

**PRIMARY AND SECONDARY LAW-MAKING
IN THE RENEWED EU**

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Abstract: The aim of the article is to explain the renewed primary and secondary law-making in the EU context. The article defines international treaties and secondary law; classifies international treaties, indicates the status of secondary laws; and introduces the law-making procedures under international law, EU law, and Estonian law. The main general conclusions are that international treaties that for the purposes of this article are defined as international agreements concluded between states and / or international organizations in written form and governed by international law, can be classified as private law treaties or contractual treaties, and law-making treaties. The latter in turn can be divided into constituent international treaties and common international treaties. This is how treaties can also be defined and classified under EU law that distinguishes between the constituent treaties and international agreements. For the purposes of this article, the EU's international agreements are defined as the EU's agreements with third countries and / or international organizations, and the delegation for concluding such treaties comes from the constituent treaties. The EU's international agreements can be classified by division of competences between the EU and its Member States; by subject-matter, by parties, etc. – also depending on which classification the negotiation and conclusion procedures of the agreements differ. Based on the constituent treaties of the EU, the legal acts of the EU, the constituent treaties foreseeing the legal acts, the competent institution, the procedure, and the form of the act are adopted. The article gives also an overview of the Council and Commission legislation, and the renewed consultation procedure, ordinary legislative procedure, and consent procedure. In the end, the article demonstrates that the developments in Estonian law reflect the international and EU law-making developments.

Keywords: international treaties, international treaty-making, secondary legislation, decision-making in the EU, Estonian Foreign Relations Act, Procedure for Proceeding of the European Union Documents

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1. Introduction

The article focuses on primary and secondary law-making in the European Union (hereinafter EU). As the notion of democracy has different dimensions – one can distinguish between universal and liberal democracy, democracy in external and internal relations, constitutional democracy, representative and participatory democracy, input and output democracy, in addition the legal, historical, political, and other meanings of democracy, which has changed and will change in time and space, so do the laws and law-making procedures.

Beginning with human rights, because many people understand human rights as universal rights based on morals and ethics – i.e. on ontological common truth or objectivity, even those rights can be recognized and applied only subjectively. The reason is that as no human being can know what the entire common truth is, no-one is objective. Consequently, there exist only subjective ideologies (Habermas 2002:16) and subjective laws, even if in global covenants. The same subjectivity-rule applies towards other, more state-centred rights. Therefore, the frequently asked questions about rights have been – “What are the rights that should be recognized?”, and “How is consensus achieved in order to determine such rights?”.

Those questions are equally important within states, as well as in their relations with other states and international actors. The Universal Declaration of Human Rights (hereinafter UDHR), for example, has been created through an extraordinary (Khan 2003:2) consensus across the world. The European Convention on Human Rights (hereinafter ECHR), reflecting the ideas in the UDHR, has been created through a consensus in Europe. Those two afore-mentioned acts contain human rights. But besides human rights there exist also other rights that are supranationally recognized. If one takes the laws of the EU, where the Member States’ legal systems differ, then beginning with the understanding of basic values and ending up with, say, property laws, it may indeed be difficult to reach consensus on rights. Thus, the participants in law-making procedures of such suprastate systems constantly find themselves in the condition, where they have to formulate laws from relative universality. As recognition procedures involve people, and people can be nothing more than subjective, law-making procedures may face the questions: “Can there exist absolute rights at all or are all rights constrained in the (subjective) interest of someone?”, “How does one know that the right values have been codified?”, “How does one become aware of the values that need to be codified (uncodified morals)”, “Isn’t the content of rights actually determined by the political will of the governors?” (Schiappa 2003), and “How to avoid the latter?”, “Is such avoidance possible?”, “Who should and how be authorized to say that something is acceptable to everyone?” (Wolff 2009:64).

When people try to reach consensus on values, the agreed values must be recognized in order to be law. For that aim there exist purposive agencies (Winston 1989), including democratic state or suprastate recognition mechanisms, through which mechanisms consensus is reached about the content of a concrete

right and the rules are enacted. Certain structures and procedures are foreseen for such activities. Although law is generally not supposed to fix what morals is, only a recognized right creates legal relationship.

In addition to formal recognition, there exists societal recognition of rights that means legitimation, which is formally achieved by direct participation (direct elections). A society (whether more or less universal or state-centred) that wishes to be named democratic, as a key element has representative government, elected through free elections. The powers in a democratic society are separated and balanced. The exercise of powers is limited by the rule of law, which means that limitation of rights must be regulated by law (Merrills 2000).

The conclusion of international agreements between different subjects of international law, and other developments characteristic of today's participation in the pluralist world, as well as the accompanying communication among different identities, have made the researchers talk about changes in the concept of state sovereignty (Walker 2003), redefinition of state sovereignty (Eriksen, Fossum 2007), or shared sovereignty (Sørensen 2002:696). Other authors are of the opinion that international participation does not necessarily mean changes, redefinition or sharing of sovereignty, but is an attribution of sovereignty (Klabbers 1998), or may mean changes, redefinition or sharing of sovereign rights, because state sovereignty includes 'a claim to autonomy' (De Búrca 2003:450, 456–457) – a state can remain autonomous and still be bound by international rules, thus sovereignty and international commitments 'go hand in hand' (Klabbers 1998). Related to international law-making, one can talk about two dimensions in this context – more universal conclusion of international treaties, and more state-centred delegation of law-making functions to international organizations. The article, in the following, tries to explain those two dimensions under EU law.

In the first part, the article defines and classifies international treaties, and introduces the basic principles governing the conclusion of international treaties, as understood in international law. The international treaties are defined for the purposes of this article as international agreements concluded between states and / or international organizations in written form and governed by international law, and the main conclusions in that part are that international treaties can be classified as private law treaties, named also contractual treaties, and law-making treaties, the latter in turn can be divided into constituent international treaties and common international treaties. This is how treaties can also be defined and classified under EU law that distinguishes between the constituent treaties and the EU's international agreements.

The second part of the article is devoted to international treaties and secondary acts in EU law. The delegation for concluding the EU's international agreements lies in the constituent treaties. For the purposes of this article, the EU's international agreements are defined as the EU's agreements with third countries and / or international organizations. The EU's international agreements can be classified by division of competences between the EU and its Member States; by subject-

matter, including the areas to which either the ordinary legislative procedure or the special legislative procedure applies, or where consent by the European Parliament is required; by parties, etc. – depending on which classification the negotiation and conclusion procedures of the agreements differ. Based on the constituent treaties of the EU, the secondary acts of the EU are adopted, the delegation for adopting such acts also lies in the constituent treaties that foresee the legal act to be adopted, the competent institution, the procedure, and the form of the act. The article gives an overview of the Council and Commission legislation, and the renewed consultation procedure, ordinary legislative procedure, and consent procedure.

The third part of the article is devoted to the definition of international agreements, their classification and procedures foreseen for their adoption in Estonian law. The author found the following classes of international treaties from Estonian law: constituent, common, accession, ‘more important by substance’, bilateral, multilateral, and inter-agency international agreements. The conclusion of international agreements is viewed separately from participation in law-making procedures, delegated by international agreements. This part of the article allows the conclusion that the developments in Estonian law reflect the international and EU law-making developments.

2. International law

2.1. The concept of treaty

For the purposes of the 1969 Vienna Convention on the Law of Treaties (hereinafter VCLT), ‘treaty’ means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (Article 2).

For the purposes of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, ‘treaty’ means treaties between one or more states and one or more international organizations, and treaties between international organizations (Article 1).

Draft articles on the law of treaties between States and international organizations or between international organizations (hereinafter Draft Articles) define treaty as international agreement governed by international law and concluded in written form between one or more states and one or more international organizations or between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation (Article 2).

2.2. Classification of international treaties

The 1969 Vienna Convention distinguishes between bilateral and multilateral international agreements (Article 40 VCLT). Already during the preparatory work

of the 1969 Vienna Convention, a proposal was made to distinguish between international treaties also on the basis of their content. Catherine Brölmann refers to Sir Gerald Fitzmaurice who, relying on the function of a treaty and the legal relations resulting from it, distinguished between three different categories of international treaties, and this classification is relevant also today: firstly, bilateral or multilateral treaties based on a reciprocal exchange of rights or benefits as classical contractual treaties (for example, treaties establishing a customs union) (Brölmann 2005:387); secondly, 'interdependent' treaties, where the performance of one party depends on that of "all the other parties" (for example, disarmament treaties) (Brölmann 2005:387), and thirdly, law-making treaties or „system or régime creating treaties [...] or treaties involving undertakings to conform to certain standards and conditions, or [...] any other treaty where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty [...] so that the obligation is of a self-existent character, requiring an absolute and integral obligation and performance under all conditions ..." (for example, human rights treaties, maritime regimes, ILO conventions) (Brölmann 2005:387–388). Thus, one may distinguish between international contractual treaties (named also private law treaties), and international law-making treaties (such as constituent international treaties and common international treaties). From those, the article focuses on international law-making treaties.

The term 'constituent treaty' that is different from the term 'common international treaty', is used in the 1969 Vienna Convention, as well as in its counterpart from 1986, and in the Draft Articles. Of international law publicists, McNair used the notion of constituent treaty allegedly in the year 1930 (Brölmann 2005:384, 387). Peter Malanczuk refers to 'constituent treaties' of international organizations (Malanczuk 1997:52). Piet Eeckhout confirms that powers are conferred on international organizations under the constituent treaties (Eeckhout 2004). Jan Klabbers refers to the 'organic constitutive element' of a constituent treaty that distinguishes those treaties from other treaties (Klabbers 2002:82).

In addition, accession to a treaty is viewed differently from a conclusion of a treaty, because the acceding state does not participate in the negotiation processes of the basic treaty or treaties (Malanczuk 1997:133).

2.3. Conclusion of international treaties

A basic principle of international law that a state cannot be bound by a rule of international law without consent, requires that states participate on equal basis in the formulation of a certain rule. This means that all the states subject to a certain international rule have the right to defend their interests, and that right does not depend on whether they participate in formulation of international custom, treaty or decision-making within an international organization. In order to guarantee the principle of consent, the international treaty law and practice establish general requirements for conferral of powers by states. Pursuant to Article 11 of the VCLT, for an international treaty could enter into force, consent may be expressed

by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, accession, or by any other means if so agreed, as expression of the will of the state to be bound by a treaty. The most common expressions of consent have been deemed signature and ratification (Klabbers 1996). Extremely important during the relevant periods is the determination of the exact content of the treaty and for that aim states may pose their own conditions to the process of formation of international law. This process is viewed as mutual adaptation and recognition process.

The relevant procedures and persons in the states are determined by law. The relevant laws in states differ. A treaty enters into force after all the negotiating states have expressed their will to be bound by it (Malanzcuk 1997:134). Peter Malanzcuk mentions separately accession to a treaty, in which case the acceding states do not participate in negotiation processes (Malanzcuk 1997:133).

Both afore-mentioned Vienna Conventions refer to the capacity of all states to conclude treaties and the person or persons who have the full powers to represent a state in negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the state to be bound by a treaty, or for accomplishing any other act with respect to a treaty. Such person must produce the appropriate full powers or derive those powers from the practice of the state or from his/her functions as the Head of State, Head of Government and Minister for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty; head of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited; or a representative accredited by states to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ. The Draft Articles clarify the act of ratification, amounting to the formal confirmation of a willingness to be bound. Signing and ratifying a treaty follow the negotiation and adoption of the text of a treaty. According to Article 9 of the 1969 Vienna Convention, by the consent of all the states participating in drawing up a treaty, or if the adoption of a treaty takes place at an international conference, it requires the vote of two thirds of the present and voting states, but also a different weighing of votes is allowed if the same majority decides to apply a different rule. For example, the intention of the parties of the treaty at the time of conclusion and adoption of it, is essential (Amerasinghe 1996:121).

The 1969 Vienna Convention allows amendment of treaties by agreement between the parties (Article 39 VCLT). The content of the amendment may be indicated in the treaty. For example both, the Charter of the UN (Article 108), as well as the Treaty on European Union (Article 48), contain Articles on amendment. If an amendment has not been agreed upon, conditions of the Vienna Convention or direct customary law apply. For the purposes of treaty amendments, the 1969 Vienna Convention distinguishes between amendments of multilateral and bilateral treaties. The 1969 Vienna Convention also distinguishes between the amendments that affect the object and purpose of the treaty, and by that all parties

to the treaty (Article 41 VCLT) and amendments between only some of the parties to the treaty (Article 42 VCLT). The general rules are that other parties to the treaty must consent to the amendment, and the amendment usually requires the same form that was used for conclusion of the treaty, therefore it should be already foreseen at the time of conclusion of a treaty that it may later be complicated to make amendments, or withdraw from a freely consented international obligation.

3. European Union law

3.1. The concept of international treaty

EU law knows the establishing treaties and the treaties amending those treaties that are also named constituent treaties, and international agreements. The constituent treaties of the EU are defined in Article 1 of the Treaty on European Union (hereinafter TEU) as the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter TFEU), although the TEU does explicitly neither use nor define the term ‘constituent treaty’. The term ‘constituent treaty’ is used in the 1969 and 1986 Vienna Conventions, and in the Draft Articles, to which acts the EU is not a Member. Therefore, one may ask what the relevance of those acts to the EU actually is. At the same time, the VCLT is a codification of international customary law, which with or without codification, applies also for the EU. In addition, the EU is bound by the VCLT through its Member States who are parties to that Convention. The constituent nature of the establishing treaties of the European Communities and the treaties amending those treaties can also be analysed in the light of the previously indicated opinions of international law publicists (Brölmann 2005:384, 387, Malanczuk 1997:52, Eeckhout 2004, Klabbers 2002:82).

International agreements of the EU are defined in Article 216 of the TFEU as agreements with one or more third countries or international organizations, based on express or implied provisions of the EU’s founding treaties („where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope“ (Article 216 (1) TFEU).

3.2. Classification of international treaties

The constituent treaties of the EU *de lege lata* are the TEU and the TFEU. The EU concludes international agreements with third countries and / or international organizations, distinguishing international agreements by division of competences between the EU and its Member States; by parties of international agreements, by subject-matter, including the areas to which either the ordinary legislative procedure or the special legislative procedure applies, or where consent by the European Parliament is required; and by negotiation and conclusion procedures.

Thus, according to the exercise of the principle of conferral of powers, the agreements of the EU under the areas of exclusive and shared powers are distinguished. For example, sometimes – when the conclusion of an international agreement is provided in a legislative act of the EU or it is necessary to enable the EU to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope - the EU has exclusive competence for the conclusion of international agreements (Article 3 TFEU); according to the parties to agreements - the international agreements concluded by the EU and its Member States with third countries and / or international organizations are called mixed agreements; by content, the following agreements are distinguished: association agreements, agreements with the states which are candidates for accession, agreement on the EU's accession to the ECHR, international cooperation agreements, budgetary agreements, and agreements under certain policy areas, such as the common foreign and security policy, common commercial policy, and in the field of transport, regulated in different Articles of the founding treaties. For example, Article 217 TFEU allows conclusion by the EU of agreements with one or more third countries or international organizations that establish an association involving reciprocal rights and obligations, common action and special procedure. Article 219 TFEU regulates the conclusion of international agreements on an exchange-rate system for the euro in relation to the currencies of third states.

3.3. Conclusion of international treaties

3.3.1. Constituent treaties

The constituent treaties of the European Communities were concluded by some of the founding Member States of today's EU. A new state wishing to accede to the EU has first to apply for such membership. Pursuant to Article 49 of the TEU, the European Parliament and national parliaments are notified of this application, and the applicant state has to present the relevant application to the Council, the latter consults the Commission, which has to receive the consent of the European Parliament, which acts by a majority of its component members, and after that acts unanimously. The European Council agrees upon the conditions of eligibility. After that, the conditions of admission and the adjustments to the founding treaties of the EU are specified in an agreement between the Member States and the applicant state. The agreement must be ratified by all the Member States and the applicant state in accordance with their constitutional requirements.

The already existing Member States of the EU may wish to amend the founding treaties of the EU. If this is the case, the Member States are expected to act in accordance with an ordinary revision procedure, or with simplified revision procedures (Article 48 TEU). The ordinary revision procedure is for example foreseen for either to increase or to reduce the competences of the EU, for what aim the government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. The Council submits these proposals to the European Council, and the

national parliaments are also notified. The European Council must first, after consulting the European Parliament and the Commission, by a simple majority vote, adopt a decision in favour of examining the proposed amendments. After that, the President of the European Council convenes or decides not to convene a Convention composed of representatives of the national parliaments, Heads of State or Government of the Member States, the European Parliament and the Commission, which examines the proposals for amendments and adopts by consensus a recommendation to a conference of representatives of the governments of the Member States. The conference is convened by the President of the Council for the purpose of finding consensus on the amendments to be made. The amendments enter into force after they have been ratified by all Member States. The simplified revision procedures are used for revising all or part of the provisions of Part Three of the TFEU relating to the internal policies and action of the EU, for what the government of any Member State, the European Parliament or the Commission may submit proposals to the European Council who may adopt a decision amending all or part of the relevant provisions of the TFEU. The European Council is deemed to take the decision here by unanimity. The decision enters into force after having been approved by the Member States.

3.3.2. International agreements

The general procedure for concluding international agreements of the EU is regulated by Article 218 TFEU, foreseeing the following procedure: The Council authorizes the opening of negotiations, adopts negotiating directives, authorizes the signing of agreements and concludes the agreements. At the same time, the Council may address directives to the negotiator, and also designate a special committee to be consulted in the negotiations. On a proposal by the negotiator, the Council adopts a decision that authorizes the signing of the agreement and, if necessary, its provisional application before the agreement becomes valid. On a proposal by the negotiator, the Council also adopts a decision concluding the agreement. The Council adopts the decision concluding the agreement after it has obtained the European Parliament's consent in the case of association agreements; agreement on the EU's accession to the ECHR; agreements establishing a specific institutional framework by organising cooperation procedures; agreements with important budgetary implications for the EU; agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. In other cases, the Council adopts a decision after consulting the European Parliament, or if the European Parliament does not give its opinion within a time-limit. As a rule, the Council acts by a qualified majority vote throughout the procedure. In cases where an agreement covers a field for which unanimity is required for the adoption of a EU act, as well as for association agreements and the agreements with the states which are candidates for accession, the Council acts unanimously. The Council also acts unanimously for concluding the agreement on accession of the EU to the ECHR, the relevant decision enters into force after it has been approved by the

Member States in accordance with their relevant constitutional requirements. In the case of an agreement exclusively or principally related to the common foreign and security policy area, the Commission, or the High Representative of the EU for Foreign Affairs and Security Policy, submit recommendations to the Council, the latter then adopts a decision authorizing the opening of negotiations and - depending on the subject of the agreement - nominates the EU negotiator or the head of the EU's negotiating team.

The international agreements in the area of the EU common commercial policy are regulated by Article 207 TFEU, stating that Article 218 is applied in agreements with common commercial policy as a general regulation, and Article 207 as a special regulation. The latter Article foresees the following procedure - the Commission makes recommendations to the Council, which authorizes it to open the necessary negotiations. The Council and the Commission are responsible for ensuring that the agreements negotiated are compatible with the EU's internal policies and norms. Such negotiations are conducted by the Commission in consultation with a special committee appointed by the Council to assist the Commission in this task. The Commission acts here under the supervision of the European Parliament, reporting regularly to the special committee and to the European Parliament on the progress of negotiations. The Council acts by a qualified majority for the negotiation and conclusion of the referred agreements, whereas the Council acts unanimously for the negotiation and conclusion of the agreements in the fields of trade in services, the commercial aspects of intellectual property, and foreign direct investment, where such agreements include provisions for which unanimity is required for the adoption of internal rules. Thus, the EU's international agreements related to common commercial policy, are also divided according to internal procedures and subject-matter into the trade in cultural and audiovisual services agreements, trade in social, education and health services agreements, and agreements in the field of transport.

In case of doubt whether a planned agreement is compatible with the basic treaties, a Member State, the European Parliament, the Council or the Commission may seek the opinion of the Court of Justice of the European Union (hereinafter CJEU) on the compatibility of the agreement with the basic treaties. If the CJEU is of the opinion that the agreement is not compatible with the basic treaties, the designed agreement cannot enter into force unless it is amended or the basic treaties have been revised. This has, for example, happened with regard to the accession of the European Community (hereinafter EC) to the ECHR, in which case the European Court of Justice (as it was called at the time) gave opinion 2/94 on accession by the Community to the ECHR (1996, ECJ I-1759), where the Court of Justice stated that since the basic treaties had given neither direct nor indirect powers to the EC for enacting rules concerning human rights or conclusion of international human rights treaties, accession of the EC to the ECHR would have meant institutional changes of such substantial significance that the accession would have been impossible without a Treaty amendment.

3.4. Law-making in the European Union

3.4.1. The concept

EU law is characterized by the principles of supremacy and direct effect, unlike other international organizations (e.g. the United Nations (hereinafter UN) and the Council of Europe), whose activities mainly rely on international treaties (although powers to adopt resolutions have also been conferred on the principal organs of the UN by the UN Charter). In constituent treaties, the EU Member States have conferred on the EU its own law-making capacity. This means that the law-making procedures of the EU start living their own life, independent of the direct will of the Member States (Sarooshi 1999:55). Eriksen and Fossum explain that the EU can no longer be understood as a mere international organization which derives its legitimacy solely from the Member States, but as „a polity in its own right with direct links to its citizens“ (Eriksen, Fossum 2007, the idea being known also from the case *Van Gend en Loos*) – as *inter alia* the laws of the EU have direct effect on its Member States.

The EU Member States have set up EU institutions and conferred law-making powers on those institutions. When the EU Member States now participate in the law-making procedures of those institutions, the Member States no longer represent their individual interests, but the common interest of all the members of the EU (Franck, Fossum 2003). The institutions that exercise law-making functions, established by the EU Member States in its constituent treaties, are the European Parliament, the Council, and the Commission. The functions of those institutions are not clearly separated and those institutions possess a different degree of legitimacy:

The European Parliament – the only institution in the EU whose legitimation to act on supranational level comes directly from the citizens of the Member States - is still not the main law-giver in the EU, but only one participant in the legislative procedures (Majone 2002:323–324). The Parliament does not have the right to initiate laws, but has limited legislative competence – mainly, the competence to participate in the process leading to the adoption of the EU acts by exercising its powers under the procedures laid down in the TFEU and by giving its consent or delivering advisory opinions. The Parliament did not receive the position of the main law-giver of the EU with the Treaty of Lisbon, which left the major powers in legislative procedures to the Council. This means that the powers of the directly elected Members of Parliament are more limited compared to the Council and the Commission who represent the EU’s executive powers, and whose representatives are not directly elected, but respectively represent the (legitimately appointed) governments of the Member States or are nominated by the Heads of State and Government and approved by the European Parliament, having thus indirect legitimation. At the same time – when the legitimacy of the Council and the Commission is only indirect, the European Parliament with its direct legitimation has limited powers. It can be said that the EU is characterized by weak legitimacy. As legitimacy is an important guarantee of democracy, there has been talk of the

democracy deficit (for example, Weiler 1999:77) in the EU. As that democracy deficit also affects the Member States through the direct effect of the EU laws (Eriksen, Fossum 2007), the topical questions are how to guarantee greater legitimacy to the EU institutions, and how to increase the European Parliament's powers (Majone 2002:333) in order to guarantee more direct legitimation in the EU's legislative procedures. These are all important questions, because the laws of the EU affect its citizens similarly to national laws, but at the same time the national institutions have "no longer a monopolised right to perform political representation" (Sørensen 2002:698).

3.4.2. *The legislative procedures*

The EU lacks *Kompetenz-Kompetenz* – the general power to create itself powers – and different procedures are foreseen in the constituent treaties for law-making. Such procedures may be generalized as follows: the legal acts of the EU are adopted on the basis of the powers conferred in the founding treaties, not exceeding those powers, by a competent institution, according to the prescribed procedure, and using the foreseen form.

There are different procedures for making laws foreseen in EU law – the Commission acting alone, the Council acting on a proposal by the Commission, and the procedures embracing all three law-making institutions of the EU – the consultation procedure, the ordinary legislative procedure (previously, the co-decision procedure), and the consent procedure (previously, the assent procedure), whereas the cooperation procedure was repealed by the Treaty of Lisbon. That way, the legal acts of the EU have two types of basis, but since the founding treaties have not foreseen hierarchical differences between the EU institutions participating in taking EU legal acts (on the hierarchical structure of legal system see Kelsen 1996:63, and specifically Miller, Clark 2010) the legal acts of the EU are considered to carry equal weight. In the following, the article introduces the renewed consultation procedure, the ordinary legislative procedure, and the consent procedure that have also be named as three main decision-making procedures in the EU.

(a) *The consultation procedure.* Under the consultation procedure, the Commission submits a proposal to the Council; the European Parliament gives its opinion on the Commission's proposal to the Council. On the basis of that opinion, the Commission may amend its draft. The Council then examines the proposal, may amend the proposal, adopt it as it is, or reject it. The Council adopts the proposal by qualified majority or unanimity. If the Council chooses to reject the Commission's proposal – it must act on unanimity. If foreseen in an Article of the TFEU as a legal basis, consultation is compulsory and the adoption of the act depends on the European Parliament's opinion. The scope of the consultation procedure was significantly diminished by the Lisbon Treaty, bringing some areas from under that procedure under the ordinary legislative procedure, and some areas under the consent procedure (Chalmers, Monti 2008:35; Miller, Clark 2010).

(b) *The ordinary legislative procedure.* The ordinary legislative procedure is regulated by Article 294 TFEU, which foresees three readings after the Commission has proposed an act to the European Parliament and the Council of the EU. Under the first reading the European Parliament adopts its position and communicates it to the Council. If the Council approves the position, the act will be adopted, but if the Council does not approve the position, it adopts its own position and communicates it to the European Parliament for a second reading. Under the second reading, if the European Parliament has not taken a decision within three months, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council; if the European Parliament approves the Council's position, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council. In case the European Parliament rejects the Council's position, the proposed act shall be deemed not to have been adopted; or if the European Parliament proposes amendments to the Council's position, the text thus amended shall be forwarded to the Council and to the Commission, which is expected to give an opinion on those amendments. If the Council approves all those amendments acting by a qualified majority, the act shall be deemed to have been adopted; if the Council does not approve the amendments, a meeting of the Conciliation Committee is convened. Under the third reading, if the Conciliation Committee approves a joint text, the act is adopted if approved by the Council by a qualified majority, and by the Parliament by a majority of the votes cast. If the Conciliation Committee fails to approve the text – the act shall be deemed not to have been adopted. The Lisbon Treaty renamed the procedure, and extended it to forty new fields (Chalmers, Monti 2008:35).

(c) *The consent procedure.* The consent procedure means that the European Parliament must agree positively to the adoption or repeal of a measure. The Council cannot adopt the proposal without the Parliament's agreement (Chalmers, Monti 2008:35; Miller, Clark 2010).

4. In Estonian law

4.1. The concept of treaty

The Estonian Constitution does not define international agreements, although it distinguishes between different international agreements. Article 3 of the Estonian Foreign Relations Act defines international agreements as bilateral or multilateral written agreements consisting of one or several documents which are concluded between the Republic of Estonia and a foreign state or an international organization and which are regulated by international law. Article 3 of the Estonian Foreign Relations Act also defines inter-agency international agreements as written agreements between a state agency or local government of the Republic of Estonia and an agency of a foreign state or an international organization which are concluded according to their competence and regulated by international law.

4.2. Classification of treaties

4.2.1. In the Estonian Constitution

(a) *The constituent treaties.* In the Estonian Constitution, Article 121 (3) refers to the constituent type of international treaties. The Estonian Constitution does not mention explicitly constituent treaties, i.e. the constitutional treaties of international organizations. And yet, by referring in Article 121 (3) to “treaties by which the Republic of Estonia joins international organisations or unions”, the Constitution makes clear that it distinguishes from other treaties the constituent type of international treaties.

(b) *The specific treaties requiring ratification.* Article 121 of the Estonian Constitution generally specifies that the powers to ratify and conclude the treaties of the Estonian State which alter State borders, the implementation of which requires the passage, amendment or repeal of Estonian laws, by which the Estonian State joins international organizations or unions, by which the Estonian State assumes military or proprietary obligations and in which ratification is prescribed, belong to the *Riigikogu*. Article 122 of the Estonian Constitution specifies that the ratification of international treaties which alters the State borders of Estonia requires a two-thirds majority of the membership of the *Riigikogu*. While such treaties are ratified and denounced by the *Riigikogu*, at the same time, Article 8 (7) of the Foreign Relations Act talks about conclusion by the government of the Estonian Republic of international agreements which are not subject to ratification by the *Riigikogu* in the name of the Republic, by that also indicating that there exist different types of international treaties that are treated differently.

(c) *The accession treaties.* In the year 2004, the Estonian State acceded to the EU. The international law principle that an accession to a treaty should be viewed differently from the conclusion of a treaty, because the acceding state does not participate in the negotiation processes of the basic treaty or treaties (Malanczuk 1997:133), is also an Estonian constitutional principle, meaning that the Estonian State ratifies a convention after having signed that convention, but if signing a convention is no longer possible, the state joins or accedes to the convention (Explanatory...2006). In the year 2004, the Estonian State did not sign the establishing treaties of the EU, but instead concluded the Accession Treaty between the Estonian State and the new and old Member States of the EU (Treaty...2003), the Accession Act (Act...2003), and several relevant annexes (Annexes...2003), Accession Protocols (Protocols...2003) and the Final Act (Final...2003). The Constitution of the Republic of Estonia Amendment Act specifies in Article 2 that as of Estonia’s accession to the EU, the Constitution of the Republic of Estonia applies, taking account of the rights and obligations arising from the Accession Treaty, by that indicating that the State accedes to the EU without participating in the conclusion and signing processes of the constituent treaties of that organization, but by accession to that organization.

(d) *By content.* According to Articles 121 and 122 of the Estonian Constitution, one can say that the Estonian Constitution distinguishes between treaties also by their subject-matter.

4.2.2. *In the Foreign Relations Act*

(a) *Bilateral and multilateral treaties.* In the Estonian Foreign Relations Act the concept of international treaty embraces bilateral and multilateral written agreements between the Estonian State and a foreign state or international organization; such agreements may consist of one or several documents (Explanatory...2006).

(b) *The EU agreements.* Related specifically to the EU, the concept of international agreement embraces the agreements of the EU and its Member States with third countries or international organizations, i.e. agreements where one party is the EU or Euratom and the Member States, and the other party is a third country or/and international organization (mixed-agreements). The concept of international treaty in the Foreign Relations Act also embraces agreements between the Member States. These two types of agreements fall under the second subindent of Article 3 of the Foreign Relations Act – being according to the Explanatory Letter to the Draft Foreign Relations Act “‘international agreements’ (regulated by international law)”. The concept of international agreement in the Foreign Relations Act does not embrace international agreements, where one party is the EU (the EU or the Euratom), and the other party is a third country or /and an international organization, i.e. the agreements that fall under the exclusive competence of the EU. Such agreements are nevertheless briefly referred to in Article 10 (2) of the Foreign Relations Act, because such agreements become international agreements for Estonia through Estonia’s membership in the EU. As for the international agreements that fall under the exclusive competences of the EU – the conclusion of such agreements is not regulated by the Foreign Relations Act. Article 10 (2) of the Foreign Relations Act only specifies with regard to those agreements that “governmental authorities shall organise the submission of the positions of the Republic of Estonia concerning international agreements within the exclusive competence of the European [Union] in legislative drafting of the European Union”. At the same time, the Foreign Relations Act does not regulate the conclusion of such agreements, which is instead regulated by the Procedure for Proceeding of the European Union Documents, Government of the Republic Rules and Regulations, and the Rules of Procedure of the *Riigikogu*. This means that the governmental authorities present the positions of the Estonian State during the preparatory work of the international treaties that fall under the exclusive competences of the EU, because such treaties form the basis of obligation of the EU and of the Estonian State only as a Member to the EU, not of the Estonian State as a separate party to such treaties. The procedure for proceeding of such treaties is therefore similar to the procedure for proceeding of the secondary acts of the EU (Explanatory... 2006). The governmental authority whose representative participates in the Council’s working group is responsible

for the coordination of the draft agreement with all relevant authorities and if necessary arranges the submission of the draft to the Estonian government for decision (Explanatory... 2006). The governmental authority also monitors non-interference into Estonia's competences.

(c) *The inter-agency international agreements.* The Estonian Foreign Relations Act also distinguishes between international agreements and inter-agency international agreements – the latter are written agreements between an Estonian State agency or local government and an agency of a foreign state or an international organization that are concluded according to the relevant competences and regulated by international law, which is a matter of distribution of state competences (Fernandez 1999:22). An inter-agency international agreement differs from other international agreements because it is concluded on behalf of a state authority (agency or local government) in the area of its competences, whereas other international agreements are concluded on behalf of the Estonian State on directly constitutional or governmental level. If during the preparation of an inter-agency international agreement an authority is acting outside its competences, a general international agreement under the Foreign Relations Act will need to be concluded instead of an inter-agency international agreement. Examples of inter-agency international agreements are the cooperation agreements of ministries, as well as the agreements concluded by internal authorities within their competences with the same level foreign authorities (Explanatory... 2006).

4.3. Conclusion of international treaties

The supreme legal basis for conclusion of international treaties by the Estonian State lies in the Estonian Constitution. The articles in the Constitution constitute a broad basis for the conclusion of international treaties. Chapter IX of the Estonian Constitution regulates foreign relations and international treaties. Article 120 of the Estonian Constitution clarifies that the procedure for the relations of the Estonian State with other states and with international organizations is provided by law. When Estonia acceded to the EU, the legal basis lied in the Estonian Constitution, and in the Constitution of the Republic of Estonia Amendment Act. Article 1 of the Constitution of the Republic of Estonia Amendment Act specifies that Estonia may belong to the EU in accordance with the fundamental principles of the Constitution of the Republic of Estonia. This statement has been named a 'defence clause' (Laffranque 2007:80) towards the very constitutional values. The adoption of the Constitution of the Republic of Estonia Amendment Act confesses that international law and EU law are constitutionally separated in the Estonian State (this does not characterize only the Estonian State. See, for example, Grabenwarter 2005:104). The constitutional Articles of general authorization leave further specification to other laws.

In addition to the Constitution and actual State practice, the foreign relations of the Estonian State are founded on the generally recognized principles and

provisions of international law and international custom and practice, as well as on international obligations arising from other sources, and the State's legislation. The generally recognized principles and provisions of international law and international custom and practice embrace *inter alia* the fundamental principles of international treaty law – e.g. the principle of equality of the parties (including the equality of the parties in recognition procedures). If an international agreement and internal law are in conflict, according to Article 123 (1) of the Estonian Constitution, the Estonian State cannot enter into such an international agreement. Article 123 of the Constitution should be understood so that the conformity of an international treaty with the Constitution should be controlled at the time of conclusion, not only when an international treaty is applied after it has entered into force. This means that theoretically there cannot arise situations, where a valid international agreement is in conflict with the Constitution if concrete questions have been analysed at the time of the preparatory work of a concrete agreement (Explanatory... 2006). According to Article 123 (2) of the Estonian Constitution – if the state laws or other legislation are in conflict with international treaties ratified by the *Riigikogu*, the provisions of the international treaties apply. This means that the non-conforming laws or other legislation should be brought in conformity with the international agreement, or supremacy of international agreements. The Explanatory Letter to the Foreign Relations Act also clarifies that if an international agreement is in conflict with the Constitution, the international agreement will be denounced or amended. If the state chooses denunciation, it has to fulfil the international agreement until that agreement is valid. By such regulation the Estonian State recognizes the international treaty law principle *pacta sunt servanda*. This regulation also demonstrates that the State honours the principle that a State Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty (Article 27 VCLT). The referred rule has an exception in Article 46 of the VCLT talking about internal law of *fundamental* importance. These principles rather concern the *exercise* of conferred powers, but should not be forgotten at the time of conclusion of international treaties.

The Estonian Constitution regulates ratification and conclusion of certain treaties by the *Riigikogu* in Article 121. Article 122 of the Estonian Constitution specifies that the ratification of international treaties which alters the State borders of Estonia requires a two-thirds majority of the membership of the *Riigikogu*.

The Foreign Relations Act distinguishes between participation in the composition of the text or conclusion of a draft international agreement, and joining or acceding to an already adopted international agreement. Participation in the conclusion of a draft international agreement means participation in the *travaux préparatoire*, signing and ratification of such agreement, whereas the 'already adopted international agreements' are the conventions that have already been adopted or entered into force and which a new Member may only join or accede to. In the case of joining or acceding to an already adopted international

agreement, the new Member does not participate in the drafting of the text of the initial agreement, but in the drafting of a text of the relevant internal legislative act for that agreement and /or in the drafting of the text of an accession agreement. In the Estonian State, these tasks belong to the government. The previous means that in the case of joining a multilateral international agreement, which has internationally been adopted but is still open for signing, a legislative act of the government is prepared that approves the international agreement and grants authorization for signing it, unless the signature requires separate authorization.

The actual practice of the Estonian State with regard to preparation of international agreements is also foreseen in the Foreign Relations Act (Explanatory... 2006). According to Article 4 of the Foreign Relations Act, the bodies conducting foreign relations in the Estonian State are the *Riigikogu*, the President of the Republic, the government of the Republic, the Ministry of Foreign Affairs and other State agencies and local governments according to their competence. Conclusion by the Estonian State of international agreements is in detail regulated in Chapter 3 of the Foreign Relations Act. This Chapter contains subsections on the conclusion and enforcement of international agreements, performance, amendment and expiry of international agreements, and keeping custody and publication of international agreements.

4.4. EU law-making

4.4.1. *The procedure for proceeding of the European Union documents*

For the Estonian State, law-making by the EU institutions falls under the exclusive competences of the EU, and participation of the Estonian governmental authorities in the EU law-making procedures is regulated by the Procedure for Proceeding of the European Union Documents, Government of the Republic Rules and Regulations and the Rules of Procedure of the *Riigikogu*. The Foreign Relations Act only clarifies the existing situation. The reason is that participation of the Estonian governmental authorities in the EU law-making procedures is not considered foreign relations in Estonia. Therefore, the relevant procedure for proceeding of documents is regulated by separate acts. Also Article 1 (2) of the Foreign Relations Act makes clear that the Foreign Relations Act does not regulate the relations between the Estonian Republic and the EU, unless so expressly written in the Foreign Relations Act.

5. Conclusions

This article focused on the treaty-making and decision-making procedures in the EU related to international law and Estonian law. The article was divided accordingly into three main chapters on laws and law-making under international

law, EU law and Estonian law. The beginning of every chapter gave the definitions of international agreements and / or legal acts, followed by classification of international agreements, determination of the status of legal acts, and discussion of the relevant law-making proceedings.

The main conclusions are that the classification of international treaties in private law treaties (that are also named contractual treaties), and law-making treaties (the latter in turn in constituent international treaties and common international treaties), applies also towards the international treaties of the EU; the delegation for concluding the international treaties of the EU, as well as for adopting the legal acts of the EU lies in the constituent treaties of the EU; the law-making procedures in international law and EU law are governed by similar principles; in Estonian law, the conclusion of international agreements is viewed separately from participation in law-making procedures delegated by international agreements; the developments in Estonian law reflect the international and EU law-making developments.

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