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## Delegated and implementing acts in the proposal of “hydrogen and decarbonized gas market package” – meaning and functioning<sup>1</sup>

**Abstract:** The European Commission presented two proposals on 15 December 2021 with the objective of reforming the internal gas market by introducing hydrogen and decarbonized gases. The main objective of the paper is to present the legal characteristics of the delegated and implementing acts provided in the provisions of these proposals from the point of view of the theory of administrative law. On this basis, we shall attempt to assess their importance in shaping the regulations for biomethane and hydrogen. This objective will be achieved by outlining the assumptions of these proposals, briefly presenting the delegated and implementing acts provided for in them and analysing the nature of these acts, including the differences between them and the effects of their adoption.

**Keywords:** delegated act, implementing act, tertiary acts, EU administrative law, EU administrative acts.

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<sup>1</sup> “Hydrogen and decarbonized gas market package” is a common name of both the proposal for a Directive of the European Parliament and of the Council on common rules for the internal markets in renewable and natural gases and in hydrogen and proposal for a Regulation of the European Parliament and of the Council on the internal markets for renewable and natural gases and for hydrogen (recast); see: European Commission, “Hydrogen and decarbonized gas market package,” [https://energy.ec.europa.eu/topics/markets-and-consumers/market-legislation/hydrogen-and-decarbonised-gas-market-package\\_en](https://energy.ec.europa.eu/topics/markets-and-consumers/market-legislation/hydrogen-and-decarbonised-gas-market-package_en) (accessed: 04.06.2023).

## Introduction

Although Directive 2009/73/EC applies not only to natural gas, but also to other types of gases, including biogas and gas from biomass,<sup>2</sup> it has not led to a harmonized increase in the production and consumption of renewable or low-carbon gases throughout the EU.<sup>3</sup> The European Commission (Commission) presented two proposals on 15 December 2021 with the objective of reforming the internal gas market by introducing these gases. The proposed Directive<sup>4</sup> and the proposed Regulation<sup>5</sup> will recast the Directive 2009/73/EC<sup>6</sup> and the Regulation 715/2009.<sup>7</sup> In addition to many changes that are to make biomethane and hydrogen in gas networks, the proposals provide for many provisions empowering the institutions of the European Union (EU), in particular the Commission, to adopt acts referred to as “delegated” or “implementing” acts. This is not a new solution in natural gas regulations (Regulation 715/2009 empowers the Commission to adopt network codes by adopting delegated acts), however the proposed Directive and the proposed Regulation will become the basis for a substantial increase in adoption for delegated and implementing acts.

The main objective of the paper is to present the legal characteristics of the delegated and implementing acts provided for in the proposed Directive and the proposed Regulation from the point of view of the theory of administrative law. On this basis, we shall try to assess their importance in shaping the regulations for biomethane and hydrogen. This objective will be achieved by outlining the assumptions to the proposed Directive and the proposed Regulation, briefly presenting the delegated and implementing acts provided for in them and analysing the nature of these acts, including the differences between them and the effects of their adoption.

The research focuses on draft EU acts of law, as well as current provisions of primary and secondary law. The main research method used in the study is the dogmatic law method.

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<sup>2</sup> Article 2(1) of Directive 2009/73/EC.

<sup>3</sup> REGATRACE, “Mapping the state of play of renewable gases in Europe,” <https://www.europeanbiogas.eu/mapping-the-state-of-play-of-biomethane-in-europe> (accessed: 10.05.2023).

<sup>4</sup> Proposal for a Directive of the European Parliament and of the Council on common rules for the internal markets in renewable and natural gases and in hydrogen, COM/2021/803 final.

<sup>5</sup> Proposal for a Regulation of the European Parliament and of the Council on the internal markets for renewable and natural gases and for hydrogen (recast), COM/2021/804 final.

<sup>6</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211 of 14.08.2009, p. 94–136).

<sup>7</sup> Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ L 211 of 14.08.2009, p. 36–54).

# 1. Outline of future common rules for the internal natural gas and hydrogen markets

The basic idea behind the proposed Directive and the proposed Regulation is to transform the single gas market into internal natural gas and hydrogen markets. The Commission wants to achieve that by establishing different legal regimes for different gases. The terms “natural gas market” and “hydrogen market” are not adequate, because the basis for differentiating the markets will be the presence or absence of methane in the gases that are traded. Therefore, all gases containing methane will be governed primarily on the basis of current laws on the single gas market. However, renewable and low-carbon gases will be given favourable regulatory treatment in comparison with fossil gases. The essence of the rules for hydrogen will be similar to the essence of the current laws and the future regulations for natural gas, but there will be some differences, which are worth highlighting.

## 1.1. Future natural gas market regulations – incentives for renewable and low-carbon gases

The proposed natural gas market regulations will be similar to those that are currently applicable (the core of which are unbundling rules, Third Party Access rules and strong powers of the regulatory authorities to interfere in market relations), but they will address all methane gases, including fossil methane gases and renewable or low-carbon methane gases.<sup>8</sup> To achieve that, the Commission proposed an inclusive definition of the term “natural gas”, which will cover “all gases that primarily consist of methane, including biomethane, or other types of gas, that can technically and safely be injected into and transported through the natural gas system.”<sup>9</sup> The objective of proposing such a definition is to place a plethora of gases, including renewable gases<sup>10</sup> and low-carbons gases<sup>11</sup> onto the market. This distinction is crucial, because the proposed Directive and the proposed Regulation provide numerous incentives for renewable and low-carbon gases, in order to effectively guarantee their presence on the market. We shall focus on just three examples.

The first is the limitation of the possibility of refusing access to the network for renewable and low-carbons gases. Member States will be obliged to enable renewable and low-carbon gases to gain access to the market and infrastructure

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<sup>8</sup> However, it should be emphasized that the recast will change this environment to some extent, in particular in the area of consumer protection.

<sup>9</sup> Article 2(1) of the proposed Directive.

<sup>10</sup> Article 2(2) of the proposed Directive.

<sup>11</sup> Article 2(11) of the proposed Directive.

regardless of whether the renewable and low-carbon gases production facilities are connected to distribution or transmission networks. This rule is confirmed by the proposed Directive<sup>12</sup> and the proposed Regulation.<sup>13</sup> However, it is not always possible to connect a production facility to the network and the most common reason for that is the lack of network capacity. In such a situation, with regard to natural gas, transmission system operators (TSO) and distribution system operators (DSO) will be able to refuse access or connection to the natural gas system.<sup>14</sup> The separate grounds for refusal are specified for renewable and low-carbon gases. Firm access for them may only be limited to offering capacities which are subject to operational limitations in order to ensure economic efficiency.<sup>15</sup> So, in principle, infrastructure operators will only exceptionally be able to refuse access for renewable and low-carbon gases.

The second is the possibility of organizing a distribution system based on an entry-exit system. Basically, under an entry-exit gas system, reservation of capacity is split into entry capacity, to transport gas from the injection points to a virtual balancing (trading) point, and exit capacity, to transport gas from the balancing (trading) point to the exit points in the system. At the virtual balancing (trading) point, gas is traded regardless of where it is physically located. The Commission views an entry-exit system as a tool enhancing competition on the market.<sup>16</sup> Only transmission systems are currently based on the entry-exit system. Renewable and low-carbon gases are produced and sold locally, so they have limited access to virtual balancing points and a fully competitive market. Therefore, the Commission suggests that, if possible, Member States should also implement an entry-exit system in distribution systems.<sup>17</sup> However, there is no obligation to do this, so the decision to implement it is up to each Member State.<sup>18</sup>

The third is the obligation to apply discounts in capacity-based tariffs for renewable and low-carbon gases. This will include three types of discounts:

1. a discount for inputting from renewable and low-carbon gas production facilities;
2. a discount for tariffs at entry points from and exit points to storage facilities (unless a storage facility is connected to more than one transmission or distribution network and used to compete with an interconnection point), and
3. a discount on the cross-border tariffs at points of interconnection between Member States.

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<sup>12</sup> Article 26 of the proposed Directive.

<sup>13</sup> Articles 13 and 33 of the proposed Regulation.

<sup>14</sup> Article 34(1) of the proposed Directive.

<sup>15</sup> Article 34(3) of the proposed Directive.

<sup>16</sup> Item 18 of the recitals of the proposed Regulation.

<sup>17</sup> Item 20 of the recitals of the proposed Regulation.

<sup>18</sup> Article 2(30) of the proposed Regulation.

With regard to the first type, a discount of 100% is to be applied to the respective capacity-based tariffs for scaling-up the injection of renewable gases and a discount of 75% on low-carbon gases.<sup>19</sup> As for the second type, a discount is to be set at a level of 100% in the Member States where the renewable and low-carbon gas is first injected into the system.<sup>20</sup> As for the third type, network users will receive a discount of 100% on the capacity-based tariff from the transmission system operator at the points of interconnection between Member States for renewable gases and 75% for low-carbon gases, after providing proof of sustainability to the respective transmission system operator, which is based on a valid sustainability certificate pursuant to Articles 29 and 30 of Directive (EU) 2018/2001 and registered in the Union database.<sup>21</sup>

## 1.2. Hydrogen legal framework – tested legal framework with a few changes

The current legal framework only allows the introduction of hydrogen onto the market to a small extent<sup>22</sup> and the need for change here was emphasized both in the EU strategy on hydrogen<sup>23</sup> and in REPowerEU.<sup>24</sup> The Commission decided to create a separate regulatory framework for hydrogen, essentially based on regulations on the single market in gas. Nonetheless, this is not simply one-to-one copying of existing laws, but rather maintaining a certain idea, which is to create the basis for regulated competition.<sup>25</sup>

The future hydrogen market should be understood as the market of “hydrogen of a high grade of purity.”<sup>26</sup> Therefore, the Commission does not envisage the emerging market and the (infrastructure) system as being a place containing mixes of various gases. To some extent, it will be acceptable to mix gases, including methane and hydrogen, in the natural system, but that is not currently a dominant trend. Interestingly, neither the proposed Directive nor the proposed Regulation contain a definition of the term “hydrogen”. It can be inferred from the draft laws

<sup>19</sup> Article 16(1)(a) of the proposed Regulation.

<sup>20</sup> Article 16(1)(b) of the proposed Regulation.

<sup>21</sup> Article 16(5) of the proposed Regulation.

<sup>22</sup> C. Banet, *Building Europe's Hydrogen and Renewable Gas Markets: Short-Term Priorities for Grid Regulation*, Bruxelles 2023, p. 24.

<sup>23</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions “A hydrogen strategy for a climate-neutral Europe” COM/2020/301 final.

<sup>24</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions “REPowerEU Plan” COM/2022/230 final.

<sup>25</sup> More on the essence of the term “regulated competition”: K. Talus, *Introduction to EU Energy Law*, Oxford 2016, p. 6.

<sup>26</sup> Article 2(5) of the proposed Directive.

that a division into renewable and low-carbon hydrogen will be provided, but only a legal explanation of the latter can be found in the documents reviewed.<sup>27</sup>

The establishment of a separate hydrogen market is followed by the establishment of separate infrastructure system with its operators. Their main task will be to ensure equal access to critical infrastructure. The hydrogen network operator (HNO),<sup>28</sup> the hydrogen storage operator (HSO)<sup>29</sup> and the hydrogen terminal operator (HTO)<sup>30</sup> can be distinguished. Another difference between the regulations on natural gas and hydrogen is the lack of division into the transmission and distribution of hydrogen. HNOs will perform the function of “hydrogen transport,” which will mean the transport of hydrogen through a hydrogen network with a view to delivering it to customers, but not including supply, regardless of the pressure, the geographic coverage or the connected customer group.<sup>31</sup>

Hydrogen operators will be unbundled as is currently the case with gas infrastructure operators. It is worth mentioning the specific rules regarding the HNO. In this regard, just as the TSO, there are three models of unbundling, with the principal model being ownership unbundling.<sup>32</sup> However, for hydrogen networks belonging to a vertically integrated undertaking, a Member State may decide not to apply this obligation and designate an independent HNO that is unbundled in accordance with the rules on the independent system operator.<sup>33</sup> In turn, where a hydrogen network belongs to a certified TSO, or where a hydrogen network belonged to a vertically integrated undertaking on the date of entry into force of the proposed Directive, Member States may also decide not to apply the ownership unbundling model and designate an entity that is under the sole control of the TSO or of the vertically integrated hydrogen undertaking as an integrated HNO unbundled in accordance with the rules on independent transmission operator.<sup>34</sup> One additional obligation is imposed on the HNO. Where it is part of an undertaking that is active in transmission or distribution of natural gas or electricity, it must be independent at least in terms of its legal form.<sup>35</sup>

The hydrogen infrastructure is to be covered by the Third Party Access rule. There are two options for its implementation, namely through the establishment of regulated third-party access or negotiated third-party access. In each of the types of infrastructure, the Commission offers two methods of implementation of

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<sup>27</sup> It is planned to include the definition of the term “renewable hydrogen” into the recast of Directive (EU) 2018/2001; nonetheless, at some point the pieces of legislation should be properly connected via references.

<sup>28</sup> Article 2(22) of the proposed Directive.

<sup>29</sup> Article 2(6a) of the proposed Directive.

<sup>30</sup> Article 2(8a) of the proposed Directive.

<sup>31</sup> Article 2(21) of the proposed Directive.

<sup>32</sup> Article 62(1) of the proposed Directive.

<sup>33</sup> Article 62(3) of the proposed Directive.

<sup>34</sup> Article 62(4) of the proposed Directive.

<sup>35</sup> Article 63 of the proposed Directive.

rules involving indicating one or possibly two options at once as the basic method of implementation and indicating an alternative method in the form of one of the options. This approach is another difference between the natural gas and hydrogen regulations. As for the hydrogen network, essentially, Member States will ensure implementation by establishing regulated third-party access.<sup>36</sup> Tariffs, or the methodologies underlying their calculation, are intended to be approved by a regulatory authority and published before they enter into force.<sup>37</sup> A Member State may decide to implement the negotiated third-party access option “in accordance with objective, transparent and non-discriminatory criteria”<sup>38</sup> up to 31 December 2035. The negotiated third-party access option is favoured in the case of hydrogen terminals.<sup>39</sup> In this respect, unlike in any other cases, the alternative of regulated third-party access is not limited in time.<sup>40</sup> As for hydrogen storage facilities, the Commission has left it up to the Member States to decide which option of implementation is more appropriate.<sup>41</sup> However, as of 1 January 2036, access to all hydrogen storage facilities is intended to be regulated.<sup>42</sup>

## 2. Acts stipulated in the provisions of the proposed Directive and the proposed Regulation

The proposed Directive and the proposed Regulation will provide the legal basis for the functioning of the natural gas and hydrogen markets. However, they will not constitute the complete regulatory framework in this area, because some of their provisions empower certain institutions of the EU to adopt delegated and implementing acts.

### 2.1. Delegated acts stipulated in the provisions of the proposed Directive and the proposed Regulation

#### 2.1.1. Delegated acts stipulated in the provisions of the proposed Directive

The proposed Directive provides for delegations to adopt the delegated acts in Articles 8, 56, 66, 74, 75 and 76. They can be divided into two groups:

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<sup>36</sup> Article 31(1) of the proposed Directive.

<sup>37</sup> Article 31(2) of the proposed Directive.

<sup>38</sup> Article 31(4) of the proposed Directive.

<sup>39</sup> Article 32(1) of the proposed Directive.

<sup>40</sup> Ibid.

<sup>41</sup> Article 33(1) of the proposed Directive.

<sup>42</sup> Article 33(2) of the proposed Directive.



1. delegated acts setting guidelines; and
2. other delegated acts.

The first group encompasses delegated acts setting guidelines to ensure full and effective compliance of the transmission system or hydrogen network owner and the storage system or hydrogen storage operator with the criteria of independence,<sup>43</sup> stipulating the guidelines setting out the details of the procedure of certifying a transmission system operator, hydrogen network operator or hydrogen network owner, which is controlled by a person or persons from a third country or third countries,<sup>44</sup> laying down guidelines on the extent of the duties of the regulatory authorities to cooperate with each other and with ACER,<sup>45</sup> presenting guidelines setting out the details of the procedure on the compliance of a decision made by a regulatory authority with the network codes and other guidelines,<sup>46</sup> and laying down guidelines defining the methods and arrangements for keeping records, as well as the form and content of the data that are to be kept.<sup>47</sup> Other delegated acts are those specifying the methodology for assessing savings in greenhouse gas emissions from the use of low carbon fuels.<sup>48</sup>

General rules on their adoption are presented in Article 83. The power to adopt these acts will be conferred indefinitely on the Commission from the date when the proposed Directive enters into force.<sup>49</sup> Even so, the delegation of this power may be revoked at any time by the European Parliament or the Council.<sup>50</sup> A revoking decision will put an end to the delegation of power specified in that decision and will take effect on the day following the date of publication of the decision in the Official Journal of the European Union or at a later date specified therein.<sup>51</sup> Importantly, the decision will not affect the validity of any delegated act already in force.<sup>52</sup>

Before adopting a delegated act, the Commission will be required to consult the experts nominated by each Member State.<sup>53</sup> As soon as it adopts a delegated act, the Commission will simultaneously notify it to the European Parliament and to the Council.<sup>54</sup> This is important, because delegated acts will only enter into force if no objection is expressed either by the European Parliament or by the Council within two months of the date of notification or if the European Parliament and the Council both inform the Commission before the end of that period

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<sup>43</sup> Article 56 of the proposed Directive.

<sup>44</sup> Article 66(10) of the proposed Directive.

<sup>45</sup> Article 74(5) of the proposed Directive.

<sup>46</sup> Article 75(9) of the proposed Directive.

<sup>47</sup> Article 76(4) of the proposed Directive.

<sup>48</sup> Article 8(5) of the proposed Directive.

<sup>49</sup> Article 83(2) of the proposed Directive.

<sup>50</sup> Article 83(3) of the proposed Directive.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Article 83(4) of the proposed Directive.

<sup>54</sup> Article 83(5) of the proposed Directive.



that they will not object.<sup>55</sup> That period will be extended by two months at the request of the European Parliament or of the Council.<sup>56</sup>

### 2.1.2. Delegated acts stipulated in the provisions of the proposed Regulation

The proposed Regulation provides for delegations to adopt delegated acts in Articles 13, 16, 28, 53, 54, 56 and 60. They can be divided into three groups:

1. delegated acts regarding guidelines;
2. delegated acts regarding the establishment of network codes; and
3. other delegated acts.

The first group<sup>57</sup> includes delegated acts laying down guidelines setting out the details of the procedure for certifying TSOs and hydrogen network operators,<sup>58</sup> among others. The second group consists of delegated acts regarding network security and reliability rules<sup>59</sup> including rules on operational network security, as well as reliability rules ensuring the quality of service of the network<sup>60</sup> or rules on trading related to the technical and operational provision of network access services and system balancing,<sup>61</sup> among others. The third group contains delegated acts amending the proposed Regulation by changing the discount levels set with respect to renewable and low-carbon gases,<sup>62</sup> and supplementing the proposed Regulation on the definition of the geographical area covered by each regional cooperation structure.<sup>63</sup>

The general rules on the adoption of all of these delegated acts are presented in Article 63. They are identical to those set out in Article 83 of the proposed Directive.<sup>64</sup>

## 2.2. Implementing acts stipulated in the provisions of the proposed directive and the proposed Regulation

### 2.2.1. Implementing acts stipulated the provisions of the proposed Directive

The proposed Regulation provides for delegations to adopt implementing acts in Articles 8, 17, 22, and 82. They can be divided into two groups:

<sup>55</sup> Article 83(6) of the proposed Directive.

<sup>56</sup> Ibid.

<sup>57</sup> Articles 13(5), 56(3), and (4) and 60(11) of the proposed Regulation.

<sup>58</sup> Article 13(5) of the proposed Regulation.

<sup>59</sup> Articles 53(2), and 54(2) of the proposed Regulation.

<sup>60</sup> Article 53(2)(b) of the proposed Regulation.

<sup>61</sup> Article 53(2)(d) of the proposed Regulation.

<sup>62</sup> Article 16(4) of the proposed Regulation.

<sup>63</sup> Article 28(3) of the proposed Regulation.

<sup>64</sup> See: Article 63(2),(3),(4),(5) and (6) of the proposed Regulation.

1. implementing acts setting interoperability requirements; and
2. other implementing acts.

The first group consists of implementing acts setting interoperability requirements for smart metering and procedures to ensure access to data from those metering systems<sup>65</sup> and interoperability requirements and non-discriminatory and transparent procedures for access to metering and consumption data, as well as data required for customer switching and other services.<sup>66</sup> The second group contains implementing acts by which the EC decides whether voluntary national or international schemes setting standards for the production of low carbon fuels or low carbon hydrogen provide accurate data on greenhouse gas emission savings and demonstrate compliance with the correct methodology<sup>67</sup> and by which the EC refuses or authorizes a Member State to enter into negotiations in order to amend, extend, adapt, renew or conclude an agreement with a third country on the operation of a transmission line with a third country or a hydrogen interconnector with a third country.<sup>68</sup>

In any case, the Commission will be empowered to adopt the implementing acts stipulated in the provisions of the proposed Directive. Implementing acts setting interoperability requirements are to be adopted in accordance with the Article 4 of Regulation 182/2011.<sup>69</sup> The implementing acts, by which the Commission decides whether voluntary national or international schemes setting standards for the production of low carbon fuels or low carbon hydrogen provide accurate data on greenhouse gas emission savings and demonstrate compliance with proper methodology, are intended to be adopted in accordance with the Article 5 of Regulation 182/2011. The implementing acts, by which the Commission refuses or authorizes a Member State to enter into negotiations in order to amend, extend, adapt, renew or conclude an agreement with a third country on the operation of a transmission line with a third country or a hydrogen interconnector with a third country, will be adopted “in accordance with the procedure referred to in Article 83(2)” of the proposed Directive. This provision will grant the EC the power to adopt delegated acts indefinitely from the entry into force of the proposed Directive.

### 2.2.2. Implementing acts stipulated in the provisions of the proposed Regulation

The proposed Regulation provides for delegations to adopt implementing acts in Articles 20b, 51, 53, and 54. They can be divided into two groups:

<sup>65</sup> Article 17(3) of the proposed Directive.

<sup>66</sup> Article 22(2) of the proposed Directive.

<sup>67</sup> Article 8(11) of the proposed Directive.

<sup>68</sup> Article 82(7) of the proposed Directive.

<sup>69</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers (OJ L 55 of 28.02.2011, p. 13–18.).

1. implementing acts establishing common specifications; and
2. implementing acts establishing network codes.

The first group consist of implementing acts establishing common specifications for facilitating the cost effective integration of large volumes of biomethane in the existing natural gas system<sup>70</sup> and for the requirements set out in Article 46 of the proposed Directive.<sup>71</sup> The proposed Regulation will also enable the Commission to adopt these common specifications in a network code. The second group contains implementing acts establishing network codes for the natural gas system<sup>72</sup> and the hydrogen system.<sup>73</sup>

In any case, the Commission will be empowered to adopt the implementing acts stipulated in the provisions of the proposed Regulation. Implementing acts establishing common specifications and establishing network codes for the natural gas system are to be adopted in accordance with Article 5 of Regulation 182/2011. With regard to the acts from the first group, in the early stage of preparation of the draft implementing act establishing a common specification, the Commission will gather the views of the relevant bodies or groups of experts appointed under the relevant sectoral EU law, and will consult all relevant stakeholders.<sup>74</sup> The Commission will prepare the draft implementing act on the basis of those consultations. Meanwhile, the implementing acts establishing network codes for the hydrogen system will be adopted in accordance with Article 4 of Regulation 182/2011.

### 3. Legal nature of delegated and implementing acts

As can be seen, the proposed Directive and the proposed Regulation empower the Commission to adopt delegated acts and implementing acts. From the point of view of the theory of administrative law, it is important to examine their legal nature and characteristics. The answer may also have a significant impact on the application of these acts, in particular with regard to the procedural protection of an individual. The way in which normative acts serve this purpose may differ from that of typical administrative acts.

In order to discover the legal nature of delegated acts and implementing acts, we should focus on procedures in which they are enacted, because that is the main criterion of their distinction. The procedures for adopting delegated acts and

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<sup>70</sup> Article 20b(1) of the proposed Regulation.

<sup>71</sup> Article 51(1) of the proposed Regulation.

<sup>72</sup> Article 53(1) of the proposed Regulation.

<sup>73</sup> Article 54(1) of the proposed Regulation.

<sup>74</sup> Article 20b(1) and 51(1) of the proposed Regulation.

implementing acts are not left to chance, but their choice is strictly determined by the objective of the act and the institution or authority which is empowered to adopt the act. According to Articles 289–291 of the Treaty,<sup>75</sup> there are three procedures of adoption of legal acts:

1. the legislative procedure;
2. the non-legislative procedure (in which the Commission gains the power to adopt non-legislative acts of general application); and
3. the implementing procedure.

With regard to the first procedure, the Treaty is the main and only basis for its application. The other two are regulated generally by the Treaty, but their application is also subject to legislative acts, or more specifically their provisions imposing the obligation to adopt a certain act and defining their objective. These two elements must be recognized to determine whether the non-legislative or implementing procedure applies. Acts adopted in the non-legislative or implementing procedure are so-called tertiary acts (*Tertiärakt*). They are understood as third-tier acts, which come after Treaties (first-tier acts) and legislative acts (second-tier acts). These are positioned within the framework of other acts of secondary law to which they refer.<sup>76</sup>

As arises from the literal disposition of the Treaty, only acts adopted in the implementing procedure can possibly be considered as strictly administrative acts (issued within the administrative jurisdiction). By their nature, they cannot, as such, be considered acts adopted in the legislative procedure. Also, acts adopted in the non-legislative procedure cannot be considered administrative acts. These, called delegated acts, are intended to supplement or amend certain non-essential elements of a legislative act. So it can be said that delegated acts are parts of legislative acts. The objectives, content, scope and duration of the delegation of power is to be explicitly defined in the legislative acts.

Acts adopted in the implementing procedure do not create abstract and general legal norms. EU institutions or authorities may adopt two types of acts in the implementing procedure, namely concrete acts or abstract (regulatory) acts. If the act is adopted in concrete circumstances, this would be considered as a way of exercising public administration. If the circumstances in which the act is adopted were abstract, it would be considered a legislative activity.

In principle, the Commission is empowered to adopt delegated and implementing acts. In this context, it would be necessary to mention the exception from Article 26 of the Treaty, which provides for the Union being able to adopt measures with the aim of establishing or ensuring the functioning of the internal market. The Council, on a proposal from the Commission, shall determine the

<sup>75</sup> Treaty on the Functioning of the European Union (OJ C 326 of 26.10.2012).

<sup>76</sup> R. Streinz, *Europarecht*, Heidelberg 2016, p. 161.

guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.<sup>77</sup>

According to the Treaty, delegated acts, and especially implementing acts, are still considered legal acts. The legal institutions of EU law are distinct from the legal institutions of each Member State. Therefore, the terminology of EU law should not be examined from the national perspective and the research conducted on national legal systems. As a result, recognizing the act of applying the law as a legal act should not be surprising. Furthermore, according to the jurisprudence of the Court of Justice of the European Union, an administrative act is understood as part of a whole together with the legislative act on the basis of which it was issued.<sup>78</sup> This applies to acts issued by EU agencies and EU authorities (not EU institutions).

However, the matter of distinguishing between the criteria for adopting a delegated or an implementing act is not clear. Therefore, Non-Binding Criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union were established through the Interinstitutional Agreement.<sup>79</sup> The Agreement specifies that delegated acts must always be of a general nature, unlike implementing acts, which may also be of a concrete nature. Furthermore, any amendment to a legislative act is only possible by means of a delegated act. These changes may only apply to non-essential provisions. Delegated acts serve to establish additional provisions which are part of the legal framework of a legislative act. Yet, provisions serving the implementation of a legislative act without affecting its substantive content should be included in an implementing act. However, apart from the cases of individual decisions, as well as acts taken in concrete cases, the distinction between the criteria for establishing rules in the form of delegated or implementing acts may still be unclear. For example, paragraph II(E) of the Agreement states: “Measures establishing a procedure (that is to say a way of performing or accomplishing something in order to achieve a certain result defined in the basic act) can be laid down either in a delegated act or in an implementing act (or can even be an essential element of the basic act), depending on their nature, objectives, content and context.”

Implementing acts adopted by the Commission may be verified and accepted by Member States. Adopting acts in the implementing procedure requires the application of Regulation 182/2011, to which point 61 of the recital of the proposed Regulation refers. With regard to previous parts of this paper, the decisive factor for the classification of acts of EU law is the procedure in which they are adopted and the circumstances in which the procedure is conducted (whether this is in a concrete or an abstract situation). Therefore, EU acts, including legal acts, need

<sup>77</sup> Article 26(3) of the Treaty.

<sup>78</sup> Judgment of the Court of Justice of European Union (Grand Chamber), 22 January 2014, Case C-270/12.

<sup>79</sup> OJ C 223 of 03.07.2019, pp. 1–4.

to be described by reference to the legislative act, the delegated act and the implementing act, which better reflects their essence than specifying the types of names of the given act.

Referring the above to the provisions of the proposed Directive and the proposed Regulation, i.e. pursuant to Article 8(6) and (11) of the proposed Directive, the Commission may decide that voluntary national or international schemes setting standards for the production of low carbon fuels or low-carbon hydrogen provide accurate data on greenhouse gas emission savings for the purposes of this Article and demonstrate compliance with the methodology referred to in paragraph 5 of this Article. In this case, the Commission is empowered to adopt an implementing act. This corresponds to the assumptions of the Agreement, because the proposed Directive mentions rules serving the implementation of substantive provisions contained in another act. In turn, according to Article 76(4) of the proposed Directive, the Commission is empowered to adopt delegated acts supplementing this Directive by establishing guidelines which define the methods and arrangements for keeping records, as well as the form and content of the data that is to be kept. This refers to Article 76(1) of the proposed Directive, which provides that Member States shall require supply undertakings to keep at the disposal of the national authorities, including the regulatory authority, the national competition authorities and the Commission, for the fulfilment of their tasks, for at least five years, the relevant data relating to all transactions in natural gas and hydrogen supply contracts and natural gas and hydrogen derivatives with wholesale customers and transmission system operators, as storage and LNG operators as well as hydrogen network, storage and terminal operators. These guidelines are purely of a normative nature, so the form of delegated act is appropriate.

Article 20b of the proposed Regulation empowers the Commission to adopt implementing acts laying down common specifications for facilitating the cost effective integration of large volumes of biomethane in the existing natural gas system, when, for the listed reasons, harmonized standards for these requirements have not been established. In this case, an implementing act replaces the harmonized standards. These standards are technical standards and have no legal significance. Their use by the entrepreneur gives the ability to invoke the presumption of compliance with the requirements of the law.<sup>80</sup> An example of a reference to a delegated act is provided for in Article 28(3) of the proposed Regulation. The objective of this is to supplement the proposed Regulation with provisions defining geographical areas covered by regional structures of the cooperation regulation. This is the task of the network operators in order to, among other things, ensure the coordination of network operation in normal and emergency conditions.

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<sup>80</sup> More on harmonized standards: M. Kruś, "Charakter prawny norm zharmonizowanych w sprawie wyrobów budowlanych," *Prawo i Klimat* 2020, no. 2, pp. 49–64.

In the context of implementing acts of the said normative nature, according to terminology of EU law, they are still legal acts. That stems from their direct impact on the rights and obligations of their addressees. That is the factor which differentiates implementing acts from the adoption of provisions of administrative law, e.g. sets of rules constituting the basis for the activity of the administration. Most frequently, provisions of administrative law have no direct impact on the rights and obligations of an administered entity, but they are addressed to administrative entities.<sup>81</sup> Also, they may constitute the basis for the adoption of an administrative decision. E. Schmidt-Aßmann describes such acts as crucial in the context of the development of administrative law.<sup>82</sup> The author cites M. Möstl who indicates that administrative norms have a dual nature, as sources of law and instruments of action.<sup>83</sup> Both implementing acts and delegated acts mentioned in this paper should be included among the sources of EU law, as referred to in the Treaty. The implementing acts mentioned above do not have the features of acts adopted in the process of the administrative jurisdiction, and they should be considered so-called regulated acts.<sup>84</sup> From the point of view of procedural guarantees, we are dealing here with a situation of the possible use of instruments for controlling the correctness of the law-making process.

## 4. Conclusions

Delegated and implementing acts are adopted in various procedures and have different objectives, which affects their legal nature. From the point of view of the theory of administrative law, the former are acts that supplement (add detail to) a legislative act. The latter resemble acts issued under general administrative jurisdiction. In the case of the proposed Directive and the proposed Regulation, both delegated acts and implementing acts are instruments of a regulatory function of European administrative law. Their impact on the functioning of the natural gas and hydrogen markets will be varied, but they are intended to allow the Commission to actively pursue the previously set goals, which are to support the development of competition and promote renewable and low-emission gases.

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<sup>81</sup> S. Detterbeck, *Allgemeines Verwaltungsrecht mit Verwaltungsprozessrecht*, Munich 2019, p. 13.

<sup>82</sup> E. Schmidt-Aßmann, *Dogmatyka prawa administracyjnego, Bilans rozwoju, reformy i przyszłych zadań*, Warszawa 2022, p. 108.

<sup>83</sup> M. Möstl, § 19 *Besonderer Teil*, [in:] H.-U. Erichsen, D. Ehlers, *Allgemeines Verwaltungsrecht*, Berlin 2005, pp. 577–578, after: E. Schmidt-Aßmann, *Dogmatyka prawa administracyjnego*, p. 109.

<sup>84</sup> M. Kruś, *Akt transnarodowy w systemie europejskich aktów administracyjnych*, Poznań 2021, p. 123.



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