

## ADMINISTRATIVE ACTS OF THE EUROPEAN UNION

**Marek Jaśkowski\***

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**Abstract:** In light of the transfer of the non-negligible extent of administrative competences from member states to the EU it is important not to deprive the interested individuals of legal guarantees, originally enjoyed by them under the national law of administrative procedure. Therefore, formal qualification of an act at the EU level should not result in diminishing individual procedural protection. With this assumption in mind the present contribution is intended to construe a notion of an administrative act of the European Union on the basis of national law conceptions of administrative acts. Subsequently, the article presents an analysis of various categories of EU acts in light of a uniform notion of the individual administrative act as an attempt to standardize the structures, procedures and methodologies employed in different domains of EU competence.

### 1. Introduction

We have been witnessing the debate concerning the uniform administrative procedure of the EU for several years now<sup>1</sup>. Recently,

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\* Assistant professor, Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw

<sup>1</sup> See among others C. Harlow, *Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot?*, 'European Law Journal' 1996, vol. 2, no. 1,

much interest has been focused on the ReNEUAL initiative<sup>2</sup> (ReNEUAL Model Rules on EU Administrative Procedure<sup>3</sup>, hereinafter referred to as 'Model Rules' or 'MR') and the Proposal for Regulation for an Open, Efficient and Independent European Union Administration submitted by the European Parliament. In a previous contribution I discussed the notions of a 'decision' and an 'administrative act' as employed by the MR and the RP respectively<sup>4</sup>. For the purposes of the present article it is justified to recall that according to Article III-2 paragraph 1 of the Model Rules, 'Decision' means administrative action addressed to one or more individualised public or private persons which is adopted unilaterally by an EU authority, or by a member state authority when Article III-1(2) is applicable, to determine one or more concrete cases with legally binding effect. However, it has to be emphasised that according to the authors of the Model Rules, this definition 'excludes several kinds of acts and measures', among others 'it excludes (i) legislative acts which lie outside the scope of application of the model rules considered as a whole and (ii) non-legislative acts of general application which are subject to the rules established in Book II'.<sup>5</sup> Book II would be applicable to the procedures leading to the establishment, amendment and repeal of legally binding non-legislative acts of general application, including (a) acts adopted by the Commission or the Council under Articles 290 and 291 TFEU and (b) legally binding non-legislative acts of the EU institutions, bodies, offices and agencies adopted on the basis of Treaty provisions or

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pp. 3-25; G.A. Bermann, *A Restatement of European Administrative Law: Problems and Prospects*, 2009, <http://www.reneual.eu/>; A. Meuwese, Y. Schuurmans, and W. Voermans, *Towards a European Administrative Procedure Act*, 'Review of European Administrative Law' 2009, vol. 2, no. 2; J. Ziller, *Alternatives in Drafting an EU Administrative Procedure Law*, European Parliament 2011, <http://www.europarl.europa.eu/studies>.

<sup>2</sup> J. Supernat and B. Kowalczyk (eds.), *Kodeks postępowania administracji Unii Europejskiej [Code of administrative procedure of the EU]*, Instytut Wydawniczy EuroPrawo, Warszawa 2017; M. Ruffert (ed.), *The model rules on EU administrative procedures: adjudication*, Europa Law Publishing, Groningen 2016, European administrative law series 11.

<sup>3</sup> Current version of the document can be found at <http://reneual.eu/index.php/projects-and-publications/reneual-1-0> [accessed 12.12.2017].

<sup>4</sup> M. Jaśkowski, *Decisions and Administrative Acts according to the ReNEUAL Model Rules on the EU Administrative Procedure and Proposal for Regulation for an Open, Efficient and Independent EU Administration*, 'Polish Review of International and European Law' 2016, vol. 5, no. 2.

<sup>5</sup> Explanations, p. 95.

legislative acts.<sup>6</sup> ‘Acts of general application’ are to be understood as acts of general character, as opposed to individual acts (administrative acts, acts of application of the law)<sup>7</sup>. With regard to ‘administrative acts’ in the understanding of the Regulation proposal, it was left undefined. This was an intended omission. According to the authors of the proposal:

The definition of ‘administrative activities’ in Article 4(b) is appropriate as it gives a broad scope of application to the guarantees of good administration concretised through the Regulation. It is therefore essential not to jeopardize this goal by the definition of ‘administrative act’ which is indeed absent in the draft. Such a definition is very difficult to draft and any definition is prone to trigger criticisms.<sup>8</sup>

It is submitted that such a lack of precision leaves a great margin of discretion in the hands of the authorities applying the law (administrative, but first of all judicial). This, in turn, seems to contradict one of the very objectives of the codification, which is to ensure transparency and predictability. With regard to the scope of application, according to Article 2, paragraph 2 of the proposed Regulation it would not be applicable to the activities of EU administration neither in the course of legislative procedures nor of procedures leading to the adoption of non-legislative acts directly based on Treaties, delegated acts or implementing acts. It is submitted that the scope of application of both documents may seem to be more restricted than initially expected, although for different reasons. In the case of the Regulation proposal, the notion of an administrative act is not defined, which would enable one to encompass by it a wider category of acts, then in the case of a ‘decision’ as understood in Book III of the Model Rules. On the other hand, the exclusion of implementing acts by the Regulation proposal is susceptible to considerably limit its significance in certain areas.

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<sup>6</sup> Article II-1 MR.

<sup>7</sup> D. Dąbek, *Stanowienie prawa przez unijną administrację w modelu kodeksu postępowania administracyjnego Unii Europejskiej ReNEUAL - polska perspektywa* [Lawmaking by the european administration according to ReNEUAL Model Rules on the EU Administrative Procedure - Polish perspective] [in:] J. Supernat and B. Kowalczyk (eds.), op. cit., p. 174.

<sup>8</sup> D.-U. Galetta et al., *The context and legal elements of a Proposal for a Regulation on the Administrative Procedure of the European Union’s institutions, bodies, offices and agencies. Study*, European Parliament 2016, p. 18.

The present paper is more of a theoretical character. It is rather intended to identify the basic features of an ‘individual administrative act’ (IAA) and to evaluate the acts issued by the EU in the light of those features. Consequently, IAA is not a category of act formally recognized in EU Treaties, notably it is not to be equated with decisions to which Article, 288 paragraph 4 TFEU refers. It is a doctrinal category which can encompass acts belonging to various formal categories, since it is the characteristics of the act – and not its formal designation – which allow to classify an act as an IAA.

Analysing various categories of EU acts in the light of a uniform notion of IAA is also aimed at meeting the demand to standardize the structures, procedures and methodologies employed in different domains of EU competence<sup>9</sup>.

## 2. The notion of IAA

The notion of IAA has its source in case law and in legal writings, its construction having been driven by the intention to ensure protection of the legal situation of individuals. IAA contributes to this aim mainly by (1) restricting the ability of the administrative authority to withdraw any rights awarded by the IAA of and (2) offering the possibility to have the act reviewed by the court<sup>10</sup>. The definitions of the notion of IAA, as a doctrinal creation, vary in legal literature<sup>11</sup>. On the basis of research by K. Ziemiński one can assume that the following features are widely accepted as characteristic for this category: it is an (1) *authoritative* ruling by an administrative body, which is (2) intended to produce legal effects

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<sup>9</sup> H.C.H. Hofmann, *Seven Challenges for EU Administrative Law*, ‘Review of European Administrative Law’ 2009, vol. 2, no. 2, p. 57.

<sup>10</sup> B. Adamiak, *Zagadnienie domniemania formy decyzji administracyjnej* [*The presumption of the form of administrative decision*], [in:] ‘Podmioty administracji publicznej i prawne formy ich działania’ [Public administration and forms of its action], Towarzystwo Naukowe Organizacji i Kierownictwa “Dom Organizatora”, Toruń 2005, p. 8; J. Łętowski, *Prawo administracyjne. Zagadnienia podstawowe* [*Administrative law. Fundamental questions*], Warszawa 1990, p. 183.

<sup>11</sup> K.M. Ziemiński, *Indywidualny akt administracyjny jako forma działania administracji* [*Individual administrative act as a form of administrative action*], Poznań 2005, and literature quoted therein.

and produces such effects, and (3) constitutes a resolution of a given case and specifies an individual addressee<sup>12</sup>.

With regard to the *authoritative* nature of the act, it should be pointed out that there are three elements constitutive thereof: (1) the unilateral nature of the act, (2) the presumption of legality of the act and (3) the capacity to apply coercion to ensure the enforceability of the act by the administrative body<sup>13</sup>. The unilateral nature of an act is understood as the possibility of resolving the case by the administrative body independently of the will of the addressee. Such a body has the power to determine his legal situation by force of authority, not by consensual arrangements (the latter being typical for relations based on private law). With regard to the second element – the presumption of validity – it is understood as the obligation to treat the act as valid until it is revoked or annulled by a competent authority. Consequently, until then, such an act has to be observed and applied, both by authorities and individuals. With regard to capacity to apply coercion it has to be emphasised that it is about the ability of the administrative body itself to resort to coercion, without the necessity of acquiring a court decision beforehand<sup>14</sup>. It is further necessary to distinguish between indirect and direct coercion. The former is understood as the competence to impose administrative penalties for non-observation of legal rules and to “motivate” the person in default to fulfil the obligation. The direct coercion, in turn, encompasses the coercive measures taken to enforce the obligation (an execution)<sup>15</sup>.

Another element which requires more detailed explanation is the *individual* nature of IAA, since this is the feature which allows us to distinguish them from acts of a general nature. Firstly, the addressees of both categories of acts are designated in a different manner: general acts refer to certain categories defined on the basis of certain features or situations, while individual acts specify addressees with regard to their

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<sup>12</sup> K.M. Ziemiński, *op. cit.*, pp. 452-453.

<sup>13</sup> For a different notion of administrative authority, especially with regard to the coercive element, see M. Krawczyk, *Podstawy władztwa administracyjnego [Bases of administrative authority]*, Wolters Kluwer, Warszawa 2016.

<sup>14</sup> E. Ochędowski, *Prawo administracyjne - część ogólna [General administrative law]*, Toruń 1996, p. 10.

<sup>15</sup> J. Radwanowicz, *Uwagi o przymusie administracyjnym [Remarks concerning the administrative coercion]*, [in:] E. Ura (ed.) *Jednostka wobec działań administracji publicznej* [An individual vis-à-vis administrative action], Rzeszów 2001, pp. 383-384.

identity (name)<sup>16</sup>. Moreover, the individuality of IAA may also be understood as an individual character of a case to be resolved by such an act<sup>17</sup>. As J. Zimmermann rightly observes, IAA is the result of the application of law, for it is by means of IAA that an abstract and general legal rule is “transformed” into a rule relating to a concrete situation and an individualised addressee<sup>18</sup>. IAA establishes legal consequences of a concrete situation, while for a general act such a situation is irrelevant. Therefore IAA needs to specify individual addressees<sup>19</sup>.

In this paper I adhere to the former view, i.e. an act may be regarded as individual when it concerns the legal situation of an individually specified person. I find it, however, important to highlight the fact that not all persons individualised by an act are its addressees. An addressee is to be understood only as the person to whom the act is directed (addressed). Therefore, any other persons, even if enumerated by the act, cannot be qualified as addressees. For example, a company is not an addressee of a European Commission’s decision ordering the member state to recover state aid, because such a decision is addressed to the said member state. Another example: a person whose assets are frozen is not an addressee of a regulation imposing such a measure, for it is addressed to financial institutions. This distinction between addressees and other persons aimed at by the act is important not just for the sake of theoretical clarity, but also for practical consequences, among others the extent of obligations of an addressee, his responsibility or procedural rights.

This leads us to the question of naming the individual persons concerned who are not, however, the addressees of the act. Some authors prefer to use the denomination ‘addressee’ anyway<sup>20</sup>. Another terminology is employed by M. Goldmann: ‘first level addressees’ denotes the person to whom the act is explicitly addressed, while ‘second level addressee’ – the person who is ultimately affected by the act. The same person can be

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<sup>16</sup> W. Chróścielewski, *Akt administracyjny generalny [General administrative act]*, Łódź 1994, pp. 93–95; D. Schmalz, *Allgemeines Verwaltungsrecht und Grundlagen des Verwaltungsrechtsschutzes*, Baden-Baden 1998, p. 218.

<sup>17</sup> K.M. Ziemiński, op. cit., pp. 500-501.

<sup>18</sup> J. Zimmermann, *Prawo administracyjne [Administrative law]*, Warszawa 2010, p. 289.

<sup>19</sup> K.M. Ziemiński, op. cit., pp. 500-502.

<sup>20</sup> See for example A.H. Türk, *The Concept of Legislation in European Community Law*, Alphen aan den Rijn 2006, pp. 82, 86, 115, 120.

a first and a second level addressee at the same time, but not necessarily<sup>21</sup>. The present paper applies the term ‘addressee’ to a person to whom the act is addressed and ‘targeted person’ for the individualised person whose legal situation is ultimately targeted by the act.

Amongst other elements distinguishing between general and administrative acts certain authors point out to the different nature of procedures leading to the adoption of such acts and a different way of communicating them to addressees (publication of general acts and notification of the individual ones)<sup>22</sup>. With regard to the two latter elements it should however be emphasised that in my opinion, the relation between the nature of the act and the character of the way in which it is adopted and communicated goes – or should go – in the opposite direction. For it is the nature of the act which should determine the necessary procedural guarantees, not the other way round. I therefore subscribe to the view of M. Goldmann, according to which the procedure should be conducted with respect of the requirements dictated by the nature of a given category of acts, since it is such a procedure which ensures the legitimacy of the act and its effectiveness<sup>23</sup>.

In conclusion, I would like to restate that for the purposes of the present contribution, the term of IAA should be understood as an act of application of EU law, issued by an EU body, having an authoritative nature (which includes its unilateral character and the presumption of legality), the ultimate aim and result of which is the determination of legal situation of a given person (targeted person).

### **3. Acts of the EU in light of the notion of IAA**

#### **3.1. Administrative authority of the EU**

Firstly, it needs to be emphasised that the application/implementation of EU law takes place primarily on the level of member states (“indirect administration”). However, EU law provides for EU bodies (mostly for

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<sup>21</sup> M. Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, ‘German Law Journal’ 2008, vol. 9, no. 11, p. 1881, 1886.

<sup>22</sup> W. Chróścielewski, op. cit., pp. 93-95.

<sup>23</sup> M. Goldmann, op.cit., p. 1885.

the Commission) certain competences to apply it in individual cases directly (hence “direct administration”). Certain authors observe that this administrative dimension of the EU is recently on the rise<sup>24</sup>.

With regard to the character of EU acts it seems clear that they can be regarded as *authoritative* in the above-mentioned sense. Certain EU bodies have the competence to issue acts unilaterally binding for individuals and member states, directly on the basis of Treaties or on the basis of secondary law. Also the *presumption of validity* is attributed to acts of the EU. Generally, they are presumed to be valid and have to be applied regardless of any pending proceedings concerning their validity, until they are annulled or withdrawn<sup>25</sup>. According to Article 278 TFEU, actions brought before the Court of Justice shall not have suspensory effect. It is however up to the Court to order that application of the contested act to be suspended. This presumption of validity of acts of the EU however has its limits: measures tainted by an irregularity, the gravity of which is so obvious that it cannot be tolerated by the EU legal order, must be treated as having no legal effect – they must be regarded as legally non-existent. For reasons of legal certainty, such a finding is reserved for situations that are quite extreme<sup>26</sup>. With regard to the possibility of resorting to *coercion* to ensure the enforcement of its acts, the EU itself is entitled to do so only to a limited extent. Certain institutions of the EU are entitled to impose penalties on individuals for infringement of rules of the law of the EU<sup>27</sup>. One should note that such penalties can be aimed at deterring undertakings from infringing the substantive obligations stemming from the Treaties (e.g. prohibitions expressed in Articles 101 and 102 TFEU) or from secondary law, including individual decisions (e.g. a Commission decision ordering interim measures). Additionally, the said penalties can be imposed to ensure that

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<sup>24</sup> M.P. Chiti, *Forms of European Administrative Action*, ‘Law and Contemporary Problems’ 2004, vol. 68, no. 1, pp. 38-41; L. Azoulay, *The Court of Justice and the Administrative Governance*, ‘European Law Journal’ 2001, vol. 7, no. 4, pp. 427-428.

<sup>25</sup> Case *Chemie Linz GmbH versus Commission*, C-245/92 P., Judgment of 8.7.1999, ECLI:EU:C:1999:363, para. 93.

<sup>26</sup> Case *mPAY24 GmbH versus OHIM*, T-275/10, Judgment of 22.11.2011, ECLI:EU:T:2011:683, paras. 28-31.

<sup>27</sup> For example: the Commission (e.g. chapter VI of Council Regulation no 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p.1), the European Central Bank (Council Regulation no 2532/98 of 23.11.1998 concerning the powers of the European Central Bank to impose sanctions, OJ L 318, 27.11.1998, p. 4).



procedural decisions are carried out (e.g. failure to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff of an undertaking<sup>28</sup>). It should also be noted that in certain cases the penalties can have a twofold character. They can be inflicted in the form of a fine or of a periodic penalty payment.

On the other hand, the competence to apply direct coercion remains in the hands of the member states. Specifically, according to Article 299 TFEU, acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than states, shall be enforceable in conformity with the rules of civil procedure of the member state in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision. One can therefore conclude that the competence of the Union to apply coercion is limited to indirect coercion, direct coercion remaining in the hands of member states. However, it has to be taken into account that non-enforcement of the Union's acts by a member state can result in a declaration of infringement of Treaty obligations by this state. Often, the extent of manoeuvre on the part of a member state is therefore strongly limited.

Particularly interesting is the question of the *individual character* of IAA. Two major problems which I would like to refer to are: (1) whether IAA has to be addressed to an individual (in other words this is the question regarding the notion of an "addressee" of an act) and (2) what is the relation between IAAs and acts of "individual concern" as provided in Article 263, paragraph 4 TFEU.

With regard to the individual concerned, I submit that an individual act is not necessarily the one specifying an individual addressee. Before elaborating further on this point the meaning of the term "addressee" (of a legal act) must be recalled. Most simply said, it is a person/an entity, to whom an act is directed. The addressee(s) can be specified individually (as a single person or a group of individually specified persons) or in a general manner (by reference to a certain feature or situation). In my opinion the category of individual acts should not be restricted to the former group of acts. An act should be regarded as of individual nature if it aims at regulating the legal situation of an specified (targeted) person. Such an individual need not be the addressee of the act. I would therefore regard as individual (in the discussed meaning) all following categories of acts:

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<sup>28</sup> Article 23(1)(d) of Regulation 1/2003.

(1) acts addressed to an individual addressee and concerning his legal situation, (2) acts addressed to an individual addressee (including any member state) and concerning the legal situation of another individual person/entity, (3) acts specifying addressees in a general manner (including all or certain member states), but concerning the legal situation of individual persons/entities. In both cases (2) and (3) the addressees would be obliged to take some measures with regard to the said individual persons or entities. Therefore, to the extent to which an addressee was a member state, the above systematisation would correspond to the above-mentioned distinction (by M. Goldmann) between “first” and “second” level addressees.

However, from my perspective, the addressee(s) may be an entity of any kind, not just a member state. For example, a regulation requiring that financial institutions (the “addressees”) freeze assets belonging to certain individually designated persons would be addressed to the said institutions, while it would concern also the rights of specified asset owners – whom I would call ‘targeted persons’ and not addressees of such act. Incidentally, they might even be unaware of such an act until it is enforced. In conclusion I would like to emphasise, that even acts which recognise their addressees in a general manner could be regarded as individual acts for certain individualised persons, whose legal situation they aim to regulate. Therefore, it is not the individual designation of an addressee which is decisive for the nature of the act – it is the individual designation of persons targeted by such an act.

Finally, a more developed concept of an ‘addressee’ presented in case T-673/13 *European Coalition to End Animal Experiments*, requires presentation. According to the Court, the “term ‘addressee’ refers to a person whose identity is sufficiently determined in the decision in question and to whom the decision is to be communicated”<sup>29</sup>. Two types of persons can therefore be qualified as addressees : (1) those formally indicated as addressees (formal condition) as well as (2) those who are identified in the act as addressees “on the basis that the decision, expressing the will of its author, aims to produce binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in its legal position”<sup>30</sup>. Such an approach, however, blurs the terminological

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<sup>29</sup> Case *European Coalition to End Animal Experiments*, T-673/13, Order of the General Court of 13.3.2015, ECLI:EU:T:2015:167, para. 24.

<sup>30</sup> *Ibid.*, para. 26.

distinction between addressees of the act and persons targeted by it (as explained above).

Having read the above opinions one might wonder whether this “individual nature” of an act could not be equated with acts of “individual concern” within the meaning of Article 263 paragraph 4 TFEU. However, I submit that there is a difference between these categories. According to settled case law, a person other than the one to whom an act is addressed may claim to be individually concerned only if that decision affects them “by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed” by such an act<sup>31</sup>. It is therefore possible that a person could turn out to be individually concerned even if the body issuing the act was unaware of his existence. The “individual concern” can manifest itself *ex post*, after the act had been adopted. An IAA is a different notion: from the outset it is intended to determine the rights of an individually identified person. The intention to change the legal situation of an individual is the reason (or one of the reasons) for which the body initiates the procedure leading to adoption of the act. The identity of the individual concerned is therefore known *ex ante*, which enables him to take part in the procedure. Therefore, while attempting to define the notion of IAA, I emphasise that one of the features is that it is *intended* to affect the rights of a given individual.

Also, the concept of “individual concern” within the meaning of article 263 TFEU has only procedural significance: it does not explain the nature of the act, but rather the particular relation which the person instituting proceedings has (or ought to have) towards the act. Here, one has to take into account the position taken by the Court of Justice in the *Codorniu* case: the fact that the given “provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general [...] does not prevent it from being of individual concern to some of them”<sup>32</sup>. In light of this judgment it is clear that the nature of the act and the possibility of instituting proceedings

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<sup>31</sup> Case *Mory SA, Mory Team and Superga Invest v European Commission*, C-33/14 P, Judgment of the Court of 17.9.2015, ECLI:EU:C:2015:609, para. 93.

<sup>32</sup> Case *Codorniu*, C-309/89, Judgment of the Court of 18.5.1994, ECLI:EU:C:1994:197, para 19.

against it are separate notions and they may be evaluated by the Court according to different criteria<sup>33</sup>.

It has to be emphasised, however, that older case-law of the CJEU with regard to the notions of 'regulation' and 'decision' has to be analysed with care. The origin of the problem was in the wording of Article 173, paragraph 2 TEEC and later of Article 230, paragraph 4 TEC, according to which any natural or legal person could appeal against a *decision* which, although in the form of a regulation, would be of direct and individual concern to him. In light of this provision one had to arrive at a conclusion that an act formally adopted as a regulation could in fact constitute a decision (and therefore a decision "disguised" as a regulation) and that only such decisions in the form of regulations could be challenged before the Court by individuals. Also, in earlier case-law<sup>34</sup> the Court rejected an interpretation, according to which the term 'decision' would also cover regulations. Consequently, the Court took the position that an action brought by an individual is not admissible in so far as it is directed against a regulation having general application, the criterion of distinction between a decision and a regulation being whether or not the measure in question has general application<sup>35</sup>. Such wording of Article 173, paragraph 2 TEEC and Article 230, paragraph 4 TEC was susceptible to create certain confusion with regard to the evaluation of the true nature of the act by the CJ and admissibility of introducing an action against it by a natural or legal person (for example, originally the Court could be inclined to qualify a regulation as a decision principally to justify the admissibility of the action).

One can also point out inconsistencies in CJ position with regard to the notions of 'decision' and 'regulation'. As indicated above, the Court took the view that the criterion of distinction between a decision and a regulation is whether or not the measure in question has general application, the measure of general application being a measure applied to objectively determined situations and producing legal effects with respect

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<sup>33</sup> An opposite view seems to be supported by R. Kovar, according to whom 'les deux opérations qui consistent respectivement à déterminer la nature juridique des actes et à définir des conditions d'ouverture du recours en annulation à leur encontre continuent à être conçues comme indissociables' (R. Kovar, *Actes juridiques unilatéraux de l'Union européenne*, 'Répertoire de droit européen', Dalloz, no 105).

<sup>34</sup> Case *Confédération nationale des producteurs de fruits et légumes and others*, 16/62 and 17/62, Judgment of the Court of 14.12.1962, ECLI:EU:C:1962:47.

<sup>35</sup> Case *Alusuisse Italia SpA*, 307/81, Judgment of the Court of 6.10.1982, ECLI:EU:C:1982:337, para 8.

to categories of persons envisaged in the abstract<sup>36</sup>. This is obviously not valid in the light of post-Lisbon Article 288, paragraph 4, which confirms that a decision does not have to specify an addressee, but neither was this position accurate before the Lisbon Treaty<sup>37</sup>. These two – apparently contradictory – positions of the CJ could be reconciled if a conception of *procedural* meaning of a decision in Articles 173, para 2 TEEC/230 para. 4 TEC was accepted, which would not be identical to the notion of the decision as adopted in Articles 189, para. 4 TEEC/249 para. 4 TEC<sup>38</sup>. Such a view was however consequently rejected by the CJ according to which it was ‘inconceivable that the term ‘decision’ would be used in Article 173 TEEC in a different sense from the technical sense as defined in Article 189 TEEC/<sup>39</sup>. This position was later confirmed in more recent judgments<sup>40</sup>.

In the *Timex* case the Court found that the contested anti-dumping regulation was legislative in nature and scope (inasmuch it applied to traders in general) and at the same time a decision of direct and individual concern with regard to Timex. The company’s name was not mentioned in the operative part of the regulation, but – as the Court emphasised – the original complaints were filed by Timex, its views were

<sup>36</sup> Ibid.; Case *Regione autonoma Friuli-Venezia Giulia*, T-417/04 Order of the Court of First Instance of 12.3.2007, ECLI:EU:T:2007:82, para 44.

<sup>37</sup> See for instance: Council Decision of 24.10.1988 establishing a Court of First Instance of the European Communities (OJ L 319, 25.11.1988, p. 1); Council Decision of 20.12.1993 on public access to Council documents (OJ L 340, 31.12.1993, p. 43-44); Council Decision of 25.5.1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities’ interests (OJ L 149, 16.6.1999, p. 36-38); Council Decision of 12.7.2002 amending the Protocol on the Statute of the Court of Justice of the European Communities (OJ L 218, 13.8.2002, p. 1) – those instruments did not specify individual addressees, but were they not decisions?

<sup>38</sup> See J. Bast, *Legal Instruments*, [in:] A. von Bogdandy and J. Bast (eds.), ‘Principles of European Constitutional Law’, Oxford 2006, p. 401; H.C. Röhl, *Die anfechtbare Entscheidung nach Art 230 Abs. 4 EGV*, ‘Zeitschrift für ausländisches öffentliches Recht und Völkerrecht’ 2000, vol. 60.

<sup>39</sup> Case *Confédération nationale des producteurs de fruits et légumes and others*, 16/62 and 17/62, Judgment of the Court of 14.12.1962, ECLI:EU:C:1962:47, p. 478.

<sup>40</sup> See, among others, *Government of Gibraltar*, Case C-298/89 Judgment of the Court of 29.6.1993, ECLI:EU:C:1993:267, para. 15; Cases *Carlo Ripa di Meana, Leoluca Orlando and Gastone Parigi*, T-83/99, T-84/99 and T-85/99 Judgment of the Court of First Instance of 26.10.2000, ECLI:EU:T:2000:244, para. 27; Case *DOW AgroSciences BV and DOW AgroSciences Ltd*, T-45/02 Order of the Court of First Instance of 6.5.2003, ECLI:EU:T:2003:127, para. 31.

heard during the procedure, the conduct of the investigation procedure was largely determined by Timex observations and the anti-dumping duty was fixed in the light of the effect the dumping had on the Timex situation<sup>41</sup>. In the *Weddel* case, the Court initiated its analysis by stating that “It is necessary to examine whether the provisions of Regulation No. 2806/87 are of direct and individual concern to the applicant within the meaning of the second paragraph of Article 173 of the EEC Treaty” but concludes that:

Article 1 of Regulation No. 2806/87 is not a provision of general application within the meaning of the second paragraph of Article 189 of the EEC Treaty but must be regarded as a bundle of individual decisions [...] in the guise of a regulation, each of those decisions affecting the legal position of each applicant. It must therefore be concluded that the regulation is of direct and individual concern to the applicant<sup>42</sup>.

This is somewhat puzzling because the Court mixed two separate concepts: the material nature of the act and the direct and individual concern which is relevant for procedural reasons. The above examples confirm that the older case-law of the Court, concerning the admissibility of initiating proceedings under Articles 173, paragraph 2 TEEC and Article 230, paragraph 4 TEC is not necessarily decisive as regards the real distinction between regulations and decisions as different forms of Union’s secondary law<sup>43</sup>.

The case-law of the 1990s suggested that the Court finally decided to disregard openly the requirement that the contestable act should be a decision. In *Extramet*, the Court observed that although the anti-dumping regulations are of legislative character, their provisions may nonetheless be of individual concern to certain traders, without losing their character as regulations (thus omitting the ‘decision requirement’)<sup>44</sup>. In the same vein, in *Codorniu*, the CJEU took the position that:

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<sup>41</sup> Case *Timex Corporation*, 264/82 Judgment of the Court of 20.3.1985, ECLI:EU:C:1985:119, para. 15.

<sup>42</sup> Case *Weddel & Co. BV*, C-354/87 Judgment of the Court of 6.11.1990, ECLI:EU:C:1990:371, para. 23.

<sup>43</sup> See similar reasoning by J. Bast, op.cit.; H.C. Röhl, op.cit.

<sup>44</sup> Case *Extramet Industrie*, C-358/89 Judgment of the Court of 16.5.1991, ECLI:EU:C:1991:214, paras. 13-14.

Although it is true that according to the criteria in the second paragraph of Article 173 of the Treaty the contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them<sup>45</sup>.

However, later case law casts doubt on this conclusion, since in the *UPA* case, the CJEU concluded that ‘a measure of general application such as a regulation can, in certain circumstances, be of individual concern to certain natural or legal persons and is thus in the nature of a decision in their regard’. Here, the Court seemed to insist again on the said requirement<sup>46</sup>.

Since 2009 the relevant provision (Article 263, paragraph 4 TFEU) is worded in a different manner. It omits the requirement that the challenged act be effectively a decision, employing the notion of an “act” instead: any natural or legal person may institute proceedings against, *inter alia*, an act which is of direct and individual concern to them. Nevertheless, the above historical background should not be neglected when analysing the Court’s case-law on the nature of EEC/EC legal acts.

### **3.2. Application of the notion of IAA to the legal acts adopted by the EU**

Having discussed the features of IAA, I would like to analyse which acts issued by the EU could be qualified as IAAs. This question can be approached from different angles. First of all, one should examine which categories of acts enumerated in Article 288 TFEU (regulations, directives, decisions) could be regarded as IAAs. Secondly, it has to be considered whether IAAs should be restricted only to certain categories of acts specified in Articles 289-291 TFEU (legislative, delegated and implementing acts and acts which did not earn any of those adjectives) or is this classification irrelevant here.

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<sup>45</sup> Case *Codorniu*, C-309/89 Judgment of the Court of 18.5.1994, ECLI:EU:C:1994:197, para. 19.

<sup>46</sup> Case *Unión de Pequeños Agricultores*, C-50/00 P Judgment of the Court of 25.7.2002, ECLI:EU:C:2002:462, para. 36.

### 3.2.1 Decisions, regulations, directives

Article 288 TFEU lists categories of acts issued by the institutions and bodies of the EU: regulations, directives, decisions, recommendations and opinions. The two latter categories, not having a binding character, shall not be considered, as one of the features of IAAs is of a compulsory character.

#### Decisions

Among the remaining three categories decisions may *prima face* seem to constitute an archetype of an IAA, which is however only partly true. The category of ‘decisions’ in the meaning adopted in Article 288 TFEU can be further differentiated: (1) decisions which specify those to whom they are addressed, and (2) decisions which do not contain such a specification. The general character of decisions which do not specify those to whom they are addressed likens them to acts of general application (regulations)<sup>47</sup>. On the other hand, can decisions specifying the individual addressee be equated with IAA?

The answer is not evident as far as decisions addressed to specified member states are concerned. The first question to be posed could be ‘Can a decision addressed to a member state be qualified as an administrative act at all?’ I submit that within the specific character of EU law such a qualification is admissible. This position finds confirmation, for example, in Article 9 of regulation 1173/2011<sup>48</sup>, according to which sanctions imposed pursuant to Articles 4 to 8 (deposits and fines within the preventive and coercive parts of the Stability and Growth Pact, sanctions concerning the manipulation of statistics by member states) shall be of an administrative nature. Similarly, decisions such as those concerning awarding of grants to the member states on the basis of regulation 652/2014<sup>49</sup> can be recognised as IAAs. What is

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<sup>47</sup> A. Wróbel, *Komentarz do art. 288 TFEU [Commentary to Article 288 TFEU]* [in:] A. Wróbel, D. Kornobis-Romanowska, and J. Łacny, ‘Traktat o funkcjonowaniu Unii Europejskiej’ [Treaty on the Functioning of the European Union], Warszawa 2012, p. 687.

<sup>48</sup> Regulation (EU) No. 1173/2011 of the European Parliament and of the Council of 16.11.2011 on the effective enforcement of budgetary surveillance in the euro area (OJ L 306, 23.11.2011, p. 1)

<sup>49</sup> Regulation (EU) No. 652/2014 of the European Parliament and of the Council of 15.5.2014 laying down provisions for the management of expenditure relating to the food chain, animal health and animal welfare, and relating to plant health and



more, the arguments invoked in the introduction to the present paper, concerning the protective nature of administrative acts as their *raison d'être*, are not less valid with regard to the protection of legal position of the member states vis-à-vis the bodies of the EU.

The second problem is more complex and refers to the fact that a state can be both an addressee of an act and a legislator. Consequently, while certain decisions targeting a given member state could clearly be qualified as IAAs, other decisions addressed to them (and requiring legislation on the part of the member states or prohibiting such an activity, e.g. in a case of a decision prohibiting a sectoral aid scheme) are qualified as legislative acts, in some aspects similar to directives<sup>50</sup>.

One can also identify decisions of a more complex nature. Decisions on financial assistance granted to individual member states could serve as an example. Not only do they award financial assistance, but also impose certain conditions to be fulfilled by the member state in question. For instance, Council implementing decision 2016/542<sup>51</sup> granted a loan to Greece, but at the same time it required, inter alia, that Greece reforms its pensions system and VAT system (including modification of VAT rates). Another example: Council implementing decision granting financial assistance to Portugal<sup>52</sup> provided that this member state should reform municipal self-government, functioning the judicial system and make the labour market more flexible. In such cases I find it debatable whether the decisions can be qualified as “administrative”. Ultimately, their implementation requires introducing by the member states interested important changes at a legislative level. In this way such decisions are in fact similar to directives.

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plant reproductive material, amending Council Directives 98/56/EC, 2000/29/EC and 2008/90/EC, Regulations (EC) No. 178/2002, (EC) No. 882/2004 and (EC) No. 396/2005 of the European Parliament and of the Council, Directive 2009/128/EC of the European Parliament and of the Council and Regulation (EC) No. 1107/2009 of the European Parliament and of the Council and repealing Council Decisions 66/399/EEC, 76/894/EEC and 2009/470/EC.

<sup>50</sup> Case *Carp*, C-80/06 Opinion, paras. 59-60 and Judgment of the Court of 7.7.2007, ECLI:EU:C:2007:327, paras. 21-22; Case *Saint-Gobain*, C-503/07 P Order of the Court of 8.4.2008, ECLI:EU:C:2008:207, para. 71; Case *Telefónica SA*, C-274/12 P Opinion, ECLI:EU:C:2013:204, para. 26 and case-law invoked therein.

<sup>51</sup> Council Implementing Decision (EU) 2016/542 of 17.7.2015 on granting short-term Union financial assistance to Greece (2015/1181), OJ L 91, 7.4.2016, p. 22.

<sup>52</sup> Council Implementing Decision of 30.5.2011 on granting Union financial assistance to Portugal, OJ L 159, 17.6.2011, p. 88.

## Regulations

In light of Article 288, paragraph 2 TFEU, a regulation, as an act of general application, could theoretically be seen as an antithesis of an IAA, the latter being *ex definitione* of an individual character. In practice, however, it is not so rare that a regulation has the attributes of an IAA insofar as it targets individualised persons (even if it is not formally addressed to them). For example, this is the case of regulations concerning individual restrictive measures (“smart sanctions”), for instance imposing on financial institutions the duty to freeze the funds of enumerated natural or legal persons, groups or entities. The general way in which the addressees of such regulations are determined does not prevent us from concluding that such acts are indeed individual with regard to targeted persons (in this case: those whose funds are to be frozen). This conclusion is corroborated by the fact that such a restrictive measure is introduced as a consequence of the behaviour of the targeted person, which is described in the regulation (or in an annex thereto). Among other examples of regulations which could be qualified as IAA are regulations authorising applicant (‘holder of the authorisation’) to introduce a feed additive<sup>53</sup> and regulations imposing anti-dumping measures with regard to individual suppliers<sup>54</sup>. The nature of the latter was considered in case-law of the Court of Justice and was also the object of discussion in legal literature. It therefore merits a short presentation within the framework of the present contribution.

The case-law concerning the nature of anti-dumping regulations does not seem entirely clear and consistent. According to the Court, anti-dumping regulations “are of a legislative character inasmuch as they apply generally to the traders concerned”<sup>55</sup>, but at the same time they have a dual nature “as acts of a legislative nature and acts liable to be of direct and individual concern to certain traders”<sup>56</sup>. Such wording leaves however some doubt as to the meaning of the phrases quoted. The expression “direct and individual concern” originates from (current) Article 263 TFEU and

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<sup>53</sup> On the basis of regulation 1831/2003.

<sup>54</sup> Article 9(5) of Regulation 2016/1036.

<sup>55</sup> Cases *C & J Clark International*, C-659/13 and C-34/14, Judgment of the Court of 4.2.2016, ECLI:EU:C:2016:74, para. 58.

<sup>56</sup> Case *TMK Europe*, C-143/14, Judgment of the Court of 16.4.2015, ECLI:EU:C:2015:236, para. 18; Case *Nachi Europe*, C 239/99, Judgment of the Court of 15.2.2001, ECLI:EU:C:2001:101, para. 37.

refers to the conditions of admissibility of individuals' actions against regulations of the EU. Therefore it is not clear whether the Court was referring to the nature of the anti-dumping regulations or rather – which seems more probable – to the admissibility of the action. Such a doubt is all the more justified that all the above quotations come from those judgment passages which were devoted to the analysis of admissibility of legal action (here one should recall the *Codorniu* judgment (see above) and the Court's position according to which genuinely legislative measures can nevertheless be of individual concern towards certain persons<sup>57</sup>). Consequently, the fact that in the quoted judgments the Court found the anti-dumping regulations to be of individual concern (and therefore challengeable on the basis of (present) Article 263 TFEU) does not explain their nature.

In *Alusuisse Italia* the Court found it necessary to examine the nature of the challenged regulation and arrived at a conclusion that the contested anti-dumping regulations were of a general application 'as regards independent importers', who were not expressly named in the regulation, 'because they applied to objectively determined situations and entailed legal effects for categories of persons regarded generally and in the abstract'. The Court did not consider the nature of the regulation with regard to the exporters which *were* individually named in the regulation (the contested regulations imposed a general anti-dumping duty with regard to all orthoxylene originating in Puerto Rico and the United States of America, with the exception of the named exporters whose exports were charged with a lowered anti-dumping duty and other named exporters whose exports were not subjected to an anti-dumping duty at all). However, the Court emphasised that the independent importers, '*in contrast to exporters*', were not expressly named in the regulation<sup>58</sup>. This suggests that the regulation should be regarded as an individual act with regard to exporters named therein<sup>59</sup>. Yet another and more dated example of Court's approach is the *NTN* case, in which the Court found that an article of an anti-dumping regulation constituted a collective decision

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<sup>57</sup> Case *Codorniu*, C-309/89, Judgment of the Court of 18.5.1994, ECLI:EU:C:1994:197, para. 19.

<sup>58</sup> Case *Alusuisse Italia SpA*, 307/81, Judgment of the Court of 6.10.1982, ECLI:EU:C:1982:337, para. 8.

<sup>59</sup> According to A. Türk, the CJ's position can be interpreted that, a contrario, the said regulation should be considered decisions vis-à-vis the exporters indicated therein (A.H. Türk, *op.cit.*, p. 137-138)

relating to named addressees<sup>60</sup>. One has to take in account, however, the ambiguity of the Court's qualification of regulations as decisions in earlier case-law (as discussed above).

The administrative nature of anti-dumping regulations was also emphasised in legal literature. According to H. Hofmann, anti-dumping measures are to be considered as a single-case administrative act. Also J. Schwarze finds that the content of anti-dumping regulations is principally administrative<sup>61</sup>. A. Türk notes that such regulations take into account the individual situation of certain traders and considering them as acts of a general nature would be hard to reconcile with the assumption that general acts should be characterised by general reference to objectively determined situations<sup>62</sup>. On the other hand, according to C.-F. Durand they remain acts of general application, even though they are the result of detailed analysis of individual situations, which bears resemblance to state aid control procedures. However, antidumping measures are addressed to customs authorities of the member states<sup>63</sup>. I would like to conclude the subject of anti-dumping regulations by stating that the idea of hybrid acts (i.e. acts of dual nature – general and at the same time individual with regard to certain persons) was more accurate in revealing the character of this category of regulations.

Finally, it is significant that often regulations of a hybrid nature are to an extent treated as individual acts and this is also mirrored in the procedures leading to their adoption. For example, regulation 1831/2003 provides that the applicant may be asked by the Authority to provide supplementary information, and that he should be notified of both the opinion of the Authority and the Commission's regulation (Articles 8 and 9 of Regulation 1831/2003). Regulation 2016/1036 provides that persons indicated shall have the right to participate in the procedure of investigation and that the regulation imposing anti-dumping measures shall be sent to known interested parties. With regard to individual restrictive measures (including regulations), authority which adopts them

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<sup>60</sup> Case *NTN Toyo Bearing Company*, 113/77, ECLI:EU:C:1979:91, Judgment of the Court of 29.3.1979, para 11.

<sup>61</sup> J. Schwarze, *The Legal Protection of the Individual against Regulations in European Union Law. Remarks on the ECJ judgment in the case UPA of 25 July 2002 in view of the European Constitutional Reform*, 'European Public Law' 2004, vol. 10, no. 2, p. 299.

<sup>62</sup> A.H. Türk, op.cit., p. 139.

<sup>63</sup> C-F Durand, *Typologie des interventions*, [in:] J.B. Auby and J. Dutheil de la Rochère (eds.) 'Traité de droit administratif européen', Bruylant 2014, p. 170.

is bound to communicate the grounds on which those measures are based, either when those measures are adopted or, at the very least, as swiftly as possible after their adoption, in order to enable those persons or entities to exercise their right to bring an action<sup>64</sup>.

## Directives

With regard to directives, they are usually qualified as a legislative (general) instrument, even though they do specify the addressee(s) – i.e. all or certain member states, and are sometimes equated with decisions addressed to member states<sup>65</sup>. In this regard it should be recalled that – as explained above – decisions addressed to member states and requiring undertaking legislative activity on their part do not, in principle, qualify as IAA within the meaning adopted in the present paper. At the same time in the opinion of B. Kurcz, since, according to CJ’s case-law, it is the content of the act which determines the nature of the act, it cannot be excluded that a directive could be found to constitute an act of individual character<sup>66</sup>. This supposition is corroborated by later case-law in which the Court qualified a directive as an act which can concern a person in an individual and direct manner<sup>67</sup>. Indeed, practice shows that, for instance, authorisation of plant protection products on demand of the applicant was achieved by issuing an implementing directive (which effectively led to inclusion of the substance in Annex I to Council Directive 91/414 concerning the placing of plant protection products on the market (no longer in force)<sup>68</sup>.

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<sup>64</sup> Case *BMI*, T-35/10 and T-7/11, Judgment of 6.9.2013, ECLI:EU:T:2013:397, para. 56.

<sup>65</sup> S. Prechal, *Directives in EC Law*, Oxford 2006, p. 16; J. Bast, *op.cit.*, p. 380, 382; A.H. Türk, *op.cit.*, p. 84–85, B. Kurcz, *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego [EC directives and their implementation in national law]*, Kraków 2004, p. 37–38.

<sup>66</sup> B. Kurcz, *op.cit.*, p. 37–38.

<sup>67</sup> Case *Vischim Srl*, T-420/05, Judgment of the General Court of 7.10.2009, ECLI:EU:T:2009:391, para. 69–79.

<sup>68</sup> See, for example, Commission Implementing Directive 2011/56/EU of 27.4.2011 amending Council Directive 91/414/EEC to include cyproconazole as an active substance and amending Commission Decision 2008/934/EC (OJ L 108 of 28.4.2011, p. 30).

### 3.2.2 Legislative, delegated and implementing acts

Another problem to discuss is the relation between the notion of IAA as employed above and the distinction between legislative, delegated and implementing acts. In other words, can IAAs be found in any of those categories or should this notion be limited only to certain of them?

The category of the first choice to look for administrative acts are *implementing* acts, for the implementation of EU law (as understood in Article 291(1) TFEU) encompasses individual decision-making. Both theory and practice go hand in hand, as numerous examples of IAA can be found within the category of implementing acts (for example: implementing antidumping regulations or the implementation of regulations authorising the use of feed additives<sup>69</sup>).

As far as *legislative* acts are concerned, it could be argued that such acts cannot be qualified as administrative acts at all because of the opposition of legislation (law-making) and application of law<sup>70</sup>. The notion of administration could be defined by opposition to legislation. According to such ‘negative’ definitions, administration would encompass activities of a state, with the exclusion of legislative and judicial activities. According to the authors of the study “The context and legal elements of a Proposal for a Regulation on the Administrative Procedure of the European Union’s institutions, bodies, offices and agencies”, the distinction between administrative and legislative acts is so clear that it does not merit any explanation:

The draft explicitly excludes legislative procedures and judicial proceedings from its scope of application. From a strictly legal perspective this exclusion is not essential. It goes without saying that ‘administrative’ is clearly different from ‘legislative’ or ‘judicial’. Nevertheless it is indeed useful for the sake of clarity to restate this exclusion, as is often done in EU legislative texts.<sup>71</sup>

I do, however, believe that for the purposes of this paper such an exclusion *a priori* is not justified. It has to be taken into account that ‘legislation’ as understood in TFEU need not be equated with national

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<sup>69</sup> See also S. Peers and M. Costa, *Accountability for delegated and implementing acts after the Treaty of Lisbon*, ‘European Law Journal’ 2012, vol. 18, no. 3, p. 446.

<sup>70</sup> See, for example, E. Ochendowski, *op.cit.*, p. 7, 10.

<sup>71</sup> D.-U. Galetta et al., *op.cit.*, p. 16.

concepts of ‘legislation’. First of all, the distribution of competences in the EU is not based on the classical model of the horizontal separation of powers in a state (legislative – executive – judicial)<sup>72</sup>. One can even recall the opinions according to which the Community should be considered as a regulatory agency that was entrusted by member states with certain responsibilities to perform<sup>73</sup>. According to P.L. Lindseth, “From an administrative perspective, the EC Treaty should be understood, not as a constitutional charter, but as a kind of enabling legislation adopted and revised by the unanimous consent of the member states. Rather than think in constitutionalist terms of separation of powers at the Community level, one should think in terms of the EC’s delegated legislative, executive, and adjudicative functions”<sup>74</sup>. One can discuss whether the above opinions are still pertinent, but it is hereby submitted that the current construction of the Union does not justify their complete abandonment.

Moreover, it has been emphasised that the distinction of the EU’s legislative acts is of a purely formal nature and it is the consequence of the procedure applied in a given case<sup>75</sup>. To exclude certain categories of acts from the scope of administrative guarantees only because of their formal qualification would be contrary to the position advanced in this paper, namely that it is the nature of the measure which should determine the appropriate procedure, not the other way around. In other words, measures of an administrative nature should be required to be adopted in an administrative procedure which guarantees procedural protection. Therefore, a measure of such a character should not be disqualified as administrative for the reason of its purely formal qualification as (EU) legislative. Additionally, it has been submitted that a special legislative

<sup>72</sup> J.P. Jacqué, *Pouvoir législatif et pouvoir exécutif dans l’Union Européenne* [in:] J.B. Auby and J. Dutheil de la Rochère (eds.) *‘Traité de droit administratif européen’*, Bruylant 2014, s. 49.

<sup>73</sup> G. Majone, *Europe’s ‘Democratic Deficit’: The Question of Standards*, ‘European Law Journal’ 1998, vol. 4, no. 1, pp. 27–28; P.L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, ‘Colum. L. Rev.’ 1999, vol. 99, pp. 658–660, 683.

<sup>74</sup> P.L. Lindseth, *op. cit.*, p. 660.

<sup>75</sup> R. Grzeszczak, *Władza wykonawcza w systemie Unii Europejskiej [Executive power in the EU system]*, Warszawa 2011, p. 145; A. Doliwa-Klepcka, *Stanowienie aktów ustawodawczych w Unii Europejskiej [Adopting of the legislative acts in the EU]*, Warszawa-Białystok 2014, p. 20; M. Dougan, *The Treaty of Lisbon 2007: Winning minds, not hearts*, ‘Common Market Law Review’ 2008, vol. 45, no. 3, s. 678–679.

procedure could be considered a “camouflage” for regulatory acts<sup>76</sup> and that “the new distinction between legislative and non-legislative act, it seems, is basically a harmless ornament in the European construction, the added value and beauty of which mainly depend on the eyes of the beholder”<sup>77</sup>.

Finally, even though Article 290(1) TFEU provides that “essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power”, this does not seem to introduce a qualitative distinction as regards these acts. First of all, this restriction does not constitute a general requirement, it is confined to relations between, on one hand, legislative acts, and, on the other, delegated (and implementing) acts. Secondly, as is often emphasised in legal literature<sup>78</sup>, the Lisbon Treaty did not requalify the assent and consultation procedures into post-Lisbon legislative procedures in a consistent way, leaving essential elements of some areas to be regulated in non-legislative acts (acts without an adjective). For example, Article 103 TFEU provides for a consultation procedure, in which the Council can lay down appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU, including, among others, provisions intended to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by providing for fines and periodic penalty payments. However, lack of qualification of this consultation procedure as a legislative one results in a situation where essential elements of competition law are left to be determined by non-legislative acts. Anyway, even though EU precludes administrative acts from intervening in the scope of essential elements reserved for legislative acts, the opposite is not true. The legislative acts can still regulate matters of non-essential nature<sup>79</sup>, theoretically including administrative cases.

In light of the above considerations it seems justified to reject the proposition to exclude *a priori* legislative acts of the EU from the scope of present analysis. That said, one could assume that instances of IAA should be rare among EU legislative acts. Indeed, this appears to be a justified assumption: the author of the present contribution did not identify such

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<sup>76</sup> A.H. Türk, *op.cit.*, p. 231 (with regard to the Constitutional Treaty).

<sup>77</sup> J.B. Liisberg, *The EU Constitutional Treaty and its distinction between legislative and non-legislative acts – Oranges into apples?*, ‘Jean Monnet Working Paper’ 2006, no. 1, p. 45.

<sup>78</sup> See, for example, D. Ritleng, *La nouvelle typologie des actes de l’Union*, ‘RTD Eur.’ 2015, no. 1 and authors noted therein.

<sup>79</sup> J.P. Jacqu e, *op.cit.*, p. 47.



examples in the category of acts adopted according to ordinary or special legislative procedures (post-Lisbon)<sup>80</sup>.

The case is similar with regard to *delegated* acts. According to Article 290(1) TFEU, they are non-legislative acts of general application intended to supplement or amend certain non-essential elements of legislative acts. This presupposes that “the purpose of granting a delegated power is to achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act” and not just “the addition of further detail, without its non-essential elements having to be amended or supplemented”, as is the case with implementing acts, according to the CJEU<sup>81</sup>. Does this exclude the possibility that a delegated act could be qualified as IAA? H. Hofmann observes that:

under the wording of Article 290 FEU, delegated acts may not be issued as single-case measures, and may only be acts of general application. In reality however, this distinction is difficult to observe. Acts of general nature, supplementing or amending certain elements of legislative acts, can often have both an abstract-general and a concrete-individual application<sup>82</sup>.

<sup>80</sup> With possible exception of legislative acts of assistance, adopted on the basis of Article 212(2) TFEU (see, for example, decision (EU) 2016/2371 of the European Parliament and of the Council of 14.12.2016 providing further macro-financial assistance to the Hashemite Kingdom of Jordan (OJ L 352, 23.12.2016, p. 18).

<sup>81</sup> Case European Commission v European Parliament and Council of the European Union, C-427/12, Judgment of the Court of 18.3.2014, paras 38-40. Interestingly, the Court did not follow the Commission’s argument that “if the purpose of those powers is to adopt non-essential rules of general application, having the legal function of completing the normative framework of the legislative act concerned, those rules supplement the legislative act in accordance with the first subparagraph of Article 290(1) TFEU. If, by contrast, those rules are intended merely to give effect to the rules already laid down in the basic act while ensuring uniform conditions of application within the European Union, they come under Article 291 TFEU” (para 23).

<sup>82</sup> H.C.H. Hofmann, *Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality*, ‘European Law Journal’, 2009, vol. 15, no. 4, p. 491. However, it should be emphasised that the (pre-Lisbon) example given by H. Hofmann is not accurate. He recalls “annex lists fleshing out general provisions of legislation as was the case in T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council”. However, in such cases the modifications of annexes are carried out by means of implementing, rather than delegated acts (see, for example, numerous amendments to Council Regulation (EC) No. 881/2002 of 27.5.2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban, and repealing Council

On the other hand, according to the Commission, “it is clear from the wording of Article 290 that the Commission may never adopt a delegated act relating to a measure of an individual nature”<sup>83</sup>. Also the CJEU seems to insist on their general nature: “the lawfulness of the EU legislature’s choice to confer a delegated power on the Commission depends solely on whether the acts the Commission is to adopt on the basis of the conferral are of general application and whether they supplement or amend non-essential elements of the legislative act”<sup>84</sup>. This, however, need not be conclusive with regard to the potential nature of delegated acts as IAA, given the ambiguity of qualification of antidumping regulations by the Court.

Even though they should not from the outset be excluded from the extent of the analysis, it is difficult to find examples of delegated acts (post-Lisbon) which would fulfil the criteria of IAA. It is however conceivable (even though not necessarily correct) for the Union legislative to empower the European Commission to assess a given case and precise certain aspects of application of the legislative act accordingly<sup>85</sup>.

## Conclusion

In light of transfer of the non-negligible extent of administrative competences from member states to the EU it is important not to deprive

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Regulation (EC) No. 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ L 139, 29.5.2002, p. 9).

<sup>83</sup> Implementation of Article 290 of the Treaty on the Functioning of the European Union, Communication of the Commission, COM(2009) 673 final.

<sup>84</sup> *European Commission v European Parliament and Council of the European Union*, Case C-88/14, Judgment of the Court of 16.7.2015, ECLI:EU:C:2015:499, para. 32. In the same vein, see AG Jääskinen in C-270/12: “individual administrative decisions are, self-evidently, wholly precluded under Article 290 TFEU.” (*Case United Kingdom v European Parliament and Council*, C-270/12, AG opinion, para 80).

<sup>85</sup> For example: Article 1(9) of regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15.5.2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, empowering the Commission to designate third-country central banks, transactions with which would be exempt from certain provisions of this regulation; similarly Article 1(6) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4.7.2012 on OTC derivatives, central counterparties and trade repositories.

interested individuals of legal guarantees, originally enjoyed by them under national law of administrative procedure. Therefore, formal qualification of an act at the EU level should not result in diminishing individual procedural protection. Thus, the present paper adopts a notion of an administrative act of the EU based on certain features, and not on the formal qualification of the act. For the purposes of the present contribution, the term of IAA is understood as an act of application of EU law, issued by an EU body, having an authoritative nature (which includes its unilateral character and the presumption of legality), the ultimate aim and result of which is the determination of a legal situation of a given person (targeted person). The assessment of different categories of acts of secondary law shows that IAAs can be found amongst decisions (but they do not encompass all of this category) and regulations. It is extremely rare but not impossible to identify directives with qualities of IAA. On another level, IAAs can be found in the category of implementing acts, while they are virtually absent amongst legislative and delegated acts.

It is submitted that proposals concerning the adoption of rules of EU administrative procedure should aim at working out uniform solutions for acts having important common qualities, for it is the nature of the act which should determine the procedural solutions for its adoption, and not inversely. In this sense the present contribution is intended to be an opinion expressed in the debate on the reform of EU procedural law.

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