GENERAL ASPECTS ON THE IMPLEMENTATION OF THE EU LEGAL ORDER, UNDER PUBLIC INTERNATIONAL LAW

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Abstract

We believe that achieving a uniform legal order, as the European Union order, is nothing new at international level, as long as at the basis of what today is forming the European Union law, we find several international treaties concluded under the existing regulations of international law. In this respect, we are considering, first of all, the three founding Treaties of the European Communities, which, from the point of view of international law, have at least three fundamental features, namely: firstly, they express the legal bond between member states of the Communities; secondly, they constitute an organized assembly of legal rules; thirdly, documents developed under these treaties, by bodies empowered in this regard, have legal effects in the states parties.

Keywords: *Treaties establishing the European Communities; European Union; international law; Member States.*

1. The Founding Treaties, authentic international treaties

The conclusion of international treaties requires a set of procedures that must be fulfilled for the treaty to be constituted, to become binding on the parties and to enter into force. According to Professor Nguyen Quoc Dinh[1], concluding an international treaty, *"is a process involving multiple aspects:*

1) the adoption of the treaty text and its authentication;

2) the consent of the state to be bound through the treaty;

3) the international notification of the consent;

4) the entry into force of the treaty, according to its provisions, in states which have expressed their consent".

The international notification of the state consent to become party to the Treaty and the entry into force of the Treaty shall be subject exclusively to international law, while the consent of the state to be bound by the treaty shall be governed solely by the law of that state. Given this aspect, it is undeniable that the Treaties establishing the European Communities and the European Union have been concluded by sovereign states, by expressing their agreement will. Thus, states have become *"contracting parties"*[2] to three multilateral treaties, before becoming *"member states"* of some organizations, the main objective of which is the economic integration.

Although, the Community Treaties have entered into force over 60 years ago (one of those treaties ceasing even to have legal effects by exceeding the period for which it was concluded), the above mentioned goal has not yet been achieved, and the process of economic integration is still continuing; that is why, we believe that the EU member countries, despite the fact that *"have limited, only in some areas, their sovereign rights and have, thus, created,*

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[1] Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *„Droit international public",* ediția a VII-a, L.G.D.J, 2002, p 125.

[2] According to the Preambles of the three founding Treaties.[3] Decision of the ECJ, July 15, 1964, *Costa v. / ENEL,* 6/64.

a system of law applicable to nationals and states themselves"[3], are still contracting parties, preserving of course, their sovereignty, aspect highlighted whenever the conclusion of new treaties at EU level comes in question, with the purpose of changing the founding Treaties, by negotiating the mutual rights and obligations.

The founding Treaties contain both obligations and rights for the states parties. As far as obligations are concerned, we observe at a careful analysis of these international legal instruments, that they contain general, but also special obligations.

1.1. Rights of the states parties

The founding Treaties confer upon states, as contracting parties, a number of rights and these rights are, moreover, essential for the functioning of the Union. Thus, we mention: the participation of states to the establishment of common institutions and bodies; the right to bring an action, before the Court of Justice of the European Union, in order to ensure compliance with treaties; the enforcement immunity; the right to decide on the accession of new member states; the right to revise treaties.

A. Under the founding Treaties, states parties have the right to take part, according to certain criteria, to the establishment of the main institutions of the European Communities[4] and later, of the European Union. In this regard, each state has one representative at ministerial level, in the decision-making institution. The governments of member states appoint members of the Commission - the EU's authentic executive. As for the Court of Justice, its members are appointed by the common agreement of governments of the member states.

B. States parties to founding treaties have the right to bring to the Court of Justice in Luxembourg, an action against any contracting party. This action aims at ensuring the compliance with Community law and, more recently, with the European Union law.

C. Another right conferred upon states parties, in the founding treaties, is the immunity from enforcement, resulting from the fact that the Treaties do not contain provisions for the enforcement of states in the case where they do not fulfill their obligations[5]. In this situation, we consider that the enforcement immunity applies under the state sovereignty. It is clear that if the Court of Justice of the European Union gives a sentence against a state which did not fulfill an obligation, that sentence represents, in fact, a principle, because it is not enforceable. This situation has been considered in the literature as "capital for understanding the Community institutional system. Unlike what happens in a federal state where the federal power has the means to reduce the potential resistance of the federal state against the federal order, in the Community, there is no Community enforcement"[6]. States keep their sovereignty within the Union, and if they refuse to voluntarily enforce their assumed obligations, the exception of non-enforcement is applicable *("non adimpleti contractus")*. By invoking this exception, a suspension of enforcement of the Union's obligations towards the member state is obtained, until that state fulfills its incumbent

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[3] Decision of the ECJ, July 15, 1964, *Costa v. / ENEL*, 6/64.

[4] Under TCEC: the Special Council of Ministers, the High Authority, the Common Assembly, the Court of Justice. Each Treaty founding EEC and Euratom establishes the following institutions: the Council, the Commission, the Assembly, the Court of Justice.

[5] The situation was different in the case of the Treaty of Paris which initially provided at art. 88, paragraph (3), two penalties for the State failing to perform its obligations, namely the payment suspension by the CECA, to the State concerned and the authorization given by the High Authority of Member States to take, notwithstanding the common market principles, defense or retaliation measures on the State concerned
(see http://eurlex.europa.eu/fr/treaties/dat/11951K/tif/TRAITES_1951_CECA_1_FR_0001.pdf).

[6] Pierre Pescatore, L'ordre juridique des Communautés Européennes. Etude des sources du droit communautaire, Presses Universitaires de Liège, A.S.B.L., p. 54.[7] For modifying Treaties, the Vienna Convention on the Law of Treaties of 1969 has a lot of relevance, stating in art. 26 that: "Every treaty in force is binding upon the parties and must be enforced by them, in good faith".

obligations.

And still, there is one way to penalize the member state which becomes guilty of failing its assumed obligations. Thus, in the case of failure to comply with an obligation, that State breaches the individual rights and interests and the persons prejudiced can address national jurisdictions and obtain, under certain conditions, the repair of the prejudice caused, under the form of a sentence against the state, for example the obligation of that state to refund the illegally collected taxes.

D. The accession of a state to the European Union requires, among other things, the agreement of all already member states. In other words, any member of the Union has the right to express its agreement or, conversely, to make use of its right of veto on the accession of new member states.

E. The founding treaties contain a clause under which any revision thereof can be made only with the unanimous agreement of all member states. The treaty is revised through a diplomatic treaty subject to ratification. Thus, no commitment can be changed without formal consent.

1.2 . Obligations of member states

Naturally, states parties to the founding treaties acquire besides rights, also a number of obligations, which we shall divide into general and special.

- General obligations

Although these obligations are not numerous, they are, however, fundamental and specific to international law.

A. A first general obligation consists in **loyalty to the Union**. Founding treaties contain a clause of loyalty to the Union, according to which states parties must apply treaties in good faith and act in order to ensure the achievement of objectives pursued. This clause is nothing more than a way of expressing the principle of pacta sunt servanda[7] from international law. The idea, which results in an obligation to enforce and act in good faith, is found in art. 5[8] of the Treaty establishing the EEC[9], article that states: "Member states shall take all appropriate measures, whether general or particular in order to ensure the fulfillment of obligations resulting from this Treaty or from acts of Community institutions. At the same time, it facilitates the achievement of its mission". Under that same article, member states must refrain from any action "likely to jeopardize the achievement of objectives of this Treaty".

Moreover, the Court of Justice, even in its early decisions, has resorted in its motivations, to this general obligation of cooperation and loyalty to the member states, either by citing articles that enshrines it, or by referring to a more general form, the obligation of solidarity between member states. In this regard, we find several rulings, among which we mention the first ones ruled by the Court, in this area:

- the decision from 1969[10] where the ECJ stated that "solidarity grounds the whole Community system, under the commitment set out in art. 5 of the Treaty";

- in the Case *Scheer*[11], from 1970, the Court stated the following: at the beginning of implementation of the common agricultural policy, when the Commission could not fully assume its role, the member states were entitled and were required to take national legislative measures to facilitate the proper application of EU law;

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[7] For modifying Treaties, the Vienna Convention on the Law of Treaties of 1969 has a lot of relevance, stating in art. 26 that: "Every treaty in force is binding upon the parties and must be enforced by them, in good faith".

[8] The current art. 4, TEU.

[9] We find similar clauses in art. 192 of the Euratom Treaty, and also in the Treaty of Paris in art. 86, paragraphs 1 and 2.

[10] Decision of the ECJ, December 10, 1969, Commission v. / France, 6/69.

[11] Decision of the ECJ, December 17, 1970, Scheer v. / Einfuhr -und Vorratsstelle für Getreide und Futtermittel, 30/70 .

- the decisions from 1971 *: the Commission v. / France*[12] and *the Commission v. / Italy*[13]. In the first ruling, the court in Luxembourg talked about a general obligation of cooperation laid down in art. 192 of the EAEC Treaty, under which the parties had to resort to means offered by the Treaty to resolve any legal uncertainty that states were obliged to overcome in order to cover the failure of obligations;

- in the decision from 13 July 1972[14], the Court stated: "the effect of Community law, considered as having *res judicata* authority, by the Republic of Italy, compelled the competent national authorities to refrain from applying a national provision, recognized as being incompatible with the Treaty, as well as to take all necessary measures to facilitate the effect of Community law".

B. Another general obligation is **the coordination of national policy in order to ensure the common interest**, initially enshrined in art. 6 of the Treaty. According to the Treaty, member states commit themselves to coordinate their economic policies in order to achieve the objectives of the Treaty. Unlike the good faith principle existing in all three founding Treaties, this obligation is not provided, in similar terms, in the ECSC and Euratom Treaties. However, in the last two treaties, we find a general clause which gives to the Council of Ministers, the task of coordinating national policies with the action of Communities[15].

C. The financial contribution is another obligation of states parties, provided in the founding Treaties. This obligation is found in the Treaties of Rome, but it is missing from the Treaty of Paris. This is not really a gap, but has a reasonable explanation, in the sense that this Community had its own resources in the form of levies on coal and steel[16]. The obligation of financial contribution no longer exists today because, since 1970, the contributions of member states have been gradually replaced by their own resources[17].

D. The obligation of **responsibility[18] for actions of the Communities / Union towards third countries.** Although not covered by any of the three treaties, we believe that this obligation must be taken into consideration, resulting from the general rules of international law.

- Special obligations

By joining the founding Treaties, member states have undertaken a number of obligations arising from the economic character and the main objective of the European Communities, that of achieving the common Market. It concerns the obligations to do, characteristic especially for the transition period, otherwise told, commitments that states parties have undertaken. We mention the fact that it does not involve rules directly applicable to subjects in the member states. Given the large number of special obligations, further on, we shall only make a list of those that we consider to be illustrative for the achievement of the major objective of the Communities, namely the economic integration. Thus, we mention:

- the obligation to gradually remove, national tariffs and to replace them with a common external tariff;

- the obligation to abolish quantitative restrictions within the Common Market;

- the obligation to establish the free movement of workers;

- the obligation to set out the freedom of establishment and the freedom to provide services;

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[12] Decision of the ECJ, March 31, 1971, *the Commission v. / Conseil*, 22/70.
[13] Decision of the ECJ, December 14, 1971, *Commission v. / France*, 7/71.
[14] Decision of the ECJ, July 13, 1972, *Commission v. / Italy*, 48/71.
[15] Article 26 TEAEC and article 115 TCEC.
[16] Art. 49 TEAEC.
[17] Under the Treaty of 22 April 1970.[18] For more details regarding „responsibility" see Elena Emilia Ştefan, "*Răspunderea juridică. Privire specială asupra răspunderii în Dreptul administrativ*", "Pro Universitaria" Publishing House, Bucharest, 2013, p. 25-39.
[18] For more details regarding „responsibility" see Elena Emilia Ştefan, "*Răspunderea juridică. Privire specială asupra răspunderii în Dreptul administrativ*", "Pro Universitaria" Publishing House, Bucharest, 2013, p. 25-39.

- the obligation to liberalize the financial services;
- the obligation to renounce at the state aid;
- the obligation to eliminate tax differences etc.

2. Institutional systems set out in the founding Treaties

As known, under international law, one of the constituent elements of international intergovernmental organizations is the existence of a self-institutional system. Treaties founding the European Communities, and later the European Union are not limited only to make mutual legal bonds between the contracting parties, but they also create, inclusively, for each organization that they set up, a self- institutional system. In other words, the founding treaties provide the establishment of a "social assembly organized with a common purpose, which is anything but the result of national interests in attendance. This assembly is provided with bodies invested, to some extent, with autonomy and who are able to work towards achieving a common interest"[19].

A significant part of the content of founding treaties is reserved to the institutions of the European Union.

3. The classic review of constitutive treaties, under international law[20]

Each constitutive Treaty contains a review clause. Thus, in the Treaty of Paris it was stipulated that "after the transition period, the government of each Member State and the High Authority may propose amendments to this Treaty. The proposal will be submitted to the Council. The Council issues, by two-thirds majority, a favourable opinion in a conference with representatives of the governments that will be immediately convened by the President of the Council in order to reach a common agreement on the amendments to the Treaty. Amendments shall enter into force for all Member States after being ratified by all Member States in accordance with their respective constitutional requirements"[21]. Similar provisions are also found in the Treaties of Rome, as follows: The Government of any Member State or the Commission may submit to the Council, proposals on the review of this Treaty (CEEC, respectively TEAEC note[22]). If the Council, after consulting the Assembly and in the cases received from the Commission issues a favourable opinion at the reunion of a conference with representatives of Member States governments, convened by the President of the Council in order to reach a common agreement on the amendments to this Treaty, amendments shall enter into force after being ratified by all the Member States, under the internal constitutional procedures of each Member State[23].

Currently, provisions relating to the revision of Treaties of the European Union are found in art. 48 of the Treaty on European Union. The doctrine states that this article is one of the most important of the Treaty[24]. The text of the new art. 48 TEU, as amended by the Lisbon Treaty replaces the single revision procedure of the Treaties, provided prior to 2009[25]. Thus, under the mentioned article, Treaties may be amended in accordance with an ordinary

[19] Pierre Pescatore, *op. cit.* , p 56.
[20] This point of the article was published in Knowledge Horizons-Economics, Volume 5, Special Issue 1, „Pro Universitaria" Publishing House, Bucharest, p. 108-110.
[21] Art. 96, TEAEC (the variant from 1951).
[22] Our note.
[23] Art. 236 EECT and art. 204 TEAEC (variant from 1957).
[24] François-Xavier Priollaud, David Siritzky, „Le traité de Lisbonne. Texte et commentaire article par article des nouveaux traités européenne (TUE-TFUE)", La documentation Française, Paris, 2008, pag. 137.
25 The year when the Treaty of Lisbon has entered into force.

revision procedure. Also, they may be amended in accordance with some simplified revision procedures: a simplified procedure aimed at internal Union policies and activities and a simplified procedure named "bridging clause".

Regarding the ordinary procedure[26], we briefly mention the following: The Government of any Member State, the European Parliament or the Commission may submit to the Council, proposals for the amendment of Treaties. These proposals may, among other things, either increase or reduce the competences conferred upon the Union, in the Treaties. These proposals shall be submitted to the European Council, by the Council and the national Parliaments shall be notified. If the European Council, after consulting the European Parliament and the Commission, adopts by simple majority, a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, the European Parliament and the Commission. The European Central Bank is also consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt, by consensus, a recommendation addressed to the Conference of representatives of Member States Governments. The European Council may decide by a simple majority, with the approval of the European Parliament, not to convene a Convention if this is not justified by the proportion of changes. In the latter case, the European Council shall define the terms for the Conference of Member States. In order to adopt by common agreement, the amendments to be made to the Treaties, the Council President shall convene a conference of representatives of the Governments of Member States. Amendments shall enter into force after being ratified by all Member States in accordance with their constitutional requirements.

Regarding the simplified review procedures[27], as already mentioned, the first procedure envisages certain treaty provisions, and the second is known as the "bridging clause".

According to the first simplified procedure provided in art. 48 TEU, this applies only if the total or partial review of the provisions of Part Three of the Treaty on the functioning of the European Union is wanted, i.e. that concerning the internal policies and actions of the Union. The initiative belongs to the government of any Member State, the European Parliament or the Commission. The project of total or partial review is presented to the European Council. The European Council may adopt a decision for total or partial amendment. The European Council shall decide unanimously after consulting the European Parliament and the Commission, as well as the European Central Bank in the case of institutional changes in the monetary area. This Decision shall enter into force only after the approval of Member States in accordance with their respective constitutional requirements.

The second simplified procedure "allows adopting an act by means other than those provided by the founding treaties, without resulting however in a formal amendment of the Treaties. The general "bridging clause" applies in two situations:

• in the case where the Treaties provide that an act must be unanimously adopted by the Council, the European Council may decide to allow the Council to adopt the decision by qualified majority;

• in the case where the Treaties provide that the acts should be adopted under a special legislative procedure, the European Council may decide to authorize the adoption of those acts under the ordinary legislative procedure[28].

In both cases, the European Council shall decide unanimously and must obtain the consent of the European Parliament. Each national Parliament shall have, in addition, a right

26 Par. (1) – (6) of art. 48, TEU.
27 Par. (7) – (8) of art. 48 TEU.
28 According to http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0013_ro.htm

to object and prevent the activation of the general bridging clause. The bridging clause applies to all European policies, except to the defence policy and to decisions with military implications.

At a careful analysis of the texts presented above, we note that the review procedure envisages a preparatory stage with community character and a diplomatic stage. So, we shall remember that the preparatory phase, which develops at the Union level, is that where the initiative of treaties review may belong to the government of a Member State, the Commission or the European Parliament. The project is then submitted to the European Council that must consult, in its turn, the European Parliament, and where the initiative belongs to one of the governments of Member States, to the Commission. Subsequently, the European Council shall convene a Convention for the review of this Treaty. After making the decision to convene a diplomatic convention, the diplomatic stage follows. The Convention's mission is to reach a common agreement on the total or partial review of an EU Treaty. We believe that under the Convention, nothing happens other than the completion of negotiations on amending the Treaty, the signing by representatives of Member States, because negotiations are held in the preliminary stage. In other words, the amendments are negotiated and agreed by the European Council, and the Convention's purpose is the formalities required by signature. Amendments will not take effect until all Member States have expressed their consent, according to their national constitutional rules.

In conclusion, the EU Treaties may be amended totally or partially, in accordance with rules of the classic international law, under which the amendment of Treaties in force is following the procedure for their conclusion, namely: negotiation, signature and ratification by all States parties to the original Treaty.

4. Conclusions

In conclusion, we note that the Treaties which formed the foundation of the European Communities, and later of the European Union are international legal instruments governed by rules of public international law. The negotiation, conclusion, expression of consent, amendment of Community Treaties, respectively of European Union Treaties are specific stages of entry into force of any international treaties, governed by the same rules of international law.

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