

New Developments in the system of acts of the European Law: interinstitutional agreements

IGOR BLAHUŠIAK

1. Introduction

Interinstitutional agreements (IIAs) are one of the oldest institutes of the EU law¹ and have influenced many areas of the EU Law, varying from the adoption of budget and political responsibility of the Commission to the procedures of conclusion of international agreements. They substantially influenced the overall balance of Institutions in the EU² and many times even pre-determined the developments of the primary EU law.³

In the spite of the aforementioned facts, they belong among “*one of the last unexplored areas of the European law*”.⁴ No pro-type model of an IIA has been constructed so far and the doctrine is also not unified concerning the issue of legal effects of IIAs or their position in the system of the European law. However, in the recent few years we are able to witness a growth of interest in IIAs.⁵

This contribution was written predominantly as a reaction to the latest developments in the EU law after the entry into force of the Lisbon Treaty. Therefore, it aims to clarify the position of IIAs within the system of the acts of the European law.

¹ The first IIA was concluded in 1963. For details, see HUMMER, W. *From „Interinstitutional Agreements“ to „Interinstitutional Agencies/Offices?“* In: *European Law Journal*, Vol. 13, No. 1, 2007.

² Notably when speaking of strengthening of the Parliament’s competences. See e. g. DRIESSEN, B. *Interinstitutional Conventions and institutional balance*. *European Law Journal*, Vol. 33, No. 4, 2008, p. 555–556.

³ See e. g. *Framework agreement on relations between the European Parliament and the Commission* (2000) that provided for in the case that the Parliament if Parliament asked the Commission President to withdraw confidence in an individual Member of the Commission, he would seriously consider whether he should request that Member to resign. Treaty of Nice adopted provision of former Art. 217, § 4 TEC, which elevated this obligation into the provisions of primary law. See *Framework agreement on relations between the European Parliament and the Commission*. OJ C 339, 29.11.2000, p. 269.

⁴ See HUMMER, W. (2007), p. 49 et seq.

⁵ Articles by Hummer, Marti or Driessen are to be mentioned primarily. See HUMMER, W. *Interinstitutionelle Vereinbarungen und „institutionelles Gleichgewicht“*. In: Hummer, W. (Hrsg.) *Paradigmenwechsel im Europarecht zur Jahrtausendwende*. 1. Aufl. Wien: Springer, 2004, p. 111 – 180 and an updated version of almost identical paper: HUMMER, W. (2007), p. 49–74; MARTI, G. *Les Accords Interinstitutionnels: Source du Droit Constitutionnel de l’Union Européenne?* Available [online] www.droitconstitutionnel.org, cit. 15. 1.2015; DRIESSEN, B. (2008), p. 550 – 562. As for the monographies, we can mention works by Alemann, Driessen or Katz (et. al.). See ALEMANN, F. von. *Die Handlungsform der interinstitutionellen Vereinbarung. Eine Untersuchung des Interorganverhältnisses der europäischen Verfassung*. 1. Aufl. Berlin: Springer, 2006; DRIESSEN, B. *Interinstitutional Conventions in EU Law*. 1st ed. London: Cameron May, 2007; KIETZ, D.; SLOMINSKI, P.; MAURER, A.; PUNTSCHER–RIEKMANN, S. *Interinstitutionelle Vereinbarungen in der Europäischen Union. Wegbereiter der Verfassungsentwicklung*. 1. Aufl. Baden-Baden: Nomos, 2010.

2. Definition of IIAs

Although the first explicit references to IIAs in the positive law can be traced as early as the Amsterdam Treaty,⁶ definition of this institute is provided by a Declaration No. 3 on the Art. 10 of the Treaty Establishing the European Communities (TEC), attached to the Treaty of Nice. Art. 295 Treaty on Functioning of the EU (TFEU) provides the first definition in the “core” text of the Treaties, materially following the spirit of the “Nice” definition: „*The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature.*“⁷

This definition characterizes IIAs on the basis of formal and material characteristics. However, its approach in the issue of delimitation of the parties to IIAs may seem to be rather inconvenient, since it does not reflect the factual situation with IIAs concluded so far.⁸ Therefore, in order to reflect this factual practice of the institutions, it is desirable to establish the definition criteria of IIAs on a theoretical level.

Since the doctrine is not capable of reaching an agreement on an universal acceptance of a single definition of IIAs and bearing in mind the fact that this issue was analyzed in other contributions,⁹ we limit ourselves to claim that most of the scholars tend to combine formal and material definition criteria in search of a common definition of this institute. Instead of making reference to these numerous efforts, we introduce our own definition – we define IIAs as *written agreements between at least two organs of the EU, published in the Official Journal and concluded with the purpose of concretization of the provisions of primary law.*

Therefore, we are able to state that IIAs are a relevant category of acts of the European law. The following sections of this contribution will inspect the issues of classification of this category of acts within the system of the EU law.

⁶ See e. g. Protocol No. 3 on the application of the principles of subsidiarity and proportionality or the Declaration No. 33 on the Art. 188, § 3 TEC, attached to the Treaty of Amsterdam.

⁷ Prov. of the Art. 295 TFEU.

⁸ A number of IIAs were concluded in a configuration of concluding parties deviating from the prescribed pattern of the Parliament, the Commission and the Council acting jointly. Moreover, the Institutions have concluded IIAs not only on the matters pertaining to their mutual cooperation *in stricto sensu*, but also in many other fields of the European law, for instance in the field of external relations of the EU, comitology, access to the documents and human rights.

⁹ See e. g. BLAHUŠIAK, I. *Interinstitutional Agreements in the System of EU Law after the Adoption of the Lisbon Treaty*. In: *Law as Unifying Factor of Europe. Collection of Abstracts from the International Scholastic Conference organised by the Comenius University in Bratislava, Faculty of Law on 21st - 23rd of October 2010*. 1st ed. Bratislava: Comenius University, 2011. In printing.

3. Position of IIAs within the system of the European law

Although IIAs are to be considered as an unique category of the EU law, many scholars mark them as decisions *sui generis*.¹⁰ We will not follow this line of thought and will try to remove IIAs from this residual category and determine their precise position in the system of EU law.

3.1. The issue of systemization of the sources of the EU law

The EU law is an autonomous legal system.¹¹ Due to its specific character, it is rather difficult to determine a hierarchy of its acts.¹² The issue is aggravated by the fact, that these acts bear a plethora of names, and therefore, their system is rather complicated to orientate in.¹³ Acts occur in various forms and a tendency to multiply not only the total volume, but also the number of types of acts could be observed in the past years.¹⁴

The doctrine provides numerous different classifications of acts of European law. For example, from the point of view of the hierarchy of norms, these are being divided into legislative ones, represented by certain provisions of the Treaties, and the other norms, contained in the other acts of the EU law.¹⁵ We will try to incorporate IIAs into this hierarchy.

3.2. Classification of IIAs in the system of the EU law – overview of doctrinal viewpoints

3.2.1. IIAs as an authentic interpretation of the Treaties

IIAs were rather often utilized as a tool of interpretation of the respective Treaties' provisions. Therefore, some scholars have concluded that IIAs are to be considered as an authentic interpretation of the Treaties.

¹⁰ KAPTEYN, P. J. G. (et. al.) *The Law of the European Union and the European Communities*. 4th ed. Alphen aan Rijn: Kluwer Law International, 2008, pp. 288–289. Also, other scholars systematically place IIAs within the category of *sui generis* acts. See e. g. BIEBER, R.; EPINEY, A.; HAAG, M. *Die Europäische Union* 6. Aufl Baden-Baden: Nomos, 2005, p. 210; NASSER, H.; VERSCHRAEGEN, B. *Die Europäische Union. Anspruch und Wirklichkeit*. 1ste Auf. Wien: Springer, 2001, p. 269 et seq; CHALMERS, D. (et. al.) *European Union Law*. 1st ed. Cambridge: Cambridge University Press, 2006, p. 137 et seq.; HUMMER, W. (2007), p. 61; DONY, M. *Droit de la Communauté et de l'Union européenne*. 2. ed. Bruxelles: Editions de l'Université de Bruxelles, 2001, p. 112.

¹¹ See Case 26/62 *Van Gend en Loos* and Case 6/64 *Costa v. E. N. E. L.*

¹² Although the IGC in 1996 was originally to examine the question of introducing a hierarchy of the EU law acts.

¹³ The Institutions e. g. adopt programmes, resolutions, actions programmes, framework programmes, etc. This fact is taken into account by the IIA on expedited working method for official codification of legislative acts. See *Declaration by the European Parliament, the Council and the Commission of 6 March 1995 on the incorporation of financial provisions into legislative acts*. OJ C 102, 4.4.1996, p. 4.

¹⁴ MATHIJSEN, P. S. R. F. *A Guide to European Union Law*. 9th ed. London: Sweet & Maxwell, 2007, p. 26.

¹⁵ TÝČ, V. *Základy práva Evropské unie pro ekonomy*. 5. vyd. Praha: Linde, 2006, p. 65.

When critically analyzing this line of thought, it has to be admitted that each Institution does interpret its competences in the light of the Treaties, indeed. However, this activity cannot be perceived as an authentic interpretation, since, according to the provisions of the Vienna Convention on Law of the Treaties,¹⁶ only the subjects that were present at a Treaty negotiations are competent to deliver such an interpretation; in the case of the EU, these are the Member States.¹⁷

Taking into account the wording of the Art. 48 TEU and a revision procedure provided for therein, it might be argued that certain Institutions could be theoretically been taken in account.¹⁸ However, one has to consider the principle of attributed powers. Therefore, this conclusion cannot be seen as valid, due to the fact that the only Institution that is entrusted with the task of interpretation of (*inter alia*) the Treaties, is the Court of Justice.¹⁹

A classification of IIAs as the acts of an authentic interpretation of the Treaties, issued by the Institutions themselves, is therefore to be refuted.

3.2.2. IIAs as contracts

Other scholars perceive IIAs as contracts of the respective Institutions. In this case, IIAs are seen as a special type of contracts of the public law that is not to be interchanged with contracts of the private law.²⁰

In order to test the validity of this concept, one has primarily to explore the extent of competence of the Institutions and organs of the EU to enter in the mutual contractual relations. The doctrine solves this issue rather ambiguously. There are views asserting that this competence is to be at the Institutions' disposal, in order to ensure viability of their cooperation.²¹ But, on the other hand, there are also views drawing attention to the fact that the Institutions do not have competence to enter into agreements among themselves, since a pre-condition of such an action is a legal subjectivity, which is only awarded to the EU as a complex.²²

Some make in this regard a reference to the competence of the executive organs of international organizations to enter into administrative agreements among themselves.²³ However, in this case, it is a competence oriented primarily externally (from the perspective of an international organization) and not conversely (internally). Therefore, this competence does not constitute a legal basis for a conclusion of such agreements among organs of one international organization.

¹⁶ See Vienna Convention on Law of the Treaties.

¹⁷ See provision of Art. 31, § 2 TEU.

¹⁸ Since the Art. 48 TEU mentions several times involvement of the Commission and the Parliament.

¹⁹ See provision of the Art. 267 TEU.

²⁰ ALEMANN, F. (2006), p. 325 et seq.; BOBBERT, CH. *Interinstitutionelle Vereinbarungen im Europäischen Gemeinschaft*. 1. Aufl. Bern: Lang, 2001, p. 110.

²¹ See BOBBERT, CH. (2001), p. 104.

²² See provision of Art. 335 TFEU.

²³ HUMMER, W. (2004), p. 162.