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Abstract

As long as a formal merger of the EU and the EC to one single legal body has not taken place, a multitude of questions arises from the relationship between EC and EU law. Some of these questions are related to the problem whether the EU possesses legal personality or not. In this context, the concept of dédoublement fonctionnel of the EC institutions is of fundamental importance. However, the ECJ, as a general rule, lacks extensive competences within the framework of the EU Treaty. This is the decisive obstacle for the creation of legal unity of EU and EC. Nevertheless, not only from the political but also from the legal point of view, the borderline between Community and Union law begins to fade. This phenomenon is furthermore underlined by the frequent use of references from one treaty to the other(s), thus establishing legal points of contact between the two systems.

European Union and European Communities

Werner Schroeder[*]

Introduction

Art. 1 EU describes the European Union as a new stage of European Integration, with the European Communities as the base, which is complemented by the policies and different forms of cooperation such as the common foreign and security policy and police and judicial cooperation in criminal matters. This description is the reason for the popular understanding of the Union as a Greek temple, which rests on three pillars. According to a more exact view one will recognise that this construction does not answer all questions concerning the legal status of the Union and that it is in its ambivalence symptomatic for the condition of European Integration.

Discussion and explanations are needed as to whether the Union possesses legal personality. This dispute is linked to the discussion concerning the relationship between the Union and the Communities. At first sight it is a debate on technical matters the results of which can be destroyed by the next intergovernmental conferences. Meanwhile, the organisational status of the Union after the revisions of the Treaties of Amsterdam 1997 and Nice 2001 is not clear. After attempts to end this amorphous condition and to merge the Union and the Communities were rejected several times by the majority of the Member States, it is quite possible that a medium-term stabilisation of the condition will be achieved. In the meantime, the questions concerning the state and the internal order of the Union cannot remain unanswered because the creation of a clear and comprehensible legal structure of the Union is a question of fundamental constitutional significance. It simplifies an identification of the citizens of the Union with the Union itself, it improves the Union's capacity to act and ultimately it contributes to a clearer assignment of legal action between the Union and the Member States on the one hand, and between the Union and the European Communities on the other hand. So, the solution for this problem forms part of the "constitutionalisation" of the EU because

the creation of transparency and comprehensibility of the legal structures of the Union is the overall objective of European constitutional reform.

Apart from this, the above questions have practical relevance. The question whether the European Union possesses legal personality is crucial for knowing whether the Union itself or the Member States have the competence to conclude certain treaties under international law, whether they are allowed to establish diplomatic representations or whether they are liable according to the principles of responsibility in international law for damages caused by a joint action in the field of CFSP. Whoever wants to accept legal personality for the Union must also remember the practical impact on the organisational relationship with the European Communities and the connecting- and separating line between the Treaty on European Union, the Community Treaties and the law of the Member States.

This will be examined in the following article, which is, after an overview of the institutional development of the Union (II.) and of the status of research on the Union's legal status (III.) primarily dedicated to the question of legal personality (IV.) of the Union, to the examination of the organisational structure of the Union (V.) and the existence of a legal system of the Union and its relation to the law of the Communities (VI.) Finally it tries to explain the strange constitutional relationship between the Union and the Communities (VII.).

The institutional development of the EU

With the Treaty on European Union, concluded in Maastricht on 7th February 1992, the Union was founded as a new legal creation on the Communities (Art. 1(3) EU). The Treaty on European Union is arranged as a framework treaty. Due to this, one can assume that there is, after Maastricht, another legal categorie above Community law, which provides the common

legal framework for the activities of the Union *and* the Communities. In this context, one will find the common objectives in Art. 2 EU, a common institutional and legal framework according to Art. 3(1) EU, a European Council in Art. 4 EU that formulates final conclusions for Community and Union, the commitment of the European Parliament, Council, Commission, Court of Justice and the Court of Auditors to the Union and the Community Treaties in accordance with Art. 5 EU and also final provisions concerning accession, amendment of treaties, coming into force etc under Arts. 46 to 53 EU, which are valid for both Community and Union.

The questions concerning the relationship between the new Union and the existing Communities and the legal relationship between the EU Treaty and the three Community Treaties remain unanswered. The practice of the existing Community institutions after the entering into force of the Treaty of Maastricht has increased the uncertainty concerning legal status. For example, the Council acts as Council of the European Union, even if it acts in Community affairs. Besides, since Maastricht, the Commission calls itself ”European Commission”. It is not necessary to go more deeply into the question whether the aforementioned redesignations are legally correct because they have no influence on the attribution or legality of measures based on the EU Treaty or the Community Treaties.

No clarification concerning the legal status and the legal structure of the Union was achieved at the Intergovernmental Conference in Amsterdam. The Dutch proposal, which characterised the Union as the legal successor of the European Communities, vested with legal personality and capacity to act, was not accepted. The Treaty amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts from 2nd October 1997 does not modify the unclear structures of the Union and the relationship between Union law and Community law. But, the new Arts. 24 and 38 give the Council the right to

conclude ”agreements” with international organisations or third party states in the fields of CFSP and PJCC. Nevertheless, it remains unanswered for whom or for which legal entity the Council concludes these agreements.

As a general rule, the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 26th January 2001 does not modify this legal situation. Essentially, the Treaty deals with the composition and the cooperation of the institutions within the framework of Community law. For this study it is of special interest that in the field of Union policies, i.e. CFSP and PJCC, a qualified majority is more frequently used, and also that the new provisions in Art. 24(6) and Art. 38 together with Art. 24(4) and(6) EU state that the agreements concluded by the Council of the European Union are binding for the Union’s institutions. Art. 254 EC recognises a sort of unification of Union and Community. As a consequence of the fact that legal acts of the Union in the fields of CFSP and PJCC are also published in the Official Journal, the publication organ of the Communities has been renamed the ”Official Journal of the European Union”. Some tendencies towards unification in the EU can also be recognised in the minutes on the financial consequences of the expiry of the Treaty establishing the European Coal and Steel Community and the Coal and Steel Research Fund. After its expiry on 23 July 2002, the Treaty was repealed for the benefit of the EC. In accordance with Art. 1 of the minutes, all assets and liabilities pass over to the EC. The scope of application of the EC Treaty also includes issues formerly in the ECSC.

At present, under the title ”post - Nice process” a discussion is taking place concerning the future of the Union, which aims at preparing for the Intergovernmental Conference in 2004. Questions about the legal status of the Union and the EU Treaty are important parts of this discussion. The constitutional character of this discussion is highlighted by the fact that it

deals with topics that are being discussed in the Convention established by the European Council in Laeken on 14th/15th December 2001 on the topic of ”Toward a constitution for European citizens”. A working group of the convention is discussing the question of legal personality of the Union, and especially the question whether the Union should obtain its legal personality due to a merger with the communities or through the creation of an additional legal person. Moreover, it is investigating the consequences of such a procedure for the demarcations between the law of the Union and the Communities.

The state of research

After Maastricht, the legal value of the phenomenon ”Union” was rather dubious in legal research. In the meantime there have been some attempts to classify the Union and its constitutional relationship to the Communities in a dogmatic way.

The Temple Model

The temple model dominates not only in public opinion, but also in academic writing. It is based on Art. 1(3) EU and implies that together with the European Communities, CFSP and PJCC the Union is built on three pillars. The Common Provisions represent the roof of the temple and the Final Provisions the socle, both being applicable to all pillars. The temple model is a political metaphor which contributed to general use of the notion ”Union” in popular language to designate all activities which occur in connection with the single institutional framework of Art. 3 EU. The acts of the Union are terminologically attributed to the Union, regardless of whether it is referred to a legal act according to the EC Treaty or to a measure of the Union under Title V or VI EU. Legally speaking, the model is ultimately not a satisfactory solution because it does not reveal how the organisations and institutions,

described in the EC Treaty, relate to one another. The picture is distorted in particular insofar as the communities are in the same row of pillars as the CFSP and PJCC.

The Union as a link between intergovernmental and supranational policies

Among the dogmatic explanations, there is one opinion in particular which sees the Union as a form of cooperation between the Member States that does not have legal personality and at the same time as the roof for the Communities possessing legal personality. The Union is classified as an intergovernmental platform to coordinate national policies in the fields of foreign affairs, security, internal affairs and justice with the objective of ensuring the consistent appearance of Communities and Union. This view is based on the idea that the Treaty of Maastricht may not dilute the deliberately established separation of intergovernmental forms of cooperation and common policies. It sees the single institutional framework as a risk which it tries to minimise. As far as the Unions' constitution indicates an organisational autonomy on several points, it bears in mind the entirety of Member States, which are always designated as contracting states. This theory ignores that the Treaty on European Union intends there to be legal autonomy of the Union towards the Member States and recognises it, potentially, as a bearer of international duties and rights.

The Union and the Communities as separate organisations

Another tendency in academic writing grants the Union the character of an autonomous organisation, to a certain extent even legal personality in international law. This view does not accept the institutional and material relationship between Union and Communities, it sees this organisation and its legal rules in a horizontal connection without going into detail about the organisational relationship. This construction cannot explain the fact that the Union and the

Communities are connected to one another in accordance with the Common and Final Provisions of the EU Treaty. As a theory it remains diffuse.

The Union as a ”layered” organisation

Some perceive the architecture of the Union as an example for a ”layered” international organisation. These are organisations to which, alongside their members, i.e. the Member States, other organisational entities as legally independent sub-organisations belong. The accession to the umbrella organisation is typically linked to the accession to the legally independent sub-organisations.

The construction principle of the organisational structure can already be found in Community law. The European Central Bank (ECB) according to Art. 107(2) EC and the European Investment Bank (EIB) according to Art. 266 EC are organisations vested with legal personality, which are legally integrated into the Community legal system without being a member of the Community. In addition to this, there exist a whole range of offices, agencies and other institutions, which partly possess legal personality and which are institutionally connected with the Community especially through the competences of the ECJ. The relationship between the Union and the Communities is interpreted in an ambivalent way when the model of a layered organisation is used. The Communities are deemed to be, as members, the foundation of the Union under Art. 1(3) EU, but at the same time to dispose of procedural and competence related autonomy vis-à-vis the Union and finally to be capable of enacting legally binding acts on the international level. Besides, with the CFSP and PJCC there exist some policies directly assigned to the Union. These policies, executed by the Union itself and the policies of the Community should be functionally connected through common objectives and institutionally through common institutions equipped with double

functions.

The merger of Union and Communities

The merger theory emphasises even more strongly the unity of the Union and the Communities. It not only rejects the division of the Union in competences exclusively assigned to the entity of the Member States and competences exclusively assigned to the Communities, but also rejects an organisational model of the Union comprising an umbrella structure and the Communities as sub-organisations. This theory interprets the pillar model of the EU-Treaty in a way that the Communities are legally absorbed by the Union and only the Union, in place of the Communities, possesses legal personality and is subject to duties and rights. It is criticised that the maintenance of legally independent units of action is a useless fiction which does not meet the political and social reality in which the Union and the Communities act as one organisation. On the contrary, its institutions as de facto decision-making units should be placed in the foreground. The idea of the Union as a uniform body is linked to the theory that the rules of the EU Treaty and the Community Treaties form a common legal system**.**

Provisional results

So far the discussion has mainly dealt with the legal status of the Union. The legal relationship between the Union and the Community or Union and Community law are still not clear. Especially the theory of the Union seen as a layered organisation does not answer the question of how the relationship between each level of the Union should be legally arranged. Consequently, it remains unclear whether the law of the umbrella organisation, the Union, enjoys supremacy in relation to Community law or whether the general principles of

Community law can be transferred to Union law. Only the merger theory offers a consistent solution for the terminological, theoretical and practical problems that are connected with the creation of the Union as a ”roof” over the communities. This theory is able to explain many aspects of the unification of the organisation and law of the Union as it can be seen in the EU Treaty, but it has to deal with legal and political impediments, which still have to be cleared. Finally, positive law offers the answers to important questions concerning the relationship between the Union and the Communities and Union and Community law. When searching for solutions, legal theories can only be used as models. They have to be measured against reality and therefore they are not insurmountable obstacles for the creation of a new social, political and legal reality as represented by the Union.

Autonomy of the Union in public international law

To the extent that one tries to draw the legal outline of the amorphous structure of the Union, this is done initially under the heading of international legal personality. The question of legal personality is considered as crucial for the creation of an identity of the Union. In international relations the Union appears as an independent entity and therefore it can be designated as an international actor. The theory that the Union is an independent body with legal personality and that it is bound by the action of the constitutional institutions as designated by the EU Treaty nevertheless cannot be based on an explicit Treaty provision.

The reconstruction of the Union in the light of the theory of the state

The merger theory regards the specific attempts at justification as unnecessary because they question the value of the concept of international legal personality in general and also in the

special case of the Union. Legal personality is not regarded as the essential aspect to determine the legal structure of an organisation because it only has an effect on external relations vis-à-vis third party states and international organisations. Ultimately, the real character of a certain organ of sovereign power emerges internally through its institutions. The legal body itself disappears behind the institutions and becomes a legal fiction. This is not only true for the exercise of political power through the allocation of competences, procedures and activities between the institutions, but also for the allocation of legal responsibility. The creation of a new legal subject is not necessary because the Union has not got institutions of its own, but, according to Art. 3 and 5 EC, makes use of the existing institutions of the communities within the scope of the single institutional framework.

The starting point is the idea that the legal personality of a state and of the Union, which as a state-like subject having sovereign power is comparable to the state, is a theoretical concept. Therefore, some authors propose to replace the concept of legal personality of the state by the concept of organisation as a state because it is more effective when it comes to legally describing the complex reality of acts of states. At first, legal personality was indeed needed as a model to define the character of the state as a fictive contract based body which has to fulfil certain functions and for this purpose it is granted rights and duties. For some authors, such determinations seem to be unnecessary because the state is considered as being equipped with comprehensive competences. But, the legal personality of the state in a federal system keeps its function in positive law. It serves to draw the line between the legal spheres of the federal state and the regional states and it ensures national continuity and the fulfilling of tasks vis-à-vis third party states in the fields of international law.

The reconstruction of the constitution of the Union in the light of the traditional model of a federal system indeed bears some problems because the institutional nature of the Union follows its own patterns, which are only partly compatible with national ones. But, this is the

main problem which has always appeared when interpreting Community law that is constitutionally inspired. The idea that the theory of the state can illustrate how the exercise of sovereign power can be organised is becoming more and more acceptable. One can draw conclusions regarding the interpretation of the Union as a ”common public authority”. But, even if the Union is not a state, it has nevertheless got its own institutions, competences and legal instruments to exercise its sovereign powers and it is in this sense comparable to national holders of public authority.

Usefulness of the concept of international legal personality

The decisive argument against the aforementioned assumption of the merger theory is not the state theory, but the fact that the idea which is relevant for the development of the concept of the legal person on a national level is also valid with reference to international and supranational public authorities.

Elements of the legal emancipation of a public authority

Public authorities are endowed with legal personality in order to fulfil particular tasks assigned to them. Their legal status symbolises not only that they are able to execute these tasks autonomously. It also enables the institutions, as part of their international capacity, to act legally and to thereby become emancipated from their members. With a corresponding reasoning the ICJ deduces from the UN Charter the international legal personality of the UN and its capacity to enter into legal relationships and to have international duties and rights as an unwritten precondition. The capacity to act, which is necessary to fulfil tasks effectively, could not be maintained, if ”the concurrent action (…) of 85 or more Foreign offices” would be necessary.

In a similar way the ECJ has referred to the international legal position of the Community as an essential precondition for the autonomous character of this organisation and its legal order. The Court of Justice explained the unique nature of the common legal system compared to national law on the one hand and public international law on the other as early as the *van Gend & Loos* judgement: the institutional independence of the community results from its legal personality and capacity, its own institutions, its specific procedure and from the limitation of national sovereignty. Granting legal personality to the Community is used as an instrument to enforce common objectives against the interests of the Member States. This idea appears most evidently in the *Algera* case. In his opinion Advocate General Lagrange takes the view that the

> ”Community is a legal person governed by public law, and as such, it shall enjoy “the legal capacity it requires to perform its functions and attain its objectives” (Art.6), but only that capacity..."

The *EEA I* opinion also describes in an impressive way the difference between the communities and a loose agreement in public international law such as the European Economic Area, which only establishes duties and rights between the parties to the Treaty, but has no intention of assigning sovereign powers to specific organs.In this sense, the legal personality of the Union is of great importance for its emancipation from its own Member States, to establish its own international identity as required under Art. 2 EU and to enable the autonomous and effective execution of its duties.

The normative function of international legal personality

Furthermore, the legal personality of the Union in public international law has also developed a practical dimension that cannot be dismissed with reference to an assumed poor

epistemological content of the concept of legal personality. With the help of this legal construction, questions concerning treaty-making powers and the liability of the organisation vis-à-vis third parties besides the Communities and the Member States can be answered. Admittedly, in organisational law, intraorganisational questions are given priority such as the exercise of competences by the institutions, who act as the executors and possessors of authority as well as being the subject of the duties and rights of the organisation, while interorganisational questions are increasingly kept in the background. Finally, the question whose institutions exercise which competences, better said who is, for example, liable for the damages suffered by other legal subjects, cannot remain unanswered. Because of this, it is not justifiable to answer questions concerning the status of the Union only with regard to its relationship to the Member States and the Community institutions.

The international legal personality of the Union

Provisions concerning the legal personality of the Union, for example Art. 281 EC for the EC, Art. 184 EA for the EAEC and Art. 6 CS for the ECSC cannot be found in the EU-Treaty.

The intention of the Member States

This fact was certainly discussed during the Intergovernmental Conference in Amsterdam and a specific provision which grants the Union international legal personality was suggested. But, such proposals were not accepted, partly with reference to the fact that the EU still does not and should not possess such legal personality. There is also the opinion of several institutions and Member States which aims at proving that the Union is not an international organisation or other institution with legal personality, but that it has to be qualified as a form of cooperation under public international law without international legal personality.

However, it is dubious whether legal personality for the Union can be refused because of such historical attempts at interpretation. The historic intention of some Member States is not opposed to the attempts to reconstruct a legal personality for the Union under international law through systematic and teleological interpretation of the EU Treaty.

Autonomous competences of the Union

International legal personality is often refused with the argument that no competences have been assigned to the Union.

However, the EU Treaty definitely contains assignments of competences to the Union. According to Art. 11 EU, for example, the Union is able to declare itself competent for all areas of CFSP. Also, with regard to the legal commitment of the Member States to the joint actions of the Union according to Article14(3) EU, framework decisions and decisions according to Art. 34(2) EU as well as the obligation to co-ordinate their actions on international conferences and at the diplomatic level under Arts. 19 resp. 20 EU all point to a restriction on the sovereignty of the Member States in the fields of CFSP and CJCC. In areas which are subject to such legal action, a shift of competences from the Member States to the Union took place and the Union has exercised its competences. This is even more so because the corresponding measures can also be implemented under the majority principle (Arts. 23(2), 34(2) lit. c and (3) EU). At least the CFSP is explicitly designated as a ”Common Policy”. This indicates that one is dealing with the action of an independent legal body, which is more than simple intergovernmental cooperation.

After Amsterdam, the Council has, according to Arts. 24 and 38, the competence to conclude agreements with international organisations or third party states in the fields of CFSP and PJCC and also to legally bind the Member States (Art. 24(5) and (6) EU). One opinion

interprets this provision so that the Council, as representative of the Member States, makes a collective of statements on behalf of the Member States. Declaration n° 4 of the Final Conference in Amsterdam is the basis which is used to indicate that Art. 24 does not intend an ”assignment of competences of the Member States to the European Union”. An interpretation of this provision backed by Art. 300 EC in the sense that the ”Council” as institution of the Union can enter into treaties in the fields of international law for the ”Union” as a subject of international law, appears more persuasive. If it is only the Member States who are to be bound then it is only the Representatives of the Governments of the Member States meeting in the Council who would have acted. In addition, if it were so, the provision in Art. 24 (5) EU stipulating that certain Member States should be released from their commitments to the treaty because of national constitutional requirements, would be unnecessary. On the contrary, the authorisation of the Council to make a treaty could be ceded in advance only by those Member States intending to be bound by the treaty. Furthermore, the conclusion of a treaty under Art. 24(1) EU is a matter of ”implementation” of the CFSP, which under Art. 11 EU is a policy of the Union with special objectives and forms of action. Against Declaration n° 4 to the Treaty of Amsterdam can be argued that the competences of the Council to conclude a treaty for the Union in the framework of the CFSP is not a newly assigned competence, because it is, like Art. 300 EC, a purely procedural provision concerning the conclusion and the effects of treaties under international law. The substantive competences to conclude a treaty result implicitly from the material provisions of the EU Treaty on the CFSP, which already existed before the Treaty of Amsterdam. Art. 24 EU only provides for the ”implementation” of these provisions.

The new flexibility provisions in Arts. 23, 40 and 43 et seq. make it possible for some Member States to be released from their commitments to measures of the Union in the areas of CFSP and PJCC. Worth mentioning is above all Art. 23 EU, as it allows the constructive

abstention of a Member State, but provides at the same time, that the decision ”is binding for the Union”. This further shows that the Union is able to pursue its own interests.

The corporate structure of the Union

The Union as a body of public international law has members and institutions which are capable of articulating their intentions in a self-determined manner.

The definition in Art. 1(1) EU, which states that the Member States together found a Union, hints at the foundation of a new entity having legal personality. The Union also defines, in accordance with Art. 2 EU ”objectives”, above all the objective ”to assert its identity on the international scene”. The Union shall ”define and implement” these objectives through the CFSP in accordance with Art. 11(1) EU and ”pursues” these objectives through specific legal actions in accordance with Art. 12 EU. The preservation of the ”security of the Union” in Art. 17(1) EU forms part of its policy. In the fields of the CFSP, the ”Union”, in accordance with Art. 18, is represented by the presidency. Finally, in accordance with Art. 49, applicant states become members ”of the Union”. If one really thinks that the Union is nothing more than a platform for the implementation of intergovernmental and supranational policies, the admission of new states as members of the EC, the ECSC, Euratom and to the forms of cooperation in the fields of CFSP and PJCC would be the correct construction. Significantly, the accession of a state to only one Community is no longer possible after the elimination of the corresponding rules in the Community Treaties.

The corporate structure of the Union is reflected in the fact that the Union, unlike an intergovernmental conference and also unlike the European Political Cooperation (EPC) after 1986, consists of ”Member States” and not of contracting states. The EU Treaty imposes on the Member States specific duties towards the Union, for example through the principle of

loyalty and mutual solidarity in the fields of the Union's external and security policy in accordance with Art. 11(2) EU. According to Art. 13(2) EU the implementation of common strategies should be made available by the ”Union and the Member States”. On the other hand, the Treaty states corresponding duties of the Union vis-à-vis the Member States, for example, respect for national identity according to Art. 6(1) EU. It is difficult to imagine that the Member States are the addressees of such provisions, so that they should respect their own identity!

The institutions’ capacity to articulate their intentions in a self-determined way in order to fulfil common objectives marks the difference to multilateral treaties or conferences, where the parties to the treaty establish their common intention, without assigning its implementation to a superior institution. Because of the single institutional framework, the Union has such institutions with the European Council, but also with the European Parliament, the Council, the European Commission, the Court of Justice and the Court of Auditors. These institutions, to which special functions are assigned under Arts. 4 and 5 EU and other substantive provisions concerning the CFSP and the PJCC of the EU Treaty, are identical with the institutions of the communities, acting under the EC, the ECSC and the EAEC Treaty. The question whether the institutions have to be classified as institutions solely for the Union or whether it is a case of lent institutions, can remain unanswered. In both cases, the Union is capable of articulating its intentions and because of this the Union possesses the prerequisites to claim rights in its own name derived from public international law.

The theory which sees the Union as a simple legal association of intergovernmental and supranational policies does not sufficiently value the single institutional framework under Art. 3(1) EU. This provision does not comprise a mandate to act which has to be strived for through all legal and political means, but is a clear legal norm, which cannot be ignored when

interpreting the legal construction of the Union. In the same way one cannot say that the Council of the Union is an institutional *aliud* in relation to the Council of the Communities. Arts. 3, 4 and 5 make clear that the single institutional framework of the Union and the Communities also includes the Council, which acts in a legally binding way for the Union. If the Member States meeting in the Council want to use this body as an intergovernmental platform, they meet as Representatives of the Governments of the Member States meeting in the Council.

The practical reality

In practice, there are also evident traces of legal personality of the Union in public international law, even if simple practice cannot overrule the provisions of the EU-Treaty.

Above all, the first accessions to the Union under Art. 49 EU have to be stressed. According to Art. 1 of the treaties of accession with Austria, Sweden and Finland, the new Member States become ”Members of the Union and contractual parties of the treaties, on which the Union is founded”. The provisions in the Community Treaties concerning the duties and the rights of the Member States and concerning the powers and jurisdiction of the institutions of the Communities are also applicable in the accession treaties. The Council of the European Union is the addressee of the membership application, which it receives as the competent institution under international law in the name of the Union and the Communities.

The fact that the Union is a subject of public international law can be deduced from its international legal activities. Above all, the Union itself has declared, in some legal acts, that it is committed to the rules of public international law. As an example for the international commitment of the Union, the Treaty with Bosnia and Croatia concerning the administration of the city of Mostar is often cited, which was signed by the presidency of the Council of the

European Union ”for the Member States of the European Union acting in the framework of the Union”. In the meantime, the Union has, under Art. 24 EU, concluded two international agreements concerning the activities of a monitoring mission of the European Union in Macedonia and the Federal Republic of Yugoslavia, in which the Union is named as a ”participating party”. In the agreements explicit commitments under public international law vis-à-vis the Union were assigned to the receiving countries, for example concerning the protection and the security of the mission and its members or their right to free movement within the territory. Since that time, the Union has signed an agreement with the Republic of Lebanon, in the form of an exchange of letters and based on Art. 24 EU concerning cooperation in the fight against terrorism. Other agreements under Art. 24 EU between the Union and Switzerland concerning implementation of the Schengen-Acquis, with Albania, Iran, and the NATO are in preparation.

The declarations of the presidency of the Council of the European Union concerning the CFSP in Art. 18 EU are of special interest from the point of view of public international law, especially when they deal with the worldwide state of democracy and human rights. While these declarations were made at the time of the EPC ”on behalf of the EC and the Member States”, the presidency of the Council of the EU makes them in accordance with the EU Treaty ”on behalf of the Union”. Such declarations can be seen as actions of the Union with significance in public international law because they refer to legal positions which have legal effects *erga omnes*. They are often made at the request of third party states and they are transmitted to the Secretary General of the UN.

The organisational structure of the Union

The organisational structure of the Union is one of the problems resulting from the co-

existence of Union and Communities, which is not yet solved. It becomes increasingly important to reconsider the pillar model together with the legal personality of the Union, and especially the difference established between Union and Communities. This relationship can be clarified by a merger of both levels, which does not only respect the creation of an identity of the Union on the international stage, but also the wishes of the citizens of the Union for transparent and comprehensible structures. The Treaties do not contain an explicit provision concerning the merger of the legal personalities of Union and Communities. So which reasons are there to believe that a merger of Union and Communities has already happened, as some authors assume?

The uniform public authority of the Union

Art. 1(3) EU, which refers to the Communities as ”foundations” of the Union, the single institutional framework of the common institutions in accordance with Art. 3 and 5 EU, the common accession to the Union and the Communities in Art. 49 EU and the common appearance of the Union in practice indicate that the Union and the Communities represent a political unity. The public authority exercised by the Union vis-à-vis the citizens of the Union (Art. 17 EC), the Member States (Art. 49 EU) and over a certain territory (Art. 299 EC) has the same roots and is subject to the same legal duties.

Linking public authority to the concept of legitimacy

Public authority is a concept that has been developed in a national context. Traditionally, it is interpreted as the sum of the public functions and competences, i.e. the legally organised political power of the state. This power operates through the existence of public institutions and the fulfilling of public functions by these institutions. There is neither a direct normative

link between the notion of public authority and the law of the Union nor is it used in the EU Treaty. Nevertheless, there cannot be any doubt about the Union acting as a ”public authority”. It has institutions with decision-making power, competences and instruments for legal action providing the Union with the possibility to legally bind not only the Member States, but also citizens. Therefore, as in the case of any sovereign subject of law, the questions concerning legitimacy and the legal limitations of public authority and sovereign power have to be asked.

Perhaps a typical example for the multitude of the existing concepts of legitimacy is the description referring to the attempt to create legitimacy (= legitimisation) as the justification of the use of public authority before tribunals of law and morality. The sense of constitutional attempts at legitimisation is therefore to justify or to explain public authority in order to guarantee that the subjects to this order accept it as a legitimate order. This can be achieved through different aspects of legitimisation, in particular through a personal legitimisation of legislative institutions by linking them to the citizens who have a right to vote. In addition to this, there is also a content-related dimension to legitimacy which is achieved through binding the legislative institutions to the constitution and the administration to the laws. And finally, the existence of these and other institutions find their legitimisation, from an institutional point of view, in the decision of the constitutional legislator to create them.

The German *Grundgesetz,* for example*,* provides in Art. 20(2) for the corresponding institutional and personal legitimisation of public authority by binding the use of this authority to particular bodies of legislation, administration and judicature, but in the last resort by binding it to acceptance by the People. This also implies that all partial public authorities acting within the state have one uniform base. Nevertheless, public authority especially in federal systems can be distributed at different levels of the state (federal state, regional states, local authorities). Therefore, the concept of federal state stands for the sum of different public

organisations and legal orders, i.e. those of the federal state and of the regional states. The uniformity of public authority results from the fact that it is applied under a common legal and political umbrella and that there are institutions providing for coordination of the different competence sharing authorities, who are under an obligation to monitor the observance of the common constitution, and from common action in foreign relations. The content related legitimacy of the public authority is furthermore achieved through different legal duties. The public authority is bound by the fundamental rights, by the obligation to provide effective legal protection through independent courts and is tamed by the principles of the rule of law and in particular the separation of powers. Here too federal constitutions suggest that the given legal duties are applicable to all public authorities within the state or that, due to the supremacy of federal law and the requirement of consistency, they find at least an equivalent in all public acts.

Common legitimacy of public authority of Union and Communities

As the Communities embedded into the Union exercise public authority, here too the question concerning the common foundations of legitimacy of this authority arises. The parallels between the authority of the Union, divided between the Union and the Communities, and the situation in a federal state as described are astounding.

The EU Treaty (see recitals 3 and 6 of the Preamble and Art. 6(1) EU) as well as the EC Treaty (Art. 189 EC) recognise the necessity of democratic legitimacy for the use of public authority. Regarding the constitutional level, the Union enjoys a common legitimacy with the communities. Under Art. 52 EU the Union Treaty has to be ratified by the competent institutions of the Member States, which, according to Arts. 6 and 7 EU have to be democratically legitimised. Those rules concerning ratification also exist in the Community

Treaties (Art. 313 EC, Art. 99 CS and Art. 224 EA). However, after the entering into force of the Treaties they have become irrelevant. Since Maastricht, further legitimisation of Community law results from the conclusion (see Arts. G, H and I EU Maastricht version) and amendment of the EU Treaty (Arts. 1, 2, 3 and 4 EU Amsterdam and Nice versions). The ratification of the EU Treaty does not only back and legitimise specific powers of the Union (CFSP and PJCC), but also legitimises Community policies. The personal legitimisation of the legal public authority by the Union's citizens as operated through the election of the representatives of the Peoples of Europe for the European Parliament under Art. 190 EC not only refers to the Communities, but also to the acts of the Union within the CFSP and the PJCC, as is shown by Arts. 3, 5, 28 and 41 EU. The same applies to the legitimacy of the Council representatives as members of democratically elected governments (Art. 7 EU) of the Member States under Art. 203 EC and Arts. 3, 5, 28 and 41 EU.

The procurement of democratic legitimacy through the EU-Treaty thus involves the Union and the Communities. This results most clearly from the fact that the same institutions mentioned in Art. 5 EU and Art. 7 EC, Parliament, Council, Commission, Court of Justice and Court of Auditors act both for the Union and for the Communities. These provisions as well as the wording "single institutional framework" in Art. 3 EU show that the institutions existing at the time of the creation of the Union act in the fields of the Communities and in the framework of the Union's policies. Thus Union and Community authorities have a common institutional legitimacy.

In addition to this a common content related legitimacy is created through binding the institutions acting for the Union and the Communities to the Treaties (Art. 5 EU). This comprises in particular the common objectives of the EU Treaty (Art. 2 EU), the constitutional principles of freedom, democracy and the rule of law as enumerated in Art. 6(1) EU, the fundamental rights (Arts. 6(2) and 46 lit. d EU) and the other Common Provisions in

Title I and the Final Provisions in Title VIII. Finally, the existence of a common budget under Arts. 28 and 41 EU has to be mentioned, which now has the function of a ”General budget of the European Union” and comprises expenditures under the Community Treaties as well as certain expenditures in the framework of the CFSP and the PJCC.

Consequences

Public authority in the last instance aims at creating political and legal unity and therefore needs uniform legitimacy. Applying this premise to European integration, one sees the interdependence between the attempt to create political, social, economic an legal unity in Europe and its ties to the will of the citizens of the Union. Those ties can be established in two ways, through the European Parliament and through the national parliaments, but it is without doubt related to one single object of legitimacy, the Union. But even if the terminology of legitimacy as offered by political science seems helpful for the uniform interpretation of the constitution of the Union, some cautiousness is nevertheless necessary. First of all, the Union is not a state, even if, as a public authority, it disposes of similar decision-making powers and of different instruments to impose its powers on the Member States and individuals. It appears to be problematic in this comparison that the constitution of the Union is still influenced by the concept of functionalism, i.e. an organisation responding to the demands of efficacy in fulfilling its tasks. It is also shaped by the specific political conditions of Intergovernmental Conferences. These conferences are (still) governed by the rule of unanimity (Art. 48 EU) and in the first instance not oriented towards constitutional demands such as democracy, transparency or the rule of law. These influences cannot be ignored when examining the Union and interpreting its diffuse organisational structures. The sense of dividing the Union into different bodies with legal personality can be seen – despite the single legitimacy of

Union and Communities – in a corresponding will of the constitutional legislator, who maintains this division in order to reinforce the vertical dimension of the institutional balance between the Union and the Member States.

From the point of view of organisational law the reference to a single legitimacy is of no use because it cannot answer *in concreto* the question concerning the legal relationship between the two entities – Union and Communities. However, the public authority of the Union can be subdivided and can be exercised by different bodies having legal personality and by different institutions.

The Merger of the European Communities as an example?

The idea of merging Union and Communities to one legal person with one single organisation, common institutions and a common budget is, however, not without precedent. Analysing the rules established by the EU Treaty concerning the assignments of the institutions, the budget etc in the relationship between the Union and the Communities, one will discover that they emulate the uniform Community structures as created by different merger treaties. The theory of a merger existing *de lege lata* or to be achieved *de lege ferenda* is thus backed by the arguments used in the discussion concerning the consequences of this merger for the uniformity of the Communities. Is it therefore correct to say that the merger theory brings all the necessary arguments concerning the merger of the Communities to a conclusion?

Merger of the institutions of the Communities

On the 1st January 1958 the Convention on certain institutions common to the European

Communities of 23rd March 1957 established the Assembly, today's Parliament, and the Court of Justice as institutions common to the EEC, the EAEC and the ECSC, thus creating close organisational links between the three Communities. The Economic and Social Committee was from its beginning created as an institution common to the three Communities (Art. 5 of the Convention). In Arts. 1 and 9 of the Merger Treaty of 8th April 1965 this method was also used for the Council and the Commission. In Art. 24 of the Merger treaty it was made clear that from the entry into force of the Treaty onwards there was not only one single institutional structure, but also a common staff "for the single administration of those Communities". In addition to this, Art. 20 of the Treaty introduced a single "budget of the European Communities".

Theory of dédoublement fonctionnel

This situation, best described as a community of institutions, can be explained through the *dédoublement fonctionnel*, i.e. the theory of role splitting. According to *Scelle* national authorities can, in the absence of international institutions, fulfil the tasks of those institutions, thus splitting their competences and acting on two decision-making levels and for two legal persons to which they belong. An example of this is the concept of "Community Court". It may not be applied to the ECJ but also to national courts when enforcing Community law under Art. 234 EC, thus acting within the Community system. *Scelle* himself developed his theory against the background of a French local authority, the *préfet*, a public authority who is, on the one hand, the governing institution of a *département***,** and who can, on the other hand, represent the mayor at the local level. In German administrative law the *Landrat* is a similar model for role splitting. It is an institution of the self-governing local body *Landkreis,* but also a public authority when acting as the head of the public administrative authority *Landratsamt*.

In this constellation, too, questions concerning liability arose. They found their answer in the theory of functions, thus linking liability to the duty accomplished when causing the damage.

It is typical for all of these examples that the institutions exercise a mandate in one legal order and, because of role splitting, also as institutions in another legal order in which they have been integrated for these purposes. Thus, for this institution the obligation arises to identify itself with the two legal orders, even if in some cases a conflict of interests may arise. These conflicts are settled through personal union and additional requirements of consistency.

For some authors, the theory of a *dédoublement fonctionnel* of the institutions acting under the EU Treaty and the Community Treaties is too formalistic because it uses a narrow concept of institution which does not allow the institutions to fulfil their own duties, but only to fulfil duties for other legal persons. Institutions are ultimately seen as tools of legal persons, and the acts of the institutions are assigned to these legal persons as the ”final subject of assignment”. Admittedly, this narrow concept of institutions cannot be found in all legal orders. Nevertheless, it has been accepted in Community law, which only assigns legal personality to the Communities, but not to the institutions. The underlying idea of these doubling-up strategies lies in practical considerations of the constitutional legislators. They seek to achieve a better distribution of power and better control, which, from the point of view of the sociology of organisations, has without doubt a certain use and importance in legal practice.

Operational Unity of the Communities

With this in mind it can be dogmatically explained that the two conventions of 1957 and 1965 did not merge the Communities, but only formed an operational unit of the institutions, administrations and budgets. The further existence of three legally independent Communities can be justified with regard to Arts. 281 EC, 6 CS and 184 EA, all of them stipulating that

every single Community has got legal personality in international law, and the preamble and Art. 32 (1) of the Merger Treaty, striving for the conclusion of a ”Treaty establishing a single European Community”. The Treaty of Amsterdam incorporated the two merger conventions into Art. 9(2).

The Court of Justice has underlined the “operational unity of the Communities” resulting from the merger of the institutions as described above. They are part of a uniform process of integration and have the same political objectives. This uniform view has not only been based on the fact that the Communities have the same institutions, but also on the fact that the Communities are linked to one another through legal principles which determine their actions (general principles of law, especially fundamental rights, and further basic principles such as supremacy, direct effect etc.), that they have the same members, and that there is a certain expectation from third party states and international organisations as well as the citizens, to whom they appear to be one entity, to be just that.

But, the Court of Justice also stressed that one cannot ignore, by referring to this entity, that some discrepancies between the different Communities, which arise from different legal provisions in the Treaties, do exist. Indeed, there are operational differences between the Communities, as for example the legal personality of the ECSC is limited in time, which ended after the expiration of the ECSC according to Art. 97 on the 23rd July 2002, whereas the legal personalities of the EC and the EAEC continue under Arts. 312 EC and 208 EA. Therefore, it must be examined from case to case which Community is actually acting. Accordingly, it is not correct to refer to a union of the three Communities having its foundation in positive law, even if the existing legal links between the Communities are real.

Studying the debate on the Maastricht Treaty, one will understand why the idea of merging the three Communities had to be postponed. It reflects the widespread fear among the

Member States that the Communities could get or arrogate new competences. By referring to different Communities one can avoid seeing the Community as one state-like public authority with comprehensive competences.

Union and Communities as an operational unit

Therefore, for the present, the Union has not been merged with the Communities. They only form an operational unit.

The single institutional framework

However, the question concerning the relationship between the Union and the Communities and whom the institutions mentioned in Art. 5 EU shall be assigned to cannot be answered through the sophisticated wording ”single institutional framework” in Art. 3 EU. Those provisions only state that the institutions existing at the time of the creation of the Union and enumerated in Art. 7 EC (Parliament, Council, Commission, Court of Justice and Court of Auditors) act in the field of the Community as well as in the field of the Union, but does not state whose institutions they are.

Some authors discuss whether the Union’s institutions are ”lent” to the Communities or whether they are institutions originally belonging to the Union. Usually, the result depends on whether one admits legal personality of the Union or not. Apart from the fact that this dispute is, due to the lack of practical consequences, of no use, the ”lending” construction has to be dismissed because the EU Treaty is based on the model of a single institutional framework not as a temporal, but as a permanent solution. By creating the single institutional framework the construction of a functional double competence of the merged Community institutions is applied to the relationship Union – Communities. The existing Community institutions are

converted into the new institutions common to two different communities and get multiple competences.

The single institutional framework also implies that there is no organisational hierarchy between Union and Community in the sense of a superiority of the Union. In a federal system for example, the supremacy of competences achieved through obligations to act consistently as well as different supervisory duties of the administration or decision-making powers of the highest judicial authorities show that assuring respect for the Federal Constitution is a duty of the institutions of the federal state. These typical powers for the superior level to influence the lower level do not exist in the law of the Union. Neither is the European Council, which under Art. 4 EU provides the Union with the necessary impetus and has thus got an executive function, an institution that proves the hierarchical superiority of the Union. Nevertheless, the activities of the European Council cannot, despite its duties to define general political guidelines, be reduced to a purely political function, as the Council acts in the area of the CFSP with legislative powers. Leaving aside special cases enumerated in the Treaty (Arts. 99(2) and 128(1) EC) it does not, however, possess general instruction and direction powers to be exercised vis-à-vis the Communities. Its guidelines generally cannot be revised by judicial instances and have at most political effects.

Therefore, the requirement of consistency in all activities is of even greater importance, as it aims at coordinating the acts of the Union and the Communities which are formally equal. If there was a clear organisational assignment between Union and Communities either in the form of a hierarchy or by merging the two entities, this requirement would be largely superfluous. In the areas where Union and Community activities meet, which is especially the case in the fields of CFSP under Arts. 11 et seq. EU and of foreign trade policy under Arts. 113 et seq. EC, political coherence is needed because there is no general rule imposing supremacy for Union policies over Community policies. Therefore, the margins of action of

the Union and the Communities have to be determined, which is not only achieved through the general requirement of coherent action, but also through specific ”bridging clauses” between EU and EC.

Unified structures, but coexistence of Union and Communities

Despite these tendencies towards harmonisation, one cannot deduce from the Treaties a merger of the structures of Union and Communities to one single legal entity. This theory is supported in the first place by positivistic arguments such as the legal personality recognised for the three Communities in Arts. 281 EC, 6 CS and 184 EA, which persist as the bases of the Union (Art. 1(3) EU) and by the fact that the Community treaties as a general rule remain unaffected by the amendments introduced by the EU Treaty (Art. 47 EU). It cannot be deduced from these provisions that this clause in Art. 47 EU only aims at safeguarding the material *acquis communautaire,* but not also at safeguarding all Community provisions including those concerning organisational matters. However, the persistence of the Communities as entities with legal personality is an important aspect of the *acquis*.

Therefore, one cannot object that maintaining the separation of Communities and Union is purely formal because these entities and the institutions acting for them don’t dispose of decision-making, budgetary and staff autonomy to justify the separation. The ”clause of unaffectedness” in Art. 47 EU however guarantees the Communities autonomy in competence related and procedural issues. This is significant because on the Union level the actors may be different from those on the Community level. Thus, competition cannot only be found in the relationship between Union and Communities concerning competences or procedures, but also between the institutions – despite partial identity (for example, on the question whether the Commission or the Council presidency or the High Representative of the CFSP should

represent the Communities on the international level, or on the question whether the Commission or the Member states should have the right to initiate legislative procedures). In these cases, horizontal competence disputes concerning competences of the institutions are linked to the question of which entity is competent and thus end in vertical competence disputes concerning the relation between Union, Communities and Member states.

There is no need to wonder about the fact that the relationship between the Union and the Communities, which is organised in a functional way, is atypical because it is not in line with what we know from the structure of other international organisations, i.e. the UN ”family”. There is no obligation to comply with one model. The Community construction was unique as is also the case with the Union. The institutional constitution of the Union as an autonomous structure thus aims at steering certain intergovernmental policy areas and at the same time preserves what has been achieved on the Community level.

One Legal System of Union and Communities?

The discussion on the unification of the Union increasingly establishes a link between the already existing functional unity of Union and Community *organisation* and the relationship between Union and Community *law*. This can be seen in the present suggestions to revise, together with assigning legal personality to the Union, the relationship between the Treaties. This leads to the question whether or not it is possible to see a systematic unity in the relationship between Union and Community law, deduced from a uniform creative power of the Union institutions. If this were the case, the theory of separated legal personalities of the Union and the Communities would be even more dubious.

The idea of legal unity in the case law of the ECJ

The idea of legal unity plays an important role in European Community law. Thus, the ECJ refers to community laws as an ”own legal system” and as ”single, uniform law”. The argument is used to support not only the autonomy and supremacy of Community law, but also the uniform interpretation of the Treaties.

One would reject this approach if the concept of legal system is linked to the requirements of consistency, which cannot be seen in the reality of Community law. Nevertheless, lawyers trained in legal systems dominated by positivism will adopt these implications of legal unity because the uniform interpretation is a postulate of the rule of law and of democracy. It serves to make the use of authority predictable and legitimate.

As an important consequence the uniform approach to Community law allows for the comprehensive use of the general principles of law. They can be found either as structural principles, which are already inherent in the Treaties, as for example, the principle of supremacy of Community law, direct effect etc. or as fundamental principles of law drawn from the rule of law as the classic general principles of Community law (e.g. fundamental rights or the principle of proportionality). Both categories of principles have to be separated as part of the ”law” whose application and interpretation the Court of Justice has to ensure under Arts. 220 EC, 31 CS and 136 EA from the ”(law of) the Treaty”. It is obvious that these principles of law determined by identical provisions have the same effects within all Community Treaties.

The uniformity of the legal order of the three Communities is furthermore ensured by general collision clauses in Art. 305 EC, of which, after expiration of the ECSC, only Art. 305(2) regulates the relationship between EC and EAEC. At first sight, this guarantee, according to which provisions of the EC Treaty ”shall not affect” the provisions of the other treaty,

underlines the fact that the legal systems of the different Communities are separated. Nevertheless, the Court of Justice has limited the ambit of this rule. It only applies it to treaty constellations in which the Treaties collide directly because they contain provisions which are contradictory on their face. In constellations where the other Treaties do not provide for a complete set of norms in the relevant field, it allows reference to the provisions of the EC Treaty as a general norm.

The unification of Community law by ”harmonising” the provisions of different treaties has to respect positive treaty law, i.e. the promotion of nuclear energy in Art. 2 EA, whereas Art. 2 EC aims at sustainable development and a high level of protection of the environment for all Community activities. Accordingly, the ECJ ruled that the different provisions in the Community treaties must not be covered over by the theory of the uniformity of the legal order.

Towards Unity of Union Law and Community Law

Similar questions on the unity of law arise from the relationship between Union and Community Treaties. Because of their links through the Common Provisions in Arts. 1 – 7 EU and in the Final Provisions about adherence, amendments to the Treaties, implementation etc. (Arts. 46 to 53 EU) some authors claim that the two levels form one legal system. It is questionable whether the Constitution of the Union provides for the existence of such a unity or if it can be established by the actors under the EU Treaty.

Unity of organisation and unity of legal order

If one accepts the theory of a systematic legal unity, the concept of *dédoublement fonctionnel* is of fundamental importance. The authors favouring the merger theory assume that the Union

and the Communities, due to their single institutional framework under Arts. 3 and 5 EU, constitute *one* social order which can only dispose of *one* legal system. However, a uniform organisation does not necessarily imply unity of the legal system. The concept of institutional role splitting as described above shows that an organisation can act for different legal orders and therefore unity of the legal systems is not necessary. But, the opposite conclusion is not necessarily correct, either. The example of federal systems shows that legal unity can be created even from complex legal structures, composed of different legal persons, organisations and constitutional backgrounds. Nevertheless, there is one prerequisite for creating legal unity between two different entities: there has to be one common legal instance with final decision-making power to coordinate the different fields of law.

In the relationship between Union and Communities the single organisational structure, therefore, does not create legal unity. One obstacle seems to be the fact that the procedures and forms of action differ widely between Union law and Community law. The actions carried out in the CFSP and PJCC frameworks under Arts. 12-16 and 24 EU and 34 and 38 EU respectively are not only adopted unanimously and with rudimentary participation of the Parliament and the Commission, they address, contrary to Community measures, governments or parliaments of the Members States and do not create direct effects for the citizens of the Union. However, in the end other factors are more important as the existence of a legal order does not necessarily imply structural homogeneity in all fields.

The decisive obstacle for the creation of legal unity in the relationship between Union and Community law is the general exclusion of jurisdictional powers in the EU Treaty. Only in specific cases is Union law submitted to judicial review. Even if Union law and Community law have some legal aspects in common such as, for example, the general principles of law, a common constitutional jurisdiction is still missing. The fact that such jurisdiction effectively ensures legal unity is illustrated by ECJ case law on the unity of Community law.

Demarcation of competences in the EU Treaty and the EC Treaty

Problems concerning demarcation arise from the differing procedures, structures of competence, methods and institutional competences existing under the EU and EC Treaties. The Council always appears to be tempted to shift fields of Community competence to the CFSP and the PJCC where it has greater political weight than within Community law. Therefore, the Commission and the Parliament fight tendencies towards a ”contamination” of the First Pillar with Union policies. This is problematic when it comes to setting a common position of the Union vis-à-vis third party states in the field of the CFSP, especially to the extent where the community has competence with exclusive right of community initiative (foreign trade, development policy) or where the introduction of sanctions in a two stage procedure are concerned and therefore the activities of the Union and the Communities have to fulfil the requirements under Arts. 14 EU and 301 EC. In practice, sometimes the Union enacts sanctions without further Community legislation.

To date the Court of Justice has rejected these attempts and guaranteed respect for the barrier created in Art. 47 EU vis-à-vis Community law. The ECJ can also do this for acts of the Union enacted in the fields of CFSP and PJCC without interpreting EU Treaty provisions which under Art. 46 EU are not subject to its jurisdiction. It may decide on the grounds of Community law whether the act of the Union is illegal in the light of Art. 47 EU and therefore has to be annulled. Such jurisdiction is not *ultra vires*. So far, the ECJ has dealt with an act of the Council, which can under Art. 230(2) EC also be subject to an annulment action when the Council acts outside Community law. By examining this measure, in this case enacted on the base of the wrong treaty, the Court implicitly rejected the theory that the Union is merely an institutionalised intergovernmental conference and its normative acts are treaties between the Members States based on public international law. At the same time it assumes that the norms

enacted by the Council on the basis of the EU Treaty are binding and have legal effects. The Union has complied with this case law and given up the artificial separation of exportation controls of dual-use-goods in a Common Action of the Union under Art. 14 EU and a Community regulation under Art. 133 EC. The Court of Justice reaffirmed its case law in the *Hautala* case. This concerned a demand for access to a report by the working group ”Exportation of Conventional Arms”, which the Council refused. The Court correctly rejected the claim that the Court of First Instance was not competent to review the legality of the Council decision under Art. 46 EU because the document in question was a document of the Union drafted in the framework of Title V EU. The rules governing access to Council documents laid down in Arts. 203(3) and 255 EC are, according to Art. 28(1) EU, also applicable in the field of the CFSP.

Mutual influences of Union and Community law

The tendency towards policy making covering several pillars, however, leads to mutual influences in the relationship between intergovernmental Union law and supranational Community law.

On the Community level legal unity is created through the complementary function of the EC Treaty under Art. 305 in relation to the other Community treaties. A similar reference to the EU Treaty as *lex generalis* for ”enrichment” of the *Community treaties* would be possible. The ”clause of unaffectedness” in Art. 47 EU can be compared to the collision clause in Community law as described in Art. 305 EC. Therefore, it seems likely that the case law will be referred to in this context and the ”Common Provisions” in Title I applied to Community law, too. This is at least valid for cases where there is no direct collision with Community law because the issue has been completely regulated by Community law. Partially, the Union’s

constitutional legislator has anticipated these points of contact between the EU and EC Treaty and regulated them by a system of references, as in Arts. 2(2) EU and 5 EC (subsidiarity), Art. 6(2) and 46 lit. d (EU fundamental rights), Art. 7 EU and 309 EC (sanctions against Member states), Arts. 43-44 EU and Arts. 11-12 EC (closer cooperation), Arts. 12 EU and 301 EC (embargo measures) and Art. 42 EU and Arts. 61 et seq. EC (internal security), leading to a point where a general system of references is no longer necessary.

There is movement in two directions. The *Law of the Union* is also influenced by Community law. It adapts the mechanisms of judicial control known from the EC Treaty, but modifies them in connection with the Union, as for example for annulment actions and the preliminary rulings procedure in Arts. 230 EC & 234 EC respectively, modified for PJCC by Art. 35 EU. Other provisions of institutional Community law are also incorporated into the EU Treaty by references to the EC Treaty in Arts. 28 and 41 EU. The question whether the general principles of law developed by the ECJ for Community law can be applied to Union law is more delicate. Even if there is an obligation for the Union under Art. 2(1) EU to build on the Community acquis, one cannot argue that all principles of law being part of the acquis may be applied to specific acts of the Union. Nevertheless, referring to structural principles (supremacy, direct effect, loyalty) and principles similar to those of the rule of law (proportionality, fair hearing etc and fundamental rights) in the law of the Union is not in any way prohibited. Principles of community law can be seen as *leges generales* to the EU Treaty and be applied to the law of the Union, as long as there is no direct contradiction with provisions of the EU Treaty. What the ECJ has stated for the supremacy of Community law vis-à-vis national law can also be said for the law of the Union, that an organisation has been created having its own institutions, legal personality and legal capacity and real powers, which has to be able to effectively implement the objectives of the Treaty. Consequently, Union law has uniform effect too; it has to be applied directly and without national

transformation in all Member States and binds all its addressees and in the case of conflict ousts national law. Therefore, it is possible that the case law developed under Art. 220 EC and recognised in Art. 6 (2) EU is applied in a preliminary ruling under Art. 35 EU too and that this procedure is reconstructed in the light of the principles developed for Art. 234 EC. Nevertheless, there would be a collision of norms excluded by the clause of unaffectedness in Art. 47 EU, if framework decisions and other decisions under Art. 34(2) lit. b and c EU, which expressly ”shall not entail direct effect”, would be granted direct effect by referring to the ECJ case law developed in the field of Community law.

By applying this method, it is however possible to reconstruct from the EU Treaty and the Community treaties some elements of law common to the whole system which have to be interpreted according to uniform criteria. Nevertheless, the necessary prerequisites for creating a common legal system cannot be found. The decisive shortcoming for a consequent application of Community principles can be found in the absence of a provision equivalent to Art. 220 EC which obliges the ECJ to ensure that the ”law” of the Union is observed. An analogous application of Community principles will only take place in selective fields, where the Court of Justice is competent under Art. 46 EU. It is not possible, alternatively, to achieve legal unity of Union law and Community law through creating a hierarchy of the normative acts. For example, there is no collision clause that stipulates a supremacy of the EU Treaty over the other treaties as does Art. 103 UN Charter. But, also the contrary, i.e. supremacy of Community law over Union law, cannot be justified. It rather results from the multiple links existing between the EU Treaty and the Community treaties that Union law and Community law coexist as a general rule on the same level. The osmotic relationship between Union law and Community law shaped by different techniques of reference and adaptation does not create *a single* legal order. These techniques are also used to implant norms from a legal order in to another legal order. To date, the two legal systems have only a few points of contact

where a relationship between Union law and Community law is created through reference or adoption. Nevertheless, the separation of the two levels is only temporary. It operates on a borderline which is being permanently shifted and will probably be abolished during one of the coming Intergovernmental Conferences.

Conclusion: Tensions between fragmentation and unification

The constitution of the Union is being dominated by pluralism and fragmentation. Union and Communities constitute, through their uniform institutional structure, their uniform legitimacy and multiple common provisions, a functional operational entity. Until the date of their formal merger we have to accept a pluralism of entities which promotes staged integration of intergovernmental and supranational competences, procedures, instruments of action and legal protection mechanisms as intended by the Union's constitutional legislator.

This incomplete state of the Union does not comply with the traditional models of organisation theory. But, from a dogmatic point of view, this is acceptable, as legal theory can be helpful when problems of comprehension and interpretation arise. Due to the multitude of existing links between the EU Treaty and the Community treaties the discrepancies between the different legal systems can be minimised, especially by referring to the principles of Community law. After enlarging the competence of the ECJ through the EU Treaty, one can recognise the outlines of a common organisational and legal system. The still existing borderlines between Union law and Community law are increasingly fading since Amsterdam and Nice.

Nevertheless, these tendencies towards unification are overshadowed by a new approach to flexible integration in the framework of closer cooperation between the Member States under Art. 11 EU. Already the division established through the Maastricht Treaty between

integration policy on Union level and on Community level illustrates this quest of the Member States for a more flexible integration. Obviously, the constitutional legislators in Amsterdam and Nice searched for a compromise solution after recognising that the tendencies of unification and legalisation of Union and Communities would dilute that concept. This development is further proof for *Joseph Weiler's* theory of interdependence between the legal and political aspects of the supranational and intergovernmental principle and his thesis of the ”dual character of supranationalism” which sees the key to success for European integration in the balance between the political and the legal side of this principle. From this point of view it is consistent when the Member States react by enforcing their ”voice” in the framework of political decision making, after an ”exit” (i.e. fleeing their legal obligations) has been blocked by the aggregation of Community law. The creation of the Union roof consisting of intergovernmental elements is an example for the attempt of the Member States to maintain political control over certain policy fields. But, as borderlines between Union and Communities begin to fade, the Member States have created in Amsterdam and Nice a new ”exit” through integrating general provisions on flexibility into the EU Treaty.

From the point of view of the theory of the state the existing constitutional relationship between the Union and the Communities might appear grotesque. But, they are legal realities which can be explained by the specific functional conditions of integration within the existing tensions between law and politics. Here, the diffuse condition of the modern European states with their multiple interdependencies is reflected, as *Ulrich Everling* has correctly observed. Even if they should not only be ”brushed up” at the next Intergovernmental Conference, but genuinely reformed in the sense of a consistent merger of Union and Communities with their constituent treaties, they will be an exemplary model of how the supranational principle operates.