

## LEGAL OPINION

# QUALIFICATION OF THE GUIDELINES ISSUED TO IMPLEMENT TEN-T POLICY (ART. 154 – 156 TEC)

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**Green Paper COM(2009) 44 of 4. February 2009: Towards a better integrated Transeuropean Transport Network at the service of the Common Transport Policy**

### 1. The problem

Art. 155 (1), first indent, of the TEC calls on the EU to establish guidelines for the planning of the Transeuropean Transport Network (TEN-T). The function of these guidelines is defined in Art. 1 (2) of the Community's guidelines for the development of a Transeuropean Transport Network: The guidelines are to constitute a general reference framework intended to encourage the Member States and the Community to realise the TEN-T adjust their measures to each other.

There is no mention of the legal character the guidelines are to have. The – exhaustive – enumeration of binding legal instruments of the European Community (Art. 249 TEC) does not mention guidelines either. This makes it difficult to legally qualify guidelines in general, and guidelines on TEN-T policy in particular.

Up to now, the TEN-T guidelines were established in the form of a decision of the European Parliament and the Council addressed to the Member States. This choice of an appropriate legal instrument has not been put into question since its first use in 1996. In the meantime, however, the Commission is considering ways to make the guidelines more binding to the Member States. It is being discussed to issue the guidelines in the form of a regulation or a directive rather than a decision. This legal opinion is to shed light on how guidelines should be legally classified.

### 2. The TEN-T guidelines as legal norms

First, it is to be asked whether the TEN-T guidelines are legal norms at all and not just political instruments. In principle, the legal quality of an act depends on its content and the procedure by which it was decided.<sup>1</sup> TEN-T guidelines that affect the territory of a Member State require the approval of the latter. This prerequisite confers a veto right upon the Member State affected. Since there were no Member States so far that were not affected by TEN-T guidelines, this resulted in a de facto unanimity requirement. This already indicates that TEN-T guidelines must be more than just non-binding measures, but acts with a certain legal effect for the Member States. A further argument can be drawn from Art. 156 TEC, which refers to Art. 251 for the procedure to be followed when establishing guidelines. Art. 251 TEC explicitly only applies to the "adoption of an act".

This does not imply a statement, however, on the degree to which guidelines are binding. According to Art. 2 (1) of the TEN-T guidelines, „(t)he trans-European transport network shall be established gradually by 2020“. This does not allow the conclusion that the guidelines are binding in their entirety. In spite of the strict language of the decision, they only formulate binding goals, which can only have a limited legal effect.<sup>2</sup> A hint as to the intended extent to which guidelines should be binding can be inferred from Art. 154 TEC, which defines the EU's role as contributing to the establishment and development of trans-European networks. It follows from this complementary function of EU action that the guidelines cannot oblige Member States to carry out specific projects. Only the duty to appropriately support the measures in the guidelines and to contribute to its realisation can be construed as a positive obligation of the Member States.<sup>3</sup>

**The TEN-T guidelines are thus to be classified as legal acts with a limited legal effect.**

### 3. Legal implementation

Since TEN-T guidelines have a limited legal effect, but guidelines do not constitute a recognized legal instrument in Community law, they must be issued by means of one of the recognized legal instruments. Since Art. 156 TEC refers broadly to Art. 251 TEC for all matters of procedure, it basically allows a choice between all

<sup>1</sup> Lecheler, in: Grabitz-Hilf, Recht der EU, Art. 155 EGV, at 3.

<sup>2</sup> Bogs, Die Planung transeuropäischer Verkehrsnetze, p. 101.

<sup>3</sup> Van Vormizeele, in: Schwarze, EU-Kommentar, Art. 155 EGV, at 7.

legal instruments mentioned in Art. 249 TEC.<sup>4</sup> The question in what form a legal act is to be taken is controlled by material criteria and not the intention of the acting body.<sup>5</sup>

#### **a) Regulation**

According to Art. 249 (2) TEC, the regulation has general effect in each Member State, is binding in its entirety and directly applicable. Under the jurisprudence of the European Court of Justice (ECJ), this means that the legal act apply to “objectively determined situations and produces legal effects with regard to categories of persons regarded generally and in the abstract”.<sup>6</sup> The regulation thus covers not only the Member States, but also citizens, companies and authorities.

This shows that the Regulation is ill-suited as a vehicle to implement guidelines. According to Art. 155 (1), first indent, of the TEC, the guidelines contain “objectives, priorities and broad lines of measures envisaged in the sphere of trans-European network” as well as “projects of common interest”. From this follows that the guidelines cannot be meant to bind single citizens or companies, but only the Member States, for only the latter are able to implement transport policy projects within the defined goals and priorities. Thus the guidelines lack the element of a comprehensive legal effect that is typical for regulations.

**It would be unlawful to implement TEN-T guidelines by means of a regulation.**

#### **b) Directive**

Directives are addressed to the Member States, formulate an objective to be pursued, and leave to the national authorities the choice of form and methods (Art. 249 Abs. 3 TEC). The problems arising in the context of the implementation of the guidelines by means of a regulation thus do not play a role here.<sup>7</sup>

However, there are systematic differences running counter to the implementation of the guidelines in the form of a directive. Directives are an instrument of legal harmonisation aiming at the approximation of the provisions laid down by law, regulation or administrative action.<sup>8</sup> The TEN-T guidelines, however, aim at the planning level of the EU and not the (lower) Member States’ level.<sup>9</sup>

**Implementing the guidelines by means of a directive appears ill-suited and not in conformity with the EU’s system of legal instruments.**

#### **c) Decision**

The implementation of guidelines in the form a decision is questionable because a decision is comprehensively binding, „in its entirety“, upon those to whom it is addressed. This comprehensive binding effect of decisions is justified by the fact that decisions typically settle individual cases and are thus closely linked to the execution of the law. However, this is not true for TEN-V guidelines. It has become common practice in the EU, though, to also issue rules of an abstract and general character in the legal form of a decision addressed to the Member States. Such a “legislative” decision, however, gives TEN-T guidelines a legal authority going beyond their function as a general reference framework.<sup>10</sup>

The advantage of a decision is that it binds only “those to whom it is addressed” (Art. 249 TEC). It can therefore not bind everyone and, contrary to a directive, it cannot require an approximation of national planning law either.<sup>11</sup>

**Among the recognized legal instruments of the EU, a decision addressed to the Member States is the most suitable one to implement TEN-T guidelines although it is not truly well suited.**

### **4. Conclusion**

The EU’s system of legal instruments hits its limits when it comes to the implementation of TEN-T guidelines. In the last analysis, none of the recognized instruments mentioned in Art. 249 TEC unequivocally lends itself for this purpose. For this reasons, **guidelines should** be included into Art. 249 TEC in the course of a future modification of the Treaty. Until then, TEN-T guidelines should continue to be issued in the form of a decision addressed to the Member States.

<sup>4</sup> Oppermann, Europarecht, § 22, at 55.

<sup>5</sup> Biervert, in: Schwarze, EU-Kommentar, Art. 249, at 16.

<sup>6</sup> EuGH, Rs. 101/76, Koninklijke Scholten Honig ./ . Rat and Commission, at 21.

<sup>7</sup> Jürgensen, Gemeinschaftlicher und nationaler Grundrechtsschutz bei der Realisierung transeuropäischer Verkehrsnetze, p. 65.

<sup>8</sup> Biervert, in: Schwarze, EU-Kommentar, Art. 249 EGV, at 22.

<sup>9</sup> Bogs, Die Planung transeuropäischer Verkehrsnetze, p. 160.

<sup>10</sup> Bogs, a.a.O., p. 161.

<sup>11</sup> Bogs, a.a.O., p. 161.

It is true that this procedure does not correspond to the original function of decisions to settle individual cases, because the TEN-V guidelines contain both a choice of individual projects and principles of an abstract and general nature. It is unfortunate that, while the TEN-T guidelines are meant to create a general reference framework, a decision aims at binding its addressee in a comprehensive manner. Nevertheless, a decision addressed to the Member States is to be preferred over a regulation or a directive, since it neither binds everyone nor causes a necessity for the approximation of laws.

**Author:** Thiemo-Marcell Jeck

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