

THE REGULATION. THE DECISION. THE DIRECTIVE. LEGISLATIVE DIFFERENCES

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Abstract

The article is set to establish the elements that determined the European legislator, within the Lisbon Treaty, to conclude that for certain regulatory domains a specific type of legislative act is to be used (regulation, directive or decision), as well as to define the juridical dissimilarities between the 3 types of secondary legal acts.

Keywords: regulation, decision, directive, Lisbon Treaty, Council and European Parliament

I. Introduction

The entire European Union's legal creation included in institutive treaties could have remained a dead point of law if it didn't exist the juridical instruments to develop and generate its application in the Member States.

The juridical instruments that are held through institutive and modifying treaties, made available for the European co-legislators in order to fulfill their mission, are called legislation.

According to the provisions of the Treaties¹ the legislative acts include:

1. the Regulation;
2. the Decision;
3. the Directive.

II. Content

The differentiation of EU²'s legislative acts from non-legislative acts results from the legal force conferred to them. Thus, the legislative acts have a compulsory legal force, their direct or indirect application being imperative for all Member States. Non-legislative acts (opinions and recommendations) are not binding, Member States having the possibility not to apply in their national legislation the rules contained therein.

The regulation is the most powerful legislative act of the European co-legislators³ made available through the EU treaties. Under the provisions of the TFEU "the regulation is a federal regulatory document with general application, binding in its entirety and directly applicable in all Member States. It is an integration instrument aiming at the unification of the applicable legislation within Member States".

The regulation has the following characteristics:

a) "It is general: it contains general requirements and impersonal, generally stating the same way the law into domestic law does"⁴;

It is customary that regulations are seen as similar to primary or secondary legislation issued by Member States. The analogy is not entirely unsubstantiated, since there is this feature of the regulations that are meant to be generally applicable across Member States.

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¹ Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), adopted in Lisbon in 2007.

² The European Union.

³ The Council and the European Parliament under Art. 14 and 16 of the TFEU.

⁴ Fabian Gyula, Institutional law of the European Union, Ed. Hamangiu, Bucharest, 2012, p 121.

Moreover, the Court⁵ concluded that the regulations are abstract normative measures that are not addressed to a particular person or group of persons⁶. These considerations confirm the similarity between the Regulation, as a European legal instrument, and legislation, especially the primary one, the national legislation.

In relation to the generality of the Regulation "it frequently happens that a natural or legal person to claim that a measure called regulation is actually a decision. This happens most often when the person seeks the annulment of a measure as art. 263 TFEU⁷ limits the right of private individuals to arraign measures that take the form of regulation, ruling in this regard that << any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute the proceedings against any act which is of direct and individual concern and also against any legislative act which is of direct interest and does not entail implementing measures>>⁸. The criterion for determining whether a measure is a regulation or not is one of substance, not form"⁹.

b) "It has a compulsory legal power", meaning that Regulation is compulsory in its entirety to all EU member states and union bodies, its non-compliance entailing the defying of obligations assumed by the States through the Treaties. The selective and incomplete application of the regulation is prohibited, respectively not enforcing the regulation by invoking national provisions or practices;

c) "It has a direct application, meaning that the regulation is automatically valid throughout the Union without the interposition of national legislative power, and is, therefore, apt to confer rights and impose obligations on Member States, their bodies and individuals, as national law does"¹⁰; "the term has a meaning connected to the manner in which international norms penetrate national legal systems. In some Member States, this happens by transforming the measure into a national law by the internal system or by a shorter enactment act of the international act. These methods would be cumbersome when more such international measures would have to be integrated into national legal systems. The European Union issues thousands of regulations. If each of them should be incorporated separately in each national legal system before they can be applied then it would reach a jam. The expression <<directly applicable >> removes this difficulty"¹¹; "any form of transposition is, in fact, prohibited, because it would question the origin of the obligations provided by the Regulation same as the date of the enforcement". Direct applicability implies that the regulation immediately creates rights and obligations upon which individuals can build relationships with both national (vertical direct effect) and in relation to other individuals (horizontal direct effect)¹².

d) "It is intended for states and individuals" (the rule is that it is addressed to Member States);

e) It has full legislative power as the union legislative authority can prescribe through the regulation not only an outcome, but enforce all the rules considered appropriate for the implementation and enforcement.

Two of these characteristics have generated discussion in the doctrine and especially generated jurisprudence. We refer here to the implementation of regulations and their direct applicability. The two issues are closely related to the concept of delegation of sovereignty. A close analysis shows that the regulation, by its direct applicability, appears as a supranational legal framework which, by contrary does not allow any national interference in changing the regulatory object, the desirable result to be achieved or even the provisions contained therein. From this

⁵ Court of Justice of the European Union.

⁶ Paul Craig, Grainne de Burca, EU Law, Fourth Edition, Hamangiu Publishing, Bucharest, 2009, p.104.

⁷ Former Art. 230TCE.

⁸ Treaty on European Union, art. 263, paragraph 4.

⁹ Idem note 5.

¹⁰ Gyula Fabian, op. cit., p. 122.

¹¹ Paul Craig, Grainne de Burca, op.cit., p. 104-105.

¹² Fuerea Augustin, European Community Law. The general, All Beck Publishing House, Bucharest, 2003,

perspective it was expressed in the doctrine¹³ the idea that "in those sectors in which the legislating process is realized through regulations, one can talk about a real delegation of sovereignty from Member States to the European Union".

"The direct applicability means that the Regulation comes into force and is applicable for or in prejudice of the subjects of law without being necessary measures of taking-over national law. European Union's Member States are obliged to respect the direct application of the regulations. Scrupulous observance of this obligation is a prerequisite for the unitary and simultaneous application of regulations throughout the Union. By taking into national law, the Regulation will receive an uncertain status regarding the judicial body that is qualified to construe it. The legal acts whose enactment rules are requested by the regulation does not contravene the taking-over interdiction. For example, within the Romanian national legislation it was issued a Government Emergency Ordinance no. 122/20120 establishing penalties for violation of Regulation no. 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labeling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC and amending Regulation no. 1907/2006, published in Official Gazette no. 892 of 30 December 2010"¹⁴.

There are, however, situations in which such take-over rules distort the original meaning of the Regulation settlements. In this case, the Court of Justice of the European Union immediately intervened to defend supremacy of the federal law in relation to the national law. For example 'Court in the case Tachograph, concluded that Great Britain has defied its obligations under the EEC Treaty¹⁵ because, although the legislative power enacted implementing rules imposed by Regulation no. 1463/70 amended by Regulations no. 1787/73 and 2828/77 regarding the assembly of a tachograph on each truck, the implementing rules left the decision of assembling and of using control equipment at the exploiters choice, based on volunteering, thus practically neutralizing the provisions of the Regulation"¹⁶. The annunciation of national standards for the enforcement of the provisions of a European regulation is the only permissible situation of transposition. In all other cases the transposition is "unnecessary and is unlawful because it leads to the failure of a simultaneous and uniform application of rules across the European Union"¹⁷.

Once again, the Court of Justice of the European Union intervened and confirmed the direct applicability of regulations and therefore, the prohibition of transposition, whenever there were violations of this character caused by national regulations.

We illustrate this through Case 34/73 Smallpox c. Amministrazione delle Finanze¹⁸ when "the Court was asked by a national court whether the provisions of a regulation may be introduced into the legal order of a Member State national measures that reproduce the content of European standards to the extent that the rule's subject is brought under national law. The European Union's Court of Justice ruled that the direct applicability of the Regulation means that its enforcement and its application in favor or to the detriment of subjects of law happen independently of any measure of reception into national law. European Union Member States are committed, on the strength of the obligations that arise from the Treaty and assumed through its ratification, not to obstruct the direct effect inherent to the regulations and other community legal rules.

Strict adherence to this requirement is a prerequisite for the simultaneous and uniform regulations throughout the European Union. More specifically, Member States are not allowed to take measures that might affect the Court's jurisdiction to rule on any question of interpretation of

¹³ Jordan George Barbulescu, Decision-making in the European Union, Polirom, Science, 2008, p.153.

¹⁴ Gyula Fabian, op.cit., p.122-123.

¹⁵ Now TUE.

¹⁶ Gyula Fabian, op.cit., p.123.

¹⁷ Gyula Fabian, op.cit., p.122.

¹⁸ Judgment of 10 October 1973, due 34/73, Fratelli Smallpox Spa / Amministrazione dello stato delle Finanze, ECR 1973, p.1981 (see also Fabian Gyula, op. Cit., P 122).

federal law or validity of a European Union act, which means that no proceeding that would hide the community nature of a legal rule is admissible. The Court remains fully competent, despite national provisions aimed at transforming a national standard into a European one"¹⁹.

"The field of application of the regulation is very vast, starting with the harmonization of national laws in order to create the internal market, up to the establishment of mechanisms concerning the formation of agricultural markets or of the provisions on competition rules"²⁰.

Regulations can take many forms:

- a) Basic regulations or
- b) Implementing regulations usually enacted in order to detail a basic regulation or a directive's provisions.

The decision is the legislative act of the European Union which can be considered a pseudo-regulation because it has all the characters of a regulation apart from the field of application which is restricted to concrete recipients (individuals or legal entities, states or groups of states).

"The decision is governed by art. 288 TFEU²¹. Under these regulations, the decision is binding in its entirety. Whenever the recipients are indicated, the decision is binding only to them. Decisions are characterized by the following features:

- a) They are not of general application; they are addressed to precise recipients, designated or identified, usually in the final article. Decisions may apply to different legal subjects other than states, especially when they refer to competition, which is of particular interest for traders.

These decisions might require certain obligations or impose sanctions to subjects to whom they are addressed. They do not have to be completed with implementing measures taken by the state²². Furthermore, "decisions could be the chosen method to introduce a new federal policy²³ area or to establish general procedures, such as the case of the decision regarding comitology"²⁴.

- b) "For their enforcement, decisions must be notified to the addressee; the absence of the addressee deters the enforcement of the decision. The fact that they cannot be notified does not lead to their invalidity, but to the situation that they are not opposable, even if they were published in the Official Journal of the European Union.

c) The decisions must be reasoned clear and valid, and those that rely on a constant practice can be summarily justified;

- d) Decisions are compulsory in their entirety for all their recipients.

Decisions taken by the Council and Parliament, through the ordinary legislative procedure take effect on the date fixed by the enactment or in 12 days after publication.

According to the Functioning of the European Union European Treaty the Central Bank has the right to take decisions and publish them"²⁵. Considering these decisions one can wonder whether they have the characteristics of a legal act or not. Our opinion is that decisions taken by the European Central Bank have a legal character because the Treaty makes available to this institution almost all the legal instruments necessary to enact legal rules. This way the European Central Bank may enact, dependent on the considered situation, regulations, decisions, opinions or recommendations strictly in the banking field. The only tool that is not available to the European Central Bank is the directive due to reasons that regard the indirect character of directive's regulation.

Another aspect that should be detailed refers to the decisions adopted by the European Council or the Council in the field of security and defense policy and also foreign policy. These decisions are not laws as expressly provided in article 31 TEU. Therefore, we consider that they have

¹⁹ Paul Craig, Grainne de Burca, *op. cit.*, p.10.

²⁰ Nicoleta Diaconu, *European Union's Law*, second revised edition, ed. Lumina Lex, Bucharest, 2009, p.85.

²¹ Ex. Art.249, paragraph 4. TCE.

²² *Idem*, note 19, p. 87.

²³ Socrates program established by Decision 819/95, published in OJ L 87, 1995, p.10.

²⁴ Paul Craig, Grainne de Burca, *op. cit.*, p.107.

²⁵ Nicoleta Diaconu, *op.cit.*, p.87.

primary legal power through their own regulation in the treaty, but they do not follow the procedures that a legislative act does so they cannot be arraigned or contested.

Moreover, the Treaties provide that such decisions are to be enacted with unanimous consent. Exceptions are allowed but are specifically regulated.

Those decisions are enacted in situations governed by:

- a) Art. TUE 22 of the European Council decision on the EU's relations with other countries than the European Union's member states;
- b) Article 27. (3) TEU decision on the organization and functioning of the European External Action Service;
- c) Article 28 par. (1) TEU - Council decision on a EU's operative action if the international situation requires;
- d) Article 29 TEU - EU Council decision on defining positions on external issues a geographical or thematic nature;
- e) Article 31 par. (2) TEU - European Council or the Council decision on the definition of an action or EU external positions;
- f) Article 39²⁶ - Council decision on the establishment of rules on the protection of individuals with regard to the processing of personal data by the Member States (notwithstanding the ordinary procedure provided for in Art. 16 line (2) TFEU);
- g) Article 41. (2) and (3)²⁷ - decision of the Council relating to expenditure on the activity of foreign policy and security policy of the European Union;
- h) Article 42 par. (4) TEU - Council decision on launching joint missions of EU Member States;
- i) Paragraph 43. (2) TEU - Council decision on the common mission objectives;
- j) Article 45 par. (2) TEU - Council decision on defining the statute, seat and operational rules of the European Defense Agency;
- k) Article 46 par. (3)²⁸ - Council Decision on the participation of Member States in cooperation in the defense;
- l) Article 48 par. (6) - European Council decision amending treaties;
- m) Article 48 par. (7) - European Council decision amending legislative procedure by the European Council in the special legislative procedure to the ordinary legislative procedure adopted legislative acts in the field of security and defense policy and foreign policy.

The directive is the legal instrument used by the European institutions. Testimony to this is the number of directives issued by the Commission, Council and Parliament in comparison with the number of regulations or decisions.

"Directives are different from regulation in two essential aspects. They must address to all Member States and they are compulsory as to the result to be achieved, whilst leaving Member States the choice of form and methods. Generally, European institutions have a considerable freedom of choice whether they legislate by regulation or directive. There are express provisions in the treaty²⁹ governing the use of directives. A careful study reveals that legislating through directive, imposed by the Treaty, is closely linked to special legislative procedure³⁰ while regulation is used as a binding legislative instrument for the ordinary procedure³¹.

As R. Kovar³² noted, "the directive intrigue, disturb. And the reason for all these is its uniqueness. "

²⁶ Treaty on European Union (TEU), adopted in Lisbon in 2007.

²⁷ *Idem*.

²⁸ *Ibidem*.

²⁹ Treaty on the Functioning of the European Union, signed in Lisbon in 2007.

³⁰ Article 29 of the Treaty on the Functioning of the European Union.

³¹ Art. 14 from TFEU.

³² Observations sur l'intensité normative des directives – 1987.

"In order to try to elucidate the real reasons that explain the difficulties posed by this original legal instrument, we must analyze ... the characters and functions of the Directive within the European law"³³.

"Unlike union regulation, which is an integration tool, the directive is more of a tool for harmonization"³⁴. "The Directive appears as a tool used at a union level to harmonize national laws, to overcome the differences, the contradictions, most of the time substantial, in internal regulations of the various EU member states"³⁵.

In this respect, the European legislator states that without prejudicing the article 114, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, enacts directives for the approach of laws, regulations and administrative provisions of Member States which directly affect the establishment or the functioning of the internal market³⁶. "The Directive is a compromise between the existing need within the European Union for regulation and state sovereignty. The Directive creates an enactment obligation for the receiver states.

This obligation results from art. 288 under TFEU and also from the loyalty clause provided by art. 4 under TEU which stipulates that "under the principle of sincere cooperation, the Union and the Member States respect each other, assist each other in carrying out tasks which flow from the Treaties or resulting from those institutions of the Union. Member States facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of its objectives"³⁷.

The most important legal characters of the Directive are the following:

a) "It is compulsory in the aim that it appoints"³⁸ "from the analysis of the directive's definition in the Treaty³⁹ one can see that it is considered a two-story legislative method: at a union level it establishes the policy guidelines and the legislative model, it is then for the Member States to transpose this model, pliers second level is therefore the national level. As such, the directive is compulsory only regarding the ultimate goal, which is set at European level ..."⁴⁰

b) "It has general content";

c) "It is intended for a State or several Member States";

d) "It has an incomplete normative character, since it requires national legislative power, the means and form needed to achieve the target set at the sovereign discretion of each state; by means one must understand the legal institutions likely to achieve the stated objective⁴¹; from this perspective one can say that "a directive is a rule that follow the framework law's technique rounded by the infliction decrees. Thus, unlike regulation the directive is more flexible, given the realities in the Member States. As such, receiving states retain some judicial discretion in the transposition of directives. However, the directive retains its normative character. Therefore, theoretically, the directive can contain only an obligation of result, not one of means, and states have absolute freedom regarding legal act transposing and designation of responsible institutions to implement these rules. It can be noted however, that in time, the directive's normative intensity experienced a major advance and the judicial discretion of States has declined accordingly, withdrawing, due to the fact that the objective to be achieved was precisely defined.

³³ Augustin Fuerea, op. cit., p.109.

³⁴ Gyula Fabian, op. cit., p.124.

³⁵ Augustin Fuerea, idem note 32.

³⁶ Article 115 of the Treaty on the Functioning of the European Union.

³⁷ Gyula Fabian, op. cit., p.124.

³⁸ Idem.

³⁹ Art 288 din TFEU (former 249 TCE).

⁴⁰ Augustin Fuerea, op.cit., p.111.

⁴¹ Idem note 36.

This legislative technique has been questioned especially by doctrine and, in some cases, by states, being considered that the letter and spirit of the Treaty's⁴² provisions are violated, and the Directive aims to be an alter ego of regulation. The Court of Justice of the European Communities⁴³ dismissed through a decision rendered in the *Enka*⁴⁴ case this point of view, stating that a directive may have a variable regulatory intensity, and this variability depends by the outcome that the Council and the Commission want to achieve. Therefore, we cannot discuss about a single scope established by the treaty⁴⁵, it rather fluctuates from very large to very small or even inexistent, so it all depends on union-wide target. This practice lead to the reduction of the differences between the directive and the regulation, as the Court recognized that the directive can also be binding in its entirety (objectives and means to achieve them), the same way the regulation is, if this is necessary to achieve the goal set at union level. The regulatory technique in question has not met strong opposition from the Member States, as the situation is likely to be beneficial for them. States themselves are interested in such directives since the reduction of national judicial discretion diminishes the risk of removal from the European objectives and proportionally decrease the danger of assuming the liability of a state for ignoring EU rules"⁴⁶.

e) "It is indirectly applicable because the receiving State must transpose the directive within a certain period (usually between 1 and 3 years) until it creates rights and obligations for refugees. But the state is obliged not to take action that would contravene the Directive, even before absorbing it into national law. The Directive have to be transposed or implemented (through national measures⁴⁷) within the specified period"⁴⁸. "It should be mentioned that these national measures don't intend to introduce the directive into national law as it is understood in the dualistic theory which considers that an act of an international character cannot be applied in the domestic law unless it is <<nationalized>> thus, transformed in a domestic law by processing the act by the latter. Under European Union's law there even exist a ban against any type dual process. Transposition is merely the implementation of this act through internal measures, the process being similar to the situation in which the government decides to apply a law or ordinance.

The first condition of national transposition measures is its existence. The demonstration of its uselessness comes to the state which cannot claim any legal impediments such as national contrary provisions, be they constitutional or materials.

In addition, states cannot invoke the direct effect of the Directive to exempt the adoption of an accordingly internal act. The only situation when the lack of transposition is not sanctioned is when there are already national provisions similar to those of the Directive. On the contrary, a state can assume liability before the Court of Justice of the European Union's on the ground of non-fulfillment of the union obligations.

When a directive is only the synthesis of previous directives already enacted, the so-called consolidation directives, it doesn't have to be implemented if those directives whose synthesis represent have been already implemented. Regarding the internal document's characteristics Court⁴⁹ ruled in the 1976 *Royar* decision that Member States are obliged to choose between the means at their disposal those that lead to the aims of the Directive, so the state must choose the most appropriate forms and methods to ensure the effectiveness of the Directive. According to the equivalence theory⁵⁰ "the transposition of the directive must be equivalent to an act that would have

⁴² TFEU.

⁴³ Nowadays the Court of Justice of the European Union.

⁴⁴ C. 38/77, ENKA BV, 23.11.1977.

⁴⁵ TFEU.

⁴⁶ Augustin Fuerea, op. cit., p.112-113.

⁴⁷ Author's note.

⁴⁸ Gyula Fabian, op. cit., p. 124.

⁴⁹ Court of Justice of the European Union.

⁵⁰ ECJ decision (cur CJEU) in 1986 *Commission v. Belgium*.

been normally adopted in the internal law for achieving the same result"⁵¹. Returning to the transposition's deadline, we mention that it is extremely important because "until its completion the State cannot be held liable for the transposition's delay". For example, in the case *Kolpinghuis Nijmegen*⁵², a coffee house owner has been indicted for selling an assortment of mineral water containing a supplement banned by Directive no. 777/1980, but which had not been taken over by Dutch law and had not been published. Court held that such a directive cannot take effect.

However, there is an exception from the indirect applicability rule, namely the direct application of the directive when the following conditions are met:

- 1) the State did not respect the terms of acquisition or wrongly implemented the Directive;
- 2) the content of the directive is sufficiently precise and unconditional to create rights for individuals;
- 3) the Directive creates benefits for the union citizen;
- 4) can be invoked by an individual up against the state, meaning in relation with the state's institutions "⁵³(so-called direct effect).

The Directive comes into force within 20 days after the publication in the Official Journal of the European Union "when enacted through the ordinary legislative procedure and is addressed to all States". The directives that address only to some member states don't always have to be published, but just brought into notice to the receivers. We emphasize that it is important to make a distinction between the term "come into force" and "implementation deadline"⁵⁴.

III. Conclusions

Through founding treaties, the European Union have a number of legal instruments which help it realizes its goal of generating an accelerated integration at a legal level between Member States. These instruments have been described in the article's content. It is clear that the regulation is the representative instrument of the union integration concept and of the application of the supremacy of the European law towards national law of the member states principle. In this context the Directive can be considered as a method of harmonization of legislation in the fields that carry a national sovereignty. We should appreciate the strive of the treaties authors'⁵⁵ to strengthen the principle of mutual control between European institutions in the matter of enactment in which supranational enactment is most often established through ordinary legislative procedure, while indirect legislating (through Directive) is established often via special legislative procedure. As a proposition of law *ferenda*, we consider necessary to indicate the legal instrument to use in all areas of regulations (regulation, decision or directive), the dismissing of unnamed acts from the treaties and clarifying the legislative procedures applicable to the European Council or Council decisions which currently do not comply with legal proceeding

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⁵¹ Augustin Fuerea, *op.cit.*, p.114.

⁵² Case 80/86, *Kolpinghuis Nijmegen*, collection 1987, p.3969.

⁵³ Gyula Fabian, *op. cit.*, p.126.

⁵⁴ *Idem* p.128.

⁵⁵ Lisbon TEU and TFEU adopted in 2007.

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