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INSTRUMENTS AND THE HIERARCHY OF NORMS

1 CENTRAL ISSUES

i. This chapter examines two related issues: the EU's legal and non-legal instruments and the hierarchy of norms.

ii. The EU has a number of legal and non-legal instruments that are used to attain Union objectives. The principal legal instruments are regulations, directives, and decisions. These will often be used in conjunction with each other. The foundational provision in an area may, for example, be a directive, and regulations and decisions may supplement it. The foundational provision may alternatively take the form of a regulation, which is then supplemented by further regulations, directives, or decisions. The EU also has numerous soft law methods for developing Union policy. Formal and informal law will commonly be used together to attain EU goals in any particular area.

iii. The Treaties lay down a number of conditions for the legality of such instruments. Thus reasons must be given for all legal acts, and there are requirements concerning publication and signature.

iv. The hierarchy of norms is the second issue addressed in this chapter. This phrase captures the idea that in a legal system there will be a vertical ordering of legal acts, with those lower down the hierarchy being subject to legal acts of a higher status. Prior to the Lisbon Treaty a hierarchy of norms could be discerned. There were, for example, 'primary' regulations, directives, or decisions that laid the legal foundations for policy in a particular area, and these would be supplemented by 'secondary' regulations, directives, or decisions that dealt in greater detail with an issue covered in the primary norm. The secondary norms were clearly subject to the primary norms, and hence lower in the hierarchy.

v. The framers of the Lisbon Treaty felt, however, that it was desirable in terms of simplicity, democratic legitimacy, and separation of powers to have a more definite hierarchy of norms than had existed hitherto. There are now five principal tiers to the hierarchy of norms in EU law, which are, in descending order: the constituent Treaties and Charter of Rights; general principles of law; legislative acts; delegated acts; and implementing acts.

vi. The subsequent discussion will elaborate the meaning of these different tiers that constitute the hierarchy of norms. It will be seen that there are however considerable problems with the new Lisbon regime, in particular in relation to the distinction between delegated and implementing acts. It is only when these problems have been understood that one can decide whether the Lisbon objectives of simplicity, democratic legitimacy, and separation of powers have been attained.

2 INSTRUMENTS

It is important to understand the different types of EU instrument. Article 288 TFEU is the foundational provision:

> To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
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> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
>
> Recommendations and opinions shall have no binding force.

(A) INTRODUCTION

The more particular meaning of these legal acts will be examined below. It is however important to be aware of five points that are relevant to all these instruments.

First, there is no formal hierarchy between these provisions. It should not therefore be thought that regulations are somehow 'superior' to directives, or vice versa. It is equally important to understand that regulations, directives, and decisions will often be connected in the development of EU policy in a particular area. There may, for example, be a 'foundational' regulation, and directives or decisions may be made pursuant to this. The 'foundational' provision may equally be a directive or a decision.

Secondly, regulations, directives, and decisions may, as will be seen below, take the form of legislative, delegated, or implementing acts. The regulations, directives, and decisions do not alter their nature, but their place within the overall hierarchy of norms will depend upon whether they are legislative, delegated, or implementing acts.

Thirdly, the Treaties may specify the type of instrument to be used, but will often not do so. Article 296 TFEU states that where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality.

Fourthly, Article 296 TFEU imposes an obligation to give reasons[1] for legal acts, and this includes reference to any proposals, initiatives, recommendations, requests, or opinions required by the Treaties.

Finally, Article 297 TFEU specifies rules for the making of the legal acts in Article 288. Thus where a regulation, directive, or decision takes the form of a legislative act adopted under the ordinary legislative procedure it must be signed by the Presidents of the European Parliament and the Council. Legislative acts adopted under a special legislative procedure are signed by the President of the institution which adopted them. Legislative acts must be published in the Official Journal and enter into force on the date specified therein or, in the absence thereof on the twentieth day following that of their publication.

Where the regulation, directive, or decision is a non-legislative act and does not specify to whom it is addressed, it is signed by the President of the institution which adopted it. Regulations and directives addressed to all Member States, as well as decisions which do not specify to whom they are addressed, must be published in the Official Journal. They enter into force on the date specified

[1] Ch 15.

in the absence thereof, on the twentieth day following publication. Other directives, and decisions which specify to whom they are addressed, must be notified to the addressee and take effect upon such notification.

(B) REGULATIONS

Regulations are binding in their entirety and directly applicable in all Member States. It is common to think of regulations as akin to legislation made by Member States. There is some force in this analogy, since regulations are measures of general application, applicable to all Member States. The legal reality in the post-Lisbon world is, however, that regulations can, as will be seen below, take the form of legislative, delegated, or implementing acts.

Regulations are said by Article 288 to be 'directly applicable'. Commentators have debated the meaning of this term.[2] We cannot know the intent of those who drafted the Treaty in the absence of the *travaux préparatoires*. It is unclear whether the Treaty framers meant the phrase 'directly applicable' to connote the idea that individuals have rights, which they can enforce through national courts. The ECJ has on occasion interpreted directly applicable in this manner.[3]

The term does, however, have another meaning, which is concerned with the way in which international norms enter national legal systems. In some Member States, notably those which have a dualist view of the relationship between national and international law, this must be done either by the national system transforming the measure into national law, or by a shorter national act adopting the relevant international act. These methods would be very cumbersome when there are many such measures to be transferred into national legal systems. The EU enacts thousands of regulations. If each regulation had to be separately incorporated into each national legal system before it could be legally effective then the EU would grind to a halt. The phrase 'directly applicable' obviates this difficulty. It signifies that regulations are part of the national legal systems, without the need for transformation or adoption by separate national legal measures.

Member States may nonetheless need to modify their law in order to comply with a regulation, or they may need to pass consequential legal measures in order to give full effect to what is demanded by the regulation. This does not alter the fact that the regulation itself has legal effect in the Member States independently of any national law, and Member States should not pass measures that conceal the nature of the EU regulation.

Case 34/73 Variola v Amministrazione delle Finanze [1973] ECR 981

The ECJ was asked by a national court whether the provisions of a regulation could be introduced into the legal order of a Member State by internal measures which reproduced the contents of the Community provision 'in such a way that the subject-matter is brought under national law'.

THE ECJ

10. The direct application of a Regulation means that its entry into force and its application in favour of those subject to it are independent of any measure of reception into national law.

[2] J Steiner, 'Direct Applicability in EEC Law—A Chameleon Concept' (1982) 98 LQR 229; A Dashwood, 'The Principle of Direct Effect in European Community Law' (1978) 16 JCMS 229.

[3] Ch 7.

> By virtue of the obligations arising from the Treaty and assumed on ratification, Member States are under a duty not to obstruct the direct applicability inherent in Regulations and other rules of Community law.
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> Strict compliance with this obligation is an indispensable condition of simultaneous and uniform application of Community Regulations throughout the Community.
>
> 11. More particularly, Member States are under an obligation not to introduce any measure which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of Community law or the validity of an act of the institutions of the Community, which means that no procedure is permissible whereby the Community nature of a legal rule is concealed from those subject to it.
>
> Under Article 177 of the Treaty in particular the jurisdiction of the Court is unaffected by any provisions of national legislation which purport to convert a rule of Community law into national law.

An individual may allege that a measure which is called a regulation is really a decision. This arose most commonly when an individual sought to annul a measure because what was Article 230 EC limited the ability of individuals to challenge measures in the form of regulations. The test of whether a measure really is a regulation is one of substance, and not form. The fact that the contested act is called a regulation is not therefore conclusive.[4]

(C) DIRECTIVES

Directives differ from regulations in two important ways. They do not have to be addressed to all Member States, and they are binding as to the end to be achieved while leaving some choice as to form and method to the Member States. The ability to act through directives as well as regulations gives the EU valuable flexibility. The direct applicability of regulations means that they have to be capable of being 'parachuted' into the legal systems of all the Member States just as they are. Normally every 't' must be crossed, and every 'i' must be dotted in regulations, since Member States must not tamper with them. If this were the only way to develop EU policy, the legislative process would work very slowly. There might be areas where it was difficult to devise regulations with the requisite specificity, which were suited to immediate impact in the Member States, more especially because the Member States have differing legal systems, and there are variations in the political, administrative, and social arrangements within the Member States.

Directives are particularly useful when the aim is to harmonize the laws within a certain area, or to introduce complex legislative change. This is because discretion is left to Member States as to how the directive is to be implemented. It should not however be thought that directives are vague. They are not. The ends which Member States have to meet will be set out in considerable detail. The force of directives has been increased by ECJ rulings. The Court held that directives have direct effect, enabling individuals to rely on them, at least in actions against the state,[5] and that a Member State can be liable in damages for non-implementation of a directive.[6]

(D) DECISIONS

Article 288 TFEU states that a decision is binding in its entirety, and a decision which specifies those to whom it is addressed is binding only on them. This captures the duality in the use of decisions as legal acts prior to the Lisbon Treaty.

[4] Ch 14.
[5] Ch 7.
[6] Ch 8.

In most instances decisions were used as binding legal acts in relation to specific addressees, as exemplified by the many decisions made in the context of competition and state aids. Some decisions were however of a more generic nature, setting out the legal rules to govern an inter-institutional issue such as Comitology, or providing the legal foundation for Community programmes.[7]

The English version of Article 288 is capable of covering both types of decision. The German and Dutch wording however signifies the generic rather than the individualized version of decision.[8] It remains to be seen whether the individualized sense of decision will subsist. It would be very odd if it did not, since it has been a staple and important form of legal act ever since the inception of the EEC.

(E) INTER-INSTITUTIONAL AGREEMENTS

Inter-institutional Agreements between the Council, Commission, and the European Parliament have long been an important part of the EU. They are a form of constitutional glue through which the major institutional players can resolve high-level issues, provide guiding principles, or lay the foundations for more concrete legislative action. Such agreements have been made on topics of constitutional significance such as subsidiarity, transparency, the budget, and participation rights.[9]

Article 295 TFEU now provides that the European Parliament, Council, and Commission shall consult each other and by common agreement make arrangements for their cooperation. It also stipulates that they may, in compliance with the Treaties, conclude inter-institutional agreements which may be of a binding nature. There is therefore specific Treaty foundation for rendering inter-institutional agreements binding.

(F) RECOMMENDATIONS, OPINIONS, AND SOFT LAW

Article 288 states that recommendations and opinions have no binding force. While this precludes such measures from having direct effect, it does not immunize them from the judicial process. It is, for example, open to a national court to make a reference to the ECJ concerning the interpretation or validity of such a measure.[10]

Recommendations and opinions are, subject to the preceding point, forms of soft law.[11] They are not however the only species of soft law. The Commission has, for example, issued policy guidelines in the area of state aids to indicate how it will exercise its discretion.[12] There are moreover other EU initiatives, such as the open method of coordination, which straddle the divide in certain respects between soft and hard law.[13]

The admixture of formal and informal law is a common feature of any legal order. This feature has been positively lauded in the EU, rather than seen as a cause for apology or criticism. Thus the Commission in its 2000 Review of the Internal Market Strategy included a neat checklist of the legislative and non-legislative measures it intended to take in order to attain the single market.[14] The same

[7] A von Bogdandy, J Bast, and F Arndt, 'Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis' (2004) 23 YEL 91, 103–106.

[8] B de Witte, 'Legal Instruments and Law-Making in the Lisbon Treaty' in S Griller and J Ziller (eds), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty* (Springer, 2008) 95–96.

[9] Chs 1, 5.

[10] Case C-322/88 *Grimaldi v Fonds des Maladies Professionelles* [1989] ECR 4407.

[11] K Wellens and G Borchardt, 'Soft Law in European Community Law' (1989) 14 ELRev 267; J Klabbers, 'Informal Instruments before the European Court of Justice' (1994) 31 CMLRev 997; L Senden, *Soft Law in European Community Law* (Hart, 2004).

[12] Ch 29.

[13] Ch 6.

[14] COM(2000)257 final.

readiness to use the full range of policy instruments was apparent in the Nice European Council. In the implementation of the Social Agenda 'all existing Community instruments bar none must be used: the open method of coordination, legislation, the social dialogue, the Structural Funds, the support programmes, the integrated policy approach, analysis and research'.[15] A glance at the Commission's work programme for any year will reveal the interaction between legislative and non-legislative techniques for attaining EU objectives.[16]

The admixture of formal and informal law, while inevitable, can nonetheless give rise to problems. It may be difficult for those affected to understand what the 'law' actually is in a particular area. Recourse to informal law may also prevent the Council and EP from having effective input into the resulting norms.

3 HIERARCHY OF NORMS

(A) RATIONALE

Prior to the Lisbon Treaty the legal acts of the Community were those specified above. Regulations, directives, and decisions could be used either as the 'primary' norm to govern a particular topic, or as a 'secondary' norm made pursuant to the 'primary' norm. The EC Treaty contained however no formal hierarchy of legal acts. This has now changed. The Constitutional Treaty included reform of legal acts and created a hierarchy of norms. The Lisbon Treaty retained a hierarchy of legal acts,[17] although the nomenclature was altered because it was felt by the European Council that the words 'law' and 'lawmaking' in the Constitutional Treaty should be excised on the ground that they carried 'federal' and 'constitutional' resonance.

The provisions in the Constitutional Treaty on the hierarchy of norms followed, with some modifications, the recommendations of Working Group IX on Simplification,[18] but it is instructive to note the cautionary warning of the Group, that 'nothing is more complicated than simplification'.[19] The Working Group sought to attain a number of objectives: simplification, democratic legitimacy, and separation of powers. The hierarchy of norms was said to be 'the consequence of a better separation of powers'.[20] There was to be a clearer delineation between matters that fell to the legislative arm of government and those that were for the executive.

We shall consider in due course whether these aims have been realized. The remainder of this chapter will explicate the hierarchy of norms in EU law. The discussion begins with the top of the hierarchy, the constituent Treaties. This is followed by consideration of general principles of law, which sit below the Treaties but above other forms of legal act. There will then be analysis of the delineation

[15] Nice European Council, 7–9 Dec 2000, Annex 1, [28].

[16] Commission Work Programme 2011, COM(2010)623 final, Vol II.

[17] Von Bogdandy, Bast, and Arndt (n 7); P Craig, 'The Hierarchy of Norms' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century, Rethinking the New Legal Order* (Hart, 2004) 75–93; K Lenaerts and M Desomer, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures' (2005) 11 ELJ 744; J Liisberg, 'The EU Constitutional Treaty and its Distinction between Legislative and Non-Legislative Acts' in B Olsen and K Sorensen (eds), *Regulation in the EU* (Thomson, 2006) 133–168; P Stancanelli, 'Le système décisionnel de l'Union' in G Amato, H Bribosia, and B de Witte (eds), *Genesis and Destiny of the European Constitution* (Bruylant, 2007) 485–543; de Witte (n 8); H Hofmann, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality' (2009) 15 ELJ 482; P Craig, *The Lisbon Treaty, Law Politics and Treaty Reform* (Oxford University Press, 2010) ch 7; B Driessen, 'Delegated Legislation after the Treaty of Lisbon: An Analysis of Article 290 TFEU' (2010) 35 ELRev 837; P Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation' (2011) 36 ELRev forthcoming.

[18] CONV 424/02, Final Report of Working Group IX on Simplification, Brussels, 29 Nov 2002.

[19] Ibid 1.

[20] Ibid 2.

between legislative, delegated, and implementing acts laid down in the Lisbon Treaty, with the details as to how these acts are made being considered in the following chapter.

(B) TREATIES AND CHARTER

It is common when discussing the hierarchy of norms to focus solely on legislative, delegated, and implementing acts, and the hierarchy between them. This is indeed a central part of the subject. It is however incomplete. It is the constituent Treaties, the TEU and TFEU, which sit at the top of the hierarchy of norms in the EU. The Charter of Rights has the same status, since Article 6(1) TEU states that the Charter has the same legal value as the Treaties. The Treaty provisions will themselves be construed in light of the Charter, in order to give the interpretation that best fits with Charter rights. Any legislative act must, as we have seen in the previous chapter, be made pursuant to some Treaty Article, and the Union Courts will determine the scope and interpretation of such Treaty and Charter provisions.

(C) GENERAL PRINCIPLES

The point made in the preceding section is important and obvious. The subject matter in this section is less obvious for those who are not yet familiar with EU law. The second tier of the hierarchy of norms belongs to what are known as general principles of law.[21] They sit below the constituent Treaties, and may be used when interpreting particular Treaty Articles. They sit above legislative, delegated, and implementing acts: general principles can be used not only to interpret such acts, but also as a ground for invalidation if a particular legislative, delegated, or implementing act contravenes these principles.

The general principles have been largely fashioned by the Union Courts. They have read principles such as proportionality, fundamental rights, legal certainty, legitimate expectations, equality, the precautionary principle, and procedural justice into the Treaty, and used them as the foundation for judicial review under Articles 263 and 267 TFEU. This is examined in more detail below,[22] but the role played by such principles must be understood here.

All developed legal systems embody grounds of judicial review that provide the framework within which the courts exercise their powers. The principles of judicial review will normally form part of administrative law, and provide the basis for legal challenges to governmental action. These principles may be developed by the courts. They may be laid down by statute or code. They may be formed from an admixture of the two.

In the EU, the Treaty forms the starting point for elaboration of the grounds of review. Article 263(2) TFEU stipulates that judicial review shall be available for lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. The influence of French juristic thought is clearly imprinted on these grounds of review. Article 263 TFEU nonetheless accorded the ECJ, and later the CFI (now the General Court), considerable latitude in fashioning the principles of judicial review.

The ECJ's role was facilitated by the broad wording of Article 263(2), especially the third ground of review, 'infringement of the Treaties or any rule of law relating to their application'. The absence of the *travaux préparatoires* means that we do not know what the latter part of this phrase was intended to connote. The intent might simply have been to ensure that Commission decision-making complied

[21] T Tridimas, *The General Principles of EU Law* (Oxford University Press, 2nd edn, 2006); P Craig, *EU Administrative Law* (Oxford University Press, 2006).

[22] Ch 15.

not only with the primary Treaty Articles, but also regulations, directives, etc, passed pursuant thereto. If this had been the intent it could however have been expressed far more simply. The intent might alternatively have been to capture compliance not only with secondary legislation, but also with other rules of law relating to the application of the Treaty that might be developed by the Courts. In any event, the very ambiguity in the phrase provided the ECJ with a window through which to justify the imposition of administrative law principles as grounds of review.

Article 19 TEU (ex Article 220 EC) was equally important in this respect. It charged the Union Courts with the duty of ensuring that in the interpretation and application of the Treaty the law should be observed. This might have been interpreted in a limited manner to connote the idea that, for example, Commission decisions should be made within the limits of the primary Treaty Articles and secondary legislation. The word 'law' within this Article was however open to a broader interpretation that was used by the ECJ to fashion a system of general principles through which the legality of Union and Member State action could be determined.

The judicial task of elaborating principles of judicial review was further facilitated by more specific Treaty Articles, which made reference to, for example, non-discrimination. It was then open to the ECJ to read these particular Treaty references as indicative of a more general principle of equal treatment and non-discrimination that underpinned the legal order.[23]

In developing these concepts the ECJ and later the CFI drew upon administrative law doctrine from the Member States. They did not systematically trawl through the legal systems of each Member State in order to find common principles. The approach was, rather, to consider principles in the major legal systems of the Member States, to use those that were felt to be best developed, and to fashion them to the EU's own needs.[24] German law was perhaps the most influential. It was German jurisprudence on, for example, proportionality and legitimate expectations that was of principal significance for the development of EU law in these areas.

The general principles afford the EU Courts considerable power over the interpretation of Treaty Articles and the interpretation and validity of other Union acts, as will be apparent from discussion throughout this book. The EU Courts also have considerable power over whether to recognize a new general principle of EU law, as exemplified by the following cases.

Cases T–74, 76, 83–85, 132, 137, 141/00 Artegodan GmbH and Others v Commission
[2002]ECR II–4945

[Note Lisbon Treaty renumbering: Arts 6, 152, 153, 174, 175 EC are now Arts 11, 168, 169, 191, 192 TFEU]

The case concerned marketing authorizations issued for drugs to control obesity. The Commission withdrew the authorizations pursuant to Directive 65/65 on the basis of scientific advice that the drugs might be harmful to health. The applicants sought annulment of the Commission decisions, and the CFI considered the status of the precautionary principle in EU law.

THE CFI

181 [W]here there is scientific uncertainty, it is for the competent authority to assess the medicinal product in question in accordance with the precautionary principle. It is therefore appropriate to recall

[23] Cases 117/76 and 16/77 *Ruckdeschel v Hauptzollamt Hambourg-St. Annen* [1977] ECR 1753, [7].
[24] Case 14/61 *Hoogovens v High Authority* [1962] ECR 253, 283–284, Lagrange AG.

the origin and content of that principle before explaining its effect on the rules of evidence in connection with the system of prior authorisation of medicinal products.

182 As regards environmental matters, the precautionary principle is expressly enshrined in Article 174(2) EC, which establishes the binding nature of that principle. Furthermore, Article 174(1) includes protecting human health among the objectives of Community policy on the environment.

183 Therefore, although the precautionary principle is mentioned in the Treaty only in connection with environmental policy, it is broader in scope. It is intended to be applied in order to ensure a high level of protection of health, consumer safety and the environment in all the Community's spheres of activity. In particular, Article 3(p) EC includes 'a contribution to the attainment of a high level of health protection' among the policies and activities of the Community. Similarly, Article 153 EC refers to a high level of consumer protection and Article 174(2) EC assigns a high level of protection to Community policy on the environment. Moreover, the requirements relating to that high level of protection of the environment and human health are expressly integrated into the definition and implementation of all Community policies and activities under Article 6 EC and Article 152(1) EC respectively.

184 It follows that the precautionary principle can be defined as a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests. Since the Community institutions are responsible, in all their spheres of activity, for the protection of public health, safety and the environment, the precautionary principle can be regarded as an autonomous principle stemming from the abovementioned Treaty provisions.

185 It is settled case-law that, in the field of public health, the precautionary principle implies that where there is uncertainty as to the existence or extent of risks to human health, the institutions may take precautionary measures without having to wait until the reality and seriousness of those risks become fully apparent... Prior to the enshrinement in case-law of the precautionary principle, on the basis of the Treaty provisions, that principle was implicitly applied in the review of proportionality....

The CFI was therefore willing to extrapolate from limited Treaty references to the precautionary principle, and from mention of the principle in some case law, and enshrine it as a general principle of law. It was not however willing to recognize a general principle in *Audiolux*.

Case C-101/08 Audiolux SA ea v Groupe Bruxelles Lambert SA (GBL) [2009] ECR I-9823

The reference for a preliminary ruling raised the question whether there was a general principle of Community law of equality of shareholders under which minority shareholders were protected by an obligation on the dominant shareholder, when acquiring or exercising control of a company, to offer to buy the minority shareholders' shares under the same conditions as those agreed when a shareholding in that company conferring or strengthening the control of the dominant shareholder was acquired.

THE ECJ

33 In that connection, the national court refers to a number of provisions of secondary Community legislation, namely Articles 20 and 42 of Directive 77/91, General principle 3 and Supplementary principle 17 of the Code of Conduct, Paragraph 2(A) of Schedule C in the Annex to Directive 79/279 and Article 3(1)(a) of Directive 2004/25, read in the light of Recital 8 in the preamble thereto.

34 It must be observed, first of all, that the mere fact that secondary Community legislation lays down certain provisions relating to the protection of minority shareholders is not sufficient in itself

to establish the existence of a general principle of Community law, in particular if the scope of those provisions is limited to rights which are well defined and certain. Therefore, in examining the provisions mentioned by the national court, the sole purpose is to ascertain whether they give any conclusive indications of the existence of such a principle. In that connection, it must be stated that only if those provisions are drafted so as to have binding effect... will those provisions have indicative value showing the well-defined content of the principle concerned (see, to that effect, Jippes and Others, paragraph 79).

35. First, it is clear that the scope of the abovementioned provisions of Directives 77/91 and 79/279 is limited to well-defined situations and that they do not cover a situation such as that at issue in the case in the main proceedings.

...

42. ...Furthermore, as the Advocate General notes, in point 84 of her Opinion, those provisions are essentially limited to regulating very specific company-law situations by imposing on companies certain obligations for the protection of all shareholders. They do not therefore possess the general comprehensive character which is otherwise naturally inherent in general principles of law.

43. Second, as regards General principle 3 and Supplementary principle 17 of the Code of Conduct and Directive 2004/25, it should be noted that neither that code nor the directive expressly mentions the existence of a general principle of Community law relating to the protection of minority shareholders.

...

50. [T]he provisions of Directive 2004/25 apply to specific situations, so that no general principle with a specific content can be inferred from them. In addition, they do not, as was already stated with respect to the provisions of Directives 77/91 and 79/279, in paragraph 42 of this judgment, possess the general, comprehensive character which is naturally inherent in general principles of law.

...

52. Having regard to the foregoing, it must be held that the provisions of secondary Community law to which the national court refers do not provide conclusive evidence of the existence of a general principle of equal treatment of minority shareholders.

(c) LEGISLATIVE ACTS

Article 289 TFEU is the governing provision that deals with legislative acts. It provides as follows:

1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.

2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.

3. Legal acts adopted by legislative procedure shall constitute legislative acts.

4. In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.

The basic premise of Article 289 TFEU is that legislative acts are legal acts adopted by a legislative procedure. The legal acts that can be legislative are regulations, directives, or decisions: provided that they are adopted in accordance with a legislative procedure they will constitute legislative acts for the purposes of the Lisbon Treaty. The default position is that this will be the ordinary legislative procedure, which is the successor to co-decision. A special legislative procedure is however mandated in certain instances.[25]

[25] Ch 5.

The important point to note is that the definition of a legislative act is purely formal. This follows from the wording of Article 289(3) TFEU: any legal act, whether in the form of a regulation, directive, or decision, which is enacted in accordance with the ordinary or special legislative procedure is a legislative act for the purposes of the Lisbon Treaty. This formalism is symmetrical: any legal act enacted by the ordinary or special legislative procedure is by definition a legislative act; and if a legal act is not enacted in this manner then it does not constitute a legislative act. There are two consequences of this formalism.

The first is that the content of the act is not relevant to its status as a legislative act. If a legislative procedure is prescribed for the enactment of a legal act then it is by definition a legislative act, notwithstanding that the content of the measure might well be regarded as administrative in nature. The converse is equally true. If the Lisbon Treaty does not prescribe a legislative procedure for the passage of a legal act then it is not a legislative act, even if judged by its content it lays down rules of general application that would in substantive terms be regarded as legislative in nature.

The second consequence of the formalistic approach is that the only legal acts that constitute legislative acts for the purposes of the Lisbon Treaty are those made in accordance with the ordinary or special legislative procedure as defined in Article 289(1)–(2) TFEU, including in the case of the latter the requirement that this special procedure is mandated in the specific cases provided for by the Treaties. This gives rise to problems because certain Treaty Articles do not specify the ordinary or special legislative procedure. and hence the acts made thereunder are *prima facie* not legislative acts,[26] even though the measures enacted under the predecessor provisions of the EC Treaty clearly were legislative in nature.

(E) DELEGATED ACTS

Article 290 TFEU defines the new category of delegated act, and sets the conditions and controls over the making of such acts.

> 1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.
>
> The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.
>
> 2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:
>
> (a) the European Parliament or the Council may decide to revoke the delegation;
>
> (b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.
>
> For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.
>
> 3. The adjective 'delegated' shall be inserted in the title of delegated acts.

The Lisbon Treaty established two categories of act below that of legislative acts: delegated and implementing acts. The procedure for the making of such acts will be considered in the subsequent chapter. The present discussion is concerned with the nature of delegated and implementing acts and the criteria for the divide between them. The rationale for the divide was to distinguish between secondary measures that were 'legislative' in nature, delegated acts, and those that could be regarded

[26] See, eg, Arts 103, 109 TFEU; Craig, *The Lisbon Treaty* (n 17) ch 7.

as more purely 'executive', implementing acts. The difficulties of realizing this divide were however never fully thought through in the deliberations on the Constitutional or Lisbon Treaty, and it is, as will be seen below, very doubtful whether the objective has been realized.

A brief word by way of background to the pre-Lisbon position is necessary to understand the current regime. Prior to the Lisbon Treaty there was no divide between what are now termed delegated and implementing acts. The standard pattern was for there to be a 'primary' regulation or directive that governed a particular policy area. This was complemented by 'secondary' legal measures that 'implemented' the primary rules in accordance with Article 202 EC. This admixture of primary and secondary rules is common in legal systems. The Council recognized from the outset of the EEC that not everything could be done by primary regulation and that it would need to delegate power to the Commission to make secondary norms. The Council was however unwilling to accord the Commission a blank cheque, because it realized that regulatory choices and contentious issues could be resolved through such measures, the devil being in the detail.

This was the rationale for the birth of what became known as Comitology, whereby national technocrats would sit with the Commission when it made these secondary measures, with the possibility of sending them to the Council in accordance with the management and regulatory committee procedures if the national technocrats disagreed with the Commission's proposal. These committee procedures will be analysed below.[27] Suffice it to say for the present that they gave national technocrats who were Member State representatives input into the making of the secondary measure. The power of the management and regulatory committees flowed from the fact that if they disagreed with the Commission's proposal it could be referred back to the Council, which could then veto the measure.

The European Parliament was not happy with this regime, because although it had some role in the Comitology process, it was very much dominated by Council and Member State interests. The Commission for its part always chafed at what it regarded as unwarranted Comitology constraints on its executive autonomy. The front line Directorates-General might have been content working with national technocrats, but the higher levels within the Commission were never happy with management and regulatory committees. The strategy was to devise some method whereby it could be freed from these limitations.[28] It advocated a regime of *ex ante* and *ex post* constraints on non-legislative acts of the kind that are now contained in Article 290 TFEU. Comitology in its pre-Lisbon form will therefore no longer operate in relation to delegated acts. It is clear nonetheless that some 'advisory' committees composed of national experts will continue to exist in relation to delegated acts, and it is clear also that a revised form of Comitology operates in relation to implementing acts. Article 290 now governs delegated acts, which have a number of features.

First, they are described as 'non legislative acts of general application'. They are, however, only non-legislative in the formal sense that they are not legislative acts, because they have not been made in accordance with the ordinary or special legislative procedure. Many such delegated acts will nonetheless be legislative in nature. This view is reinforced by the fact that they are said to be of general application, and can supplement or amend certain non-essential elements of legislative acts, and because there is a separate provision dealing with administrative decisions.[29] The reality is therefore that a delegated act will often be what would be regarded in some domestic legal systems as secondary or delegated legislation. This was recognized by the Working Group, which depicted these acts as a new category

[27] Ch 5.

[28] European Governance, COM(2001)428 final, [20]–[29]; Institutional Architecture, COM(2002)728 final, [1.2], [1.3.4]; Proposal for a Council Decision Amending Decision 1999/468/EC Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, COM(2002)719 final, 2; Final Report of Working Group IX on Simplification, CONV 424/02, Brussels, 29 Nov 2002, 12.

[29] Art 288 TFEU.

of legislation.[30] It was also acknowledged by the European Parliament's Committee on Legal Affairs, whose report was explicitly prefaced on the premise that delegation was a 'delicate operation', whereby the Commission was instructed to exercise a power that was 'intrinsic to the legislator's own role'.[31]

Secondly, the legislative act must define the objectives, content, scope, and duration of the delegation of power. This is reinforced by the injunction that the essential objectives of an area must be reserved to the legislative act, and cannot be delegated. These requirements will be policed by the Union Courts, although judicial review to determine whether the essential elements of an area were adequately laid down in the primary act has not hitherto been intensive or searching.[32]

Thirdly, the delegated act can 'amend or supplement' non-essential elements of the legislative act. Any general measure that amends or supplements a legislative act must be a delegated act made under Article 290, not Article 291. The meaning of amend and supplement is therefore crucial, because different controls operate under Articles 290 and 291. The two categories are mutually exclusive, as accepted by the Commission.[33] The term 'amend' denotes a delegated act that formally changes some non-essential element of the legislative act. The word 'supplement' is not subject to such ready definition, as acknowledged by the Commission,[34] but it has in the past been used in a symmetrical manner with 'amend', such that the former connotes the addition of non-essential elements, while the latter captures the deletion thereof.[35] This interpretation is evident in the 2009 Commission Communication, where the Commission construed 'supplement' to connote a measure that specifically added new non-essential rules that changed the legislative act, whereas conversely a measure that only gave effect to the existing rules of the basic instrument should not be deemed a supplementary measure.[36] The difficulty of this divide will become apparent below when discussing implementing acts.

The fourth feature of delegated acts is that they are subject to the controls specified in Article 290. The efficacy of these controls will be analysed below.[37] Suffice it to say for the present that in addition to the requirement that the legislative act specifies the essential features of the subject matter, the EP or the Council is empowered to revoke the delegation and can veto the particular delegated act.

(F) IMPLEMENTING ACTS

Article 291 defines the new category of implementing act and specifies the conditions for the making of such acts. It should be noted that an implementing act can be made pursuant to a legislative act or a delegated act. This follows from Article 291, which specifies that implementing acts can be made pursuant to any legally binding Union act.

> 1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.
>
> 2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.

[30] Final Report of Working Group IX (n 18) 8.
[31] Committee on Legal Affairs, On the Power of Legislative Delegation, A-7 0110/2010, Rapporteur J Sjazer, Preamble C.
[32] Ch 5.
[33] Implementation of Article 290 of the Treaty on the Functioning of the European Union, COM(2009)673 final, [2.2].
[34] Ibid [2.3].
[35] 2006/512/EC: Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission [2006] OJ L200/11.
[36] COM(2009)673 (n 33) [2.3].
[37] Ch 5.

3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

4. The word 'implementing' shall be inserted in the title of implementing acts.

It is important once again to take a step back in order to understand the change made by the Lisbon Treaty. We have already seen that pre-Lisbon the making of secondary measures was governed by Article 202 EC, which was framed so as to allow delegation of power to the Commission for the 'implementation' of rules laid down by the Council, subject to the Comitology procedure. There was significant variation as to the secondary measures concluded pursuant to Article 202 EC. In reality there was a spectrum of secondary norms, with 'pure' rule-making at one end, 'pure' implementation at the other, and many measures falling between the two. This did not however matter pre-Lisbon since the same Treaty provision, Article 202 EC, applied to all such measures.[38]

The term 'implementation' as used in Community legislation and on official websites thus covered what are now termed delegated acts, as well as the terrain now covered by implementing acts. Thus the standard format in EC legislation was to empower the Commission to make 'implementing provisions', 'implementing rules', or 'determine detailed rules', subject to Comitology, and the paradigmatic application was through delegated rule-making or decision-making that amended or supplemented the primary legal norm.[39] The same terminology was evident on official websites, where the term 'implementing provisions' carried the broad connotation used in Community legislation.[40]

The post-Lisbon world now requires us to distinguish between delegated acts and implementing acts. Delegated acts are of general application and amend or supplement the legislative act. Implementing acts will normally be of general application, since Article 291 specifies their use in circumstances where uniform conditions for implementing legally binding acts are needed. Thus in most instances implementing acts will be of general application. The key distinguishing feature is therefore, as seen above, that implementing acts execute the legislative act without amendment or supplementation. Consider in this respect the Commission's approach to this issue.

Implementation of Article 290 of the Treaty on the Functioning of the European Union
COM(2009) 673 final

Firstly, it believes that by using the verb 'amend' the authors of the new Treaty wanted to cover hypothetical cases in which the Commission is empowered formally to amend a basic instrument. Such a formal amendment might relate to the text of one or more articles in the enacting terms or to the text of an annex that legally forms part of the legislative instrument. It makes little difference whether the annex contains purely technical measures; as soon as the Commission is empowered to amend an annex containing measures of general application, the regime of delegated acts must be applied.

[38] The nature of the secondary measure could after 2006 impact on the precise version of the Comitology procedure.

[39] Craig, *The Lisbon Treaty* (n 17) 271.

[40] See, eg, http://ec.europa.eu/competition/antitrust/legislation/regulations.html; http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/index_en.htm; http://ec.europa.eu/internal_market/services/services-dir/implementation_en.htm; http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm.

> Secondly, the Commission wishes to stress the importance that should be attached to the verb 'supplement', the meaning and scope of which are less specific than those of the verb 'amend'.
>
> The Commission believes that in order to determine whether a measure 'supplements' the basic instrument, the legislator should assess whether the future measure specifically adds new non-essential rules which change the framework of the legislative act, leaving a margin of discretion to the Commission. If it does, the measure could be deemed to 'supplement' the basic instrument. Conversely, measures intended only to give effect to the existing rules of the basic instrument should not be deemed to be supplementary measures.
>
> The legislator is entitled to enact full and comprehensive regulations governing a particular field of action, entrusting to the Commission the responsibility for ensuring their harmonised implementation through implementing acts; alternatively the legislator can choose to regulate the field in question only partially, leaving the Commission the responsibility for supplementing the regulations with delegated acts.

The Commission captures the criterion that must be applied to distinguish delegated and implementing acts. There, are, however two very real difficulties with this criterion, which call into question the plausibility of the divide between delegated and implementing acts.[41]

First, there is what might be termed 'the language problem': all secondary measures involve some addition to the primary act. Many thousands of secondary measures have been enacted since the inception of the EEC. In the paradigm case they bring greater exactitude to the meaning of an article of the primary act. Thus, for example, there might be a complex primary act dealing with agriculture, and a secondary measure specifies in greater detail one part of the primary act relating to, for example the requirements for the independence of agencies that pay money pursuant to the primary regulation. Such measures clearly 'add something' to the primary act. This will be equally true for any measure classified as an implementing act in the post-Lisbon world, since the very specification of uniform conditions of implementation will be 'adding something' to the enabling provision in the legislative or delegated act. The key issue is therefore whether what is added will be regarded as amending or supplementing the primary act. This demands the following evaluation.

The legislature and Court might consider that the article in, for example, the legislative act has sufficiently resolved the relevant issues, the conclusion being that the secondary measure, while obviously imbuing the article of the legislative act with greater detail, does not supplement it by adding any 'new' non-essential element so as to trigger the need for recourse to Article 290, the conclusion being that Article 291 can be used. They might in other instances find that the relevant article in the legislative act is less definitive, the conclusion being that while it has provided sufficient guide as to essential principles, the secondary measure has nonetheless supplemented it by the addition of 'new' non-essential elements, the conclusion being that Article 290 must be used.

The divide between the terrain of delegated and implementing acts will turn on the preceding determination. It is difficult to regard this as satisfactory. It is bound to generate inter-institutional disputes as to whether recourse should be had to Article 290 or 291 TFEU. It calls into question the normative foundation for the differential controls that operate in relation to delegated and implementing acts. There will inevitably be instances where juxtaposition of acts will reveal scant reason as to why the 'supplementation' of the legislative act in the one instance should be regarded as a 'new' non-essential element, such that a delegated act is required, while in other instances this is not so, such that an implementing act can be used.

Secondly, the preceding difficulty is exacerbated by the 'time problem'. The problem is quite simple, but quite dramatic. It is not possible to decide conclusively whether a secondary measure falls into the category of delegated or implementing acts according to the preceding criterion until it is made,

[41] Craig, *The Lisbon Treaty* (n 17); Craig, 'Delegated Acts' (n 17).

more especially because any draft measure may be changed prior to final enactment and this may take the measure from the category of delegated to implementing act, or vice versa. However the choice between delegated and implementing act has to be made at an early stage. This is because the procedures for making delegated and implementing acts are very different.[42] Delegated acts are subject to the *ex ante* and *ex post* controls described above exercised by the Council or European Parliament; implementing acts are subject to a revised version of the Comitology procedure. The danger is that once the Commission has decided that a measure should be classified as, for example, an implementing act, and the revised Comitology process has been engaged, it will be loathe to admit that any changes made by this process involve 'supplementation' of the legislative act via the introduction of 'new' non-essential elements, since this would mean that the act should be regarded as a delegated act.

(G) INCOMPLETE CATEGORIZATION

The discussion thus far has considered the schema of legal acts in the Lisbon Treaty and the problems presented by this novel regime. It would however be wrong to conclude this discussion without adverting to the incompleteness of the Lisbon categorization. There are two respects in which this is so.

First, certain acts do not seem to fit the categories considered above. We have seen that legislative acts, delegated acts, and implementing acts can in principle take the form of regulations, directives, or decisions, subject to the caveats noted above. We have also seen that each type of legal act has its own criteria. Legislative acts are defined formally in accordance with the procedure for their enactment. Delegated acts must be made pursuant to a legislative act, they must be of general application, and amend or supplement non-essential elements of the legislative act. Implementing acts are premised on the need for uniform conditions of implementation. This leaves an interesting inquiry as to the nature of acts that do not fit these categories.

Consider, for example, a standard administrative decision addressed to a particular person, which falls within the definition of decision in Article 288 TFEU. It will not be a legislative act if it is not made by a legislative procedure. It will not be a delegated act, since these can only be made pursuant to a legislative act and must be of general application. It will not be an implementing act, since the paradigm administrative decision addressed to a particular person has nothing to do with uniform conditions for implementation as that term is used in Article 291. We might conclude that such decisions cannot legally be made. This would however lead to very considerable practical difficulties and would fly in the face of Article 288, which clearly contemplates a decision addressed to a particular person. The alternative is to accept that such decisions can be legally made, but to acknowledge that they may not fit into the categories of legislative, delegated, or implementing act, the corollary being that the hierarchy of legal acts composed of these categories does not capture the totality of the ways in which legal norms are made in the post-Lisbon world.

Secondly, while the Lisbon Treaty dismantled the formal pillar system that applied hitherto, there are nonetheless distinct rules concerning the legal acts that can be used for the Common Foreign and Security Policy, CFSP.[43] Article 25 TEU provides that the Union shall conduct the CFSP through a number of measures. General guidelines must be defined, this being a matter for the European Council.[44] Decisions should be adopted defining actions to be undertaken by the Union, positions to be taken by the Union, and arrangements for the implementation of the preceding decisions. These decisions are taken primarily by the Council on the basis of the general guidelines decided by the

[42] Title V TEU.
[43] Ch 10.
[44] Arts 26(1), 42(2) TEU.

European Council.[45] It is however unclear whether the term 'decision' used in this context bears the same meaning as in Article 288 TFEU, although this seems doubtful given the specific contexts in which the decision is used in relation to the CFSP. The CFSP is also to be furthered through strengthening systematic cooperation between Member States in the conduct of policy. The CFSP is put into effect by the High Representative and by the Member States, using national and Union resources. Legislative acts cannot be undertaken in relation to the CFSP,[46] and the general rule is that decisions are taken unanimously, although there is provision for qualified-majority voting in certain instances.[47]

4 CONCLUSIONS

i. The EU has a number of formal legal norms at its disposal. The three principal types are regulations, directives, and decisions. In most instances the EU can choose which type of legal provision to use.

ii. EU policy in any particular area will be made by various formal legal norms. A basic regulation can be made more concrete through further regulations, or through directives or decisions. The foundational provision may equally well be a directive or even a decision, which can then be complemented by secondary norms cast in terms of regulations, directives, or decisions. These formal legal norms will be supplemented by a variety of soft law devices.

iii. The Lisbon Treaty instituted a more formal hierarchy of legal norms than existed hitherto. There are now five categories within this hierarchy: the constituent Treaties, TEU and TFEU, and the Charter of Rights; general principles of law; legislative acts; delegated acts; and implementing acts. There are four points to note about this hierarchy.

iv. First, the elaboration and application of general principles of law lies principally with the Union Courts. This gives them considerable power to decide what constitutes a general principle of EU law. They also have considerable power in deciding how these principles should be applied. This is particularly important because general principles can shape the interpretation of Treaty provisions and other Union acts, and because they can in addition serve as the ground for invalidation of legislative, delegated, and implementing acts.

v. Secondly, certain elements within this hierarchy are defined in purely formal terms. Thus, for example, the definition of legislative acts is formal in the sense that it connotes acts made in accordance with a legislative procedure, irrespective of the nature of the measure enacted. The definition of delegated acts is also formal, insofar as they are said to be non-legislative, since this simply means that these acts have not been made in accordance with the procedure for legislative acts.

vi. Thirdly, the distinction between delegated and implementing acts is problematic. The rationale for the divide was to distinguish between secondary measures that were 'legislative' in nature, delegated acts, and those that could be regarded as more purely 'executive', implementing acts. The difficulties of realizing this divide were however never fully thought through in the deliberations on the Constitutional or Lisbon Treaties. It is clear that the distinction turns on a criterion that is questionable in terms of principle and very difficult to apply, 'the language problem', and this difficulty is exacerbated by the 'time problem'. The consequence is that different mechanisms of control and accountability in Articles 290 and 291 will be applied to secondary measures, where the distinction between the measures is a very fine one, judged by the criterion demanded by

[45] Arts 26(2), 28, 29, 42(4), 43 TEU.
[46] Art 31 TEU.
[47] Art 31 TEU.

the Treaty provisions. This is not satisfactory. It may lead to the institutional players spending very considerable amounts of time trying in good faith to apply the criterion, even though its application is inherently contestable. It may alternatively lead the institutional players to seek to categorize the secondary measure as a delegated or implementing act, based on their perception of which set of procedures maximizes their input/control and hence is optimal from their perspective. If this happens, and in all likelihood it will, it will thereby undermine the very rationale for the division between the two types of act.

Fourthly, the hierarchy or norms is incomplete, in the sense that there are certain legal acts that do not readily fall within any of these categories.

5 FURTHER READING

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