

## European Parliament Report on the legal personality of the European Union (21 November 2001)

**Caption:** Whereas the three European Communities all have legal personality, and are therefore subjects of international public law, the European Union is simply a Union of States without legal personality of its own, and without the capacity to act at international level. On 21 November 2001, the Committee on Constitutional Affairs of the European Parliament submits a report containing proposals for the simplification of the Union's structure and the recognition of its single, legal personality.

**Source:** EUROPEAN PARLIAMENT, Committee on Constitutional Affairs. Report on the legal personality of the European Union (2001/2021(INI)), Final A5-0409/2001 (Rapporteur: Carlos Carnero González), PE 304.279. [s.l.]: 21.11.2001, 23 p. 23 p. (Session document 1999-2004).

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## Report on the legal personality of the European Union (2001/2021(INI))

Committee on Constitutional Affairs

Rapporteur: Carlos Carnero González

Final A5-0409/2001

21 November 2001

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### Procedural page

At the sitting of 15 March 2001 the President of Parliament announced that the Committee on Constitutional Affairs had been authorised to draw up an own-initiative report, pursuant to Rule 163 of the Rules of Procedure, on the legal personality of the European Union.

At the sitting of 3 May 2001 the President of Parliament announced that she had also referred the matter to the Committee on Legal Affairs and the Internal Market for its opinion.

At its sitting of 4 October 2001, the President of Parliament announced that she had also referred the matter to the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy for its opinion.

The Committee on Constitutional Affairs had appointed Carlos Carnero González rapporteur at its meeting of 13 February 2001.

It considered the draft report at its meetings of 20 June 2001, 13 September 2001, 10 October 2001 and 20 November 2001.

At the last meeting it adopted the motion for a resolution by 14 votes to 3, with no abstentions.

The following were present for the vote: Giorgio Napolitano, chairman; Christopher J.P. Beazley, vice-chairman; Carlos Carnero González rapporteur; Georges Berthu, Jens-Peter Bonde, Elmar Brok (for José María Gil-Robles Gil-Delgado), Richard Corbett, Giorgos Dimitrakopoulos, Gerhard Hager (for Olivier Dupuis) Sylvia-Yvonne Kaufmann, Hanja Maij-Weggen, Cecilia Malmström, Iñigo Méndez de Vigo, Gérard Onesta (for Johannes Voggenhuber), Alonso José Puerta (for Armando Cossutta), Willi Rothley (for Jo Leinen) and Karl von Wogau (for Ursula Schleicher).

When the text as a whole was put to the vote, Mr Berthu announced his intention of appending a minority opinion to the explanatory statement pursuant to Rule 161(3) of the Rules of Procedure.

The opinions of the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy and the Committee on Legal Affairs and the Internal Market are attached.

The report was tabled on 21 November 2001.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

## Motion for a resolution

### European Parliament resolution on the legal personality of the European Union (2001/2021(INI))

*The European Parliament,*

– having regard to the Treaty signed in Nice on 26 February 2001 and Declaration No 23 on the future of the Union annexed to the Nice final act,

– having regard to its resolutions of 17 May 1995 on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference - Implementation and development of the Union<sup>1</sup>, 19 November 1997 on the Treaty of Amsterdam<sup>2</sup>, 18 November 1999 on the preparation of the reform of the Treaties and the next IGC<sup>3</sup>, 3 February 2000 on the convening of the Intergovernmental Conference<sup>4</sup>, 13 April 2000 on the proposals for the Intergovernmental Conference<sup>5</sup>, 25 October 2000 on the constitutionalisation of the Treaties<sup>6</sup> and 31 May 2001 on the Treaty of Nice and the future of the European Union<sup>7</sup>,

– having regard to the memorandum of the three Benelux governments on the future of Europe, in particular paragraph IV,

– having regard to Rule 163 of its Rules of Procedure,

– having regard to the report of the Committee on Constitutional Affairs and the opinions of the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy and the Committee on Legal Affairs and the Internal Market (A5-0409/2001),

A. whereas it has called on numerous occasions for a comprehensive and in-depth reform of the treaties leading to a clearer and more readily understandable Union structure and, in this context, for the Union to be given legal personality,

B. whereas, through Declaration No 23 on the future of the Union, the Intergovernmental Conference which was wound up in Nice on 11 December 2000 opens the way for a further reform of the Treaties in 2004 using a new method of preparation,

C. whereas the Treaty on European Union does not explicitly give the Union legal personality whereas the Treaty establishing the European Coal and Steel Community (Article 6), the Treaty establishing the European Atomic Energy Community (Article 184) and the Treaty establishing the European Community (Article 281 - ex Article 210) do so,

D. whereas the complexity of European integration, the product of successive layers, partial breakthroughs and compromises, is reflected in the complex nature of its legal structure,

E. whereas even before the adoption of the Treaty on European Union, the existence of various legal entities (European Economic Community, European Coal and Steel Community, European Atomic Energy Community) founded on different legal bases and instruments and governed by separate treaties was already a source of confusion,

F. whereas the Treaty on European Union has made the situation even more complicated by adding a new structure which modifies and supplements those that already exist,

G. whereas the Treaty of Nice did nothing to make the founding treaties of the Union, with which the public find it difficult to identify, more readable or readily understandable,

H. whereas in today's world the various aspects of external policy are closely interlinked,

I. whereas the coexistence of the Union, without legal personality, and the Communities, and the resulting split between the functions of the Union and the Communities tends to perturb the Union's partners and make the negotiation of international treaties and representation of the Union in international organisations more difficult,

J. whereas under Articles 24 and 38 of the Treaty on European Union, the Council may conclude agreements acting unanimously, on a recommendation from the Presidency, in the sphere of the common foreign and defence policy and in the sphere of judicial and police cooperation in criminal matters without any agreement being binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure, whereas in such cases the Member States may agree that the agreement shall apply provisionally to them and whereas clauses of this kind, even if they have no constitutional force, nonetheless form the rudiments of legal personality of the European Union,

K. whereas Declaration No 4 annexed to the Amsterdam final act shows that, even on that occasion, the reluctance of some Member States prevented the formulation of a genuine Treaty-making power for the European Union,

L. whereas public opinion and non-member countries perceive the complex organisation of the Union as an autonomous and unitary system, even if in formal terms it still lacks legal personality,

M. whereas the Union's lack of legal personality creates a legal vacuum in so far as neither the fundamental rights enshrined in the 'Charter of Fundamental Rights of the European Union', even if it were to take the form of instrument of Community law, nor any other instrument of international public law designed to protect the rights of the individual and to which the Member States have subscribed, are enforceable vis-à-vis the Union,

N. whereas, although it is feasible from a purely technical legal point of view either to confine any reform to a 'simplification of the treaties' without going into the substance, i.e. while maintaining the existing law, as suggested in Declaration No 23 annexed to the Nice final act, or to merge the Communities without giving the Union legal personality, or to maintain simultaneously a legal personality resulting from a merger of this kind alongside a separate legal personality of the Union as such, for the reasons outlined above and in the interests of the harmonious development of Europe, it is imperative to go further and to replace the existing legal personalities of the Communities with a new and single personality attributed explicitly to the Union,

O. whereas if specific arrangements were maintained in certain areas such as the Atomic Energy Community or cooperation in second and third pillar matters, this would not necessitate formal independence from the Union endowed with legal personality,

1. Considers that, within the framework of preparations for the next Intergovernmental Conference, announced by the Nice Conference in its Declaration No 23, the issue of the Union's structure must again be addressed and the response to this question must be equal to the tasks that the peoples and States in the Union intend to tackle together;
2. Reaffirms that it is essential to put a stop to the dismemberment of the institutional system and to establish a simple, transparent and comprehensible structure by combining the existing Communities and pillars into a single Union, which alone would have legal personality;
3. Points out that a merger of this kind, within the framework of the process of constitutionalisation and without prejudice to the distinction between the provisions of a constitutional nature and the others, must be accompanied by a unification of the treaties into a coherent Treaty on European Union;
4. Considers that the alternative of giving the Union legal personality alongside the legal personalities of the Communities would not provide the necessary clarity and transparency as the terms 'Union' and 'Communities' would have to be maintained in parallel within a single unified Treaty;

5. Points out that a simplification of the treaties maintaining the law as it stands, without modifying them, as suggested among the topics put forward in Declaration No 23 annexed to the Nice final act, is not incompatible with changes of substance, as indicated by the other topics listed in Declaration No 23 and should indeed logically go in hand with a unification of the legal personality;

6. Considers that giving the European Union legal personality:

- constitutes the prerequisite for legal clarity of the status of political Union and the European Constitution,
- improves the Union's image and its capacity to take action by facilitating the Union's political and contractual activities at bilateral and multilateral level on the international stage, and its presence in international organisations, even if different procedures apply internally, and is an essential step towards increasing the coherence, visibility and efficiency of its external action,
- gives Union policy a higher profile and makes it easier for citizens to identify with the Union,
- is a key element in establishing a system for the protection of fundamental rights at Union level,
- and helps remedy the dysfunctions caused by the pillar structure;

7. Considers that:

- the attainment of political Union implies giving the European Union legal personality;
- the process of constitutionalisation must, therefore, lead to a definition of this legal personality;

8. Proposes therefore, in accordance with its earlier positions on the subject, that the European Union should be given legal personality;

9. Calls, to this end, for the Treaty on European Union to be amended to recognise the single, full legal personality of the Union, with provision made in any case for including this principle in the new European Constitution;

10. Calls for the subjects covered by this resolution, namely the structure of the Union and the legal personality of the Union, to be included in the forthcoming reform of the Union and therefore put on the agenda for a Convention convened to prepare the next Intergovernmental Conference;

11. Instructs its President to forward this resolution to the Council, the Commission, and the governments and parliaments of the Member States and the candidate countries.

### **Explanatory statement**

The Single European Act, which came into force on 1 July 1987, is the first specific expression in primary Community law of the will 'to continue the work undertaken on the basis of the Treaties establishing the European Communities and to transform relations as a whole among their States into **a European Union**' (see preamble).

This European Union was created by the Maastricht Treaty, which came into force on 1 November 1993 and was consolidated by the Amsterdam Treaty of 1 May 1999.

In its present form, it is based on the 'pillar' model.

Thus the European Union is the common roof over the three pillars, the first of which is composed of the three Communities (EC, ECSC and EAEC). Title V of the EU Treaty, which contains the provisions on a common foreign and security policy is the second pillar, whilst the third pillar is devoted to police and

judicial cooperation in criminal matters, the provisions on which are contained in Title VI of the EU Treaty.

The issue of whether the Union has legal personality is disputed. The prevailing view is been that it was not the will of the Member States to give the Union legal personality.

Expert opinion generally maintains that an international organisation such as the European Union, unlike a nation State, does not have legal personality under international public law nor is it an entity recognised by international public law unless its founders, which are themselves recognised by international public law, confer such personality on it.

While the Treaty establishing the European Community (Article 281, ex 210), the Treaty establishing the European Atomic Energy Community (Article 184) and the Treaty establishing the European Coal and Steel Community (Article 6) contain explicit provisions to this effect, the Treaty on the European Union says nothing on the subject.

Expert opinion also contends that where agreements are concluded by the Council under Articles 24 or 38 of the Treaty on European Union in the sphere of the common foreign and security policy or police and judicial cooperation in criminal matters, the legal effects apply only to the Member States individually and the terms and conditions laid down by national law concerning their conclusion and ratification continue to apply (Article 24, first subparagraph, third sentence, TEU).

From this perspective, the European Union must be seen as a Union of States without legal personality of its own under international public law or domestic law, which, when it takes action at international level, does so on behalf of the Member States.

The lack of legal personality is therefore the **legal expression** of the pillar structure and the divide between the 'Community' and 'intergovernmental' spheres. In practice this legal situation is not usually evident within the Union. Thus in EUR-Lex under the heading of "Community legislation in force" there is for example an 'Agreement between the European Union and the Federal Republic of Yugoslavia on the activities of the European Union Monitoring Mission (EUMM) in the Federal Republic of Yugoslavia'<sup>8</sup>. A similar arrangement exists in private law where, for example, construction firms join up in the form of a 'joint venture' to work on a particular project.

### 1. Consequences of the Union's lack of legal personality

The main consequences of the Union's lack of legal personality are as follows:

- The term '**Union**' used in the EU Treaty **refers to the Member States as a whole**. Those Member States are the only reference as far as rights and obligations under public international law are concerned.
- The Member States defend the Union's interests as agents.
- **The Union has no capacity to take action under public international law**. It cannot therefore in particular conclude agreements, join an international organisation, act as an observer within such an organisation or conduct diplomatic relations.
- The Union cannot be a party to legal proceedings, either actively or passively. Thus, if it fails to fulfil its commitments under public international law, the Member States are liable.
- Because of its lack of legal personality, the Union does not have legal capacity **in the Member States**, nor can proceedings be brought against it in those Member States.
- Going hand in hand with the lack of legal personality, the activities of the Union which are subject to the jurisdiction of the courts are restricted under Article 46 of the EU Treaty. Thus the Court of Justice of the European Communities is not for example authorised to rule on infringements of fundamental rights within

the field of common foreign and security policy.

## 2. Advantages of the Union's having legal personality

These advantages may be put into three categories: the advantages of having legal personality for the purposes of **Union action at international level**, the advantages for **Union citizens** and the advantages for **legal clarity**.

### 2.1 Advantages of legal personality for the purposes of Union action at international level

As the Commission pointed out back in 1995 in its report on the operation of the Treaty on European Union<sup>9</sup>, the pillars of the Treaty are not isolated structures but must be interconnected if the Union is to function as a whole.

However, the general positions adopted by the Council in second pillar matters raise problems in maintaining clear distinctions between the competences and procedures of the Community treaties and those of Title V of Treaty on European Union. Measures taken under Title V, including common positions, are binding on the Member States not only politically but also legally. Measures seeking to achieve the objectives of the Community may not be undertaken legally except pursuant to the Community treaties. The Union Treaty contains no clear provisions allowing the problems of the links between the pillars to be resolved.

These problems are characteristic of a Union designed on a pillar structure. The lack of effectiveness is felt not only in internal decision-making but also in the external representation of the Union. Non-member countries have difficulty in distinguishing clearly the responsibilities of the various parties of the Union and their legal status and respective powers; this problem is exacerbated by the constant change in the composition of the Troika.

The Union is the world's largest trading bloc. It is also one of the major donors of funds for developing countries. At the same time it is one of the largest financial contributors to a number of ongoing processes: the Middle East peace process, humanitarian aid to the countries of the former Yugoslavia, etc. Finally, with the establishment of Economic and Monetary Union, it will become one of the most important monetary areas in the international economy.

However, it is doubtful whether the Union derives the full benefit and influence that it might reasonably expect from its position, in so far as its external action is carried out at parallel levels, on the one hand through traditional negotiation by the Community and, on the other, through the mechanisms of the common foreign and security policy.

In its recent White Paper on European governance<sup>10</sup>, the Commission launched a debate on the issue of how the Union can contribute to the reform of various multilateral organisations and sketched out proposals, within the framework of the next Intergovernmental Conference, to enhance representation of the Union in international forums on the basis of the existing treaties.

All this is laudable and useful. However, it does nothing to alter the fact that, in the medium term, merging the treaties and conferring legal personality on the Union is the only way of increasing the coherence, visibility and effectiveness of Union action at international level.

Only recently Parliament drew attention to areas where greater activity is required of the Union at international level; these spheres go well beyond the 'pillar structure'. In its resolution on the existence of a global system for the interception of private and commercial communications (ECHELON interception system)<sup>11</sup> Parliament regards it as essential that an agreement should be negotiated and signed between the European Union and the United States stipulating that each of the two parties should observe, vis-à-vis the other, the provisions governing the protection of the privacy of citizens and the confidentiality of business

communications applicable to its own citizens and firms<sup>12</sup>. It also calls on the Member States to consider to what extent industrial espionage and the payment of bribes as a way of securing contracts can be combated by means of European and international legal provisions and, in particular, whether WTO rules could be adopted which take account of the distortions of competition brought about by such practices, for example by rendering contracts obtained in this way null and void; it calls on the United States, Australia, New Zealand and Canada to join this initiative<sup>13</sup>.

## 2.2 Advantages for Union citizens

The immediate advantages for Union citizens of the Union having legal personality come into play above all in the third pillar. This is the level at which the Union coordinates the action of the Member States within the context of police and judicial cooperation in criminal matters (Articles 29 et seq. of the EU Treaty). For this purpose, there are legislative powers going to some extent beyond the basic structure of the third pillar which is that of public international law (Article 34 of the EU Treaty). In addition, part of the Schengen *acquis* will become effective as Union law at the level of the third pillar<sup>14</sup>. If there were any intervention affecting fundamental rights in the abovementioned fields, the existence of a European Union having liability might be important for citizens. Hitherto, intervention in the legal sphere of citizens has not however been directly that of the Union because Union law does not produce direct effects in the Member States.

The lack of legal protection within the context of the second pillar which goes hand in hand with the lack of legal personality has already been mentioned above (at the end of paragraph 1).

With regard to the **identity of the Union in the eyes of its citizens**, there is no doubt that its lack of legal personality and the consequences arising therefrom are factors making it difficult for citizens to identify with the Union. The legal personality of the Union would help to 'identify' the 'common home' which the European Union represents. The Union's having legal personality would thus make the treaties easier to understand. It is also a crucial element in any constitutionalisation, if 'constitution' is understood as a set of basic laws establishing, *inter alia*, relations between the citizen and the constituted entity<sup>15</sup>.

## 2.3 Advantages of the Union having legal personality for the purposes of clarity and simplicity of the Union's structure

The controversy over the legal nature of the Union is fostered by a number of ambiguities inherent in the present legal situation. The difficulty in making a distinction between the Community and the Union lies on the one hand in the fact that the main Community institutions, in this case the Council, the Commission and the European Parliament, also take action on the basis of the EU Treaty<sup>16</sup>. Conversely, the European Council, a specific Union institution, also plays a role within the context of the European Community<sup>17</sup>. This institutional overlapping is increased by the fact that pursuant to Article 28(2) et seq. and Article 41(2) et seq. of the EU Treaty, the administrative tasks coming within the common foreign and security policy and the third pillar are financed by the European Community budget, and also by the fact that accession to the European Community and amendments to the Treaty are governed uniformly in respect of all pillars by the EU Treaty<sup>18</sup>.

In its recent report on reform of the Council<sup>19</sup>, our committee points out that within the Council there is not only a complex decision-making procedure, but a wide range of different policy instruments have also been developed for each of the three pillars, namely 18 for the first pillar, five for the second pillar and four for the third pillar. This not only raises questions as to the legal force of policy instruments, but also makes the decision-making procedure even more complicated.

All this shows that the Treaty on European Union presents real structural weaknesses, despite the added value it provides for instance in terms of the parliamentarisation of the political system.



The proliferation of different types of procedure, the result of successive compromises, diminishes the effectiveness of decision-making, makes the Treaty difficult to understand and makes it hard to determine liability.

The highly unsatisfactory provisions relating to justice and home affairs also fall into this category: neither the legal instruments provided, nor the operating structures adopted seem to be an appropriate response to the strong call for coordination in this sphere<sup>20</sup>.

A determined effort to overcome these weaknesses cannot ignore the option of merging the treaties and conferring legal personality on the Union as such, as called for in this motion for a resolution.

The report by the European University Institute in Florence<sup>21</sup>, which confines itself strictly to existing law and consequently glosses over the issue of the Union's having legal personality, provides an essential starting point.

The blueprint advocated in that report was developed in 1995 at Parliament's request by Professor Bieber of the European Centre for Comparative Law at the University of Lausanne<sup>22</sup>.

Professor Bieber rightly points out in his introduction that in the preamble to the 1967 Treaty establishing a single Council and a single Commission of the European Communities (commonly referred to as the 'Merger Treaty'<sup>23</sup>) the Member States had already stated their determination 'to unify the three Communities' and that the aim of unification of the Communities is therefore part of the Community *acquis*.

### 3. Conclusion

If Parliament does not want to depart from the position it has adopted on numerous occasions in the past, there is no doubt that it must advocate giving the Union legal personality.

In its resolution of 2 October 1997 on 'public international law, Community law and the constitutional law of the Member States' Parliament expressly advocated an amendment to the EU Treaty to the effect that the European Union be given legal personality<sup>24</sup>.

This would be a step towards 'constitutionalisation of the Treaties' as described by Parliament in its resolution of 25 October 2000, in which it stated in particular that 'the current treaties should therefore be replaced by a single "framework treaty" which is clear and concise and which provides for the merging of the European Union and the three communities into a single entity; that Treaty would be restricted to fundamental constitutional provisions, covering the objectives of the Union, the protection of fundamental rights, citizenship, the allocation of powers, and institutional matters'<sup>25</sup>.

This resolution was confirmed by the resolution on the Treaty of Nice and the future of the European Union of 31 May 2001<sup>26</sup>, and in particular paragraph 7 thereof, which says that: 'the European Parliament recognises that the Treaty of Nice marks the end of a progression that began in Maastricht and continued in Amsterdam and demands the opening of a constitutional development process culminating in the adoption of a European Union Constitution.'

The approach set out in this report should not be misunderstood: the aim is not to create a European superstate through a big bang of some kind; there is no question of wanting to force the Member States into a federal style Procrustes' bed<sup>27</sup>. The unified Treaty, which would constitute the basic instrument of the European Union, and legal personality, could be framed in a flexible way to encompass traditional Community policies and the new policies of the Union.

Neither does the approach advocated in this report involve the transfer of power to the Union at the expense of the Member States; the latter would, for example, keep their seats and votes in international forums alongside the Union representative.

The sole aim is to help give the Union a structure that is simpler, easier to understand and equal to its tasks.

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To summarise the arguments put forward above, we might therefore state that giving the Union legal personality

- improves the Union's image and its capacity to take action at international level;
- makes it easier for citizens to identify with the Union, helping to 'make it a household name';
- makes the Union's structure clearer and easier to understand;
- and is an essential step towards the 'constitutionalisation' of the Treaties, helping to remedy the dysfunctions caused by the 'pillar structure' by improving coherence between the different European policies.

o o o

20 November 2001

#### **Minority opinion by Mr Georges BERTHU (NI)**

The current institutional structure, which gives the European Community (i.e. first pillar procedures) legal personality and denies such legal personality to action organised by the Member States in second and third pillar matters (police and judicial cooperation, CFSP), is justified by a specific intention, namely to maintain the principle that in the second category of pillars it is the States which are the principal players and, in these spheres, it is the expression of the democratic will within the national framework which must take precedence.

Consequently, unanimous decision-making (subject to 'constructive abstention'), the freedom of choice of States, and hence variable geometry, are the principles that underpin the non-Community pillars.

Granting the European Union legal personality, that is creating an overarching legal framework common to the three pillars, cannot be understood in any other way, despite the cautious wording of the Carnero González report, but as a means of starting to unify the pillars from the top down and eliminating the independent presence of States on the international stage. It would therefore be harmful to democracy which, in this sphere especially is either national or ceases to exist.

The unification of the pillars would open the door to a super-State and would result in considerable inflexibility, when what is necessary is rather to preserve flexibility by maintaining a multiplicity of pillars, and even introducing an 'interparliamentary' pillar (dominated by the national parliaments) between the Community and intergovernmental pillars.

8 November 2001

#### **Opinion of the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy**

for the Committee on Constitutional Affairs

on the European Union's legal personality

(2001/2021(INI))

Draftsman: Armin Laschet

## Procedure

The Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy appointed Armin Laschet draftsman at its meeting of 20 June 2001.

It considered the draft opinion at its meetings of 9 October and 6 November 2001.

At the latter it adopted the following conclusions by 33 votes to 1.

The following were present for the vote: Elmar Brok, chairman; Baroness Nicholson of Winterbourne, and Catherine Lalumière, vice-chairmen; Alexandros Baltas, Bastiaan Belder, Andre Brie, John Walls Cushnahan, Rosa M. Díez González, Robert J.E. Evans (for Raimon Obiols i Germa pursuant to Rule 153(2)), Giovanni Claudio Fava (for Klaus Hänsch), Alfred Gomolka, Bertel Haarder, Glenys E. Kinnock (for Magdalene Hoff), Jan Joost Lagendijk, Cecilia Malmström (for Pere Esteve), Pedro Marset Campos, Hugues Martin, Linda McAvan, Philippe Morillon, Sami Naïr, Arie M. Oostlander, Reino Kalervo Paasilinna (for Emilio Menéndez del Valle), Doris Pack (for The Lord Bethell), Hans-Gert Poettering, Jacques F. Poos, Jacques Santer, Amalia Sartori, Patsy Sörensen (for Daniel Marc Cohn-Bendit), Ioannis Souladakis, Hannes Swoboda, Geoffrey Van Orden, Demetrio Volcic (for Pasqualina Napolitano), Matti Wuori and Christos Zacharakis.

## Short justification

I The current situation in the field of the CFSP

In the current state of European integration, each of the three Communities has a legal personality (Articles 281 of the EC Treaty, Article 6 of the ECSC and Article 184 of the EAEC Treaty). This implies that each Community, as a legal person, may conclude agreements with non-member countries and international organisations (those agreements being binding on the Communities, which will be liable for its performance), be held liable under international law and take actions where their rights are infringed. However, neither the EU Treaty nor the powers and means conferred on the Union by the contracting parties and the founding Treaty endows the European Union with a legal personality. The Union, therefore, has no power of its own and can only achieve its objectives through action taken by the Communities and the Member States, either in accordance with Community law or through action undertaken by the Member States and the Community institutions, in accordance with the rules of Title V or VI of the EU Treaty. For this reason, it is generally assumed that the Union does not have the capacity in real terms to take action under public international law and it cannot therefore conclude agreements (with the exception of the very limited treaty making power recognised in Articles 24 and 38 of the EU Treaty, implying an implicit recognition of a minimal international legal personality to this end in the CFSP and JHA fields), to join an international organisation, act as an observer within such an organisation or conduct diplomatic relations.

II Some arguments in favour of a single legal personality for the Union in the field of the CFSP

### A. More coherence, unity and legal visibility for the CFSP

The most striking consequence of the failure to endow the Union with a legal personality for its external actions is that the international status of the Union as well as its visibility and negotiating power continue to be very limited. At a time when the EU is asserting its global role and gaining in coherence and visibility in political (Mr. PESC), economic (Euro) and even military terms (with the new CESDP), it is clear that the lack of presence in legal terms in the international sphere is dramatically reducing the possibilities for the CFSP as a whole.

## **B. Need for a dramatic improvement in the conclusion by the European Union of international agreements in the field of the CFSP**

Each Community actually has the capacity to conclude agreements (although sometimes only together with the Member States), including multilateral agreements establishing an international organisation. However, as previously stated, the Union only enjoys the very limited treaty making power recognised in Articles 24 and 38 of the EU Treaty. International agreements entered into by the Union are binding on the Member States, and depending on whether a given act of the Union is based on a power of the Communities or of the Member States, those legal persons will be liable for it internationally. This unsatisfactory situation has not significantly changed in Nice. In real terms, that means that the new Treaty continues to totally ignore the EP when agreements are being concluded in the intergovernmental sphere. This is unacceptable, especially in those cases in which the agreements present clear financial implications on the Union's budget.

## **C. Recognising the capacity for the Union to join and act in international organisations**

Each of the Communities (EC, EAEC and ECSC) may actually accede to an international organisation, provided that the statutes of the organisation permit non-states to join. In some instances, the Community has replaced the Member States, but usually it becomes a member of an international organisation alongside the Member States (as in the case of FAO, WTO, etc). A similar approach could now be requested for the Union itself: on the one hand, to assure more coherence and visibility for the CFSP in the relevant fora and on the other, to strengthen the credibility of the Union's external action as a whole. This would seem particularly necessary for those international organisations directly linked to matters covered by the CFSP and the CESDP (and in any case for the United Nation's organs and agencies). To avoid any possible conflict with Member States wishing to preserve their prerogatives in some of those organisations (especially the UN's Security Council), the Union could become a member of those international organisations alongside the Member States.

## **D. Enhancing the international representation of the European Union and its capacity to conduct diplomatic relations**

In matters coming within the CFSP (and Justice and Home Affairs), the current intergovernmental character of the international representation of the Union is totally unsatisfactory. Moreover, endowing the Union with an international legal personality would undoubtedly allow further development of the CFSP by the setting-up of EU diplomatic representations and by creating an EU diplomatic corps. Those two steps would not only provide the Union with some gains in terms of external coherence, unity, visibility and efficiency, but also impact positively on the rights and daily activities of European citizens when living, working or travelling abroad.

## **Conclusions**

The Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy calls on the Committee on Constitutional Affairs, as the committee responsible, to incorporate the following points in its motion for a resolution:

1. Asks for a revision of the EU Treaty to endow the European Union with a single legal personality, i.e. a single internal and international legal personality for the three Communities and the EU; considers this an essential step towards increasing the coherence, visibility and efficiency of the external action of the Union;
2. Considers discussing this question again within the agenda of the Convention and the 2004 IGC, as well as by raising it systematically in any meetings held with a view to the revision of the EU Treaty, as being the best way of achieving that aim;
3. Considers the prior assent of the European Parliament, instead of simple consultation, necessary, before the conclusion of any type of agreement on the European Union's behalf by the Council, especially in those cases in which the agreement presents financial implications on the Union's budget, so as to significantly

improve the role of the Union in the conclusion of international agreements in the field of the CFSP,

4. Declares itself in favour of giving the Union the capacity to join and act in international organisations by becoming a member alongside the Member States of those international organisations directly linked to matters covered by the CFSP and the CESDP, and at least for the United Nation's organs and agencies;
5. Considers that the current responsibilities of the High Representative for the CFSP and the Commissioner for External Relations should be taken over by a single *Commission* vice-president responsible for foreign affairs;
6. Reiterates its demand for the setting-up of EU diplomatic representations in non-member countries, where less than four Member States have diplomatic missions, with a view to the gradual setting-up of an EU diplomatic corps within the structure of the European Commission under the responsibility of the Commission vice-president, in order to enhance the international representation of the European Union as well as the role of the European diplomacy.

14 November 2001

### **Opinion of the Committee on Legal Affairs and the Internal Market**

for the Committee on Constitutional Affairs

on the legal personality of the European Union

(2001/2021(INI))

Draftsman: Ana Palacio Vallelersundi

#### **Procedure**

The Committee on Legal Affairs and the Internal Market appointed Ana Palacio Vallelersundi draftsman at its meeting of 11 April 2001.

It considered the draft opinion at its meetings of 10 July and 11 October 2001.

At the latter meeting it adopted the following conclusions unanimously.

The following were present for the vote: Ana Palacio Vallelersundi, chairman and draftsman; Willi Rothley, first vice-chairman; Ward Beysen, third vice-chairman; Pedro Aparicio Sánchez (for Enrico Boselli, pursuant to Rule 153(2)), Paolo Bartolozzi, Luis Berenguer Fuster (for Maria Berger), Janelly Fourtou, Marie-Françoise Garaud, Gerhard Hager, Malcolm Harbour, Heidi Anneli Hautala, The Lord Inglewood, Kurt Lechner, Klaus-Heiner Lehne, Neil MacCormick, Toine Manders, Luís Marinho, Arlene McCarthy, Manuel Medina Ortega, José María Mendiluce Pereiro (for Carlos Candal, pursuant to Rule 153(2)), Bill Miller, Diana Wallis, Joachim Wuermeling and Stefano Zappalà.

#### **Short Justification**

The questions examined in this opinion do not include the numerous constitutional issues raised by the report, which are considered by the committee responsible but simply relate to the judicial aspects of the Union's legal personality.

When the European Union was created by the Maastricht Treaty, its authors did not recognise the Union's legal personality. The division of powers between the Community and intergovernmental cooperation in various fields meant that the legal nature of the Union was a question which had to take second place.

This results in a real ambiguity in so far as the Communities, which have a legal personality, are encompassed in the Union, which does not. However, the absence of a specific affirmation of the legal personality of an international organisation by the treaty instituting it does not necessarily mean that it does not have one. An organisation with rights and obligations assigned to it by the contracting parties has the capacity to act at international level.

The rapporteur draws attention to the doctrine firmly established under international law, to the effect that the legal personality of an international organisation derives from the characteristics given to it by the contracting parties. At international level, the legal personality derives from the rights and obligations conferred by the contracting parties – as distinct from those of the members of the organisation – which can be accounted for only by a large degree of international personality and the capacity to act at international level <sup>28</sup>.

In this respect, a legal personality is already existent in embryo, made up of elements such as the appointment of a High Representative for Common Foreign and Security Policy and the power to conclude international agreements binding on the Member States.

The merger of the Union with the Communities would lead to an urgent need to clarify existing legal and political complexities arising from the three-pillar structure. It would also help to resolve existing problems concerning the terms of reference of the Court of Justice with regard to the various pillars. It would also enable broader guarantees to be provided concerning citizens' rights established under the Community legal system. For these reasons, the rapporteur takes the view that it is important to guarantee that, whatever legal solution is adopted regarding the European Union – European Communities debate, the basic principles of the Community legal system should not be diluted when the two are brought together.

## Conclusions

The Committee on Legal Affairs and the Internal Market calls on the Committee on Constitutional Affairs, as the committee responsible, to incorporate the following points in its motion for a resolution:

1. Recalls that juristic personality is imputable to an organisation in accordance with the characteristics it has, and that these characteristics depend on the provisions defining the organisation as established by those who come together to form it; hence the question whether personality in international law is imputable to an organisation of states has to be answered in the light of the characteristics it has under the treaties between states which establish it. What determines the issue is whether the organisation is to be considered an entity competent to act in its own name and to bear rights and duties of its own, or does no more than constitute a framework of action by other subjects whose rights and duties are affected by acts and decisions undertaken in the framework of the association;
2. Notes that the European Union has competence to conclude international agreements, and has appointed a High Representative for Common and Security Policy who is empowered to represent the Union as such;
3. Provision having been made under the Treaties of Maastricht, Amsterdam and Nice for the Union gradually to take over the powers assigned to the European Communities and the Western European Union, the Union should be accorded the legal personality granted to the European Communities and the Western European Union by the founding Treaties;
4. Takes the view, nevertheless, that the European Union has legal personality, in so far as the terms of reference of the Union Institutions are established under the TEU, thereby consolidating a new legal system, even though it enjoys only a restricted range of competences in its own name and right;
5. The Treaty on European Union should therefore be amended to recognise the full legal personality of the Union, with provision made in any case for including this principle in the new European Constitution;

6. In exercising the rights and obligations deriving from recognition of this legal personality, existing Community legislation will be applicable, as applied and interpreted by the Court of Justice, together with the powers already assigned in this field to the different Community institutions, including the European Parliament; furthermore, any powers assigned to the Union must be made subject to a power of the European Parliament, so as to ensure full democratic legitimacy, and to control by the Court of Justice;

7. Stresses that the merger between the Communities and the Union must not undermine the characteristics and fundamental principles of Community law and legal monitoring by the Court of Justice, all of which must continue to form part of the Union's legal system.

<sup>1</sup> OJ C 151, 19.6.1995, p. 56.

<sup>2</sup> OJ C 371, 8.12.1997, p. 99.

<sup>3</sup> OJ C 189, 7.7.2000, p. 222.

<sup>4</sup> OJ C 309, 27.10.2001, p. 85.

<sup>5</sup> OJ C 40, 7.2.2001, p. 409.

<sup>6</sup> OJ C 197, 12.7.2001, p. 186.

<sup>7</sup> Texts adopted, point 4.

<sup>8</sup> OJ L 125, 5.5.2001, p. 2-4.

<sup>9</sup> SEC(95) 731, 10.5.1995.

<sup>10</sup> COM(2001) 428, 25.7.2001, paragraph 3.3.

<sup>11</sup> A5-0264/2001, 5.9.2001, Minutes PE 308.751, p. 45.

<sup>12</sup> A5-0264/2001, 5.9.2001, Minutes PE 308.751, paragraph. 9.

<sup>13</sup> A5-0264/2001, 5.9.2001, Minutes PE 308.751, paragraph. 19.

<sup>14</sup> See Protocol (No 2) integrating the Schengen acquis into the framework of the European Union. As long as the rules governing the Schengen Information System have not been transferred to the first pillar, they must be regarded as Union legislation based on the third pillar (Article 2 of the abovementioned Protocol).

<sup>15</sup> See also Article 1(2) of the EU Treaty.

<sup>16</sup> See Article 5 of the EU Treaty. With regard to the field of the common foreign and security policy, Article 28(1) of the EU Treaty governs the application of the institutional provisions of the EC Treaty concerning the EP, the Council and the Commission, and with regard to the third pillar, Article 41(1) of the EU Treaty. Article 46 of the EU Treaty defines the powers of the Court of Justice of the European Communities in relation to certain provisions of the EU Treaty.

<sup>17</sup> See Article 99(2) of the EC Treaty and Article 128 of the EC Treaty.

<sup>18</sup> See Articles 48 and 49 of the EU Treaty.

<sup>19</sup> Poos report, A5-0308/2001, 17.9.2001, paragraph 4 of the motion for a resolution.

<sup>20</sup> See conclusions of the Commission's 1995 report, op. cit. p. 74.

<sup>21</sup> A unified and simplified model of the European Communities Treaties and the Treaty on European Union in just one Treaty, European Parliament, Working Papers W-9,10 - 1996.

<sup>22</sup> Draft consolidated Treaty of the European Union, European Parliament, Working Papers W-17, 1995.

<sup>23</sup> OJ 152.13.7.1967.

<sup>24</sup> Paragraph 16 of the resolution, A4-0278/1997.

<sup>25</sup> Paragraph 4 of the resolution, A5-289/2000.

<sup>26</sup> Resolution A5-0168/2001 on the basis of the Méndez de Vigo/Seguro report of 3 May 2001.

<sup>27</sup> Expression used by Stefan Oeter in 'The remarkable nature of treaties', Frankfurter Allgemeine Zeitung, 6.9.2001.

<sup>28</sup> International Court of Justice, advisory opinion of 11 April 1949, reparation for injuries suffered in the service of the United Nations, Reports 1949, p. 181. A summary is available on the Internet site [www.icj-cij.org/cijwww/cdecisions/csummaries/cisunsommaire490411.htm](http://www.icj-cij.org/cijwww/cdecisions/csummaries/cisunsommaire490411.htm).