BRIEF CONSIDERATIONS ON THE PRINCIPLES SPECIFIC TO THE IMPLEMENTATION OF THE EUROPEAN UNION LAW

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Abstract

The principles specific to the implementation of EU law have as characteristic that they mark the specificity of EU law in relation to other legal orders, from national or international point of view. These principles include the principle of conferral, with multiple consequences on the entire EU system, but also the principle of subsidiarity, proportionality or of sincere cooperation.

Keywords: *principles of EU law; principle of subsidiarity; principle of loyal cooperation; principle of proportionality*

1. The principle of conferral[1]

Under the provisions of the Treaties, each institution shall act within the limits of prerogatives conferred on it by these Treaties.

The principle of conferral can be understood as a transfer into European Union law, of the specialty principle of international organizations. This stems from the fact that, like all international organizations, the European Union is an entity established by the Member States and does not share with them, the quality of original subject of international law.

Under Article 5 of the Treaty on European Union, "the demarcation of the Union's competences is governed by the principle of conferral". "Under the principle of conferral, the Union can only act within the limits of the competences conferred on it by the Member States in the Treaties to attain the objectives set out in those Treaties". Competences not conferred upon the Union in the Treaties remain with the Member States"[2].

Regarding the importance of the principle of conferral, it is determined by the types of competences covered in the EU treaties. In this respect, the nature and characteristics of competences will influence the process of their conferral. Thus, we can distinguish two situations. In the first case, EU competences do not replace state competences. They remain, but will be framed by rules of law originating in the EU. In this situation, the Union's institutions have the task to exercise a double action: on the one hand, to prescribe in accordance with Treaties, rules detailing and customizing the limitations set out by them and on the other hand, to ensure compliance with those limitations by Member States. In the second case, the Union's competences were intended to replace state competences. In this situation, the EU institutions have legislative powers greater than those of the Member States

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[1] Legal basis:

- Statement no. 24: The Union is not authorized „in any way to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties".
- Article 5 TEU paragraphs (1) and (2): „(1) The demarcation of the Union's competences is governed by the principle of conferral. The exercise of these competences is governed by the principles of subsidiarity and proportionality. (2) Under the principle of conferral, the Union can act only within the limits of the competences conferred on it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

[2] 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").

due to the Union dimension of actions, accounting in this way, the task to enact common rules in the implementation and enforcement of which, the Member States acquire the quality of Community authorities (such a situation is encountered for example in joint policies).

Therefore, under this principle, the EU institutions carry out only those tasks that are specifically set out. At this level, the fulfillment of implicit, deducted responsibilities is not allowed.

The reason behind this principle is rooted precisely in matters pertaining to the rigor shown in the plan of action, but also to the liability[3] of institutions to whether or not fulfill the tasks / competences.

2. The principle of subsidiarity[4]

The principle of subsidiarity was introduced into the legal order of the European Union for the first time, by the Single European Act in 1986, and was firmly established in Article 3B of the Treaty of Maastricht. Until the emergence of these two conventional texts, the principle was, implicitly, present in the founding Treaties, even before ever being in the case law of the Court of Justice of the European Communities.

Under Article 5, paragraph (4) TEU, actions at EU level will not exceed what is necessary in order to achieve the objectives set out in the Treaties. This means in fact that whatever it can be done at national level by Member States, it should not be done jointly at EU level; however, if this is not possible, collective intervention is required. The competence of common law belongs, therefore, to states. More specifically, it is an acceptance from states to limit their competences in order to grant more competences to the Union. Therefore, the national competence is the rule, and the competence of the European Union is the exception. The doctrine states: "the principle of subsidiarity is a principle governing competences in the Union, and not a principle under which competences are granted"[5].

The principle of subsidiarity involves the following **two** aspects:

- the first aspect considers the situation in which the Union is competent to work in the areas and to the extent of objectives assigned to it expressly and obviously, being an exclusive competence. In fact, in this case, the implementation of the principle of subsidiarity (for example, in the areas of agricultural, transport, competition policies or common commercial policies) cannot even be brought into question;
- the second aspect relates to the case where we are in the presence of competing competences, i.e. in areas which do not belong to the Union's exclusive competences (for example, areas of social policy, health and consumer or environmental protection), and Member States cannot, because of the dimension and effects of that action, to attain their objectives. In this situation, the Union will only intervene in the cases where these objectives can be better attained at its level than at the level of Member States.

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[3] For details regarding „the liability", see Elena Emilia Ștefan, "*Răspunderea juridică. Privire specială asupra răspunderii în Dreptul administrativ*", "Pro Universitaria" Publishing House, Bucharest, 2013, pp. 40-49.

[4] Legal basis:

- Article 5 paragraph (3): „Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action can not be sufficiently achieved by the Member States at central level or at regional and local level, but the dimension and effects of the proposed action, can be better achieved at Union level.

Institutions of the Union shall apply the principle of subsidiarity in accordance with the Protocol on the application of subsidiarity and proportionality. The national Parliaments ensure the compliance with the principle of subsidiarity, in accordance with the procedure set out in that Protocol".

- Protocol (No. 2) on the application of the principles of subsidiarity and proportionality.

[5] Guy Isaac, Marc Blanquet, „*Droit général de l'Union Européenne*", 10e édition, Dalloz , 2012 , p. 91 .

Thus, considering the two aspects above mentioned, it is obvious that the principle of subsidiarity applies only in the case of shared, competing competences, and not in the case of exclusive competences of the European Union.

3. The principle of proportionality[6]

The principle of proportionality has been jurisprudentially established, being applicable, initially, in the matter of economic operators' protection against damage that could result from the application of Community law. Subsequently, it was codified by the Treaty of Maastricht, as it follows: "the Community action shall not exceed what is necessary to achieve the objectives of this Treaty"[7]. With the entry into force of the Treaty of Lisbon, the content of the principle becomes much more accurate, in the sense that "the Union's action, in content and form, shall not exceed what is necessary to achieve the objectives of the Treaties".

Unlike subsidiarity, which "aims at determining if a competence should be exercised"[8], proportionality occurs "once the decision to exercise a competence was taken, in order to determine the extent of the law"[9]. The principle of proportionality has been designed to avoid excessive regulatory activities of the Union and to find other solutions than legislative in order for the Union to achieve its objectives.

More precisely, proportionality means that, if in the application of a competence, the Union has to choose between several modes of action, it must retain that mode which leaves states, individuals and businesses, the greatest freedom. To this end, the Union must consider whether legislative intervention is urgently needed or other means could also be used, such as reciprocity, recommendation, financial support, encouraging cooperation between states or accession to an international convention. The principle of proportionality implies that, if it proves that it is more than necessary to adopt a rule in the European Union, its content should not be an excess of regulation, in the sense that it is preferable to resort to the adoption of a directive rather than to a regulation[10]. In this respect, there are also the provisions of Article 296 TFEU, namely: "if Treaties do not specify the type of act to be adopted, the institutions shall select it, from case to case, in compliance with applicable procedures and with the principle of proportionality".

In turn, the Court of Justice stated in its ruling[11], in *the Queen* case[12], that the "principle of proportionality requires that the acts of the [European Union's] institutions do not exceed the limits of what is appropriate and necessary in order to achieve the legitimate objectives pursued by the regulation in question, in the sense that when there is the possibility to choose between several appropriate measures, it must be resorted to the least onerous, and that the disadvantages caused must not be disproportionate to the aims pursued"[13]. In this respect, the academic literature[14] identifies three dimensions, specific to the principle of proportionality, namely: adequacy, necessity and non-disproportionality.

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[6] Legal basis:
- Article 5 para. (4) TEU: „Under the principle of proportionality, the Union's action, in content and form, shall not exceed what is necessary to attain the objectives of the Treaties. Institutions of the Union shall apply the principle of proportionality in accordance with the Protocol on the application of the principles of subsidiarity and proportionality".
- Protocol (no. 2) on the application of the principles of subsidiarity and proportionality.

[7] Article 5 para. (3).

[8] Jean Paul Jacqué, „*Droit institutionnel de l'Union européenne*", 7e édition, Dalloz, 2012, p. 183

[9] Idem.

[10] Guy Isaac, Marc Blanquet, *op. cit*., p. 100.

[11] ECJ Ruling, 5 Mai 1998.

[12] C-157/96.

[13] Section 60 from the ruling.

[14] Guy Isaac, Marc Blanquet, *op. cit*., p. 100.

Therefore, according to the European Commission[15], “proportionality is a guiding principle for defining how the Union should exercise its competences, both exclusive and shared - *which should be the form and nature of EU action?* According to the TEU, the content and form of the Union’s action shall not exceed what is necessary to achieve the objectives of the Treaties. Any decision should favour the least restrictive option in this regard”[16].

4. Common aspects of the principles of subsidiarity and proportionality[17]

Under Article 1 of Protocol no. (2) on the application of the principles of subsidiarity and proportionality, each EU institution shall, at all times, provide compliance with the principle of subsidiarity. In this regard, the Protocol establishes a control mechanism for compliance with this principle. Thus, before proposing legislative acts[18], the Commission, under Article 2 of the Protocol, must proceed to extensive consultations involving the regional and local dimension of actions envisaged. From the necessity of consultation, it can be derogated only in case of emergency, but in this case, the Commission must explain its decision in its proposal. Further, the Protocol provides that[19] both the European Parliament and the Commission are required to submit to national parliaments, their draft legislative acts, as well as their amended drafts, at the same time as to the Council. The Council, in turn, is required to submit to national parliaments, the draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, as well as the amended drafts.

In fact, the draft legislative acts must be grounded in terms of compliance with the principles of subsidiarity and proportionality. In this sense, Article 5 specifies that any draft legislative act must contain a detailed statement allowing the assessment of the compliance with the principle of subsidiarity. This statement includes “elements allowing the assessment of the financial impact of the draft in question and, in the case of a directive, of its implications on the rules to be implemented by Member States, including on the regional legislation, as appropriate. The reasons that lead to the conclusion that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. The draft legislative acts must consider the need to proceed so that any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimized and proportionate to the aim pursued”[20].

Within eight weeks from the transmission of the draft legislative act, the national parliaments can send to the President of the European Parliament, the Council and the Commission, a reasoned opinion stating why they consider that the draft in question does not comply with the principle of subsidiarity[21]. Once the opinion received, the President of the Council will transmit it further to the governments of states which initiated the draft

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15 European Commission Report on subsidiarity and proportionality (18th report “Better Regulation” for 2010), COM (2011) 344 final, Brussels, 10.06.2011 (http://eur-lex.europa.eu/LexUriServ / LexUriServ.do? uri = COM: 2011:0344: FIN: RO: PDF).

[16] Ibid, p. 2.

[17] For details, see Roxana-Mariana Popescu, *„Introducere în dreptul Uniunii Europene”,* „Universul Juridic” Publishing House, Bucharest, 2011, pp. 84-95 and Mihaela-Augustina Dumitraşcu, *„Dreptul Uniunii Europene şi specificitatea acestuia”*, „Universul Juridic” Publishing House, Bucharest, 2012, pp. 66-72.

[18] Under Art. 3, „In the meaning of this Protocol, “draft legislative act” mean proposals of the Commission, initiatives from a group of Member States, the European Parliament’s initiatives, requests from the Court of Justice, the European Central Bank's recommendations and requests of the European Investment Bank on the adoption of a legislative act”.

[19] Article 4.

[20] Article 5 of the Protocol.

[21] Under Article 6 of the Protocol.

legislative act, respectively to the Court of Justice, the European Central Bank or the European Investment Bank, if one of these institutions is the originator of the draft legislative act.

In the case where the reasoned opinions on non-compliance of a draft with the principle of subsidiarity represent at least one third of all the votes allocated to national parliaments, or a quarter for a draft referring to the area of freedom, security and justice, the draft must be reviewed. Following this review, the Commission or, where appropriate, the group of Member States, the European Court of Justice , the European Central Bank or the European Investment Bank , if the draft legislative act is issued by them, can decide whether to maintain the draft, to amend it or to withdraw it. No matter what the solution is, it must, however, be reasoned.

Article 7 of the Protocol regulates, including the situation in which the opinion is offered in the ordinary legislative procedure. In this case, the opinions reasoned on the non-compliance of a draft legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to national parliaments, the draft must be reviewed. Following such review, the Commission can decide to maintain the proposal, to amend it or withdraw it. If it chooses to maintain the proposal, the Commission must justify, in a reasoned opinion, why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of national parliaments must be submitted to the Council and the European Parliament in order to be taken into consideration in the procedure[22]:

(a) before concluding the first reading, the European Parliament and the Council shall examine if the legislative proposal is compatible with the principle of subsidiarity, taking particularly into account the reasons expressed and shared by the majority of national parliaments, as well as the Commission’s reasoned opinion;

(b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the Council and Parliament (as legislative institutions) consider that the legislative proposal is not compatible with the principle of subsidiarity, it will not be further examined.

In the case where a Member State or a Member State on behalf of its national parliament notices that a legal act of the Union was adopted without complying with the principle of subsidiarity, it can attack that act, through an action for annulment, the Court of Justice of the European Union being the one that has the competence to rule on such actions. Such actions can be also formulated by the Committee of the Regions against legislative acts for the adoption of which the Treaty on the functioning of the European Union provides that it must be consulted23.

According to the European Commission[24], “the control and monitoring of subsidiarity issues have played an important role in the agenda of the European Parliament and the Committee of the Regions which adapted their internal procedures to more effectively analyze the impact and added value of the work performed”[25].

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[22] Under Article 7, paragraph (3) of the Protocol.
[23] Article 8, paragraph (2) of the Protocol.
[24] The annual Report of the European Commission for 2012 , regarding subsidiarity and proportionality COM(2013) 566 final, 30.7.2013 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0566:FIN:RO:PDF).
[25] Ibid, p. 11.

5. The principle of sincere cooperation

Under the principle of sincere cooperation, "Member States are obliged to implement EU law, thereby contributing to the mission of the Union, and to refrain from any action that could jeopardize the achievement of the EU objectives"[26].

Under Article 4 TEU, "according to the principle of sincere cooperation, the Union and the Member States shall respect and assist each other in carrying out missions arising out of the Treaties. Member States shall take any general or particular action to ensure the fulfillment of obligations under the Treaties or resulting from the acts of EU institutions. Member States shall facilitate the achievement of the Union's mission and refrain from any measure detrimental to the achievement of its objectives". In this way, three obligations are established in the task of Member States[27]: two positive (the adoption of measures to implement EU law and facilitate the exercise of the Union's mission) and one negative - not to take any action that would jeopardize the objectives of the Union.

In the Union, under the principle of sincere cooperation, the Member States are invited to support the Union's actions and not to hinder its proper functioning, for instance[28] by punishing infringements of EU law, as strictly as infringements of national law or by cooperating with the Commission in procedures linked to the monitoring of compliance with EU law, e.g. by sending the documents required in accordance with the rules etc.

The sincere cooperation is a principle that the Treaty on European Union requires to be complied with by the EU institutions, too. Thus, according to Article 13 paragraph (2), the last sentence is "institutions shall cooperate with each other fairly".

The inter-institutional collaboration principle is found in Article 249 TFEU "that stipulates that the Council and the Commission must start mutual consultation and agree on the modalities of collaboration. Inter-institutional cooperation is organized in various ways, including: exchanges of letters between the Council and the Commission; inter-institutional agreements, joint declarations of the three institutions"[29] etc.

The principle has been often invoked by the Court of Justice in Luxembourg in various rulings over time. Thus, in 1983, the Court reminded in the ruling from the case *Luxembourg v./ the European Parliament*[30], that "when provisional decisions are taken, governments of the Member States must, under the rule which requires states and Community institutions, mutual obligations of sincere cooperation, rule inspired, especially from Article 5 TEC, consider that these decisions do not affect the proper functioning "[31]of the Union's institutions. In 1986, in the ruling in case *Greece v. / the Council*[32], the Court maintains its position, extending however, the sincere cooperation also to relations between the Union's institutions, saying that in the dialogue between the Union's institutions, "must prevail the same mutual obligations of sincere cooperation (...) that govern also the relations between Member States and Community institutions"[33]. The Court goes back to the principle of cooperation, in 1990

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[26] François-Xavier Priollaud, David Siritzky, „Le Traité de Lisbonne. Texte et commentaire article par article des nouveaux traités européens (TUE-TFUE)", La documentation Française, Paris, 2008, pp. 39-40.

[27] According to *Rapport* de Monsieur Etienne Goethals presented during „Réunion constitutive du comitésur l'environnement del'AHJUCAF. Ecole Régionale Supérieure de la Magistrature de l'OHADA Porto-Novo (Bénin) – Actes", http://www.ahjucaf.org/IMG/pdf/pdf_Actes_Porto-Novo.pdf.

[28] According to: http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10125_ro.htm

[29] http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l10125_ro.htm

[30] 10 February 1983, case 230/81 (http://curia.europa.eu/juris/celex.jsf?celex=61981CJ0230&lang1=ro&lang2=FR&type=NOT&ancre=).

[31] Section 37 from the ruling.

[32] 27 September 1988, case 204/86 (http://curia.europa.eu/juris/celex.jsf?celex=61986CJ0204&lang1=ro&lang2=FR&type=NOT&ancre=).

[33] Section 16 from the ruling.

when it specified, in the ordinance ruled in the case *Zwarveld*[34], that "in this community of law, relations between Member States and Community institutions are governed, under Article 5 TEC35, by the principle of sincere cooperation. The principle obliges not only Member States to take all measures necessary to ensure the strength and effectiveness of Community law, including, when needed, even of criminal nature, but requires equally to Community institutions, mutual obligations of sincere cooperation with Member States"36.

At a careful analysis of references made by the Court to the principle of sincere cooperation, we can see that, according to the Luxembourg Court, this principle has the following features37: it is a guiding principle of relations between Member States and EU institutions; it is a bilateral principle and it is a principle that applies not only to relations between Member States and EU institutions, but also to relations between EU institutions".

6. Conclusions

The principles of the European Union are stemming from specific principles of public international law, on the one hand, and from the principles contained in the legal systems of Member States, on the other hand. To become principles of EU law, these categories of principles are "communitarised"[38], as they are passed through the "filter of EU objectives, so sometimes, they may stand some limitations in order to comply with EU law"[39].

As we have seen, the European Union Treaties contain only general references to the principles specific to the implementation of EU law because the jurisprudence of the Court of Justice of the European Union was, in fact, the real developer of these principles.

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[34] Ordinance from 13 July 1990, C-2/88 (http://curia.europa.eu/juris/showPdf.jsf?text=&docid=95877&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=529108).
[35] Treaty establishing the Economic European Community.
[36] Section 17 of the Ordinance.
[37] According to Guy Isaac, Marc Blanquet, *op. cit*., pp. 101-102.
[38] Jean Paul Jacqué, „*Droit institutionnel de l'Union européenne"*, 7e édition, Dalloz, 2012, p. 530 and the next.
[39] Idem.

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