

## Jürgen Bast, Grundbegriffe der Handlungsformen der EU

### Summary

The present thesis concerns the legal instruments of European Union law. EU law is understood here as a single legal order which encompasses Community law as a qualified part. The term legal instrument (*Handlungsform*, literally ‘form of action’) refers to the various forms which an EU legal act can take. A legal instrument is either codified in the Treaties on which the Union is founded—e.g., the type ‘regulation’ as defined in Article 249(2) EC—or it was developed in law-making practice—e.g., the type ‘decision *sui generis*’.

The first part of the study develops basic concepts of the EU’s legal instruments, in order to clarify the legal significance in EU law of this category and to expose the specific ordering functions it serves.

The point of origin in positive law is Article 249 EC, from which a model is derived of what makes up a legal instrument. In contrast to expectations grounded in national law, Article 249(1) EC already indicates that in EU law various law-making institutions are empowered to use an identical set of instruments. In order to qualify a legal instrument, the author that an act is attributed to is not determinative, nor is the procedure in which it was enacted. As evidenced by Article 249(2)–(5) EC, an EU legal instrument is defined by a bundle of legal effects that an act entails precisely due to its affiliation with a given type of act. This characteristic bundle of legal effects is called here the operating mode (*Wirkungsmodus*) of that instrument. Attached to the operating mode, there is a particular set of requirements concerning an act’s legality and its entry into force, i.e., a specific regime of validity (*Gültigkeitsregime*). Likewise, the respective instrument determines a particular set of rules concerning legal review, which forms its regime of control (*Kontrollregime*).

Since most of the legal bases in the Treaties do not specify a particular instrument, the law-making institutions enjoy a wide margin of discretion when choosing the appropriate legal instrument in a given case. They may not only pick one of the instruments listed in the catalogue of Article 249 EC but also make use of an atypical composition of legal effects, as long as these effects remain foreseeable and are generally permitted by the Treaties. By way of continuation and proliferation to other fields, a new legal instrument can emerge from law-making prac-

tice. If it proves to be a useful innovation, such a new creature may eventually appear in the text of the institution's Rules of Procedure, or even in the Treaties. European constitutional law thus provides for an open system of legal instruments, which permits a high degree of learning aptitude. This flexibility is counterbalanced by a rigid and complete system of competences which does not allow for any irregular displacement through institutional action. A strict competence requirement applies regardless of the instrument chosen, be it a codified one or one coined in practice.

The European Court of Justice largely respects the prerogative of the law-making institutions to choose a legal instrument and thereby determine an act's legal effects. Contrary to a widespread opinion, there is no evidence in the case-law that the ECJ claims for itself the power to re-qualify the 'truly' chosen instrument according to substantive criteria, at least if the instrumental identity of the act at hand is beyond doubt according to formal criteria (predominantly by express auto-qualification). What the Court in fact reserves for itself is determining the scope of legal review. For these purposes, the ECJ construes the relevant EC Treaty provisions, in particular the terms "acts" and "decision" in Article 230(1) and (4), as purely procedural law concepts that do not refer to any specific instrument. Hence, a possible danger of circumvention is eased by a system of legal review in which there is only a limited role to play for the instrument's regime of control. By choosing a legal instrument, *e.g.*, a formal decision directed to a private person, the law-making institutions can assuredly *open* legal review. Yet they can never bar access to the courts simply by choosing, or avoiding, a particular instrument.

The second part of the study turns to the probably most important innovation in the field of legal instruments: the decision *sui generis* (in German called *Beschluss*, in contrast to the decision pursuant to Article 249(4) EC, which is called *Entscheidung*). By exploring the legal regime of this non-codified instrument, further insights into the EU's system of legal instruments are won.

The term decision appears with different meanings in the text of the Treaties. Occasionally, the instrument mentioned in Article 249 EC is referred to; in this case, the Danish, Dutch, and German versions use the terms *beslutning*, *beschikking*, and *Entscheidung* respectively. In most instances, the Treaties employ the term decision as a synonym for the term act without an implied reference to any particular instrument; in this case, the aforementioned languages mostly use the terms *afgørelse*, *besluit*, and *Beschluss*. Hence, the Treaties—aside from Article

34(2)(c) EU, which concerns a separate legal instrument—do not expressly recognize a legal instrument called *Beschluss*. Yet, starting from the early days of Community law, acts titled as *Beschluss* (*afgørelse, beslut*) appeared in the law-making practice of the Council, the Commission, and the Parliament. This type has meanwhile evolved into one of the most commonly used instruments of EU law. Apart from their denomination, these acts can be identified by their introductory clause (“has decided as follows”, in contrast to “has adopted the following decision”) and the lack of a closing phrase indicating to whom the decision is addressed. These decisions *sui generis* may therefore also be called addresseeless decisions, to be distinguished from decisions in the sense of Article 249(4) that always specify the addressee on whom they are binding.

In order to qualify the operating mode of addresseeless decisions, the present study employs the criteria of binding force, formal addressee, implementation structure, and obligatory force. Firstly, these decisions belong to the group of instruments having binding force, as opposed to non-binding instruments such as recommendations, opinions, and resolutions. Secondly, just as the regulation, the decision *sui generis* is associated with the group of instruments whose effects arise *vis-à-vis* everyone, in contrast to legal instruments whose effects are limited to a formally defined addressee, such as the directive and the recommendation. Thirdly, one has to distinguish instruments that show a one-step implementation structure from those with a two-step structure that requires an implementing act on the part of the Member States. The paradigm of the latter group is the directive. The addresseeless decision belongs to the former because it immediately becomes fully operative when the act enters into force. The fourth criterion concerns the capacity to impose legal obligations. All binding instruments can oblige the institutions and bodies of the Union, but their obligatory force *vis-à-vis* the Member States and the citizens varies. Whereas both regulations and decisions with a specified addressee can directly impose obligations on anyone within the Union’s jurisdiction, the obligatory force of directives is limited to the Member States. The operating mode of decisions *sui generis* is even more confined. As a rule, they neither oblige Member States nor private parties. Only exceptionally can they assign duties to the Member States to facilitate the practical results intended by them, as the ECJ held in its *Erasmus* judgment concerning an incentive measure in the form of an addresseeless decision. As a corollary to their binding force and their capacity to oblige the Union institutions, addresseeless decisions can create rights on which individuals can rely

before a Union court. This has been confirmed by the ECJ in the context of the right of access to documents.

Concerning the regime of validity, it turns out that under the current Treaties only a few among the general conditions for legality and effect are linked to the legal instruments. Since decisions *sui generis* are not covered by the wording of Article 254 EC, neither publication nor notification is required for them to enter into force. Concluding by analogy to Article 254(1) EC, publication is obligatory solely for addresseeless decisions enacted under the co-decision procedure. Other addresseeless decisions take effect immediately after their adoption, unless otherwise provided in the relevant act. As to the conditions for legality, three elements have to be pointed out: the giving reasons requirement, the language regime, and the standard for the choice of instrument. Despite the narrow wording of Article 253 EC, its duty to state reasons applies to addresseeless decisions since it covers the full range of acts that can be challenged under Article 230(1) EC. The language regime under Regulation No. 1 is two-fold. Acts having a specified addressee must be drafted in the language of the addressee, whereas acts of general application and acts whose publication is obligatory have to be drafted in all official languages. Because decisions *sui generis* at all events have no specified addressee, they fall under the requirement of multilingualism. The institutions' choice of instrument is governed by the principle of proportionality, notwithstanding a wide margin of discretion. Other things being equal, the principle requires choice of the legal instrument with the most confined obligatory force.

As to the regime of control, a decision *sui generis* is in any case an act whose legality can be challenged under Article 230(1) EC, due to its binding force. This finding has been confirmed by several cases before the ECJ, in particular actions against addresseeless decisions concluding an international agreement. A decision having no addressee may constitute a decision in the meaning of Article 230(4) EC, as well. Bearing in mind that decisions *sui generis* do not impose obligations on private persons, this may only be the case in triangular situations in which the decision is benefiting a competitor of the plaintiff. This constellation routinely comes up in anti-dumping proceedings when the institutions make use of addresseeless decisions for terminating investigations or accepting undertakings. These acts may be of direct and individual concern to the private complainant that initiated the proceeding. An addresseeless decision can also give rise to an admissible plea of illegality under Article 241 EC. Regardless of the legal instrument at hand, this plea is admissible against all acts of general application whose legality is

of relevance in the particular case before the ECJ, provided that the act has not become definitive as against the plaintiff who could undoubtedly have sought its annulment under Article 230 EC.

In sum, the decision *sui generis* should be regarded as a useful complement to the codified legal instruments. The elements of its legal regime are adequately balanced. The duty to state the reasons on which an addresseeless decision is based and the requirement to draft it in all official languages correspond to its binding force and its nature of having no addressee. Its capacity to enter into force without prior publication is justified in view of the limited obligatory force of that instrument, which is mainly designed to be binding on the institutions and bodies of the Union. In constellations in which a private party is adversely affected by an addresseeless decision, effective legal protection is assured either through a direct action or through a plea of illegality. The functional advantages of that instrument are due to the combination of binding force with a characteristically confined obligatory force, which no codified legal instrument provides for. It offers a unique choice for various regulatory purposes whenever a Union policy is meant to be determined without the aim of imposing obligations on individuals or Member States. A high degree of protection of private interests and of Member States' autonomy is inscribed in the operating mode of that instrument. This is the pivotal point of the EU's system of legal instruments: the law-making institutions are given a range of options for deliberately limiting the legal effects of their acts—in adopting non-binding acts, in limiting effects on specified addressees, in enacting laws that require transposition, or in using instruments with a confined obligatory force.