

The choice of normative instruments for the implementation of EU law

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Abstract

Faced with the diversity of national legal systems, European authorities choose among the instruments at their disposal, and seem to use regulations to unify the national laws, as opposed to directives or soft law to simply harmonize or coordinate. However, the adequacy between the instrument and the goal to be achieved must be questioned. Indeed, the purpose of this paper is to focus on the combination of EU methods within the same legal instrument, regardless of the legal field concerned.

INTRODUCTION

The purpose of this paper is to examine how and why the EU authorities choose the legal instruments they use in order to produce EU rules, destined to be implemented within the national legal orders¹. In fact, we could find a plethora of legal instruments, such as regulations, directives, or even what we usually call “soft law”, i.e. rules that don't have binding force but simply indicate certain directives to follow, and incite the Member States to cooperate. Article

288 of the Treaty on the Functioning of the EU², almost identical to Article 249 of the EC Treaty, provides us with definitions of these instruments: according to the article “a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States”, while “a directive shall be binding, as to the result to be achieved, [...], but shall leave to the national authorities the choice of form and methods”. Finally recommendations and opinions “shall have no binding force”. It is also the case of other legal tools of soft law.

One could thus conclude that there is a pretty clear equation between the choice of the instrument and the normative intensity of the rules produced. That would mean that there is a close relationship between the instrument and the method of implementation used by the EU authorities. Hence, we could claim that the regulation aims for the *unification* of national legal orders (i.e. replacing the many legal systems with a single legal order), the directive aiming for *harmonisation* (i.e. producing standards that set goals for the Member States to achieve by transposition measures),³ while the soft law aims at *coordination* (i.e. a guidelines procedure intending to promote and support the cooperation between Member States and the convergence of national policies, without any binding intervention from EU authorities)⁴. Therefore, one could think that the choice, for instance, of a directive as an instrument for implementation is sufficient to determine the type of intervention- and consequently the normative intensity of the norms produced- as well as give room to manoeuvre to the Member States⁵.

However, it seems that this equation does not actually reflect the reality of the EU legal production. Our thesis is that the traditional definitions are no longer up-to-date and we should, therefore, rethink the choice of the legal instruments. In fact, the borders between the legal instruments are not as clear as we might initially imagine; different methods can actually co-exist within the same legal instrument: there are regulations that not only unify, but also harmonise and coordinate, and directives that, beyond harmonisation, unify and coordinate.

¹ For a detailed study of the implementation procedure, also called « normative integration », cf. among others M. Delmas-Marty, *Critique de l'intégration normative*, Paris, PUF, 2004.

² Official Journal of the E.U. n° C. 83, vol. 53, 30 march 2010, pp. 1-403.

³ For an approach of the harmonisation in the EU law cf. among others M. Delmas-Marty, “Le phénomène de l'harmonisation: l'expérience contemporaine”, in C. Jamin & D. Mazeaud (eds), *L'harmonisation du droit des contrats en Europe*, Paris, Economica, 2001, p. 23.

⁴ Cf. about the realisation and the implementation of EU law, J. Porta, *La réalisation du droit communautaire. Essai sur le gouvernement juridique de la diversité*, thèse, Paris, éd. Fondation Varenne, 2007.

⁵ Cf. about the EU intervention by means of directives C. Zolynski, *Méthode de transposition des directives communautaires. Etude à partir de l'exemple du droit d'auteur et des droits voisins*, Paris, Dalloz, 2007.

Hence, we have chosen to first examine two case studies (I): on one hand Regulation n°805/2004 of 21 April 2004, creating a European enforcement order for uncontested claims⁶; and on the other hand Directive 123/2006 of 12 December 2006 on services in the internal market (also called “Bolkestein” Directive)⁷. We will first focus on some dispositions that can illustrate the coexistence of different implementation methods. We will then try to explain the reasons of the reconsideration of these traditional definitions. Finally, we will present other criteria in order to explain the choices of the EU authorities as far as the production of EU rules is concerned (II).

I. Rethinking the traditional classification of EU legal instruments: two case studies

The two case studies that we will present will let us demonstrate the need for reconsideration of the traditional classification of EU legal instruments. We will examine two different instruments, a regulation and a directive, derived from different fields of law.

The first case study is a regulation related to the European enforcement order for uncontested claims (EEO). In fact, with the signature of the Treaty of Amsterdam on 2 October 1997, the Member States have granted European authorities competence to implement measures in the field of civil cooperation, in order to progressively establish an area of freedom, security and justice. According to Article 65 of the EC Treaty, these measures “shall include [...] the recognition and enforcement of decisions in civil and commercial cases...”⁸ Among others, a regulation has thus been adopted, Regulation (EC) n° 805/2004 of the European Parliament and of the Council of 21 April 2004, creating a European enforcement order for uncontested claims. It allows the free movement of judgments, out-of-court settlements or authentic instruments concerning uncontested claims in all the Member States, without any intermediate procedure in the Member State of enforcement prior to recognition and enforcement.

The aim of this instrument, that creates a new enforcement order, by means of regulation, is mainly to coordinate national procedures which can benefit from the European enforcement order, rather than to elaborate a European procedure applicable in all Member States. However, one could easily believe that the European instrument produces only uniform rules for this enforcement order to be applied in the same manner in all the European Union.

⁶ JOCE L. 143, 30 april 2004, p. 15-39.

⁷ JOCE L. 376, 27 december 2006, p. 36-68.

⁸ Article 65 TCE has been replaced by Article 81 TFEU; from now on, measures to be taken are aimed at ensuring “the mutual recognition and enforcement between Member States of judgments”.

Indeed, if we focus on some of the articles, we observe that the regulation gives precise definitions of the terms used (Article 4), mentions the details to be found on the document instituting the proceedings of the uncontested claims (Article 16), specifies the procedure of enforcement (Article 20) with the conditions, for instance, to stay or limit enforcement (Article 23). Furthermore, it contains in Annexes all the standard forms to be adopted to enable enforcement of uncontested claims. These measures are binding in their entirety and do not give the national authorities any room for manoeuvre.

Nevertheless, alongside these uniform rules, the instrument gathers different national procedural rules and does not stick to one kind of procedure. For instance, the regulation gives different interpretations of an “uncontested claim” – “the debtor has expressly agreed [...]; the debtor has never objected to it [...]; the debtor has not appeared or been represented [...]” (Article 3) – in order to enlarge the field of claims concerned, regardless of the national interpretations of an “uncontested claim”. The instrument may thus be applied to claims very different from one another, considering as more or less equal cases in which the debtor expressly agreed, as well as cases in which he did not appear. Similarly, the core of the regulation deals with the adoption of minimum standards to ensure that judgments, court settlements and authentic instruments on uncontested claims can freely circulate. These minimum standards, detailed in Chapter III, concern the notification of the debtor of the uncontested claims procedures. There are many different ways of notification which are accepted, with proof of receipt by the debtor (Article 13) or without any such proof (Article 14). Again, the instrument details these various means of notification in order to enlarge its field of application.

The regulation also gives to Member States room to manoeuvre, in order to decide on particular phases of the procedure. Indeed, in order to be certified as a European enforcement order, a judgment has to be “enforceable in the Member State of origin” (Article 6.1.a), according to the existing national rules. Accordingly, at the end of the proceedings, “the enforcement procedures shall be governed by the law of the Member State of enforcement” (Article 20.1). Furthermore, even if the regulation lays down certain conditions, such as the need for a “material error”, it specifies that “the law of the Member State of origin shall apply to the rectification or withdrawal of the European enforcement order certificate” (Article 10.2).

In conclusion, it may easily be said that Regulation (EC) n° 805/2004 of 21 April 2004, despite its appearance of regulation, is mainly an instrument to coordinate national proceedings, in order to determine those which may benefit from a European enforcement order, and is far from setting down a European procedure.

The second case study is a directive concerning the services in the internal market. The aim of this directive, that has stimulated an extremely lively debate, is to complete the measure that encourages the free circulation of people, capital and merchandise.

In fact, the services sector seems to be a decisive one for the European Union's economy. As it is mentioned in the **report from the Commission to the Council and the European Parliament on the state of the internal market for services**: "services are the engine of economic growth"⁹. Growth in the economy is essentially driven by services, as they account for 70% of GDP and employment in the majority of Member States. This observation justifies why this sector is of vital importance for the accomplishment of the internal market and consequently the accomplishment of the economic reform programme adopted by the Lisbon European Council, with the aim of making the EU the most competitive and dynamic knowledge-based economy in the world by 2010.

The EU authorities think that there is a large number of barriers which are preventing or slowing down the development of services between Member States, in particular those provided by SMEs, which are predominant in the field of services (see Whereas 3 of the directive). According to the Commission¹⁰, a decade after the projected completion of the Internal Market, there is still a huge gap between the vision of an integrated EU economy and the reality as experienced by European citizens and European service providers. The range of barriers perceived as affecting service provision and use, which are far more wide-ranging than was expected, amounts to a considerable drag on the EU economy and its potential for growth, competitiveness and job creation.

The directive aims to remove these barriers in order to achieve the goal of establishing a genuine internal market, set by the European Council in Lisbon. The interesting point of this directive is the coexistence of rules that harmonise and coordinate. In fact, as is indicated in the "whereas" of the directive, the purpose is to remove, as a matter of priority, barriers which may be dismantled quickly and, for the others, to launch a process of evaluation, consultation and complementary harmonisation of specific issues, which will make possible the progressive and coordinated modernisation of national regulatory systems for service activities, which is vital in order to achieve a genuine internal market for services by 2010 (see whereas 7).

As a matter of fact, the normative intensity of the rules produced varies: there are dispositions that aim at harmonising the national legal systems, producing rules that should be implemented into the national legal orders, such as the prohibited restrictions (article 19), the assistance to recipients (article 21) or the information on providers and their services (article

⁹ COM (2002) 441 final.

22). Regarding those dispositions, the manoeuvring room given to the Member States is confined by their obligation to transposition.

On the other hand, we can find many rules, especially those concerning the different administrative procedures, that do not aim to harmonise, but to remove overly burdensome authorisation schemes, procedures and formalities that hinder the freedom of establishment and the creation of new service undertakings. We could mention, as an example, article 37, which is related to the codes of conduct at Community level, according to which the “Member States shall, in cooperation with the Commission, take accompanying measures to encourage the drawing up at Community level [...] of codes of conduct aimed at facilitating the provision of services or the establishment of a provider in another Member State, in conformity with Community law” or the article 39 concerning the mutual evaluation. As far as these rules are concerned, the Member States have at their disposal a very important room to manoeuvre as these dispositions of the directive mostly set guidelines procedures.

Therefore, one can easily observe that, in spite of its nature as a directive, this legal instrument contains not only rules that harmonise, but also rules that coordinate.

We will now try to explain the reasons which lead European authorities to alternate different implementation methods.

II. Explaining the choice of EU legal instruments: some other criteria

The first question that arises is whether the choice of the legal instrument used, in order to produce EU rules, is a deliberate one, in other words, whether there is a conscious choice made by the EU authorities. Actually, we do not have much information to answer this question; the procedures followed in order to produce EU rules are rarely very clear and accessible to the public. However, some dispositions of the instrument, among which the “whereas” (i.e. the preliminary chapter that explains the reasons of the adoption of each instrument), could provide us with some indications.

Our purpose is to propose some new criteria in order to explain the choice of EU legal instruments. We could mention two main elements that determine, in our opinion, not only the kind of instrument used but also the normative intensity of the rules produced.

¹⁰ COM (2002) 441 final, op. cit.

The first criterion is the intention to avoid obstacles to the internal market. To ensure the free movement of goods or persons, the European authorities have to pass uniform rules that would apply in the same way in all Member States.

For instance, as far as the directive on services in the internal market is concerned, it is clearly mentioned that “it is necessary to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States” (see whereas n° 5). We can thus understand that the directive’s main purpose is the strengthening of the internal market.

Besides, one can easily notice the above purpose by a simple reading of the dispositions of the directive, such as the first article, concerning the subject matter of the directive; in fact, this article mentions that “this directive ? establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services”.

As regards the regulation about the European enforcement order, the first “whereas” lays down that “the Community is to adopt, inter alia, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market”. Article 1 of the regulation highlights the scope of the instrument: “to permit, by laying down minimum standards, the free circulation of judgments, court settlements and authentic instruments throughout all Member States without any intermediate proceedings...”.

Beyond the goal of ensuring the free circulation of judgments, there is the desire to strengthen the area of freedom, security and justice within the European Union. The need to improve cooperation in civil matters has derived from the development of the internal market, because the free circulation of goods, services or persons should also mean the free circulation of judgments for potential litigants faced with transnational disputes. More generally, the judicial cooperation in civil matters tends to “eliminate any obstacles deriving from incompatibilities between the various legal and administrative systems”¹¹. These obstacles impact on all the European freedoms of circulation.

We can thus observe that the aim of both instruments is to ensure the internal market’s proper function. This reason could explain, to a certain extent, as we will later demonstrate, the intention of the European authorities to create binding rules that unify the national legal systems.

¹¹ Presentation of the “judicial cooperation in civil matters” in the Europa website : <http://europa.eu/scadplus/leg/en/s22003.htm>

The second element is the necessity to deal with the diversity of national legal systems. The EU law does not aim at replacing the national legislations with a uniform set of European rules. It takes responsibility for situations that, because of their transnational nature, cannot be dealt with individually by Member States in a satisfactory way. Consequently, the EU law often focuses on coordination of national legal systems, rather than unification.

In the field of judicial cooperation for instance, civil proceedings may vary from one State to another. Regulation n° 805/2004 takes into account the “differences between the Member States as regards the rules of civil procedure and especially those governing the service of documents” (whereas n°13). It leads the European legislator to a mere adoption of “minimum standards” – i.e. minimum common rules, Member States being free to adopt more protective rules. It is also in order to preserve national specificities of civil proceedings that the regulation gives to Member States room to manoeuvre, in order to decide on particular phases of the procedure, when they do not particularly impact on the free circulation of judgments.

Besides, the directive on services illustrates the same preoccupation: in fact, whereas n°115 states that “codes of conduct at Community level are intended to set minimum standards of conduct and are complementary to Member States' legal requirements. They do not preclude Member States [...] from taking more stringent measures in law or national professional bodies from providing for greater protection in their national codes of conduct”. The Member States are consequently free to adopt measures that go beyond these minimum standards.

That is why the traditional distinction between EU instruments – regulations, directives, soft law – should be reviewed. Nonetheless, political and symbolic considerations must be taken into account. The political aspect of the implementation is significant, and it seems that European authorities choose directives where they cannot put regulations into force. Furthermore, beyond this political aspect, this distinction also has a symbolic value. Indeed, the simple fact of elaborating a regulation reveals a desire to guarantee the constitution of a uniform European framework.

However, the coexistence of rules of different nature in EU instruments can be criticised. As regards Regulation (EC) n° 805/2004 of 21 April 2004, creating a European enforcement order for uncontested claims, it did not choose one specific kind of national procedure, with just one interpretation of the “uncontested claim” or one way to notify the uncontested claims procedures to the debtor. It did not give details on the enforceability of a judgement or on the enforcement procedure, nor on the procedure for rectification or withdrawal of the European enforcement order certificate. It chooses to address a broad field of different national

procedures, and admit many different judicial rules. Consequently, judges as well as litigants can easily be confused, and may prefer not to use the European enforcement order.

This regulation has thus been highly criticised for its complexity. The application for certification as a European enforcement order being optional for the creditor, the latter may consequently in many cases use the classical system of recognition and enforcement under Regulation (EC) n° 44/2001 or other Community instruments. Because of this, the results of the application of the EU instrument are the exact opposite of what was expected, which was to apply to a broad range of national procedures, regardless of their differences.

Conclusion

It is therefore clear that the traditional classification of the EU normative instruments must be reconsidered and that the EU legal practice no longer fits the definitions that have been initially given. A regulation can coordinate and harmonise, a directive can unify and coordinate. The EU authorities must constantly juggle the achievement of Internal Market on the one hand, and the diversity of national legal systems on the other.

The question that arises is whether this finding, that is to say the alteration of the methods used, is a positive sign, meaning the effort of the EU authorities to adapt the legal instruments to the goals that are to be achieved as well, as to the reality of the national legal systems or, on the contrary, a rather negative sign, meaning a disorder in the EU legal system. However, this question, which is related to politics, goes past the objectives of this contribution.