.E. and others*, ECLI:EU:C:1996:92, point 1 of the operative part; judgment of the Court (First Chamber) of 30 April 1998, Case C-215/97, *Barbara Bellone v Yokohama SpA*, ECLI:EU:C:1998:189. Instead of many, see also D. Miąsik, *op. cit.*, p. 964.

[51] For a synthetic compilation of situations of that type, see opinion of Advocate General Szpunar in case C-261/20 *Thelen Technopark*, points 24–28.

[52] The liability for granting such rights is borne by the legislative authorities of member states, which consequently means that individuals must base their rights on the national provisions implementing the directive. Instead of many, see P.V Figueroa Regueiro, *op. cit.*, p. 31.

[53] "In short, in these situations the directive will relieve from obligations, but will not give rise to rights" (*ibidem*, p. 31).

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THE ACADEMIC CONCEPT OF DIRECT EFFECT OF THE PROVISIONS OF DIRECTIVES ACTING "AS A SWORD" OR "AS A SHIELD" IN THE CONTEXT OF THE CONCEPTS OF SUBJECTIVE AND OBJECTIVE DIRECT EFFECT

The principle of direct effect of the provisions of directives is not of a normative nature, so it is difficult to determine its actual meaning. In this situation, while not being entirely precise, the academic concept of direct effect in a subjective and objective sense could prove helpful. The main aim of devising this concept was to help understand the principle of direct effect and its implications for national courts and for decisions made in specific factual states.[54]

The subjective approach, developed in the classical doctrine of direct effect, requires that directly effective provisions of EU law (directives) confer on the party to the proceedings certain rights which the national court is required to protect. According to that concept, rooted in the German legal tradition, in particular the Schutznorm principle,[55] the directly effective provisions of a directive must be of a subjective character, in the sense that an individual must derive their rights directly from them, and the national courts must provide protection for these rights. A consequence of the subjective direct effect of directives is the so-called substitution effect.

While some authors restrict the concept of direct effect only to the situation of creating rights and obligations by a norm of a directive of a subjective nature, others understand the concept more broadly – as comprising any possibility of applying a norm of EU law (directive) by a national body.[56] They postulate the admissibility of relying on EU law not so much for the implementation of rights as for the purpose of achieving other procedural effects. That broader approach includes the so-called objective direct effect, where an individual may rely on a provision of a directive with an aim to achieve the result of non-application of national provisions contravening the directive. The direct effect thus understood causes the so-called blocking effect. That effect takes place where the national court, having found that the national provisions are contrary to the directive, is obliged to refuse to apply them.

The concept of dividing the direct effect of directives into direct subjective effect and direct objective effect is often associated by scholars in the field with the "ability to plead substitution" (French: *invocabilitéde substitution*) and "abil-

[54] M. Szwarc-Kuczer, [in:] *Stosowanie prawa…*, p. 206.

[55] Instead of many, see M. Ruffert, *Rights and Remedies in European Community Law: A Comparative View*, "Common Market Law Review" 1997, vol. 34(2), pp. 307–336.

[56] M. Szpunar, *Bezpośredni skutek prawa wspólnotowego…*, p. 6, 9.

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ity to plead exclusion" (French: *invocabilitéd'exclusion*) of EU law.[57] While the former concept relates to a model for invoking (application) of directives based on the fundamental importance of the principle of direct effect, the latter concept is based primarily on the fundamental importance of the principle of the primacy of Union law.[58] According to the opinion of Advocate General Léger in case C-287/98 *Grand Duchy*, "ability to plead substitution refers to the ability of a party to rely on a directive before a national court, instead of a national instrument which is non-existent or which does not comply with the directive, in order to enjoy a right established by that directive".[59] Positive application of a directive means, in fact, the application of a directly effective provision of a directive under which an individual claims a specific right. Hence, there is a close correlation between the direct effect of a directive in the subjective sense and the positive application of a directive.[60]

On the other hand, according to the scholarly perspective on the negative effect of a directive, it consists in relying on a provision of a directive only with the aim to preclude the application of conflicting national provisions.[61] It is noted that the effect of excluding national provisions which are incompatible with the directive is closely linked to the principle of primacy and independent of the direct effect of the directive, which in this case is merely a model for the review.[62] Although the negative application of a directive may be associated with the direct effect of a directive in the objective sense, they differ significantly. In objective terms, direct effect means that the national court is required, under a directive provision that is capable of having direct effect, to disapply provisions of national law which are inconsistent with it (that is, a provision of the directive which acts as a "norm relevant for the case"). On the other hand, the proponents advocating the negative application of directives in disputes between private parties point out that the provision of a directive against which the provision of national law is confronted does not constitute legal grounds for a judicial decision, but merely a model for the decision according to which the provision of national law is assessed (the provision

[57] Instead of many, see idem, *Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego*, Warszawa 2008, pp. 136–137; P. Brzeziński, *Stosowanie pozytywne i negatywne dyrektywy unijnej pomiędzy podmiotowymi prywatnymi*, "Europejski Przegląd Sądowy" 2010, vol. 8, p. 11.

[58] Especially in the context of ability to plead exclusion, see A. Sołtys, *Relacja zasady…*, p. 8.

[59] Opinion of Advocate General Léger delivered on 11 January 2000, Case C-287/98, *Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster*, ECLI:EU:C:2000:3, points 57–58 and the literature referred to therein.

[60] P. Brzeziński, *op. cit.*, p. 11.

[61] As noted by Advocate General Szpunar in the opinion delivered on 15 July 2021 (Case C-261/20 *Thelen Technopark Berlin GmbH v MN*, point 59), invoking the directive to exclude a provision of national law (which is tantamount to the directive acting "as a shield") is in contrast to invoking the directive to substitute a provision of the directive for the rationale for the ruling.

[62] P.V. Figueroa Regueiro, *op. cit.*, p. 28.

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of the directive acts as a "standard for judicial review").[63] In this case, the effect of the exclusion of a norm of national law is not a consequence of the direct effect of the directive (the norms of the directive do not have to meet the "traditional" criteria of direct effect, i.e. clarity, precision, unconditionality and completeness[64]) since the principle of the primacy of EU law applies here.[65]

In view of the difficulties in establishing consistent definitions of these concepts, the scholarly opinion attempts to vividly "explain" the application of the directive provisions that are capable of having direct effect. It has been pointed out that, in the subjective sense, such provisions act "as a sword" to protect the rights of the individual. On the other hand, in objective terms, directly effective provisions constitute a "shield" which protects the individual from the judicial application of provisions of national law which are contrary to the directive.[66]

In view of the foregoing, in the context of the theory of the use of the directive provisions as a "sword" and "shield", it is beyond doubt that, after the expiry of the period prescribed for the implementation of the directive into national law, where the directive ha not been transposed or has been transposed incorrectly, its provisions can only be used by the individual both as a "shield" against contravening national rules and as a "sword" to assert certain rights.[67] On the other hand, on the horizontal plane, it is possible, at most, to consider the possibility of only using the directive as a "shield", as Advocate General Szpunar did in case C-261/20 *Thelen Technopark*.[68]

At this point, however, it should be stressed that the concept of using the provisions of the directive as a "sword" or "shield", like the other theories relating to the scope of the doctrine of direct effect discussed above, has not been clearly confirmed by the case law of the Court of Justice. They remain only in the field of academic analysis and are not fully consistent with the case law of the Court of Justice. However, they were accepted by some advocates general,[69] which enabled the views in question to be directly confronted with the position of the Court of Justice.

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[63] Instead of many, see S. Prechal, *Directives…*, p. 241; eadem, *Does Direct Effect Still Matter?*, "Common Market Law Review" 2000, vol. 37(5), p. 1053.

[64] A. Sołtys, *Relacja zasady…*, p. 8 and the literature cited therein.

[65] P. Brzeziński, *op. cit.*, p. 12. See also statements of scholars in the field on the ECJ judgments, in which the theory of negative and positive application of EU law is challenged. Instead of many, see P. Craig, G. de Búrca, *op. cit.*, p. 309.

[66] Cf. K. Lenaerts, D. Arts, *Procedural Law of the European Union*, London 1999, p. 82; M. Lenz, D. Sif Tynes, L. Young, *Horizontal What? Back to Basics*, "European Law Review" 2000, vol. 25, p. 516.

[67] Cf. M. Szwarc-Kuczer, [in:] *Stosowanie prawa…*, p. 202.

[68] Opinion of Advocate General Szpunar in case C-261/20 *Thelen Technopark*, points 51–63.

[69] Opinion of Advocate General Saggio delivered on 16 December 1999, joined cases C-240/98 to C-244/98, *Océano Grupo Editorial SA and Salvat Editores SA v Rocío Murciano Quintero and Others*, ECLI:EU:C:1999:620, points 30, 37–38; opinion of Advocate General Alber delivered on

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JUDGMENT OF THE COURT OF JUSTICE IN CASE C-261/20 *THELEN TECHNOPARK* – RESOLUTION OF THE QUESTION OF THE USE OF A DIRECTIVE AS A "SHIELD" IN HORIZONTAL RELATIONS

One of the most recent judgments in which the Court of Justice has had an opportunity to rule on the direct effect of directives is the judgment in case C-261/20 *Thelen Technopark*.[70] In the case, the Court, sitting as the Grand Chamber, issued a preliminary ruling requested by the Bundesgerichtshof – the German referring court – in a dispute between two individuals: *Thelen Technopark Berlin GmbH* (*Thelen Technopark*) and engineer MN. The latter had agreed to provide to Thelen Technopark engineering services for the needs of a construction site in Berlin. In the contract, the parties agreed that MN would receive a lump-sum consideration of EUR 55,025. Against invoices issued by MN, Thelen Technopark paid MN a total gross amount of EUR 55,395.92. One year later, MN terminated the contract and issued a final invoice for an amount in excess of that agreed by the parties in the contract. MN made the final settlement on the basis of the minimum rates under the German Decree on fees for services provided by architects and engineers (German: *Honorarordnung für Architekten und Ingenieure*, HOAI).[71] Subsequently, MN, taking into account the payments already made, sued Thelen Technopark for payment of the remainder of the remuneration due amounting to a gross EUR 102,934.59.

Having partly lost the case in the lower courts, Thelen Technopark has brought an appeal on a point of law (revision) before the Bundesgerichtshof. That court, in its reference for a preliminary ruling, recalled that the Court of Justice in earlier

18 January 2000, Case C-343/98, *Renato Collino and Luisella Chiappero v. Telecom Italia SpA*, EU:C:2000:23, point 31; opinion of Advocate General Ruiz-Jarabo Colomer delivered on 6 May 2003, joined cases C-397/01 to C-403/01, *Bernhard Pfeiffer* (C-397/01), *Wilhelm Roith* (C-398/01), *Albert Süß* (C-399/01), *Michael Winter* (C-400/01), *Klaus Nestvogel* (C-401/01), *Roswitha Zeller* (C-402/01) *and Matthias Döbele* (C-403/01) *v Deutsches Rotes Kreuz, Kreisverband Waldshut eV.*, EU:C:2003:245, point 58. See also statements by those advocates general who are in favour of recognising the direct effect of the directive in horizontal relations in order to avoid differentiation between employers and other entities depending on whether or not they can be attributed the status of the state or its emanation: opinion of Advocate General Van Gerven delivered on 26 January 1993, C-271/91, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority*, ECLI:EU:C:1993:30, point 12; opinion of Advocate General Jacobs delivered on 27 January 1994, C-316/93, *Nicole Vaneetveld v SA Le Foyer and SA Le Foyer v Fédération des mutualités socialistes et syndicales de la province de Liège*, ECLI:EU:C:1994:32, point 21.

[70] Judgment in case C-261/20 *Thelen Technopark*.

[71] German: Verordnung über die Honorare für Architekten- und Ingenieurleistungen (Honorarordnung für Architekten und Ingenieure – HOAI) of 10 July 2013 (BGBl. 2013 I, p. 2276).

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case law[72] had ruled on the inconsistency of HOAI with Directive 2006/123/EC.[73] In particular, according to the Court, Directive 2006/123/EC precludes national legislation which prohibits the agreement in contracts with architects or engineers of fees which are lower than the minimum rates laid down in national legislation (*in casu* HOAI). In the light of the Court's cited case law, the provisions of Directive 2006/123/EC are capable of having direct effect, given they are sufficiently precise, clear and unconditional.

In those circumstances, the Bundesgerichtshof requested the Court of Justice for preliminary ruling on the question of whether, under EU law, a national court hearing a dispute between individuals is required to disapply a provision of national law from which the claimant derives its claim in the main proceedings, where that provision is contrary to the directive, namely Directive 2006/123/EC. As pointed out by the referring court, that question relates to a situation in which it is not possible to carry out a conforming interpretation of national provisions.

Due to the fact that the Bundesgerichtshof's doubts are rooted in the classic problem of EU law, namely the horizontal application of the provisions of directives by national courts after the time limit for its transposition has unsuccessfully expired, Advocate General Szpunar, when presenting to the Court a proposal for the decision in the case, addressed primarily the concept of potential use of the directive "as a shield", doing so from the perspective of the individual relying on the provisions of the directive. First of all, according to the advocate general, it should not be possible for an individual (*in casu Thelen Technopark*), in the national proceedings, to rely on a provision of the directive in order to use the directive as a "shield" in a situation where another entity wants an obligation provided for in national law provisions contravening the directive be imposed on the former. In this case, as pointed out by the Court of Justice in the judgment in this case, the inclusion of the directive would worsen the situation of the other party – that is, MN, who in practice would be deprived of its right, under national law, to claim higher amounts than those agreed in the contract and corresponding to the minimum prescribed by national regulations.[74] Thus, as vividly explained by the advocate general "in defending against an action, the customer raises his 'shield' with one hand, but at the same time thrusts his 'sword' with the other, in order to impose on the service provider the obligation to recognise that the customer's liability towards

[72] Judgment of the Court (Fourth Chamber) of 4 July 2019, Case C-377/17, *European Commission v Federal Republic of Germany*, ECLI:EU:C:2019:562; order of the Court (Ninth Chamber) of 6 February 2020, Case C-137/18, *Hapeg dresden gmbh v Bayrische Straße 6–8 GmbH & Co. KG*, ECLI:EU:C:2020:84.

[73] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376/36, 27.12.2006).

[74] Judgment in case C-261/20 *Thelen Technopark*, point 36.

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him can be met by the payment of an amount lower than the minimum rate".[75] This is in fact about "two sides of the medal" because "determining whether a directive sets out an obligation which a party wishes to impose on the other party or merely a prohibition on imposing an obligation arising from national law depends on the procedural setting and the perspective adopted, and therefore this distinction is not based on an objective criterion".[76] Above all, however, "the idea that a directive as such would have different effects in horizontal relations depending on whether it was used as a 'sword' or as a 'shield' is not, in my view, supported by the wording of the third paragraph of Article 288 TFEU. That provision does not entail any power to annul or render ineffective national provisions which are contrary to the directive in horizontal relations".[77] It seems that the concept of distinguishing the effects of the provisions of a directive horizontally depending on whether they result from the use of the directive "as a sword" or "as a shield" was finally rejected in joined cases C-397/01 to C-403/01 *Pfeiffer and Others*.[78]

Later in his line of argument, the advocate general has addressed the problem of the directive potentially acting as a "shield" from a slightly different perspective, namely from the point of view of the national body deciding the case. In this context, the advocate general rejected the possibility of relying on a directive in horizontal relationships, which would boil down in the process of judicial application of law to removal of the national provision contravening the directive from the rationale of the ruling. In particular, the advocate general challenged the appropriateness of invoking the provisions of the directive in order to exclude (ignore) a conflicting provision of national law (which, in turn, due to the character of the provisions of Directive 2006/123/EC, which are precise, clear and unconditional, would entail attributing to those provisions an objective direct effect).[79] In his conclusion, the advocate general took the view that "the provision of the third paragraph of Article 288 TFEU and the case law of the Court of Justice do not provide any grounds for assuming that the rights and obligations of individuals may at all be determined in a binding manner by taking account of the provision of a directive 'as such' when determining the legal grounds for a ruling that resolves a dispute between individuals. In this context, it should be recognised that when determining the

[75] Opinion of Advocate General Szpunar in case C-261/20 *Thelen Technopark*, point 57.

[76] *Ibidem*, points 56–58.

[77] *Ibidem*, point 55.

[78] See *ibidem*, point 61. In the judgment in joined cases C-397/01 to C-403/01 (*Pfeiffer and Others*, point 109), the Court ruled that "even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties". Cf. judgment in case C-261/20 *Thelen Technopark*, point 32.

[79] That would be a situation contrary to the option of using a directive as a "sword" to substitute its provision in the rationale of the ruling, as a consequence of the subjective direct effect of the directive.

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legal grounds for that ruling, it is irrelevant whether a provision of national law is excluded ['ability to plead exclusion'], or substituted by the provision of a directive or whether the provision of a directive is used to supplement the rationale for the ruling ['ability to plead substitution'] (…) there are no grounds for assuming that a directive has direct effect in horizontal relations if the result of its inclusion is merely to exclude the application of a provision of national law".[80]

It should be pointed out that, although Advocate General Szpunar has postulated to reject the possibility of recognising the direct effect of a directive in the horizontal arrangement, when the directive is relied on as a "shield" in order to exclude the application of the national law of a Member State contravening the directive, he has ultimately, in relation to the case in the main proceedings, supported the acceptance of the obligation of the national court to disapply the national legislation that is inconsistent with the directly effective provisions of Directive 2006/123/EC. In particular, according to the advocate general, the need to disapply the national law setting minimum rates for service providers in a manner contrary to Directive 2006/123/EC is justified to the extent necessary to respect the fundamental right, enshrined in Article 16 of the Charter of Fundamental Rights (the Charter),[81] in the form of freedom of contract, more specifically the parties' right to set the price,[82] and insofar as the provisions of Directive 2006/123/EC give concrete expression to the freedom of establishment enshrined in Article 49 TFEU.[83]

The Court of Justice did not rule in the operative part of the judgment in case C-261/20 *Thelen Technopark* as proposed by the advocate general, but agreed with him as regards questioning the possibility of using the provisions of a directive "as a shield". In particular, according to the Court, "a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against that individual before a national court. In accordance with the third paragraph of Article 288 TFEU, the binding nature of a directive, which constitutes the basis for the possibility of relying on it, exists only in relation to 'each Member State to

[80] Opinion of Advocate General Szpunar in case C-261/20 *Thelen Technopark*, point 63.

[81] Article 16 of the Charter is a "self-executing" provision., i.e. sufficient to independently grant individuals the right that may be invoked in disputes with other individuals. See opinion of Advocate General Szpunar in case C-261/20 *Thelen Technopark*, point 93.

[82] See judgment of the Court (Grand Chamber) of 19 January 2010, Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG*., ECLI:EU:C:2010:21; judgment of the Court (Grand Chamber) of 7 August 2018, Case C-122/17, *David Smith v Patrick Meade and Others*, EU:C:2018:631; judgment of the Court (Grand Chamber) of 6 November 2018, joined cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871; judgment of the Court (Grand Chamber) of 22 January 2019, Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, ECLI:EU:C:2019:43. For the interpretation of the general principles of EU law, instead of many, see A. Kalisz, [in:] *System Prawa Unii Europejskiej*, vol. 3: *Wykładnia prawa Unii Europejskiej*, ed. L. Leszczyński, Warszawa 2019, pp. 217–220.

[83] Opinion of Advocate General Szpunar in case C-261/20 *Thelen Technopark*, point 127.

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which it is addressed'; the European Union has the power to enact, in a general and abstract manner, obligations for individuals with immediate effect only where it is empowered to adopt regulations. Therefore, even a clear, precise and unconditional provision of a directive does not allow a national court to disapply a provision of its national law which conflicts with it (…) a national court is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to a provision of EU law if the latter provision does not have direct effect".[84]

Thus, the Court of Justice, by referring to the basic features of EU law, and in particular the nature and legal effects of directives that distinguish them from regulations, has finally resolved the question of the direct effect of directives in horizontal relations. According to the Court, it is true that the general principles of EU law, first of all the principle of primacy, impose on all Member States' authorities the obligation to ensure the full effectiveness of the rules of EU law by disapplying, where necessary, of conflicting national provisions. However, the possibility of such a refusal to apply national rules is limited in the case of directives, since directives may not have the effect of creating rights and obligations on the part of individuals and may not be relied on in a dispute between individuals in order to disapply the national law contravening the directive.

Although in the judgment in case C-261/20 *Thelen Technopark*, the Court did not refer directly to the concept of recognising the effectiveness of directives used as a "shield" not as a "sword", but – given the ruling questioning the possibility of disapplication of contravening national norms only on the basis of the norms of the directive – it should be considered that the judgment discussed unequivocally rejects the above-mentioned concept. At the same time, it goes in line with the earlier case law of the Court (see judgment in case C-573/17 *Popławski II*[85]), which questioned the concept based on the distinction between positive and negative application (ability to plead substitution and ability to plead exclusion) of EU law, and thus distinguishing between the use of the provisions of the directive as a "sword" and as a "shield".

Thus, in the light of the recent case law of the Court of Justice, the idea that a directive as such would have different horizontal effects depending on whether it is used as a "sword" or as a "shield" is not viable. It follows from the case law of the Court that it is strictly forbidden to draw legal consequences solely under the norms of directives, either in the form of rights or obligations of individuals in horizontal relations. Due to the fact that the Court clearly supports the position

[84] Judgment in case C-261/20 *Thelen Technopark*, points 32–33.

[85] See judgment of the Court (Grand Chamber) of 24 June 2019, Case C-573/17, *Criminal proceedings v Daniel Adam Popławski*, ECLI:EU:C:2019:530, point 68 and the case law of the Court referred to therein, points 64–67. This judgment was issued regarding framework decisions, the legal structure of which is similar to that of directives.

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that a directive may not be relied upon in a dispute between individuals in order to exclude the application of the member state's regulation contrary to that directive, the academic postulate of using the provisions of the directive as a "shield" loses, in fact, its validity.

It should be noted at this point that the above-mentioned exclusion of the horizontal effect of directives also means an increase in the role of forms of private enforcement facilitating compliance with and correct implementation of directives. In particular, the importance of the obligation of conforming interpretation, and where such an interpretation is impossible (as is the case in the main proceedings in Thelen Technopark) the member state's liability for damages, grows. In the latter aspect, it is worth noting that in the judgment in case C-261/20 *Thelen Technopark* the Court has strengthened the existing established case law, according to which the party harmed as a result of non-compliance of national law with EU law may claim compensation for the damage caused by the said inconsistency.[86]

Finally, in the concluding observations on the judgment concerned, it should be noted that by rejecting the possibility of using a directive as a "shield" in a dispute between private parties in order to justify the refusal to apply national law contravening the directive, the Court, as regards the factual circumstances resulting from the order for reference, did not find grounds to disapply the provisions of national law due to the need to respect a general principle of EU law or a treaty norm specified in the directive.[87]

CONCLUSIONS

According to the case law of the Court of Justice, the principle of direct effect is one of the general principles of EU law which characterise this law and define the relationship between it and the national law of the Member States. Together with the principle of primacy, it is of fundamental importance for clarifying the mechanisms of application of EU regulations in national legal orders. However, it is limited by some EU legislation, in particular directives.

The direct effect of directives in horizontal relations has become a controversial issue among legal scholars and practitioners. The conceptualisation of the issue found its expression in subjective and objective approaches to the direct effect of directives that were not transposed or that were incorrectly transposed into the national legal order. The theory which proposes that the direct effect of directives be recognised in the horizontal arrangement, formulated in response to postulates of

[86] Judgment in case C-261/20 *Thelen Technopark*, points 41–48 and the case law referred to therein.

[87] *Ibidem*, points 52–54.

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some scholars in the field, supported by the arguments of certain advocates general, is based on the distinction between situations of the use of a directive as a "sword" (subjective effect), and cases of the use of a directive as a "shield" (objective effect). This distinction allows proponents of the concept to recognise the possibility for individuals to use a directive as a "shield" against national provisions contravening it in order to achieve certain procedural effects in proceedings before national courts where the time limit for implementation of the directive has expired without effect.

However, the concept allowing an individual to use a directive "only as a shield" and not as a "sword" (against another individual) in order to assert one's rights under the directive has not been confirmed by the recent case law of the Court of Justice. In particular, in the judgment in case C-261/20 *Thelen Technopark*, the Court ruled against the postulate of recognising the objective direct effect of directives in horizontal relations, which, while manifesting itself in the possibility of using the directive as a "shield", implies an obligation on the national court to disapply national provisions contravening the norms of the directive. In the light of the judgment in case C-261/20 *Thelen Technopark*, the principle that a directive may have an exclusionary effect is applicable only where the provisions of a directive have the attribute of direct effect, which, according to the previous case law of the Court, occurs in essence only in the vertical arrangement.

The judgment in case C-261/20 *Thelen Technopark* goes in line with the case law of the Court of Justice in joined cases C-397/01 to C-403/01 *Pfeiffer and Others* and more recent case law on the effect of directives, in which the Court, although not explicitly, has clearly questioned, in the light of the Court's arguments, the possibility for an individual to use a directive as a "shield" in national proceedings where another individual wants that an obligation under national provisions contravening the directive be imposed. Thus, in the light of the recent case law of the Court, there are no grounds to assume that a directive has direct effect in the horizontal arrangement, because such a legal act as a directive may not have the effect of creating rights and obligations on the part of individuals, and it may not be relied on in a dispute between individuals in order to justify a refusal to apply national law contravening the directive. As a consequence, a national court which is hearing a dispute between individuals and is unable to carry out conforming interpretation, must not, when establishing the legal grounds for its decision, solely on the basis of a directive, disapply the national provision contravening the directive.

In view of the above, the concept proposing to distinguish between the effects of a directive in the horizontal arrangement according to whether they result from the use of the directive either "as a sword" or "as a shield", even if the provisions of the unimplemented directive are precise, clear and unconditional, in fact loses its sense due to the lack of usefulness.

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ABSTRAKT

Niniejsze opracowanie o charakterze naukowo-badawczym dotyczy jednej z ogólnych zasad prawa Unii Europejskiej, jaką jest reguła bezpośredniego skutku. Publikacja stanowi wkład do trwającej od dawna dyskusji na temat bezpośredniego skutku dyrektyw jako aktów prawa wtórnego Unii Europejskiej. Głównym celem artykułu jest przybliżenie problematyki stosowania przepisów dyrektyw w kontekście stosunków horyzontalnych. Problematyka ta ma fundamentalne znaczenie dla wyjaśnienienia mechanizmów bezpośredniego stosowania dyrektyw, które nie zostały prawidłowo implmentowane do krajowego porządku prawnego. Mimo że we wcześniejszym orzecznictwie Trybunał Sprawiedliwości zasadniczo opowiedział się za odrzuceniem koncepcji bezpośredniego skutku dyrektyw w płaszczyźnie horyzontalnej, przedmiotowe zagadnienie – ze względu na jego złożoność – ponownie było rozpatrywane w jednym z najnowszych postępowań toczących się w trybie prejudycjalnym – sprawie C-261/20 *Thelen Technopark*. Odnosząc się do tego wyroku, autorka poddaje analizie możliwość wykorzystania dyrektywy jako „tarczy" w procesie sądowego stosowania prawa w celu eliminacji z podstawy rozstrzygnięcia przepisu prawa krajowego sprzecznego z dyrektywą. W szczególności chodzi o możliwość takiego działania dyrektywy w relacjach horyzontalnych, które sprowadza się do wyłączenia stosowania niezgodnego z nią przepisu prawa krajowego. Problematyka ewentualnego wykorzystania dyrektywy jako „tarczy" jest rozpatrywana również z nieco innej perspektywy, mianowicie z punktu widzenia jednostki i możliwości powołania się przez nią na dyrektywę w postępowaniu krajowym w sytuacji, gdy inna jednostka chce doprowadzić do nałożenia na nią obowiązku przewidzianego przepisami prawa krajowego sprzecznymi z dyrektywą. Problem ten, jak można argumentować, ostatecznie rozstrzyga Trybunał Sprawiedliwości w sprawie C-261/20 *Thelen Technopark*, orzekając, że sąd krajowy rozpoznający spór między jednostkami o roszczenie wywiedzione z przepisu krajowego sprzecznego z dyrektywą nie jest zobowiązany odstąpić od stosowania tego przepisu wyłącznie na podstawie prawa Unii Europejskiej.

Słowa kluczowe: prawo Unii Europejskiej; bezpośredni skutek dyrektywy; skutek działania dyrektywy w relacjach horyzontalnych; subiektywny i obiektywny skutek bezpośredni; stosowanie przepisów krajowych sprzecznych z dyrektywą