

EU Regulations, Directives and Decisions: A Comparison

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This note on the difference between EU Regulations, Directives and Decisions is intended to inform GI stakeholders in the Member States on the implementation ramifications of the legal instruments chosen by the European Commission in promulgating the INSPIRE Implementing Rules. The text is a slightly modified extract from *The ABC of Community Law, 5th Edition*, by Dr Klaus-Dieter Borchardt, published by Directorate-General for Education and Culture, in 2000. References to ECSC (European Coal and Steel Community) legal instruments in that text have been removed from this extract, as not being relevant to the INSPIRE Directive's implementation modalities. It is hoped that this short (3-page) description of the differences between the legal instruments will clarify questions raised by the stakeholder community on why INSPIRE is a legal **Directive** (which must be transposed into national EU Member State law within a prescribed time), yet the technical Implementing Rules are being issued as either Regulations (e.g. in the case of the INSPIRE Metadata and Network Services IRs) or as Decisions (e.g. in the case of the INSPIRE Monitoring and Reporting IR), which have different implementation and enforcement implications for the Member States.

With regard to the degree to which these legal instruments impact on Member States' legal systems, note that Regulations are the most powerful EU instrument, followed in (lesser) order of strength by the Directive, then the Decision, and finally EC Recommendations or Opinions, which are not legally binding.

EC Regulations

The legal acts that enable the Community institutions to encroach furthest on the domestic legal systems are **Regulations** in the EC and Euratom Treaties. Two features very unusual in international law mark them out:

- Their Community character, which means that they lay down the same law throughout the Community, regardless of international borders, and apply in full in all Member States. A Member State has no power to apply a Regulation incompletely or to select only those provisions of which it approves as a means of ensuring that an instrument which it opposed at the time of its adoption or which runs counter to its perceived national interest is not given effect. Nor can it set up provisions or practices of domestic law to preclude the mandatory application of a Regulation.
- Direct applicability, which means that the legal acts do not have to be transposed into national law but confer rights or impose duties on the Community citizen in the same way as national law. The Member States and their governing institutions and courts are bound directly by Community law and have to comply with it in the same way as with national law.

The similarities between these legal acts and statute law passed in individual Member States are unmistakable. If they are enacted with the involvement of Parliament (as part of the co-decision procedure), they may be described as 'European legislation'. Parliament has no responsibility for Regulations, which are only enacted by the Council or the Commission and thus, from a procedural point of view at least, they lack the essential characteristics of legislation of this kind.

Directives

The EC/Euratom **Directive** is the most important legislative instrument alongside the Regulation. Its purpose is to reconcile the dual objectives of both securing the necessary uniformity of Community law and respecting the diversity of national traditions and structures. What the Directive aims for, then, is not the unification of the law, which is the Regulation's purpose, but its harmonisation. The idea is to remove contradictions and conflicts between national laws and regulations or gradually iron out inconsistencies so that, as far as possible, the same material conditions obtain in all the Member States. The Directive is one of the primary means deployed in building the single market.

A **Directive** is binding on the Member States as regards the objective to be achieved but leaves it to the national authorities to decide on how the agreed Community objective is to be incorporated into their domestic legal systems.

The reasoning behind this form of legislation is that it allows intervention in domestic economic and legal structures to take a milder form. In particular, Member States can take account of special domestic circumstances when implementing Community rules. What happens is that the Directive does not supersede the laws of the Member States but places the Member States under an obligation to adapt their national law in line with Community rules. The result is a two-stage law-making process.

First, at the Community stage, the Directive lays down the objective that is to be achieved by any or all Member State(s) to which it is addressed within a specified time-frame. The Community institutions can actually spell out the objective in such detailed terms as to leave the Member States with scant room for manoeuvre, and this has in fact been done in Directives on technical standards and environmental protection.

Second, at the national stage, the objective set at Community level is translated into actual legal or administrative provisions in the Member States. Even if the Member States are in principle free to determine the form and methods used to transpose their Community obligations into domestic law, Community criteria are used to assess whether they have done so in accordance with Community law. The general principle is that a legal situation must be generated in which the rights and obligations arising from the Directive can be recognised with sufficient clarity and certainty to enable the Community citizen to rely on or, if appropriate, challenge them in the national courts. This normally involves enacting mandatory provisions of national law or repealing or amending existing rules. Administrative custom on its own is not enough since it can, by its very nature, be changed at will by the authorities concerned; nor does it have a sufficiently high profile.

Directives addressed to one or more Member States do not as a rule directly confer rights or impose obligations on the Community citizen. They are expressly addressed to the Member States alone. Rights and obligations for the citizen flow only from the measures enacted by the authorities of the Member States to implement the Directive. This point is of no importance to the citizen as long as the Member States actually comply with their Community obligations. But there are disadvantages for the Community citizen where a Member State does not take the requisite implementing measures to achieve an objective set in a Directive that would benefit him, or where the measures taken are inadequate. The Court of Justice has refused to tolerate such disadvantages, and a long line of cases has determined that in such circumstances the Community citizen can plead that the Directive has direct effect in actions in the national courts to secure the rights conferred by it. Direct effect is defined by the Court as follows:

- the provisions of the Directive or ECSC recommendation must lay down the rights of the EU citizen/firm with sufficient clarity and precision;
- the alleged rights are not conditional;
- the national authorities may not be given any room for manoeuvre regarding the content of the rules to be enacted;
- the time allowed for implementation of the Directive/ECSC recommendation has expired.

The decisions of the Court of Justice concerning direct effect are based on the general view that the Member State is acting equivocally and unlawfully if it applies its old law without adapting it to the requirements of the Directive. This is an abuse of rights by the State and the recognition of direct effect of the Directive seeks to combat it by ensuring that the State derives no benefit from its violation of Community law. Direct effect thus has the effect of penalising the offending Member State. In that context, it is significant that the Court of Justice has applied the principle solely in cases between a citizen and a Member State, and then only when the Directive was for the citizen's benefit and not to his detriment - in other words, when the citizen's position under the law as amended under the Directive was more favourable than under the old law (known as 'vertical direct effect'). The direct effect of Directives in relations between citizens themselves ('horizontal direct effect') has not been accepted by the Court of Justice. The Court concludes from the punitive nature of the principle that it is not applicable to relations between private individuals since they cannot be held liable for the consequences of the State's failure to act. What the citizen needs to rely on is certainty in the law and the protection of legitimate expectations. The citizen must be able to count on the effect of a Directive being achieved by national implementation measures.

Nevertheless, once the period allowed for transposition has expired, the Directives acquire full legal force and effect in that all State bodies are obliged to interpret and apply national law in accordance with the Directives ('interpretation in line with Community law').

In its judgments in *Francovich* and *Bonifaci* in 1991, the European Court of Justice went further, holding that Member States are liable to pay damages where loss is sustained by reason of failure to transpose a Directive in whole or in

part. Both cases were brought against Italy for failure to transpose Directive 80/987/EEC on the protection of employees in the event of the employer's insolvency, which sought to protect the employee's rights to remuneration in the period preceding insolvency and dismissal on grounds of insolvency. To that end, guarantee funds were to be established with protection from creditors; they were to be funded by employers, the public authorities, or both.

The problem facing the Court was that, although the aim of the Directive was to confer on employed workers a personal right to continued payment of remuneration from the guarantee funds, this right could not be given direct effect by the national courts, meaning that they could not enforce it against the national authorities, since in the absence of measures transposing the Directive the guarantee fund had not been established and it was not possible to ascertain who was the debtor in connection with the insolvency.

The Court finally held that, by failing to implement the Directive, Italy had deprived the employed workers in question of their rights and was accordingly liable to damages. Even if the duty to compensate is not written into Community law, the Court of Justice sees it as an integral part of the Community legal order since its full effect would not be secured and the rights conferred by it would not be protected if Community citizens did not have the possibility of seeking and obtaining compensation for invasion of their rights by Member States acting in contravention of Community law.

Individual Decisions

A third category of Community legal acts consists of EC or Euratom **Decisions**. In some cases the Community institutions may themselves be responsible for implementing the Treaties or Regulations, and this will be possible only if they are in a position to take measures binding on particular individuals, firms or Member States. The situation in the Member States' own systems is more or less the same; legislation will be applied by the authorities in an individual case by means of an administrative decision.

In the Community legal order, this function is fulfilled by the individual **Decision**, which is the means normally available to the Community institutions to order that a measure be taken in an individual case. The Community institutions can thus require a Member State or an individual to perform or refrain from an action, or can confer rights or impose obligations on them.

The basic characteristics of a Decision can be summed up as follows.

- It is distinguished from the regulation by being of individual application: the persons to whom it is addressed must be named in it and are the only ones bound by it. This requirement is met if, at the time the Decision is issued, the category of addressees can be identified and can thereafter not be extended. Reference is made to the actual content of the Decision, which must be such as to have a direct, individual impact on the citizen's situation. Even a third party may fall within the definition if, by reason of personal qualities or circumstances that distinguish him from others, he is individually affected and is identifiable as such in the same way as the addressee.
- It is distinguished from the Directive in that it is binding in its entirety (whereas the Directive simply sets out objectives to be attained).
- It is directly applicable to those to whom it is addressed. A Decision addressed to a Member State may, incidentally, have the same direct effect in relation to the citizen as a directive.

Instances in which Decisions are used include, for example, the granting or refusal of State aid (Articles 87 and 88 EC), the annulment of agreements or arrangements contrary to fair competition (Article 81 EC) and the imposition of fines or coercive measures.