

## **LEGAL PERSONALITY OF THE EUROPEAN UNION AFTER THE LISBON TREATY - A FUNDAMENTAL CHANGE?**

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### **Abstract in Slovak**

Cieľom príspevku je preskúmať otázku právnej subjektivity Európskej únie. Hoci formálne udelenie právnej subjektivity tejto organizácií ustanoveniami Lisabonskej zmluvy môže byť považované za podstatnú zmenu, v príspevku bude preskúmaná otázka, či a do akej miery majú ustanovenia Lisabonskej zmluvy len deklaratívny, a nie konštitutívny účinok. Taktiež bude preskúmaný rozsah právnej subjektivity Európskej únie.

### **Key words in Slovak**

Európska únia, právna subjektivita, Lisabonská zmluva, medzinárodné vzťahy, Medzinárodný súdny dvor

### **Abstract**

The aim of the contribution is to survey the issue of legal personality of the European Union. Although the awarding of legal personality to the European Union by the Treaty of Lisbon might be perceived as a fundamental change, we will examine to whether and to which extent the provisions of the Lisbon Treaty has had merely a declarative, not a constitutive effect. We will also investigate the consequences that of the recent change in the Treaty of Lisbon on the extent of legal personality of the European Union.

### **Key words**

European Union; legal personality; Treaty of Lisbon; international relations; International Court of Justice

### **1. Introduction**

The European Union (hereinafter as the "EU") was established in 1993 as a sui-generis entity. One of the main reasons to claim this assertion was the fact that formally it had no legal personality.

Usually, when an international organization is being set up, it is awarded a legal personality by its founding members. This personality is derived from the legal personalities of the respective members, it is secondary and derived. The "usual" pattern was also followed when the Six founding states

established the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community.<sup>1</sup>

However, this traditional pattern was not followed when forming the EU. Since many believed and were concerned with fact that eventual legal personality of the EU might hamper the position of the European Communities or the Member States in the international relations, the EU was not awarded this quality.

## 2. The EU after 1993: Undisputed Lack of Legal Personality

Although the EU was not in the 1993 awarded any express legal personality, the Treaty on European Union (hereinafter as the "TEU"; 1993 version) stated in Article B that Union shall assert inter alia its identity on the international scene.<sup>2</sup>

Notwithstanding with fact what was intended under the notion of *asserting of the identity on the international scene*, one would presume that successful attainment of this goal would require recognition as a legal entity. For instance, one of the means of asserting of an entity's identity is traditionally conclusion of treaties and conventions. But, for being able to enter into commitments within these instruments, a legal personality is needed. Thus a peculiar situation was created - as doctrine puts it, "*to create an entity with ambitions in the field of foreign policy and migration issues yet withhold international legal personality from it, was always going to be an awkward construction.*"<sup>3</sup>

There are many theories explaining why the EU was not awarded any degree of legal subjectivity. Some authors claim that this would compromise identities of the Members States on the international scene, others point out

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<sup>1</sup> The legal personality of the European Community of Coal and Steel was provided for in the Art. 6, para 1 of its founding treaty. For other two Communities, it was not provided for in the original version of the founding treaties and the respective provision was added by later revisions of the Treaties. See for the European Economic Community the Art. 281 Treaty establishing Economic Communities (1993 version) and for the European Community of Atomic Energy the Art. 184 Treaty establishing the European Community of Atomic Energy (1993 version).

<sup>2</sup> See Art. B of the TEU (1993 version).

<sup>3</sup> KLABBERS, J.: Presumptive Personality: The European Union in International Law. In KOSKINNIEMI, M. (ed.): International Law Aspects of the European Union. 1st ed. The Hague: Kluwer Law International, 1998. 22 pp. ISBN 90-411-0488-7, p. 252.

to fact that if the EU had legal personality, this would impinge the legal personality of the Communities.<sup>4</sup>

However, the doctrine at the time shortly after the adoption of the Treaty on European Union was consensual and clear: the EU did not possess any kind of legal personality whatsoever.<sup>5</sup>

### 3. Overview of the attempts to grant the EU legal personality

#### 3.1 Treaty of Amsterdam

This paradoxical situation was reflected also during the negotiations leading to the adoption the Treaty of Amsterdam. The report of the Reflection group<sup>6</sup> clearly stated that *"The current possibilities offered by the Treaty have provided some positive results. We believe, however, that the time has come to provide this common policy with the means to function more effectively ... The Union today needs to be able to play its part on the international stage ... We think that the Conference must find ways and means of providing the Union with a greater capacity for external action, in a spirit of loyalty and mutual solidarity. It must be capable of identifying its interests, deciding on its action and implementing it effectively."*<sup>7</sup>

Although the report did not speak specifically for awarding a quality of legal personality to the EU, the Council Presidency took the position that this is the course of action that should be taken. It pointed out that EU's lack of legal personality *"considerably hindered effective external action by the Union and demonstrated need for adjustments."*<sup>8</sup> Thus, it should be established *"a fourth legal personality, that of the Union, to the three*

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<sup>4</sup> See eg. SCHOUTHEETE, P.; ANDOURA, S.: The Legal Personality of the European Union. *Studia Diplomatica*, Vol. 60, 2007, no. 1.

<sup>5</sup> See eg. O'KEEFE, D.; TWORNEY, P. M. (eds.): *Legal issues of the Maastricht Treaty*. 1st ed. London: Chancery Law Publishing, 1994. 374 pp. ISBN 047-1941-999.

<sup>6</sup> On the Reflection Group see EUROPEAN COUNCIL AT CORFU, 24 - 25 JUNE 1995: Presidency Conclusions, p. 19. See also EUROPEAN PARLIAMENT: Resolution on the Intergovernmental Conference. B4-0266/97, para 14; REFLECTION GROUP: Reflections Group's Report: A Strategy for Europe. Messina, June 2, 1995. Available at [online] [http://www.europarl.europa.eu/enlargement/cu/agreements/reflex2\\_en.htm](http://www.europarl.europa.eu/enlargement/cu/agreements/reflex2_en.htm), cit. May 15, 2010; EUROPEAN COUNCIL AT FLORENCE, 21 - 22 JUNE 1996: Presidency Conclusions, Annex II.

<sup>7</sup> See REFLECTION GROUP: Reflections Group's Report: A Strategy for Europe. Messina, June 2, 1995. Available at [online] [http://www.europarl.europa.eu/enlargement/cu/agreements/reflex2\\_en.htm](http://www.europarl.europa.eu/enlargement/cu/agreements/reflex2_en.htm), cit. May 15, 2010.

<sup>8</sup> See CONFERENCE OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBERS STATES: Note from the Presidency. CONF 3850/96, p. 10.

*existing legal personalities of the European Communities; ... these legal personalities should be merged to form only one.*"<sup>9</sup> Also, giving the EU a capacity to conclude international agreements in certain areas covered by the Titles V and VI of the TEU (1993 version) was suggested.

However, later documents of the Intergovernmental Conference 1996 (hereinafter as the "IGC") name granting the legal personality to the EU as only one of "*two avenues that could be explored*".<sup>10</sup> The other option was to provide the EU only with capacity to conclude certain international agreements. Due to the positions of the UK and French governments, it was this latter option that was adopted to the final text of Amsterdam Treaty.

Consequently, the Treaty of Amsterdam only added the Articles 24 and 38 of the TEU (1999 version). These provided for treaty-making capacity of the EU in the fields of Common Security and Foreign policy and Police (hereinafter as the "CFSP") and Judicial Cooperation in Criminal Matters (hereinafter as the "PJCCM").

These provisions might seem as a logical supplement to a provision awarding the EU a legal personality. Nevertheless, in the spite of the wording of the report of Reflection group, positions of the European Parliament and the Irish and Dutch Council Presidencies,<sup>11</sup> it was not possible to find such a provision in the entire Treaty of Amsterdam.

These developments had created a somewhat paradoxical situation, when on one hand the EU was granted specific treaty-making powers, which is one the main characteristic of international legal personality. On the other hand, however, the EU was not granted full legal personality itself.

However, with coming of the Amsterdam Treaty into effect, the EU had its own purpose and functions, both being important elements of definition of the international organization by the International Court of Justice. In addition, international practice recognised the EU as a legal person, since many states and even other international organizations had entered into

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<sup>9</sup> Ibid. See also position of Austria: PERMANENT REPRESENTATION OF AUSTRIA TO THE EUROPEAN UNION: Basic position of Austria for the Intergovernmental Conference, CONF 2857/96, p. 10; and non-paper on legal personality of the EU. CONFERENCE OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES. SECRETARIAT: Legal Personality of the Union (Non-paper). CONF 3829/97.

<sup>10</sup> See CONFERENCE OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES: Progress Report on the Intergovernmental Conference. Addendum to Report. CONF 3860/1/96, p. 36.

<sup>11</sup> See REFLECTION GROUP: Reflections Group's Report: A Strategy for Europe. Messina, June 2, 1995. Available at [online] [http://www.europarl.europa.eu/enlargement/cu/agreements/reflex2\\_en.htm](http://www.europarl.europa.eu/enlargement/cu/agreements/reflex2_en.htm), cit. May 15, 2010.

contractual relations with the EU. Also, many representations were accredited to the EU and also the EU itself has had a kind of its own diplomatic representations in the significant number of countries all over the world.

Consequently, it can be argued that these developments led to the creation of a sort of "constrained" international legal personality of the EU. This assertion is to be analyzed more thoroughly.

### 3.2 Treaty of Nice

Another revision of the primary law of the EU by the Treaty of Nice could have been perceived as an opportunity to solve aforementioned paradoxical situation. Although a possibility to include this issue into the IGC's deliberations was debated,<sup>12</sup> and there were some Member States in favour of adoption this measure,<sup>13</sup> there had been a little progress.<sup>14</sup>

In the end, there was only a small reform of the wording of Art. 24 TEU (2003 Version), which introduced the qualified majority voting in the Council<sup>15</sup> and the phrase that these agreements bind the institutions of the EU.<sup>16</sup>

### 3.3 Convention on the Future of the EU and the Constitutional Treaty

The issue of legal personality of the EU thus remained salient also after the entry of the Treaty of Nice into force. Indeed, it was one of prominent issues debated at the Convention on the Future of the EU.

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<sup>12</sup> See CONFERENCE OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES: Note from the Presidency. Possible proposal for entering other items on the Conference agenda. CONFER 4716/00, p. 2.

<sup>13</sup> See position of Greece. CONFERENCE OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES: Information Note. Memorandum from the Greek Government to the Intergovernmental Conference on institutional reform of the European Union. CONFER 4719/00, p. 7.

<sup>14</sup> See CONFERENCE OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES: Intergovernmental Conference on Institutional Reform. Presidency report to the Feira European Council. CONFER 4750/00, p. 118.

<sup>15</sup> Art. 24/3 TEU.

<sup>16</sup> Art. 24/6 TEU.

The Working Group III on Legal Personality was created and delivered its final report on October 1, 2002.<sup>17</sup> This report, adopted almost unanimously,<sup>18</sup> stated that "*Union should in future have its own explicit legal personality. It should be a single legal personality and should replace the existing personalities.*"<sup>19</sup> It also characterized post-Nice situation as "*ambiguous in a number of ways and likely to undermine affirmation of the Union's identity at international level and legal certainty, both of which are necessary in international relations with third States and international organizations.*"<sup>20</sup> In analyse of the effects of this proposed change, the report stated that explicit conferral of a legal personality on the EU does not entail per se any amendments to its internal powers and the division of competences between the EU and the Member States.

The Constitutional Treaty (hereinafter as the "CT") endorsed the recommendation of the Working Group II. By the virtue of the Article I-7 CT, the Union was granted legal personality<sup>21</sup> and the "technical" consequences of this change were dealt with in Article IV-438 CT.<sup>22</sup>

### 3.4 Lisbon Treaty

After the developments leading to the abandonment of CT and the adoption of the Lisbon Treaty,<sup>23</sup> the position to grant the EU with legal subjectivity was retained also in the draft of the Lisbon Treaty. The Lisbon Treaty introduced Article 47 TEU stating that "*The Union has legal personality*",<sup>24</sup> and Article 335 TFEU: "*In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their*

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<sup>17</sup> See THE EUROPEAN CONVENTION: Final Report of Working Group III on Legal Personality. CONV 305/2.

<sup>18</sup> See *ibid*, p. 1.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid*, p. 8.

<sup>21</sup> This Article stated provided that "*The Union shall have legal personality.*" Art. I-7 CT.

<sup>22</sup> This Article stated provided that "*The European Union established by this Treaty shall be the successor to the European Union established by the Treaty on European Union and to the European Community*". This combination "*ended the separate legal personality of the European Community: from now on there would be only one legally recognised organisation (the "European Union") with a single legal personality.*" Art. IV-438 CT.

<sup>23</sup> See BLAHUŠIAK, I. Some Thoughts on the Process Leading to Adoption of the Lisbon Treaty. In BURDA, E. (ed.): *Mílnika práva v stredoeurópskom priestore* 2008. 1. vyd. Bratislava Univerzita Komenského, 2008. 8 pp. ISBN 978-80-7160-271-2.

<sup>24</sup> Art. 47 TEU (2009 version).

*laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings...*"<sup>25</sup>

Thus, a lengthy process of express granting of full legal personality to the EU was finished. In order to fully analyze the consequences of the change formally introduced by the Lisbon Treaty, we have to inspect relevant provisions of the international law first.

#### 4. Legal subjectivity in International Law

##### 4.1 Theoretical construction

The theory of international law distinguishes two ways of acquisition of legal personality by international organizations.<sup>26</sup> The first one is by a provision of an international organization's statute.<sup>27</sup> The other way is by an implied conferral.

Since, as it has been analyzed before, there was no express conferral of legal personality on the EU until the entry to force of the Lisbon Treaty, there was a little doubt that the EU indeed did not have legal personality acquired this way. However, there is also another way of acquisition of this quality available.

In order to establish the criteria for an international organization to acquire legal personality implicitly, we have to turn to the case law of the International Court of Justice (hereinafter as the "ICJ"). The ICJ in its famous advisory opinion in the case *Reparation for Injuries Suffered in the Service of the United Nations*<sup>28</sup> came to conclusion that an international organization is a legal person, since "*Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those function to be effectively discharged.*"<sup>29</sup>

However, as the ICJ warned, "*this is not the same thing*"<sup>30</sup> as a State nor that rights and duties of an international organization are "*the same as those of a*

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<sup>25</sup> See Art. 335 Treaty on Functioning of the European Union.

<sup>26</sup> See BROWNLIE, Q. C.: *Principles of Public International Law*. 8th ed. Oxford: Oxford University Press, 2008. 784 pp. ISBN 9780199217700, p. 245.

<sup>27</sup> Schouheete and Andoura speak of "*easy way*". See SCHOUTHEETE, P.; ANDOURA, S., p. 2 if.

<sup>28</sup> See INTERNATIONAL COURT OF JUSTICE: *Opinion of April 11, 1949*, ICJ Reports 1949, p. 174.

<sup>29</sup> *Ibid*, p. 180.

<sup>30</sup> *Ibid*.

*State.*<sup>31</sup> The respective rights and duties of an international organization derived from acquired legal personality depend on "*its purposes and functions as specified or implied in its constituent documents and developed in practice.*"<sup>32</sup> Thus, we can see that the ICJ adopted a functional approach, with two conditions on acquisition of legal personality by an international organization, being purpose and functions.

In the line of this reasoning, the doctrine of international law adopted a theoretical definition of an international organization, that comprises of fulfillment of these conditions:<sup>33</sup>

- A permanent association of Member States;
- Equipped with organs;
- With its own purpose and
- With its own powers for attainment of the defined purposes.

The EU has indeed a permanent character<sup>34</sup> and its own organs (institutions).<sup>35</sup> As Schoutheete and Andora show,<sup>36</sup> if we analyse Article 24 TEU (1993 version), we can see a clear purpose given to the EU, namely "*to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy.*"<sup>37</sup> We can thus conclude without reasonable doubt that the EU was indeed given a purpose that implied international legal personality.

The last condition, that of functions, is to be viewed in the light of Articles 24 and 38 TEU (1997 version). The EU was granted a possibility to enter into legal arrangements with other subjects of international law.<sup>38</sup> Thus, the EU fulfills also the last condition to acquire legal personality under international law.<sup>39</sup>

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> See eg. BROWNLIE, Q. C., 2008, p. 648.

<sup>34</sup> See Article 53 TEU (2009 version; ex-Art. 51).

<sup>35</sup> See Art. 13 TEU (2009 version, ex-Art. 9).

<sup>36</sup> See SCHOUTHEETE, P.; ANDOURA, S., p. 4.

<sup>37</sup> See Art. 24 TEU (1993 version).

<sup>38</sup> See BROWNLIE, Q. C., 2008, p. 649.

<sup>39</sup> This can be concluded even if we take into account the Declaration No. 4 to the Amsterdam Treaty, stating that Articles 24 and 38 of the TEU (1999 version) do not imply any transfer of competences, we have to conclude that the under international law. As Schoutheete and Adnoura show, the international legal personality implies capacity to act,



Consequently, it can be argued that in the view of theory, the EU had acquired legal personality even before the entry of Lisbon Treaty in force in the field of CSFP and PJCCM. However, we shall be careful when assessing the precise scope of this personality.

#### 4.2 Limitations

There are two very important limitations. The first one being the fact which has just been mentioned: the EU acquired (theoretically) legal in the fields of CFSP and PJCCM, being it an international legal personality. This is only legal personality in the sphere of international law and shall be not be extended to the sphere of private law.<sup>40</sup>

The other limitation is comes out if take in to the account the fact that Kapteyn (et. al.)<sup>41</sup> points out. The presented theoretical construction is valid only in between the Member States of the EU, since the Treaties are *res inter alios acta*. In order to construe an international legal personality vis-a-vis the third subjects, one element is missing. This is the recognition of the legal personality of the EU by the third subjects. It is precisely this element that is will be examined more closely in the following sub-section.

#### 4.3 International practice

The act of recognition can be either express or implied (tacitly). The latter case is more frequent. As a result, since many other entities that are subjects of international law with their own respective legal personalities recognize the legal personality of the EU, this is very difficult to disclaim.<sup>42</sup>

There are a number of instance in which the legal personality of EU is implicitly recognized. For instance, if we inspect treaty-making power of the EU is quite widely recognized by a variety of actors. Agreements on peacekeeping missions have been concluded with countries such as Bosnia

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not a competence. See SCHOUTHEETE, P.; ANDOURA, S., p. 4. See also LEAL-ARCAS, R: EU Legal Personality in Foreign Policy? In: Berkeley Press Legal Series, 2006, paper 1754, p. 64.

<sup>40</sup> See KAPTEYN, P. J. G. (et. al., eds.): The Law of the European Union and the European Communities. 1st ed. Alpen aan der Rijn: Kluwer Law International, 2008. 1614 pp. ISBN 978-90-411-2631-3, p. 90.

<sup>41</sup> As for the Communities, legal personality within the scope of private law was established by the express provision of Article 282 Treaty establishing the European Communities (1993 version). This provision, however, did not apply to the EU. Nowadays, it was replaced by the Article 335 TFEU, cited above.

<sup>42</sup> See KAPTEYN, P. J. G. (et. al., eds.), 2008, p. 93.

and Herzegovina,<sup>43</sup> Indonesia,<sup>44</sup> Democratic Republic of Congo,<sup>45</sup> New Zealand<sup>46</sup> or Chile.<sup>47</sup> Such agreements were also concluded with international organizations and other subjects of international law as NATO<sup>48</sup> or International Criminal Court.<sup>49</sup>

The other instance of the effects of legal personality on the international plane is active and passive right of legation. There are many missions of states and international organizations accredited *to the EU*.<sup>50</sup> The European Commission, acting on the behalf of the EU<sup>51</sup> also set up reciprocally many representations in the foreign countries.

Also, the legal personality of EU is implicitly recognized when executing the sanctions of the UNO Security Council<sup>52</sup> or cooperating within other

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<sup>43</sup> See eg. Agreement between Bosnia and Herzegovina and the EU on security procedures for the exchange of classified information. OJ L 324, October 27, 2004.

<sup>44</sup> See eg. Agreement in the form of an Exchange of Letters between the European Union and the Government of Indonesia on the tasks, status, privileges and immunities of the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission - AMM) and its personnel. OJ L 176, June 30, 2006.

<sup>45</sup> See eg. Agreement between the European Union and the Democratic Republic of the Congo on the status and activities of the European Union Police Mission in the Democratic Republic of the Congo (EUPOL KINSHASA). OJ L 256, October 1, 2005.

<sup>46</sup> See eg. Agreement between the European Union and New Zealand on the participation of New Zealand in the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN). OJ L 274, October 10, 2007.

<sup>47</sup> See eg. Agreement between the European Union and the Republic of Chile on the participation of the Republic of Chile in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA). OJ L 202, August 3, 2008.

<sup>48</sup> See Agreement between the European Union and the North Atlantic Treaty Organisation on the Security of Information. OJ L 80, March 27, 2003.

<sup>49</sup> See Agreement between the International Criminal Court and the European Union on Cooperation and Assistance. OJ L 115, April 28, 2006. Agreement between the International Criminal Court and the European Union on Cooperation and Assistance. Interestingly, this agreement defines the "EU" as the the Council of the European Union, the Secretary General/High Representative and the General Secretariat of the Council, and the Commission of the European Communities. The □ EU □ does not mean the Member States in their own right. See Art. 2 of the Agreement. The agreement pertains to information contained in the EU documents, including EU classified information, originating from an individual Member State. If such a case arises, any request is to be made directly to the relevant Member State. See Art. 3/1 of the Agreement.

<sup>50</sup> There was a tendency to present the mission to the EU, not to the EC. See also LEAL-ARCAS, R., 2006, p. 27.

<sup>51</sup> See Art 24 TEU (2003 version).

<sup>52</sup> See Common Position of 19 March 1998 defined by the Council on the basis of Article J.2 of the Treaty on European Union on restrictive measures against the Federal Republic of Yugoslavia (98/240/CFSP). OJ L 095, March 27, 1998; and Council Common Position of 10 November 2000 on the maintenance of specific restrictive measures directed against Mr Milosevic and persons associated with him (2000/696/CFSP). OJ L 255, October 9, 2000.

bodies of the UNO<sup>53</sup> or when developing its own security and defence policies.<sup>54</sup> The EU plays also an important role on international fora, such as WTO<sup>55</sup> or Kyoto Summit on Climate Change.<sup>56</sup>

#### 4.4 Case law of the European Court of Justice

The ECSC Treaty explicitly bestowed the European Coal and Steel Community international legal capacity.<sup>57</sup> However, no corresponding provision was to be found within the EEC and EURATOM Treaties. It was only through the virtue of ECJ to make the matter clear.

In its judgement in ERTA<sup>58</sup> the European Court of Justice (hereinafter as the "ECJ") expressly made it clear that treaty-making power of the Community arises not only from express provision of the EC Treaty, but "*may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.*"<sup>59</sup> This reasoning can also be stretched by the way of analogy to the subject matter analysed in the previous subsections. Thus, also the case law of the ECJ provides evidence that affirms reasoning used in those subsections.

#### 4.5 In academic debate

The issue of the legal personality of the EU sparked reflections on the functions of legal personality more generally: whereas majority of authors seem to hold that personality functions as a threshold without which one simply cannot act internationally, the others suggest that personality is not

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<sup>53</sup> The EU represents the Member States in areas such as trade, agriculture or fisheries. It is also a party to more than 50 UNO conventions. See eg. The EUROPEAN COMMISSION: EU's Relations with the United Nations. Available [online] [http://ec.europa.eu/external\\_relations/organisations/un/index\\_en.htm](http://ec.europa.eu/external_relations/organisations/un/index_en.htm), cit. May 15, 2010. See also European Union at United Nations. Available at [online] [http://www.europa-eu-un.org/home/index\\_en.htm](http://www.europa-eu-un.org/home/index_en.htm), cit. May 17, 2010.

<sup>54</sup> See Art. 17/2TEU (2003 version).

<sup>55</sup> See eg. EUROPEAN COMMISSION: Negotiations of Dauha round.. EU and WTO. Available [online] [http://www.deljpn.ec.europa.eu/union/showpage\\_en\\_union.external.wto.php](http://www.deljpn.ec.europa.eu/union/showpage_en_union.external.wto.php), cit. May 15, 2010.

<sup>56</sup> See also LEAL-ARCAS, R., 2006, p. 30.

<sup>57</sup> Art. 6/2 Treaty Establishing European Community of Coal and Steel..

<sup>58</sup> Case 22/70 Commission v. Council (ERTA), para 16. See also Opinion of GA Trstenjak in case C-308/07 P Koldo Gorostiaga Atxalandabaso v. European Parliament.

<sup>59</sup> Case 22/70 Commission v. Council (ERTA), para 16.

such a threshold: entities can and do act without legal personality, or so it seems.<sup>60</sup>

Correspondingly, some authors still argued that such a quality would be "hardly corresponding to the basic institutional principles of the TEU, such as Article 1.3 TEU or Article 3.2 TEU,"<sup>61</sup> since the EU was meant to be only an umbrella concept for the Communities. As Leal-Arcas points out, the arguments against the existence of the EU legal personality revolved in the pre-Amsterdam period around these issues:<sup>62</sup>

-Lack of express provision granting the EU legal personality in the TEU;

-The fact that various functions that should be exercised by the EU were exercised by the EC, for instance conclusion of commercial treaties;

-The evidence of *travaux préparatoires* of the Treaty Establishing the EU.

However, the light of aforementioned post-Amsterdam developments, which enabled the theory presented in this contribution be construed, also the doctrine tended to award the quality of having legal personality to the EU. For instance Kapteyn (et. al.) asserts that "*the Union can already be qualified as having legal personality. This is even in spite of the express intention of the drafters of the Treaty not to give explicit legal personality to the Union. Practice is here stronger than theory.*"<sup>63</sup> This assertion became slowly prevalent.

## 5. Consequences of the Lisbon change

We can therefore argue that by the virtue of abovementioned facts the EU gradually acquired its own legal personality even before the entry into force of the Lisbon Treaty. Consequently, the Lisbon Treaty can be perceived as a mere declaration of a pre-existing fact. In this section, we shall briefly inspect the consequences of the change brought by the Lisbon Treaty.

When taking the pre-Lisbon developments in account, we shall not forget that even if a legal personality was established in the abovementioned way, it entailed only the capacity to act, not the competence to do so. Thus,

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<sup>60</sup> See KLABBERS, J., 1998, p. 16.

<sup>61</sup> See LEAL-ARCAS, R., 2006, p. 6.

<sup>62</sup> Ibid., pp.52-60.

<sup>63</sup> See KAPTEYN, P. J. G. (et. al., eds.), 2008, p. 63. See also KLABBERS, J., 1998.

although legal personality of the EU before the entry into force of Lisbon Treaty was indeed existent, it was only a very constrained one. Also, the precise nature and extent of this personality was not fully known, thus possible having given rise to doubts on the capacity of the EU to enter into commitments.<sup>64</sup> Some authors even argued that "*contracting third parties may not enter into treaty relations with EU states because of the worry that it would be difficult to hold a Member State responsible for its legitimate international obligations because of legal complexities surrounding the external competency of European international organizations.*"<sup>65</sup>

The fact that the EU acquired, by the virtue of the Lisbon Treaty, legal personality has had important legal consequences in the sphere of international law. The Union has become a subject of international law - alongside the Member States but without jeopardising their own status as subjects of international law. As a result, it has acquired the ability to avail itself of all means of international action, i. e. right to conclude treaties, right of legation, right to submit claims or to act before an international court or a judge, right to become a member of an international organisation or become party to international conventions, as well as right to enjoy immunities.<sup>66</sup>

These are the issues which were also partly clarified prior the adoption of the Lisbon Treaty. Nevertheless, no doubt can be raised nowadays against these assumptions, which is perhaps the most important change brought about by the Lisbon Treaty. On the international plane, there will be a little confusion caused by the existence of separate entities of the EC and the EU. Also, clarification of legal instruments in the form of various agreements and conventions will be *pro futuro* easier; there will be just one legal regime for these. The number of possible confusions on applicable legal regimes and scope will be significantly lowered.

Also, as another important change can be highlighted stretching the legal personality of EU to the field of private law. As for the future, it will be the EU that will have capacity to enter into contracts, but also will be party to any occurring legal proceedings.

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<sup>64</sup> Eg. Verwey spoke about questions about internal political arrangements and external treaty-making competency of the EU and EC, about the delimitation of specific policy areas that EU and EC and the areas that are exclusively the domain of Member States. See VERWEY, D. R.: *The European Community, the European Union and the International Law of Treaties: A Comparative Legal Analysis of the Community and the Union's External Treaty-Making Practice*. 1st ed. The Hague: TMC Asser Press, 2004. 320 pp. ISBN 9067041823, p. 159.

<sup>65</sup> See *Ibid*, p. 185.

<sup>66</sup> See THE EUROPEAN CONVENTION: Final Report of Working Group III on Legal Personality. CONV 305/2., point 19.

The EU will also be able to enter to other international organizations. It is still to be observed if a single EU representation will be created within the UNO or the EU enters platforms such as G7. A coherent position of the EU and its Member States, which has been already presented for some time, will be strengthened by the fact that the EU transfers also formally from "a talking club" to a subject of international law without disputed personality. It is clear also nowadays that the EU will become a member of the Council of Europe, which will also lead to interesting legal consequences.<sup>67</sup>

If we summarize all of the assumptions above, two final remarks have to be made. Firstly, all of the aforementioned developments which were brought about after entry of the Lisbon Treaty into force will strengthen the legal certainty on the EU actions and thus will help to strengthen its position and ability to act on the international plane.<sup>68</sup>

For the second point, we shall refer to the opinion of the ICJ which stated that the international legal personality does not necessarily lead to either a creation of super-state or any significant transfer in competences to the supranational level.<sup>69</sup> In the case of the EU this also holds true, although, if we consider the scope of EU aims and functions, we might end up consenting with McGoldrick who asserts that the EU holds on the international plane almost the same capacities at a State does.<sup>70</sup>

## 6. Conclusions

In the light of the facts presented above, we argue that the main change brought about by the Lisbon Treaty has been not the mere fact of formal recognition of legal personality of the EU, but the implications of this provision. It has been argued that in particular strengthened legal certainty and ability to act will further strengthen EU's ability to act on the international plane.

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<sup>67</sup> See eg. JACOBS, F. G.: Accession of the European Union to the European Convention on Human Rights. Available [online] [www.statewatch.org/news/2007/sep/jacobs-eu-echr.pdf](http://www.statewatch.org/news/2007/sep/jacobs-eu-echr.pdf), cit. May 19, 2010.

<sup>68</sup> As one author remarks, the "*EU is by far the most externally active international organization. Other international organizations tend to have far less external activities, and rarely need to maintain contacts with the outside world ... But the EU is different: ever since its creation it was conceived of as having an external dimension.*" Klabbers, p. [http://ivr-enc.info/index.php?title=The\\_EU\\_and\\_International\\_Law](http://ivr-enc.info/index.php?title=The_EU_and_International_Law).

<sup>69</sup> See INTERNATIONAL COURT OF JUSTICE: Opinion of April 11, 1949, ICJ Reports 1949, p. 174.

<sup>70</sup> MCGOLDRICK, D.: International Relations Law of the European Union, 1st ed. New York: Longman, 1997. 249 pp. ISBN 0582288576. p. 38. See also VERWEY, D.R., 2004, p. 59.

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