

Requirements of the Rule of Law from the Perspective of European Union Law - Primary and Derived European Law

Iulian NEDELCU
Iulian Paul NEDELCU

Page | 33

ABSTRACT

The Treaty of Lisbon maintains the principle of the supremacy of Community law in relation to national law, and in this respect we consider it necessary to present briefly some elements of European law.

The European legal order, or in other words, European law¹, consists of a series of structured and hierarchical rules.

European law consists of the three founding treaties of the Union² and the amending treaties, which have adapted to the new realities of European life and which, moreover, emphasize the dynamic and unpredictable³ nature of European integration. The Treaties represent the fundamental part of European law and the legal system of the European Union because, on the

¹Professor Augustin Fuerea, a well-known specialist in the field, points out that the Community legal order is given, in a broad sense, by the set of rules governing the relations in which the European Communities find themselves, and in a narrow sense by the relations between the European Communities and the Member States. natural and legal persons as belonging or not to the Member States, relations between Member States and other international organizations, in the *Handbook of the European Union*, 4th edition, revised and added, Universul Juridic Publishing House, Bucharest, 2010, p.133; for other definitions of community law, see Dumitru Mazilu, *European Integration, Community Law and European Institutions*, Lumina Lex Publishing House, 2008, p.54, Ovidiu Ținca, *General Community Law*, Didactic and Pedagogical Publishing House, Bucharest, 1999, p. 200, Viorel Marcu, *Community Institutional Law*, 3rd edition, Lumina Lex Publishing House, Bucharest, 2002, p.32, Beatrice Andreșan – Grigoriu, Tudorel Ștefan, *Community Law*, CHBeck Publishing House, Bucharest, 2007, Nicoleta Diaconu, *Law European Union – Treaty*, Lumina Lex Publishing House, Bucharest, 2008, p.55, Gabriel Liviu Ispas, *European Union – Evolution. Institutions. Mechanisms*, Universul juridic Publishing House, Bucharest, 2012, p.55.

²At present, only two of them are still in force, signed in Rome on March 25, 1957, in force since January 1, 1958.

³Andreșan - Grigoriu, B., Tudorel, Șt., 2011, *Treaties of the European Union*, Bucharest: Hamangiu Publishing House, p.3.



basis of and in accordance with them, all the rules that make up all secondary legislation are generated, as well as the other acts of the European Union.

Moreover, primary legislation is the essence of the Union's constitutional framework and, together with the principles of law, occupies the most important position in the hierarchy of sources of Community law.

KEYWORDS: *Rule of Law, European Union law, Primary and derived law.*

1. Introduction

Primary legislation of the UE we mention: the Unique European Act⁴, the Treaty of the European Union in Maastricht⁵, the Treaty of Amsterdam⁶, the Treaty of Nice⁷, The Treaty of Lisbon⁸.

⁴Completed in December 2007, following a highly emotional ratification process, it enters into force on 1 December 2009. Among the significant changes contained in this document is the introduction of the "*delegated acts*" system which authorizes the Commission to adopt non-legislative and general application, which complements or amends certain non-essential elements of the legislative act, replacing the comitology procedure, criticized over time due to its complexity and lack of transparency, new regulations making a clear distinction between legislative and non-legislative acts. For details on the Lisbon Treaty see: Marin Voicu, 2009, *European Union - before and after the Lisbon Treaty*, Bucharest: Universul Juridic Publishing House; Dragomir, Ed., Niță, D., 2010, *Lisbon Treaty*, Bucharest: Nomina Lex Publishing House.

⁵Adopted on 10 December 1991, signed on 7 February 1992 and entered into force in November 1993, it was the second fundamental revision of the founding treaties, bringing through it some fundamental revisions to the construction of Europe. Three "*pillars*" can be distinguished: the first, the Community, the second, the Common Foreign and Security Policy and the third, Justice and Home Affairs, see A. Fuerea, op cit., p.44.

⁶Signed on 2 October 1997, entered into force in May 1999, the Treaty of Amsterdam amends and complements the Maastricht Treaty, in particular as regards the right to work and the rights of citizens, the removal of barriers to the free movement of goods and services. In this sense, each Member State has to work more concretely within Europol, and it is possible to give the EU a better voice in the international institutions. Institutions and procedures capable of ensuring the proper functioning of an enlarged Union have also been created.

⁷Signed on 26 February 2001, entered into force in January 2003; the first amendment after the change of regime in Eastern Europe and the break-up of the Soviet Union, contains regulations designed to improve the decision-making mechanism, given the expected enlargement of the Union to 27 states, see Ovidiu Tinca, Treaty of Nice, 9/2001, p.14.

⁸See Note 4.

This category of rules is joined, as an element of European Union primary law, by the treaties of accession of new members to the European Union together with the annexes and accompanying protocols which, moreover, have the same legal value as the accompanying act. In addition, they may lay down additional rules for all Member States⁹.

It is considered in the doctrine¹⁰ that the institutional treaties perform the function of a constitution for each of the states of the European Union, provided that they provide for the relations between the institutions, their competences and the cases in which they operate a division between the Union institutions and the Member States.

The regulations contained in the founding treaties of the European Union may not be the subject of any contentious control or derogation, unless there is an authorized procedure in this regard¹¹.

Within the European legal order, the ability to create rules of law belongs to certain bodies which exercise this competence following a pre-established procedure, which is the main feature of the European Union.

European Union law gives its institutions the power to adopt binding legal rules, in line with the European interest, which are above the national interests of the Member States. The Court also pointed out, in a reference case¹², that the European institutions created by the Treaties exercise sovereign rights from the Member States, adopting legislation automatically, but within the limits laid down by the Treaties of the Union.

⁹The status of the Court of Justice, the privileges and immunities of the Communities, the status of the two European systems of central banks, the role of national Parliaments, conditions for the application of the principles of subsidiarity and proportionality have been established.

¹⁰Rideau, J., 2006, *Institutional Law of the Union and the European Communities*, 5th edition, Paris: L.G.D.J. Montchrestien, p.106.

¹¹Rideau, J., *op.cit.*, p.240.

¹²CJEU, C-6/64 Costa/Enel, see Moreau Defarges, P., 2002, *Les Institutions européennes*, 6th edition, Paris: Armand Colin, cited by Dacian Cosmin Dragoș, 2005, *European Union, Institutions, Mechanisms*, Bucharest: All Beck Publishing, p.97.



They shall adopt unilateral acts in the performance of their duties under the Treaty establishing the Union.

Thus we can say that we are in front of a legislated right, with norms adopted in and for the application of the treaties. In the Union's regulatory hierarchy, these rules are secondary sources of European law. Their secondary normative character lies in the impossibility to contravene the primary sources and the general principles of European law formulated by the Court of Justice in its jurisprudence¹³.

Even if these institutions have a normative power comparable to the legislative one, we do not find in the text of the institutional treaties the terms “law”, or “legislation”. However, the Court of Justice “changed” customs, using notions such as “*the legislative system of the communities*”¹⁴, “*the legislative power of the community*”. Things have returned to a natural expression, with the Treaty of Amsterdam, when referring to the “*quality of legislator*” of the Council.

The Regulation is the main source of secondary Community law, which expresses the legislative power of the Communities.

The Treaty defines it in a complex way¹⁵, stating that it has general application, is binding in all its elements and applies directly in all Member States¹⁶ without the need for them to adopt national legislation to take over the regulations, their entry into force and the production of legal effects at national level being carried out independently of any takeover measure in the domestic legislation.

¹³Fuerea, A., *Community Business Law*, 2006, Bucharest: Universul Juridic Publishing House, p.25, Manolache, O., 2006, *Community Law*, 5th edition, Bucharest: C.H.Beck Publishing House, p.23.

¹⁴CJEU, C25/70, Koster.

¹⁵Art.288, ex-article 249 TEC.

¹⁶Art.288 (ex-article 249 TEC), in Beatrice Andreșan – Grigoriu, Tudorel Ștefan, *op. cit.*, p.288.

2. European integration process

Thus, all citizens can avail themselves of the provisions of the regulation and, as the Court states in its case-law¹⁷, the only thing which the Member States are obliged to do is not to impede the direct application of the regulations. Page | 37

Being comparable, as a legal force, with a national law, the regulation contains general and impersonal provisions, with abstract character, reason for which are considered the most important legal acts that can be adopted by the institutions of the European Union. They are of general applicability, being binding in all their elements and being directly applicable in all Member States¹⁸.

From a material point of view, as the legal force of the provisions they contain, the case law of the European courts has distinguished between the basic regulations and the implementing regulations¹⁹.

The basic regulations are the regulations adopted by the Council²⁰ in accordance with the procedure laid down in the Treaty.

Implementing regulations are adopted by the Commission²¹, authorized for this purpose by the Council or, may even be adopted by the Council, their characteristic being highlighted by the fact that they can be checked and annulled if they infringe the basic regulations.

¹⁷CJEU C-43/71, Politi.

¹⁸This Regulation is, for example, the Community act regulating the prices of a category of products or imposing certain obligations on car manufacturers in the European Union.

¹⁹Rideau, J., *op.cit.*, p.156, Fuerea, A., *Manual...*, p.141-142.

²⁰Council Regulation (EC) No 1293/2007 of 30 October 2007 abolishing the anti-dumping duties imposed by Regulation (EC) No.150/2002 on imports of recordable compact discs originating in Taiwan and authorizing their repayment or remission, and the abolition of countervailing duties imposed by Regulation (EC) No 960/2003 on imports of recordable compact discs originating in India, authorizing their repayment or remission and terminating the corresponding procedure, published in OJ L 288, 6.11. 2007, p.17-19.

²¹Regulation (EC) no. Commission Regulation (EC) No 639/1999 of 25 March 1999 concerning the authorization of a new additive in feeding stuffs published in OJ L 82, 26.3.1999, p.6-7.

The regulations enter into force only after their publication in the "*Official Journal of the European Communities*", the absence of publication leading to the loss of binding status without entailing the illegality of the regulation²².

The European Directive is a two – step method of legislation, which sets out the objectives to be achieved by the Member States, leaving it to the national authorities to choose the most appropriate means.

The provisions of the Directive may apply, becoming directly binding, if they are addressed²³ to one or more Member States or to all Member States. In order for the principles set out in the Directive to take effect at the level of the citizen, the national legislature must adopt an act, specific to each legal system of that State, with a clear and unequivocal content²⁴, through which the content of the Directive will enter its own legal circuit. .

Transposition into national law will be adapted to the objectives defined in the directive, without the need to formally take over the content, and sometimes a more general legal framework is more appropriate if it implements the provisions of the directive in a sufficiently precise and clear manner²⁵.

The directive provides for a deadline for transposition into national law, but Member States have a margin of maneuver that allows them to take into account national particularities. If the deadline is not met, infringement proceedings will be instituted against that State.

It should be noted that Member States are not obliged to adopt transposition measures before the deadline but, according to the case law of the European Court of Justice²⁶, they must

²²CJEU C-185/73, Hauptzollant Bielefeld/Konig.

²³Article 288 of the Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union (ex Article 299 of the EC Treaty) published in the Official Journal of the EU, C 83 of 30 March 2010, see: eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:RO:HTML

²⁴ See Case CJEC 291/84 Commission v Netherlands.

²⁵Ștefan, T., Andreșan-Grigoriu, B., 2007, *Community Law*, Bucharest: C.H.Beck Publishing House, p.120.

²⁶ See case 26/62, Van Gend en Loos / Administration of Belastingen.

refrain from taking measures that would seriously compromise the result prescribed by the Directive²⁷.

Failure to implement a directive is a serious breach of European law²⁸ and has a negative impact on the European integration process, this practice being interpreted as an opposition of that state to the uniform application of law which can create discrimination between citizens by not granting the rights conferred by the directive.

It happens²⁹, however, that some transpositions are incorrect or made late, and this is not due to the opposition of the states to the implementation but due to the legal or administrative difficulties encountered. Even these situations constitute breaches of the obligations of the Member States and may give rise to liability on the part of the Commission by virtue of the provisions of Articles 226 to 228 TEC³⁰.

It has been found that this type of breach of the European legal order occurs quite frequently, which is why the Court has developed case law capable of making states more diligent in transposing directives.

In the early 1960s, the ECJ developed two principles governing the relationship between Community law and the national laws of the Member States: the principles of "*direct effect*"³¹ and "*supremacy*". These two principles derive from the nature of the EC Treaty which, according to the ECJ, established a "*new legal order*" under international law to which Member States and their nationals are subject.

²⁷ CJEU, C129/96, Inter-Environnement Wallonie ASBL c. Walloon region.

See the site: <http://curia.eu.int/en/content/juris/index.html>

²⁸ CJEU C-147/77, Commission v Italy.

²⁹ CJEU, C-1/00, Commission v France.

³⁰ Article 226: 'If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter, after giving the State concerned the opportunity to and submitted comments. If the State concerned does not comply with this opinion within the time limit set by the Commission, it may refer the matter to the Court of Justice.'

According to the principle of "*direct effect*"³², a provision of the EC Treaty or a secondary legislative act (regulation, directive or decision) conferring rights on individuals may – under certain conditions – be invoked directly by them before national courts³², in other words, if a rule of law benefits a category of individuals, it also benefits them individually, even if this provision does not explicitly state this³³.

According to European case law, national judges have an obligation to effectively enforce these rights. The idea behind the "*direct effect*"³⁴ principle is primarily the protection of individual rights, a component of the rule of law. It also ensures that European law is effectively enforced in the national legal order by national courts and individuals who wish to enforce their rights. An EU provision can only have a "*direct effect*" if it is clear and unconditional³⁵.

According to the principle of "*supremacy*", whenever EU law is adopted, it will take precedence over domestic law³⁶.

3. Conclusions

The principle of supremacy refers to all EU legislation, regardless of its nature: Treaty, secondary legislation (mainly directives, regulations and decisions), international agreements and general principles of European law. European law prevails over national law, regional and local rules, as well as the constitutions of the Member States.

³²CJEU, 26/62, Van Gend en Loos / Administratie der Belastingen.

³³CJEU C-24/66, Kampffmeyer v Commission.

³⁴The "direct effect" can be invoked by individuals before a national court against a Member State (the so-called "*vertical direct effect*") or against another citizen (the so-called "*horizontal direct effect*"), and for individuals to benefit from "Direct effect" of regulations in EU law, there must be a guarantee that national courts will give priority to European law, not national law.

³⁵CJEU, C 26/62, Van Gend en Loos/Administratie der Belastingen.

³⁶See case 6/64, Costa / E.N.E.L.

In fact, in the 1960s and 1970s, the judicial contribution to the supranational dynamism of European states proved to be of particular importance.

During this period, while European political developments were less active or in a state of crisis, the Court contributed in various ways to legislative development and the integration process.

An example of this is the situation where the Court authorized an extended application of Article 308 EC, thereby increasing the Union's jurisdiction, and for this³⁷ it used the principle of direct effect in order to increase the effectiveness of European policies provided neither by the Member States nor by the European institutions³⁸.

Another feature of European law is that its rules create obligations at every level of national authorities: thus, the judge must invalidate a national measure contrary to European law, and the administration must not apply national measures contrary to European law. The Member State's legislature will have to repeal such measures. And in case of doubt as to the interpretation of national law, the national court must interpret it in accordance with the relevant EU directive³⁹.

This obligation applies in cases where the national provisions in question were adopted before or after the EU directive, as well as in cases where legal proceedings before the national court are "vertical" or "horizontal"⁴⁰.

It is also valid if the national measure applies only during a transitional period or if the interpretation refers to national case law.

Another category of regulations based on primary law is the decision, the effect of which is binding in all its elements on the addressees to whom it is addressed.

These acts do not have a general influence, being, by their nature, individual acts that produce effects for one or more addressees. From the point of view of direct applicability, it may be that the decision addressed to a Member State involves the Member State taking measures to

³⁷Weiler, J., 1991, *The Transformation of Europe*, in 100 Yale LJ 2403, p.2431-2453.

³⁸Idem, p.343.

³⁹See Case C-14/83, Van Colson and Kamann v North Rhine-Westphalia – Principle of 'compliant interpretation'.

⁴⁰See Case C-106/89, Marleasing/Comercial Internacional de Alimentación.

implement it. The decision is directly applicable by its addressees, a fact which is acknowledged in practice.

When the decision is addressed to one or more Member States, it may create rights or obligations for individuals. In that case, in order to preserve the effectiveness of the decision, they may invoke it before the national courts. Decisions shall be taken by the Council on a proposal from the Commission or, in more rare cases, on its own initiative. The Commission may, in certain cases, issue decisions

The decision is binding in all its elements⁴¹, a feature which is similar to the regulation and distinguishes it from the directive. It is therefore an individual act implementing European law⁴².

Compared to the other acts listed in the Treaty, recommendations and opinions are not legally binding, however they are useful tools in guiding national legislation.

The recommendations made by the Council and the Commission are, in most cases, calls on the Member States⁴³ to amend their national legislation and adapt it to a proposed general framework. In most cases, the recommendations precede the binding acts, they play the role of a "preliminary procedure" in European legislation, starting from the premise of trust in the self-discipline of its addressees.

However, the recommendation is not without any legal effect, C.J.U.E. stating that national jurisdictions must use it as an instrument for interpreting national measures adopted for their implementation or where the recommendation supports other measures taken by the EU institutions of a binding nature.

The Commission, in view of the content of a previous Directive⁴⁴ - because, following meetings between the Parties, it found that certain Member States' interpretations of the content of

⁴¹Art.288 (ex-article 249 TEC), in Andreșan-Grigoriu, B., Tudorel, Șt., *op.cit.*, p.288.

⁴²ECJ C-16/62, in Historical Jurisprudence of Community Courts, Romanian European Institute, Bucharest, 2010.

⁴³Commission Recommendation of 19 March 2010 on the authorization of systems for mobile communications services on board ships (MCV services), (2010/167 / EU), published in OJ L 72, 20.3.2010.

⁴⁴Directive 2008/57 / EC of 17 June 2008 on the interoperability of the rail system within the Community, published in OJ L 191 of 18 July 2008.



the Directive differed, leading to the risk that national implementing rules would cause different applications in the Member States, ie the opposite of the purpose of the directives which recommend to the Member States a certain legal conduct.

By the content of the act⁴⁵ referred to in the case presented above, the Commission recommends that, when authorizing the putting into service of the characteristic elements, Member States should ensure that the principles and guidelines laid down in the rule are taken into account.

⁴⁵Commission Recommendation of 29 March 2011 on the authorization for placing in service of structural subsystems and vehicles pursuant to Directive 2008/57 / EC, published in OJ C 95/1 of 8 April 2011. The Recommendation provides that a single authorization for the vehicles should be sufficient for the entire EU rail network, Vehicle authorization procedures are harmonized and include certain clear deadlines with fixed deadlines set by the competent authorities, the technical rules applicable to the granting of marketing authorizations should be stable, transparent, non-discriminatory and, as far as possible, harmonized, and in order to ensure interoperability, it is necessary to demonstrate the safe integration and technical compatibility between the vehicle and the network through a rules-based approach.



REFERENCES:

1. Alexandru I., 2008, *Public Administration Treaty*, Bucharest: Universul Juridic Publishing House.
2. Apostle Tofan D., 1999, *The discretionary power and excess of power of public authorities*, Bucharest: Ed. All Beck.
3. Bălan E., 2004, *Introduction to the study of dominance*, Bucharest: Ed. All Beck.
4. Muraru I., Tănăsescu E.S., 2003, *Constitutional law and political institutions*, vol. I-II, Bucharest: Ed. All Beck.
5. Nedelcu P., 2015, *Decentralization – comparative study*, Bucharest: Universul Juridic Publishing House.
6. Nedelcu P., 2015, *Administrative Law and Elements of Administration Science*, Bucharest: Universul Juridic Publishing House.
7. Verginica V., 2018, *Theoretical and practical treatise on administrative law*, Vol.I, Bucharest: Universul Juridic Publishing House.
8. Elgie R., 2021, *Semi-Presidentialism. Sub-Types and Democratic Performance*, New York: Ed. Oxford University Press.
9. Schwarze, J., 1994, *European Administrative Law*, Office for Official Publications of the European Communities, Brussels: Bruylant.

LEGISLATION

- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007

- Romanian Constitution of November 21, 1991 - republish, amended and supplemented by the Law on the revision of the Romanian Constitution no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003;
- The O.U.G. 57/2019;
- The criminal code entered into force on February 1, 2014, according to art. 246 of Law no. 187/2012;

ABOUT THE AUTHORS:

Iulian NEDELCU, PhD, University Professor, Dolj Bar Assoc.

Iulian Paul Nedelcu, PhD, University Lecturer, Dolj Bar Assoc.

Email: avocatnedelcu@yahoo.com

