Adieu à la Directive?

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EC-directive, unique nature. Questions and debate. Irremovable from EC law. Change of name and context in Constitution. Concept of law. Opportunities missed. Evolution to continue.

1. Exploring the changes

This contribution explores the question of whether, in relation to the directive, the Constitutional Treaty amounts to an ordinary *Etikettenschwindel,* or whether there are elements in that Treaty, which are going to change the nature and use of the instrument.

In Sections 2 and 3, I will first give a very broad-brush picture of the evolution of the directive. Next, I will turn to the new provisions of the Constitutional Treaty and discuss these against the background of the conceptual and practical problems the directive has given rise to. As every exploration, this contribution already had a somewhat speculative character before I finalised the text in the middle of June 2005. After the two no's to the Constitutional Treaty, there is a risk for this article to look like a purely academic exercise. This may indeed be partly true, in particular to the extent that the relevant constitutional provisions are discussed. On the other hand, a closer consideration reveals that the underlying constitutional problems and quest for appropriate solutions to these are of a more permanent nature and have to be addressed irrespective of the coming into force of the Constitutional Treaty.

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2. An EC Law superstar

The directive is probably the most debated, well documented, cherished but also despised instrument of the EC.[1] Why? According to the classic terms of Robert Kovar '[*l*]*a directive intrigue, dérange, divise. Sa singularité en est la cause, …*'.[2] No doubt, the unique character of the directive was for a long time the primary source of debate. All efforts to capture it in terms of legal acts existing in international and national law seemed to fail. Similarly, the rather rudimentary definition of the legally binding EC instruments in Article 249 of the EC Treaty provoked quite some problems and disagreement. At a certain stage even the European Commission found the directive to be an '*instrument hybride, et de statut ambigu*'. Soon, the debate was also fed and, indeed, complicated by the case law of the ECJ on direct effect of directives.

While the early analyses and controversies were mainly of a theoretical and conceptual nature, in a later stage, with the directives more or less accepted as instruments of indirect legislation, the main sources of dissatisfaction became of a more practical nature. The most important of these are first the improper use of directives, i.e., usually instead of regulations, second, the blurred distinction between directives and regulations, and third, the never ceasing problems of adequate and timely implementation into the national law of the member states. As will become clear below, some of the old discussions reappear in the new constitutional context.

Despite the objections and doubts voiced by some, others still consider the directive to be the instrument *par excellence* to fulfil the functions it is designed to have within the system of the EC Treaty. The most important field of activities in which directives are used as a means of Community intervention is the harmonisation of laws, the mutual recognition of national rules included. Several differences exist, however, between directives, depending on their subject-matter. Directives adopted for the purpose of harmonisation in the internal market differ from those aiming at social protection or at environmental protection. Some, like the notorious notification directive, do not really fit into the picture of harmonisation of laws, as they lay down a procedure to be followed. Recently the EC started to use directives as instruments for liberalisation, particularly in the field of public utilities, such as electricity, gas and communications. The objective

[1] The present contribution draws, at least as far as the 'good old directive' is concerned, on S. Prechal, *Directives in EC Law*, 2nd edn. (Oxford, Oxford University Press) 2005. Interestingly, the predecessor of the directive, the ECSC recommendation never attracted so much attention; probably because scholarship focused mainly on the decision. Cf. J. Bast, 'On the Grammar of EU Law: Legal Instruments', Jean Monnet Working Paper 9/03, p. 5-7.

[2] R. Kovar, 'Observations sur l'intensité normative des directives', in Capotorti, Ehlermann et al. (eds.), *Du droit international au droit de l'intégration. Liber Amicorum Pierre Pescatore* (Nomos, Baden-Baden 1987), at p. 359.

of these directives is not primarily harmonisation but (re-)regulation of the markets. This also changes the character of the instrument. Another recent phenomenon is that of directives which in fact 'hide' framework agreements between the social partners, adopted under Article 139(1) EC, and which are 'implemented' by the Council in accordance with the procedure provided for in Article 139(2) EC.[3]

Whatever these differences, in the context of 'harmonisation', the member states are required to adapt their laws *only to a certain extent*, namely as far as necessary to achieve the objectives set out in the relevant Treaty provision which serves as the legal basis for the directive. The directive corresponds well with this idea of limited intervention. It is binding 'as to the result to be achieved' but leaves the member states the choice of 'form and methods'. By its very nature, the directive, as such, is a very suitable instrument for bringing about the necessary changes in national laws while respecting as far as possible the national legal systems, with their own concepts and terminology. At least, this is how it should work in theory. Meanwhile, directives are not always perceived as smoothly operating instruments, which perfectly integrate into national law, even in case of adequate transposition. There is, for instance, a growing criticism from scholarship of private law concerning the *dis*harmonising or even disruptive effects of directives on domestic legal system and doctrine.[4]

That said, it is also true that the limited intervention concept and the intrinsic nature of the directive as a means of decentralisation are features which make it go hand-in-glove with the principle of proportionality and, according to some, also subsidiarity. At the Edinburgh Summit, the member states agreed that the principle of proportionality codified in Article 3B (third paragraph) of the EC Treaty (now Article 5) should imply that wherever legislative intervention by the Community is required, preference should be given to directives over regulations and to framework directives over detailed measures.[5] The same view was later endorsed in the Protocol on subsidiarity and proportionality to the Treaty of Amsterdam and in the White Paper on European Governance.[6]

Finally, as is well-known, the main characteristics of the directive were captured in a new instrument under the Third pillar, the framework decision. Indeed, with one major exception: the member states preferred to deny *expressis verbis* the direct effect of this instrument.

[3] Cf., e.g., Directive 1999/70 (fixed-term work), *OJ* 1999, L 175/43.

[4] Cf., e.g., J.M. Smits, 'The Europeanisation of national legal systems: some consequences for legal thinking in civil law countries', in M. van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Oxford, Hart Publishing 2004), p. 229 at p. 239.

[5] *Edinburgh European Council*, Bull. EC 12-1992, p. 15.

[6] Protocol on subsidiarity and proportionality to the Treaty of Amsterdam, in point 6, and the White Paper on European Governance, COM (2001) 428 final, p. 20.

3. An EC Law survivor

With a certain regularity, proposals are being put forward to replace the directive by another act. In the European Parliament's Draft Treaty for European Union, 1984, the directive disappeared. Its new 'law of the Union', however, was to an extent comparable to the directive. This law, a directly applicable act, was deemed to have the character of framework legislation in principle, needing further implementation either by the Union institutions or by the member states.

During the run up to the Intergovernmental Conference on European Union, leading to the Union Treaty, the introduction of a hierarchy of norms was initially high on the agenda.[7] Proposals were made for breaking with the typology of existing Community acts as defined in the old Article 189 of the EEC Treaty and doing away with the directive. Yet, its essence would be retained in a new legal instrument, 'the law', establishing the basic principles and leaving the member states considerable discretion with respect to its implementation.[8]

The *Sutherland Report* (1992) recommended that directives be converted into directly applicable regulations, once a satisfactory degree of approximation of national laws by means of directives had been achieved. The idea to more often use regulations instead of directives, at least in certain areas of law, was submitted again in the *Molitor Report* (1995) and some 6 years later in the *White Paper on European Governance.* Replacing directives by regulations would constitute an important contribution to legal certainty and transparency of Community legislation, thus meeting the need on the part of individuals and national enforcement authorities to have a single point of reference concerning applicable Community legislation. Similarly, uniform application of the rules would be better safeguarded.

Apart from these advantages, the proposals to replace directives by regulations are also prompted by practical and jurisprudential developments blurring the distinction between directives and regulations. There is the case-law of the Court of Justice on direct effect of directives and there is the fact that, although regulations formally require no incorporation into the national legal order, in practice adoption of national rules is often necessary to make them fully operative. In this respect, some discretion may be left to the member states. Directives themselves have become quite detailed, sometimes even amounting to *lois uniformes*.[9] Often little is left of the freedom to choose form and method. Member states can only comply by transcribing the text of the directive at issue into their national law, a

[7] Though finally nothing came off but a Declaration on the Hierarchy of Community Acts, annexed to the Maastricht Treaty.

[8] A comparable concept reappeared recently again in the 'Penelope' Feasibility Study, Contribution to a Preliminary Draft Constitution of the European Union, 4 Dec. 2004, Art. 77 on 'European Laws'.

[9] Cf. J. Bast, *supra* n. 1, p. 11.

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tendency which has been reinforced by the ECJ, notably where the Court requires an accurate reproduction of the directive's terminology in national implementing legislation. Some member states have adopted the practice of transposing certain directives by mere reference in their national laws, illustrating the normative self-sufficiency of these directives.

It remains to be seen to what extent and in what areas this somewhat hesitant tendency will evolve and directives will yield to regulations. In some quarters it is noted that not only Community legislative activity as such is declining, but also that Community legislative instruments are becoming less detailed.[10] In any case, one of the reactions to the detailed character of many directives is the emergence of the so-called framework directive. This is an instrument unknown in the typology of the EC Treaty and it is, in fact, not clear to what it exactly refers. One of the characteristics of a framework directive seems to be that it lays down only basic and general principles. From this perspective, it is believed that the member states have more latitude in relation to the implementation of these directives. However, much depends on how this framework is further completed. Some directives, which are known as 'framework directives', are further implemented through so-called 'daughter directives' or 'individual directives' which may be rather detailed. Unfortunately, the terminology seems far from settled. The term framework directive is also used for the 'new-approach' directives, which lay down the essential requirements and leave the undertakings the choice of how to comply with these obligations. In other terms, it is a combination of a legislative framework and self-regulation.[11]

While on the one hand an opening for replacing directives by regulations seems to exist, at least in certain areas, one may also turn the problem upside-down and ask whether some of the steps taken in the context of the much celebrated open method of co-ordination or by adopting various soft law instruments, should not in fact be more appropriately dealt with by directives, provided that the latter are 'restored' to what was probably the original conception: to indicate in a binding but not very detailed fashion the result to be achieved and leave it to the member states to determine how to accomplish this in their legal order.[12]

Lastly, the directive is also 'coming under pressure' in the discussion about the quality of EC legislation when this includes issues like the choice of the 'right' legal instrument for a certain course of action.

[10] F. Franchino, *Delegation and Constraints in the National Execution of the EC Policies: A Longitudinal and Qualitative Analysis*, West European Politics 2001, p. 169 at p. 178.

[11] Cf. The legal instruments: present system, CONV 50/02 and D. Simon, Le système juridique communautaire, 3rd edn., Paris (PUF droit) 2001, at p. 325.

[12] On the use of soft law, *see* the detailed study of L. Senden, *Soft Law Instruments in European Community Law* (Oxford, Hart Publishing 2004).

All the problems and tendencies pointed at above notwithstanding, both the directive as an instrument of EC intervention and the concept it embodies have proven their usefulness. As two-stage legislation, it forms an important transmission belt between the European and the domestic levels. It gloriously endures the discussions and measures concerning the quality of EC legislation, the hierarchy of norms, the classification of acts, the perceived need for less and better legislation and alternative means of EC regulation. In the Constitutional Treaty's Article I-33, the directive again seems to survive, though under a new name: framework law.

Or perhaps not entirely …?

4. An EU Law mutant

According to Article I-33, labelled '[t]he acts of the Union', the European framework law is defined as a legislative act, binding, as to the result to be achieved, upon each member state to which it is addressed, while leaving national authorities the choice of the form and methods. The only new element, compared to the current definition of a directive in Article 249 EC Treaty, is the specification that it is a legislative act. When reading further in Article I-33, we find another act defined as being '…binding, as to the result to be achieved, upon each Member State to which it is addressed, but [leaving] to the national authorities the choice of the form and methods'. This time we are dealing with a European regulation, which is a non-legislative act, but it is 'of general application' and is going to be used for the implementation of legislative acts and of certain provisions of the Constitution. What happens here? Is this going to change something? Is the directive being cloned and, next, slightly modified?

The main aim of Article I-33 et seq. of the Constitutional Treaty is to simplify and rationalise the instruments of the Union. This is done by reducing the number of the instruments available and, in particular, by introducing the distinction between legislative and non-legislative – i.e., executive – acts. This distinction corresponds closely to the one under the French constitution between *pouvoir législatif* and *pouvoir réglementaire*.[13]

While the former refers to rules enacted in a parliamentary procedure, the latter concerns rules issued by the executive. Between the legislative and the executive acts there exists a clear hierarchy. This distinction between the acts and their hierarchical relationship is obviously not an exclusive French matter – it is

[13] Cf. L.A. Geelhoed in: Kapteyn and VerLoren van Themaat, *Het recht van de Europese Unie en van de Europese Gemeenschappen*, Sixth Completely Revised Edition (Kluwer, Deventer 2003), p. 1181-1182.

well-known in other member states as well – but is perhaps applied with less *rigueur*. For EU law, however, the distinction is new. In the current situation there is neither a separation of powers between legislative and executive, nor a clear-cut distinction between the various instruments. The instruments, which are now considered as legislation in the sense of laying down generally binding rules, are regulations and directives. Yet, these can be both legislative and executive in the above-mentioned sense.

Under the Constitutional Treaty, legislative acts should be, in principle, adopted by the European Parliament and the Council, on the basis of a proposal by the Commission, unless a specific legislative procedure applies. The non-legislative acts can be adopted by the European Council, the Council, the Commission and the European Central Bank. It would seem that a mixture of the procedure to be followed and the author of the act at issue are the decisive criterion for the nature – legislative/executive – of the act concerned.

The legislative/executive acts dichotomy, tied in with the distinction between a parliamentary procedure and an adoption by the executive, has been criticised. Upon closer consideration the procedures laid down in the Constitutional Treaty appear to result from the political desirability to keep certain issues away from the European Parliament, leaving them to the Council or, where appropriate, the Commission. Indeed, as long as there is no agreement and clarity about the respective roles of the Council, the Commission and the European Parliament, the distinction will not entirely correspond with the professed underlying idea of separation of powers and the intended hierarchy of norms.[14] Moreover, another quite common distinction, namely that legislative acts, including parliamentary input, should regulate the essential issues and that executive acts should work out the details, although proposed, did not get a clear place in the Constitutional Treaty.

However imperfect all this may be, the fact is that the distinction between legislative and executive acts and therefore also the legislative and executive functions has been introduced for the first time in the Constitutional set up of the Union. This has not only a constitutional significance, but also a more practical one. If properly applied, it will structure the rule making process and make the relationship between the various instruments a bit more transparent.

The newly introduced distinction may also have implications for the directives' 'old style'. In the first place, as the beginning of this section illustrates, the Constitutional Treaty makes an attempt to differentiate between a 'legislative' directive and an 'executive' directive.

[14] Cf. R. Barents, *Een grondwet voor Europa* (Kluwer, Deventer 2005), p. 344, 354 and 362. Cf. also C.M. Alves, 'La hiérarchie du droit dérivé unilatéral à la lumière de la constitution européenne: révolution juridique ou sacrifice au nominalisme?', *CDE* 2004, p. 691, in particular at p. 719-725.

However, we may go further and look for other possible effects.

The remainder of this contribution will address the question of whether the distinction between legislative and non-legislative acts may affect the nature of the directive and whether the Constitutional drafts(wo)men took the opportunity to clarify the most pressing dilemmas surrounding the directive as an instrument of Community action.[15] Section 5 is about the problem of the detailed nature of the directive. In section 6 the distinction law versus framework law or, in the still current terms, regulation versus directive will take centre stage, with focus on the 'curtailed potential' of a directive as a rule, which is generally valid in the member states. Indeed, this has to do with the persistent refusal of the ECJ to recognize the horizontal direct effects of directives.

5. No detailed framework laws?

By introducing the distinction between legislative and non-legislative acts, the drafters of the Constitutional Treaty intended initially to entrench the idea that a legislative instrument should be limited to the main, essential elements to be regulated and that the adoption of these acts should be subject to the 'ordinary legislative procedure', i.e., the joint adoption by the European Parliament and the Council, on a proposal from the Commission.[16] In other terms, the current co-decision procedure. In the final report of the competent Working Group,[17] legislative acts were defined as acts which are adopted directly on the basis of the Treaty and which contain the essential elements and the fundamental policy choices in a certain field. The more detailed executive rules should be left to non-legislative measures. For the adoption of the latter, less 'democratic' procedures would suffice.

The content related definition is said to reflect the (unimpressive) jurisprudential *acquis*[18] as well as national constitutional traditions, which differ in this respect. In any case, there is nothing revolutionary about this. The need to distinguish better between essential principles to be captured in basic legislation on the one hand and implementing rules on the other was identified by the Commission in, for instance, its White Paper on European Governance and in the Lamfalussy Report.[19] In fact, the rather successful Lamfalussy method is based on this prin-

[15] Although I focus mainly on the framework law, some of the observations apply *mutatis mutandis* to the European regulations, which are 'hiding' directives.

[16] In contrast to what the name may suggest, there exists so many specific legislative procedures that the ordinary procedure seems to be rather an exception than the main rule.

[17] Cf. the Final report of Working Group IX on Simplification, CONV 424/02.

[18] Cf. K. Lenaerts, 'A Unified Set of Instruments', *EuConst* (2005) p. 57 at p. 61.

[19] *The Final Report of then Committee of Wise Men on the Regulation of European Securities Markets*, Brussels, 15 February 2001.

ciple. Level one instruments of the 'four-level regulatory process', i.e., framework directives or regulations, focus on general rules and principles, while level two is for more detailed implementing measures.[20] In the final version of the Constitutional Treaty, the content related criterion has been shuffled away. There are only indirect references, such as Article I-36, on delegation, providing that essential elements may not be subject to delegation.

Until now it was the general nature of the acts and their binding force that made the ECJ consider regulations and directives as legislation.[21] As is well known, the ECJ concentrates in this respect on the substance of the instrument, but it does not make the distinction between essential and non-essential elements.[22] One may wonder whether and, if yes, what influence the introduction of a more specific notion of legislation may have on the character of the framework laws.

The introduction of the procedural element coupled with the notion of legislation under the Constitutional Treaty will, as such, hardly change the things. The content related element, as far as it is still present, may indeed counter the often-bemoaned degree of detail of directives. As was indicated above, limiting the content to the main elements fits also into an existing ambition to end the improper use of directives. Yet, the first question to be addressed next is what is essential in the sense that it should be laid down in legislation. In this respect, the generally ignored 'Penelope' draft[23] contained a more elaborated indication as to the substantive aspect of legislative acts. These '… shall determine the fundamental principles, general orientation and essential aspects of the measures to be taken … They shall determine the rights and obligations of persons and undertakings and the nature of the guarantees which they are to enjoy in all Member States'.

The second and probably more difficult question is how to impose such a substantive limitation in EU legislative practice. At the end of the day, will the distinction between legislative and non-legislative acts make some difference? The techniques of delegation to the Commission for adopting European regulations, or for the adoption of European implementing regulations provided for in the Constitutional Treaty, already exist today and have until now not contributed to much self-discipline of the European legislator.

[20] Cf. the Commission Staff Working Document on the Application of the Lamfalussy Process to EU Securities market Legislation, Brussels 15 November 2004, SEC (2004) 1459.

[21] Cf. Case 160/88R *Fedesa* [1988] ECR 4121, Case C-63/89 *Assurances du Crédit* [1991] ECR I-1799, Case C-298/89 *Gibraltar* [1993] ECR I-3605 and Joined Cases T-172/98, T-175/98 – T-177/98 *Salamander* [2000] ECR II-2487.

[22] The above-mentioned *acquis*, in fact the *Köster*-case law (Case 25/70, ECR [1970] 1161) did not relate to the distinction between legislative and non-legislative acts but concerned above all the issue of delegation and the legality of the so-called Management Committee procedure.

[23] Penelope Feasibility Study, Contribution to a Preliminary Draft Constitution of the European Union, 4 Dec. 2004, Art. 77(2).

On the one hand, the need, probably also fed by some distrust, to lay down precise and detailed rules to be implemented in order to avoid divergent implementation will not disappear. The same will probably be true as to the various member states' wishes to have their national peculiarities accommodated in one way or another in the directive concerned. To the contrary, both aspects may even become more important, since there are, after accession, more legal systems and cultures to be bridged. In other terms, the UK drafting techniques are probably not *passé*.[24]

On the other hand, much will depend on the 'guts' of the legislator to make use of delegation and implementation at EU level. The Constitutional Treaty is rather explicit: delegation should be used to supplement or amend certain non-essential elements of the framework law; where uniform conditions for implementing legally binding rules are needed, the Commission and, in certain cases, also the Council, shall be given implementing powers.[25] The latter implies that these institutions shall adopt a European regulation which may, by its very nature, be more detailed than the framework law. This, despite the fact that a European regulation may have the character of a 'directive'. In other terms, an intermediate level might be inserted, resulting in 'layered legislation' of first the framework law itself, then more detailed delegated or implementing European regulations and, finally, national implementing measures. However, if the intermediate step is deleted and the implementation is left to the member states directly,[26] the risk that framework laws will again become detailed is real, in particular where the adoption of European regulations would have been the proper option but, for some reason, the legislator does not want to follow that path.

In any case, the legislative/executive distinction in the Constitutional Treaty slightly transforms the perspective on the question of how detailed framework laws may be. What was before a practical issue now has a constitutional dimension. Furthermore, one may wonder whether the concentration of rule-making at the legislative level will remain viable with the very broad substantive scope of EU law, as it results from the Constitutional Treaty. This could give an additional impetus for making a more rational use of legislative and executive acts.

6. Law versus framework law

The issue of details, which puts the distinction between regulations and directives under pressure, is not solved by the Constitutional Treaty. Perhaps the distinction

[24] Cf. Conseil d'État, Rapport Public 1992, p. 45-46

[25] The Treaty may be explicit, but the exact difference between the two options is in many respects not clear.

[26] Which is the basic option of the Constitutional Treaty.

between regulation and directive is even more blurred in the Treaty in the sense that, when we look at the 'hidden' content based criterion, both laws and framework laws are supposed to regulate the essential elements. European regulations may go into details irrespective of whether they are in the nature of the old regulation or of the old directive. The fact that a 'European regulation' may be an 'old regulation' or an 'old directive' is confusing. Initially, the European regulation was defined only in terms of the old regulation. The directive version was added on the basis of a Dutch amendment. Whether this was a stroke of genius or a moment of madness remains to be seen. It might result in real hybrids, single acts that are partly regulations and partly directives. In any case, the single term for two rule-making modalities will, no doubt, result in carloads of problems of implementation and application.

Also in other respects there is not much advancement. The selection of the type of act is still, as a rule, a matter of discretion of the competent institution. The only explicit guiding principle is proportionality.[27] Whether the latter will lead to some kind of scrutiny by the ECJ as to the proper use of instruments has to be awaited.

The fundamental distinction between laws and framework laws remains, like in the case of regulations and directives, 'the structural necessity'[28] to enact national transposition measures in order to give framework laws full legal effect, fully maintaining the idea of 'two-stage' or 'indirect' legislation. At the EU level the intended result of a framework law is laid down in an act, which is binding on the member states. Next the member state effectuates the content of the framework law by transposing it into national law and thus turning it into a normative act with an effect *erga omnes*.

The nature of the instrument remains puzzling, at least if we build upon the analogy with directives. Framework laws, like directives nowadays, are pieces of legislation, i.e., acts of general application. They are law-creating and can, in principle, be considered as law generally valid in the member states. Most EC directives also aim at the creation of rights and obligations for private individuals. These rights and obligations may exist *vis-à-vis* other individuals or *vis-à-vis* the State authorities. In this sense, and in contrast to what the definition of directives in Article 249(3) and that of framework laws in Article I-33 may suggest, directives and therefore also framework laws are to be considered as a source of rights and duties. The above-mentioned 'Penelope' draft was patently clear in this respect when it stated that legislative acts '…shall determine the rights and obliga-

[27] Art. I-38.

[28] F. Capotorti, 'Legal Problems of Directives, Regulations and their Implementation', in Siedentopf and Ziller (eds.), *Making the European Policies Work: the Implementation of Community Legislation in the Member States*, (IEPA), (London, Sage 1988), at p. 156.

tions of persons and undertakings and the nature of the guarantees which they are to enjoy in all Member States'. As I have suggested, these are issues encompassed by the notion of essential elements, which form the substantive core of legislative acts. In principle, by virtue of their specific characteristics of legislation in two stages, directives and, under the Constitutional Treaty framework laws, are *indirect* sources of rights and obligations for individuals. The rights and obligations under national law have their origin in the directive. It is only after the process of transposition that rights and obligations provided for by the directive become fully binding for the individuals within the member states.

On the other hand, as is well known, under certain circumstances, directives are direct sources of rights, i.e., they confer rights without the intercession of national implementing measures. First, this is the case where the ECJ allows reliance on the directive in the context of direct effect. Second, also for purposes of State liability, the question is addressed as to whether the directive at issue confers or is intended to confer rights.

In contrast to rights, according to the ECJ, directives cannot impose obligations upon individuals directly. As a consequence, directives have no horizontal or inverse vertical direct effect. One of the main arguments for this finding is of a constitutional nature. In *Faccini Dori,* the ECJ held that the acceptance of horizontal direct effect would mean 'to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations'.[29]

Indeed, this denial of horizontal direct effect has consequences for the full effectiveness and for the protection of rights of others, namely, in so far as the enforcement of a right of one requires compliance with an obligation by another. Similarly, as far as it also implies a prohibition of inverse vertical of directives, the provisions at issue cannot be enforced against individuals. In this sense, there exists an important limitation to the validity of directives as generally binding rules in the member states. This limitation is also likely to apply to framework laws.

In order to overcome as far as possible this limitation, the ECJ has developed various techniques to bypass it. These include the broad interpretation of the notion of 'the State' and, in particular, the acceptance of horizontal side effects of both the (vertical) direct effect and the interpretation of national law in conformity with the directive at issue. As is well known, this case-law has sparked a lively controversy.[30] Despite some recent efforts to accommodate the contradictions in the case-law,[31] in my view, the debate is not settled.

[29] Case C-91/92 [1994] ECR I-3325, para. 24.

[30] For an overview of the discussions *see* S. Prechal, *supra* n. 1, p. 210-215 and p. 255-270.

[31] Cf. Case C-201/02 *Wells*, judgment of 7 Jan. 2004, nyr in ECR and Joined Cases C-397/01 to C-403/01 *Pfeiffer*, Judgment of 5 Oct. 2004, nyr in ECR.

There are no reasons to believe that this will change under the Constitutional Treaty. Framework laws being defined in the same way as directives, the ECJ's case-law is very likely to continue to apply. According to Article IV-438(4) of the Constitutional Treaty, the case-law of the ECJ 'shall remain, mutatis mutandis, the source of interpretation of Union law and in particular of the comparable provisions of the Constitution'. Due to the incorporation of the third pillar, the case-law will extend to new areas. Framework laws will inherit the weakness of the directive: the instrument will be equated in various respects to rules generally valid in the member states but not as far as the imposition of obligations on individuals is concerned. Yet, it is exactly this exception that will make the application of framework laws in the domestic legal order of the member states complex and controversial. In this respect, the Constitutional Treaty missed an opportunity.

Are there any prospects that at least the directive-like European regulations may have full legal validity and, therefore, also horizontal effect? Some – highly speculative – argument could be drawn from the fact that they are merely a variety of the umbrella concept of European regulation. The latter is, by its very implementing nature, aiming at full effects in everyday practice and the making of such a distinction as to the effects within one single concept makes no sense.

7. Final observations

It seems that from the perspective of the usefulness of and need for instruments like directives in European law, the proposals in the Constitutional Treaty are certainly not revolutionary. To the contrary, once again we witness the 'disappearance' of the directive, only to see it immediately re-imported under a new name – with all the 'assets and liabilities' of the old directive. In other terms, it is to be expected that the directive is going to evolve under a new label if ever the Constitutional Treaty comes into force.

The most pressing problems related to directives – their detail, their difference from regulations and their incomplete nature as acts of general validity – are not really resolved by the Constitutional Treaty. In my opinion, a more specific and more elaborate content related definition of legislative acts could have contributed better to drive back the adoption of detailed legislation at the 'wrong' level and to restore the 'initial mission' of directives. Indeed, '*contributed*', since the ultimate decision on how detailed a concrete framework law or directive will be and what may be left to delegated or implementing legislation is to be taken in the legislative process itself. It is, as such, not an issue to be dealt with in detail at the level of the Constitution. Perhaps more importantly, the opportunity to make such choices exists already – no constitutional text is needed for this purpose. The

Constitutional Treaty creates only a new context and an additional incentive to change the practice.

Also the literal adoption of the definition of directives imports into the Constitutional Treaty the old problems of the legal effects that the instrument may produce. I realise that on the critical point, i.e., the point of *full* general validity, one of the clarifying options would be to deny direct effect altogether, as was done in relation to the framework decision in the third pillar[32] and, in less categorical terms, in the German Constitution in relation to federal framework legislation.[33] Yet, there are also other options. In particular, by deleting the member states as explicit addressees of the framework law and, at the same time, by specifying that framework laws need, in principle, transposition into national law, the drafters could have removed the cause of the complex and puzzling jurisprudence of the ECJ. The nature of the framework law as two (or more) -stage legislation would be maintained with all the advantages this technique has. Instead of parachuting 'turnkey' rules into the national legal systems, the member states would be left a certain latitude leaving them in a position to take into account national (legal) peculiarities and economic, social and other circumstances when implementing a framework law. It would allow them to insert the content of a framework law into their national legal order, particularly into pre-existing national legislation related to the same matter, and to do so by means of the most appropriate and familiar legislative techniques.

In so far as the timely and adequate transformation of framework laws into national law would prove to be equally cumbersome as that of directives nowadays, the courts could fall back on the second best option. This is to fully apply the relevant provisions of the framework law, indeed provided that the provisions are suitable – in terms of direct effect – to be applied in the case at hand.

In any case, a subtle redefinition of the directive merits attention in any other future attempt at rationalisation of the EU legal instruments.

[32] Yet, also in relation to framework decisions there are examples of exploring and pushing the limits of their effectiveness in individual cases. *See* Case C-105/03, *Pupino*, judgment of 16 June 2005, nyr in ECR.

[33] Art. 72(2) of the Basic law provides '[o]nly in exceptional circumstances may framework legislation contain detailed or directly applicable provisions'. Section 3 provides also an interesting parallel with EU law: 'When the federation enacts framework legislation, the Länder shall be obliged to adopt the necessary Land laws within a reasonable period prescribed by the law.'

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