

A Critical Analysis of the European Union Law-making Process and Sources of Law

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Abstract

This study focused on the critical analysis of the European Union law-making process and sources of law. The study employed doctrinal legal methodology which covers research into doctrines and analysis of the relevant legal instruments including; Treaty on European Union (TEU), Treaty on the Functioning of the European Union (TFEU) and other instruments, legal articles and books citing secondary materials where issues need to be placed in contexts of the European Union's law-making process and sources of law. The findings on the European Union law making process revealed three major methods of the European Union's legislative process which they entail: firstly, ordinary legislative process containing procedures such as formulation, first reading, second reading, conciliation, third reading and special provisions; secondly, special legislative process containing procedures such as consultation procedure, consent procedure and approval procedure; and thirdly, non-legislative procedures such as procedure for adopting delegated acts and implementing acts; and the findings of the study on the European Union's sources of law indicates that are two major categories of sources of law including; primary source of law such as the European Union founding treaties like the Treaty on European Union and the Treaty on the Functioning of the European Union; and the secondary source of law such as legislative and non-legislative acts, international agreements, sui generis decisions, soft law, inter-institutional agreements, agreement between member states, legal unwritten custom; and thirdly, the general principles of law such as protection of the legitimate expectations, right to a fair hearing, the guarantee of fundamental rights and the principle of proportionality.

Keywords: European Union, Law-making process, sources of law, legislative process, Treaty on European Union, Treaty on the Functioning of European Union.

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1. INTRODUCTION

The European Union (EU) is a huge and powerful supranational economic and political union of twenty-seven (27) member states that are located majorly in Europe [1]. Each member nation in the European Union is referred to as a Member State. The current twenty (27) Member States are Belgium, Austria, Bulgaria, Cyprus, Croatia, the Czech Republic, Estonia, Denmark, France, Finland, Germany, Hungary, Greece, Ireland, Latvia, Italy, Lithuania, Malta, Luxembourg, the Netherlands, Portugal, Poland, Romania, Slovakia, Slovenia, Sweden and Spain. The union's entire size is 4,233,255 km² (1,634,469 sq mi), and there are an estimated 448 million people living there. The European Union (EU) is frequently referred to be a *sui generis* political body that combines the traits of a federation and a confederation (without precedent or contrast or comparison) [2]. The European Union (EU) is not just a creation of law; it also exclusively uses law acquired from many sources to further its goals or objectives. It is an effective and meritorious union based on law. The common economic and social lives of the peoples of the Member States is governed not by the use of force or threat but by the use of the effective European Union law. This is the real basis of the institutional system of European Union. It establishes the process for law-making and the Union institutions' decision-making that governs their relationship. It gives the institutions the tools they need to enact laws that are binding on Member States and their citizens in the form of regulations, directives, and decisions. As a result, the Union starts to put a lot more emphasis on the people and their daily lives are directly impacted by its judicial system. It grants people rights and imposes obligations on them, resulting in a hierarchy of legal regimes governing them as citizens of both their state and the Union, a phenomenon known from federal institutions [3]. The European Union's (EU) legal system offers a self-contained system of legal protection for the purposes of recourse to and the enforcement of Union law, much like any other legal system. The relationship between the European Union (EU) and the Member States is also outlined by union law. The Member States are required to take all necessary steps to ensure that the commitments originating from treaties or as a result of actions taken by the institutions of the Union are fulfilled. They must make it easier for the European Union to complete its tasks and refrain from taking any action that would compromise the achievement of the treaties' goals. In the event that Union Law is violated, the Member States are responsible to the citizens of the European Union (EU) [4].

The Treaty of Lisbon has strengthened the role of European Union in developing, promoting and enforcing human rights norms by making the Charter of Fundamental Rights of the European Union, which includes social and economic rights, legally binding [5] and by committing the European Union (EU) to accede to the European Convention on Human Rights. The Treaty has also changed much of the European Union's legislative and procedural nomenclature to take account of the reforms it introduced. As a consequence of the Treaty of Lisbon the European Union is now governed by two Treaties: The Treaty on European Union (TEU), which lays down the objectives of the European Union (EU) [6] and its general institutional, legislative and policy-making framework, and the details of the Common Foreign and Security Policy; and the Treaty on the Functioning of the European Union (TFEU), which contains detailed provisions governing the European Union's operation and competences in all other areas. These Treaties (the EU Treaties), like their predecessors, are given effect in the United Kingdom by the European Communities Act 1972. The various institutions involved in the European Union law-making process entail: the European Parliament, the Council of the European Union (simply called 'the Council'), the European Commission, the European Court of Justice and the Economic and Social Committee and the Committee of the Regions.

The European Union (EU) has got powerful and effective institutional framework for law-making and advancing and defending its goals, values, and interests, as well as those of its citizens and Member States. Additionally, this framework helps to guarantee the consistency, efficacy, and continuity of European Union (EU) policies and initiatives. The European Union's institutional framework for law-making, effective administration and implementation of their policies as outlined in the Treaty on European Union, is made up of seven institutions: the European Commission, the European Court of Justice, the European Central Bank, the European Parliament, the European Council, the Council of the European Union (commonly referred to as "the Council"), and the Court of Auditors [7]. Each institution acts within the limits of its remit, granted in the treaties in line with the procedures, conditions and purposes laid down therein. The Parliament, the Council and the Commission are assisted by the European Economic and Social Committee and the European Committee of the Regions performing advisory functions. The European Union is a Union based on the rule of law that has established a complete system of legal remedies and procedures designed to enable the Court of Justice of the European Union

(CJEU) to review the legality of the European Union (EU) institutions' acts [8]. The major treaties and general principles are placed at the top of hierarchy or the main primary legislation of the European Union. The Charter of Fundamental Rights received the same value after the Lisbon Treaty went into effect on December 1st, 2009. Primary legislation has precedence over any international agreements reached by the European Union. The next level of law, known as secondary law, is only legal if it is in accordance with the agreements and acts that come before it in the hierarchy. A cornerstone of the European Union legal system is the priority of European Union law attempts to maintain the coherence and uniformity of European Union law [9]. Thus, the purpose of this research paper is to analyse in details and explicitly the European Union law-making process and the various sources of law.

2. RESEARCH METHOD

The study employed doctrinal legal methodology. This entails research into doctrines and analysis of the relevant legal instruments including; Treaty on European Union (TEU), Treaty on the Functioning of the European Union (TFEU) and other instruments, legal articles and books citing secondary materials where issues need to be placed in the contexts of European Union law-making and sources of law.

3.FINDINGS AND DISCUSSION

The findings and discussion of the study on the European Union (EU) law-making process and sources of law encompass the following:

3.1. European Union Law-Making Process

The European Union makes law through a variety of legislative procedures. The procedure employed for a particular legislative proposal depends on the relevant area of policy. For the legislation to become law, they must first be submitted by the European Commission and approved by both the European Parliament and the Council of the European Union. Recently, the European legislative process, which was first orientated towards the defence of national interests by Member States, has evolved into something much more balanced, with the status of the European Parliament continually being raised. The first method, in which the Parliament was just consulted, was first expanded to include collaboration or cooperation with the Council, and then

the Parliament was granted co-decisional powers in the European Union (EU) legislative process. The Treaty of Lisbon reorganised and reformed the legislative process in the European Union (EU). According to the Treaty on European Union, the institutional framework that are highly involved in law making process in the European Union comprises of three institutions: (a) the European Parliament, (b) the Council of the European Union (simply called ‘the Council’), (c) the European Commission [10]. However, sometimes, European Court of Justice and the Economic and Social Committee and the Committee of the Regions get involved or intervene in the legislative process in case there exist disagreement or anomaly among the European Parliament, the council of the European and European Commission in the law-making process or legislative process. There are currently three primary methods for enacting legislation in the European Union: (1) Ordinary Legislative Procedure (formerly called co-decision), (2) Consent (formerly called assent) and (3) Consultation. The procedure used depends on the substance of the proposed legislation. The explicit analysis of the three methods of European Union’s law-making process encompasses the following:

1. The ordinary legislative procedure

The ordinary legislative procedure is the main legislative procedure by which directives and regulations are adopted. It was previously known as the co-decision procedure, and is occasionally called the “community method” as a contrast to the ‘intergovernmental methods’ which can relate to the consultation procedure or to the open method of co-ordination [11]. This is the procedure used unless the treaties state that another procedure should be used. The process of European Union (EU) law-making begins at the European Commission (this is called the right of initiative). The European Commission proposes laws, either of its own choosing or based on consultations with other European Union institutions, member states or public consultations. According to Treaty on the Functioning of the European Union (TFEU), where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply [12]. The Commission shall submit a proposal to the European Parliament and the Council [13]. The various stages of European Union’s law-making under the ordinary legislative procedure entail the following:

(a) Formulation stage

The European Union Commission is the one responsible for setting the machinery in motion, where it draws up for the European Union on the required measure to be taken (known as the 'right of initiative'). The proposal is prepared by the Commission department responsible for that area of expertise; usually, the department also consults with national experts at this beginning stage of the law-making process. This occasionally takes the shape of discussions in specially formed committees; alternatively, experts may be asked questions by the pertinent Commission departments. However, the Commission is free to make its own proposals without taking the national experts' recommendations into consideration. The Commission as a whole vote on the draft drawn up, which details the measure's exact content and form down to the last detail. A simple majority is required for adoption. It is currently referred to as a "Commission proposal" and is delivered simultaneously to the Council, the European Parliament, and, where consultation is necessary, the Economic and Social Committee and the Committee of the Regions. It also includes thorough justification.

(b) First reading

According to Treaty on the Functioning of the European Union (TFEU), the European Parliament shall adopt its position at first reading and communicate it to the Council [14].

- If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament [15].
- If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament [16].
- The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position [17].

(c) Second reading

The Treaty on the Functioning of the European Union (TFEU) stipulates that if, within three months of such communication, the European Parliament [18]: (a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have

been adopted in the wording which corresponds to the position of the Council; (b)rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted; (c)proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments [19]. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority: (a)approves all those amendments, the act in question shall be deemed to have been adopted; (b)does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee [20]. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion [21].

(d) Conciliation

The Treaty on the Functioning of the European Union (TFEU) provides that the Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading [22]. The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council [23]. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted [24].

(e)Third reading

The Treaty on the Functioning of the European Union (TFEU) provides that if, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with

the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted [25]. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council [26].

(f) Special provisions

The Treaty on the Functioning of the European Union (TFEU) provides that where, in the cases provided for in the Treaties, a legislative act is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice, paragraph 2, the second sentence of paragraph 6, and paragraph 9 shall not apply. In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee in accordance with paragraph 11 [27].

2. The special legislative procedures

The second fundamental method of European Union's law-making process is known as "special procedures" and is being used far less frequently. For instance, the European Union's legislation pertaining to taxation, trade agreements, and agriculture is passed through consultation, consent, approval, discharge and incorporation into domestic procedures. The treaties occasionally permit an alternative method to the standard legislative process. In some circumstances, a proposal must be approved by both the European Parliament and the Council of the European Union without the ability to change it. The special legislative procedure is generally characterized by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, taking a decision such as Statute of the European Investment Bank) [28] or by the European Parliament adopting a legal act after obtaining the approval of the Council such as exercise of the right of inquiry via a parliamentary committee of inquiry [29] and conditions

governing the performance of the Ombudsman's duties) [30]. The various procedures of special legislative process entail the following:

(a) Consultation procedure

This is applied when the Treaties permit the Council to pass legislation without the consent of the European Parliament. The Council may decide to enact the law even if the Parliament recommends against it, but the Parliament must provide its recommendation on the topic. The European Parliament (or other European Union institutions and consultative bodies) is consulted before the Council makes a decision on a Commission proposal; this was the consultation process, which was once the standard legislative procedure at the European Union level but is now only occasionally used as a special legislative procedure. For instance: derogations in the context of monetary and economic and union [31]; issuing coins [32]. Under this procedure the Council, acting either unanimously or by a qualified majority depending on the policy area concerned, can adopt legislation based on a proposal by the European Commission after consulting the European Parliament. While being required to consult Parliament on legislative proposals, the Council is not bound by Parliament's position. In practice the Council would frequently ignore whatever Parliament might suggest and even sometimes reach an agreement before receiving Parliament's opinion. However, the European Court of Justice has ruled that the Council must wait for Parliament's opinion and the Court has struck down legislation that the Council adopted before Parliament gave its opinion [33].

(b) Consent procedure

Under this procedure, the proposal must be approved by both the Parliament and the Council in order to become legislation, and neither body has the authority to change it. When the European Union (EU) needs the European Parliament's permission but is not proposing legislation (for instance, when it wants to censure a member state for breaching European Union regulations) or when legislation to combat discrimination is proposed, this method is employed. By way of illustration, the Treaty on the Functioning of the European Union (TFEU) mandates that, in line with a specific legislative procedure, the European Parliament and the Council shall establish the Union's annual budget [34] which has got detailed rules and largely corresponds to the ordinary legislative procedure [35].

(c) Approval procedure

The approval procedure, which requires the consent of the Parliament before a legal instrument may be enacted, is another important way that the Parliament participates in the European Union legislative process under special legislative procedure. The Parliament, however, is not given any opportunity to directly affect the nature of the legal provisions through this process. For instance, it is only permitted to accept or reject the legal instrument that has been submitted to it; it is not permitted to make any revisions or secure their acceptance during the approval process. Thus, Parliament has the legal authority to accept or reject any proposal, but there is no legislative process for making adjustments. However, Parliament has established a conciliation committee and a process for submitting interim reports where it can voice its concerns to the Council and threaten to withhold consent if those concerns are not addressed [36]. Provision is made for this procedure in connection with the conclusion of international agreements [37], enhanced cooperation [38] or for the exercise of dispositive powers [39]. Both the approval legislative procedure for adopting legally binding non-legislative actions and the special legislative procedure for adopting legislative acts may include the approval procedure.

(d) Discharge procedure

This is used to evaluate how well the Commission is carrying out the budget it has approved. The Parliament has the last say in whether to grant the discharge, despite the Council's power to make recommendations.

(e) Incorporation into domestic law

The domestic legal systems of Member States are mostly a legacy of different historical legislation [40] each of which has to be adapted in order to play an essential role in ensuring the standards of European Union Law are implemented effectively and uniformly. In order to enforce European Union (EU) legislation and directives consistently and reliably across all the different jurisdictions of each Member state of the European Union, Member States governments have a treaty obligation to amend their current Primary and Secondary legislation in a way that is reasonable consistent and understandable to people and businesses.

3. Non-Legislative procedures

Under this procedure the Council can adopt legal acts proposed by the Commission without requiring the opinion of Parliament. The procedure is normally used when setting the common external tariff [41] and for negotiating trade agreements under the European Union's Common Commercial Policy where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 [42] shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations [43]. However, formally speaking these acts are not legislative acts. Non-legislative acts are enacted via a streamlined process in which an institution or any other European Union (EU) body adopts a legal act under its own authority. The relevant basis of competence under the EU treaties gives rise to the authority to do so. This procedure initially only pertains to (simple) binding laws that are passed by an European Union (EU) institution acting within the scope of its authority, such as when the Commission determines, after notifying the parties involved to submit comments, that aid provided by a State or using State resources is either not compatible with the internal market under the provisions of Article 107 of the Treaty on the Functioning of the European Union (TFEU) or is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. In deviation from the rules of Articles 258 and 259 of the Treaty on the Functioning of the European Union (TFEU), the Commission or any other interested State may refer the matter directly to the Court of Justice of the European Union if the State in question does not comply with this decision within the allotted period. In derogation from the provisions of Article 107 of the Treaty on the Functioning of the European Union (TFEU) or from the regulations provided for in Article 109 of the Treaty on the Functioning of the European Union (TFEU), the Council may, acting unanimously, decide upon a request from a Member State that aid that State is granting or intends to grant shall be considered to be compatible with the internal market if such

a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known [44]. If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case [45].

(a) Procedure for adopting delegated acts and implementing acts

It has long been common practice for the Parliament and the Council to grant the Commission legislative and implementation authority. By establishing comitology committees, where the influence of the Parliament, the Council, the Commission, and the Member States varied, the powers granted have been exercised. However, there was no obvious distinction made between the conferring of executing powers (executive authority) and the delegating of lawmaking functions (legislative power). According to Treaty on the Functioning of the European Union, a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power [46]. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows: (a) the European Parliament or the Council may decide to revoke the delegation; (b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act. For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority [47]. The adjective “delegated” shall be inserted in the title of delegated acts [48].

The Treaty on the Functioning of the European Union further stipulates that member States shall adopt all measures of national law necessary to implement legally binding Union acts [49]. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in

the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council [50]. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [51]. The word “implementing” shall be inserted in the title of implementing acts [52].

3.2. European Union Sources of Law

The legal term called “legal source” has two fundamental meanings. In its original sense, it referred to the rationale behind the emergence of a legal provision, or the motive for the creation of the legal provision [53]. This definition demonstrates the powerful will to maintain peace and build a better Europe through tighter economic links to two pillars of the European Union constitutes the “legal source” of Union law. However, “legal source” from the legal point of view refers to the creation and manifestation of the law [54].

3.2.1. Primary law

The first major source of European Union is the primary law. The primary European union law is the constituent authority of the European Union’s legal system or order that originates from the Member States [55]. The term primary law of European Union covers the founding Treaties of the European Union [55]. For instance, the original founding Treaty was the Treaty on European Union signed at Maastricht on 10th December 1991 entered into force on 1 November 1993 (Maastricht Treaty). This law has been amended several times last by the Lisbon Treaty [56], and then the current treaty which is being enforced called Treaty on the Functioning of the European Union (TFEU) or (Treaty), the Lisbon Treaty renamed this Treaty. The original founding Treaty was the Treaty establishing the European Economic Community, signed at Rome on 25 March 1957 entered into force on 1 January 1958 (EEC Treaty). The Maastricht Treaty renamed the EEC Treaty to the Treaty establishing the European Community (EC Treaty). The Lisbon Treaty continued the rebaptizing and the EC Treaty became the Treaty on the Functioning of the European Union (TFEU). The latest consolidated version can be obtained from the Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European

Union (OJ C83, 30.03.2010) [57] (hereinafter jointly also referred to as the ‘Treaties’ or the ‘founding Treaties. The concept of primary law, as described above, is also used by the Court of Justice (hereinafter: the ‘CJ’ or the Court) and the General Court (hereinafter: the ‘GC’ or the General Court) [58]. The General Court defined clearly the notion of primary law in *Dubois* (with regard to the Treaty texts which were in force at the time of the case): “primary Community law consists of the Treaties establishing the European Coal and Steel Community, the European Community and the European Atomic Energy Community, and the agreements which supplemented or amended those Treaties, such as the Convention on certain institutions common to the European Communities, the treaties concerning the accession of new Member States, the Single Act and the Treaty on European Union. Those treaties are agreements concluded between the Member States in order to establish or modify the European Communities [59].”

Additionally, “protocols annexed to the Treaties by common accord of the Member States”, which form “an integral part thereof [60] is also among the category of primary law [61]. Lastly, primary law further entails the general principles of European Union law [62] [63]. In as much as they are derived from the constitutional traditions common to the Member States or international agreements to which the Member States are signatories [64] they originate directly from the Member States similar to other forms of primary European Union law. The Court declared as early as at the beginning of the seventies that it protects the general principles of law, of which fundamental rights form part, as an integral part of European Union law [65]. Thus, fundamental rights may qualify as primary law either on account of being stipulated in the Charter of Fundamental Rights or being general principles of European Union law.

1. The European Union (EU) founding treaties as the primary source of Union law

The first major source of European union law is the European Union (EU) founding treaties that have got various with appendices, annexes and protocols attached to them, later additions and amendments. Thus, this term contains various founding Treaties of the European Union, 17 such as the Treaty on the European Union (TEU) [66], the Treaty on the Functioning of the European Union (TFEU or Treaty) where the Lisbon Treaty renamed this Treaty. The other original founding Treaty other European Union was the Treaty establishing the European Economic Community that was signed at Rome on 25th March 1957 entered into force on 1 January 1958

(EEC Treat). The Maastricht Treaty renamed the EEC Treaty to the Treaty establishing the European Community (EC Treaty). The Lisbon Treaty continued the rebaptizing and the EC Treaty became the Treaty on the Functioning of the European Union (TFEU) [67] (Hereinafter jointly also referred to as the Treaties or the founding Treaties). These two Treaties are the most important sources of European Union primary law and they have the same legal value [68]. These founding treaties and the instruments amending and supplementing them (chiefly the Treaties of Maastricht, Amsterdam, Nice and Lisbon) and the various accession treaties contain the basic provisions on the European Union's objectives, organisation and *modus operandi*, and parts of its economic law. The same is true of the Charter of Fundamental Rights of the European Union, which has had the same legal value as the treaties since the Treaty of Lisbon entered into force [69]. They thus set the constitutional framework for the life of the European Union, which is then fleshed out in the Union's interest by legislative and administrative action by the Union institutions. The treaties, being legal instruments created directly by the Member States, are known in legal circles as primary Union law.

3.2.2. Secondary law

The second most important source of European Union law is secondary law. The secondary law is the law made by the institutions of the European union through total exercise of the power conferred upon them. The secondary law of the European Union entails: legislative acts, non-legislative acts (simple legal instruments, delegated acts, implementing acts), non-binding instruments (opinions, recommendations) and other acts that are not legal acts (such as interinstitutional agreements, resolutions, declarations, action programmes and so forth). The term legislative acts refer to the acts adopted either by ordinary or special legislative procedure [70]. 'Delegated acts' are non-legislative acts of general and binding application to supplement or amend certain non-essential elements of a legislative act [71]. They are adopted by the Commission; a legislative act must be drawn up explicitly delegating power to the Commission for this purpose. Where uniform conditions are needed for implementing legally binding European Union acts, this is done by means of appropriate implementing acts, which are generally adopted by the Commission and, in certain exceptional cases, by the Council [72]. The Union institutions can issue recommendations and opinions in the form of non-binding

instruments. Finally, there is a whole set of ‘acts that are not legal acts’ which the Union institutions can use to issue non-binding measures and statements or which regulate the internal workings of the European Union or its institutions, such as agreements or arrangements between the institutions, or internal rules of procedure. The major sources of secondary law of the European Union entail the following:

1. The legislative and non-legislative acts.

The legislative and non-legislative acts can take very different forms or Acts of the institutions. These legislative and non-legislative acts are listed in the Treaty on Functioning of the European Union. The Treaty on the Functioning of European Union stipulates that to exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions [73]. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States [74]. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods [75]. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them [76]. However, recommendations and opinions shall have no binding force. In the way of binding legal acts, it includes regulations, guidelines and decisions. In the way of non-binding legal acts, the list includes recommendations and opinions. This list of acts is not exhaustive, however. Many other legal acts do not fit into specific categories. These include resolutions, declarations, action programmes and White and Green Papers. There are considerable differences between the various acts in terms of the procedure involved, their legal effect and those to whom they are addressed; these differences will be dealt with in more detail in the section on the “means of action”. The creation of secondary Union legislation is a gradual process. Its emergence lends vitality to the primary legislation deriving from the Union treaties, and progressively generates and enhances the European legal order.

2. International agreements of the European Union

The European Union’s participation or role at the international level is a third source of Union legislation. The European Union must be concerned with its economic, social, and political

contacts with the outside world since it is one of the focal points of the world and cannot limit itself to handling its own internal affairs. Thus, the European Union enters into international law agreements with “third countries” and other international institutions [45]. According to Treaty on Functioning of the European Union, association goes well beyond the simple regulation of trade policy and entails close economic collaboration as well as extensive financial support from the European Union (EU) for the affected country. Three different forms of association agreements can be distinguished [77].

1. Agreements that maintain special links between certain Member States and non-member states. The fundamental reason for the creation of agreements that maintain special links between certain Member States and non-member states was due to the existence of nations and territories outside of Europe with which Belgium, Denmark, France, Italy, the Netherlands, and the United Kingdom still have particularly strong economic relations as a result of their colonial pasts. It was necessary to make special agreements because the implementation of a common external tariff in the European Union would have severely hampered commerce with these regions. Accordingly, the goal of association is to foster the social and economic development of the member nations and territories and to forge solid economic ties between them and the Union as a whole [78]. Thus, a wide range of preferential arrangements exist that allow items to be imported from certain nations and territories at significantly lower or even zero customs rates. The European Union provided both financial and technical support via the European Development Fund. The EU-ACP Partnership pact between the European Union (EU) and 70 countries in Africa, the Caribbean, and the Pacific (the ACP) is by far the most significant pact in actuality. The ACP countries will progressively get unrestricted access to the European internal market as a result of this agreement being transformed into regional economic partnership agreements [53].

2. Agreements as preparation for possible accession to the Union or for the establishment of a customs union. The association agreements are also utilised to get countries ready for potential Union membership. The agreement acts as a first step towards membership during which the candidate nation can attempt to align its economy with the European Union [4]. The western Balkan countries (Albania, Bosnia & Herzegovina, Kosovo, Montenegro, and Serbia) are now implementing this policy. The extended stabilisation and association process (SAP), which serves

as the overarching framework for the evolution of the western Balkan countries all the way to their accession, is supporting this accession process [4]. The three fundamental goals being pursued by the SAP encompass: stabilisation and a rapid shift to a market economy; development of regional cooperation; and the possibility of European Union (EU) membership. The SAP is built on a progressive partnership in which the European Union (EU) provides economic and financial support, trade privileges, and a legally binding arrangement in the shape of stabilisation and association agreements. To qualify for possible membership, each nation must fulfil certain standards within the SAP's structure. Annual reports assess the western Balkan countries' advancement towards potential European Union (EU) membership [79].

3. Agreement on the European Economic Area (EEA). The Agreement on the European Economic Area (EEA) Agreement establishes a solid foundation for future enlargement of European Union by bringing the (remaining) members of the European Free Trade Association-Iceland, Liechtenstein, and Norway-into the internal market and obliging them to adopt approximately two-thirds of the European Union's legislative framework. On the basis of the *acquis communautaire* (the body of primary and secondary Union law), the Agreement on the European Economic Area (EEA) is to have free movement of people, capital, goods, and services; uniform rules for state aid and competition; and closer coordination of horizontal and flanking policies (such as those relating to the environment, R&D, and education) [53].

4. Cooperation agreements. As they are only intended for close economic cooperation, cooperation agreements are not as comprehensive as association agreements. The European Union has similar accords, for example, with Israel, the Mashreq States (Egypt, Jordan, Lebanon, and Syria), and the Maghreb states (Algeria, Morocco, and Tunisia) [79]

5. Trade agreements. The European Union has got a lot of trade agreements regarding tariffs and trade policy with individual non-member states, groups of such countries, or within international trade organisations. The World Trade Organisation Agreement (WTO Agreement) and its multilateral trade agreements, particularly the General Agreement on Tariffs and Trade (1994), the Anti-Dumping and Subsidies Code, the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights, and the Understanding on Rules and Procedures Governing the Settled Claims Process, are the most significant

international trade agreements [4]. However, bilateral free trade agreements have been outpacing multilateral agreements over time. For example, all the trading countries, including the EU, have resorted to establishing bilateral free trade agreements due to the enormous challenges involved in concluding multilateral liberalisation accords within the framework of the World Trade Organisation (WTO). The most recent instances include the successful conclusion of negotiations with Singapore and Canada (CETA- Comprehensive Economic and Trade Agreement), as well as the current discussions with the United States (TTIP-Transatlantic Trade and Investment Partnership) and Japan [4].

3. Inter-institutional agreements of the European Union

Furthermore, inter-institutional agreements are normally also considered as a form of secondary law. According to the Treaty on the Functioning of the European Union, 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 [80]. Accordingly, the legal force of an inter-institutional agreement may depend on whether the institutions intended it to be binding, an indicator of which is the title chosen for the agreement such as declaration, code of conduct or agreement (agreement indicating a higher degree of binding force) [61]. When it can be inferred that the institutions only intended to coordinate their positions in an agreement before the adoption of a binding act, the agreement will not have binding force [81]. As long as they do not have binding force they fall within the heterogeneous category of “soft law”.

4. “*Sui generis*” decisions

Another secondary source of European Union law is the “*Sui generis*” decisions. The term *sui generis* is a Latin expression that translates to “of its own kind.” It refers to or denotes anything that is peculiar to itself; of its own kind or class. In the legal perspective, *sui generis* denotes an independent legal classification [82]. The commentators pointed out that before the Lisbon Treaty had introduced changes, *sui generis* decisions were the fundamental instruments that were distinguishable from other decision as incorporated in the nomenclature of legal acts [83] [84]. According to the Treaty on the Functioning of the European Union to exercise the Union's

competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions [85]. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States [86]. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods [87]. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them [88]. Recommendations and opinions shall have no binding force [89]. Although under the former system standard decisions were understood to be individual administrative acts, “*sui generis*” decisions were employed as general legislative or executive measures. For instance, certain decisions of an organic nature took the form of “*sui generis*” decisions, such as the Comitology Decisions [90] as well as the decision establishing the General Court [84] (then called the Court of First Instance). They were also used to approve international agreements and to lay down institutional arrangements for internal organizational matters such as rules of procedure or rules setting up a body or committee [81]. *Sui generis* decisions seem to have been codified by the Lisbon Treaty and as a result, no longer qualify as atypical acts.

5. Soft law

Another fundamental secondary source of European Union law is soft law. Soft law means quasi-legal instruments such as recommendations or guidelines whose binding force is either negligible or slightly less powerful than that of regular law [91]. The various atypical acts adopted by the European Union institutions such as communications, resolutions, notices, action plans, codes, guidelines that do not have the binding force all belong to the multitude of soft law instruments that form part of the European Union legal order. The classic and explicit definition of soft law describes soft law as “rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects [92]”. Gribnau discusses three core elements of this definition and they encompass: (i) rules of conduct or commitment, (ii) no legally binding force, and (iii) practical impact on behaviour. The two latter two elements demonstrate a tension between the effect and aim of these instruments. Although they do not produce any formal, legally enforceable obligations that have got an effect even though they influence the behaviour of the subjects to a certain direction. The main rationale for the growing

importance of soft law instruments in the European Union's legal system is connected to the need of shifting to new forms of governance [93], where the horizontal relationships, networks and involvement of stakeholders replace the strict hierarchy, normative order and centralised top-down lawmaking and administration [94]. Another explanation for the rise in non-binding regulations in the European Union (EU) is the replacement of formal European Union (EU) regulatory instruments in technologically complex policy areas with norms adopted by expert committees, special bodies, and organisations with the in-depth technical expertise required for effective regulation instruments [95].

6. Agreements between the Member States

The agreements between the Member States make up the last source of European Union law. These agreements may be reached for the resolution of disputes directly related to European Union's activities, but no authority has been granted to the institutions of the Union (such as the 2012 Fiscal Compact Treaty, which was signed without the participation of the Czech Republic and the United Kingdom) [96]. In addition, there exist comprehensive international agreements (treaties and conventions) between the Member States that are specifically designed to address the shortcomings of territorially circumscribed accords and provide law that is applicable universally across the European Union. This is crucial primarily in the field of private international law (for example the Convention on the Law Applicable to Contractual Obligations 1980) [53].

7. Legal custom unwritten

The legal custom which is unwritten is another source European Union law. The legal custom unwritten refers to a custom or procedure that has been adhered to, accepted, and then became part of primary or secondary law of the European Union. The principle possible establishment of the legal custom unwritten in the Union law has been acknowledged in principle. However, there are many restrictions that prevent it from becoming established in the context of Union law. The first difficulty is the fact that there is a unique procedure for amending treaties [97]. This makes it considerably more difficult to satisfy the requirements by which the practice is regarded to have been followed and accepted for a significant period of time, but it does not rule out the

possibility of the establishment of legal custom. The fact that any legal action by an institution may only draw its legitimacy from the treaties, and not from that institution's real conduct or any purpose on its part to create legal effective legal relations, presents another barrier to the creation of legal custom in the Union institutions. This means that at the level of the treaties, the Union institutions are never permitted to establish legal custom; at most, only the Member States may do so, and even then, only under the strict criteria outlined above [96].

3.2.3. General principles of law

The general principles of law refer to the unwritten sources of European Union law. The general principles of law are the fundamental principles of justice and law that every legal system or order must uphold [53]. The basic principles of law are one of the most significant sources of law in the Union because written Union legislation primarily deals with economic and social issues and is only partially capable of establishing regulations of this kind. They make it possible to close gaps and resolve legal interpretation disputes in the most impartial manner. These principles are always applied when the legislation is applied, especially in the decisions of the Court of Justice, which is in charge of making sure that the law is observed in the interpretation and application of the Treaty. The principles shared by the legal systems of the Member States serve as the primary points of reference for developing the general principles of law [4]. They offer the context against which the European Union regulations required to address an issue can be formulated. These main general legal principles include the protection of legitimate expectations, the right to a fair hearing, the guarantee of fundamental rights (at least for Poland and the United Kingdom, which are exempt from the Charter of Fundamental Rights due to an opt-out), the principle of proportionality (which has actually been regulated by a positive provision in and the primacy of Union law that stipulates that the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality [98].

4. CONCLUSION

The paper analyses European Union law-making process and sources of law. The findings of the study revealed that there are two major types of the European Union's legislative process which

they entail: ordinary legislative process containing procedures such as formulation, first reading, second reading, conciliation, third reading and special provisions; special legislative process containing procedures such as consent procedure, consultation procedure and approval procedure; and lastly non-legislative procedures such as procedure for adopting delegated acts and implementing acts; and the findings of the study on the European Union's sources of law indicates that are three major categories of sources of law including; firstly, primary source of law such as the European Union founding treaties like the Treaty on European Union and the Treaty on the Functioning of the European Union; secondly, secondary source of law such as legislative and non-legislative acts, international agreements, sui generis decisions, soft law, inter-institutional agreements, agreement between member states, legal unwritten custom; and the lastly, the general principles of law such as protection of the legitimate expectations, right to a fair hearing, the guarantee of fundamental rights and the principle of proportionality.

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