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Is there a Closed System of Legal Acts of the European Union after the Lisbon Treaty?

The Example of Unspecified Acts in the Union Policy on the Environment

I. THE PRINCIPLE OF CONFERRAL OF POWERS

It is a traditional principle of international law that the scope of activities of every international organization is limited by the powers conferred upon it by the respective constituent treaty. This results from international organizations not having the full sovereign general law-making powers of States, but only those powers specifically delegated to it by its founders, the Member States.[1]

So it is in case of the European Union and its institutions: Article 5 Treaty on European Union (TEU) – the latest reform of the Union's primary law, the *Lisbon Treaty*[2], entered into force on 1 December 2009[3] – states that "[t]he limits of Union competences are governed by the principle of conferral. […]"[4]. Under this principle, also called "principle of specific attribution of powers"[5], the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.[6] So the Union only has competence when it can point to a power contained in the Treaties.

The principle of conferral of powers is not only binding for the Union in relation to its Member States, but also of relevance for the interinstitutional

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1 See on this, Ian Brownlie, Principles of Public International Law, 7th ed. (Oxford 2008), pp. 679 et seqs.

2 O.J. 2008, C 115/1.

3 On the *Treaty of Lisbon*, see Stefan Griller/Jacques Ziller (eds.), The Lisbon Treaty (Vienna 2008). On the genesis of that reform Treaty and its predecessor, the so-called *Constitutional Treaty*, see Jean-Claude Piris, The Constitution for Europe (Cambridge 2006).

4 Article 5, para. 1 TEU.

5 Since French administrative law has had a significant influence on the development of the Union's legal system, the principle of conferral of powers is sometimes restated by using the French expression that the Union has a competence d'attribution, in other words, jurisdiction only over those matters which have been attributed to the Union. Cf. Peter E. Herzog, Article 5 TEC, in: Hans Smit/Peter Herzog/Christian Campbell/Gudrun Zagel (eds.), 1 Smit & Herzog on The Law of the European Union, 81-3.

6 See Article 5, para. 2 TEU and Article 7 TFEU. On the principle of conferral of powers, see in general, Paul Craig/Gráinne de Búrca, EU Law, 4th ed. (Oxford 2008), p. 82; Paul Craig, EU Administrative Law (Oxford 2006), p. 403; Damian Chalmers, European Union Law, Vol. I: Law and EU Government (Aldershot 1998), pp. 207 et seqs.; Damian Chalmers/Christos Hadjiemmanuil/Giorgio Monti/Adam Tomkins, European Union Law (Cambridge 2006), pp. 211 et seqs.

distribution of competences. According to Article 13, para. 2 TEU, "each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them".

Finally, a very important consequence resulting from the principle of conferral of powers is that the Union's primary law is not only decisive for attributing powers as such to the Union, *i.e.* granting the institutions authority to take acts in certain matters, but also for the form of the specific acts.

II. THE TYPES OF ACTS OF SECONDARY LAW

Article 288 Treaty on the Functioning of the European Union (TFEU), as did Article 249 of the former EC Treaty, enumerates three binding and two non-binding forms of acts of the Union's institutions.[7] According to that provision, the institutions shall, in exercising the Union's competences, adopt regulations, directives, decisions, recommendations and opinions. The wording of Article 288 TFEU indicates, at least in connection with the principle of conferral laid down in Articles 5 and 13, para. 2 TEU, that this enumeration is creating a closed system[8] of forms of secondary law.[9] Besides that, Article 288 TFEU provides definitions of the legal instruments mentioned.[10]

Accordingly, *regulations* create generally binding rules, directly applicable in all Member States. Thereby the regulation denotes a measure somewhat comparable to a national statute.

In contrast to the regulation, which is binding in its entirety, the *directive* is binding on the Member States only as to the result to be achieved. It leaves to the national authorities the choice of form and methods for its implementation. Nevertheless, because of its binding character, although solely directed against

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7 Beyond that, by providing for the first time a primary law basis for so-called "interinstitutional agreements", binding solely for the involved institutions and not creating legal obligations for third parties, the *Lisbon Treaty* creates another source of law. As this instrument is being dealt with in Article 295 TFEU which, significantly, is not inserted in the Treaty section on legal instruments but in the subsequent section dealing with decision-making procedures, we will not go into deep here.

8 On closed systems of forms of legislative acts see generally, Harald Eberhard, Der verwaltungsrechtliche Vertrag: Ein Beitrag zur Handlungsformenlehre (Vienna 2005), pp. 258 et seqs., and *id.*, Altes und Neues zur "Geschlossenheit des Rechtsquellensystems", Oesterreichische Juristen-Zeitung 2007, pp. 679 et seqs. (p. 679 et seq.).

9 There should not be made a secret of the ongoing existence of a separate range of instruments within the chapter on the Common Foreign and Security Policy laid down in Articles 23 et seqs. TEU (on the specificity of CFSP legal instruments, cf. Bruno de Witte, Legal Instruments and law-Making in the Lisbon Treaty, in: Stefan Griller/Jacques Ziller [eds.], The Lisbon Treaty [Vienna 2008], pp. 79 et seqs. [p. 90]). Those acts (e.g. the "general guideline") have their origin in the former so-called second pillar of the European Union in the version of the *Maastricht Treaty*, which was based on traditional inter-state cooperation in contrast to the supranational so-called first pillar. On this former structure of the Union, cf. Paul Craig/Gráinne de Búrca, EU Law, 4th ed. (Oxford 2008), pp. 15 et seqs.

10 On the different types of Union legislation, cf. Paul Craig/Gráinne de Búrca, EU Law, 4th ed. (Oxford 2008), pp. 83 et seqs.

the Member States, the directive is distinguished from the non-binding recommendation.

A *decision*, on the other hand, shall be binding in its entirety. In contradiction to regulations which also have binding force in entirety, decisions are not generally applicable but have an individual character. A decision which specifies those to whom it is addressed shall be binding only on them.

Finally, the non-binding acts were called *recommendations* and *opinions*. Although these explicitly have no binding force, they are nevertheless to be classified as legal acts.[11] In the first place, their legal character results from the Treaty provisions that require the institutions to adopt them. Secondly, although they do not have binding force on their own, they may become binding as part of a binding norm or at least as a necessary stage in a procedure to pass a binding act.[12] Finally, they do have a legal effect, since the general obligations of loyalty imposed by Article 4, para. 3 TEU also apply to recommendations and opinions. Consequently, Member States are obliged to take them seriously.[13] Hence the ECJ stated in Case C-322/88 (*Grimaldi v. Fonds des Maladies Professionelle*s) that the recommendations in question[14] "[…] cannot be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions"[15]. As to the opinion, on the other hand, the ECJ interestingly enough pointed out their non-binding force in Joined Cases 1 and 14/57 (*Société des usines à tubes de la Sarre v. High Authority*). The Court held subject to dismissal a request for judicial review of an opinion within the meaning of Article 54, para. 4 of the then ECSC Treaty, on the ground that "[…] these opinions are merely advice given to undertakings. The latter thus remain free to pay regard to or ignore it […]"[16].

Thereby Article 288 TFEU provides definitions of the acts of secondary law but does not attribute general authority to take such acts to the institutions. According to the principle of conferral the questions of whether and in what form

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11 On the nature of legal acts, *i.e.* of "norms" see generally Hans Kelsen, General Theory of Law and State (Cambridge, MA 1946), pp. 30 et seqs.

12 As an example can serve the Treaty infringement procedure laid down in Article 258 TFEU. There a reasoned opinion by the Commission is an indispensable condition for the Commission to bring the matter before Court of Justice. Further, under Articles 117 and 116 TFEU a recommendation issued by the Commission may be the preliminary to the adoption of a directive. On the other hand, in case of more general opinions e.g. in the field of social policy according to Article 156 TFEU, one can hardly classify these acts as part of a binding norm.

13 Cf. Christian Campbell, Article 249 TEC, in: Hans Smit/Peter Herzog/Christian Campbell/Gudrun Zagel (eds.), 4 Smit & Herzog on The Law of the European Union, 349-30.

14 Commission recommendation of July 23, 1962 concerning the adoption of a European schedule of occupational diseases, O.J. 1962, 80/2188 and Commission recommendation 66/462 on the conditions for granting compensation to persons suffering from occupational diseases, O.J. 1966, 147/2696.

15 ECJ, Case C-322/88, *Salvatore Grimaldi v. Fonds des maladies professionnelles*, 1989 ECR I-4407, para. 18.

16 ECJ, Joined Cases 1 and 14/57, *Société des usines à tubes de la Sarre v. High Authority of the European Coal and Steel Community*, 1957-58 ECR 105, at 115.

the institutions may act can be answered only on the basis of the specific provisions in the Treaties.

It goes without saying that this strict principle of conferral of powers comes to application only in case of binding acts.[17] Solely such acts may be taken only in accordance with the provisions of the primary law, regarding their substance as well as their form.

As recommendations and opinions, although of non-binding character, are nevertheless to be regarded as legal acts mentioned in Article 288, the principle of conferral of powers applies to them likewise. In the result, these both types of secondary law may only be issued by the organs if the Treaty specifically confers a power, or in certain circumstances imposes a duty, to act in such a way.

The Treaty expressly provides for the Council to address recommendations to Member States[18], to the European Parliament[19], to individuals[20], and even to itself[21]. The Treaty also extensively provides for the Commission to make recommendations to the Member States[22] and to the Council[23]. Further, according to Article 292 TFEU to the Commission and the Council is granted the general competence to adopt recommendations.[24] This is the sole provision that explicitly confers on these two institutions a general power to adopt non-binding legal acts whenever they consider it necessary. From that follows *e contrario* that all other institutions, except in cases expressly provided for in the Treaty, have no general or residual authority to make recommendations. But as in respect of non-binding acts not mentioned within the range of legal acts in Article 288 TFEU the strict principle of conferral is not applicable at all, general authority to take such non-binding acts is granted to the Union's institutions. Therefore other institutions may always resort to non-binding "resolutions" and the like.

III. A HIERARCHY OF TYPES OF SECONDARY LAW

The EU legal system already knew a hierarchical structure within the range of secondary law. In practice, the text of a regulation frequently provided that

17 Cf. Christian Campbell, Article 249 TEC, in: Hans Smit/Peter Herzog/Christian Campbell/Gudrun Zagel (eds.), 4 Smit & Herzog on The Law of the European Union, 349-4.

18 See e.g. Article 121, para. 4 TFEU on coordination of economic policy; Article 126, para. 7 TFEU on avoidance of excessive government deficits; Article 148, para. 4 TFEU on the annual employment report; Article 165, para. 4 TFEU on education, vocational training, youth and sport.

19 See e.g. Article 319, para. 1 TFEU on the discharge of the Commission for its budget implementation.

20 Before the *Amsterdam Treaty* entering into force in 1999, recommendations could also be addressed to individuals under former Article 91, para. 1 TEC on dumping within the Community.

21 The former EC Treaty stipulated in ex-Article 121 EC that the Council may make recommendations to itself, meeting in the composition of the Heads of State or Government, with regard to convergence criteria.

22 See, *inter alia*, Article 60 TFEU on liberalization of services.

23 See, e.g., Article 121, para. 2 TFEU on coordination of economic policy; Article 218, para. 3 TFEU on international treaties of the Community.

24 The European Central Bank, on the other hand, by this provision is empowered just to adopt recommendations in the specific cases provided for in the Treaties. As example for that serves Article 129, para. 3 TFEU. This provision states that the European Central Bank may make recommendations to the Council on the European Central Bank Statute.

implementing measures had to be taken either by a Community institution (usually the Commission[25]) or the Member States, or both. Implementation by the Commission frequently took place by means of individual decisions, but often also by means of further regulations, but the implementing act had to be in conformity with the basic regulation. There thus in many cases had been an enforceable legal hierarchy between two legal instruments which had the same denomination.[26]

By the *Lisbon Treaty*, this hierarchy within secondary legislation gets more formalized. Each binding legal instrument will be available at three different levels of law-making: for legislation (Article 289 TFEU), for the adoption of delegated acts (Article 290 TFEU) and for the adoption of implementing or executive acts (Article 291 TFEU). Their position at one of these three levels will be indicated in the formal denomination of the act. Thereby the main novelty is the law-making at an intermediate level, between the purely legislative and purely executive, by the adoption of "delegated acts" according to Article 290 TFEU. These "delegated acts" have their basis in legal acts, adopted in conformity with the legislative procedure (Article 289 TFEU), which authorize the Commission "to supplement or amend certain non-essential elements of the legislative act" (Article 290, para. 1 TFEU). In such a case, the adjective "delegated" shall be inserted in the title of delegated acts (Article 290, para. 3 TFEU). The same applies to simple implementation acts according to Article 291 TFEU where according to para. 4, the word "implementing" shall be inserted in the title. So, there will be three versions of each of the three binding legal instruments enumerated in Article 288 TFEU: legislative regulations, directives and decisions; delegated regulations, directives and decisions; and implementing regulations, directives and decisions.[27] As De Witte points out in that context, thereby the "decision", before the *Lisbon Treaty* entering into force according to ex Article 249 EC merely an executive act, will now be available at all three levels and thereby fulfill rather different functions.[28]

IV. SPECIFICATION OF THE TYPE OF ACT AS LIMITATION OF THE UNION'S POWERS

According to the strict principle of conferral of powers the applicable Treaty provisions normally indicate clearly whether the Union is authorized to act and

25 If the exercise of delegated power was conditioned on the approval of a committee composed of representatives of Member States, this procedure came to be known as Comitology. Cf. Paul Craig/Gráinne de Búrca, EU Law, 4th ed. (Oxford 2008), pp. 118 et seqs.; Paul Craig, EU Administrative Law (Oxford 2006), pp. 99 et seqs.

26 See on this in detail, Bruno de Witte, Legal Instruments and law-Making in the Lisbon Treaty, in: Stefan Griller/Jacques Ziller (eds.), The Lisbon Treaty (Vienna 2008), pp. 79 et seqs. (pp. 91 et seq.).

27 Cf. Paolo Ponzano, 'Executive' and 'delegated' acts: The situation after the Lisbon Treaty, in: Stefan Griller/Jacques Ziller (eds.), The Lisbon Treaty (Vienna 2008), pp. 135 et seqs. (pp. 91 et seq.).

28 Cf. Bruno de Witte, Legal Instruments and law-Making in the Lisbon Treaty, in: Stefan Griller/Jacques Ziller (eds.), The Lisbon Treaty (Vienna 2008), pp. 79 et seqs. (p. 95).

which of its institutions may in fact act. Furthermore, not only the "whether" and "who" thereby is strictly determined, but also the "what", *i.e*. in what form the respective institutions have to act.

However, in some of the provisions conferring powers to the Union, the form in which the act must be cast is left open. In that context three general categories of cases can be distinguished.

In the first case the Treaty authorizes only one type of act out of the range enumerated in Article 288 TFEU. As examples can serve Articles 45, para. 3 no. d, Article 75, or Article 109 TFEU (regulations), Articles 50, para. 1 and 52, para. 2 TFEU (directives) and Articles 105, para. 2 and 108, para. 2 TFEU (decisions). In such cases in which only one type of act is authorized, no other type may be chosen. Arguments can be drawn from the strict principle of conferral of special powers, according to which the grant of a special power not only delimits the scope of the power, but also defines exhaustively the forms provided for its use,[29] as well as from the principle of effective legal protection.[30]

In the second case, the Treaty authorizes two or more types of legal instruments mentioned in Article 288 TFEU. Thereby, the primary law permits a choice to be made by the respective institution among the referred types of acts. As an example can serve Article 46 TFEU (directives or regulations). In such a case, one of the specified types has to be utilized. Any other type, whether mentioned in Article 288 TFEU or *sui generis*, has to be regarded as not allowed. This conclusion again is founded on the strict principle of conferral.

In the third case, finally, the Treaty fails to specify in what form the authority granted has to be exercised. According to some powers, institutions have the competence to adopt "provisions"[31], "rules"[32], "framework programmes"[33], "general action programmes"[34], "programmes"[35] and "guidelines"[36], according to others simply to adopt "measures"[37]. Some provisions merely state that an institution is empowered to "determine"[38], to "decide"[39], to "fix"[40] or to "lay down"[41]. None of these forms of action is mentioned in Article 288 TFEU. Therefore one in general can speak of *unspecified acts*. In all these cases, it has to be determined on the basis of the interpretation of the respective competence and its context, but also in the light of the general rules of interpretation of the Union's legal order, whether the institution may adopt a binding or non-binding

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29 Cf. Christian Campbell, Article 249 TEC, in: Hans Smit/Peter Herzog/Christian Campbell/Gudrun Zagel (eds.), 4 Smit & Herzog on The Law of the European Union, 349-4 et seq.

30 See on this *infra*.

31 E.g. Article 21, para. 2 TFEU, Article 25 TFEU, or Article 192, para. 2 no. a TFEU.

32 E.g. Article 18 TFEU and Article 183 TFEU.

33 E.g. Article 182, para. 1 TFEU.

34 E.g. Article 192, para. 3 TFEU.

35 E.g. Article 182, para. 4 TFEU.

36 E.g. Article 26, para. 3 TFEU.

37 E.g. Article 48 TFEU or Article 192, para. 2 nos. b and c TFEU.

38 E.g. Article 26, para. 3 TFEU and Article 183 TFEU.

39 E.g. Article 108, para. 2 TFEU.

40 E.g. Article 31 TFEU.

41 E.g. Article 91, para. 1 TFEU and Article 183 TFEU.

act and whether one of the types enumerated in Article 288 or an act *sui generis* may be used.[42]

V. DIFFERENT TYPES OF UNSPECIFIED ACTS

The enactment of an unspecified act is laid down in primary law either by not mentioning the type of act explicitly and thereby leaving the institution free in the choice of its action (empowerment to adopt "provisions", "rules" or "measures"; to "determine", to "decide" to "fix", or to "lay down") or by stipulating a type not mentioned in Article 288 TFEU ("programmes", "framework programmes", "general action programmes", "guidelines").

Without doubt, in any such case the institutions may resort to non-binding acts not mentioned in Article 288 TFEU. In case of a non-binding act they even have the right to develop new types of acts like resolutions, programmes and the like.

If, however, the respective power imposes a duty to issue a binding act (such a duty may either result from the provision of the ordinary legislative procedure[43] for the respective power, or be identified by means of interpretation) the institution principally has to make use of one of the types enumerated in Article 288 TFEU.

In any case this is inevitable if the respective competence refers to the ordinary legislative procedure, as this procedure according to Article 289, para. 1 TFEU "[…] shall consist in the […] adoption […] of a regulation, directive or decision […]".[44] It has to be determined by interpretation which one out of these acts has to be enacted in the specific case. In that context, certainly the basic principles of subsidiarity (Article 5, para. 3 TEU) and proportionality (Article 5, para. 4 TEU), as well as the *Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality* will be of importance.[45] This approach finds confirmation in Article 296 TFEU. This provision states in its first sentence that "[w]here the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality".

Beyond that, the general rejection of an institution's right to develop new types of binding norms in case of unspecified acts seems to be mandatory on the

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42 Cf. Christian Campbell, Article 249 TEC, in: Hans Smit/Peter Herzog/Christian Campbell/Gudrun Zagel (eds.), 4 Smit & Herzog on The Law of the European Union, 349-5.

43 Without doubt, this procedure laid down in Articles 289 and 294 TFEU demands the enactment of a binding act. This finds confirmation in Article 289, para. 1 TFEU which states that "[t]he ordinary legislative procedure shall consist in the […] adoption […] of a regulation, directive or decision […]".

44 The same applies to the special legislative procedure, as Article 289, para. 2 TFEU, governing that procedure, also provides for the adoption of either a regulation, a directive, or a decision.

45 According to the law in force there are no nearly unalterable priorities set, as has been done e.g. by a Declaration on Article 100a of the then EEC Treaty, added to the Single European Act (O.J. 1987, L169/24). There, the Member States called upon the Commission in its proposals pursuant to then Article 100a TEEC to give precedence to the use of the directive if harmonization involves the amendment of legislative provisions in one or more Member States. Cf. on this Akos. G. Toth, The legal status of the declarations annexed to the Single European Act, 23 CMLR 1986, pp. 803 et seqs.

one hand because of the basic principles of conferral of special powers and the rule of law, on the other hand because of the principle of effective legal protection.

In the context of the principle of conferral it is of importance to keep in mind that the specification of the type of act has not at least the function of limitation of the competencies of the Union. As HERZOG and CAMPBELL point out correctly, there is a close connection between the grant of power and the act used to exercise it, as the specification of the form that an act may take is constituting a limitation on the scope of the power granted. Since the various types of acts have different legal effects, they define the scope of the power for whose exercise they may be used.[46]

Further, according to Article 297 TFEU solely legislative acts and non-legislative acts adopted in the form of regulations and directives which are addressed to all Member States, as well as decisions which do not specify to whom they are addressed, shall be published in the *Official Journal of the European Union*. As publication of all binding legal acts is an essential attribute of a system dedicated to the rule of law, this fundamental value of the Union[47] also provides an argument for the institutions principally having to make use of one of the types enumerated in Article 288 TFEU.

A third argument against a right to choose an act *sui generis* is the principle of effective legal protection. Although this argument has lost its importance, since the Union's legal order according to the *Lisbon Treaty* now under certain conditions offers legal protection against "acts" in general (Article 263, para. 4 TFEU)[48], whereas the corresponding provision in the former EC Treaty (Article 230, para. 4 EC) granted protection solely against specific types of acts[49].

Be that as it may, Article 296 clarifies in its third sentence that the European Parliament and the Council, "[...] when considering draft legislative acts, [...] shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question".

From this results that even in a case where seemingly an act *sui generis* is explicitly authorized in primary law (as example can serve Article 182 TFEU which requires the enactment of a "framework programme" in the field of research) the respective institutions have to use one of the types enumerated. In the case of the "framework programmes" provided for by Article 182 TFEU this interpretation seems to be mandatory in all events since this act shall be adopted in accordance with the ordinary legislative procedure. As we already have shown

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46 Cf. CHRISTIAN CAMPBELL, Article 249 TEC, in: HANS SMIT/PETER HERZOG/CHRISTIAN CAMPBELL/GUDRUN ZAGEL (eds.), 4 Smit & Herzog on The Law of the European Union, 349-5.

47 See Article 2 TEU.

48 See Article 263, para. 4 TFEU: "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".

49 See Article 230, para. 4 TEC: "Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former". Cf. on this JUERGEN BAST, Handlungsformen und Rechtsschutz, in: ARMIN VON BOGDANDY/JUERGEN BAST (eds.), Europaeisches Verfassungsrecht: Theoretische und dogmatische Grundzuege (Berlin 2009), pp. 489 et seqs. (pp. 519 et seqs.).

supra, this procedure according to Article 289, para. 1 TFEU "[…] shall consist in the […] adoption […] of a regulation, directive or decision […]", therefore a type of act out of the range of Article 288 TFEU.

From this results, by the way contrary to the opinion of some authors[50], that in case of a competence not specifying the form of act or seemingly providing for a specified atypical act, the recourse to a type not mentioned in Article 288 TFEU solely is permitted if the enactment of an act according to the catalogue is not making sense or is even excluded.

As an example for the latter may serve the power of the European Council, acting unanimously, to alter the number of members of the Commission, provided for in Article 17, para. 5 TEU[51]. Such a decision, without doubt is to be qualified as an act of secondary legislation as it is delegated from primary law. On the other hand, no type among the forms enumerated in Article 288 TFEU seems to be adequate to come up to the requirements to alter primary law, even if this power is delegated by primary law. Therefore, the "decision" in the sense of Article 17, para. 5 TEU has to be qualified as an legal instrument *sui generis*. Acts of this type by some authors are called "sui generis decisions" or "general decisions".[52]

VI. THE EXAMPLE OF THE UNION POLICY ON THE ENVIRONMENT

Title XX TFEU on the Union policy on the environment is a textbook example of the establishment of a series of competences authorizing the enactment of unspecified acts. Article 192, para.1 TFEU provides for "action" by the Union, para. 2 allows for "provisions" and "measures", and, finally, para. 3 empowers to the adoption of "general action programmes".

a) "Action", "provisions" and "measures" according to Article 192, paras. 1 and 2 TFEU

As we have shown *supra*, in case of a competence not mentioning the type of (binding) act explicitly and thereby leaving the institutions free in the choice of

50 Cf., e.g., Koen Lenaerts/Piet van Nuffel, Constitutional Law of the European Union, 2nd ed. (London 2005), paras. 17 et seqs.; cf. also, Juergen Bast, Handlungsformen und Rechtsschutz, in: Armin von Bogdandy/Juergen Bast (eds.), Europaeisches Verfassungsrecht: Theoretische und dogmatische Grundzuege (Berlin 2009), pp. 489 et seqs. (pp. 526 et seq.); Thomas Grosz, Exekutive Vollzugsprogrammierung durch tertiaeres Gemeinschaftsrecht?, in: Die Oeffentliche Verwaltung 2004, pp. 20 et seqs. (p. 23).

51 This provision states that "[a]s from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number".

52 See, among others, Bruno de Witte, Legal Instruments and law-Making in the Lisbon Treaty, in: Stefan Griller/Jacques Ziller (eds.), The Lisbon Treaty (Vienna 2008), pp. 79 et seqs. (p. 81). From the point of view of De Witte, the *sui generis* decision plays an important and often underestimated role in Community law, as they are used for detailed institutional arrangements in the internal operation of the European Union, such as in laying down rules of procedure or setting up new committees or new administrative bodies, as well as adopting the budget.

action, the institutions principally have to make use of one of the types enumerated in Article 288 TFEU. Furthermore, choosing either a regulation, a directive, or a decision seems mandatory in the particular case of Article 192, para. 1 TFEU, as this competence provides for "action" according to the ordinary legislation procedure. The same applies to Article 192, para. 2, where the adoption of "provisions" and "measures" in accordance with a special legislative procedure is authorized, as Article 289, para. 2 TFEU, regulating the special legislative procedure, also provides for the adoption of either a regulation, a directive, or a decision.

In practice, the European Parliament and the Council, acting under Article 192 TFEU (resp. the former Article 175 EC), ordinarily made use of regulations[53] and directives[54].

Finally, the question arises whether a recommendation likewise may be used by the respective institutions. As the recommendation notwithstanding its non-binding character may have considerable legal significance, the principle of conferral also applies in that case. Therefore it would not be permitted to issue recommendations on the basis of Article 192, paras. 1 and 2 TFEU. It might very well be possible for the Council as well as for the Commission to launch recommendations on the general competence to adopt recommendations, granted by Article 292 TFEU.

b) "General action programmes" according to Article 192, para. 3 TFEU

Prior to the implementation of a Title on the Union policy on the environment in primary law in general and a power to enact "general action programmes" in particular,[55] the Council issued Community Environment Action Programmes as non-binding resolutions.[56] As we have shown *supra*, in case of absence of a specific competence, institutions may always resort to such non-binding instruments.

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53 See, e.g., Council regulation (EEC) no. 880/92 of 23 March 1992 on a Community eco-label award scheme, O.J. 1992, L 99/1; Council regulation (EEC) no. 1836/93 of 29 June 1993 allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit scheme, O.J. 1993, L 168/1; Regulation (EC) no. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, O.J. 2006, L 190/1.

54 See, e.g., Council directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms (incl. amending acts), O.J. 1990, L 117/1; Council directive 97/11/EC of 3 March 1997 amending directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, O.J. 1997, L 73/5; Council directive 1999/22/EC of 29 March 1999 relating to the keeping of wild animals in zoos, O.J. 1999, L 94/24**;** Council directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, O.J. 1998, L 330/32.

55 Such a power had been inserted into primary law by the *Maastricht Treaty* (c.f. the then Article 130s, para. 3 TEC, O.J. 1992, C 224/1.

56 See, e.g., the Council resolution adopting the *Third Environmental Action Programme* (1982-1986) of 7 February 1983, O.J. 1983, C 46/1; the Council resolution adopting the *Fourth Environmental Action Programme* (1987-1991) of 19 October 1987, O.J. 1987, C 328/1; the resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council adopting the *Fifth Environmental Action Programme* (1992-2000) of 1 February 1993, O.J. 1993, C 138/1.

After the establishment of a specific power in primary law to adopt environment action programmes by the *Maastricht Treaty* entering into force on 1 November 1993, the *Sixth Community Environment Action Programme* of 22 July 2002 (2002-2012)[57] was enacted according to the then Article 175, para. 3 EC. As type of legal act for the first time the "decision" had been chosen, the form which shall be binding in its entirety on those to whom it is addressed.

Now, after the *Lisbon Treaty* entering into force, the same would be the case according to Article 192, para. 3 TFEU. From the principle of conferral of powers and the ordinary legislation procedure applicable in the specific case results that the respective programmes have to be enacted as one of the types out of the range of Article 288 TFEU, whereby the "decision" certainly would fit best.

c) "Guidelines" by the Commission

"Guidelines" issued by the Commission ordinarily have two functions in Union policy on the environment. For one thing, they may serve the purpose of a self-commitment of the Commission, and for another thing, they may have the function to govern Member State's implementation measures.

To begin with, "guidelines" meant as a self-commitment of the Commission in order to indicate how it will exercise its discretion, although not released as binding acts and therefore not covered by the principle of conferral, have at least some legal consequences.[58] As these guidelines govern the Commission's exercise of its scope of discretion granted by a particular competence, people concerned enjoy protection of legitimate expectation. This e.g. is the case with the *Community guidelines on State aid for environmental protection*[59]. The Commission thereby made a self-commitment to apply these guidelines in the assessment of environmental aid according to the former Article 87, para. 3 no. c EC (now Article 107, para. 3, no. c TFEU), thus increasing legal certainty and the transparency of its decision-making.[60] In this context, the ECJ concluded that although internal guidelines did not have the character of legal acts that the administration was always bound to observe, they did nonetheless set out a rule of conduct indicating the practice to be followed. The institution could not depart from this without giving the reasons that led it to do so, since otherwise legitimate expectations and the principles of equality of treatment would be infringed.[61] Thereby the Court made it clear that the Commission cannot readily depart from such general statements in individual cases. Because of this quasi-binding character such guidelines are sometimes qualified as "soft law"[62].

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57 Decision no. 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the *Sixth Community Environment Action Programme*, O.J. 2002, L 242/1.

58 Cf. in detail, Paul Craig, EU Administrative Law (Oxford 2006), p. 641 et seqs.

59 O.J. 2008, C 82/1.

60 See on this, Benedikt Scheel, Klimaschutz durch Umweltschutz- und Energiebeihilfen: Neue Leitlinien der Europaeischen Gemeinschaft, in: Die Oeffentliche Verwaltung 2009, pp. 529 et seqs.

61 Cf., inter alia, ECJ, Case 148/73, *Louwage v. Commission*, 1974 ECR 81, para. 12; see also, Case C-313/90, *CIRFS v. Commission*, 1993 ECR I-1125, paras. 34 et seqs.

62 Cf. Damian Chalmers/Christos Hadjiemmanuil/Giorgio Monti/Adam Tomkins, European Union Law (Cambridge 2006), pp. 137 et seqs.; Paul Craig/Gráinne de Búrca, EU Law, 4th ed. (Oxford 2008), p. 87.

On the other hand, in some current environmental law directives of the Union the Commission is authorized to draw up "guidelines"[63] for implementation measures by the Member States.[64] The major part of these authorizations has not been granted in accordance with the procedure then provided for in ex Article 202 EC, accordingly the Council , in the acts which it adopts, may confer on the Commission powers for the implementation of the rules which the Council lays down. As a consequence, in such cases not founded in the insofar exhaustive ex Article 202 EC, the Commission because of the principle of conferral of powers does not have a competence to enact acts legally binding for the Member States. If, however, there exists an authorization delegated to the Commission according to ex Article 202 EC, this institution has the power to issue the respective regulations or decisions. As the denomination of an act solely indicates but not definitively determines its nature,[65] such a "guideline" may irrespective of its designation be qualified as a regulation or decision.[66] As regards the situation after the *Lisbon Treaty*, there would solely be to assume the power on behalf of the Commission to enact binding delegated acts or binding implementation measures, if the procedure according to Article 290 TFEU resp. Article 291 TFEU had been observed.[67] As has been shown above, in such a case the Commission would have to issue either an implementing regulation, an implementing directive, or an implementing decision. There would be no margin for other binding acts as there is no competence of the secondary legislator to invent types of legal acts beyond its own powers.

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63 On the guideline see in another context, the EC competition policy, HERWIG C.H. HOFMANN, Negotiated and Non-Negotiated Administrative Rule-Making: the Example of EC Competition Policy, in: (43) CMLR 2006, pp. 153 et seqs.

64 See, e.g., Article 9, para. 6, no. d of the so the so-called Seveso II Directive (96/82/EC), O.J. 1997, L 10/13; Article 9, para. 1, Article 14 and Article 24, para. 3 Greenhouse Gas Emissions Trading Directive (2003/87/EC), O.J. 2003, L 275/32.

65 See ECJ, Case 147/83, *Binderer GmbH v. Commission*, 1985 ECR 257, paras. 11 et seqs.

66 Cf. MICHAEL MAYRHOFER, Europaeische Verwaltungszusammenarbeit (not yet published).

67 Cf. MICHAEL MAYRHOFER, Europaeische Verwaltungszusammenarbeit (not yet published); cf. a different view at THOMAS GROSZ, Exekutive Vollzugsprogrammierung durch tertiaeres Gemeinschaftsrecht?, in: Die Oeffentliche Verwaltung 2004, pp. 20 et seqs. (p. 24).