FEATURES OF THE UNWRITTEN SOURCES OF EUROPEAN UNION LAW

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Abstract
There are three sources of European Union law: primary law, secondary law and supplementary law. Besides the case law of the Court of Justice, supplementary law includes international law and the general principles of law. It has enabled the Court to bridge the gaps left by primary and/or secondary law. International law is a source of inspiration for the Court of Justice when developing its case law. The Court cites written law, custom and usage. General principles of law are unwritten sources of law developed by the case law of the Court of Justice. They have allowed the Court to implement rules in different domains of which the treaties make no mention.

Key words: *European Union; EU law; unwritten sources; case law of the Court of Justice; general principles of law.*

1. Introductive considerations

The sources of European Union law are specific ways by which the rules of conduct deemed necessary in the European structures, become rules of law by a will agreement of member states[1]. Narrowly, the preponderance of EU law sources, from quantitative point of view, is given both by the establishing treaties (as primary, principal sources) and by other rules contained in the documents (acts) adopted by the Union institutions in the implementation of these treaties (as derived, secondary sources).

More broadly, however, EU law is: all the rules (of law) applicable in EU legal order, some of them even unwritten; the general principles of law or the jurisprudence of the Court of Justice; the rules of law whose origin is outside the Union legal order, originating from external liabilities of the Communities, of EU, respectively, and the complementary law derived from conventional acts concluded between the member states, for enforcing the Treaties. Further, we shall analyze, in synthesis, the features of the unwritten sources of European Union law.

2. General principles of EU law[2]

Special attention, within the unwritten sources of EU law, should be paid to the general principles of law, because they have a considerable contribution to the process of establishing EU law.Established by the Luxembourg Court of Justice case law, the general principles of law are an important factor in strengthening and developing the EU legal system; this is possible due to their essential characteristic, namely the need to be consistent with the specificity of this legal system unique in the world.

Starting from the classification provided by the doctrine in the field[3], we shall further present and analyze the general principles of EU law, in the following structure:

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[1] Dumitru Mazilu, *"Integrare Europeană. Drept comunitar şi Instituţii Europene"*, Lumina Lex Publishing House, Bucharest, 2000, p. 69.

[2] For details, see Mihaela Augustina Dumitraşcu, "*Dreptul Uniunii Europene şi specificitatea acestuia*", Universul Juridic Publishing House, Bucharest, 2012.

[3] Denys Simon, *„Le Système juridique communautaire* ", 2nd Edition, PUF, Paris, 2000, pp. 251-255. The author classifies the general principles of EU law, as follows: fundamental rights; principles deriving from the

- fundamental rights;
- principles specific to EU law;
- principles derived from the national legal systems of member states.

A. Fundamental rights. The fundamental rights are all those essential and inalienable rights of the human being, valid in all circumstances and without any possibility of derogation. In the EU context, this formula is used as a synonym for the phrase "human rights" and covers a wide range of rights, including economic rights, similar to those recognized by the Constitutions of member states or international conventions, in general and the European Convention on Human Rights, of November 4, 1950, in particular.

Under art. 6, par. (1) TEU[4], following changes brought to the Treaty of Lisbon, the Charter of Fundamental Rights has the same legal value as the Treaties, although this legal instrument is not really a treaty, not being ratified by the member states. The Charter is not incorporated in the Treaty, but it is attached by means of a provision referring to that document. Among novelties introduced in this field, we see that the former "principles" become "values" in the Treaty of Lisbon and, for the first time, the rights of minorities are mentioned. Thus, art. 2 TEU, as amended by the Treaty of Lisbon states that the Union is founded on values of respect for the human dignity[5], freedom[6], democracy, equality[7], rule of law[8], as well as on the respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.As shown in the "Explanations on art. 52 of the Charter", Member states wished to emphasize the distinction between rights and principles. In order to prevent future judicial activism[9] of the Court of Justice, member states considered that the principles would be implemented by legislative and executive acts, when that thing[10] is wanted and would be known only in the interpretation of those provisions and by the jurisprudence referring to their legality[11].

From the point of view of its legal obligation, it should be mentioned that even before obtaining legal value, the Court of Justice had recognized the principle of respect for fundamental

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European Union's quality of subject of international law, and the structural principles. In the same vein, see also Jean-Marc Favret, *"Droit et pratique de l'Union Européenne "*, 3rd Edition, Gualino Editor, Paris, 2001, pp. 237-242. According to Favret, general principles of EU law are classified as: general principles deduced from the nature of the Union, general principles derived from national legal systems, fundamental rights, and principles of international law.

[4] Article 6 (1) The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted on December 12, 2007, in Strasbourg, which has the same legal value as the Treaties. Provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Rights, freedoms and principles from the Charter shall be interpreted in accordance with the general provisions from Title VII of the Charter governing its interpretation and implementation and with due regard to the explanations referred to in the charter, that set out the sources of those provisions.

(2) The Union shall accede to the European Convention on Human Rights and Fundamental Freedoms. The Union's competences, as defined in the Treaties, shall not affect the membership.

(3) Fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law.

[5] New specification introduced by the Treaty of Lisbon.

[6] Interesting to note is that in English, the Treaty of Lisbon replaces the term *"liberty"* (referring to rights) with *"freedom"* (referring to principles).

[7] New specification introduced by the Treaty of Lisbon.

[8] Specification made also by ECJ in its jurisprudence, *Environmental Parties - Les Verts vs. European Parliament*, 1986, 294/83: "Community based on the rule of law".

[9] *"The Lisbon Treaty"*, European Institute, Leiden University, Law Faculty, The Netherlands, March 19, 2008 (http://media.leidenuniv.nl/legacy/lisbon-treaty-summaries.pdf), p.33.

[10] Article 52 par. (2) Charter.

[11] Article 52 par. (6) Charter.

rights as part of the general principles of law protected by the Court. In this respect, the Court has recognized since 1969 "the fundamental human rights enshrined in the general principles of Community law whose compliance is provided by the Court"[12], following that, in 1974, this aspect to be developed, as follows: "As the Court has already stated, the fundamental rights are included in the general principles of law whose compliance is provided by the Court". To ensure protection of these rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member states, and therefore it can not accept measures incompatible with the fundamental rights recognized and guaranteed by the Constitutions of those states. The international instruments on the protection of human rights to which member states have cooperated or acceded, can also provide guidelines that need to be taken into account in Community law"[13].

Under the Treaty of Lisbon, there are two sources regarding the human rights, namely: the Charter, under art. 6, par. (1) TEU[14], with legal value of treaty and, under art. 6, par. (3) TEU[15], the European Convention for the Protection of Human Rights and Fundamental Freedoms, as general principles of EU law.

Under art. 6, par. (2) TEU, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, but the Union's competences, as defined in the Treaties, shall not be affected by the membership. As for the accession to the Convention, "Protocol no. 8 on art. 6, paragraph (2) TEU" was annexed to the Treaty of Lisbon.

Regarding the content of the Charter, it contains in a single text, for the first time in EU history, all civil, political, economic and social rights of European citizens, as well as of all people living on the Union's territory. These rights are divided into six chapters as follows: dignity, freedom, equality, solidarity, citizenship, justice.

The Charter, unlike the European Convention on Human Rights, covers a broader protection field, beyond civil and political rights, referring to other issues, such as the right to good administration, workers' social rights, and protection of personal data or bioethics. In addition, the Charter takes into account the political rights of EU citizens which, by definition, cannot be included in the Convention.

The Charter resumes some rights, not explicitly outlined in the Convention of 1950 and, on the other hand, it provides a more detailed definition of certain rights (for example, the right to an effective judicial appeal that must be exercised before an independent judge, the appeal being possible for the defence of all rights protected by this law, even if it does not concern fundamental rights; the right to marry, which no longer considers the classical concept, but recognizes other ways to found a family; the right not to be on trial or punished twice, after a trial and for the same offence which applies not only within the same State, but also between the jurisdictions of several member states).

EU institutions must comply with the rights enshrined in the Charter. The member states have the same obligations when they implement EU law. The Court of Justice must guarantee the proper application of the Charter. Including the Charter in the Treaty does not modify the Union's competences, but it provides enhanced rights and greater freedom to citizens.

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[12] Section 7 of ECJ Judgement of November 12, 1969, *Stauder*, 29/69.

[13] Section 13 of ECJ Judgement of May 14, 1974, *Nold*, 4/73.

[14] "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted on December 12, 2007, in Strasbourg, which has the same legal value as the Treaties. Provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions of Title VII of the Charter governing its interpretation and implementation and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions".

[15] "Fundamental rights, as guaranteed by the European Convention and as they result from the constitutional traditions common to the member states represent general principles of Union law".

We **conclude** by stating that the Charter of Fundamental Rights is an expression, at the highest level, of a democratically established political consensus on what today must be regarded as a catalogue of rights, catalogue that is part of EU legal order. The acquisition by the Charter of Fundamental Rights, of binding legal force, can be considered as the fulfilment of the promise of Brussels officials to put citizens at the heart of the European Union activities.

B. The specific principles of EU law

A number of various principles fall within this category, sharing the intrinsic, essential link to EU legal system, meaning that it marks its specificity in relation to other legal systems, of state or international. These include: the principle of institutional balance, the principle of conferral, with multiple consequences on the entire EU system, but also the principle of subsidiarity and proportionality.

a. The principle of institutional balance. With the ratification of constituent treaties, member states have decided to transfer part of their competences to the European Union. At EU level, they are exercised by institutions provided by treaties, institutions receiving specific tasks in the decision making, execution and control process. According to EU Treaties, each institution "acts within the powers conferred by (...) the Treaty"[16]. We are, therefore, facing a separation of powers between institutions, separation which, however, cannot harmonize with the model proposed by Montesquieu in the eighteenth century. Thus, the existing institutional machinery does not allow the separation of the legislative, executive and judicial powers. The European Parliament does not have the same powers of a national parliament, meaning that it does not have a real legislative power. The Council participates to the legislative function, as well as to the executive function, the latter being shared with the European Commission. However, even if the division of powers is not the same as in the national constitutional law, the role of this division might be comparable to that provided by the classical principle of separation of powers. It is about the need to avoid concentrating all powers in the hands of one body in order to prevent an abusive, arbitrary use of these powers.

It should be noted that, at EU level, most of the functions are concentrated in the Council, institution with an intergovernmental structure. This is because, the Union, despite its specificity, remains an international organization, and the authors of the Treaties have established an important role for the member states in EU structure. However, the powers conferred on other institutions tend to counterbalance those conferred on the Council in order to enable the Union, in the exercise of its powers, to take into account all the interests involved - those of the states represented by the Council, but also those of European citizens represented by the democratically elected body, namely the Parliament; the Union's interest, manifested in the independent institution - the Commission -, and the public interest in complying with the law, provided by the Court of Justice.

The principle of institutional balance combines two essential components, namely[17]: the separation of powers, respectively of tasks of institutions concerned, on the one hand and the collaboration, cooperation between institutions, on the other hand.

The first component presupposes the impossibility of delegation, transfer, acceptance or conferral of competences, from one institution to another. This separation requires the obligation of each institution not to obstruct the performance of tasks, by the other institutions. Consequently, no institution must be blocked to perform its duties. In this case, the principle of the favourable behaviour reciprocity is reflected.

This principle does not exclude, but rather involves the collaboration between institutions, in order to achieve the objectives proposed.

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[16] Art. 13 par. (2).

[17] Augustin Fuerea, *"Manualul Uniunii Europene"*, Fifth edition, revised and enlarged after the Treaty of Lisbon (2007/2009), Universul Juridic Publishing House, Bucharest, 2011, p 87.

b. The principle of conferral. According to provisions of the Treaties, each institution shall act within the limits of powers conferred by the Treaty.

The principle of conferral can be understood as a translation into EU law, of the specialty principle of international organizations. This follows from the fact that, like all international organizations, the Union is an entity established by the member states and does not share with them, the quality of fundamental subject of international law.

Under art. 5 of the Treaty on European Union, "the separation of the Union's competences is governed by the principle of conferral". "Under the principle of conferral, the Union shall act only within the limits of competences conferred on it by the member states, in the Treaties, to achieve the objectives set out therein. Competences not conferred on the Union by the Treaties remain the domain of the member states"[18].

The importance of the principle of conferral is determined by the types of competences regulated by EU treaties. In this respect, the nature and characteristics of competences are reflected in the process of conferring them. Thus, we can distinguish two situations. In the first case, EU competences do not replace state powers. They remain, but will be surrounded by EU fundamental legal rules. In this situation, the EU institutions will have the task to exert a double action: on the one hand, to prescribe in accordance with treaties, rules that would detail and customize the limits set by them and secondly, to ensure compliance with those limitations, by the member states.

In the second case, the competences of the Union are intended to replace state powers. In this situation, the EU institutions have legislative powers, more important than those of the member states, due to the Community dimension of actions, having thus, the task to enact common rules, for the enforcement and execution of which, the member states acquire the quality of Community authorities (such situation is encountered, for example, in joint policies).

Under art. 3 of the Treaty on the Functioning of the European Union, "the Union shall have exclusive competence in the following areas:

(a) the customs union;

(b) establishing rules regarding competition, necessary for the functioning of the internal market;

(c) the monetary policy for member states whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) the common commercial policy", but also for "concluding an international agreement when its conclusion is provided in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in the case when it may affect common rules or alter their scope".In all these cases, "only the Union may legislate and adopt legally binding acts, the member states being able to do so only if so empowered by the Union or for the implementation of the Union's acts".

Further, the Treaty sets out the areas in which the Union shall share competence with the member states, namely: (a) the internal market; (b) the social policy, for aspects defined in this Treaty; (c) the economic, social and territorial cohesion; (d) the agriculture and fisheries, excluding the conservation of marine biological resources;(e) the environment; (f) the consumer's protection; (g) the transportations; (h) the trans-European networks; (i) the energy; (j) the area of freedom, security and justice;(k) common safety objectives concerning public health matters, for aspects defined in this Treaty".

The following provisions are added to these above mentioned: "In the areas of research, technological development and space, the Union shall have competence to carry out activities, and in particular to define and implement programs, without the exercise of that power to prevent member states from exercising their own competence. In the areas of cooperation for development and humanitarian aid, the Union shall have competence to carry out activities and conduct a common

[18] For details, see Augustin Fuerea, *"EU legal personality and areas of competence according to the Treaty of Lisbon"*, ESIJ no. 1/2010 ("Lex ET Scientia International Journal").

policy, without the exercise of that competence to result in the member states' deprivation of the opportunity to exercise its jurisdiction. Also, "The Union and the member states may legislate and adopt legally binding acts in this area. Member states shall exercise their competence to the extent where the Union has not exercised it. Member states shall again exercise their competence to the extent where the Union has decided to cease exercising it".

Protocol 25 on the exercise of shared competence, contains a provision to the unique article, according to which "if the Union develops an action in a certain area, the scope of the exercise of competence covers only those elements regulated by that Union act, and therefore does not cover the whole area".

Declaration no. 18 concerning the delimitation of competences complements everything that we have described above, meaning, "in accordance with the division of competences between the Union and the member states, as provided in the Treaty on European Union and the Treaty on the Functioning of the European Union, any competence not conferred on the Union by the Treaties remains the domain of the member states. When the Treaties confer on the Union, competences shared with the member states in a specific area, the member states shall exercise their competence to the extent where the Union has not exercised its competence or has decided to cease exercising it. The latter situation may arise when the relevant EU institutions decide to repeal a legislative act, especially to ensure better constant compliance with the principles of subsidiarity and proportionality. The Council may request, at the initiative of one or more of its members (representatives of member states) and under article 241 of the Treaty on European Union, to submit proposals for repealing a legislative act".

In addition to these provisions, comes art. 6 TFEU, which, among other things, lists areas where the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the member states, as follows:

"(a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, professional training, youth and sport; (f) civil protection; (g) administrative cooperation". "The legally binding Union acts adopted under the provisions of the Treaties relating to these areas shall not entail the harmonization of laws, regulations and administrative provisions of member states. The scope and conditions for exercising the Union's competences are established by provisions of the Treaties relating to each area".

c. The principles of subsidiarity and proportionality. Under art. 5 of the Treaty on European Union, the exercise of the Union competence is regulated by "the principles of subsidiarity and proportionality". According to the principle of "subsidiarity, in areas which are not within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but they can be better achieved at Union level due to the dimensions or effects of the proposed action". In addition to these provisions, there are to be found also those listed in art. 4, paragraph (1) TEU, namely: "any competence not conferred on the Union by the Treaties remains the domain of the member states".

d. Principles derived from national legal systems of the member states. Expressly provided by art. 340 par. (2) TFEU[19], in the context of extra-contractual liability, the general principles of law of the Member states are often used in the reasoning of ECJ judgements. Without making a simplistic comparison of national systems of law, but rather a synthesis which helps the Court to adopt the best solution in this case[20], the Luxembourg Court established, at EU level, a set of

[19] "In matters of extra-contractual liability, the Union is required to pay, in accordance with the general principles common to the laws of the Member States, any damage caused by its institutions or by its servants in the performance of their duties".

[20] Takis Tridimas, *"The General Principles of EU Law"*, 2nd edition, Oxford EC Law Library, 2006, pp. 20-21.

common principles inspired by the law of the member states, among which, by way of example: the principle of appeal against any decision of a national authority denying a right under the treaties[21], the right to defence[22], the principle of legal security[23], the principle of good faith[24], the principle of equality before the regulation[25], the principle of withdrawal of administrative acts[26].

According to Takis Tridimas[27], the two national legal systems that have had the greatest influence in setting EU administrative law and therefore, the general principles of law are the French and German systems; the reasons are of course, of historical nature. We shall, further, present some conclusions reached by the author during the study of the influence of German, French and English legal systems on the general principles of law, as sources of EU law. Thus, the author notes[28] that the German influence was present in creating the principles of proportionality, legitimate expectation and protection of fundamental rights. The French system also had a major influence, its public law tradition being the strongest in Europe, and the French administrative law has been a model for other countries on the continent. Examples of such influences for EU law are: the action for annulment and the organization of the Court of Justice, after the State Council model. Unlike the German and French influence, the English system did not have a significant impact on EU law and, in particular, on the development of law principles. This fact is explained by the relatively late entry of Great Britain and Ireland in the European Communities (1973) and, therefore, its absence in the period of establishing the EU law. However, we must notice the major influence on procedural safeguards that the Luxembourg Court case law has had. Findings highlighted by Takis Tridimas, following his short study are that: no system of law can claim an overwhelming influence on EU law. Also, according to the author mentioned, the influence occurs in both directions, the national legal systems being profoundly influenced by jurisprudential developments at EU level, leading thus to a *jus communae* that develops and evolves constantly.

3. Case-law of the Luxembourg Court

The influence of the case law on the development of EU law is considerable, which is explained by the fact that the Union faces a system of law in the process of developing[29]. At the same time, with the purpose of ensuring compliance with the law, the Luxembourg Court of Justice was asked not only to accurately define the law, but also to cover gaps by a creative, praetorian jurisprudence; the law has often prefigured the legislative evolution.

The Court of Justice is not a source of EU law in the sense known by the *common law* legal system, the judicial decisions not having *erga omnes* effect. Solutions given by the Luxembourg Court of Justice are required on how to interpret the provisions of EU law. So, although we cannot say that EU law is a "case law", we opine that the interpretation and application of EU law in accordance with the Treaties are possible only through the jurisprudence of the European Court of Justice.

It is also appropriate to remember that Treaties provide for the ECJ, as the main role, to ensure compliance with law in the interpretation and application of the Treaties. Thus, Treaties provide the possibility of initiating an action in interpretation, with prior title. Interpretation is useful, especially if EU law, in many respects, contains either gaps or provisions having general character or unclear aspects about the meaning of a provision.

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[21] ECJ Judgement, May 15, 1986, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 222/84.
[22] ECJ Judgement, January 27, 1987, *Verband der Sachversicherer v. Commission*, 45/85.
[23] ECJ Judgement, June 16, 1993, *France v. Commission*, C-325/91.
[24] ECJ Judgement, March 22, 1961, *S.N.U.P.A.T. v. Haute Autorité*, 42/59.
[25] ECJ Judgement, November 12, 1969, *Stauder v. Stadt Ulm*, 29/69.
[26] ECJ Judgment, July 12, 1957, *Algera e.a. v. Assemblée commune*, 7/56, 3-7/57.
[27] Takis Tridimas, *op. cit*., p. 24.
[28] *Ibid*.
[29] Augustin Fuerea, *op. cit*., p. 147.

The usefulness of ECJ judgements is obvious in situations where some definitions for terms used in the Treaties and whose content was not determined enough, had to be given; we can take as example, the explanations on "charge having an effect equivalent to customs duties", "measures having equivalent effect to quantitative restrictions", "worker", "priority of Community law in relation to the member states", "autonomy of Community law" etc. Thus, according to the Court, the charge having an effect equivalent to customs duties means "any fee, regardless of its name or application, which, imposed on a product imported from a member state in order to exclude a similar national product has, by the price change, the same effect on the free movement of goods as a customs duty and can be regarded as a charge having equivalent effect, regardless of its nature and form"[30].

Since the concept of "measures having equivalent effect to quantitative restrictions" is not defined in the Treaty, the Court of Justice had the mission to clarify it. Therefore, the Court formulated the *Dassonville* judgement[31], opinion according to which "all trading rules imposed by the member states which may hinder directly or indirectly, actually or potentially, the intra-Community trade are to be considered as measures having an equivalent effect to quantitative restrictions"[32]. Subsequently, in the *Cassis de Dijon*[33] judgement, the Court extended this notion ruling that "a measure can be considered as having equivalent effect even without discrimination between imported and internal goods. In particular, the technical regulations of the importing state imposed on goods from other member states, can be considered as an equivalent measure, if not justified, because imported goods are penalized by the obligation to make changes in prices. The absence of Community harmonization cannot be used to justify this attitude, where it effectively prevents the freedom of movement. Thus, the Court established the principle according to which any product legally manufactured and marketed in a member state, in accordance with fair and traditional rules and manufacturing processes existing in that country should be allowed on the market of any other member state. This is the principle of mutual recognition by member states of those rules, in the absence of harmonization"[34].

The Treaty on the Functioning of the European Union establishes the free movement of workers, but does not define the term, which is why once again, the Court must cover the gap. By corroborating interpretations offered in several judgements[35], it results that, in the sense of EU law, worker is any person who performs work under an employment contract and for which he/she receives remuneration; the following aspects are not important: the legal nature of the contract, the remuneration amount, the contract duration, the time spent at work (full or part time); what is important is that the finality represents an economic activity.

4. Common law

In public international law, common law is particularly important and is the oldest source of both international law and law, in general[36]. International common law is, therefore, under art. 38, par. 1 letter b) of the Statute of the International Court of Justice, annexed to the UN Charter, "proof of a general practice accepted as law". Customary process elements are: the common law should be a

[30] http://circa.europa.eu/irc/opoce/fact_sheets/info/data/market/market/article_7191_ro.htm

[31] ECJ Judgement, July 11, 1974, *Dassonville*, 8/74.

[32] http://circa.europa.eu/irc/opoce/fact_sheets/info/data/market/market/article_7191_ro.htm

[33] ECJ Judgement, February 20, 1979, *Rewe / Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*), 120/78.

[34] http://circa.europa.eu/irc/opoce/fact_sheets/info/data/market/market/article_7191_ro.htm

[35] ECJ Judgement, July 3, 1986, *Lawrie-Blum*, 66/85; ECJ Judgement, March 23, 1982, *Levin*, 53/81; ECJ Judgement, May 31, 1989, *Bettray*, C-344/87 etc.

[36] Raluca Miga-Besteliu, *"Drept internațional public"*, Volume II, C.H. Beck Publishing House, Bucharest, 2008, p 68.

general practice, relatively long and uniform considered by states as expressing a rule of conduct with legally binding force.

The common law is an unwritten source and can be defined, in the light of EU law, as a practice followed and accepted, becoming legally binding, a practice that adds or modifies the primary or secondary/ derived EU legislation. It must be said that EU law does not include customs in the sense described above with reference to customary international law. Contrary to public international law, where it represents a fundamental source of law, the custom is quasi-inexistent in EU law[37].

As arguments for what we have earlier stated, we present the following:

- firstly, there is a special procedure for amending the Treaties; it does not exclude the possibility of a custom, but sets some demanding criteria that such practice must meet in order to be applicable;

- another obstacle would be that the validity of any action of the institutions is checked in relation to the Treaties, and not to their practice, which means that from the point of view of Treaties, common law cannot be created in any case, by the Community institutions; at most, the member states can do this, and even assuming that – only under the strict fulfilment of conditions mentioned.

However, certain repeated practices that are part of the texts of EU Treaties, could have the propensity to form, on a long term, customary rules. The Court of Justice did not exclude that possibility, recalling that "in any case, a mere practice cannot prevail over the rules of the Treaties"[38]. A practice *contra legem* could not in any case be a source of law. On the contrary, a practice *praeter legem* which might intervene to complete texts of treaties in order to resolve an unexpected aspect, could lead to the creation of customary rules. It is, thus noteworthy that, at Community level, one single custom is, for now, in the process of being created: it is the practice of resorting increasingly more often to informal agreements[39] established between EU institutions.

5. Conclusions

The unwritten sources are considerably important among sources of EU law. It is up to the EU legal order to receive the unwritten law, consisting mainly of the Luxembourg Court of Justice case law, among other sources[40]. To this ability, it corresponds that not less remarkable, of the Court of Justice establishing the law.

The exercise by the Court, of this regulatory mission becomes singular, in particular, by using the methods of dynamic interpretation, as well as by widely resorting to general principles of law.

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[37] L. Cartou, J.-L. Clergerie, A. Gruber, P. Rambaud, „*L'Union Européenne"*, Dalloz Publishing House, 2000, p. 78.

[38] ECJ Judgement, August 9, 1994, *France v. Commission*, C-327/91.

[39] Not to be confused with inter-institutional agreements.

[40] The imprecise, incomplete character of general rules contained in the Treaties; the rigidity of primary law due to the cumbersome procedure for revision; the inertia of secondary law resulting from blockages in the Council.

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