Athens Journal of Law - Volume 6, Issue 1, January 2020 – Pages 9-36

Legal Development of Atypical Acts in the European Union with Some Reference to Spectrum Management Legislation[1]

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The article focuses on the issue of Atypical Acts in the European Union. For facing internal and external challenges, the EU had to adjust its legal framework with a more flexible way but a binding nature. Meanwhile, atypical acts were a category of acts adopted by the European institutions. Since some standard legislative instruments could be lengthy and rigid, many EU institutions use non-standard instruments, atypical acts, as a way to obtain greater flexibility in the lead up to legislation or flanking legislative activity. This article will bring some references of spectrum management within the EU's internal legal order and its external relations to discuss the atypical acts of the EU.

Keywords: *Atypical Acts; European Union; Spectrum Management; Treaty on the Functioning of the European Union; Transparency*

Introduction

It had been a challenging time for the European Union (EU) because those internally, important, even fundamental decisions were on the agenda as its struggled with the Euro crisis and its underlying economic fissures since 2010. For facing those changes, the EU had to adjust its legal framework with a more flexible way but a binding nature. Meanwhile, atypical acts were a category of acts adopted by the European institutions. Because the adoption of the standard legislative instruments lay down in the Treaty on the Functioning of the European Union (TFEU) can prove lengthy and rigid, those EU institutions thus use non-standard instruments, atypical acts, as a way to obtain greater flexibility in the lead up to legislation or flanking legislative activity. These acts are not part of legal acts provided for by the TFEU Arts. 288 to 292. Some atypical acts are provided for by other provisions of TFEU, while others have been developed by institutional practice. Atypical acts are differentiated by their application, which is generally political. Some of them are binding, but this remains limited to the EU's institutional framework.

Atypical acts may also relate to the EU internal organization or have a more general application on specific policy areas. Each of EU institutions has developed a series of instruments in the context of its own activity. These acts essentially

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[1]I would like to thank for the financial support from Institute of European and American Studies, Academia Sinica. Any errors remain solely mine.

https://doi.org/10.30958/ajl.6-1-1 doi=10.30958/ajl.6-1-1

express the institutions' opinion on certain European or international issues. They have general application but may not have binding effects. Atypical acts may also contribute significantly to the legislative and policy process and may yield additional beneficial effects like enhancement of information and transparency, or promotion of public functions. Atypical acts are also common in the external trade relations of the EU.

This article discusses atypical acts of the EU concerning spectrum management within the EU's internal legal order and its external relations. Due to the increase of spectrum demands and the shortage of radio frequencies, issues relating to the establishment of international arrangement of spectrum use have become one of the most important tasks in many countries. On the other hand, current legislations and legal enforcements are insufficient to fit the future legal demands for spectrum management and face difficult challenges. Therefore, how to speed up the legislation and utilise specific political norms to establish suitable regulations for spectrum management now enters a new century both technically and practically. The management and legislation of spectrum resources involves performing many different activities and develops into different models. Different spectrum management approaches are required to deal with the distinct needs of individual radio users and the time period that a frequency band may be open for administrative reviews. For this purpose, the EU had adopted some specific means for spectrum management.

Like more formal conduct of trade relations by means of international agreement. The less formal character of these acts often allows them to be more policy-driven and so makes it easier to address key political concerns relevant for EU external trade relations in a more flexible and current manner. While atypical acts are most commonly associated with internal EU legislation under TFEU, this research sets out to examine the functions and effects of atypical acts and its legal development in the EU. This research hopes to provide knowledge and concrete suggestions concerning the issue of atypical acts in EU. The troubles associated with the use of atypical acts were highlighted in particular by the multilateral negotiations and enforcement of spectrum management legislation. Based on the comparative analysis of the role of atypical acts in the EU's internal legislation and external action for spectrum management, this research explores possibilities of limiting the drawbacks while preserving the benefits of the use of atypical acts in external policies. The article is accordingly structured in some parts, the forms and functions of atypical acts in the EU's internal legislation and the rules governing the use of atypical acts or in the patterns of their practical use by the EU institutions. Based on the discussion of the role and legal development of atypical acts, this article then explores the drawbacks and benefits of the use of atypical acts in spectrum management and its future development.

Role of Atypical Acts in EU Law

Atypical Acts and Sources of European Union Law

The European law, unlike some of its member states' legal systems, does not clearly distinguish between public and private law. The structures of EU law have developed in an evolutionary fashion which is most visible in the development of the different forms in EU law.[2] Generally speaking, there are three sources of EU law: primary law, secondary law and supplementary law. The sources of primary law come mainly from the founding Treaties, TFEU. These Treaties set out the distribution of competences between the EU and its member states and establishes the legal frameworks and powers of the European institutions. Secondary sources are legal instruments also based on the Treaties and include unilateral acts as well as conventions and agreements. Supplementary sources are elements of law not provided for by the Treaties which includes Court of Justice case law, international law and general principles of law, etc.

As one of the secondary sources, unilateral acts can be divided into two categories including those listed in TFEU Art. 288, and not listed in TFEU Art. 288. Those listed in TFEU Art. 288 include regulations, directives, decisions, and opinions, etc. The other comprises so-called "atypical acts" such as communications, recommendations, as well as white and green papers, etc. Through unilateral acts, individual rights are conferred by the institutions acting in an entirely autonomous manner. Increasingly, the use of unilateral forms of act for the implementation of EU law is supplemented with forms of acts, which reflect non-hierarchical relations in the EU's network of "integrated administration."[3] Moreover, the unilateral acts adopted by the European institutions are subject to be reviewed by the European Court of Justice. Along with conventions and agreements, they constitute the secondary legislation of the EU.

Under the terms of the principle of conferral, acts should have a legal basis in the TFEU corresponding to the field in which the European institutions wish to take action. However, TFEU Art. 289 establishes a distinction between legislative acts, namely those adopted following a legislative procedure, and acts which are, by default, non-legislative. The aim of non-legislative acts is to implement legislative acts or certain specific provisions from the Treaties effectively. For example, legislative acts must be published in the European Official Journal and parties to whom an act is addressed may also be informed, as is the case with decisions. As a rule, those acts enter into force on the day they are notified or published in the Official Journal. Exceptionally, non-legislative may enter into force on the 20th day following that of their publication. They may also provide for implementation on a date later than that of their entry into force.

For policy and economic purposes, the Treaties had designed the European institutions may choose the act that they deem most appropriate for implementing their policy and law. For example, where policies are designed to have an incentive effect, the Council or the Commission may opt for a recommendation.

[2]Hofmann (2006).
[3]Hofmann & Türk (2006).

For atypical acts, the EU institutions use this type of non-standard instruments as a way to obtain greater flexibility for legislation purpose or legislative activity. **For example, some atypical** acts are designed to cite the instruments conferring the power to adopt them in citations beginning with "having regard to" and to state the reasons on which they are based.

Meaning of Atypical Acts

As stated above, there has been great creativity in the development of forms of act for the implementation of law in different policy areas and in secondary law.[4] Amongst these evolutionary developments is an increase in the use of atypical acts. Atypical acts are a category of act adopted by the European institutions and relate to EU's internal organization with a more general application on specific policy areas. Under the TFEU Art. 288, the institutions shall adopt regulations, directives, decisions, recommendations and opinions which might process under certain rules with some degrees of binding capacity. Those proceeding had shown that the adoption of the standard legislative instruments could be lengthy and rigid. However, unlike what this wording seems to suggest, the EU decision making is not limited to the types of acts expressly listed in TFEU Art. 288.[5] Thus these acts are described as "atypical" because they are not part of the nomenclature of legal acts provided for by the TFEU Art. 288 to 292.[6]

The use by the European institutions of atypical acts that are legal instruments other than those provided for in the Treaty is a well-known practice. Their existence is recognised indirectly by the draft constitutional Treaty in its Art.I-32(2) which states: "when considering proposals for legislative acts, the European Parliament and the Council of Ministers shall refrain from adopting acts not provided for by this Article in the area in question." Even in the event of such a limitation being accepted by the intergovernmental conference, however, there would be no consequences for the most well-known and widely studied form of atypical acts, a kind of communications of the Commission.[7]

There is a wide variety of atypical acts. Many of them are differentiated by their application, which are generally political or economic oriented ones. Some may be binding, but this remains limited to the EU's institutional framework. Some are provided for by other provisions of the EU founding treaties, while others have been developed by institutional practice. For example, they relate to resolutions, conclusions, communications, etc. These acts have a political application, but they may not be generally legally binding. The distinction between

[4]Hofmann (2006).
[5]See Case 22/70, Commission of the European Communities v. Council of the European Communities (1971); Case 59/75, Pubblico Ministero v. Flavia Manghera and others (1976) and Case 294/83, Parti écologiste 'Les Verts' v. European Parliament..
[6]See Lenaerts &Van Nuffel (2005).See also Bieber & Salomé (1996) at 921; Cairns (2002) at 79; Klabbers (1994) at 997.
[7]Snyder (1994).

typical and atypical acts does not coincide with the issue of their character as legally binding or not, but both may in principle contain hard as well as soft law.[8]

These are forms of act which are not unilaterally set but which are the result of a negotiation between various parties. For example, they relate to the internal regulations of institutions, certain Council decisions, measures adopted by the Commission in the field of competition, telecommunication, consumer protection, etc. It is because the Commission uses atypical acts as legal steering instruments to provide legal instructions to firms, national authorities, or courts. The less formal and legal character of these acts often allows them to be more policy-driven and makes it easier to address key political concerns in a more flexible and current manner.[9]

Types of Atypical Acts

Atypical Acts provided for by the Treaties

In fact, the catalogue of decision making instruments available to EU institutions is open. There are certain acts other than those mentioned in TFEU Art. 288 are referred to in various sections of the Treaty. These acts are essentially intended to facilitate work and cooperation between the institutions. For example, in the context of the procedure for the adoption of international agreements, the Council must send negotiating guidelines to the Commission for the negotiation of the agreements. Under TFEU Art. 121(2), 148(2), 171(1), and 218(2), there are guidelines and guiding directives defined for the institutions used such as Guidelines on the application of Article 81 of the EU Treaty to technology transfer agreements, OJ (2004) C 101/2; Guidelines on Vertical Restraints, OJ (2000) C 291/1; Guidelines on the applicability of Article 81 of the EU Treaty to horizontal cooperation agreements, OJ (2001) C 3/2, etc.

The founding Treaties also provide for other types of act adopted in the context of political dialogue among EU institutions. Under TFEU Arts. 177, 287(3), and 295, ~~the~~ EU institutions may also go further by organizing their cooperation by means of inter-institutional agreements. The EU legislators including European Parliament, the Council and the Commission need to consult each other by common agreement and make arrangements for their cooperation and conclude inter-institutional agreements in compliance with the Treaties.[10] These types of agreements are also atypical acts and may have binding effect, but only for the institutions which have signed the agreements. Under the Lisbon Treaty and TFEU Art. 295, however, it seems the Treaties did not explicitly encourage EU institutions to conclude inter-institutional agreements.[11] In addition, rules of procedure are also one type of atypical acts, as the EU institutions' Rules of Procedure are atypical acts. The founding Treaties provide that EU institutions shall adopt their own Rules of Procedure under TFEU Art. 232, 240, 254, 256, 287

[8]Cosma & Whish (2003). See also Thurer (1990) and Klabbers (1998).
[9]Ruse-Khan, Jaeger & Kordic (2010).
[10]TFEU Article 295.
[11]Weiler (2010).

and 306.[12] The Rules of Procedure lay down the organization, operation and internal rules of procedure of the EU institutions. They have binding effects only for the institutions concerned. Some of these Treaty-based authorizations for action will in practice, however, be exercised in the form of a decision in the sense of TFEU Art. 288.[13]

Under TFEU, there are some types of atypical acts aimed for economic or financial regulations, especially those acts request prompt and decisive responses. For example, Conclusions could be made by the Council on the broad guidelines of the economic policies for the EU;[14] and also Incentive Measures, was regulated under the Parliament and the Council to encourage cooperation between member states and to support their action in the field of employment through initiatives aimed at developing exchanges of information and best practices.[15] Under TFEU Arts 126(4), 127(4), 132(1), and 134(1), Opinions may be delivered by the European Central Bank or some specified committee at the request of the Council or of the Commission, or on its own initiative for submission to those institutions, to keep under review the economic and financial situation of the member states.[16]

Atypical Acts not provided for by the Treaties

Each of EU institutions has developed a series of instruments in the context of its own activity. For example, the European Parliament expresses some of its political positions at international level by means of resolutions or declarations. Similarly, the Council regularly adopts conclusions, resolutions or guidelines following its meetings. These acts essentially express the institutions' opinion on certain European or international issues. They have general application but do not have binding effects and may not be defined by the founding Treaties. Binding character concerning the substance of the atypical act has been confirmed in respect of codes of conduct, letters, or general communications issued by the legislators, the Commission and the Council.[17] Some instruments including declarations, deliberations, resolutions, communications, codes of conduct, timetables, conclusions, notices[18], etc. had developed into different norms as atypical acts.

Moreover, there are "White Papers" and "Green Papers" which aim to facilitate the adoption of subsequent legal instruments either by engendering

[12]TFEU Art. 15. (ex TEC Art. 255).
[13]See Lenaerts & Van Nuffel (2005) at 17-140.
[14]TFEU Arts 121 and 148(1).
[15]TFEU Arts 19(2), 149, 165(4), 167(5), and 168(4)(c).
[16]Petit & Rato (2008).
[17]See Case C-57/95, Commission v. France (1997); Case C-325/91, France v. Commission (1993) and see Case 22/70, Commission v. Council (1971).
[18]See Commission Notice on immunity from fines and reduction of fines in cartel cases;; Commission Notice on Cooperation within the Network of Competition Authorities; Commission Notice on Cooperation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC, OJ (2004) C 101/54; Commission Notice on Informal Guidance relating to Novel Questions concerning Articles 81 and 82 of the EU Treaty that arise in Individual Cases (Guidance Letters); Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EU Treaty.

debate on the issues at stake or detailing the proposals of the Commission. The Commission adopts green papers which are intended to launch public consultations on certain European issues, such as telecommunication service, antitrust,[19] consumer protection,[20] etc. It uses these to gather the necessary information before drawing up a legislative proposal. The purpose of a Green Paper is to foster a debate on a special topic in which it aims to set out a number of issues connected with it and intends to launch a consultation on these issues.[21] Green Papers usually start with an overview of the present situation and regulatory framework. Following the results of the green papers, the Commission sometimes adopts White Papers setting out detailed proposals for European action.[22] White Papers constitute documents for discussion and also aim at laying down the main lines or strategy of action for the future.[23] For detailed implementation and interpretation of Green and White papers, the EU legislators may also adopt some acts by way of Staff Working Papers,[24] Consultation Papers,[25] Documents,[26] or even Letters.[27] For spectrum management, there are some Staff Working Papers accompanying the Commission Communication on Scientific Information in the Digital Age: Access, Dissemination and Preservation.[28] The European Commission publishes different documents in order to launch a debate on the need for Community action in a specific field, and Staff Working Papers analyse those issues in more depth, indicating the next steps that could be taken.[29] By offering some options as a solution, as in Green Papers, Staff Working Documents show the viewpoints in favour of or against a certain measure of the interested parties in a specific field.[30]

[19]See Green Paper on damages actions for breach of the EU antitrust rules.

[20]See Green Paper on European Union Consumer Protection; See also Green Paper on the Review of the Consumer Acquits.

[21]Green Paper on Copyright in the Knowledge Economy; Green Paper on the Protection of Utility Models in the Single Market at II et seq.

[22]See White Paper on damages actions for breach of the EU antitrust rules; White Paper on the review of Regulation 4056/86, applying the EU competition rules to maritime transport; See also White Paper on the modernization of the rules implementing Articles 85 and 86 of the EU Treaty Commission Program No 99/027.

[23]See, e.g., the White Paper, Completing the Internal Market, which states its function as a follow-up at 117, to the Green Paper, on the establishment of the common market for broadcasting, especially by satellite and cable.

[24]Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EU antitrust rules.

[25]DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses.

[26]See Explanatory brochure for Commission Regulation 1400/2002 of 31 July 2002.

[27]See Case C-313/90, Comité International de la Rayonne et des Fibres Synthétiques and others v. Commission of the European Communities (1993).

[28]See Staff working papers accompanying the Commission Communication on scientific information in the digital age: access, dissemination and preservation.

[29]Commission Staff Working Document, Media pluralism in the Member States of the European Union.

[30]See submissions by the music industry and interested parties in the Commission staff working document, Impact assessment reforming cross-border collective management of copyright and related rights for legitimate online music services.

The Commission also adopts several atypical acts in the form of Communications for new policy programs. Some scholar had distinguished certain categories of Communications addressed to the EU Council, the European Parliament and more generally the other institutional actors.[31] For examples, there are some Communications used for spectrum management such as the Commission Recommendation on Relevant Product and Service Markets within the Electronic Communications Sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, COM(2007) 5406 as well as the Report from the Commission to the Council and the European Parliament Evaluation Report on the application of the Council Regulation (EC) No 994/98 of 7 May 1998 regarding the application of Articles 87 and 88 (ex-Article 93) of the EU Treaty to certain categories of horizontal State aid, pursuant to Article 5 of this Regulation, COM(2006)0831 final.

Those Communications may function for different purposes. For example, there are "Informative Communications" which are produced in application of secondary legislation and aim to inform economic operators of an event likely to affect their situation.[32] The Communications may also be termed "purely interpretative", as their aim is merely to express the Commission's interpretation of EU law. Such instruments are adopted in areas where the member states are in charge of the implementation of EU law, in order to help national administrations perform this task, but also in order to make natural and legal persons aware of their rights.[33] This information shall assist administrative institutions as well as the public in assessing the scope, effects and implications of the EU law. Those Communications make explicit the policy of the Commission with regard to areas where it is empowered either by the treaty or by secondary legislation to decide on individual cases.[34] Such instruments are adopted in areas for which the Commission has discretionary power in order to provide guidance to operators as to the way the Commission intends to use its discretion such as information technology and spectrum management, etc.

Functions of Atypical Acts

The type of atypical acts affords a relatively greater degree of flexibility as regards both the formal process for their adoption and the intensity of their legal effects. Particularly, for the Commission, the steering instruments show several regulatory advantages and thus are attractive for EU regulators.

[31]Melchior (1979) at 248.
[32]Melchior (1979) at 244.
[33]Lefevre (2004).
[34]Meesen (1997) at 103.

Steering Effect and Flexibility

There is some non-binding or non decision-type of atypical acts which are not completely devoid of effects and are functioned for public consultations by the Commission over changes in enforcement policies in a given field; some are seeking the behavioural guidance as an alternative to formal legislation or informing third parties of how certain Treaty provisions will be interpreted and applied and how discretion will be used.[35] As regards steering potential in particular, atypical acts allow for a carefully tailored differentiation of those effects on the part of the addressees, affording space for both the adopting institutions in terms of self-binding effect and intensity of enforcement and the addressees in terms of compliance.[36] These steering effects in favour of prevention and enforcement cannot similarly be achieved by any of the classical legal instruments laid down in TFEU Art. 288 because of the defined legal effects characteristics associated with those explicit forms of actions.[37] Therefore, atypical acts are one of an excellent instrument for institutions to prepare the launch of new policies and test their impact.[38]

Moreover, the advantages of atypical acts compared to standard TFEU Art. 288 instruments include the essentially greater flexibility by lowering the formal requirements and enhancing quality throughout the adoption process and in the differentiation of legal effects and enforcement and transparency. Some law instruments may even allow institutions an opportunity to act outside their statutory competences. Such an adoption typically requires only compliance with the internal procedures for decision making or the rules on official representation within the institution involved. In addition, they are not subject to mandatory publication in the Official Journal under TFEU Art. 297.[39] Those advantages include reducing costs, speeding up decision making and reform, and reducing backlog.[40]

Implementation of EU Law

The uses of atypical acts are practically important and frequently used for implementation of EU law. If an institution wishes to act in the form of act provided by the Treaties, it will need to have the competence to act in the specific area. If a certain form of act is explicitly required in primary or secondary legislation, it will be obliged to use that type of act. In the absence of provisions specifying the necessary form of act, the institutions then have to decide whether to use the atypical acts. The EU institutions and member states as well as private actors then interact to create the methods for implementation of EU law and call for the development of flexible forms of acts to establish the new legal regime.

[35]Cosma & Whish (2003) at 36.
[36]Rudloff & Simons (2006) at 169.
[37]Petit & Rato (2008).
[38]Cini (2000).
[39]See Cosma & Whish (2003) at 34; See also Case C-322/88, Grimaldi (1991).
[40]See Cosma & Whish (2003) at 32.

Even in the absence of a specific legal provision, EU law contains, implicitly or explicitly, rules and principles governing the use of certain forms of acts for implementation by EU institutions. These include the general rules and principles on the legal basis for concluding a single case agreement, the law applicable to an agreement, the criteria for legality under EU law as well as the provisions for amendments, termination and problems of performance of a contract.[41] They further include the definition of matters, which can be addressed by contractual means as opposed to unilateral forms of act. Such instruments are important to ensure actual implementation of EU law by member states and individuals, but inversely, they also offer alternatives to hold administrations accountable by means other than hierarchical control through executive hierarchies.[42] They are specifically important to regulate the relation between different actors in European system of integrated administration. Especially current political or economic issues demanded cross-departments cooperation, the development of European integrated administration has therefore increased the need for and the use of atypical acts for implementation of EU law.

Pre- and Post-Regulation

For implementation of law, some categorization drawn between the pre-regulation and the post-regulation function of the act fill the role of atypical act before or after new legal provisions had been created.[43] The pre-law function can be understood in two different ways.[44] First, it can be considered to refer to the fact that a particular atypical act is adopted with the objective of elaborating and preparing future EU legislation and policies. Secondly, the pre-law function can also be understood in a more substantive way, in the sense that atypical acts have paved the way for the adoption of legislation in the future.

For pre-law functions, certain categories of atypical acts in spectrum management law can be distinguished.[45] The major category encompasses preparatory instruments and these instruments are adopted in view of preparing future EU law and policies by providing information on community joint action.[46] The other one includes the interpretative and decisional instruments aimed at providing guidance for the interpretation and application of the existing EU law. Finally, the last one covers what one could call steering instruments aimed at establishing or giving further effects to objectives and policies or related policy areas.[47]

For spectrum management, atypical acts are used in pre- and post-regulation purposes or for soft guidance. Those flexibilities come at the cost of deficits in democratic legitimacy, legality, and legal certainty. Spectrum management legal preparatory instruments in the pre-law area encompass Green Papers and White

[41]See Hofmann (2006).
[42]See Freeman (2000).
[43]Thürer (1990) at 133.
[44]See Ruse-Khan, Jaeger & Kordic (2010).
[45]Senden (2004) at 10.
[46]See Senden (2004) at 118.
[47]See Senden (2004) at 119.

Papers, which are used solely by the Commission, and action programs, which may be adopted by the Council at a later stage. For the sake of efficiency, action plans refer to a limited number of priority initiatives to be launched at the EU level and include a number of schemes put into action for the purposes of informing people about future steps, the next measures to be taken by the Commission, or the promotion of standardization processes.[48]

They also enable an overall review of the legal system structure in the spectrum management field, identifying gaps within it, especially confirming that the disparities between the national systems having a harmful effect on the proper functioning of the internal market.[49] Because action programs are quite often established or integrated on the basis of a principle in the TFEU, in the formal binding character of TFEU Art. 288, their adoption is much more formalised than that of Green and White Papers.[50] Another atypical act which adopts a sort of pre-regulatory function is the Staff Working Paper. While the Commission uses atypical acts for the above purposes, atypical acts have an influence on future legislation in spectrum management field. This is due to the fact that resolutions consider a number of directives, Green Papers, and Staff Working Papers, among others, calling upon the Commission or member states to initiate new legislative incentives or promote clearer legislative solutions.[51] The post-regulation function is fulfilled by instruments which are subsequently adapted to existing EU law with a view to implementing legislation or facilitating accurate interpretation and application.[52] This type of atypical acts is the report from the Commission to the Parliament and to the Council have their source in legal acts themselves or in the resolutions of the Parliament.[53]

Economic Demand and Policy Oriented

The wave of using atypical acts in sensitive core economic areas such as energy, finances, and telecommunications saw the establishments of EU specialised agencies and dealing certain administrative ruling. Following their establishment, further EU legislation has granted powers to these bodies that had been reserved to the EU institutions proper.[54] For instance, the European Securities

[48]See, e.g., Communication from the Commission to the Council and the European Parliament, Stimulating Technologies for Sustainable Development: An Environmental Technologies Action Plan for the European Union, at 4.1.3. The first action plan for innovation in Europe, Innovation for growth and employment at 5.

[49]The first action plan for innovation in Europe, Innovation for growth and employment, at 2.4.

[50]See Annex in Dec. 2228/97/EC of the European Parliament and of the Council, of 13 Oct. 1997, establishing a Community action programme in the field of cultural heritage (the Raphael programme).

[51]European Parliament Resolution of 25 Sept. 2008 on collective cross-border management of copyright and related rights for legitimate online music services; European :European Resolution on the impact of new technologies upon the press in Europe; European Parliament resolution on the situation and role of artists in the EU.

[52]See Senden (2004) at 120.

[53]See, e.g., the Report from the Commission to the European Parliament and the Council, Development and implications of patent law in the field of biotechnology an genetic engineering.

[54]Chamon (2011).

and Markets Authority's (ESMA's) power to impose fines under Regulation 648/2012, or its powers that were contested in Short-selling.[55]

In some areas, the strengthening of existing agencies and the establishment of new ones seems to be the EU's favourite response to policy problems or crises such as the proposed establishment of the Single Resolution Mechanism (SRM) or the alteration of the European Railway Agency.[56] From a legal perspective, some interesting issues have come under the spotlight, showing the problematic nature of the delegation to or conferral of power on these bodies.[57] One issue relates to the use of TFEU Art.114 as a legal basis to empower EU agencies and the other relates to the limits to empowering these bodies. Although the debate on the limits to empowering agencies has mainly been discussed by academics, these developments have really brought the underlying issues to the political institutions and to the Court.[58] The EU institutions can be vested with very significant powers, but this only highlights the fact that the framework governing their functioning is underdeveloped.[59] The proposed inter-institutional agreement could have addressed some problems. In addition, the EU executive should take into account the EU's need to rely on those specialised institutions as well as the atypical acts which the Commission should play in this sphere.[60]

Internal and External Relations

Atypical acts are common in the internal and external trade relationships of the EU. Due to complicated situations regarding EU external trade relations, it may require consensus among the contracting parties which seems increasingly difficult to obtain the agreements. Here, member states and other entities outside of the EU to some extent have moved to atypical acts along the lines of those examined above to pursue their policy goals.[61] For this practice, the EU has successfully relied on atypical acts for raising enforcement concerns in various fora, providing technical assistance, conducting political dialogues, or preparing guidelines to further the agenda for stronger its enforcement region-wide. These acts have certainly contributed to the conclusion of legally binding obligations in the economic field, and the debate on spectrum management is one of the important subjects in trade negotiations.

Some Arguments Regarding the Use of Atypical Acts

The use of atypical acts may contribute significantly to the legislative and policy process for steering and flexible, and may yield additional beneficial effects

[55]See Regulation 648/2012 on OTC derivatives, central counterparties and trade repositories, and Case C-270/12 United Kingdom v Parliament and Council (Short-selling) (2014).
[56]See EU COM (2013)27 final; COM (2013)30 final and COM (2013)31Final.
[57]Chamon (2014a).
[58]Hofmann & Morini (2012) and see also Griller &. Orator (2010).
[59]Geradin (2004) at 9.
[60]See Chamon (2014a).
[61]See Ruse-Khan, Jaeger & Kordic (2010).

like enhancement of information and transparency.[62] In turn, atypical acts may also associate with some drawbacks in terms of democratic legitimacy, legality, and legal certainty.[63]

Administrative Control

With the benefits of flexible and steering, the legislators have frequently used the atypical acts for the political and economic purposes and one of the convenient methods to strengthen the administrative control were through the creation of specialised agencies. It should be noted that the EU legislator not only increasingly relies on EU agencies, but also increasingly instructs member states to create independent agencies in their national legal orders.[64] Meanwhile, the powers of the European legislators including Parliament, Commission and Council vis-à-vis EU agencies could be strengthened.[65] It may be noted that during the Convention on the Future of Europe, the Parliament proposed to allow EU agencies to adopt implementing acts, with a scrutiny mechanism allowing the arms of the legislature and the Commission to repeal such acts.[66]

Some scholar suggested giving the Commission veto rights over agencies' decisions.[67] Whether this would be workable is another question, as the information asymmetry between the Commission and agencies would probably relegate a veto option to a mere theoretical possibility.[68] Enhancing the Commission's position through its representation on the agencies' boards is another possibility.[69] During the wave of agency creation, the Commission had indeed proposed to establish agencies' boards with parity between Council and Commission representatives, which the Commission had proposed this in its draft inter-institutional agreement.[70] Some scholar had challenged that if the EU legislature adopts a number of harmonization measures in different instruments based on TFEU Art.114 and then complements this body of legislation with an act solely establishing an EU agency would be more effective than the other instruments.[71]

With the use of TFEU Art.114 as a legal basis for agency creation was sanctioned by the Court in the ENISA case.[72] In that case, the Court had to deal with two issues raised by the United Kingdom: whether the EU Agency for Network and Information Security's (ENISA) tasks could be qualified as "approximation measures;" and whether organizational arrangements, such as

[62]Ruse-Khan, Jaeger & Kordic (2010).
[63]See Ruse-Khan, Jaeger & Kordic (2010).
[64]Ludwigs (2011) at 44–46.
[65]Griller & Orator (2010) at 29.
[66]See Resolution 17, the European Parliament on the typology of acts and the hierarchy of legislation in the European Union [2002] OJ C31E/126.
[67]See Griller & Orator (2010) at 29.
[68]See Chamon (2010).
[69]See Chamon (2010).
[70]See EU Commission, "Interinstitutional Agreement on the operating framework for the European regulatory agencies".
[71]See Chamon (2010).
[72]See ENISA (C-217/04) 44.

setting up a body, are possible under TFEU Art.114. However, ENISA is an atypical agency in that it is only established for a limited period, even if the institutions keep amending its founding regulation, extending that period every time.[73] The distinction on democratic grounds for using of atypical acts is not of a fundamental nature. One could take the Parliament's democratic scrutiny powers compared the Commission and mirror them in the acts laying down the statutes of EU institutions. EU institutions would find themselves in the same position as the Commission, except for the fact that the Parliament's scrutiny powers over the institutions would only be laid down in secondary law.

In addition, the contents of atypical acts may consist not only of the codification and explanation of the different sources of EU law, but may also include the Commission's own interpretation for EU law, which is not authoritative. Therefore, it is not always easy to distinguish between those aspects of different sources merely from the codification of the Court or the explanation of the Commission's interpretation. Since the atypical act is based on secondary legislation, it is likely to be an accurate reflection of the obligations of member states under the EU law and could be argued that the interpretation of Commission may not be regarded as authoritative. One way to reconcile the need for administrative interpretation with the need to ensure that the type of atypical acts does not alter the obligations of the member states under the EU law is to allow for judicial review over the content of such instruments.

For the scope of limitation in diverging interpretations at national level, the interpretation by the Commission is conducive to uniformity for the EU. Since the Commission has the supervisory responsibilities in spectrum management of EU, it should be aware of the difficulties linked with the implementation of EU law and the demands of the expertise for presentation the communications in a manner suitable for national administrations. Hence it should be concluded that administrative interpretation may be the most efficient means of ensuring greater transparency and information to uniformity for the EU. Obviously, as the aim of administrative aim is to interpret EU law they tend to fulfil a function that is reserved by the Treaty for the Court. It is important, therefore, that the Court be given opportunities to review the interpretation proposed by the Commission. It is not only the jurisdiction of the Court that is challenged, however, but also that of the member states.

One of the main areas of the proliferation of atypical acts was referred to above as being the network structures of EU administrative proceedings. Given the possibility of institutions to enter into force of EU laws, the question arises as to the relation between negotiated agreements between institutions and other parties and unilateral acts of institution's own. Although atypical acts were often used for implementation of certain legal practice, negotiated agreements were often concluded to allow for the implementation of a Commission decision. In this respect, in the reality of EU administrative laws and proceedings, complex relations between Commission decisions and agreements arise.[74]

[73]Vos (2000) at 1122.

[74]Joined Cases T 369/84 & 85/95, DIR International Film (1998); Case C-48/96 P, Windpark Groothusen (1998) and Case 56/77, Agence europeenne (1978).

The non-conclusive typology of acts in EC Art.249 and acts according to Art. 12-15 and 34 does not contain references to agreements or acts. Also, the typology established by Constitutional Treaty Arts I-33 to I-38 does not contain any reference to the possibility of agreements for normative or single case use. However, Art.I-33(2) contains a sort of hidden opening clause for atypical acts by stating that the European Parliament and Council "when considering proposals for legislative acts" "shall refrain from adopting acts not provided for by this Article in the area in question."[75] There is no such clause existing with respect to non-legislative acts. This may lead to the conclusion that the restraint called for with respect to atypical acts for legislation is not required in implementing acts.[76] Within these legal structures of networks in practice, administrative proceedings are established as composite proceedings.

Legislative Remedies

Following years of practice at atypical acts, a framework governing the use of atypical acts has still not been established in primary law. For a long time, the legal requirements of establishing agencies has been discussed and consented was that agency creation required recourse to TFEU Art.352 as a legal basis.[77] The Court also confirmed the primary law, since the entry into force of the Lisbon Treaty, explicitly provides for legal remedies against the acts of EU institutions. It found that the power foreseen in the contested TFEU Art.28 does not correspond to any of the situations defined in TFEU Art. 290 and 291. As a result, the EU legislator, by inscribing Art.28 in Regulation 236/2012, did not undermine the system as set up under TFEU Art. 290 and 291.

In the EU legal order, the infringements the principles of legality and legal certainty in particular which may potentially ensue from atypical acts of the institutions are not acceptable. Consequently, general remedies must be found to forestall such infringements and enhance the positive effects of atypical acts. It suggests including in the Treaty a rule whereby the legislator should abstain from adopting non-standard acts on a subject when legislative proposals or initiatives on the same subject have been submitted to it. The use of non-standard acts in legislative areas may give the erroneous impression that the EU legislates through the adoption of non-standard instruments.

For the Treaty of Lisbon, these proposals were not implemented. Nonetheless, that Treaty shows a limited tendency to reduce the proliferation of atypical acts by aligning a few of them with standard instruments.[78] By contrast, the remedies discussed in literature aim at the establishment of some forms of administrative rule making.[79] The simplest suggestion in this regard extends to the amendment of TFEU Art. 288 to include at least the most commonly used instruments, the

[75]Hofmann (2003).
[76]See Hofmann (2003).
[77]Lauwaars (1979) at 376.
[78]See Lenaerts & Van Nuffel (2005).
[79]See Rudloff & Simons (2006) at 178.

applicable procedures, and their legal effects.[80] Likewise, it may be sufficient to distinguish clearly between the procedural and substantive aspects of atypical acts and to elaborate the procedural rules while continuing to allow for flexibility in terms of the differentiated application of substance.[81]

The other suggestion is to focus more on the link between procedural rules and legal quality of atypical acts with the delegation of a power for the Commission to issue formal implementing rules, which would be similar to block exemption regulations, and could potentially be coupled with control and participation mechanisms.[82] It is argued that such formalization would also facilitate judicial control over such acts because such proposals significantly limit the procedural flexibility afforded for the adoption of atypical acts.[83] In particular, formal implementing rules comparable to block exemption regulations would necessarily be generally applicable law, thus removing the possibility of pursuing steering effects and enforcement or testing policy changes.[84] It may not seem beneficial to do away with those information and consultation documents in favour of a limited number of binding implementing rules. This solution therefore clearly goes too far in limiting the use of atypical acts.

The practice has shown that procedural flexibility in the adoption of atypical acts may decrease the number of institutional players involved in decision making and increase the hurdles in the way of interested parties getting involved in the decision making process.[85] The wide variety of atypical acts and the range of policy areas concerned may render flawed an approach which sought to adopt one-size-fits-all approaches, thus imposing the same rules for all types of instruments over all policy areas.[86] The assessment or balancing of positive versus negative effects associated with the use of soft atypical acts is therefore likely to differ for each type of act and the various policy areas.[87] The probable need for a differentiated approach for atypical acts should not detract from the need to lay down a relevant set on the next occasion for European integration.

Judicial Review

Due to political and economic changes, EU institutions have to frequently use the atypical act to adjust themselves for both internal and external markets as well as speed up the policy process. Using such non-standard and non-binding acts under TFEU, the European Courts had to face and explicitly begin to address the questions of the nature of delegations and the positions of EU institutions in implementing EU policies in the absence of a clear constitutional mandate.[88] It is

[80]See Bieber and Salomé (1996) at 924.
[81]See Cini (2000) at 24.
[82]See Rudloff & Simons (2006) at 171 and 178.
[83]See Rudloff & Simons (2006) at 175.
[84]See Ruse-Khan, Jaeger & Kordic (2010).
[85]Christiansen & Polak (2009); Peters (2004).
[86]See Ruse-Khan, Jaeger & Kordic (2010).
[87]See Cini (2000) at 25.
[88]Hofmann & Morini (2012).

the Court's obligation to review and interpret the meanings as well as effects of those acts while disagreement or disputes rising under circumstances.

TFEUArt.263 states that "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties"[89] In the case of France v. Commission (1993), the Court states that "the principle of legal certainty, which is part of the Community legal order, requires Community legislation to be clear and its application to be foreseeable for all interested parties. As a result of that requirement, any act intended to have legal effects must derive its binding force from a provision of Community law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis, failing which the act in question will be null and void."[90]

The Court has interpreted this formula as meaning that an action for annulment is possible "against any measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects."[91] In the Short-selling case, the Court had noted that a legislative act adopted on that legal basis must comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the member states and have as its object the establishment and functioning of the internal market.[92] The problem is that such judicial review is not possible when the Commission remains within the realm of interpretation. In other words, as long as the Commission's interpretation of EU law does not impose further obligations on the member states, there is no possibility for the Court to review the compatibility of this interpretation with its own case law on the subject through a direct action for annulment. Although the Court seemed to have a conceptual difficulty with the idea of assessing the validity of non-binding acts, it did so nevertheless by comparing the directions for interpretation included in the notice with its own appraisal of EU law.

The Court has delivered an important ruling, sanctioning future use of atypical acts but without, however, setting limits to the further development of this process. The Court found TFEU Art.114 to be a suitable legal basis to empower the legality of a number of other institutions. Using TFEU Art.352 rather than TFEU Art.114 would have put a serious brake on future creation of specialised agencies and use of atypical acts, since every member state would have gained a veto power and it would have been doubtful whether TFEU Art.114 could have been used. In other words, the Court had rejected the use of TFEU Art.114 to establish a new legal form for a cooperative society that would exist alongside the existing national legal forms and found there was no "approximation."[93]

[89]TFEU Art. 263 (ex Art. 230 TEC).
[90]See Case C-325/91, France v. Commission (1993).
[91]Case 22/70, Commission v. Council, (European Agreement on Road Transport) (1971).
[92]See Case C-270/12, *United Kingdom v Parliament and Council (Short-selling)* (2014) 100.
[93]See Case C-436/03, European Cooperative Society [2006] E.C.R. I-3733, 44.

In certain cases, the Court scrutinises acts adopted by the institutions on the merits of their substance, not their form or denomination.[94] The test here is whether the decision maker actually intended the instrument to have legal effects, even if its form *prima facie* indicates a non-binding nature.[95] Where an act of whatever form or denomination is assessed as essentially constituting a decision or regulation in the meaning of TFEU Art. 288, that act is to be judged by the same standards.[96] For such quasi-decisional, binding acts, the Court therefore exercises strict control of legality in the sense that they must not infringe or alter the rules established by the Treaty.[97]

In theory, the monopoly of the Court over the interpretation of EU law seems fairly well-protected against the risk of encroachment on the part of the Commission. However, in order to review the interpretation of the Commission, the Court depends on other actors, particularly the member states themselves, to initiate procedures. Although the legislative process of setting up and empowering institutions would have partly diminished the role of the European Parliament, the Court's ruling had supported on this point, even if the EU's legitimacy would benefit from reducing the emphasis on the legislator's large discretion and emphasizing, instead, the legislator's duty to elaborate on why powers should, exceptionally, be vested in certain institutions.[98] Adding to these uncertainties is the fact that the Courts are not bound by the interpretation of norms suggested by the Commission in a steering document,[99] so that individuals cannot be fully certain to act in conformity with the law even when complying with such an instrument.[100]

With the concern of allowing the EU to fulfil its objectives and the involvement of EU institutions, the Court's ruling appears much more like a simplification exercise. The Court has sanctioned the use of atypical acts, since the institutions have resorted to such acts already for a certain period, but that the Court has ruled that it is perfectly possible for atypical EU bodies, rather than the institutions, to adopt equally atypical acts.[101]

Publication and Lack of Transparency

The EU legislation has stipulated a comprehensive principle of transparency for many institutions, not least with the aim of promoting the public involvement in the legislative process to promote better governance and ensure the public participation, - EU institutions, bodies, and offices thus should conduct their work

[94]See Case 60/81, IBM v. Commission (1981); Joined Cases T-125 and 127/97, Coca-Cola Co and Coca Cola Enterprises Inc. v. Commission (2000).
[95]See Case C-57/95, Commission v. France (1997); Case C-325/91, France v. Commission (1993).
[96]See Case C-57/95, Commission v. France (1997). See also Case C-325/91, France v. Commission (1993).
[97]See Ruse-Khan, Jaeger & Kordic (2010).
[98]Vos (2003).
[99]See Case C-313/90, CIRFS v. Commission (1993); Case C-311/94, IJssel-Vliet Combinatie BV v. Minister van Economische Zaken (1996); Case C-382/99, Netherlands v. Commission (2002).
[100]See Cosma and Whish (2003) at 34.
[101]See Chamon (2014) at 159.

as openly as possible.[102] However, the negotiations of law making process in the EU had long time suffering from lack of transparency, the scope of the negotiations and draft documents are typically not publicly accessible. Interested parties cannot voice their concerns during negotiations, but are confronted with the negotiation outcome.[103]

Since atypical acts are not subject to mandatory publication in the Official Journal, it may become more difficult for potential addressees to become aware of policy changes affecting them. Because atypical acts are not binding on individual parties, parties affected merely by the steering effect resulting from such acts cannot attack them before the Courts. Due to its difficult to access, ambiguous in language, of unclear normative status, certain atypical acts may result in a decrease in intra-institutional as well as third-party transparency. The wide variety of atypical acts used in practice thus has been criticised for its systemic complexity and unclear status, entailing a lack of legislative and administrative transparency *vis-à-vis* third parties.[104] Because remedies towards a better balancing of the positive and negative effects, the recourse to atypical acts can be envisaged on the basis of the existing framework of primary law for confidentiality and access to documents. It was shown that some atypical acts, like Green Papers, pursue precisely the effect of involving a broad range of interested parties in the decision making process via public consultations, so that the negative effects on transparency cannot be deemed to exist generally in relation to those atypical acts.[105]

For the area of spectrum management, recourse to atypical acts in the pre-negotiation and negotiation processes should incorporate minimum standards of third-party transparency and public consultation and establish clear rules for negotiation stages which are to be publicised as compared to information that is to be kept secret. This means that whatever a given instrument is formally designated as, the examination of its substance may lead to the conclusion that it essentially constitutes a decision or regulation in the meaning of TFEU Art. 288.[106]

Clearly, the function of public information and enhancement of transparency is particularly important in practice for private individuals seeking to anticipate policies and actions.[107] With impacts on the behaviour in economic and normative compliance terms, the public information function presented by an institution to third parties may also be seen from the point of view of its steering aspect. The recourse to atypical acts has accordingly and rightly been described as a form of regulation by information or publication.[108] Atypical acts may contribute significantly to the legislative and policy process in terms of soft steering and may yield additional beneficial effects like the enhancement of information and transparency.

[102]TFEU Art.15(1).
[103]See Ruse-Khan, Jaeger & Kordic (2010).
[104]See Cosma & Whish (2003) at 25.
[105]See Ruse-Khan, Jaeger & Kordic (2010).
[106]Ruse-Khan, Jaeger & Kordic (2010).
[107]See Case C-310/99, Italy v. Commission (2002); Case C-387/97, Commission v. Greece (2000).
[108]See Rudloff & Simons (2006) at 153, 164, and 169.

Internal Members and Third Party Effects

The European Court has recognised two aspects of indirect steering effects of atypical acts which carry legal significance for third parties in terms of the creation of enforceable obligations.[109] First, the Court obliges national courts to take non-binding instruments into account to comply with their obligation to interpret national law in conformity with EU law or where those instruments are designed to supplement binding EU law provisions.[110] Second, the EU legal order protects the legitimate expectations of parties that the institution deliberately issuing information on its policy or position in a given context will adhere to that policy line.[111] In other words, even atypical acts incapable of formally binding third parties bear a certain self-binding effect on the issuing authority. If the self-binding character is not respected, any discrepancies between the policy announcement in the atypical act and a subsequent binding individual decision can be attacked in the course of an action for annulment of that later decision.[112]

Although the type of atypical acts may not be binding on the member states, it may encroach upon the member states' areas of competence. Because atypical acts are a useful source for administrative means, such acts are likely to influence the application of the EU law by the national administrations. Consequently, it appears that there should be some form of control by the member states over such instruments. The substantial flexibility afforded by atypical acts in terms of differentiation of their legal effects may also give rise to uncertainties in the determination of the addressees and even of legal effects on a scale ranging from no binding effect to self-binding effects to full third-party binding effect.

The less formal and legal character of these acts often allows them to be more policy-driven, and so makes it easier to address key political concerns relevant for EU in a more flexible and current manner. On the EU's response to the Euro crisis, this style of function is at a time when the coherence of the EU legal order under pressures.[113] For example, some acts have tended to focus strongly on the enforcement of spectrum management in particular. Apart from entering into binding agreements among member states which include specific additional obligations to enforce the regulations of spectrum management, the EU uses various flexible tools which can be considered as atypical acts within EU.

It is not surprising that the EU is pursuing a policy agenda which demands effective operation, and especially the policy enforcement for spectrum management. For the types of atypical acts, one is for systematically raising enforcement concerns of spectrum management in multilateral, regional, and bilateral contexts. The EU plans to monitor the compliance of national enforcement legislation, in particular in the priority countries. Bilaterally and regionally, the emphasis is placed on extending and clarifying enforcement

[109]See Ruse-Khan, Jaeger & Kordic (2010).
[110]See Case C-322/88, Salvatore Grimaldi v. Fonds des Maladies Professionnelles (1991); Case C-207/01, Altair Chimica SpA v. ENEL Distribuzione SpA (2003)..
[111]See Case C-313/90, CIRFS v. Commission (1993); Case C-409/00, Spain v. Commission (2003); Case C-91/01, Italy v. Commission.
[112]See Case C-443/97, Spain v. Commission (2000).
[113]Dawson & de Witte (2013) at 818.

provisions in agreements. The other is for technical assistance, realizing that improving the enforcement involves not primarily drafting legislation but training professionals, police forces, and customs officials and setting up relevant task forces and agencies. The EU wants to focus its technical assistance accordingly and the enforcement assistance will focus on identified priority countries or move away from being merely demand driven to integrate specific EU concerns.

In addition, the atypical acts are designed for political dialogue, institutional cooperation, raising public awareness, and creating public-private partnerships. The EU strategy includes several other elements such as a political dialogue should strongly convey the message that the EU is willing to assist member states in raising the level of enforcement, but also that it will not refrain from using the instruments at its disposal in cases where deficient enforcement is harming its right-holders.[114]

For external relationship, the EU's strategy comprises a comprehensive action plan to facilitate the enforcement of spectrum management in third countries from technical assistance and utilizing multilateral, regional, and bilateral fora for bringing dispute settlement cases and related sanctions. It involves mainly soft law mechanisms such as surveying and monitoring the enforcement in third countries, initiatives for negotiating stronger enforcement provisions, providing tailored technical assistance, conducting political dialogues, or preparing guidelines.[115] Most of these actions or acts are of a merely political nature with no direct legal effect. In this regard, they are flexible tools for responses of the EU's objective of spectrum management.

Conclusion

For policy demands and economic integrations, the EU legal system have developed into an evolutionary fashion and one of these evolutionary developments is an increase in the use of atypical acts. These are forms of act which are non-standard legislative instruments and non-listed legal acts under TFEU Art. 288 to 292. For steering legislation purpose and implementing the policy and law, EU institutions increasingly choose this type of non-standard instruments to obtain greater flexibility. In particular, the uses of atypical acts are common in the sensitive core economic areas such as telecommunications sector and proved by the establishments of EU specialised agencies to deal with certain administrative ruling. However, the use of atypical acts may also associate with some drawbacks including lack of transparency, shortage of legal certainty and legitimacy, etc.

For examples, the Commission has used atypical acts as legal steering instruments to provide legal instructions to firms, national authorities, or courts for the purpose of spectrum management. Such instruments are adopted in areas for which the Commission has discretionary power in order to provide the guidance to

[114]European Commission - DG Trade, Strategy for the Enforcement of Intellectual Property Rights in Third Countries (2005).
[115]See Ruse-Khan, Jaeger & Kordic (2010).

operators as to the way the Commission intends to use its discretion in the areas of information technology and spectrum management. The less formal and legal character of these acts often allows them to be more policy-driven and makes it easier to address key political concerns in a more flexible and current manner especially the high-speed changing information technology. Therefore, atypical acts are an excellent instrument for institutions to prepare the launch of new policies and test their impacts. While atypical acts are most commonly associated with internal EU legislation under TFEU Art. 288, the article then tried to examine atypical acts of the EU concerning spectrum management in the EU's legal order and its development.

Since the Commission has the supervisory responsibilities in spectrum management, the administrative interpretation may be the most efficient means of ensuring greater transparency and publication for the EU itself and member states. However, the Commission's own interpretation for EU law may not be authoritative. Thus, there are some proposals for remedies in literature aimed at the establishment of some forms of administrative rule making. One suggestion is making the amendment of TFEU Art. 288 to include at least the most commonly used instruments, procedures, and effects; the other suggestion is to focus on the link between procedural rules and legal quality of atypical acts to block exemption regulations. However, the wide variety of atypical acts and the range of policy areas concerned may lower the possibility for seeking to adopt one-size-fits-all approaches or imposing the same rules for all types of instruments over all policy areas.

In the other way, due to the Court's obligation to review and interpret the meanings as well as effects of atypical acts, the European Court may be given the opportunities to review the interpretation proposed by the Commission. Reviewing such non-standard and non-binding acts under TFEU, the Courts had to face and address the questions of the nature of delegations and the positions of EU institutions in implementing EU policies in the absence of a clear Treaties definition. The other issue is that such judicial review is not possible when the Commission remains within the realm of interpretation or without imposing further obligations on the member states. Thus the Court's review may be limited to case-by-case basis but not on general applicable rules. Additionally, because atypical acts are not binding on individual parties, parties affected merely by the steering effect resulting from such acts cannot attack them before the Courts. The wide variety of atypical acts used in practice thus has been criticied for its systemic complexity and unclear status.

For the area of spectrum management, the function of public information and enhancement of transparency is particularly important in practice. Because the spectrum is one of the natural resources shared by the whole community, the use of atypical acts may contribute significantly to the legislative and policy process in terms of soft steering and for private individuals seeking to anticipate policies and actions. On the other hand, since the spectrum resource covers areas of military, aviation, maritime, business, and emergency uses, recourse to atypical acts should keep minimum standards of third-party transparency and public consultation and

establish clear rules for negotiation stages in the pre-negotiation and negotiation processes.

Atypical acts are also common in the internal and external trade relationships of the EU. For EU internal members, although the type of atypical acts may not be binding on the member states, it may encroach upon the member states' areas of competence. Because atypical acts are a useful source for administrative means, such acts are likely to influence the application of the EU law by the national administrations. Under this article, the comparative analysis shows that whereas atypical acts in the internal context are generally used to enhance decision making transparency and the public involvement and to achieve better enforcement or post-regulatory guidance, virtually few of those effects can be associated with atypical acts. For external relationship, due to its complicated situations between the EU and its major trade partners, it may require consensus among the contracting parties which seems increasingly difficult to achieve the agreement. Therefore, how to upgrading effective operations in spectrum management and balancing the drawbacks and benefits of the use of atypical acts would be a challenging task for the EU itself and member states.

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