National Parliaments and the EU Directives

Jan Grinc*

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1. Introduction

Directives, one of the types of legal instruments of the European Union, are an often subject of interest of both legal and political science. Perhaps it is because of their intriguing nature and the two-level process of their entry into force. However, their formal and procedural aspects could not have given rise to such a great volume of treatises had the directives not regulated fundamental areas of everyday life, be it anti-discrimination measures, consumer protection, product liability, data protection or work conditions.[1] Many of the writings on directives deal with the effects attributed to them, their transposition (especially the implications of a defective transposition) and political factors influencing it, the implementation of directives by the national courts and the interpretation of directives by the Court of Justice of the EU.

In this paper, I would like to deliberate some of the conceptual questions related to directives in the system of the so called secondary law of the EU, drawing from practical experiences with the use of the instrument of directive so far and taking into account the implications of the multilingual nature of the EU law and the different legal systems of the member states. Based on this summarising exposé, I would like to suggest a possible role national parliaments could play in the process of implementation of the directives.

2. Directives, Their Purpose and the Role of National Parliaments

2.1 The Concept of Directives

* Jan Grinc is a Ph.D. student of constitutional law at the Charles University in Prague, Faculty of Law.

1 The directives amount only to about 9 % of the acts of secondary law (Bast, 2009, p. 506), but they are found virtually everywhere in the private and administrative law.

Although the scholars of EU law often argue that the EU defies the classic concepts and categories of the theory of state and postulate special categories and concepts when it comes to examination of the EU, it is always useful to approach the EU from the perspective of concepts and principles applicable in a modern rule of law democracy. This also applies to the perception of the system of legal instruments set down (if not exclusively) in Article 288 of the Treaty on the Functioning of the European Union (TFEU). We recognize the generally binding and applicable regulation and the individually binding (to the addressee) decision as the two basic types of legal acts of any state or other institution exercising public authority. Then there is the directive, which – according to Article 288 of TFEU – 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.

The directive does not have any real counterpart in the national or international legal system,[2] because it builds on the principle of conferral of powers set down in Article 5(1) of the Treaty on European Union (TEU), on the nature of the EU as an organisation intended to achieve certain goals of its member states and on the separation of the European law from the national legal systems. Not even in the federal states can we find a close relative of a directive.[3] This bears upon the fact of the different substance of the federal state and the EU. While the division of legislative competence in the federal state is intended to protect the member states' areas of autonomous policy-making, the relation between the EU and its member states is different; the EU certainly was and perhaps to a certain degree still is a 'union of purpose' (from the German *Zweckverband*[4]), aimed at achieving the defined goals, be it by her own vehicles or through the member states' authorities. As such, EU employs the national legislatures in the process of implementation of its own law.

It is therefore not surprising that the directive was initially labelled by some as a decision of its kind, because in fact it only imposes obligations to its addressees, the member states.[5] These attempts of classification have been partially undermined when the Court of Justice began developing doctrines regarding the effects directives themselves can have upon individuals in the member states as a result of their binding effect upon the member states.

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2 Cf. Prechal, 2005a, p. 482, Kapteyn, VerlLoren van Themaat, 1998, p. 326.
3 Perhaps the former German 'framework laws' (*Rahmengesetze*) come close.
4 See e. g. Isensee, 2007, p. 8.
5 See Bast, 2006, p. 380.

But the basis of this claim remains correct. The directive indeed imposes obligations upon the member states, namely to use their powers to achieve the result foreseen by the directive, i.e. the '*legal or factual situation which does justice to the Community*[Union] *interest which, under the Treaty, the directive is to ensure*'.[6] All the national authorities have to fulfil this obligation and this is where national parliaments come into play, as they are in most cases most suitable and therefore primarily responsible for the transposition of the directives into the national law,[7] which is the necessary precondition of achieving the result. This is obviously one of the manifestations of the national parliaments losing ground in the EU for the benefit of the executive.[8]

Without being first transposed into the national law, the directive cannot constitute obligations of individuals, while it still may, under certain circumstances, constitute their rights, i.e. it cannot lead to the results pursued in their entirety. The national parliament acts as a connecting link between the EU lawmaker and the national bodies applying the national law. Of course the actual drafting of the transposing act and sometimes the very passing of such act is up to the executive branch, especially the ministry under whose jurisdiction the directive falls.[9]

2.2 The Purpose of Transposition

What is the purpose of this connecting link? Aren't the regulations and the decisions sufficient and less intricate instruments? Judging from the wording of Article 288 of TFEU alone, one could assume that the specialty of the directive consists in the freedom of choice of "form and methods", of the ways to achieve the result prescribed. One could assume that the member states are free to create the rules leading to the required results as opposed to the regulations and decisions which lay down the rules themselves, uniformly and accurately. But such assumption does not hold up against the reality.

In reality, many directives do not state the 'results' to be achieved, but have a purely normative content, hardly discernible from that of the regulations. The reason for this can be

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6 Kapteyn, VerLoren van Themaat, 1998, p. 328.

7 Of course a legislative action is not always required in order to transpose a directive properly. See e.g. Case C-29/84 *Commission v. Germany* (1985) ECR 1661.

8 Cf. Duina, Oliver, 2005, p. 174.

9 Cf. e. g. Franchino, Hoyland, 2009.

found in a simple deliberation of the EU lawmaker trying to come up with measures necessary to do justice to the defined interest; rather than have the member states formulate the enactments on their own and hope that this will lead to the same results (effects) in the end, all the member states can be made to adopt the same, uniform law, if the result to be achieved calls for this.[10] This approach significantly minimises the risk of diverging interpretations of the directive and the failure to reach the same result in all of the member states. It has been viewed by some as a misuse of the form of a directive[11] however it does justice to the *effet utile* principle. Consequently, the member states trying to comply with the requirements of the EU law may in fact transpose many of the directives simply by rewriting their content into the required source of national law (although the CJEU encourages them not to do so[12]) or by a '*mere reference in their national laws, illustrating the normative self-sufficiency of these directives*'.[13]Such a word-by-word reproduction may be the safest way to achieve an orderly transposition, which effectively leaves the national parliaments in the position of EU's 'agencies'.[14] On the other hand, there are also examples of directives leaving the very choice of implementation of certain measures *à la carte* up to the member states.[15]

It is steadily mentioned in the literature that the distinction between the directives and the regulations is slowly fading.[16] This is in part attributable to the ever evolving case law of CJEU on the direct and indirect effects of the directives going beyond the main obligation of the addressees to implement the directives duly and in time, but the roots of this situation lie in the way the directives are written. If the directives were not of a detailed normative content, there could hardly have been any reasoning regarding their possible direct effect. The case law of CJEU on the direct effect of directives has not yet gone as far as to eliminate the distinction between the effects of the directives and the regulations by clearly declaring the horizontal direct effect of the directives (i.e. the possibility of individuals to plead the

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10 Kapteyn, VerLoren van Themaat, 1998, p. 329.

11 Most prominently Capotorti, 1988 and Hilf, 1993. See also Prechal, 2005b, p. 14 and references in Bast, 2009, pp. 504-505.

12 Case 252/85 *Commission v. France* (1990) ECR 2243.

13 Prechal, 2005a, p. 485.

14 Duina, Oliver, 2005, p. 174.

15 E. g. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. On the contrary, the so-called 'framework' directives (a classification not foreseen by the primary law) do not create space for deliberation of the national lawmakers as it may seem, but for the EU lawmaker drafting the follow-up 'daughter' directives.

16 Prechal, 2005b, p. 14.

directives not only against the state, but against other individuals[17]), but certainly the question of how much direct effect can a directive have without becoming in fact a regulation is more disputable and more disputed than the question of how much normatively dense a directive can be without being tantamount to a regulation, to which there is virtually no case law of the CJEU.[18]

But the answer to both questions can be found in the wording of Article 288 of TFEU. Regarding the second question, which is of interest of this paper, the answer is clear: if the Article 288 of TFEU reserves the 'choice of form and methods' for the member states, it means that there has to be a certain (considerable) amount of discretion left upon the member states by the directive.[19] Otherwise directives would not fit in the definition provided by TFEU.[20]

3. Ensuring Structural Consistency as a Possible Focus of the National Parliaments

3.1 Foundations

In search of the purpose of this freedom of choice, we have to return to the dualistic nature of the directives, i.e. the need of their transposition into the national law by the national bodies in question. From this, we can deduce a possible role of the national parliaments in the ensuring of the consistency of the European and the national law. I am not talking here about the material consistency achieved by timely and correct transposition of the directives, which is inherently required in order that the mechanism of directives works. What I am aiming at is a logical and systematic conformity, a structural consistency of the legal regulation originating from the directives with the legal system of the individual member state. It is the way the directives are transplanted into the context of the national law with its concepts, institutes and categories, which should prevent the possibly disruptive effects[21] of EU law upon the national legal system.

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17 Yet the doctrines of CJEU trying to compensate this 'drawback' of the directive in order to ensure the broadest possible effectiveness of the EU law actually gave rise to some good arguments speaking for the direct effect of directives instead of a complicated and uneasily applicable rules on the indirect effect. See Craig, de Búrca, 2008, p. 301.

18 The necessity of introduction of uniform legal regulation in certain areas is mentioned by CJEU in case 38/77 *Enka BV v Inspecteur der Invoerrechten en Accijnzen Arnhem* (1977) ECR 2203.

19 Cf. Bast, 2006, p. 382.

20 Prechal, 2005b, p. 14.

21 Prechal, 2005a, p. 483.

We can deduce this claim from the very fact that the directive delineates legal regulation to be introduced to the national legal systems of the EU member states. Even if normatively detailed, the directive should not be an 'exhaustive set of rules' ignoring entirely the existing law of the member states.[22] Quite on the contrary, a directive should observe the legal systems of the member states.[23] However, as detailed below, this is an extremely difficult task.

The claim can be deduced from the constitutional law as well. National parliaments or any other national bodies are obliged to follow the rule of law (or *Rechtsstaat*) principles. They cannot renounce their duties arising from these principles, not even when transposing the EU law. One of these duties is ensuring the terminological and systematic consistency of the adopted lawsin order to adhere to the 'rational legislator' presumption and the required degree of legal certainty in the statutory law.

But why should the structural consistency be such an issue in the EU?

One of the main problems encountered in the process of European integration is the language diversity of the EU member states. Ever since the beginning of the European Economic Community, the principle of language equality has played an essential role in the development of the European law.[24] Many works on the EU law deal with the importance and problems of legal translation in the EU law.[25] The comparative interpretation of the EU law by its language versions has become a stable method of work with the EU law.[26] The perils of legal translation are further intensified by the fact that not only the languages, but also the legal systems of the various member states are different.

There has been a lot written about the linguistic and legal problems and confusions of concrete EU legal acts, especially the directives.[27] Misguiding translations and shifted meanings in various language versions of directives is one example. It shall be noted here that

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22 Kapteyn, VerLoren van Themaat, 1998, p. 329.

23 Prechal, 2005a, p. 483.

24 EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community (1958) as amended.

25 See references at Somssich, Várnai, Bérczi, 2010.

26 Kilian, 2005, p. 5 et seq. Case 19/67 *Bestuur der SocialeVerzekeringsbank v J. H. van der Vecht* (1967) ECR 345.

27 E. g. Benacchio, Pasa, 2005, especially pp. 65-95. Extensively Somssich, Várnai, Bérczi, 2010. Kilian, 2005.Onufrio, 2007.

sometimes the ambiguity and slight meaning shift in the different language versions is even deliberate.[28] Practical problems arising from the transposition of concepts and institutes foreign to the national legal order are another one. Multilingual law-making in the EU often adopts institutes from one of the member states' (or even non-member states') legal order and subsequently inserts it into a wide range of different legal orders. This may cause confusion if the interpreters of law in those member states are not aware of and familiar with the inspirations of the directive.[29] Even for professionals, interpretation of national law based on EU directives is one of the hardest tasks casting doubts on the actual accessibility of such law.

Of course the more detailed the directives are, the less foreseeable is their impact on the national legal system[30] and the higher is the risk of their incompatibility with the structure of national legal system.[31] The member states struggling to transpose correctly and in time a detailed directive which it is unable to place in the context of its legal system may tend to go for *ad hoc* solutions of mediocre legal quality.[32] The less detailed the directives are, the bigger is the possibility to achieve structural consistency but the higher is the risk of failure to reach the required uniform effect. Finding a practical balance of the two extremities is the key to success.

3.2 Implications

A. From the viewpoint of the EU lawmaker, the concentration on facilitating structural consistency could manifest itself as follows.

In order to provide the member states with the possibility to ensure the structural consistency, certain parts of the directives should not be narrowly detailed in order to leave space for the national parliaments. The directives should not be formulated as precise norms when they are referring to legal concepts and institutes and not merely to a factual behaviour of the individual(e.g. an obligation to inform the consumer refers to factual behaviour, while the right of the consumer to withdraw from the contract refers to a legal institute). They would have to be formulated in a descriptive way, stating the result to be achieved (e. g. cancellation

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28 Prechal, 2005b, p. 33.
29 Cf. Benacchio, Pasa, 2005, p. 67 et seq.
30 Schroeder, 2003, p. 2176.
31 Prechal, 2005b, p. 33.
32 Kilian, 2005, p. 6.

of legal effects of a contract). This is actually what the CJEU has to do when it interprets a randomly used legal term with different meanings in the various member states. When an institute needs to be set uniformly in the directive, it should be described in detail so that its intended mechanism is clear. This may extend the length of the law, but could strengthen legal certainty. A detailed explanatory report instead of the often unhelpful recitals would be also useful.

One could argue that the structural consistency should be taken into account already in the process of drafting of the directive, by incorporation of country-specific variations. But this would contradict the unity of the EU law (as opposed to the plurality of the national legal orders). A directive should be the same in all the official language versions, however unreal this claim actually is, as 'no two texts in different languages will ever have exactly the same meaning'.[33]

There is obviously a question, whether the preservation of the diversity of national legal systems is desired from the viewpoint of the European integration, especially in the light of the advancing legal integration (not only within the EU framework) and various academic attempts at sketching a *ius commune europaeum.*[34] For post-communist countries such as the Czech Republic with their relatively young democratic legislation (which is furthermore about to be recast at least in the Czech Republic by an underway reform of the private law), the need to seek models and the openness towards inspiration from abroad is natural. But for the democracies of Western Europe whose long legal traditions have not been interrupted by an era of communist legal nihilism, it may not be the same.

In this respect, we can return to the question of languages. Even if the prospective common law spoke all the languages in the EU, it cannot be drafted in all the languages at once. As English is the most frequently spoken language of the EU and also the most frequent language of cross-border contracts in the EU, it seems to be a natural choice for drafting a common law for Europe.[35] Yet the United Kingdom's legal system (common law) is also the most peculiar in the EU, being the representative of the so-called common law system, while more or less the rest of the EU represents the civil law model. This means that the English legal

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33 Schilling, 2010, p. 50.
34 See Benacchio, Pasa, 2005.
35 Draft Common Frame of Reference (von Bar, 2009) has also been drafted and published in English first.

terminology, concepts and institutes are very distant from that of the rest of EU and this cannot be disregarded in any way.

The road to common law for Europe is therefore still a long one, although partial elimination of discrepancies within the *acquiscommunautaire* and its consolidation can only be positive.

B. The implications of the proposed focus of the member states' involvement in the implementation of directives for the national parliament or other body transposing EU directives are rather clear.

Legal certainty, accessibility and foreseeability are one of the fundamental requirements of legislation under the rule of law. Ensuring them is the primary responsibility of the national legislators. In the context of EU law, national legislators should comply with this responsibility either by posing appropriate claims (or delegating the duties) on the executive branch or by maintaining such control themselves, perhaps as early as they are informed on the upcoming EU legislation.[36]

The national bodies should also avoid attempts at 'creative transposition' of directives, i.e. substantial restructuring or 'retelling' of the directive in the transposing act, when such approach is not necessary in order to make the directive fit in with the national legal system, as this can make the interpretation of the transposing act even harder.

C. There is at least one more aspect to be taken into account and that is the ultimate interpreter of the directives, as transposed in the national law, the Court of Justice.

One of the tasks of CJEU is to ensure uniform interpretation of the EU law. In the context of the multilingual environment of the EU, this means interpreting differing language versions of the same provisionuniformly, thus avoiding the '*drawback of the different language versions drifting apart*' while at the same time privileging certain language versions over others.[37]

This situation has some serious implications described concisely by *T. Schilling*, 2010. First, the principle of equal authenticity is unsettled, if not trespassed. In this respect, it is

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[36] Cf. Kilian, 2005, p. 9.
[37] Schilling, 2010, p. 55.

interesting to note that the principle of equal legal authenticity of the directives does not apply to the decisions of the CJEU. Although these decisions are also translated to all the official languages of the EU, there is only one decisive wording of each decision of CJEU according to Art. 31 of the Rules of Procedure of the Court of Justice (RPCJ), namely the one in the language of the case determined according to Art. 29 of RPCJ.[38] Second, the protection of legitimate expectations of the EU citizens adhering to the wording of the EU acts or national acts of transposition in their mother tongue is undermined.[39] Third, a strictly uniform interpretation of directives by the CJEU can lead to a '*deep judicial transformation of the national law*'.[40]

These implications have to be considered seriously as the underlying situationcan hardly be improved or eliminated in practice. Interpreting the same law differently each time according to the respective citizen's language would disrupt the very unity of the EU legal system and therefore cannot be viewed as a viable solution.

It is clear that in order to make the multilingual EU law effective the purposive (teleological) interpretation has to prevail at times over the wording of the law. The CJEU is aware of this and adheres to it,[41] but it is also well aware of the tension between the '*elimination of linguistic discrepancies by way of interpretation*' and the principle of legal certainty.[42] From this tension arise limitations of the uniform interpretation and application of the EU law. It has been argued that the rule of uniform interpretation should be not be viewed as absolute and self-apparent, but rather as a principle rooted in the prohibition of discrimination based on language,[43] and that this principle has to be balanced with the protection of legitimate expectations of the EU citizens.[44]

By focusing on structural consistency, legitimate expectations may be protected at least partially by eliminating unforeseeable legal effects of foreign concepts introduced in the national legal order without setting forth these effects in detail. The uniform application

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38 Cf. Kilian, 2005, p. 10.
39 Schilling, 2010, p. 57 et seq.
40 Bast, 2009, p. 505.
41 Case 29/69 *Erich Stauder v City of Ulm – Sozialamt* (1969) ECR 419.Somssich, Várnai, Bérczi, 2010, p. 137 et seq.
42 Case 80/76 *North Kerry Milk Products Ltd. v Minister for Agriculture and Fisheries* (1977) ECR 425.
43 Art. 21(1) of the Charter of Fundamental Rights ofthe European Union. Schilling, 2010, p. 56.
44 Schilling, 2010, p. 57 et seq.

would mean the uniformity of the results achieved, not necessarily the uniformity of the legal mechanisms employed.

4. Conclusion

While this paper is just an incentive for further discussion, it tries to outline one of the possible new focuses of parliamentary representation in the European Union, or more precisely the reasons and considerations behind it and its possible implications.

The challenge of transposition of the directives is not a new one, but it is one of an ever-growing importance as the European integration progresses. In this paper, I have tried to show how focusing on ensuring the structural consistency of the national law exposed to the effects of the EU law and permeated by legal regulation originating from the EU directives could strengthen the rule of law principle in both the member states and the EU.

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