# Editorial

## Convulsive Direct Effect?

In spite of overflowing case law and an incessant scholarly debate, the doctrine of direct effect still delivers fresh surprises. The last in time is a mysterious tripartite statement included in *Thelen Technopark* ECLI:EU:C:2022:33 (commented by J Lindeboom, 'Thelen Technopark and the Legal Effects of the Services Directive in Purely Internal and Horizontal Disputes' European Papers (European Forum Insight of 11 June 2022) www.europeanpapers.eu 305).

In para. 32, the Court of justice seems to plainly follow the line of the classical doctrine by saying that "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 art. 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 which it is addressed".

The subsequent point 33 seems to draw the logical consequence of this assumption, namely that "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".

The imperativeness of both the assumption and the consequence is soothed by what, at first reading, seems an inadvertent saving clause: "of itself". But the meaning of this clause is clarified in the last passage of para. 33: "without prejudice, however, to the possibility, for that (national) court, or for any competent national administrative authority, to disapply, on the basis of domestic law, any provision of national law which is contrary to a provision of EU law that does not have such effect".

This passage is, to the knowledge of the current writer, unprecedented in case law, even though, in hindsight, one could speculate that the ground was prepared by a less explicit passage in *Poplawski* ECLI:EU:C:2019:530 para. 68. Here the Court said that "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".

Equally unprecedented might be its far-reaching implications. The of-itself-clause makes it clear that the *disapplication* (what a terrible neologism!) of domestic law contrary to directives not having a direct effect is neither based on EU law nor on domestic law, but on a combination between them. The most obvious situation seems to be the qualification of a national law contrary to an unimplemented directive as unconstitutional. There would


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be no need to refer to the doctrine of direct effect for a national court to disapply a provision of domestic law for reasons unrelated to its contrariness to an EU directive.

If this reading of *Thelen Technopark* is correct, several technical issues arise. How the premise of the binding nature of a directive for Member States (MS) only could be reconciled with the power of a national court to impose obligations upon individuals flowing from the directive, even if indirectly used as a standard of legality for national law? Which domestic law, other than that designed to implement a directive, could produce this miraculous effect?

The doctrine of direct effect is not, or not only, a logic construct. It is a complex doctrine, whose coherence is continuously challenged by preferences and ideologies about the relationship between legal orders.

The idea that a treaty can impose on its parties an obligation to consider the treaty provisions as having a direct effect is by no means a novelty. In the case of the PCJI *Jurisdiction of the Courts of Danzig* (Advisory Opinion) [3 March 1928], paras 17–18, the PCIJ famously said that "it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts". This conception tends to highlight the autonomy of the international legal order, which could determine how its obligations must be implemented in the domestic orders. Of course, absent a determination by international law, each national order remains free to implement international law based on its constitutional requirements.

The doctrine of direct effect in the European legal order was aimed at pursuing the same objective, namely to ensure the independence of European law from the constitutional systems of implementation of the MS. In *Van Gen den Loos* ECLI:EU:C:1963:1, in response to an objection raised by the governments of the Netherlands and of Belgium, namely that "the reference relate[d] not to the interpretation but to the application of the treaty in the context of the constitutional law of the Netherlands", the Court famously said that "the court is not asked to adjudicate upon the application of the treaty according to the principles of the national law of the Netherlands, which remains the concern of the national courts, but is asked [...] only to interpret the scope of article 12 of the said treaty within the context of community law and with reference to its effect on individuals".

Whereas both the PCIJ and the CJEU claimed that a treaty can determine the direct effect of its substantive obligations, the two courts differed on a matter of principle. In the view of the PCIJ, direct effects in *foro domestico* should be based on the intent of the parties. In the opinion of the CJUE, direct effects of European law should rather be deduced from "the spirit, the general scheme and the wording" of the treaties' provisions: not exactly a model of deference toward the "lords" of the founding treaties.

Not only was the doctrine of the direct effect conceived of by the Court as independent from the intent of the MS. This disconnection was precisely aimed at enforcing European law despite the reluctance and even against the will of the MS. The apex of this

tendency was perhaps reached in the long fight engaged by the Court to impose the implementation of directives. In *Ratti* ECLI:EU:C:1979:110, the Court clarified that "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".

The importance of *Ratti* in the development of the doctrine of direct effect can be hardly overshadowed. *Ratti* definitively upheld not only the verticality of the direct effects of directives but also their unidirectional character under which, in vertical relations, only individuals can invoke the direct effect flowing from directive to their benefit and the detriment of the uncompliant MS. By doing so, *Ratti* definitively transformed direct effects from a doctrine on the relations between legal orders in a constitutional doctrine on the relationship between individuals and MS under in the new order created by the founding treaties.

The logical corollary is that States are prevented from inverting the directionality of the effect of directives. In a conception of direct effect as a constitutional doctrine governing the relationship between MS and individuals, the enhancement of the effectiveness of directives at the expense of individuals will paradoxically upset the normative balance inherent in the assumption that the main aim of the doctrine of direct effect is to protect individuals *vis-à-vis* the uncompliant MS.

*Thelen Technopark*, despite its unassuming tone, has the potential to subvert the constitutional dimension of the doctrine of direct effect. If national judges had the power, based on national law, to disapply domestic provisions contrary to a directive which, "of itself", could not produce such effect, the very essence of the unidirectionality of the direct effects of directive is circumvented.

The doctrine of direct effect is controversial. It was built on the basis of a Hegelian methodology, based on claims and counterclaims to be progressively composed in a legal doctrine, which, by the way, is not entirely coherent. Over the years, the Court of justice, the custodian of this orphic mystery, attempted to adjust some of the most evident backlashes of the doctrine of direct effect, not always felicitously (for recent criticism see M Dougan, 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy' (2007) 44 CMLRev 931; L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives: Casting Light on Direct Effect and the Elusive Distinction Between Obligations and Mere Adverse Repercussions' (2019) Yearbook of European Law 18). Yet, the doctrine stood the test of time and its core contents remained more or less untouched.

But this doctrine is also a fragile object, to be handled with great care. We do not know whether the dictum in *Thelen Technopark* was aimed to start a process of revision or whether we can dismiss it as an incidental passage which escaped from the pen of the Grand Chamber. But the Constitutional relevance of direct effect for the present state of the European legal order and for its possible future development should dissuade the Court from facile and dangerous experimentalism.

**E.C.**