

## ON THE CONCEPT OF LEGISLATIVE ACTS IN THE EUROPEAN UNION LAW

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**Abstract:** *The paper focuses first on the status of legislative acts in the EU law and aims to outline the consequences of being afforded such a status. Subsequently, it deals with specific issue concerning the concept of legislative acts. There is a “grey area” of secondary legislation in the EU law, i. e. basic legal acts that are not adopted formally by a legislative procedure and therefore they are not formally considered to be legislative acts. The author calls them “innominate acts”. Particular legal bases serving for adopting of innominate acts are analysed with conclusion that these acts should be, de lege ferenda, recognized in most cases as legislative acts. The author also mentions the problem of democratic deficit and fundamental rights with regard to the issue in question.*

**Keywords:** *legislative acts, innominate acts, legislative procedure, democratic deficit, fundamental rights*

### INTRODUCTION

The Lisbon Treaty introduced the concept of legislative acts as a substantive part of secondary legislation of the European Union<sup>1</sup> (EU). Although the hierarchy of secondary law is not new, the Lisbon Treaty reinforced the status of this kind of secondary legislation and thus, in a particular case, it is important to know whether a given regulation, directive or decision is or is not a legislative act.

This paper focuses first on the status of legislative acts under primary law and aims to outline the consequences of being afforded such a status. Subsequently, the paper deals with specific issues concerning the concept of legislative acts. The Treaty on the Functioning of the European Union (TFEU) basically distinguishes between legislative acts<sup>2</sup>, i.e. legal acts adopted in accordance with the ordinary or with a special legislative procedure (by the Council and the European Parliament), on the one hand, and delegated acts<sup>3</sup> and implementing acts<sup>4</sup> (issued usually by the European Commission), on the other hand. Moreover, there is a “grey area” of secondary legislation, i.e. basic legal acts that are not adopted formally by a legislative procedure.<sup>5</sup> This paper concentrates on a specific part of this gray area: the Council and the European Parliament have been given the power to adopt regulations, directives and decisions by *de facto* legislative procedure, not *de iure*, as explained below. There are several provisions in the TFEU which anticipate the adoption of such acts. This brings uncertainty about the status of these acts. Are they or are they

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<sup>1</sup> Hereinafter also referred to as “Union”.

<sup>2</sup> Article 289(3) TFEU.

<sup>3</sup> Article 290 TFEU.

<sup>4</sup> Article 291 TFEU.

<sup>5</sup> For more details see TÜRK, A. Lawmaking after Lisbon. In: A. Biondi – P. Eeckhout – S. Ripley (eds.). *EU Law after Lisbon*. New York: Oxford University Press, 2012, pp. 69–71.

not legislative acts? This issue was recently brought up in the actions regarding the relocation mechanism act brought by Slovakia and Hungary before the Court of Justice<sup>6</sup>, but the Court has not decided the cases yet.

### Development of the hierarchy of secondary legislation in brief

A certain hierarchy of secondary law was apparent a long time before the Lisbon Treaty entered into force. Already in the early years of the European integration it was not only the Council which adopted secondary legislation. Secondary acts also authorized the European Commission<sup>7</sup> to adopt implementing legislation. This mechanism was reminiscent of typical legislative systems in states where national parliaments<sup>8</sup> adopt laws and executive bodies adopt implementing acts. However, the powers of the Commission were limited by committees representing the Member States. This led to the creation of a unique system of so-called Comitology<sup>9</sup>, although there was no legal framework defined in primary law. Nevertheless, the Court of Justice confirmed this practice in its well-known judgment *Köster*<sup>10</sup>. After the Single European Act supplemented Article 145 of the EEC Treaty<sup>11</sup>, the Council Decision 87/373/EEC<sup>12</sup> (based on this Article) laid down conditions for the Council to confer on the Commission powers for the implementation of the rules adopted by the Council and for the Commission to exercise implementing powers. Subsequently, two other decisions were adopted<sup>13</sup> involving the European Parliament in these procedures. In these decisions, we can also find the origin of the current provisions regarding delegated acts in the TFEU (as amended by the Lisbon Treaty), although previous primary law did not mention delegated acts explicitly.<sup>14</sup>

The Treaty Establishing a Constitution for Europe from 2004<sup>15</sup> intended to amend primary law in the area of legal acts. It brought a new system of secondary legislation<sup>16</sup>, but never entered into force. The Constitutional Treaty introduced new terminology, e.g. a Eu-

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<sup>6</sup> C-643/15 Slovakia v Council and C-647/15 Hungary v Council.

<sup>7</sup> Hereinafter also referred to as “Commission”.

<sup>8</sup> The difference was that in the European Economic Community, the legislator was the Council which was not a democratically elected body.

<sup>9</sup> See CRAIG, P., DE BÚRCA, G. *EU Law. Text, Cases, and Materials*. Oxford University Press, 2015, p. 137; Read more: BLOM-HANSEN, J. *The EU Comitology System in Theory and Practice. Keeping an eye on the Commission?* Palgrave Macmillan UK, 2011.

<sup>10</sup> 25/70 Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster a Berodt & Co., ECLI:EU:C:1970:115.

<sup>11</sup> Treaty establishing the European Economic Community. Article 145 stipulated as follows: the Council shall “confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down”.

<sup>12</sup> Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 197, 18. 7. 1987, p. 33–35.

<sup>13</sup> Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17. 7. 1999, p. 23–26 and Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 200, 22. 7. 2006, p. 11–13.

<sup>14</sup> See also KRÁL, R. Prameny práva EU ve světle Lisabonské smlouvy. *Acta Universitatis Carolinae Iuridica*. 2010, No. 3, p. 24.

<sup>15</sup> Hereinafter referred to as “Constitutional Treaty” or “CT”.

<sup>16</sup> Articles I-33 and following CT.

ropean Law, a European framework law, a definition of legislative acts<sup>17</sup> as well as non-legislative acts<sup>18</sup>. The Lisbon Treaty now in force was partially inspired by the Constitutional Treaty but did not take over everything: the TFEU maintained the existing list of secondary acts (i.e. regulations, directives, decisions, recommendations and opinions)<sup>19</sup>, but new terms, such as “legislative acts” and “delegated acts”, were introduced. The distinction between the various kinds of secondary acts obviously has significant legal consequences (for more details see below).

### The status of legislative acts in EU law

The Lisbon Treaty introduced a definition of legislative acts in Article 289(3) TFEU, as mentioned above, which is linked to the procedure for the adoption of such acts. It provides that “[l]egal acts adopted by legislative procedure shall constitute legislative acts”. Legislative procedures are either ordinary or special, however, in these procedures, the European Parliament and the Council always participate in order to adopt a regulation, directive or decision, usually on a proposal from the Commission.<sup>20</sup> Although the definition of legislative acts in the Treaty simply refers to legislative procedures, it is also important to consider the content of legislative acts. It is clear that legislative acts are legally binding<sup>21</sup> and usually have normative character.<sup>22</sup> They stipulate rights and duties of Union institutions, Member States and individuals. Normative content may thus be regarded as a key characteristic of legislative acts.

There are several important consequences outlined in primary law associated with legislative acts. For the purpose of this paper, the author will focus on two of them. First, draft legislative acts shall be forwarded to national parliaments to scrutinize their compliance with the principle of subsidiarity under Protocol (No. 2) on the application of the principles of subsidiarity and proportionality.<sup>23</sup> Second, the Council shall meet in public when it deliberates and votes on a draft legislative act.<sup>24</sup>

Legislative acts are called “Gesetzgebungsakten”<sup>25</sup> in German and indeed, it seems legislative acts in the EU law are comparable with national laws in democratic states. In the

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<sup>17</sup> Article I-34 CT.

<sup>18</sup> Article I-35 CT.

<sup>19</sup> Article 288 TFEU.

<sup>20</sup> See Art. 289(1)-(2) TFEU.

<sup>21</sup> See Art. 288 TFEU.

<sup>22</sup> As an exception, see for example Article 182(1) TFEU. Under this provision, a multiannual framework programme concerning research, technological development and space shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. The framework programme shall establish the scientific and technological objectives to be achieved by the activities provided for in Article 180 and fix the relevant priorities, indicate the broad lines of such activities etc. See also Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014–2020) and repealing Decision No 1982/2006/EC, OJ L 347, 20. 12. 2013, p. 104–173 which is based on Article 182(1). Another inconsistency in the concept of legislative acts can be demonstrated on legal acts which are formally considered as legislative acts but in fact amend primary law - see e.g. Article 129(3) TFEU. Legislative acts are normally used as legal instruments to implement primary law, not to amend it.

<sup>23</sup> Hereinafter also referred to as “Protocol No 2”.

<sup>24</sup> Article 16(8) TEU and Article 15(2) TFEU. The European Parliament shall meet in public as a general rule. See Art. 15(2) TFEU.

<sup>25</sup> “Gesetz” means “law” in English.

constitutional systems of democratic states, the legislative process is most often governed by the following principles. National laws - which very often impose duties on individuals (natural and legal persons) - are adopted most often by national parliaments, being democratically elected bodies. National constitutions are based on the principle that state authority is derived from the people and that the people exercise it through legislative, executive, and judicial bodies or directly.<sup>26</sup> This approach is crucial for democracy. Moreover, the national legislative process has to be transparent. National parliaments therefore meet in public so that they may be controlled by the public.

The European Union is an international organization (*sui generis*), not a state. However, the Member States have conferred on the Union legislative powers. Above all, the EU institutions adopt legal acts that may impose duties not only on Member States or EU institutions, but also on individuals. Thus, the democratic principles of law-making have to be applied at the EU level as well. The European Union itself declares that it is founded on the values of democracy and the rule of law.<sup>27</sup> The legislative procedure in the European Union has evolved over the years and it is much more democratic at present than it was at the beginning of European integration.<sup>28</sup> In most cases, the European Parliament - being the only directly democratically elected EU institution - plays a key part in the EU legislative process (together with the Council).

To reinforce the democratic level of decision-making in the EU, current primary law tries to involve national parliaments more into this process. The Lisbon Treaty introduced new powers of national parliaments in relation to the principle of subsidiarity, as set out in Protocol (No 2) on the application of the principles of subsidiarity and proportionality. Any national parliament or its chamber<sup>29</sup> may, within an eight week period, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft legislative act does not comply with the principle of subsidiarity.<sup>30</sup> The ensuing process depends on the number of reasoned opinions issued by the national parliaments of Member States. Where only a small amount of reasoned opinions has been issued (less than one third of the votes), the EU bodies shall take account of the reasoned opinions. Where reasoned opinions represent at least one third of all the votes or a quarter of votes in the area of freedom, security and justice, the draft legislative act must be reviewed (so called yellow card or early warning mechanism). After such review, the EU institutions may decide to maintain, amend or withdraw the draft and must give reasons for their decision.<sup>31</sup> Furthermore, under the ordinary legislative procedure, where reasoned opinions of national parliaments represent at least a simple majority of all votes, a rather complicated process follows which may lead to the end of

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<sup>26</sup> See for instance Article 2(1) of the constitutional act No. 1/1993 Sb., Constitution of the Czech Republic, as amended; Article 20(2) of Basic Law for the Federal Republic of Germany, 23 May 1949, BGBl. S. 1., as amended.

<sup>27</sup> Article 2 TEU.

<sup>28</sup> Although there is still certain democratic deficit left in the EU.

<sup>29</sup> Each national parliament shall have two votes. In the case of bicameral parliaments, each of the two chambers shall have one vote. See Art. 7(1) par. 2 of the Protocol No. 2.

<sup>30</sup> Art. 6(1) of the Protocol No 2. All draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise with these principles. – See Art. 5 of the Protocol No. 2.

<sup>31</sup> Art. 6(2) of the Protocol No. 2.

the legislative process (the so-called orange card).<sup>32</sup> The powers of national parliaments described above are often criticised for being too weak.<sup>33</sup> Nevertheless, the mechanism may be also seen as a first step to involve national parliaments more into legislative process at the EU level with the possibility of further future development of these powers.

Since legislative acts may have significant impact on the rights of individuals, as mentioned above, the legislative process should be transparent.<sup>34</sup> On that account, the TFEU stipulates that the European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.<sup>35</sup> In accordance with the Rules of Procedure of the EP<sup>36</sup>, debates in the European Parliament shall be public. Its committees shall normally meet in public as well, but they may decide to debate certain items of the agenda closed to the public.<sup>37</sup>

Regarding Council meetings, there has been a shift after the Lisbon Treaty. Before, when the Council acted in its legislative capacity, only the results of votes and explanations of vote as well as statements in the minutes had to be made public.<sup>38</sup> But there was no duty of the Council to meet in public. Under current primary law, Council meetings are open to the public when the Council is considering and voting on a draft legislative act.<sup>39</sup> Beyond the wording of the TFEU, the Rules of Procedure of the Council broaden the use of the transparency principle in relation to non-legislative acts, but only to a certain extent. Where a non-legislative proposal is submitted to the Council relating to the adoption of rules which are legally binding in or for the Member States, by means of regulations, directives or decisions (with some exceptions), the Council's first deliberations on important new proposals shall be open to the public. The Presidency shall identify which new proposals are important and the Council or Coreper may decide otherwise. The Presidency, the Council or Coreper may decide, on a case-by-case basis, that subsequent Council deliberations on the proposal shall be also open to the public.<sup>40</sup> There are several problematic aspects to these provisions. First, in accordance with the Rules of Procedure, deliberations on not all, but only on **important** new proposals shall be open to the public. It may be questionable which proposals are important and which proposals are not. Second, it is the Council which identifies which new proposals are to be considered as being important. Arguably, this may be influenced by political motives. Third, the principle of public deliberation of non-legislative proposals is only provided by the Rules of Procedure of the Council, but it is not guaranteed by the Treaties<sup>41</sup>.

<sup>32</sup> Read more: PÍTROVÁ, L. *Evropská dimenze legislativního procesu*. Praha: Leges, 2014, p. 221 ff.

<sup>33</sup> See for instance ZALEWSKA, M., GSTREIN, O. J. National Parliaments and their Role in European Integration: The EU's Democratic Deficit in Times of Economic Hardship and Political Insecurity. *Bruges Political Research Paper*: 2013, No. 28, [2016-07-04]. Available at: <https://www.coleurope.eu/website/study/european-political-and-administrative-studies/research-activities/bruges-political>.

<sup>34</sup> Art. 1 TEU and Art. 15(1) TFEU.

<sup>35</sup> Art. 15(2) TFEU.

<sup>36</sup> Rules of Procedure of the European Parliament, 8th parliamentary term, July 2014.

<sup>37</sup> Art. 115(2)-(3) of the Rules of Procedure of the EP.

<sup>38</sup> Art. 207(3) of the Treaty establishing the European Community.

<sup>39</sup> See also Art. 7 of the Rules of Procedure of the Council, December 2009.

<sup>40</sup> Art. 8(1) of the Rules of Procedure of the Council.

<sup>41</sup> TEU and TFEU.

## “Grey area” of EU secondary legislation – innominate acts

As explained above, legislative acts are legal acts which are adopted by a legislative procedure. Specific Treaty provisions detail whether a given legislative act is to be adopted by an ordinary or by a special legislative procedure. The ordinary legislative procedure is a single process and is described in Article 294 TFEU. Apart from the ordinary legislative procedure, there are different procedures for decision-making called special legislative procedures and the given Treaty provision always specifies which special procedure will be used in a specific case (if the ordinary legislative procedure is not to be used). For example, in accordance with Article 113 TFEU, the “*Council shall, acting unanimously in accordance with a **special legislative procedure** and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation (...)*.” Another example is Article 23 par. 2 TFEU where the Council shall act by a qualified majority<sup>42</sup>: “*The Council, acting in accordance with a **special legislative procedure** and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.*”<sup>43</sup> Other Treaty provisions refer to the ordinary legislative procedure.<sup>44</sup>

Interestingly, there are also legal bases in the TFEU for the adoption of directives, regulations or decisions which do not specifically refer to any legislative procedure (ordinary or special). Yet they set out an obligatory procedure for the adoption of such acts. As an example, Article 103(1) TFEU may be cited: “*The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.*” This Treaty provision serves as a legal basis for the adoption of measures in competition policy.<sup>45</sup> It determines the procedure which has to be followed in order to lay down the rules: the Council makes decisions on a proposal from the Commission and after consulting the European Parliament. Thus, the procedure is, in fact, identical to the special legislative procedure set in Article 23 TFEU. In both cases, the measures are adopted by the Council acting by qualified majority after consulting the European Parliament. Significantly, however, Article 103(1) TFEU, unlike Article 23 TFEU, does not explicitly use the term “special legislative procedure”. The rules anticipated by Article 103(1) TFEU were adopted by means of Regulation 1/2003<sup>46</sup>. The regulation is generally binding, as it lays

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<sup>42</sup> Art. 16(3) TEU.

<sup>43</sup> In this context, “protection” means protection of Union citizens by the diplomatic or consular authorities of any Member State under the conditions stipulated by the Treaties.

<sup>44</sup> One example for all – Art. 114(1) TFEU regarding adoption of measures in the area of internal market: “*The European Parliament and the Council shall, acting in accordance with the **ordinary legislative procedure** and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*”

<sup>45</sup> Art. 101 TFEU concerns prohibition of cartel agreements, Art. 102 TFEU prohibition of abuse of a dominant position.

<sup>46</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 4. 1. 2003, p. 1. Its legal basis is Article 83(1) TEC because it was adopted before the Lisbon Treaty entered into force. Article 83 TEC was renumbered by the Lisbon Treaty and it is Article 103 at present. Its wording was not amended by the Lisbon Treaty.



down rights and duties of undertakings and competences of Union institutions and national bodies.<sup>47</sup>

The cardinal question is, should acts adopted in accordance with Article 103(1) TFEU or any other similar provision which anticipates the adoption of acts with a *de facto* legislative procedure (hereinafter referred to as “innominate acts”) be considered to be legislative acts (with all of the consequences of being a legislative act) or not?

This question was raised by national parliaments in 2010, shortly after the Lisbon Treaty entered into force, because under Protocol No 2, national parliaments gained new powers to issue a reasoned opinion on a draft legislative act’s non-compliance with the principle of subsidiarity. In the Annual report 2010 of 10 June 2011 on relations between the European Commission and national parliaments<sup>48</sup>, the Commission stated: *“During the first half of 2010, several exchanges, both written and oral, took place between the Commission and national Parliaments as regards the scope of the subsidiarity control mechanism. In reply to specific questions raised by national Parliaments, the Commission was able to clarify that the new mechanism covers only draft legislative acts, i.e. proposals subject to either the ordinary or a special legislative procedure, provided they do not fall within the Union’s exclusive competence. This interpretation is shared by the European Parliament and the Council.”*<sup>49</sup> In the footnote No 13, the Commission is adding: *“Article 289 establishes that legislative acts are legal acts adopted by legislative procedure, whereas a legislative procedure may be an ordinary legislative procedure or a special legislative procedure. Therefore, where the Treaty’s legal basis makes no explicit mention of one of the legislative procedures, either ordinary or special, the act in question is formally speaking not a legislative act.”* Thus, the EU institutions apply a formal criterion, i.e. what is important is whether the relevant Treaty provision explicitly refers to a legislative procedure or not; the Commission does not undertake a substantive analysis or consideration of why the consultation procedure is, in some cases, to be regarded as a legislative procedure, while in others it is not.

As far as the author is aware, the Court of Justice of the European Union has not dealt with the issue described above. Recently, Slovakia and Hungary brought actions before the Court of Justice demanding review of the legality of the Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece<sup>50</sup> based on Article 78(3) TFEU. In accordance with Article 78(3) TFEU, the Council adopts a decision on a proposal from the Commission after consulting the European Parliament. The term “special legislative procedure” is not mentioned.

The Hungarian government states in the action that the contested decision establishes in fact an exception in respect of a legislative act, Regulation 604/2013<sup>51</sup>, and itself consti-

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<sup>47</sup> E. g. the Commission may impose fines on undertakings where they infringe competition rules, Art. 23(1)(a) of the Regulation 1/2003.

<sup>48</sup> COM(2011) 345 final, hereinafter referred to as “Annual report 2010”.

<sup>49</sup> The Commission also reminds that national parliaments may issue opinions on proposals which are not draft legislative acts within the political dialogue. However, these opinions cannot lead to the so called yellow or orange card.

<sup>50</sup> Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ 2015 L 248, p. 80.

tutes, in view of its content, a legislative act. The Council therefore would have had to respect the right of the national parliaments to issue an opinion on legislative acts, recognised in Protocols No 1 and Protocol No 2. As a result, the Court of Justice has an opportunity to tackle the issue, although the context here is specific.

### Legal bases for the adoption of innominate acts

In the following part, the author will concentrate on particular provisions of the TFEU that serve as legal bases for adoption of innominate acts and the nature of these acts will be analysed as well.

Article 78(3) TFEU has been already mentioned. It enables passage of acts in the event of a sudden inflow of nationals of third countries. The Council, on a proposal from the Commission after consulting the European Parliament, may adopt provisional measures for the benefit of one or more Member States concerned. This procedure is known as a consultation procedure - other Treaty provisions specifically recognise this as special legislative procedure. However, arguably, acts adopted under Article 78(3) TFEU are more likely non-legislative, because of their provisional nature.<sup>52</sup> Under the Constitutional Treaty, these measures had non-legislative character.<sup>53</sup>

Under Article 95(3) TFEU, the Council shall, on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, lay down rules for implementing the non-discrimination principle in transport policy set out in paragraph 1. This provision prohibits any discrimination which takes the form of carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on grounds of the country of origin or of destination of the goods. Again, these acts are adopted by a consultation procedure which is not explicitly called a “special legislative procedure”. It might be useful to confront this legal basis with similar Treaty provisions dealing with the prohibition of discrimination. Article 18 TFEU is especially relevant in this respect. Under Article 18, rules may be adopted to prohibit any discrimination on grounds of nationality. The European Parliament and the Council shall adopt the rules in accordance with the ordinary legislative procedure. It is unclear why the approach of the Treaty, in two similar cases, is different. In the case of Article 95(3) TFEU, the acts are not explicitly considered to be legislative acts because of the absence of any reference to the ordinary or to the special legislative procedure. In the case of Article 18 TFEU, the acts are regarded as legislative acts, without any doubts, due to the use of the expression “ordinary legislative proce-

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<sup>51</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ 2013 L 180, p. 31–59, hereinafter referred to as “Dublin regulation”.

<sup>52</sup> In the case of the above-mentioned Council Decision (EU) 2015/1601 contested by Slovakia and Hungary, the character of such act is disputable. Acts based on Art. 78(3) TFEU should not be regarded as legislative acts, in the author's opinion. On the other hand, the decision in question actually modifies a legislative act, the Dublin regulation. It remains in force for two years (see Art. 13) which is a relatively long period to be merely “provisional”. The legal basis should have been better the same as for the Dublin regulation, Art. 78(2)(e) TFEU. For more details see also ZBÍRAL, R. Nad rozhodnutím Rady o povinném přerozdělení uprchlíků v rámci EU: lze politickou porážku zvrátit právními argumenty? *Právní rozhledy*. 2015, No. 23–24, pp. 845–846.

<sup>53</sup> Article III-266 in connection with Article I-35(2) CT.



dure". The rules anticipated in Article 95(3) TFEU have been adopted in Regulation 11/1960<sup>54</sup> which lays down duties on individuals (prohibition of discrimination by carriers which takes the form of charging different rates and imposing different conditions<sup>55</sup>, requirements for a transport document<sup>56</sup>). Although the Regulation was adopted before the entry into force of the Lisbon Treaty, it was based on Article 79(3) EEC Treaty which is now Article 95(3) TFEU. It is therefore evident that acts based on Article 95(3) TFEU are of normative character and should have the status of legislative acts. Concerning the Constitutional Treaty, however, these rules were explicitly considered as non-legislative acts.<sup>57</sup>

Competition rules set in secondary law are also based on Treaty provisions that do not refer to ordinary or special legislative procedures. In accordance with Article 103(1) TFEU, regulations or directives to implement principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament. The Council likewise, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of the Treaty provisions on state aids in accordance with Article 109 TFEU. Competition rules based on Article 103(1) TFEU have significant impact on rights and duties of individuals. Regulation 1/2003, for instance, provides for the Commission's powers of inspection, including inspections conducted at homes of directors, managers and other staff members of undertakings.<sup>58</sup> Furthermore, the Commission may impose penalties on undertakings.<sup>59</sup>

The state aid Regulation 2015/1589<sup>60</sup>, based on Article 109 TFEU, lays down procedural rules mostly for the Commission and the Member States regarding notified aids and existing aid schemes. Duties are also imposed upon individuals. For example, the Commission may require undertakings to provide information. If the undertaking in question does not cooperate properly, the Commission may impose a fine on it.<sup>61</sup> Furthermore, in the case of a negative decision regarding unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.<sup>62</sup> It follows that the beneficiary has to return the state aid.

It is apparent that rules based on Articles 103(1) or Article 109 TFEU have normative content and should therefore have the status of legislative acts.<sup>63</sup> A further problematic aspect has to be mentioned in this regard. The above-mentioned rules, especially those based on Article 103(1) TFEU, suffer from a democratic deficit. These rules are not only

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<sup>54</sup> Regulation No 11 concerning the abolition of discrimination in transport rates and conditions, in implementation of Article 79(3) of the Treaty establishing the European Economic Community, OJ P 052, 16. 8. 1960, p. 1121.

<sup>55</sup> Article 4 of the Regulation 11/1960.

<sup>56</sup> Article 6 of the Regulation 11/1960.

<sup>57</sup> Article III-240(3) in connection with Article I-35(2) CT.

<sup>58</sup> Art. 20-21 of the Regulation 1/2003.

<sup>59</sup> Art. 23-24 of the Regulation 1/2003. See for example a fine of 1,06 billion EUR imposed on Intel Corp. by the Commission, Commission Decision C(2009) 3726 final of 13 May 2009. For more details see: ŠMEJKAL, V., DUFKOVÁ, B. *Průvodce aktuální judikaturou Soudního dvora EU k ochraně hospodářské soutěže*. Praha: Univerzita Karlova v Praze, Právnická fakulta, 2015, pp. 124–126.

<sup>60</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union. OJ L 248, 24. 9. 2015, pp. 9–29.

<sup>61</sup> Art. 7-8 of the Regulation 2015/1589.

<sup>62</sup> Art. 16(1) of the Regulation 2015/1589.

<sup>63</sup> These acts were of non-legislative nature under the Constitutional Treaty, see Article III-163 and III-169 in connection with Article I-35(2) CT.

considered as non-legislative, but they are also adopted by the Council after consulting the European Parliament, i.e. the dominant legislator is the Council. Since the rules may have significant impact on rights of individuals, the European Parliament should be more greatly involved. From this perspective and at least in the case of Article 103(1) TFEU, it would be more appropriate for the competition rules to be - *de lege ferenda* - adopted by the ordinary legislative procedure.

Article 129(4) TFEU entitles the Council to adopt provisions referred to in the Statute of the European System of Central Banks<sup>64</sup> and of the European Central Bank<sup>65</sup> in the field of monetary policy. The Council acts either after consulting the European Parliament and the ECB or after consulting the European Parliament and the Commission (it depends if the proposal comes from the Commission or from the ECB). Based on Article 129(4) TFEU, a wide range of legal acts may be adopted. For instance, the Council may adopt conditions for the imposition by the ECB of fines or periodic penalty payments on undertakings.<sup>66</sup> Although these conditions were set out already before the entry into force of the Lisbon Treaty, they have been subject to amendments. The post-Lisbon Regulation 2015/159 amending these rules<sup>67</sup> stipulates specific rules for sanctions imposed by the ECB in the exercise of its supervisory tasks, including upper limits of sanctions or time limits.<sup>68</sup> It is evident this act has normative character and should have the status of a legislative act. Under the Constitutional Treaty, these measures were of a non-legislative nature.<sup>69</sup>

Article 148(2) TFEU anticipates the adoption of guidelines which the Member States shall take into account in their employment policies. The guidelines shall be drawn up by the Council, on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee, the Committee of the Regions and the Employment Committee. It follows from the Treaty that the guidelines are not binding for the Member States, but the Member States shall take them into account. Indeed, the Decision 2008/618/EC<sup>70</sup> implementing the Treaty provision has the character of soft-law<sup>71</sup> and substantively should not be considered to be a legislative act. Under the Constitutional Treaty, the guidelines were considered neither as a legislative, nor as a non-legislative act.<sup>72</sup>

The Council, on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall adopt the provisions to set up joint undertakings or any other structure for the execution of Union research, technolog-

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<sup>64</sup> Hereinafter also referred to as “ESCB”.

<sup>65</sup> Hereinafter also referred to as “ECB”.

<sup>66</sup> Article 132(3) TFEU.

<sup>67</sup> Council Regulation (EU) 2015/159 of 27 January 2015 amending Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions, OJ L 27, 3. 2. 2015, p. 1–6.

<sup>68</sup> Article 1(5) of the Regulation 2015/159.

<sup>69</sup> See Article III-187(4) in connection with Article I-35(2) CT.

<sup>70</sup> Council Decision 2008/618/EC of 15 July 2008 on guidelines for the employment policies of the Member States, OJ L 198, 26. 7. 2008, p. 47–54. Its legal basis is Article 128(2) TEC because it was adopted before the Lisbon Treaty entered into force. Article 128 TEC was renumbered by the Lisbon Treaty and it is Article 148 at present. Its wording was not amended by the Lisbon Treaty.

<sup>71</sup> See e. g. following guideline contained in the annex to the Decision: “Member States should also enact measures for improved (occupational) health status with the goal of reducing sickness burdens, increasing labour productivity and prolonging working life”.

<sup>72</sup> Article III-206(2) CT.

ical development and demonstration programmes, in accordance with Article 188 par. 1 (together with Article 187) TFEU. Such provisions were adopted in Regulation 557/2014 establishing the Innovative Medicines Initiative 2 Joint Undertaking.<sup>73</sup> The joint undertaking in question is established for the implementation of the Joint Technology Initiative on Innovative Medicines for a period until 31 December 2024<sup>74</sup>. The joint undertaking replaces and succeeds previous IMI Joint Undertaking, established by Regulation 73/2008<sup>75</sup>. Regulation 557/2014 lays down rules regarding for instance financial contribution to the joint undertaking, its staff, contractual and non-contractual liability. It follows that Regulation 557/2014 contains rules concerning tasks, operation, structure, etc. of the joint undertaking and has a normative character. Although the joint undertaking has been established for a limited period of time, the period is long enough and, moreover, the undertaking succeeds a previous joint undertaking established in 2008. It is interesting to compare Regulation 557/2014 with the regulation laying down detailed rules for Eurojust. Under Article 85(1) TFEU, the European Parliament and the Council shall lay down these rules by means of regulations adopted with the ordinary legislative procedure. Such a regulation laying down detailed rules for Eurojust is therefore a legislative act due to the explicit reference to the ordinary legislative procedure. From a substantive perspective, Regulation 557/2014 is of a similar nature, having normative character, and should thus also have the status of a legislative act as well. In spite of this and already under the Constitutional Treaty, these acts had a non-legislative character.<sup>76</sup>

## CONCLUSION

It is clear that the Member States, being “Masters of the Treaty”, did not have the will to refer, in certain cases, to the “special legislative procedure” in the TFEU and thus to recognize innominate acts as legislative acts, although the logic of this approach is not apparent (there are probably political reasons). When we compare TFEU provisions which lack a reference to a special (or ordinary) legislative procedure with the equivalent provisions in the Constitutional Treaty, we find that the equivalent Constitutional Treaty provisions expressly marked such acts as “non-legislative”. The only exception is Article 148(2) TFEU, serving as a legal basis for guidelines for employment policies, which was marked neither as a legislative, nor as a non-legislative act, under the Constitutional Treaty. The double-approach to legal acts therefore could have been seen even more sharply in the Constitutional Treaty<sup>77</sup>. The Lisbon Treaty took over the system of legislative acts from the Constitutional Treaty but – unlike the Constitutional Treaty – left innominate acts without any explicit label of “non-legislative acts”, thus causing uncertainty about the status of these acts.

The issue was first dealt with by the Union institutions in connection with the new power of national parliaments to scrutinize draft legislative acts from the perspective of

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<sup>73</sup> Council Regulation (EU) No 557/2014 of 6 May 2014 establishing the Innovative Medicines Initiative 2 Joint Undertaking, OJ L 169, 7. 6. 2014, pp. 54–76.

<sup>74</sup> Article 1(1) of the Regulation 557/2014.

<sup>75</sup> Council Regulation (EC) No 73/2008 of 20 December 2007 setting up the Joint Undertaking for the implementation of the Joint Technology Initiative on Innovative Medicines, OJ L 30, 4. 2. 2008, pp. 38–51.

<sup>76</sup> Article III-253 in connection with Article I-35(2) CT.

the principle of subsidiarity. In the view of the Commission (the Council and the European Parliament), acts based on TFEU provisions which make no explicit reference to the ordinary or special legislative procedure (i.e. innominate acts), do not constitute legislative acts. As far as the author of this paper is aware, the Court of Justice of the EU has not dealt with this issue, but it has an opportunity to do so in pending cases concerning the relocation mechanism act.

After analysing relevant legal bases in the TFEU and innominate acts themselves it must be concluded that innominate acts have mostly normative content and may have substantial impact on rights of individuals. As a result, the author puts forward that such innominate acts having a normative character should be considered to be legislative acts. Some of the legal consequences of being characterised as a legislative act have been mentioned in this paper. Draft legislative acts shall be forwarded to national parliaments to scrutinize their compliance with the principle of subsidiarity. Moreover, the Council shall meet in public when it deliberates and votes on a draft legislative act. These rules make the decision-making process at the EU level more democratic and transparent. Therefore, *de lege ferenda*, explicit reference to legislative procedure should be inserted in the TFEU in these cases.

Another problematic issue has been mentioned in connection with innominate acts. These acts are adopted by a consultation procedure, meaning it is the Council that dominates the decision-making procedure - the position of the European Parliament is weak since it is merely consulted. These procedures therefore suffer from a democratic deficit which is a problem specifically where legal acts impose duties on individuals (see for example competition rules). *De lege ferenda*, these legal acts should be adopted in accordance with the ordinary legislative procedure or with a special legislative procedure, where the consent of the European Parliament is required. Such a Treaty amendment would strengthen the powers of the European Parliament in the decision-making process and would also make clear that these acts are legislative acts.

The current situation is also not sustainable also due to other grounds. As described above, innominate acts in fact sometimes restrict the rights and freedoms recognised by the Charter of Fundamental Rights of the European Union.<sup>78</sup> For instance, Regulation 1/2003 stipulates the Commission's powers of inspection which can be exercised at the homes of directors, managers and other members of staff of undertakings<sup>79</sup> which restrict their right to respect for private and family life, home and communications<sup>80</sup>. Under the Charter, any limitation on the exercise of the rights and freedoms must be provided by "law"<sup>81</sup>. An act which is treated as non-legislative, adopted by a consultation procedure where the European Parliament has only a minimum power to influence the legal act, cannot be – in the author's opinion – considered to be a "law".

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<sup>77</sup> A. Türk critically states the legislative procedure in which the European Parliament is merely consulted is indistinguishable from procedures under the Constitutional Treaty that lead to the adoption of European regulations as non-legislative acts. See TÜRK, A. The Concept of the "Legislative" Act in the Constitutional Treaty. In: DANN, P., RYNKOWSKI, M. (eds.). The Unity of the European Constitution. *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*. 2006, Vol. 186, p. 161.

<sup>78</sup> Hereinafter referred to as "Charter".

<sup>79</sup> Article 21 of the Regulation 1/2003.

<sup>80</sup> Article 7 of the Charter.

<sup>81</sup> Article 52(1) of the Charter.