INSIGHT

THELEN TECHNOPARK AND THE LEGAL EFFECTS OF THE SERVICES DIRECTIVE IN PURELY INTERNAL AND HORIZONTAL DISPUTES

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ABSTRACT: In *Thelen Technopark* (ECLI:EU:C:2022:33), the Court of Justice held that art. 15 of the Services Directive cannot be invoked against a conflicting national law in a horizontal dispute, even though the Court had already definitively established the incompatibility of this national law with the Services Directive in an earlier judgment. In view of the purely internal nature of the dispute – making art. 49 TFEU itself inapplicable – the individual harmed by the violation of the Services Directive could only recover his losses through a separate action for damages against the Member State. This *Insight* analyses *Thelen Technopark* in light of the logic and extent of the prohibition of horizontal direct effect of directives, the central role and limits of the doctrine of consistent interpretation, and the direct effect of the Charter of Fundamental Rights. It argues that the Court rightly did not extend the *Mangold* case law on directives giving concrete expression to a general principle or fundamental right to directives giving concrete expression to a fundamental freedom. This *Insight* also elaborates on the two proposals of AG Szpunar to allow for horizontal direct effect of the Services Directive either as a specification of art. 49 TFEU, or as a legislative harmonisation of the proportionality of an interference with art. 16 of the EU Charter of Fundamental Rights (CFR). While thought-provoking and worthy of critical analysis, the Court in my view rightly did not follow AG Szpunar's opinion, which likely would have resulted in a doctrinal minefield.

KEYWORDS: direct effect – directives – Services Directive – purely internal situation – art. 49 TFEU – art. 16 CFR.

I. INTRODUCTION

On 18 January 2022, the Grand Chamber of the Court of Justice held in *Thelen Technopark* that the Services Directive[1] cannot be invoked in a dispute between private individuals.[2]

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[1] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

[2] Case C-261/20 *Thelen Technopark* ECLI:EU:C:2022:33.

ISSN 2499-8249
doi: 10.15166/2499-8249/561

While the prohibition of horizontal direct effect of directives has been well-established case law since the 1986 landmark judgment in *Marshall*,[3] *Thelen Technopark* is nonetheless an important judgment for three reasons.

First, in an earlier judgment, following an infringement procedure, the Court had explicitly held that the relevant national law was incompatible with the Services Directive.[4] In this regard, the referring national court in *Thelen Technopark* had also asked the Court whether the horizontal direct effect of the Services Directive could, in this case, be based on art. 260(1) TFEU, which requires a Member State to comply with the judgment of the Court.

Second, the Services Directive aims to implement the freedom of establishment in art. 49 TFEU and the free movement of services in art. 56 TFEU, both of which can be invoked in disputes between private individuals.[5] This raises the question of whether the prohibition of horizontal direct effect of directives applies equally to directives concretising a horizontally directly effective fundamental freedom. In other words, the question is whether the *Mangold* case law,[6] applies by analogy to directives concretising a fundamental freedom rather than a fundamental right.

Third, in a sophisticated opinion,[7] advocate general (AG) Szpunar had proposed to allow art. 15 of the Services Directive to be invoked in horizontal situations on the ground that it gives specific expression to art. 49 TFEU and, remarkably, because the relevant national law, by violating this provision of the Services Directive, also violated the freedom of contract enshrined in art. 16 of the EU Charter of Fundamental Rights (CFR).[8]

The objective of this *Insight* is twofold. First, it aims to situate and analyse the outcome of the case and the reasoning of the Court in light of the broader case law on the legal effects of directives. Second, it analyses the twofold proposal of AG Szpunar to ensure the effectiveness of the Services Directive on the basis of either art. 49 TFEU or art. 16 CFR. To this end, section II outlines the factual and legal background of the case and the judgment of the Court. Section III analyses the judgment in light of the case law on the direct and indirect effects of directives as well as the case law on the horizontal direct effect of the CFR within the scope of EU harmonisation. Section IV analyses the opinion of AG Szpunar and concludes that, notwithstanding his innovative and insightful analysis, the Court was right

[3] Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* ECLI:EU:C:1986:84. For a comprehensive analysis of the case law on the prohibition of horizontal and inverse vertical direct effect of directives, see 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.

[4] Case C-377/17 *Commission v Germany* ECLI:EU:C:2019:562.

[5] Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* ECLI:EU:C1974:140; case C-341/05 *Laval un Partneri* ECLI:EU:2007:809; case C-438/05 *International Transport Workers' Federation v Viking Line ABP* ECLI:EU:C2007:772.

[6] Case C-144/04 *Mangold* ECLI:EU:C:2005:709. See Section III.3 and Section IV below.

[7] Case C-261/20 *Thelen Technopark* ECLI:EU:C:2021:620, opinion of AG Szpunar.

[8] See in more detail the analysis in Section IV below.

to reject his proposals, which likely would have resulted in increased fragmentation and uncertainty regarding the legal effects of unimplemented directive provisions. Section V concludes and argues that, if the prohibition of horizontal direct effect of directives is considered undesirable, amendment of art. 288 TFEU is the proper remedy.

II. The judgment of the Court of Justice

II.1. Factual and legal background

Thelen Technopark centered on a dispute between Thelen Technopark Berlin GmbH, a real estate company, and M.N., an engineer, concerning the payment of a fee for services provided by M.N. to Thelen. The parties had agreed a flat-rate fee of euro 55 025.[9] After having terminated the contract, however, M.N invoiced Thelen for a remaining fee of euro 102 934.59,[10] in addition to the euro 55 395.92 gross which Thelen had already paid.[11] The remaining fee was based on the minimum rates in para. 7 of the German Decree on fees for services provided by architects and engineers (*Verordnung über die Honorare für Architekten- und Ingenieurleistungen* (HOAI)).[12]

M.N.'s action was largely successful at first instance before the *Landgericht Essen* and at second instance before the *Oberlandesgericht Hamm*.[13] Thelen subsequently appealed the latter's judgment before the *Bundesgerichtshof*, arguing that M.N.'s claim ought to be dismissed entirely on the basis of art. 15(1), (2)(g) and (3) of the Services Directive.[14] These provisions require Member States to ensure that national regulations providing for fixed minimum and/or maximum tariffs for service providers are non-discriminatory, necessary and proportionate.

The referring court observed in this regard that the drafters of the HOAI were aware that the minimum and maximum rates of the HOAI may be incompatible with art. 15 of the Services Directive, but that they assumed that this incompatibility could be avoided by limiting the scope of the HOAI to purely domestic situations.[15] On 30 January 2018, however, the Court of Justice held in *X and Visser Vastgoed* that chapter III of the Services Directive, of which art. 15 is part, applies to purely domestic situations as well,[16] unlike the Treaty provisions on the freedom of establishment and the free movement of services themselves.[17]

[9] *Thelen Technopark* cit. para. 9.
[10] *Ibid*. para. 10.
[11] *Thelen Technopark*, opinion of AG Szpunar cit. paras 10–11.
[12] *Thelen Technopark* cit. paras 6, 8 and 10.
[13] *Ibid*. paras 10–12.
[14] *Ibid*. paras 13–15.
[15] *Ibid.* para. 18.
[16] Joined cases C-360/15 and C-31/16 *X* ECLI:EU:C:2018:44.
[17] Case C-268/15 *Ullens de Schooten v Belgian State* ECLI:EU:C:2016:874.

Furthermore, on 4 July 2019, following an infringement procedure brought by the Commission against Germany, the Court of Justice held that Germany had failed to fulfil its obligations under art. 15 of the Services Directive by fixing tariffs for planning services provided by architects and engineers in the HOAI.[18] Shortly after, following preliminary questions by the *Landgericht Dresden*, the Court confirmed by way of an order that art. 15 of the Services Directive precludes national legislation prohibiting the agreement of fees lowing than the minimum rates in the HOAI.[19]

Against the backlight of *X and Visser Vastgoed* (rebutting the German legislature's presumption that art. 15 did not apply to purely internal situations) and *Commission v Germany* and *hapeg dresden* (establishing the incompatibility of the HOAI with art. 15), the *Bundesgerichtshof* asked the Court of Justice, firstly, whether it follows from art. 4(3) TEU, art. 288 TFEU and art. 260(1) TFEU that art. 15(1), (2)(g) and (3) of the Services Directive can be invoked in a dispute between two private individuals, *i.e.,* that those provisions have horizontal direct effect. In the alternative, the *Bundesgerichtshof* asked the Court whether art. 49 TFEU itself, or other general principles of EU law, require the disapplication of the HOAI in a dispute between two private individuals.[20]

II.2. Duty to ensure the full effect of directives, but no horizontal direct effect

While the *Bundesgerichtshof* had only asked the Court of Justice whether it had to disapply the relevant provision of the HOAI, the Court answered this question by means of a short essay on the primacy of EU law and the duty to ensure its full effectiveness. Thus, the duty for Member State bodies to give full effect to EU law requires national courts to interpret, to the greatest extent possible, national law in conformity with EU law.[21] They ought to "consider the whole body of rules of national law [...] in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by that directive".[22] According to the referring court, such an interpretation would be *contra legem*,[23] and would therefore not be required under the doctrine of consistent interpretation.[24] While the Commission had argued that the HOAI could be interpreted consistently with the Directive, both AG Szpunar and the Court did not question the referring court's assessment.[25]

[18] *Commission v Germany* cit.
[19] Case C-137/18 *Hapeg Dresden* ECLI:EU:2020:84.
[20] *Thelen Technopark* cit. para. 23.
[21] *Ibid*. paras 25–26.
[22] *Ibid*. para. 27.
[23] *Ibid*. para. 29.
[24] *Ibid*. para. 28.
[25] *Ibid*. cit. para. 29; *Thelen Technopark*, opinion of AG Szpunar cit. para. 33.

The Court subsequently observed that the principle of primacy requires national courts, where consistent interpretation is not possible, to disapply all national law conflicting with EU law, even by their own motion if necessary.[26] Only after having reaffirmed this obligation to set aside *all* conflicting national law, the Court moved on to observe, by reference to "the other essential characteristics of EU law and, in particular [...] the nature and legal effects of directives",[27] that directives cannot by themselves impose obligations on individuals.[28] It referred not only to art. 288 TFEU but also to the lack of power of the EU "to enact, in a general and abstract manner, obligations for individuals with immediate effect" other than through regulations.[29] The horizontal direct effect of art. 15(1), (2)(g) and (3) of the Services Directive in this case would deprive M.N. of his right to claim the full amount to which he was entitled on the basis of the HOAI, which according to the Court would be contrary to the prohibition of imposing "an additional obligation [...] on an individual".[30]

This conclusion was not affected by the fact that the Court had already established the incompatibility of the HOAI with art. 15 of the Services Directive. The *Bundesgerichtshof* had referred, in this regard, to art. 260(1) TFEU, which requires a Member State that has failed to fulfil an obligation under the Treaties to take the necessary steps to comply with the Court's judgment. While this indeed entails that national courts are "required to take all appropriate measures to enable EU law to be fully applied and are thus required to disapply, if the circumstances so require, a provision of national law which is contrary to EU law",[31] the Court held that this duty does not correlate with a right for an individual, in this case Thelen, to have the HOAI disapplied by the national court.[32] In other words, in the context of art. 260 TFEU, the Member States' duty to ensure the full effect of EU law only exists *vis-à-vis* the EU.

[26] *Thelen Technopark* cit. para. 30. It is somewhat intriguing that the Court described the national courts' duty to set aside conflicting national law by their own motion in general terms. The traditional view in the case law has been that, following the procedural autonomy of the Member States and the principles of equivalence and effectiveness, national courts are not generally required to apply provisions of EU law by their own motion, unless this would make the exercise of individual rights "virtually impossible or excessively difficult" (see to this end *e.g.*, joined cases C-430/93 and C-431/93 *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* ECLI:EU:C:1995:441 and case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* ECLI:EU:C:1995:437). An obligation for national courts to disapply conflicting national law also exists specifically for certain provisions of EU consumer law (case C-168/05 *Mostaza Claro* ECLI:EU:C:2006:675) and the Treaty provisions on EU competition law (case C-126/97 *Eco Swiss* ECLI:EU:C:1999:269), which, however, appear to be specific exceptions to the general rule.

[27] *Thelen Technopark* cit. para. 31.

[28] *Ibid*. para. 32.

[29] *Ibid*.

[30] *Ibid*. paras 32 and 36.

[31] *Ibid*. para. 39.

[32] *Ibid*. para. 40.

II.3. State liability as a remedy for harmed individuals

The Court subsequently emphasised – notwithstanding the absence of a preliminary question to this end – that individuals that have been harmed by national law violating EU law may be entitled to compensation by the Member State.[33] Such individuals have a right to compensation subject to three constitutive criteria: "the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between that breach and the loss or damage sustained by the individuals".[34] The second criterion, *i.e.*, that the breach is sufficiently serious, will be met if the breach "has persisted despite a judgment finding the breach in question to be established".[35] The application of these criteria to concrete cases, such as *Thelen Technopark* itself, may create some additional conundrums, a point to which I return.[36]

II.4. Purely internal situations and the scope of art. 49 TFEU

By its second question, the *Bundesgerichtshof* had asked the Court whether paragraph 7 of the HOAI infringes art. 49 TFEU and, if that is the case, whether art. 49 TFEU requires the national court to disapply the relevant provision. As noted above, the scope of the HOAI is limited to purely internal situations. Indeed, as the Court observed, all factors of the dispute between M.N. and Thelen were confined within Germany.[37] It was for the referring court to indicate in what way a purely internal dispute nonetheless has a connection to the fundamental freedoms of the EU, so as to show that the preliminary questions are necessary to solve the dispute.[38] As the *Bundesgerichtshof* had not made any such indication, the question was inadmissible.[39]

Although the Court technically did not rule on the substantive question of whether the HOAI violated art. 49 TFEU, it did recall that the fundamental freedoms are, in general, not applicable to purely internal situations.[40] The Court thereby seemed to reject the sophisticated and important proposal of AG Szpunar to apply art. 49 TFEU to purely internal situations within the scope of Chapter III of the Services Directive.[41]

[33] *Ibid*. para. 41.

[34] *Ibid*. para. 44, recalling the three criteria established by joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur* ECLI:EU:C:1996:79 para. 51.

[35] *Thelen Technopark* cit. para. 47.

[36] See Section III.4. below.

[37] *Thelen Technopark* cit. para. 51.

[38] *Ibid*. para. 53.

[39] *Ibid*. para. 54.

[40] *Ibid*. para. 50.

[41] *Thelen Technopark*, opinion of AG Szpunar, cit. paras 34–47, and Section IV below.

III. The legal effects of directives: normative impact and (in)direct effects

In the concrete dispute between M.N. and Thelen, the Court's judgment has peculiar implications: notwithstanding that the Court had already definitively held that paragraph 7 of the HOAI violates the Services Directive, the former continues to apply to the detriment of Thelen. This section revisits the central logic of the prohibition of horizontal direct effect of directives (III.1). It subsequently touches upon the central role of consistent interpretation (III.2) and the case law on the horizontal direct effect of general principles of EU law and the CFR (III.3). Finally, it analyses the role of state liability as an alternative remedy to horizontal direct effect, and its limits (III.4). The specific proposals of AG Szpunar, which purported to avoid the straightforward application of the prohibition of horizontal direct effect, without overturning that prohibition as such, will be analysed in the subsequent Section IV.

III.1. The prohibition of horizontal direct effect and the "normative impact" of invoking a directive

In 1992, Frank Emmert argued in favour of overturning *Marshall* because the prohibition of horizontal direct effect of directives was destined to remain "a fright without an ending" (*ein Schrecken ohne Ende*); and so the better option was to have "a frightening ending" of the *Marshall* rule (*ein Ende mit Schrecken*).[42] While the Court affirmed the prohibition two years later in *Faccini Dori*,[43] Emmert's prediction stood the test of time, as the case law on the legal effects of directives became increasingly complex and, according to many commentators, basically unintelligible.[44]

First of all, in the late 1990s, the so-called "incidental effects" case law casted doubt on the prohibition of horizontal direct effect,[45] while the Court re-affirmed that prohibition in another judgment rendered in the same period.[46] In 2004, the *Wells* judgment added to the confusion allowing an individual to invoke the Environmental Impact Assessment (EIA) Directive[47] against a Member State notwithstanding the "mere adverse

[42] F Emmert, 'Horizontale Drittwirkung von Richtlinien?' (1992) 3 Europaeisches Wirtschafts- & Steuerrecht 56.

[43] Case C-91/92 *Faccini Dori v Recreb* ECLI:EU:C:1994:292.

[44] See *e.g.*, M Dougan, 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy' (2007) 44 CMLRev 931. For an overview of various theories purporting to explain the Court's case law, see L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives' cit.

[45] *E.g.*, case C-194/94 *CIA Security International v Signalson and Securitel* ECLI:EU:C:1996:172; case C-441/93 *Pafitis and Others* ECLI:EU:C:1996:92; case C-129/94 *Ruiz Bernáldez* ECLI:EU:1996:143; case C-443/98 *Unilever* ECLI:EU:C:2000:496.

[46] Case C-192/94 *El Corte Inglés v Blázquez Rivero* ECLI:EU:1996:88.

[47] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, now replaced by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

repercussions" that a third-party private individual would suffer.[48] Around the same time, the Court also seemed to circumvent the prohibition of horizontal direct effect in *Mangold* by allowing an individual to invoke Directive 2000/78/EC[49] in conjunction with the general principle of non-discrimination against another private party.[50]

However, in *Pfeiffer*[51] and *Berlusconi*,[52] the Court insisted on, respectively, the prohibition of horizontal and inverse vertical direct effect of directives. Notably, both cases involved situations in which direct effect of the directive would not entail a "substitution" of the relevant provision of national law with a directive provision, but merely an "exclusion" of conflicting national law. This distinction between "substitution" and "exclusion" had been developed in legal doctrine as a promising theory of direct effect of directives that could explain both *Marshall* and *Faccini Dori* on the one hand, and the "incidental effects" case law on the other hand.[53] Against the advice of its Advocates General,[54] the Court rejected the theory and insisted, in *Pfeiffer*, on consistent interpretation as the limit of the invocability of unimplemented directives.[55]

In a doctrinal analysis of the case law on the direct effect of directives in vertical, inverse vertical and horizontal disputes, Lorenzo Squintani and I concluded that the central question regarding the invocability of directives is whether invoking a directive directly imposes an obligation on another individual by *affecting* the legal norm directly governing the dispute at hand.[56] This was not the case in, for instance, *CIA Security*, *Ruiz*

[48] Case C-201/02 *Wells* ECLI:EU:2004:12.

[49] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[50] *Mangold* cit. In later case law on the horizontal direct effect of the general principle of non-discrimination, the Court allowed that principle as such to be invoked against another private individual. In *Mangold* itself, however, the Court referred to the general principle of non-discrimination in respect of age as one argument for requiring the disapplication of national law by Directive 2000/78/EC even though the transposition deadline for that Directive had not yet passed (paras 74–77), the other argument being that Member States are required to "refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive" (paras 67–73). The concluding para. 78 does not make clear whether it is, in the end, Directive 2000/78/EC or the general principle of non-discrimination which mandates the disapplication of national law. As noted in Section III.3 below, the Court settled this question in *Kücükdeveci* by grounding this disapplication in the general principle of non-discrimination, thereby ameliorating the tension between *Mangold* and the prohibition of horizontal direct effect of directives.

[51] Joined cases C-397/01 to C-403/01 *Pfeiffer and Others* ECLI:EU:C:2004:584.

[52] Joined cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* ECLI:EU:C:2005:270.

[53] See L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives' cit. 33–34, with further references to the literature.

[54] See to this end, joined cases C-397/01 to C-403/01 *Pfeiffer and Others* ECLI:EU:2003:245, opinion of AG Ruiz-Jarabo Colomer; and joined cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* ECLI:EU:C:2004:624, opinion of AG Kokott.

[55] *Pfeiffer and Others* cit. paras 108–119.

[56] L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives' cit.

Bernáldez, *Pafitis*, *Unilever Italia* and *Wells*.[57] In *Pfeiffer* and *Berlusconi*, by contrast, even though the direct effect of the directives would have only exclusionary effects, these effects changed the normative framework directly governing the dispute.[58] This "normative impact theory", as we coined our explanation, explains and possibly justifies all cases on direct effect of directives, to the best of our knowledge.

The outcome in *Thelen Technopark* is consistent with this doctrinal analysis. Direct effect of art. 15(1), (2)(g) and (3) of the Services Directive would have merely exclusionary effects, namely the disapplication of para. 7 of the HOAI. In the absence of this latter provision, the dispute between Thelen and M.N. would be governed by their contractual obligations and generally applicable German contract law, not the Services Directive. As AG Szpunar noted, however, "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".[59] The same is true for the so-called "sword/shield theory", which the Dutch government had raised in its submission to this case,[60] although the failure of that theory to describe the case law on directives had already been admitted by its own proponents more than 20 years ago.[61]

[57] *Ibid*. 56–59.

[58] *Ibid*. 59–61.

[59] *Thelen Technopark*, opinion of AG Szpunar cit. para. 63.

[60] As AG Szpunar notes, the Dutch government had summarised the sword/shield theory, which was proposed in C Hilson and T Downes, 'Making Sense of Rights: Community Rights in EC Law' (1999) 24 ELR 121, as follows: "an individual cannot rely on a provision of a directive in order to have an obligation arising therefrom imposed on another individual in a situation where no such obligation arises under national law (thus, he cannot use the directive as a "sword"). On the other hand, it does not follow from that case-law that an individual cannot rely on a provision of a directive where the other party seeks to have an obligation imposed on him that is laid down by national law which is contrary to the directive. The Dutch Government takes the view that in the latter situation (where the directive is used as a "shield"), it is incumbent on the national court to disapply the provision of national law" (*Thelen Technopark*, opinion of AG Szpunar cit. para. 51). As AG Szpunar notes, this formulation seems however to describe the substitution–exclusion distinction rather than the sword/shield theory (para. 59).

[61] The Dutch government referred in this regard to case C-122/17 *Smith* ECLI:EU:C:2018:631 and case C-282/10 *Dominguez* ECLI:EU:C:2012:33 (*Thelen Technopark*, opinion of AG Szpunar cit.), but these judgments do not prescribe the sword/shield theory at all. What is more, as Hilson and Downes themselves admitted, the sword/shield theory may be analytically precise by essentially applying a Hohfeldian framework to the Court's case law, it fails to explain both *Faccini Dori* and *El Corte Inglés* (in which the directive arguably was invoked as a "shield") and *Ruiz Bernaldez* and *Pafitis* (in which the directive arguably was invoked as a "sword"): C Hilson and T Downes, 'Making Sense of Rights' cit. 125–126; see also L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives' cit. 43–44. Insofar as the Dutch government did not intend to refer to Hilson and Downes' sword/shield theory, but rather had in mind the distinction between substitutive and exclusionary effects of invoking directives (see *Thelen Technopark*, opinion of AG Szpunar cit. para. 59), that theory is equally incompatible with the case law (see notes 53 to 55 above and accompanying text).

Furthermore, the Court recalled that a directive does not allow a national court to disapply a conflicting national law if that leads to an additional obligation on an individual.[62] While this formulation is not unambiguous as to what it means exactly to impose an "additional" obligation on an individual, it is consistent with the manner in which we conceptualised the logic of the Court's case law. In other words, invoking a directive leads to an "additional obligation" on another individual if affects the legal norm directly governing the dispute at hand, *i.e.,* if it "determine[s] the substantive content of the legal rule on the basis of which the national court had to decide the case before it", as the Court put it in *Unilever Italia* and *Smith v Meade*.[63] In summary, *Thelen Technopark* is consistent both with *Smith v Meade* and *Pfeiffer* as well as with *CIA Security*, *Ruiz Bernaldez* and *Unilever Italia*.

III.2. The central role of the doctrine of consistent interpretation

The Court placed significant emphasis on the imperative of interpreting national law, as much as possible, in light of EU law. This has been a central thread in the case law on the legal effects of directives and the duty to ensure their full effect.[64] In its written observations and at the hearing of *Thelen Technopark*, the Commission disputed the *Bundesgerichtshof*'s conclusion that it was impossible to interpret the HOAI in light of the Services Directive without reaching a *contra legem* interpretation.[65] This rather remarkable intervention echoed the opinion of AG Bot in *Dansk Industri*, in which he claimed to be able to interpret the relevant Danish law in conformity with EU law notwithstanding the Danish Supreme Court's conclusions to the contrary.[66] Following the opinion of AG Szpunar, however, the Court in *Thelen Technopark* deferred to the *Bundesgerichtshof*'s assessment of a *contra legem* situation.[67]

The doctrine of consistent interpretation clearly aims to remedy, to the greatest possible extent, the lacunae in the effectiveness of unimplemented directives as a result of the prohibition of horizontal direct effect. The extent of the obligation to interpret national law in conformity with EU law may cast doubt on the relevance of the prohibition

[62] *Thelen Technopark* cit. para. 32.

[63] *Smith* cit. para. 53; *Unilever* cit. para. 51.

[64] See also L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives' cit. 63–66.

[65] *Thelen Technopark*, opinion of AG Szpunar cit. paras 31–33.

[66] Not only did AG Bot cast doubt on the Danish Supreme Court's claim that consistent interpretation was not possible, he also offered a small lecture on the meaning of "contra legem" and the fact that consistent interpretation would "merely [sic!] require [the Danish Supreme Court] to change its case-law". Case C-441/14 *Dansk Industri* ECLI:EU:C:2015:776, opinion of AG Bot paras 68–70.

[67] *Thelen Technopark* cit. para. 29.

of horizontal direct effect: the Commission in *Thelen Technopark* and AG Bot in *Dansk Industri* used this obligation to lecture national courts on their own national law,[68] and the Court in *Dansk Industri* simply made up an obligation for national courts to change their case law.[69] However, as demonstrated by the deference of both AG Szpunar and the Court to the *Bundesgerichtshof*'s assessment of a *contra legem* situation, the doctrine of consistent interpretation clearly has practical limits.

At bottom, moreover, the interpretation of national law in conformity with a directive, no matter how far removed from the ordinary interpretation of national law, does not violate the letter of the original *Marshall* rule, which stipulates that directives *as such* cannot impose obligations on individuals. The "as such" part of the prohibition may be regarded as a legal formalism, but the central role of consistent interpretation is both consistent and coherent with the prohibition of horizontal direct effect.

III.3. Horizontal effects of directives and the Charter of Fundamental Rights

While *Mangold* and the subsequent Charter case law raise intriguing and extremely relevant questions about the scope of the horizontal direct effect of provisions of the CFR, this case law does not question the enduring prohibition of horizontal direct effect of directives and the concrete outcome in *Thelen Technopark*.

In *Mangold* itself, the Court held that art. 6(1) of Council Directive 2000/78/EC and the general principle of non-discrimination based on age – seemingly in conjunction – could be invoked against a national law in a horizontal dispute.[70] This interpretation was controversial not only because it seemed to circumvent the prohibition of horizontal direct effect, but also because the transposition deadline for Directive 2000/78/EC had not yet

[68] *Dansk Industri*, opinion of AG Bot cit. paras 68–70; *Thelen Technopark*, opinion of AG Szpunar cit. para. 33 (recalling the Commission's argument at this point). While AG Szpunar in the end deferred to the *Bundesgerichtshof*'s assessment of a *contra legem* situation, his musings on the Commission's argument about the interpretation of German law are noteworthy illustrations of how the duty of consistent interpretation might lead the Court to second-guess the referring national court's interpretation of national law, which would, in my view, be highly undesirable: "I can, on the one hand, agree with the Commission that the limits of interpretation under German law as set out by the referring court in the reference for a preliminary ruling appear to be excessively narrow. This is true particularly in the light of the case-law of the German courts presented in the reference for a preliminary ruling, which shows that reliance on the principle of good faith as expressed in the German Civil Code made it possible to disregard the provision of German law at issue in a number of similar cases in the past".

[69] Following AG Bot's suggestion in *Dansk Industri* cit., the Court in case C-441/14 *Dansk Industri* ECLI:EU:C:2016:278 para. 33 held that the duty to interpret national law in conformity with EU law includes a duty to change national case law, referring in this regard to case C-456/98 *Centrosteel* ECLI:EU:C:2000:402 para. 17. However, as Lorenzo Squintani and I showed in 'The Normative Impact of Invoking Directives' cit. 65, this suggestion that the Court is merely following existing case law is highly misleading, as *Centrosteel* only states *as a matter of fact* that the *Corte Suprema di Cassazione* had changed its established case law.

[70] *Mangold* cit. paras 67–78. On the relationship between Directive 2000/78/EC and the general principle of non-discrimination based on age in *Mangold*, see note 50 above.

expired, requiring the Court to declare the general principle of non-discrimination applicable because the case *also* fell within the scope of Council Directive 1999/70/EC,[71] even though national law did not violate that latter directive.[72]

By the time of *Kücükdeveci*,[73] and later cases such as *Dansk Industri* and *Egenberger*,[74] the transposition deadline of Directive 2000/78/EC had expired, and the Court expressly grounded the *Mangold* logic in the fundamental right of non-discrimination based on age as such, which had been codified in art. 21(1) CFR.

Accordingly, the horizontal direct effect of sufficiently precise and unconditional provisions in the CFR has become a question substantively independent from the direct effect of directives. The role of an applicable directive is limited to establishing a jurisdictional connection with EU law,[75] which is particularly salient in the absence of a cross-border effect bringing a case within the scope of a fundamental freedom. By contrast, the substantive question of whether the CFR provision can be invoked against another private individual ought to be decided solely on the basis of the CFR itself.[76]

The prohibition of horizontal direct effect of directives and the horizontal direct effect of the CFR are therefore perfectly consistent.[77] In the context of *Thelen Technopark*, the relevant question is whether it would make sense to apply the *Mangold–Kücükdeveci* logic by analogy to the fundamental freedoms.

The Court has traditionally continued to apply the fundamental freedoms to cases falling outside the scope of secondary legislation, with the notable exception of the Citizenship Directive.[78] The question of whether the Court could have applied art. 49 TFEU in *Thelen Technopark*, therefore, is primarily a question of whether art. 49 TFEU extends to purely internal situations within the scope of Chapter III of the Services Directive. Since this question is central to the opinion of AG Szpunar, it will be discussed separately in Section IV below.

Applying the mainstream rule that art. 49 TFEU only applies to situations involving a cross-border effect, the reasoning and outcome of *Thelen Technopark* are straightforward. Had there been a cross-border effect, there is little doubt that the Court could have applied art. 49 TFEU itself. Furthermore, since art. 15(1), (2)(g) and (3) of the Services Directive essentially codify the Court's case law on art. 49 TFEU, the Court no doubt would

[71] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP; *Mangold* cit. para. 75.

[72] *Mangold* cit. paras 44–54.

[73] Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21.

[74] Case C-414/16 *Egenberger* ECLI:EU:C:2018:257.

[75] As required under art. 51(1) CFR, which establishes the scope of the Charter.

[76] See e.g. *Dansk Industri* cit.; *Egenberger* cit.; case C-68/17 *IR* ECLI:EU:C:2018:696; case C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2; joined cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871.

[77] See *e.g.*, *Bauer* cit. paras 76–91.

[78] Case C-333/13 *Dano* ECLI:EU:C:2014:2358.

have concluded that para. 7 of the HOAI violates art. 49 TFEU, and that it should be disapplied in the horizontal dispute between Thelen and M.N.

Unfortunately for Thelen, the case did not involve any such cross-border effect, so art. 49 TFEU was to no avail. The analogy with *Mangold* and *Kücükdeveci* is incapable of doing the necessary work to reach a different conclusion. After all, the *substantive* contents of general principles of EU law and CFR provisions do not require a cross-border effect. In the absence of a cross-border effect, EU secondary legislation can establish an alternative jurisdictional connection satisfying art. 51(1) CFR, in which case the substantive content of EU fundamental rights does not prevent their application to purely internal situations. For the fundamental freedoms, by contrast, the cross-border effect is *both* a jurisdictional test *and* part of their substantive content.

III.4. Is state liability enough?

Since Thelen can benefit from neither (in)direct effect nor from the Member State's duty under art. 260(1) TFEU, all the Court can offer him is a separate claim for damages against Germany. Whether state liability is a satisfactory remedy to violations of directives has been subject to a longstanding debate, in particular focusing on the criterion of a "sufficiently serious" breach of EU law. The implication of this criterion is that not all breaches of EU law entail a right to damages, although Member States remain free to establish a lower liability threshold.[79]

In *Thelen Technopark*, the Court observed that "a breach of EU law will clearly be sufficiently serious if it has *persisted* despite a judgment finding the breach in question to be established" (emphasis added).[80] This formula appears to facilitate Thelen's damages claim against Germany. However, it also raises complex questions about the amount of damages for which the Member State is liable. The verb "persisted" indicates that a breach of EU law is not necessarily "sufficiently serious" prior to a judgment of the Court establishing that breach.

While this difference may not affect the losses incurred by Thelen for which Germany is liable, it can be consequential in cases involving increasing losses over a period of time both preceding and following a Court judgment establishing a breach. Suppose that such a breach, by itself, is excusable and not sufficiently serious, like the United Kingdom's incorrect implementation of art. 8(1) of Council Directive 90/531/EEC.[81] The Court's approach in *Thelen Technopark* implies that a harmed individual has no right to damages for all losses up until the moment that the Court established such a breach.

[79] Cf. *Thelen Technopark* cit. para. 33, allowing national courts to disapply national law conflicting with a directive in a horizontal dispute on the basis of national law.

[80] *Ibid*. para. 47.

[81] Case C-392/93 *The Queen v H.M. Treasury, ex parte British Telecommunications* ECLI:EU:C:1996:131 para. 43, in which the Court held that, in light of the imprecise wording of art. 8(1), the United Kingdom had

In *Thelen Technopark*, it is debatable whether para. 7 of the HOAI was a sufficiently serious breach of the Services Directive, especially before *X and Visser Vastgoed* confirmed the applicability of art. 15(1), (2)(g) and (3) of the Services Directive to purely internal situations. This uncertainty may be relevant because Thelen received the final invoice of euro 102934,59 on 2 June 2017, which is before the Court's judgment in *X and Visser Vastgoed*. It may not be unreasonable to suppose that the HOAI was, at that time, not yet a sufficiently serious breach.

Consider the following hypothetical. Suppose Thelen paid the invoice in 2017, only to find out on 30 January 2018 that Chapter III of the Services Directive applies to his situation, and on 4 July 2019 that para. 7 of the HOAI in fact violates art. 15(1), (2)(g) and (3) of the Services Directive. Could he still claim his damages from the German state if para. 7 of the HOAI was based on an erroneous but excusable interpretation of the scope of the Services Directive? Following that conditional, the answer seems to be in the negative. However, the implication would be that it matters whether Thelen had paid the invoice before or after the breach of the Services Directive became "sufficiently serious", which seems both illogical and unjust.

In conclusion, state liability is no panacea. In some situations, it may be an adequate remedy to fully compensate the losses incurred by the harmed individual. The criterion that the breach of EU law is "sufficiently serious", however, is capable of creating incongruencies especially in cases involving breaches that are not inherently sufficiently serious.

IV. The road not taken: the opinion of AG Szpunar

Adding to the existing conundrums surrounding the legal effects of directives, the opinion of AG Szpunar in *Thelen Technopark* introduced two alternative solutions that would have decreased the relevance – and increased the complexity – of the prohibition of horizontal direct effect. While the Court neither followed nor discussed AG Szpunar's proposals, they are worthy of closer scrutiny, especially as they pertain to the relationship between the legal (direct) effect of the fundamental freedoms and the fundamental rights in the CFR.

IV.1. Horizontal direct effect of the Services Directive and art. 49 TFEU in purely internal situations

AG Szpunar concluded that art. 15(1), (2)(g) and (3) of the Services Directive require a national court to disapply conflicting national law even in a horizontal dispute because these provisions give specific expression to the freedom of establishment in art. 49 TFEU. This intriguing conclusion seems to be based on the following reasoning.

implemented this article incorrectly but "in good faith and on the basis of arguments which are not entirely devoid of substance".

Firstly, AG Szpunar observed that Chapter III of the Services Directive does not "harmonise selected aspects of services activities", but aims to give specific expression to art. 49 TFEU.[82] This means, secondly, that as soon as a dispute falls within the material scope of the former, it is no longer possible to rely on art. 49 TFEU in order to challenge a national law,[83] whether or not there is a cross-border effect.[84] Thirdly, if art. 49 TFEU – which itself is capable of having horizontal direct effect[85] – cannot be invoked in a dispute within the material scope of Chapter III of the Services Directive, the fact that a directive *also* does not have horizontal direct effect would mean that the Directive limits the scope of application of art. 49 TFEU.[86] According to AG Szpunar, the inevitable conclusion is that the provisions of Chapter III of the Services Directive should have horizontal direct effect, "just as direct reliance on the Treaty freedom of establishment is permissible in similar situations".[87]

The Court did not substantially engage with the opinion on this point. Its rejection of the horizontal direct effect of the Services Directive can be read, however, as a rejection of the AG's proposal. This, in my view, was the right decision for three reasons.

Firstly, the claim that the Services Directive does not harmonise, but merely gives specific expression to articles 49 and 56 TFEU is not entirely convincing. As the Court confirmed in *Rina Services*, the Services Directive is an "ad hoc harmonisation" of the free movement of services.[88] *Rina Services* concerned art. 14 of the Services Directive, which indeed offers a list of prohibited requirements to which the case-by-case justifications no longer apply.[89] Similarly, arts 16(1), 17 and 18 limit the full range of justifications that would otherwise be available to Member State measures hindering the provision of services under art. 56 TFEU.

It is true that the possibility to justify the requirements mentioned in art. 15(2), pursuant art. 15(3), is similar to the Court's interpretation of art. 49 TFEU. However, if art. 15 is conceived as a "specific expression" of art. 49 TFEU, while arts 14 and 16 to 18 are "ad hoc harmonisations" regarding the free movement of services, AG Szpunar's proposal would imply that art. 15 has horizontal direct effect while arts 14 and 16 to 18 do not. Accordingly, the distinction between "harmonising" and "specifying" provisions in directives seems to entail complex questions as to what directives, and what parts of directives, are capable of having horizontal direct effect because they merely specify a horizontally directly effective fundamental freedom.

[82] *Thelen Technopark*, opinion of AG Szpunar cit. para. 38.

[83] *Ibid*. para. 43.

[84] *Ibid*. para. 40. The Commission had argued that, if there were a cross-border effect, art. 49 TFEU could be invoked.

[85] See *International Transport Workers' Federation v Viking Line ABP* cit.

[86] *Thelen Technopark*, opinion of AG Szpunar cit. para. 44.

[87] *Ibid*. para. 45.

[88] Case C-593/13 *Rina Services and Others* ECLI:EU:C:2015:399 para. 37.

[89] *Ibid*. para. 38.

Secondly, AG Szpunar strongly endorsed the view that as soon as a case falls within the scope of the Services Directive, it can no longer be assessed in light of art. 49 TFEU. However, while AG Szpunar considered this "a natural consequence of the *Rina Services* judgment",[90] that judgment does not seem to make or imply this claim.

The other argument AG Szpunar provided for this view is that it "would be contrary to the intention of the EU legislature, which, in adopting that directive, sought to regulate freedom of establishment in relation to service activities comprehensively" to continue to assess factual situations within the scope of the Services Directive in light of art. 49 TFEU.[91] The implication of this claim, however, is that the EU legislature can rule out the assessment of a case falling within the scope of the Services Directive in light of the higher-order Treaty freedom. At the same time, however, AG Szpunar inferred from the fact that art. 49 TFEU is no longer applicable even if there were a cross-border effect that art. 15 of the Services Directive must have horizontal direct effect because the EU legislature would otherwise have limited the horizontal direct effect of the Treaty freedom. There seems to be a tension between these two claims: on the one hand, the EU legislature cannot limit the horizontal applicability of art. 49 TFEU by adopting a directive, but on the other hand, it can apparently rule out an assessment in light of art. 49 TFEU by specifying that fundamental freedom, precisely by adopting a directive.

The lack of horizontal direct effect of the Services Directive is only problematic, however, because there is no cross-border effect in the dispute between Thelen and M.N. Had there been such an effect, I have little doubt that AG Szpunar would have had no trouble recognising the possibility to apply art. 49 TFEU itself, given that this would have ensured the full effectiveness of the freedom of establishment in this case.

Therefore, the claim that art. 49 TFEU no longer applies if a case falls within the scope of the Services Directive seems motivated by AG Szpunar's desire to reach a satisfactory result in the dispute between Thelen and M.N. In other words, the "only one solution which, in [AG Szpunar's] view, is also the right one"[92] is mandated by the case rather than the law. The Commission's view that art. 49 TFEU continues to apply in cases involving a cross-border effect within the scope of the Services Directive seems to me to be the right one.[93] However, unfortunately this view (*i*) undermines AG Szpunar's deduction towards the "right solution" that the Services Directive has horizontal direct effect; and, therefore, (*ii*) offers no relief to Thelen because there was no cross-border effect in this case.

Thirdly, while I sympathise with AG Szpunar's attempt to achieve a satisfactory result while maintaining the general rule against horizontal direct effect of directives, I think his proposal would create a doctrinal minefield. As mentioned above, the distinction between directives "giving specific expression to a fundamental freedom" and directives

[90] *Thelen Technopark*, opinion of AG Szpunar cit. para. 39.
[91] *Ibid*. para. 40.
[92] *Ibid*. para. 45.
[93] *Ibid*. para. 40, referring to the Commission's position.

"harmonising certain aspects related to a fundamental freedom" is difficult to make in practice and can lead to diverging outcomes even *within* a single directive, as the difference between, for instance, art. 14 and 15 of the Services Directive shows. Equally importantly, the proposal would abolish the prohibition of horizontal direct effect for a range of important directives, including Directive 2004/38/EC which, presumably, would have to be qualified as "specifying" the right to free movement in art. 21(1) TFEU,[94] while leaving the prohibition in place for a range of other, equally important directives. This latter category would include, notably, directives adopted on the basis of art. 114 TFEU.

Furthermore, one may question the integrity of the distinction between directives "giving specific expression to a fundamental freedom" and directives "harmonising certain aspects related to a fundamental freedom". Harmonisation measures adopted on the basis of art. 114 TFEU, at an abstract level, certainly give concrete expression to one or multiple fundamental freedoms. Every harmonisation measure arguably makes more specific the objectives and content of the internal market laid down in art. 3(3) TEU and art. 26(2) TFEU. Since the EU legislature is furthermore bound by the fundamental freedoms as interpreted by the Court,[95] AG Szpunar's proposal likely would have generated a perennial discussion as to whether the prohibition of horizontal direct effect still applies for one or the other directive.

IV.2. Horizontal direct effect of the freedom of contract within the scope of the Services Directive

AG Szpunar's second proposal was to require the national court to disapply para. 7 of the HOAI based on the freedom of contract, as part of the freedom to conduct a business enshrined in art. 16 CFR. In a read worthy analysis, AG Szpunar referred to the fact that the horizontal direct effect of the CFR "has only been discovered in piecemeal fashion over the years, in connection with successive references for a preliminary ruling concerning the possibility of disapplying a provision of national law that is contrary to a non-transposed or incorrectly transposed directive".[96]

As noted above, the complicating requirement of a cross-border effect in the context of the fundamental freedoms is not relevant in the context of the CFR. Either a cross-border effect (bringing a case within the scope of the fundamental freedoms),[97] or applicable secondary legislation suffices to bring the case within the scope of the CFR.[98]

[94] See to this end *e.g.*, *Dano* cit.

[95] See *e.g.*, joined cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* ECLI:EU:C:2005:449 para. 47; case C-626/18 *Poland v Parliament and Council* ECLI:EU:C:2020:1000 para. 87.

[96] *Thelen Technopark*, opinion of AG Szpunar cit. para. 70.

[97] See *e.g.*, case C-390/12 *Pfleger and Others* ECLI:EU:C:2014:281 para. 36; case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972 para. 64.

[98] See *e.g.*, case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105.

According to AG Szpunar, the freedom of contract in art. 16 CFR, which he considers "the elephant in the room" that "has not yet found its rightful place in the system of EU law",[99] can serve as a basis for disapplying para. 7 of the HOAI. Art. 16 CFR is a self-executing provision, like art. 21 CFR and unlike art. 27 CFR, which means that it is sufficiently precise and unconditional to meet the criteria for direct effect.[100] While art. 16 CFR is indeed less explicitly conditional than, for instance, art. 27 CFR,[101] I am not entirely convinced that the freedom of contract is sufficiently precise as to be self-executing. Art. 16 CFR "recognizes" the freedom to conduct a business, which surely seems different from the clear prohibition of discrimination in art. 21 CFR,[102] and the right of workers to an annual period of paid leave in art. 31(2) CFR.[103] For reasons of space, however, I leave that point aside here.

AG Szpunar recognised that the freedom of contract "protects both parties to a contract from outside interference; it does not protect one of them against the other".[104] The freedom of contract, therefore, seems an odd right to invoke against the other private party to a contract. However, AG Szpunar purported to show that invoking art. 16 CFR "does not involve direct horizontal effect in the classical sense", because the provision "is invoked as a standard of review to demonstrate the unlawfulness of [para. 7 of the HOAI] which forms the basis of the action".[105]

Somewhat ironically, a similar reasoning underlies the theory of distinguishing between exclusionary and substitution effects of directives, which the Court had rejected,[106] and which AG Szpunar also rejected in his opinion.[107] If invoking a directive in a horizontal dispute only "excludes" national law, without being applied itself against the other private individual, so the argument goes, that directive should have horizontal direct effect. In a slightly different formulation, it has been argued that the "incidental effects" case law may have involved a "disguised vertical" direct effect of directives in otherwise horizontal disputes.[108] The difference between directives and the CFR, of course, is that the argument for "disguised vertical" direct effect of directives is at odds with the prohibition of horizontal direct effect of directives, while there is no such obligation in respect of CFR provisions.

Apart from this technical point, the key substantive question is how the Court could contain the (vertical and horizontal) direct effect of the freedom of contract as part of art. 16 CFR. The infamous *Lochner* judgment of the US Supreme Court clearly demonstrated

[99] *Thelen Technopark*, opinion of AG Szpunar cit. para. 76.
[100] *Ibid*. paras 85–105.
[101] *Association de médiation sociale* cit. paras 45–46.
[102] *Dansk Industri* cit.; *Egenberger* cit.
[103] *Bauer* cit.
[104] *Thelen Technopark*, opinion of AG Szpunar cit. para. 100.
[105] *Ibid*. para. 104.
[106] *Pfeiffer and Others* cit.; *Berlusconi and Others* cit.
[107] *Thelen Technopark*, opinion of AG Szpunar cit. paras 59–63.
[108] M Dougan, 'The "Disguised" Vertical Direct Effect of Directives?' (2000) CLJ 586.

the perverse effects of invoking the freedom of contract against state regulation.[109] If strictly interpreted, art. 16 CFR could entail a "Lochnerization of EU law" as applied to both Member State regulation and EU secondary legislation. Even apart from this extreme scenario – which is of course unrealistic in the contemporary EU context – it is unclear what taking into account the freedom of contract, as part of a plethora of relevant interests and values, would mean. The difficulties of balancing fundamental rights, non-economic public interest justifications and fundamental freedoms were notably illustrated, among others, by the Court's judgment in *AGET Iraklis*.[110]

AG Szpunar came up with an interesting and nuanced proposal according to which the freedom of contract could be invoked by Thelen against para. 7 of the HOAI because "within the scope of Art. 15(2)(g) and (3) of Directive 2006/123, restrictions on freedom of contract arising from national law must remain within the limits set by EU law".[111] In other words, because the Services Directive "has already balanced the various competing fundamental rights and assessed the proportionality of the solution",[112] para. 7 of the HOAI does not meet the conditions of art. 52(1) CFR and therefore infringes art. 16 CFR.[113] If I understand this proposal correctly, it amounts to a model in which a national law violates the freedom of contract in art. 16 CFR if (*i*) the national law interferes with the freedom of contract, and (*ii*) it also violates a directive or other instrument of secondary legislation that has "balanced the various competing fundamental rights and assessed the proportionality of the solution".[114]

While AG Szpunar's opinion is certainly thought-provoking, I think that the Court rightly did not heed his proposal. Admittedly, there is some appeal to the idea that the EU legislature, in adopting a measure that affects national measures limiting the freedom of contract, "legislates the proportionality of such measures", as it were, in light of arts 16 and 52(1) CFR. However, the implication of this approach is that the prohibition of horizontal direct effect becomes illusory in respect of directive provisions that could be conceived as concretising the extent of the freedom of contract, while maintaining the prohibition in respect of other provisions. This leads to incongruencies even within the Services Directive.

For instance, national laws violating art. 15(2) of the Services Directive, which substantively addresses the Member States' legal systems, indeed interfere with the freedom of contract. But other provisions, such as art. 20(2) of the same Services Directive, substantively target private actions by requiring Member States to ensure that general conditions of access to a service do not discriminate on the basis of the nationality or place of residence of the service recipient. A hypothetical national law that violates art. 20(2) of the Services Directive by giving protection to a discriminatory access condition does not interfere

[109] Supreme Court of the United States judgment of 17 April 1905 *Lochner v New York* 198 US 45.
[110] *AGET Iraklis* cit.
[111] *Thelen Technopark*, opinion of AG Szpunar cit. para. 111.
[112] *Ibid*. para. 110.
[113] *Ibid*. para. 112.
[114] *Ibid*. para. 110.

with the freedom of contract. It follows that the prohibition of horizontal direct effect would remain in place in respect of art. 20(2), while art. 15(2) of the Services Directive – through the medium of art. 16 CFR – could effectively be invoked in horizontal disputes.

One may also recall the situation in *Faccini Dori*, in which the national law in question prevented Ms Faccini Dori to withdraw from the contract she had concluded with Recreb. Her reliance on the Doorstep Selling Directive[115] was barred by the prohibition of horizontal direct effect of directives.[116] Contrary to art. 15 of the Services Directive, the Doorstep Selling Directive regulates the freedom of contract by improving consumer protection – thus *limiting* the freedom of contract – in respect of contracts concluded away from the business premises of the trader. The reasoning of AG Szpunar would not apply to the situation in *Faccini Dori*, since it is precisely national law that is more protective of the freedom of contract than the applicable directive. It seems normatively unsatisfactory, however, to effectively grant horizontal direct effect to directive provisions aimed at protecting freedom of contract, while continuing the prohibit horizontal direct effect of directive provisions aimed at protecting consumers.

V. Conclusion

In *Thelen Technopark*, the practical consequence of the prohibition of horizontal direct effect is, of course, disappointing, especially as the Court had already explicitly deemed the German Decree incompatible with art. 15 of the Services Directive. All the Court could offer Thelen, the party that tried to invoke the Directive, was a separate damages claim against the German state.

However, the prohibition of horizontal direct effect of directives has been well established case law ever since the 1986 landmark judgment in *Marshall*. While a number of judgments in the 1990s and 2000s – including *CIA Security*, *Unilever Italia*, *Mangold* and *Wells* – had casted doubt on the relevance of that prohibition, the Court has never overturned the *Marshall* rule. Notwithstanding scepticism about the integrity of the Court's jurisprudence, moreover, the case law on the legal effects of directives and the prohibitions of horizontal and inverse vertical direct effect is internally consistent, and perhaps normatively justified, as the normative impact theory shows.[117]

The limits to the effectiveness of directives that had already become clear from earlier case law are intriguingly demonstrated by *Thelen Technopark*, which added the purely internal situations rule as a complicating factor. Had the case involved a cross-border effect, the outcome of the case undoubtedly would have been different, notwithstanding

[115] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, now replaced by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

[116] *Faccini Dori v Recreb* cit. paras 20–25.

[117] See L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives' cit.

AG Szpunar's claim that art. 49 TFEU cannot be invoked within the scope of the Services Directive. This claim, as I argued in this article, mostly seems a strategic move to force AG Szpunar's conclusion that the horizontal direct effect of the Services Directive in conjunction with art. 49 TFEU is – supposedly – the "only right solution".[118] However, the Court wisely avoided the doctrinal minefield that AG Szpunar's proposal likely would have caused, by insisting upon the prohibition of horizontal direct effect of *all* directives.

One may raise the question whether state liability offers a sufficiently effective remedy to compensate for the lack of horizontal direct effect of directives. However, this question is ultimately unhelpful. The prohibition of horizontal direct effect – in the sense that invoking a directive *as such* cannot entail a direct obligation on another individual by affecting the legal norm directly governing the case at hand[119] – has been consistently affirmed by the Court ever since *Marshall*. To be clear, this prohibition is not the only interpretation of the constraints imposed by art. 288 TFEU on the effective enforcement of directives. But it is the settled and definitive interpretation, and one that is not clearly "wrong". Therefore, it would be both unrealistic and unreasonable to expect from the Court a radical overruling of its established case law.[120]

In practice, therefore, horizontal direct effect of directives as such is only possible through an amendment of art. 288 TFEU.[121] Whether such an amendment is desirable is a complex question largely beyond the scope of this *Insight*. For one, full horizontal direct effect of directives after their transposition deadline will assimilate to an important degree the legal effects of regulations and directives. One may speculate whether this development could motivate the EU legislature to maintain the difference between regulations and directives through other means, for instance by making directive provisions less precise or

[118] *Thelen Technopark*, opinion of AG Szpunar cit. para. 45.

[119] L Squintani and J Lindeboom, 'The Normative Impact of Invoking Directives' cit. 53–55.

[120] It should of course be noted that, formally, there is no requirement to follow precedent in EU law. In practice, however, the Court's jurisprudence is based on a strong doctrine of precedent, as the Court rarely overturns earlier case law. This longstanding practice may have generated a normative obligation for the Court to continue to apply a *de facto* doctrine of precedent (cf. the positivist conception of the EU legal order in J Lindeboom, 'Why EU Law Claims Supremacy' (2018) OJLS 328; and J Lindeboom, 'The Autonomy of EU Law: A Hartian View' (2021) European Journal of Legal Studies 271). While there is extensive debate on the question of what circumstances justify departure from precedent, it is a commonplace that the fact that a precedent is "wrong" is a necessary but not a sufficient condition. For two interesting theories of precedent, see F Schauer, 'Precedent' (1987) StanLRev 571; and S Hershovitz, 'Integrity and Stare Decisis' in S Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2008). For an interesting judicial reflection on the considerations relevant to the question of whether a precedent ought to be overturned in the American context, see Supreme Court of the United States judgment of 29 June 1992 *Planned Parenthood v Casey* 505 US 833, 854–855.

[121] To be fully clear, the words "as such" indicate that this conclusion is without prejudice to the possibility of limiting the relevance of the *Marshall* rule through, for instance, the *Mangold* case law or the proposals of AG Szpunar in *Thelen Technopark*, regardless of whether such developments are desirable.

even conditional so as to preserve – to use Robert Schütze's words – a "constitutionally limited pre-emptive effect" in respect of directives and thus a greater "degree of material legislative autonomy for the Member States".[122] This, however, is a constitutional choice to be made by the Treaty drafters. *Marshall* being settled law, it is a choice that seems no longer available to the Court, as *Thelen Technopark* once more confirmed.

[122] R Schütze, 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers' (2006) Yearbook of European Law 91, 151.