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Directives, direct concern, and direct access to the CJEU: Case C-348/20 P Nord Stream 2 v Parliament and Council

By Maria Haag

The limited direct access of individuals to the CJEU is, and has been, the cause for much debate in EU law. However, in the recent *Nord Stream 2* judgment, the Court of Justice confirmed that it is not *quite* as limited as the General Court had laid it out to be in its 2020 order. Generally, for private persons – natural or legal – to be able to challenge an EU legislative act before the CJEU under Article 263(4) TFEU, they must show that, despite not being explicitly addressed by the act, they are nevertheless directly and individually concerned. Since the notorious *Plaumann* judgment, the "individual concern" condition has been the focus of the debate. In *Nord Stream 2*, however, the "direct concern" condition is at issue. According to CJEU case law, two criteria must be met to show direct concern: (1) the EU act directly affects the individual's legal situation and (2) the addressees of the act have no discretion in implementing it (see e.g., C-404/96 P *Glencore Grain*, para 41).

In the present case, the General Court argued that, before transposition into national law, a directive cannot in itself impose obligations on individuals and therefore cannot directly affect their legal situation (para 107). It concluded that the applicant could not demonstrate to be directly concerned by a directive (para 116). These findings have now been reversed by the Court of Justice, confirming that directives may indeed directly concern individuals under certain circumstances and thus continue to be challenged under Article 263(4) TFEU.

Background to the case

The case was brought by Nord Stream 2 AG, a subsidiary of the Russian majority state-owned company Gazprom. It controls a natural gas pipeline from Russia to Germany, which is funded in part by energy companies in the EU. If the applicant is any indication, the context of this case is politically hugely significant for the EU and for Europe, more broadly. In fact, the applicant went bankrupt earlier this year shortly after Russia's invasion of Ukraine. The issue before the Court of Justice in this case, however, is one of admissibility: in other words, does Nord Stream 2 AG, a private party, have standing to challenge an EU directive before the CJEU? Substantially, the case is yet to be resolved. This post therefore outlines only the constitutional importance of the Court's judgment on the standing conditions under Article 263(4) TFEU.

In 2019, Nord Stream 2 AG challenged the validity of Directive 2019/692 ("2019 Directive") before the General Court. The 2019 Directive extends the rules set out in Directive 2009/73 ("Gas Directive") to external gas pipelines that run between a Member State and a third country. The contested Directive entered into force on 23 May 2019 and applies to all pipelines completed after that date (Article 49a). According to the company, the Nord Stream 2 pipeline was close to completion at the time the Directive entered into force (see Judgment, para 17), and is now subject to the rules laid down in the Gas Directive.

The General Court dismissed the applicant's challenge as inadmissible (para 124). It argued that because directives lack direct effect before their transposition deadline, they also cannot affect a private applicant's legal situation before that date (paras 106-108). It is only via the national transposition measures that a directive may create legal obligations for a private party (para 110). The General Court added that, in this specific case, the Member States also enjoyed a wide margin of discretion in transposing certain provisions of the contested Directive (paras 111-115). It concluded that the relevant Member State in this case, Germany, had not transposed the Directive when the annulment action was brought and therefore the applicant did not have standing under Article 263(4) TFEU. Nord Stream 2 AG appealed the General Court's order before the Court of Justice.

Judgment of the Court of Justice

The Grand Chamber found in favour of the appellant and reversed the order. It held that the appellant fulfilled both the direct and individual concern conditions and sent the case back to the General Court to decide on its merits.

According to the Court of Justice, the General Court's order could easily be read as excluding directives entirely from the scope of actions brought under Article 263(4) TFEU. The order implies that directives are, categorically, unable to affect directly an individual's legal situation because they, by definition, have to be transposed into national law. Here, the Court of Justice wished to set the record straight: individuals may be directly concerned by directives. Directives can directly affect an individual's

legal situation, and not only indirectly by way of their national transposition measures (paras 68-70). The Court emphasised that in assessing whether an individual is directly concerned, it is not the form of the act that must be considered, but rather its substance and effects, the context of its adoption, and the powers of the institutions which adopted it (paras 62-63). An individual cannot be denied standing simply because the act to be challenged takes the form of a directive (para 64). Only where the directive leaves some discretion to the Member States regarding the immediate legal effects imposed on the individual can the direct link between a directive and its legal effects be called into question (para 74).

The Grand Chamber also confirmed that the General Court erred in its assessment that the 2019 Directive leaves a margin of discretion to the Member States. It again stressed that just because a directive needs to be transposed does not automatically mean that it leaves a margin of discretion to its addressees (para 96). It is important to assess whether the Member States have room for manoeuvre in transposing the specific provisions and whether it actually affects the applicant's legal situation (paras 97-98). Under the amended Gas Directive, the Member States generally enjoy some discretion in granting certain exemptions and derogations to pipelines which fulfil certain conditions. These conditions are regulated exhaustively in the Directive, and thus the Member States have no discretion in applying these exemptions and derogations to the Nord Stream 2 pipeline specifically, because the company does not fulfil the conditions (paras 104-105). The national authorities therefore have no "*genuine* discretion" (to borrow the words of Advocate General Bobek's Opinion, para 72). Regardless of which measures the Member States take, "the legal situation of the appellant will inevitably be changed" (para 110).

After confirming that the appellant was indeed directly concerned, the Court of Justice also determined that it was individually concerned (para 163). Applying the *Plaumann* test, the Court explained the appellant is part of a group that is identifiable at the time the 2019 Directive was adopted. The Court here refers to the exemptions and derogations offered by the amended Gas Directive: a derogation is available to pipelines completed before 23 May 2019, the day the 2019 Directive entered into force (Article 49a); and an exemption is available for new gas infrastructure projects where no final investment decision has yet been taken (Article 36). At the time the 2019 Directive entered into force, Nord Stream 2 was the only pipeline that was well past the pre-investment stage, but its construction was also not fully completed. Thus, it was the only pipeline that was excluded from the scope of both the derogation and the exemption. This was sufficient to distinguish the appellant and for the Court of Justice to hold that Articles 36 and 49a individually concern them (paras 161-162). The Court thereby confirmed the admissibility of the appellant's challenge of the two provisions and referred the case back to the General Court to decide on its merits.

Comments

The Court of Justice's judgment is an important course correction. The General Court's holding that directives could not directly concern individuals was quite radical and indeed misguided. As rightly pointed out by Advocate General Bobek in his Opinion (paras 38-39), it contradicted not only previous case law (T-420/05 *Vischim*, paras 75-76) but also earlier points made in the General Court's own order. The General Court had prefaced its findings by explaining that directives could indeed be challenged under Article 263(4) TFEU. It had further stressed that: "the EU institutions cannot, merely by means of their choice of legal instrument deprive natural or legal persons of the judicial protection" (para 78). However, by categorically excluding directives from being able to concern individuals directly, the General Court's order would have had precisely that consequence. Had the Court of Justice upheld its interpretation, it would have meant that individuals no longer would have been able to challenge directives before the CJEU. It would have been easy for EU institutions to bypass judicial review by adopting a directive (where possible under the Treaty). This arguably would have also breached the Court's obligation to interpret "the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU … in the light of the fundamental right to effective judicial protection" under Article 47 CFREU (see C-583/11 P *Inuit*, para 98).

The General Court's order seemingly conflated direct concern with direct effect. It argued that because directives could not be enforced against individuals before transposition into national law – effectively, because directives do not have direct effect in national actions brought against individuals – they also may not directly concern individuals. Quite confusingly, the General Court here cited the *Marshall* judgment (see para 106). This is a preliminary ruling on the lack of horizontal direct effect of directives and entirely unrelated to the standing rules under Article 263 TFEU. Further, it recalled the conditions that a provision must meet to have direct effect (see para 107: "sufficiently clear and precise"). Lastly, it used the argument also relied on in *Marshall* (para 48) that directives only address the Member States as provided by Article 288(3) TFEU (para 109). These three points give the impression that the General Court effectively intended to apply the rules on direct effect to Article 263(4) TFEU. As the Advocate General explains, however, although direct effect and direct concern "have certain similarities, they are nonetheless ontologically different and serve a different purpose" (para 40).

It is important to keep these concepts apart. Direct effect is significant at the national level. It allows different actors to enforce EU law before national courts and, specifically, in combination with the principle of primacy, to challenge national laws on the basis of EU law. With that said, direct effect is unrelated to the procedure under Article 263 TFEU before the CJEU. Instead, persons who are not explicitly addressed by an EU act must show direct concern to gain standing before the CJEU. The distinction between direct concern and direct effect is implicitly also confirmed in the Court of Justice's judgment, which emphasises that the General Court's interpretation would mean that

"directives could never directly affect the legal situation of individuals, since those effect would always be connected with the [transposition] measures … and not to the directives themselves" (para 70). Such transposition measures would then have to be challenged before the national courts and not directly before the CJEU.

The Grand Chamber's reversal is also important in ensuring that private persons who wish to challenge the legality a directive are not unreasonably overburdened. Where a directive gives no real discretion to the Member States in how the rules must be transposed and applied, making applicants wait for such a transposition is a mere detour, and a lengthy one at that. As AG Bobek already held in his Opinion: "it would be rather formalistic to suggest that the individual must still nevertheless wait for weeks, months, or even years to challenge … by way of a preliminary ruling, the content of the measure that was already known before" (para 65). This does not even mention the widely discussed shortcomings of relying on national courts to gain indirect access to the CJEU to challenge EU acts. It is good to see therefore that the Grand Chamber has not shut the CJEU's door for challenges of directives brought by individuals. Instead, the door remains ajar.