… BUT HAVEN'T WE MET BEFORE? A BRIEF ENCOUNTER WITH THE "NEW" EUROPEAN UNION, ITS (INTERNATIONAL) LEGAL PERSONALITY AND TREATY MAKING POWERS UNDER THE TREATY OF LISBON

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Abstract: This article explores the concept of European Union's legal personality, as conferred by the Treaty of Lisbon, and its impact on the external relations of the Union, focusing on the treaty making powers and procedures. It starts with a brief description of the legal personality of the European Community and the implied legal personality of the Union prior to the Treaty of Lisbon, then it looks at the proposed creation of a "brave new Union" in the failed Constitutional Treaty and finally analyses the arrangements brought by the Treaty of Lisbon and the measures undertaken to ensure the succession of the Union in external relations. The new treaty making powers of the post-Lisbon Union are considered in detail, as well as the principle of continuity regarding legal effects of certain agreements concluded before the entry into force of the Treaty of Lisbon.

Resumé: Tento článek zkoumá koncept právní subjektivity Evropské unie, zakotvené Lisabonskou smlouvou, a její dopady na vnější vztahy Unie, se zaměřením na pravomoci a postupy pro sjednávání mezinárodních smluv. Na úvod je stručně popsána právní subjektivita Evropského společenství a implikovaná právní subjektivita Unie před Lisabonskou smlouvou, následně je zkoumán návrh na vytvoření „nové" Unie v neschválené Ústavní smlouvě a konečně je podrobena analýze úprava obsažená v Lisabonské smlouvě a opatření přijatá k zajištění sukcese Unie v mezinárodních vztazích. Podrobně jsou zkoumány nové pravomoci pro sjednávání mezinárodních smluv a rovněž princip kontinuity ve vztahu k účinkům některých smluv uzavřených před vstupem Lisabonské smlouvy v platnost.

Key Words: Treaty of Lisbon, European Union, European Community, EU legal personality, external relations, treaty making powers, international treaty, EU international agreements, succession, legal effects, principle of continuity, EU external competence, common foreign and security policy, Constitution, ratification.

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1. Introduction

The Treaty of Lisbon[2] entered into force on 1 December 2009. As of that day, the European Community "has ceased to be, expired and gone to meet its maker"[3] and was replaced and succeeded by the European Union (hereinafter as the "Union"), as stipulated in Art. 1(3) of the Treaty on European Union (as amended by the Treaty of Lisbon, hereinafter as the "TEU").[4] But did the Treaty of Lisbon create a "new" Union, or did it merely amend the existing Union (based on the TEU in the "pre-Lisbon" version) and incorporated the European Community into it? In other words, is the current Union just an amended and upgraded version of the pre-Lisbon Union, or has there been a completely fresh start and the new post-Lisbon Union with an explicitly conferred legal personality[5] has also replaced the former Union, originally created by the Treaty of Maastricht?[6] And does it really matter, both in theory and practice?

I think that it matters indeed and therefore I will try to explore these questions and look at the impact of the Union's legal status on its external relations, focusing on the treaty making powers and procedures. In turn, we shall briefly describe the legal personality of the European Community and the implied legal personality of the Union prior to the Treaty of Lisbon, then we shall look at the proposed creation of a "brave new Union" in the failed Constitutional Treaty,[7] we shall further explore

[2] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Official Journal C 306 of 17 December 2007).

[3] To use just a couple of phrases aptly describing the state of "non-existence" in the famous Monty Python's "Dead Parrot Sketch".

[4] If not stated otherwise, the "TEU" will refer to the post-Lisbon version of the Treaty.

[5] Art. 47 TEU boldly states: "*The Union shall have legal personality.*"

[6] Treaty on European Union, signed at Maastricht, 17 February 1992 (Official Journal C 191 of 29 July 1992).

[7] Treaty establishing a Constitution for Europe, signed at Rome, 29 October 2004 (Official Journal C 310 of 16 December 2004).

the arrangements brought by the Treaty of Lisbon and the measures undertaken to ensure the succession of the Union in external relations and finally, we shall look at the new treaty making powers and impacts on certain agreements concluded before the entry into force of the Treaty of Lisbon.

II. Legal personality of the Union prior to the Treaty of Lisbon

The legal personality of the European Community (as well as the European Atomic Energy Community – EAEC)[8] was a fairly straightforward and uncontested matter. Art. 281 of the Treaty establishing the European Community (hereinafter as the "TEC")[9] stipulated: "*The Community shall have legal personality.*" This created a solid legal basis for the Community to act in external relations, conclude international agreements and become a member of various international organisations.

The issue of (international) legal personality of the Union in its "pre-Lisbon" form, on the other hand, was quite a different matter and its status was somewhat doubtful. It might be argued that since the "pre-Lisbon" Union did not have an explicit legal personality conferred by the TEU, it could not have been regarded as a proper subject of international law capable of acting in international relations. However, such opinion seems to be hard to defend, especially after the Treaty of Amsterdam[10] introduced new Art. J.14 and K.10 TEU[11] and thus conferred express treaty making powers on the Union, albeit remaining silent on the legal personality issue. Therefore, even though it is true that the "pre-Lisbon" TEU did not explicitly confer the (international) legal personality on the Union, it can be persuasively argued that the Union enjoyed an implied legal personality, further confirmed by the international treaty practice.[12] The Union fulfilled all the criteria for an implied legal personality, as set out by the International Court of Justice. The conditions

[8] The status of the EAEC is very similar to the status of the EC, nevertheless, the EAEC tends to be often overlooked. We shall follow this disgraceful practice and will not discuss the EAEC here. Suffice it to say that its Art. 184 states that "*The Community shall have legal personality*."

[9] Treaty establishing the European [Economic] Community, signed at Rome, 27 March 1957, as amended (consolidated text published in Official Journal C 321E of 29 December 2006).

[10] Treaty of Amsterdam, amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related Acts, signed at Amsterdam, 2 October 1997 (Official Journal C 340 of 10 November 1997).

[11] Renumbered as Art. 24 and 38 TEU according to Art. 12 of the Treaty of Amsterdam.

[12] According to Jean-Claude Piris, by the date of entry into force of the Lisbon Treaty, the European Union has concluded about one hundred international agreements on the basis of Art. 24 and 38 TEU (in the pre-Lisbon version). See Piris, J.-C.: *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge University Press, 2010, p. 86. By way of example, agreements concluded with the U.S.A included *Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by carriers to the United States Department of Homeland Security (DHS)* (OJ 2007 L204/18); *Agreement between the European Union and the Government of the United States of America on the security of classified information* (OJ 2007 L115/30); *Agreement on mutual legal assistance between the European Union and the United States of America* (OJ 2003 L181/34); *Agreement on extradition between the European Union and the United States of America* (OJ 2003 L181/27).

for implied legal personality were set out by the International Court of Justice (hereinafter the "ICJ") as follows:

> "*In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.*"[13]

To conclude this section, we can reiterate three sets of criteria that must be met by international organisations in order to possess international legal personality, as summarised by Ian Brownlie:[14]

1. A permanent association of states, with lawful objects, equipped with organs.
2. A distinction, in terms of legal powers and purposes, between the organisation and its members.
3. The existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.

If we look at the Union (at least after the Treaty of Amsterdam) and its aims (objectives), composition, institutional structure and treaty making powers, it seems beyond any doubt that it fulfills all of the above criteria and thus represents an organisation with an international legal personality.[15] We shall later see that this is of particular importance for the continuity of the Union after the Treaty of Lisbon, which did not create a "new" Union, but merely amended and reshaped the existing one. So already at this stage we can give away a partial answer to the title question: "Yes, we have met before."

III. Creating a new Union under the Constitutional Treaty

It might be useful to point out in this context that the issue of succession was approached quite differently in the Constitutional Treaty. Under its concept and grand scheme of things, the newly established Union was supposed to be a successor of both the European Union and the European Community, as explicitly stated in Art. IV-438(1) of the Constitutional Treaty: *"The European Union established by this*

[13] See its Advisory Opinion of 11 April 1949 on the legal personality of the United Nations – *Reparations for injuries suffered in the service of the United Nations* case, I.C.J. Reports (1949), p. 179.

[14] Brownlie, I.: *Principles of Public International Law*, Oxford University Press, 2003, p. 651.

[15] For a concise analysis of legal theories on international legal personality and the implications for the pre-Lisbon Union, see Verwey, D.R.: *The European Community, the European Union and the International Law of Treaties*, T.M.C. Asser Press, 2004, pp. 66-71, where the author concludes: "*Still, as stated before, the conclusion of a number of international agreements on the basis of Article 24 TEU has rendered the debate [on international legal personality] moot. The Member States have accepted that the Union has legal personality. Similarly, the practice of third countries and international organisations make it clear that as far as they are concerned the Union has legal personality.*" (p. 71)

Treaty shall be the successor to the European Union established by the Treaty on European Union and to the European Community." In terms of the Constitutional Treaty, it was clearly stated that both entities – the European Union and the European Community – were to be replaced and succeeded by a new entity with a distinct (international) legal personality, namely the European Union established under Art. I-1(1) of the Constitutional Treaty.

Despite the fact that the Constitutional Treaty represented a different approach to the issues of succession and attempted for a "fresh start", the fact that the new Union was intended to become a successor of the former Union established under the pre-Lisbon TEU further proves our assertion that the pre-Lisbon Union possessed a legal personality. Otherwise it would be hard to imagine how a new entity with an expressly conferred legal personality could possibly become a successor of an entity which did not have any legal personality.

The Constitutional Treaty thus attempted the same result as the Treaty of Lisbon – namely a Union with expressly conferred legal personality, but approached the issue of succession differently. In any event, the answer to the title question with regard to the failed Constitutional Treaty would be: "No, I believe we have not met, but I might seem strangely familiar…"

IV. The Union under the post-Lisbon TEU

The Treaty of Lisbon represented a different concept regarding the legal personality of the Union, with the High Contracting Parties striving to distinguish it from the Constitutional Treaty. It merely amended the existing Treaties (TEU and TEC), whereas building on the Union under the "pre-Lisbon" TEU as the starting point. Art. 1(3) TEU states:

> "*The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value.* ***The Union shall replace and succeed the European Community.***" (emphasis added)

As already explained above, the Union is not a new creation under the Treaty of Lisbon. Although nowhere to be explicitly stated in the Treaty of Lisbon, the term "Union" must be interpreted as not being only the legal successor of the European Community, but at the same representing the amended "pre-Lisbon" Union, thus ensuring the necessary continuity. The "Union" within the meaning of Art. 1(3) TEU is an entity with an expressly conferred legal personality,[16] succeeding the European Community (which it explicitly "*replaces*"), but at the same time it is based on the "pre-Lisbon" Union.

To support this argument, it is essential to take into account the wording of Art. 3(1) TEU (in the pre-Lisbon version), which stated: "*The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation*

[16] See Art. 47 TEU: "*The Union shall have legal personality.*"

established by this Treaty." Hence the former Union (in the pre-Lisbon situation comprising only the CFSP and JHA Pillars) continues to exist, albeit amended by the Treaty of Lisbon which effectively removed the European Community as one of the Union's pillars and incorporated it into the amended Union within the meaning of Art. 1(3) TEU. This ensures the continuity of the Union in the external relations and safeguards proper succession in terms of international law.

To give a proper effect to Art. 1(3) TEU, the succession of the amended Union into the previous legal obligations had to be duly notified to all countries and international organisations which were parties to past agreements concluded by the European Community/Union. To this end, a document titled "*Draft notification to third parties before the entry into force of the Treaty of Lisbon*"[17] was submitted by the Swedish Presidency of the Council, which outlined two template notifications: (a) to a third state; (b) to an international organisation. The fundamental message in both types of notifications consisted of an announcement that the Treaty of Lisbon had entered into force and a statement that "*as from that date the European Union will exercise all rights and assume all obligations of the European Community whilst* ***continuing to exercise existing rights and assume obligations*** *of the European Union.*" (emphasis added) The notifications were then communicated to the relevant parties in order to ensure continuity and transparency in legal obligations arising from the respective international agreements.

By way of example, on 9 February 2010 the Council deposited with International Civil Aviation Organization (ICAO) a note verbale referring to the entry into force of the Treaty of Lisbon, and stating: *"As a consequence, as from 1 December 2009, the European Union has replaced and succeeded the European Community … and has exercised all rights and assumed all obligations of the European Community* ***whilst continuing to exercise existing rights and assume obligations of the European Union.****"* (emphasis added) The note further stated "*that, as from 1 December 2009, the European Community has been replaced and succeeded by the European Union in respect of the Convention for the Unification of Certain Rules for International Carriage by Air for which the International Civil Aviation Organization is the depositary and to which the European Community, replaced from 1 December 2009 by the European Union, is a contracting party.*"[18]

As is clear from the wording of the notifications, the Union under the Treaty of Lisbon continued to exercise existing rights and assume [existing] obligations, which had come into existence prior to the entry into force of the Treaty of Lisbon. The Union could continue to do so due to a simple fact: it continued to exist under the international law, with one significant amendment – it finally received a formal assurance from the High Contracting Parties in Art. 47 TEU that it possessed a legal personality, an "internal" confirmation of the implied legal personality which has

[17] Document of the Council No. 16654/1/09 REV 1 of 27 November 2009.

[18] ICAO document Status of the European Union With Regard To International Air Law Instruments, p. 1, available at: http://www.icao.int/icao/en/leb/StatusForms/european_union_en.pdf.

been already widely recognised externally by all the third parties to international agreements concluded by the Union so far.[19] Despite the wide recognition and treaty practice, Art. 47 TEU still has a significant constitutional and symbolic value:

> "*The explicit affirmation of the Union's legal personality by the Treaty of Lisbon would, however, have positive consequences for the overall transparency of the Union's constitutional system, both towards its citizens and toward 'the wider world'.*"[20]

V. Treaty making powers of the post-Lisbon Union

The explicit conferral of an international legal personality on the Union and dismantling of the EU "Temple" based on the pillar structure had significant consequences for the Union's external affairs, namely for negotiating international agreements. After the Treaty of Lisbon, it is not required anymore to make distinction between the agreements concluded by the European Community (1st pillar), which already had legal personality under the TEC, and agreements in the 2nd (Common Foreign and Security Policy – CFSP) and 3rd (Justice and Home Affairs – JHA), where special procedures were applicable.

The key provision on international agreements is Art. 216 TFEU, which represents „material" provision / legal basis providing the conditions under which the Union has external competence, thus extending the EU internal competences to legislate in areas given in the Treaties. This provision is a codification of the implied external powers doctrine, originating in the famous European Court of Justice's (ECJ) judgement *AETR*.[21] Art. 216 TFEU reads:

> *„The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."*

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[19] It should be stressed that from the point of international law, the Treaty of Lisbon (or any other treaty, for that matter) cannot grant an **international** legal personality, and whether the legal personality of an international organisation will be recognised not only among the members of such organisation, but on the international level, is a matter of international law. However, as Geert De Baere remarks, this point is probably only of academic interest regarding the Union, since "*[T]he EU would seem to posses all the characteristics necessary for the international legal system to regard it as an international legal person. Indeed, international agreements have already been concluded in the name of the EU with third countries and international organizations, which could be said to indicate the will of at least part of the 'international legal community' to regard the EU as a legal person.*" De Baere, G.: *Constitutional Principles of EU External Relations*, Oxford University Press, 2008, pp. 144-145.

[20] Ibid., p. 146.

[21] ECJ judgement of 31 March 1971 in case 22/70 *AETR* [1971] ECR 263. In this judgement the ECJ stated that if there exists an internal Community competence to regulate the relevant field, it implies, in order to promote the aims stipulated by the founding Treaties, external competence to act on behalf of the Community in matters falling within this field with regard to third countries (theory of parallelism of internal and external powers, *implied powers*).

Art. 216 TFEU is supplemented by Art. 3(2) TFEU, which is included in Title I (Categories and Areas of Union Competence) and stipulates the exclusive external competence to conclude an international agreement: "*The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.*" This is a specific provision (*lex specialis*) in relation to Art. 216 TFEU; Art. 3(2) TFEU states the conditions for the Union's exclusive competence, whereas the scope of the Art. 216 TFEU is wider and includes all situations where a Union competence may be established, but not necessarily being of an exclusive nature. It applies also in the area of shared competence between the Union and its Member States, where these subjects stand alongside each other as one contracting party of the concluded agreement.

The legal basis for CFSP agreements is to be found in Art. 37 TEU, according to which the Union may conclude agreements in the area of CFSP.

For the procedure of negotiating international agreements, the "procedural" provision of Art. 218 TFEU shall be used, containing procedure taken to a large extent from the TEC. There are no significant changes in this area, apart from more involvement of the European Parliament, which corresponds to the overall increase in importance of this EU institution. The important thing, nevertheless, is the unification and clarification of the procedure: since it is now only the Union which acts in external relations, international agreements are also explicitly concluded by the Union (or by the Union and Member States in case of "mixed agreements") and according to Art. 216(2) TFEU, "*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.*"[22]

The above quoted provision of Art. 216(2) TFEU is a particularly welcome clarification and codification of the previous practice of concluding agreements under CFSP and JHA pillars,[23] where Art. 24(1) TEU (pre-Lisbon) stipulated that the "*agreements shall be concluded* ***by the Council*** *on a recommendation from the Presidency.*" (emphasis added) This wording initially gave rise to discussions and speculations as to the position of the Union as a contracting party, since the agreements were arguably to be concluded by the Council as an institution, and not the Union itself. As a consequence, it was also not entirely clear who should be bound by such agreements, whether it is the Council, or the Union, or the Union and the Members States? According to some views, the Union was not entitled to conclude the agreements, and the Council was merely acting on behalf of Member States.[24]

[22] It should be, however, noted at this point that Art. 218 TFEU still contains certain procedural deviations for CFSP agreements, since this area remains subject to specific provisions under Title V, Chapter 2 TEU and thus representing, to a certain extent, a "hidden" pillar from the pre-Lisbon structure.

[23] Under Art. 24 and 38 TEU (in the pre-Lisbon version).

[24] For a more detailed description of different legal issues surrounding the Union's treaty practice under CFSP and JHA pillars, see e.g. Verwey, D.R., supra note 15, pp. 71-77.

Despite these initial doubts, the Union's treaty practice confirmed its position as a contracting party to CFSP and JHA agreements, and this practice was expressly recognised and incorporated in the Treaty provisions by the Treaty of Lisbon.

It is also worthwhile mentioning that in comparison with the previous situation, the Treaty of Lisbon does not retain the provision of [ex] Art. 24(5) TEU, which enabled Member States, with regard to CFSP and JHA agreements, to make a reservation of compliance with the requirements of domestic constitutional procedure.[25] It seems to be a logical consequence of expressly conferring the international legal personality of the Union, abolishing the pillar structure and transfer of competence in these areas, which represents a certain departure from the intergovernmental cooperation. It is obvious that in the area of fully "communitarised" JHA Pillar, a reservation of compliance with domestic constitutional provisions would contradict the notion of negotiating international agreements by the Union within the sphere of transferred competence, provided such competence is of exclusive nature.[26] In the area of CFSP, regarding its specific nature, other control mechanisms from the Member States (especially their Parliaments) should be applied, which, however, must not prevent effective and flexible external actions of the Union.

At this point, it might be useful to illustrate the effects of the Union's single legal personality and the treaty making power for CFSP agreements contained in Art. 37 TEU on the example of applicable domestic procedures in the Czech Republic. The procedures regarding CFSP and JHA procedures were based on the presumption that since the pre-Lisbon Union did not have an expressly conferred legal personality and the Member States had not transferred the necessary treaty

[25] Although the national ratification procedures of certain agreements were quite lengthy and cumbersome, some commentators highlighted a very important aspect: the approval in national parliaments of (certain) CFSP or (more often) JHA agreements could be actually regarded as a compensation for lack of any formal involvement by the European Parliament, which was left out completely from the EU approval procedure. As Piet Eeckhout pointed out: „*In light of the absence of any formal role for the European Parliament in the conclusion of Article 24 agreements, a Member State which is concerned about the content of an Article 24 agreement, from the perspective of individual rights for example, could make use of paragraph (5) and require that the agreement be approved by the national parliament.*" (Eeckhout, P.: *External Relations of the European Union: Legal and Constitutional Foundations*, Oxford University Press, 2004, p. 184).

[26] Under the Treaty of Lisbon, Justice and Home Affairs will be subject to uniform legislative procedure, as well as uniform procedure for negotiating international agreements. However, reservation of internal ratification will still be relevant concerning those JHA agreements which will fall under shared competence of the EU and its Member States. In the Czech Republic, ratification will be applicable only to the category of "presidential" agreements which are subject to the Parliament's consent (in both Chambers) and ratified by the President. These are agreements whose subject matter is outlined in Art. 49 of the Act No. 1/1993 Coll., Constitution of the Czech Republic, as amended (hereinafter as the "Czech Constitution"), namely: (a) affecting the rights or duties of persons; (b) of alliance, peace, or other political nature; (c) by which the Czech Republic becomes a member of an international organization; (d) of a general economic nature; (e) concerning additional matters, the regulation of which is reserved to statute. In other words, the involvement of the Parliament reflects the political and legal importance of these types of agreements.

making competence on the Union,[27] those agreements should be regarded as if they were agreements concluded by the Czech Republic.[28] This approach meant that the draft CFSP and JHA agreements were classified according to the constitutional rules as if they were standard international agreements concluded by the Czech Republic, i.e. as "ministerial", "governmental" or "presidential" agreements, and if in the last category, they were subject to standard procedure of parliamentary approval and by ratification by the President.[29]

With the Union's single legal personality and the removal of pre-Lisbon Art. 24(5) TEU the domestic procedures must be revised to reflect the new constitutional reality. All Union's international agreements are now to be concluded by the Council on behalf of the Union, and from the point of the Czech Constitution this represents an exercise of powers transferred to the Union within the meaning of Art. 10a of the Czech Constitution.[30] The newly proposed procedure, which has already been extensively discussed with the Parliament and now awaits the formal approval of the Government, makes the respective agreements binding on the Czech Republic only by virtue of the Council's decision on their conclusion, without any formal requirement of national ratification procedure. At the same time, the Parliament will be properly informed and will have an opportunity to exercise its scrutiny rights,[31] with a possibility to submit its opinions on the draft agreements to the government in a timely manner. Once the new concept is approved and implemented in practice, the procedure then should be in full compliance with the amendments introduced by the Treaty of Lisbon.

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[27] The whole concept was based, to a large extent, on the (rather unfortunate) Declaration (No 4) on Articles 24 and 38 of the Treaty on European Union, which provided: "*The provisions of Articles 24 and 38 of the Treaty on European Union and any agreements resulting from them* ***shall not imply any transfer of competence*** *from the Member States to the European Union.*" (emphasis added)

[28] *Governmental Guidelines on Negotiations and Internal Scrutiny Procedures of International Agreements within the European Union*, approved by the resolution of the government No. 6 of 9 January 2008. The approach described above was not uncontested and the Ministry of Foreign Affairs as the authority responsible for the *Guidelines* originally proposed a solution respecting more the Union's autonomy in CFSP and JHA treaty making powers in 2006, but the adopted text was the outcome of a workable compromise reached with the Parliament and the Office of the President.

[29] For the concept of "presidential agreements" under the Czech Constitution, see note 26 supra. "Ministerial" agreements are those which can be concluded by the respective minister acting individually; the "governmental" agreements are those which can be concluded by the government acting jointly, but without parliamentary approval.

[30] Art. 10a of the Czech Constitution stipulates: *"Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution."*

[31] Within the meaning of Art. 10b of the Czech Constitution, which states: *"(1) The government shall inform the Parliament, regularly and in advance, on issues connected to obligations resulting from the Czech Republic's membership in an international organization or institution. (2) The chambers of Parliament shall give their views on prepared decisions of such international organization or institution in the manner laid down in their standing orders."*

VI. Legal effects of certain agreements concluded prior to the Treaty of Lisbon

With regard to the legal effects of the international agreements concluded under Art. 24 and 38 TEU (in the pre-Lisbon version), it follows from our concept of continuity between the pre-Lisbon and post-Lisbon Union that the legal effects of those agreements are fully safeguarded, since the Union which concluded them as one of the contracting parties continues to exist. Therefore we do not find any explicit and direct stipulation to this effect in the Treaty of Lisbon, because it would be simply redundant and stating the obvious.

However, the legal effects of those agreements are confirmed indirectly. In this respect, it should be stressed that those agreements were concluded by Council decisions, i.e. by acts of one of the Union's institutions.[32] Such acts of the Council must be held for valid and applicable, since they are no doubt covered by Art. 9 of the Protocol (No 36) on Transitional Provisions, attached to the Treaty of Lisbon, which stipulates: "***The legal effects of the acts of the institutions****, bodies, offices and agencies* ***of the Union adopted on the basis of the Treaty on European Union*** *prior to the entry into force of the Treaty of Lisbon* ***shall be preserved*** *until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union.*" (emphasis added) It clearly follows that the "post-Lisbon" *acquis communautaire* encompasses all acts of the Union's institutions, including the acts on conclusion of international agreements, which have full legal effects until the point in time when such acts have been repealed, annulled or amended.

The issue of legal effects of certain Union's agreements is certainly not only a theoretical problem, but naturally has practical consequences. Most recently it was discussed in the context of drafting the Treaty on Accession of Croatia to the European Union, regarding the provision of the draft Treaty on Accession stipulating that Croatia is to be bound by "*agreements concluded or provisionally applied by the Union (…)*". The problem arose whether a specific reference to the agreements based on Art. 24 and 38 TEU (pre-Lisbon) is required, whereas the term "Union" in the draft Treaty on Accession might possibly refer to the post-Lisbon Union only, thus excluding Art. 24 and 38 TEU agreements. The issue was clarified, with assistance of the Council's Legal Service, precisely by reliance on the concept of continuity of the Union, and no specific reference to Art. 24 and 38 TEU was deemed to be necessary.

[32] It is useful to recall in this context that according to the settled case-law of the European Court of Justice, the international agreements concluded by the European Community (or by analogy the Union) became integral part of the Community legal order because they were concluded by **acts of Community's institutions**, thus having a legal status similar to other acts of Community law. See judgements of the European Court of Justice in cases 181/73 *Haegeman* [1974] ECR 449, 270/80 *Polydor* [1982] ECR 329 and 104/81 *Kupferberg* [1982] ECR 3641.

VII. Conclusion

In our brief encounter with the "new" Union under the Treaty of Lisbon, we have seen that the Union is formally still the same Union as we used to know it in pre-Lisbon times. Having said that, it is a significantly amended and upgraded version of that Union, possessing a single legal personality which hopefully will end all speculations about its status in international relations. More importantly, the legal personality comes hand in hand with the TEU and TFEU provisions on the Union's treaty making powers, which will have, *inter alia*, impact on the domestic approval procedures in certain Member States (we have briefly mentioned the changes to be introduced in the Czech Republic). The old dilemma,[33] whether in CFSP and JHA affairs the Council acted on behalf of the Union or on behalf of the Member States, has ceased to exist for good – it is now the Union concluding international agreements and exercising rights and assuming obligations from them.[34]

So the complete answer to the title question would be: "Yes, we have met before. I have changed a lot since Maastricht and Amsterdam, but apparently not beyond recognition…"

[33] Stemming from the enigmatic wording of [ex] Art. 24 TEU.

[34] Of course, it must be borne in mind that there is still room for "mixed agreements" concluded jointly by the Union and Member States, in which case they share the rights and obligations according to the division of competences between the Union and Member States.