

THE LEGAL PERSONALITY OF THE EUROPEAN UNION - BETWEEN THE MAASTRICHT TREATY AND THE DRAFT TREATY ESTABLISHING A CONSTITUTION FOR EUROPE - REALITY AND PERSPECTIVES -

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Abstract. *The scope of the present article is to present an overview of the prevailing and accepted opinion on the legal personality of the European Union. The starting point of the presentation is the analysis of the structural differences between the EU and the European Communities. Then followed by the institutional delimitation and the differentiation of these bodies within the European Construct with regard to actual European Law. After a brief presentation of the legal nature of the EU and its lack of legal personality and legal capacity, a scrutiny of the international law requirements to international law subjectivity of the EU is performed with the same result, but this time on international law level, denying the state character of the Union. This also represents the prevailing opinion in German literature, denying the existence of a legal personality of the EU on a public and international law level with respect to the actual European law. Further, we undertake an analysis on the international law effects of the lacking legal capacity of the Union. This is followed by a short exposition of the effects on European institutions of the awarding of legal personality to the EU. In the final part of the present article the focus is on the new European Constitution, still to be adopted by the member states, which expressly provides the fact that the Union is granted the legal personality and its implication on the present situation in the literature.*

1. EUROPEAN INTEGRATION – A REALITY AFTER MAASTRICHT

Article 1 (3) of the Treaty on the European Union (TEU) stipulates that the basis of the European Union (EU) is represented by the European Communities. The beginning of the European Communities is marked by the formation of the European Coal and Steel Community (ECSC) on 23 July 1952, initiated by the French foreign

minister Robert Schuman and his collaborator Jean Monet. This Treaty had been signed on 18 April 1951 by six European states. The next step is represented by the signing of the Treaty establishing the European Economic Community (Treaty of Rome) and the Treaty establishing the European Atomic Energy Community (Euratom Treaty) in Rome in 1957. The Merger Treaty led to the creation of a single Commission and Council for the

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three Communities. The moment these Communities started to enlarge by accepting new members signified the process of European integration proper: the adoption of a “financial constitution” of the European Economic Community (EEC) in 1969, the creation of the European Monetary System in 1978 and, last but not least, the institutionalisation of the summits of heads of state and government of Member States in 1974 marked by the creation of the European Council (officially called the European Council of Heads of State or Government).

The first step towards the European Union is represented by the signing by the members of the European Council of the Solemn Declaration on the European Union (Stuttgart, 1983), stipulating the examination and assessment of the possibilities of a treaty for the setting up of the European Union. But before such a structure could be created, the already existing European bodies had to be thoroughly reformed, and this was done by the Single European Act (SEA) which entered into force on 1 July 1987. The Act paved the way for a deeper and more regulated co-operation between the various community bodies, for the consolidation of the internal market of the Communities, and to changes in the decision-making process at community level and of the legislative process.

Signing the Treaty on establishing the European Union at the Maastricht European Council in 1991 represented the decisive step in achieving a deeper co-operation at European level. Despite various divergent opinions between

signatories, the most notable being Great Britain’s refusal to accept the provisions regarding the social union (a situation remedied only after internal political changes in this country), a compromise was reached under the mediation of the President of the European Commission, Jacques Delors, at the Amsterdam European Council in 1997. The European structure after Maastricht has been marked by intergovernmental regulations, such as the Common Foreign and Security Policy (CFSP) and the co-operation in Justice and Home Affairs (JHA), as well as by changes in the EC, Euratom and ECSC Treaties. The European Economic Community was turned into the more comprehensive European Community (EC), and European Union citizenship was introduced, including the active and passive right to vote on local level, the right to vote for the European Parliament in the home country and the European right to file petitions (articles 17–22 EC Treaty).

As a consequence of the difficulties arising from the necessity – of constitutional law – of organising a referendum for the ratification of the TEU, signed in Maastricht on 7 February 1992, the Treaty entered into force only on 1 November 1993².

Article N³ (2) of the Maastricht Treaty stipulates that an inter-governmental conference should be held in order to revise this document. This conference took place in Amsterdam, in June 1997, and the new TEU entered into force on 1 May 1999,

² Observe the negative result of the referendum in Denmark and the contesting of the constitutionality of the ratification law of the TEU in Germany.

³ Currently Art. 48 TEU.

once the ratification procedures were concluded in all Member States⁴.

After having entered into force on 1 February 2003, the Treaty of Nice stipulates the abrogation of the Protocol of the Amsterdam Treaty regarding Community bodies with a view to the extension of the EU, and brings some alterations to the constitutive treaties, alterations made necessary by the prospective enlargement of these structures.

The European Council of Laeken of December 2001 created the European Convention on the Future of Europe, under the leadership of the former French president Valerie Giscard d'Estaing who, according to the Laeken Declaration on the Future of the EU, was charged with preparing the Draft Treaty establishing a Constitution for Europe. This new document was meant to mark the development of the European Union and, at the same time, a reformatory act of the European structures aimed at simplifying the already existing constitutive treaties. It was also meant to facilitate a clear and transparent distribution of the competences of the European Union and the Member States and, last but not least to consolidate democratic values and transparency in Europe. The European Convention concluded its works once this project was drawn up. On 29 October 2004, the Heads of State or Government of the 25 Member States and the three candidate countries (at that time Bulgaria, Romania and Turkey) signed the Treaty

establishing a Constitution for Europe which was unanimously adopted on 18 June of the same year. The Treaty can only enter into force when it has been ratified by each Member State in accordance with its own constitutional procedure. The French and Netherlands rejected the Constitution by referendum on 29 May and 1 June 2005. Under these circumstances a period of reflection is currently under way in all countries. However the process of ratification by the Member States has therefore not been abandoned.

On 23 July 2002, according to the provisions of article 97, the ECSC Treaty expired. A protocol annexed to the Treaty of Nice, regarding the financial consequences of the expiration of the ECSC Treaty, stipulates that the entire patrimony and all the obligations entailed by this treaty are transferred to the European Community. According to the protocol, the net value of this patrimony is destined for research in the field of the industrial use of coal and steel and, to this end, a Research Fund for Coal and Steel is to be set up. As the entire patrimony of the ECSC has been returned to the Member States once this community has ceased to exist, the decision has been made that the patrimony should be administered by the European Commission until the Treaty of Nice enters into force. As far as the non-patrimonial juridical effects are concerned, in all the agreements concluded by the ECSC, the ECSC has been replaced⁵ by the EC starting with

⁴ A referendum was necessary in Ireland and Denmark, while in France the ratification required an alteration of the Constitution.

⁵ See Decision of the Representatives of the Governments of the Member States 2002/596/EC, OJ 2002 L 194/35.

24 July 2002, the EC bearing all the rights and obligations of the dissolved organisation.

2. THEORETICAL PREMISES: THE RELATION BETWEEN THE EUROPEAN UNION AND THE EUROPEAN COMMUNITY

The Maastricht Treaty on the creation of the European Union⁶ structurally alters the construction of the Community by intensifying the process of integration and by setting up the “three-pillar” structure based on the European Communities and the intergovernmental co-operation policies, the Common Foreign and Security Policy and the Justice and Home Affairs⁷. The ratification of the Maastricht Treaty triggered ample debates in German literature, both regarding the legal nature of the EU and the existence of a legal personality of the Union. The German Federal Constitutional Court qualified the Union as “a confederation of states”⁸, a notion that was widely accepted and which reflects the co-existence of the Communities and of intergovernmental policies within the Union. The Communities maintain their own individual status, having legal personality⁹ and forming the Community pillar of the Union. Institutionally, the Union is closer to the other two pillars, the CFSP and the JHA, whose

existence and functioning entail principles and procedures different from those of the Communities. Thus, the principles of the direct applicability and of the supremacy of Community law represent procedures specific to the Community pillar, while the second and third pillar presuppose a joint intergovernmental co-operation between Member States based on the principles of international public law. This distinction, which is dogmatically essential, between the European Communities and the European Union represent the most important premises for defining the legal status of the Union.

a) Defining European Union law and Community law

Primary Community legislation is made up by the constitutive treaties of the European Communities, with all the protocols, annexes and their subsequent completions and alterations. A new category of primary legislation was created by adopting the Single European Act in 1987. This legislation altered the constitutive Treaties of the EC and, as a precursor¹⁰ to the Maastricht Treaty, the SEA envisioned an organism of intergovernmental decision aiming at European co-operation in foreign policy and established outside the already existing EC Treaties (article 30 SEA).

⁶ OJ 1992 C 191/1.

⁷ The Amsterdam Treaty altered the structure of the JHA pillar, by transferring the policies on the free movement of persons, covering visas, asylum, immigration and judicial co-operation in civil matters into the body of the EC Treaty, the first pillar (articles 61-69), the remaining subjects in the TEU being currently called “Police and Judicial Co-operation in Criminal Matters”; this alteration will be further considered when talking about the JHA pillar.

⁸ BverfGE 89, p. 155.

⁹ Art. 281 EC Treaty.

¹⁰ Pechstein/Koenig, Die Europäische Union, p. 5.

As far as the effectiveness of Community law is concerned, this is a legal source that takes precedence over national law, its regulations having priority by virtue of the supra-national character of Community law order. On the other hand, the effects of intergovernmental law, represented by the norms of the CFSP and of the JHA, are the same with those of regular international public law treaties¹¹. Community legal norms take direct effect in or on Member States without requiring national adoption. This direct applicability leads to the supra-national character of Community law order. Intergovernmental regulations in CFSP and JHA require, however, an act of national law in order to become effective in Member States, namely an act of transformation, adoption or carrying into effect. This principle has also been formulated in the Amsterdam Treaty – article 23 (2) TEU – which, despite the introduction of the majority principle in CFSP, in cases where “important reasons of internal policy” are invoked, stipulates the possibility of applying the unanimity rule. Thus, Member States mostly maintain their sovereignty in these fields that are very sensitive for each of them.

As far as the term supra-nationality is concerned, it should be noted that it is not used in a unitary way. An international organisation was characterised as being supra-national for the first time in the ECSC Treaty at the Paris Conference in 1950, when this term was introduced in article 9 of the respective Treaty. In a wide sense,

this characterisation is used for any decision of an international organisation or legislative body which immediately creates obligations for the Member States. In a narrow sense, the term applies mainly to the decision-making procedures of the EC, in those situations when the Member States may carry certain obligations even without their own accord, as a consequence of a majority decision¹². Politically, the term supra-nationality is used as a synonym for indicating a structured integration within a process¹³.

The Maastricht Treaty has, similarly to the SEA, a heterogeneous structure: on the one hand Union primary legislation is made up by regulations which alter the EC treaties (articles 8-10 TEU), and which have become part of Community primary legislation once the Maastricht Treaty entered into force. On the other hand, Union primary legislation is based on the intergovernmental legal sources of the CFSP and JHA (articles 11-42 TEU). These two fields, so different in nature, are comprised in the common regulations (articles 1-7) and the final dispositions (articles 46-53) of the TEU.

As for the relationship between Union primary legislation, as stipulated by the CFSP and JHA provisions, and Community primary legislation, represented by the EC Treaties, these two parts of the European primary legislation are not totally independent from each other. The TEU aims at creating a single institutional framework (article 3 (1) TEU) which would ensure the coherence and continuity of the

¹¹ Ibidem.

¹² Schweitzer/Hummer, *Europarecht*, p. 275.

¹³ Oppermann, *Europarecht*, p. 275.

measures meant to achieve the goals of the Union, at the same time maintaining and developing the *acquis communautaire*. Despite this intention, stipulated in article 3 (1) TEU, one can notice that unlike the Communities, in the CFSP and JAH it is not the joint bodies that act as legal subjects, but the very Member States.

Unlike the EC Treaties, the TEU does not hold provisions referring to the capacity, in the fields of CFSP and JAH, of creating secondary legislation with direct applicability in the Member States based on a competence conferred by primary legislation. In other words, neither the TEU, nor secondary legislation acts passed on its basis, such as council decisions on joint actions (article 14 (1) TEU), have direct applicability for the citizens of the Union. Neither the CFSP, nor the JHA contain norms of Union legislation which take precedence over national law. We are only dealing with treaties of international public law which commit their signatories to a tighter intergovernmental co-operation. However, in contrast with the facts mentioned above, the draft EU Constitution stipulates in its very first article the consecration of the Union's supra-national character, thus changing the current situation and placing the Union's structure on a position equivalent to that of the EC at present.

b) The relation between the law of the European Union and Community law

On the one hand, the Amsterdam Treaty brought about major changes in the European structure, while on the

other hand, article 47 of the same treaty stipulates that the treaties underlying the formation of the European Communities are not affected by changes other than those stipulated by titles II-IV TEU and by the final dispositions of the articles 46-53 TEU. As for these changes, they may be said to represent only dispositions meant to complete Community law in certain fields, without bringing about major changes.

Starting from the premise that EU law is a separate entity from EC law, it should be pointed out that between these two entities there are certain points of contact and, implicitly, the possibility of conflicts between their legal norms¹⁴. At the same time, there is the problem of the relation between these two systems which, according to article 3 (1) TEU, form together a single institutional framework. The hypothesis of the "three-pillar" structure of the Union with a "roof" supported by three pillars – EC, CFSP and JHA – gives the impression of a relation of supra-ordination of Union law versus Community law. Still, the TEU is an ordinary treaty of international public law, which entails obligations only for the signatory states, not for the EC. Even a simple participation, as part of the TEU, would not lead to a subordination of Community law in the system of Union law, but would only lead to assuming certain obligations as effect of an international treaty. Potential collision problems between norms should be solved according to article 300 (5) and (6) EC Treaty, corroborated with article 48 TEU, by altering Community law. By integrating

¹⁴ Pechstein/Koenig, Die Europäische Union, p. 68.

Union law into the EC, this would take precedence over secondary Community law norms¹⁵. However, until the draft EU Constitution has been drawn up, the possibility of integrating these two legal entities and, implicitly, the two structures, has not yet been considered by their initiators.

c) Conclusions

When characterising the relationship between the Union and the Communities, namely the roof character of the former and the pillar character of the EC, in the “three-pillar” structure, it should be mentioned that the relationship itself has no special dogmatic importance. The reason for this is that neither the obligation of observing the principle of coherence (article 3 (1) TEU), nor other possible obligations resulting from provisions of the TEU, respectively from actions of Union bodies, require dogmatic sanctioning in order to be substantiated. Assuming these obligations of the EC can be explained by the modifying instruments of the EC Treaty. Only the effect of carrying out these obligations, namely including the Communities in vaster integrative structures, as well as observing the principle of coherence by assuming the obligation of mutual alignment of Community policies with the CFSP and the JHA, can be represented for exclusively illustrative purposes for the Union as being a comprehensive structure as compared to the EC. All the above indicates that

one can not talk about a union character of the EC in the present European structure.

3. THE LEGAL NATURE OF THE EUROPEAN UNION

The character of subject of public international law has to be denied if the three conditions of the so-called theory of the three elements have not been met. These refer to the three components which have to be present obligatorily for a structure to be defined as a state and, consequently to have legal personality. The first element is represented by the people of that state, characterised by the fact that they live on the territory of the respective state on a regular basis and can be defined by the formal bond represented by citizenship¹⁶. In the case of the European Union the requirement of citizenship is missing, despite the introduction of the “citizenship of the European Union” by the Maastricht Treaty. This union citizenship is very different from the citizenship of a state as far as its rights and obligations are concerned¹⁷.

The second element is represented by the territory of the state, inside whose borders a state exerts its sovereignty. This element is absent from the European Union, referring only to the territory of the EU Member States in which the TEU takes effect. This fact results from the character of international public law of the TEU. Article 229 EC Treaty only refers to the

¹⁵ ECJ, Case 181/73, Haegemann/Belgia, [1974], pp. 449, 460; on the matter of precedence, the Court classified the international treaties, in which the EC are part, as being situated between primary and secondary Community legislation.

¹⁶ Bothe/Hailbronner/Klein/Kunnig/Schröder/Graf Vitzhum, *Völkerrecht*, p. 205; Koenig/Haratsch, *Europarecht*, p. 29.

¹⁷ Koenig/Haratsch, *Europarecht*, 2003, p. 29.

scope of the EC and not to a territory of the Union, respectively of the EC.

The last element, according to the above mentioned theory, is the actual exercising of sovereignty on that territory. Neither the TEU nor any other acts grant the Union the possibility of granting itself its own competences necessary for its functioning, in other words it can not self-mandate itself in this sense. This possibility is common to all states and is essential for exercising their sovereignty on their own territory. Article 6 (4) TEU stipulates that the Union has the necessary means to achieve its goals and implement its policies. As this norm could have been interpreted as a mandate for the Union to grant its own necessary competences, the so-called "Maastricht Decision"¹⁸ of the German Federal Constitutional Court, which refers to the constitutionality of the law of approving the Maastricht Treaty, states the contrary. In supporting this point of view, the German Court refers to the principle of conferral, stipulated by article 5 TEU and article 5 (1) EC Treaty. According to this principle, the Union may become active only if it has been specifically mandated in the respective treaties, which contradicts the possibility of self-mandating. In the same context, the German Court, which states that the EU lacks the quality of subject of international public law, maintains that the norm stipulated in article 6 (4) TEU does not contain the procedural disposition necessary for its applicability. One should also exclude

any reference to articles 202 and 205 EC Treaty, involving the possibility of action through the European Council, because the applicability of these articles in the CFSP and JHA pillars of the Union has not been specifically stipulated in article 28 (1), respectively article 41 TEU. In conclusion, the German Federal Constitutional Court interprets article 6 (4) TEU only as a statement of the political-programmatic intent of the EU Member States to provide the Union with the necessary means to achieve its goals. The Court also maintains that another interpretation of the text of article 6 (4) TEU, such as one provided by European bodies, would lack the obligatory character as far as the German state is concerned¹⁹.

Influenced by this decision, the majority opinion in the German doctrine maintains that the EU is neither a subject of international public law nor an international organisation²⁰. The concept of a structured international organisation, consisting of several organisations with legal personality – in this case the EU and the EC – independent from the relations of subordination or co-ordination existing between these entities, is not tenable. In this context, the Union is characterised as "an international association without legal personality"²¹, the Member States, as they are called in article 4 (2) or in article 11 (2) TEU, being, in fact, signatories of a treaty and not members in the sense given by the EC.

¹⁸ See footnote 7.

¹⁹ *Ibidem*, p. 195.

²⁰ Koenig/Haratsch, *Europarecht*, p. 45; Schweitzer/Hummer, *Europarecht*, p. 23; for a general presentation of the opinions of the German doctrine see Koenig/Haratsch, *Europarecht*, p. 45.

²⁰ Koenig/Haratsch, *Europarecht*, p. 45.

²¹ Koenig/Haratsch, *Europarecht*, p. 45.

4. THE LEGAL PERSONALITY OF THE EUROPEAN UNION: ANALYSIS AND CONTROVERSIES

From the very beginning it should be made clear that the TEU does not specifically stipulate the legal personality of the Union, as it exists in the EC Treaty with reference to the Community. In this sense, legal reference materials contain a number of concepts and controversies regarding the legal personality of the Union and, implicitly, the capacity of constituting a subject of international public law. According to the overwhelming majority of the formulated opinions, the Union does not have legal personality²². This specification is necessary following the analysis of the fundamental institutions and principles stated both in Community law and in the practice of international organisations. The controversies found in literature refer to the qualification of the legal status of the Union in the practice of international public law starting from the quality of international organisation to the existence or inexistence of legal personality. International organisations can be subjects of international public law if they have the capacity of holding rights and obligations in their relations of international public law. This capacity was granted by the Member States through a specific provision in the founding act, which, as we have already noted above, does not apply to the EU.

a) Legal personality by “implied-power”

The practice of international public law, however, has other means of acquiring legal personality by international organisations. One such means refers to acquiring legal personality by the so-called “implied-power” effect. According to this theory, the existence of legal personality does not require any specific provision in the founding act, but only presupposes dispositions from which, by applying the interpretation principle of “implied-power”, results that the Member States had the intention to attribute legal personality to the respective international organisation²³. Thus, an international organisation has to have the rights and obligations entailed by carrying out its tasks. This is the way in which the International Court of Justice (ICJ), in the “Bernadotte” Report²⁴, established that the legal personality of the UN (United Nations) implicitly arises from the extremely comprehensive tasks and objectives stipulated in the UN Charter (e.g., the provisions about the necessity of concluding treaties of international public law). We will further analyse whether, based on the application of the “implied-power” principle in the TEU provisions susceptible of conferring the capacity of international public law subject, one can deduce the legal personality of the EU.

According to article 49 TEU, any European state can apply for accession

²² Pechstein/Koenig, *Die Europäische Union*, pp. 28; the same opinion is shared by Schweitzer/Hummer, *Europarecht*, p. 23; Oppermann, *Europarecht*, p. 55; Herdegen, *Europarecht*, pp. 78.

²³ Pechstein/Koenig, *Die Europäische Union*, p. 40.

²⁴ ICJ Reports 1949 – Reparations for Injuries – p. 174.

to the EU. The applicant states become, after carrying out the accession procedures, members of the EU, without requiring a separate accession to the EC as the latter represents one of the fundamentals of the Union, namely the Community pillar²⁵. Paragraph 2 of article 49 stipulates that accession takes place by signing an accession treaty between the applicant state and the Member States of the Union (just as in the case of the accession of Austria, Finland and Sweden²⁶). Thus, accession treaties are concluded with the Member States of the EU and not with the Union itself, which points to the fact that we are dealing with the second pillar of the EU, namely the CFSP, where competences belong to the Member States and not to the Union. If accession treaties were concluded with the Union itself, the logical conclusion would be that the EU does have legal personality²⁷. This conclusion is also supported by the idea according to which the foreign representation of the Union is a matter of intergovernmental co-operation in which the state holding the presidency of the council can not conclude international public law treaties in the name of the other Member States. Pechstein/Koenig consider that both paragraph 1 of article 19 TEU and the intergovernmental character of the CFSP convey a partial foreign representation of the Member States on the state holding the presidency of the council. This partial representation is

limited to expressing points of view common to the States of the Union, and it does not include concluding agreements that could generate legal effects, such as concluding international treaties. Consequently, the intergovernmental character underlines the inexistence of the Union's legal personality.

b) The status of Community bodies

Tightly connected to the problem of the Union's legal personality is the qualification of the EU bodies: does the Union have its own bodies or does it resort to the bodies of the Communities in order to carry out its activities? Article 5 TEU enumerates, on the one hand, five fundamental bodies of the Union (the Parliament, the Commission, the Council, the Court of Justice and the Court of Auditors), but it makes explicit reference to Community treaties. On the other hand, article 4 TEU assigns the co-ordinating political role to the European Council, which is formed of the heads of state or government, but also of the President of the Commission²⁸. The systematic interpretation of these two provisions reveals that the intention of the European lawmaker was to create a body proper to the EU that should complete the single institutional framework postulated in article 3 TEU. This form of the Council, institutionalised by the Maastricht Treaty, has been present in Community practice since 1975 in the form of the

²⁵ Streinz, *Europarecht*, p. 54.

²⁶ For example: OJ 1994 C 241/9.

²⁷ Pechstein/Koenig, *Die Europäische Union*, p. 42.

²⁸ The European Council is not identical with the European Communities Council stipulated in Art. 121 EC Treaty.

biannual summits of the heads of state or government together with the President of the Commission, and it points out its political-diplomatic character. The European Community Council is responsible for the legal transposition of the political decisions made by the European Council²⁹. Thus, the European Council is the only body proper of the Union. This is the only way to account for the relatively reduced role played by the other bodies – Parliament, Commission, Court of Justice and Court of Auditors – within the Union. If the Union had had its own executive bodies, it could have had legal personality³⁰, considering that the existence of its own bodies is essential for the qualification of the legal status of an international organisation. The Union, therefore, carries out its tasks by means of the specific bodies of the EC, which points to the lack of legal personality.

At this point we should make some considerations as to the language used by the mass media and in certain political circles. As we have mentioned before, Community law presupposes the distinction between the EC, characterised by supra-nationality, and the EU, as a field of co-operation between Member States at intergovernmental level. This distinction should also be considered as far as the use of legal terminology in

Community law is concerned. It goes without saying that the terms used by the media have the role of simplifying legal Community jargon which greatly reflects the level of difficulty of Community structure³¹. It is also true that legal analysis requires the correct use of the terms and notions of Community law. The lack of legal personality and of proper bodies reveals in this sense the terminological distinctions existing in the legal community order. Thus, when we speak about the Council, we keep in mind the difference between the European Council, as a body of the entire Union, and the European Community Council, as a body specific for the Community pillar of the Union. As for the term “EU Council”³² used by the Council in certain documents, Dörr points out, with good reason, that it contravenes to the provisions existing in the institutive treaties, where the name “European Communities Council” was established. This provision, already stipulated in the Merger Treaty in 1965³³, in articles 1 and 9, has not been abrogated by article 50 (1) TEU, but remained as an integant part of primary Community legislation³⁴. At the same time, the Commission, as a specific body of the EC, bears the name of European Commission or European Community Commission³⁵, and not the

²⁹ Oppermann, *Europarecht*, p. 96; on the other hand, Koenig/Haratsch, p. 352, consider that as the activity of the European Council does not result in the Union acquiring legal capacity, the Council does not meet the necessary requirements to be qualified as a body specific for the Union, only having the role of intergovernmental conference at the level of international public law.

³⁰ Wichard, in: Callies/Ruffert, Art. 5 TEU, p. 51.

³¹ Dörr, NJW 1995, p. 3163.

³² For example: The Council Decision 95/358/EG, Euratom, OJ 1995 L 205/38.

³³ The Merger Treaty entered into force on 01.07.1967.

³⁴ Dörr, NJW 1995, p. 3164.

³⁵ The Resolution of the Commission of 17.11.1993, not published in the OJ.

EU Commission, as it is currently used by the media. The Court of Justice of the European Communities, as a Community juridical body, also comprises, starting with 1989, a Court of First Instance. The European Parliament does not pose problems in this sense, considering its consultative role.

The terminology used in the TEU often refers to the Union as an entity (article 6 (3), according to which the Union respects the national identity of the Member States or their fundamental rights in paragraph 2 of the same article). This is however a purely declarative statement as it does not infer the existence of the Union's legal personality.

Last but not least, the foreign policy of the Union is not the foreign policy of a proper subject of international public law, as it might result from article 18 (1) TEU, which confers the President of the Council the function of representation in the CFSP. This is only a partial representation on behalf of the state holding the Presidency of the Council for the other Member States³⁶.

c) Legal personality acquired by subsequent practice according to article 31 (3) (b) of the Vienna Convention on the Law of Treaties

Public international law practice knows another way of acquiring legal personality by an international organisation that is by subsequent practice. This is a method which is

recognised by and stipulated in the Vienna Convention on the Law of Treaties in article 31 (3) (b). This way of acquiring legal personality could be deduced from the activities of the Union in the field of international public law, mainly from its concluding international agreements. The following treaties might fall into this category: The European Union Treaty with Bosnia-Herzegovina and Croatia concerning the administration of Mostar³⁷. A possible discrepancy with the lack of the Union's legal personality, thus its incapacity of concluding international treaties in its own name (and implicitly in the name of the Member States), can be seen from the provision stipulating that the respective treaty is signed by the President of the Council in the name of the Union Member States, within the Union³⁸. However, the former foreign minister of Germany, Klaus Kinkel, makes a rightful observation referring to this situation, namely, that from legal point of view, in the case of the above mentioned treaty it is not the Union that acts, but the Member States and the Community³⁹. The signing of the Peace Treaty for Bosnia-Herzegovina on 14 December 1995 by the Presidency of the Council on behalf of the EU falls into this category too. This is again a certification of the Union's participation in this treaty in its quality of special negotiator⁴⁰ and not a signing of the treaty in the name of the Union. At the same time, the treaties signed by the Union with Yugoslavia⁴¹, respectively

³⁶ Koenig/Haratsch, *Europarecht*, p. 352.

³⁷ Bull. EU 7/8 – 1994, p. 74 and Bull. EU 6 – 1994, p. 98.

³⁸ Schröder, in: *Europäisches Verfassungsrecht*, p. 391.

³⁹ Kinkel, in *Schlußveranstaltung des 61. Deutschen Juristentags am 20.09.1996: Außenpolitik der Europäische Union – Rechtliche Möglichkeiten und politische Chancen*, 1996, p. Q 14.

⁴⁰ "European Union special negotiator", Dörr, *EuR*, 1995, p. 343.

⁴¹ Council Decision 2001/352/CFSP, OJ 2001 L 125/1.

with Macedonia⁴², concerning the setting up of a surveillance commission on behalf of the EU, treaties which explicitly stipulate the quality of participant of the Union⁴³, reinforce this conclusion. Recognising the right of the Union to participate in the relations of international public law by concluding international agreements in the form of association, may represent an argument for acquiring partial legal personality for the Union by virtue of article 31 (3) (b) of the Vienna Convention on the Law of Treaties⁴⁴. This argument could be effectively invoked if the Member States hadn't explicitly opposed it by rejecting the proposals of Ireland⁴⁵ and the Netherlands⁴⁶ to grant the Union constitutive legal personality during the negotiations that led to the conclusion of the Amsterdam Treaty. Being a fundamental provision of Community structure based on primary Community legislation, granting legal personality should have been the object of the procedure of altering the constitutive treaties, according to article 48 TEU⁴⁷. Paragraph 3 of the same article stipulates that in such a case decisions are adopted according to the rule of unanimity which, obviously, didn't happen in the present situation.

d) The absorption of the Communities in the Union

In German literature, v. Bogdandy/Nettesheim's⁴⁸ melting theory, which

starts from the idea of the unity of Community legal order, kicked off an ample debate. According to the opinion of the two authors, the Union is a unitary structure which also comprises the Communities and which adequately reveals the gradual intensifying of the European integration process. The fundamental legal ground of the melting concept is article 3 (1) TEU, which stipulates the single institutional framework of the EU. Thus, from the point of view of its organisation, of the legal consequences and of the legal system, the Union would represent a unity, which is the constitutive basis of the Community legal nucleus⁴⁹. Starting with the Maastricht Treaty, Community development enters a new phase, allowing the authors to state that the Union represents a new structure which replaces the old one. In other words, the Union absorbs the Communities, whose substitute it becomes automatically, a statement that also results from the terminology used in drawing up Community legislation. From this point of view, the authors maintain that the terms "Community" and "Community law" would be obsolete and their use would not correspond to the present image of the European structure, more and more often referred to with the terms "Union" and "Union law"⁵⁰. The conclusion reached by v.

⁴² Council Decision 2001/682/CFSP, OJ 2001 L 241/1.

⁴³ Schröder, in: *Europäisches Verfassungsrecht*, p. 391.

⁴⁴ Dörr, *EuR* 1995, p. 343 defines this quality as legal personality "in statu nascendi".

⁴⁵ CONF 2500/96, 05.12.1996, p. 91.

⁴⁶ CONF 2500/96, ADD. 1/20.3.1997, p. 47.

⁴⁷ Pechstein/Koenig, *Die Europäische Union*, p. 38.

⁴⁸ V. Bogdandy/Nettesheim, *NJW* 1995, p. 2324; by the same authors, *EuR* 1996, p. 3.

⁴⁹ V. Bogdandy/Nettesheim, *NJW* 1995, p. 2327.

⁵⁰ V. Bogdandy/Nettesheim, *NJW* 1995, p. 2327; in this sense, as the authors explain, the Regulations issued by the EU Council are called Regulation (EC) only insofar they refer to Community legislation and not to Union legislation.

Bogdandy/Nettesheim is that, from this perspective, the Union, as unitary organisation, meets all the objective conditions necessary to have legal personality, and it remains that this dogmatic concept be accepted in the practice of international public law⁵¹.

Considering the recent developments and legislative projects at the level of Community legal order⁵², the melting theory proposed by v. Bogdandy/Nettesheim has a visionary and innovative character. It represents a way of simplifying the complicated Community legal structures through proposals that are more accessible to the citizens. The melting concept however represents rather a social-political aspiration than a legal reality⁵³. From a normative point of view, the authors ignore the fact that the single institutional framework stipulated in article 3 (1) TEU only conveys a partial unity of the Community bodies, which does not directly lead to the immediate melting of the structures they represent. Politically, the proposals referring to the absorption of the Communities into the Union and to a possible granting of legal personality to the latter were explicitly rejected by the Member States.

Although there have been other opinions presented in the literature, insisting on a structural melting of the Communities within the Union⁵⁴, as well as on granting legal personality through the Amsterdam Treaty⁵⁵ the majority of

the authors stick to the thesis that the Union does not have legal personality, at least not until the European Constitution enters into force.

e) The European Union – a subject of private law?

Another aspect connected to the EU's legal personality is the question whether the EU can be a subject of private law. This capacity offers the possibility of engaging relationships at the level of private law and of concluding legal documents, mainly legal contracts in the Member States. Unlike the EC Treaty (article 282) and the Euratom Treaty (article 185), the TEU does not contain explicit provisions in this field. Although for being a subject of private law, this is not necessary, a problem arises where we deal with an international organization which does not hold the capacity of a subject of public law. According to the majority opinion in the theory of international public law, the capacity of private law of an international organisation does not result from its capacity of international public law. Assigning the status of private law subject to an international organisation falls under the regulations of national legal norms, so that there is no mandatory determining connection between the two⁵⁶.

The absence of the EU's private law capacity, such as it is the case of the German legal system⁵⁷, has no major legal consequences. As for the

⁵¹ V. Bogdandy/Nettesheim, NJW 1995, p. 2328.

⁵² We refer to Art. 6 of the Draft Treaty establishing a Constitution for Europe.

⁵³ Certainly, if we ignore the draft EU Constitution.

⁵⁴ Trüe, Verleihung, von Rechtspersönlichkeit an die Europäische Union und Verschmelzung zu einer einzigen Organisation – deklaratorisch oder konstitutiv?, Europa – Institut der Universität des Saarlandes, Nr. 37, 1997.

⁵⁵ Wichard, in: Callies/Ruffert, Art. 5 TEU, p. 51.

⁵⁶ Koenig/Harratsch, Europarecht, p. 52.

⁵⁷ In German international private law, the recognition of the private law capacity of a foreign legal personality depends on the latter's statute in the country where it is based.

necessity of such a capacity for carrying out its activity, it should be mentioned that as far as the Union is concerned its headquarters are not located in any specific country, the private law capacity being irrelevant in this case. The other issue raised refers to the necessity of private law legal personality in the case of legal protection for the citizens of the Union. The Union is not mandated to issue acts whose recipients are the citizens of the Member States⁵⁸, so that the existence of a private law capacity in this situation is again not necessary.

5. THE LEGAL PERSONALITY OF THE EUROPEAN UNION WITHIN THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

The Treaty for the future European Constitution explicitly stipulates in article I-7 the legal personality of the Union. This provision together with article IV-438 lays down that the Union established by the Constitutional Treaty is the legal successor to the European Community. According to the Final Report of Working Group III of the European Convention, which during its works discussed the problem of the Union's legal personality, the present Community structure is liable to create confusion as far as the legal capacity of European institutions is concerned. Based on this consideration, the

Working Group recommends the introduction in the Treaty of the Constitution of an explicit provision that should regulate the granting of legal personality to the Union⁵⁹. We shall further analyse the dogmatic implications of this provision and its consequences on the relations of international public law of the EU.

a) The explicit recognition of the Union's legal personality: implications on the "acquis communautaire"

Based on the mandate entrusted by the Presidium of the Convention, Working Group III analysed, in its debates, the effects of the explicit granting of legal personality to the Union, as well as the consequences born by the melting of the Union's legal personality with that of the legal personality of the Communities would have on the Community legal order⁶⁰. Considering the disappearance of the present form of Community Treaties and the drawing up of a single constitutional document that replaces them, we think that it is not that much a melting, as it is formulated in the Report⁶¹, but an absorption of the Communities into the Union⁶², idea which is also reflected in the taking over of the Community legal institutions in the new legal structure, under the name of Constitution⁶³. Thus, we can

⁵⁸ BverfGE 89, pp. 155, 175; The German Federal Constitutional Court, in its decision in the Maastricht case, retained that the TEU does not contain provisions which should represent a mandate for any actions of any nature on the possessors of basic rights, namely on the citizens of the Member States. This decision is based on the fact that there is no legal protection of the citizens' individual rights against acts of Union law neither in the field of JHA nor in that of CFSP either by the ECJ or by the Court of First Instance (Art. 46 TEU).

⁵⁹ The Final Report of Working Group III of the European Convention on the legal personality of the EU – CONV 305/02 – can be found on the Internet on the Convention's website www.european-convention.eu.int (on 02.10.2002).

⁶⁰ See the text of the Final Report, pt. 1, p. 1.

⁶¹ See pt. 3 of the Final Report, p. 2.

⁶² See also pt. 2. d) of the article – the v. Bogdandy/Nettesheim theory.

⁶³ See Art. I-1 of the Constitutional Treaty: "...this Constitution establishes the European Union...".

see that the Community pillar of the present European architecture passes on materially its institutions and organising principles (including its legal personality) to the future European Constitution. At the same time, the term "Union" reflects to a much greater extent the intensification of the process of integration and the joint European values that lie at the basis of drawing up a Constitution for Europe.

Following the explicit granting of a legal personality to the Union by article I-7 of the EU Constitution, the "Community acquis" undergoes essential alterations as far as its legal structure is concerned. The model of the "three-pillar" structure, established by the Maastricht Treaty disappears, the institutions comprised by these pillars being integrated into a unitary structure, under the form of a Constitution. At the same time, the constitutive treaties cease to be effective, but the institutions and organising principles remain valid, this time within a single text meant to simplify the European legal structure. The members of the Working Group, together with the experts and legal advisors heard during its works, reached the conclusion that a potential merger of the treaties would be the logical consequence of recognising the legal personality of the Union. This would essentially contribute to

simplifying the European legal system, as the distinction between the Union and the Communities would become irrelevant, thus eliminating a number of procedural and decision-making difficulties, mainly in the two fields of intergovernmental co-operation, CFSP and JHA. It still remains to be seen to what extent the procedural particulars of these two fields will be considered, taking into account the fact that the Treaty stipulates their integration into the single constitutional text. A special problem is raised by the correlation of these two fields with the process of lawmaking, as the Treaty does not stipulate any specific methods of passing secondary legislation in the matters of intergovernmental co-operation, as it has been the case so far⁶⁴, which means that the range of applicability of the future legal acts proposed by the constitutional text⁶⁵ also extends over the two former pillars of the Union, CFSP and JHA⁶⁶. It follows that, at least the co-operation in JHA raises the problem of the principle of direct applicability of the legal acts of the Union, if we consider that the European legal instruments stipulated in article I-33 of the Treaty are applicable in this field as well⁶⁷, and they do have this effect. This represents a novelty compared to the present *Community acquis*, in which the legislative acts specific for the JHA⁶⁸ do not benefit

⁶⁴ General guidelines, common strategies, joint actions, common positions in the CFSP – Art. 12 TEU; common positions, framework decisions, decisions and conventions for the JHA – Art. 34 TEU.

⁶⁵ European laws, European framework laws, European regulations, European decisions, recommendations and opinions – Art. 32 (1) of the Treaty; European laws and European framework laws take over, in most part, the structure of the present regulations and directives, respectively, as legal acts of secondary Community legislation.

⁶⁶ The CFSP is stipulated in part III, title V, chapter II of the Treaty, while co-operation in Justice and Home Affairs is regulated under a new name "Area of Freedom, Security and Justice", part III, title III, chapter IV.

⁶⁷ The Treaty stipulates, as far as the CFSP is concerned, European decisions which are legal acts without legislative character.

⁶⁸ See footnote 63.

from direct applicability, which explains the reserve manifested by the Member States when talking about passing the competences at Union level in this very sensitive field of national sovereignty. In order to counterbalance this effect of direct applicability, Working Group X of the Convention, which discussed the regulations of the Project referring to co-operation in the field of JHA, recommended that the competences of the Court of Justice should be extended over the field of justice and home affairs, as these measures could immediately affect individual rights of the citizen.

b) The effects on international public law of recognising the legal personality of the Union

By explicitly granting legal personality through the EU Constitution, the Union becomes an international public law subject, a capacity currently recognised only to the European Community. Following the dissolution of the “three-pillar” structure that currently ensures the fundament of the European construction, the Union takes over the competences existing within the Community pillar, including the competences of the EC on international level, consequently the negotiation and conclusion of treaties of international public law. Working Group III of the Convention reached the conclusion that granting legal personality to the Union would not require the

alteration of the distribution of competences on international level between the Union and the Member States, nor that of the procedures and competences of Community bodies, only an adaptation to the newly created structure, in the sense of correlating these provisions with those referring to the foreign policy of the Union⁶⁹.

It has to be noted that the Union's newly acquired quality of being a subject of international public law is not original but derived as it has been granted by its member states.⁷⁰ Thus this quality of the Union is limited, as the EU can be a subject of only those international rights and obligations which are necessary for reaching its objectives and the fulfilment of its competences.⁷¹ Even though, according to recent German literature, the international legal personality of the new EU can not be described as being limited.⁷² Proof of this can be seen when considering the competence to conclude international agreements provided by art. III-323 (1), as well as the exclusive competence rule of the Union of art. I-13 (2). The wording of these regulations as well as the records of the debates and negotiations held within the European Convention indicate that the Convention intended a widening of the external powers of the Union by referring to the ECJ's AETR jurisprudence⁷³ regarding the implicit capacity to conclude agreements.⁷⁴

⁶⁹ The Final Report of Working Group III, pt. 20, 21, p. 6.

⁷⁰ Von Heinegg, in: Vedder/von Heinegg, art. I-7, nr. 2; States, as opposed to international organizations, do possess an original quality of being a subject of international law, Hermann, in: *Der Vertrag*, p. 310.

⁷¹ Von Heinegg, in: Vedder/von Heinegg, art. I-7, nr. 2.

⁷² Streinz/Ohler/Hermann, *Die neue Verfassung für Europa*, p. 89; also Cremona, *CMLR*, 2003, p. 1347 (1351, 1362), Fassbender, *AVR* 2004, p. 26 (31); de Witte, in: Pernice/Maduro, *A Constitution for the European Union*, p. 95 (101).

⁷³ ECJ, Case 22/70, *Commission/Council*, [1971], p. 263.

⁷⁴ Streinz/Ohler/Hermann, *Die neue Verfassung für Europa*, p. 89.

The rule of international public law, that international legal personality also requires the formal recognition by other international legal persons e. g. by concluding agreements with non-member states and international organisations, should actually play a minor role in this situation. The new Union is the legal successor of the present EC,⁷⁵ which already has legal personality and is widely recognised by states and international organisations.⁷⁶

With a view to simplifying the foreign representation of the Union, as a consequence of its acquiring legal personality, the function of Union Minister for Foreign Affairs has been created⁷⁷. The Union Minister for Foreign Affairs is to ensure the coherent representation of the Union abroad by initiating political dialogues in international conferences and organisations. The representation of a foreign unitary common position is, however, limited in the situation in which the conclusion of an international treaty falls both in the competence of the Union and in that of Member States. Such a case requires the participation in negotiations and in

concluding of the treaty both of the Union and of the Member States, which have to co-operate in such a tight manner as to be able to adopt a unitary common position⁷⁸, although Working Group III recommended, in this sense, establishing a single delegation representing the Union⁷⁹.

As a consequence of recognising its capacity of international public law subject, the Union acquires, besides its capacity of concluding international treaties, other similar rights which ensue from this quality: the right to file complaints in an international court, the right to become member of an international organisation or of an international convention (for example, the European Convention on Human Rights), and the right of its employees to benefit from privileges and immunity.

Once the Constitution for Europe will have entered into force, the legal personality of the Union will replace that of the EC, and the Union will subsequently take over all the obligations that the Community has taken on by virtue of the international relations it is part of.

ABBREVIATIONS

ADD.	Addendum
AVR	Archiv des Völkerrechts (law journal)
Bull. EU	Bulletin of the European Union
BverfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BverfGE	Entscheidungen des Bundesverfassungsgerichts (Decisions of the German Federal Constitutional Court)

⁷⁵ See also art. IV-438 of the EU Constitution and Fassbender, AVR 2004, pp. 26.

⁷⁶ Von Heinegg, in: Vedder/von Heinegg, art. I-7, nr. 3; see also Streinz/Ohler/Hermann, Die neue Verfassung für Europa, p. 33.

⁷⁷ Art. III – 197 of the Treaty.

⁷⁸ Opinion 2/91 of the ECJ, 19 March 1993, ECR pp. I-1061.

⁷⁹ See pt. 37 of the Final Report, p. 11.

CONF	Conference
CMLR	Common Market Law Review (law journal)
ECJ	Court of Justice of European Communities
ECR	European Court Reports
EuR	Europarecht (law journal)
NJW	Neue Juristische Wochenschrift (law journal)
OJ	Official Journal of the European Union

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