



The End of the ECSC
Benedetta Ubertazzi
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Abstract
This paper studies the end of the ECSC and the events related to it. Particularly, in the silence of the ECSC Treaty, the paper analyses how these questions have been regulated by the creators of the Community system: the Member States. The paper takes into consideration the relevant set of rules which created a bridge, allowing for the survival of the legal relationships based upon the ECSC Treaty in different fields under a regulatory and administrative umbrella created under EC Treaty, and under the general rules established by it. Finally the paper will juridically qualify the transfer of legal relationships between the ECSC and the EC in the international legal order and in the internal system of each member States, with a particular attention to the Italian one.
Kurzfassung
Dieser Aufsatz befaßt sich mit dem Ende der EGKS und den damit in Verbindung stehenden Ereignissen. Insbesondere wird analysiert, wie die vorliegende Problematik von den Gründern der EG, den Mitgliedsstaaten, behandelt wird. Außerdem werden die wichtigsten Rechtssätze betrachtet, die eine Verbindung zwischen der EGKS und der EG hestellten und ein Bestehenbleiben der Rechtsbeziehungen ermöglichen, die auf dem EGKS-Vertrag gründen, der in verschiedenen Feldern unter einem regulativen und administrativen Schutz des EG-Vertrages kreiert und unter dessen generellen Regeln erlassen wurde. Abschließend wird in diesem Aufsatz die rechtliche Übertragung von Rechtsbeziehungen zwischen der EGKS und der EG sowohl in Bezug auf die internationale Rechtsordnung als auch in Bezug auf die nationalen Rechtssysteme der einzelnen Mitgliedsstaaten juristisch bewertet, wobei dem italienischen Rechtssystem dabei besondere Beachtung geschenkt wird.
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Introduction [↑]

On July 23, 2002, the Treaty establishing the ECSC expired.⁽¹⁾ This event is of certain importance, because it represents the lowering of the flag on the first of the European Communities, because it inserts itself into the ongoing reorganization and unification process of the internal structure of the European Union and because it places the problem of the death or not of the international organization into international law.⁽²⁾ It is therefore worth the effort to synthetically reconstruct in this first part of the article the different rules adopted by the various acts relating to the event.

The institution of the ECSC was established by certain States with the Treaty of Paris (1951).(3) The birth of the ECSC was followed a few years later by the establishment of the EEC and EURATOM with the Treaties of Rome of 1957. The Member States wanted the institutions of the three Communities to be united: they therefore decided, with the 1965 Treaty of Brussels,(4) to exercise through the Commission also the functions first attributed to the High Authority of the ECSC. This Treaty furthermore established that the competent Ministers periodically convene to determine coal and steel policy. Instead, they were born as common the Assembly (which became the European Parliament), the Court of Justice, and the Court of Auditors.(5) The States then redefined the composition and manner of functioning of the united community institutions, first of all with the 1986 Single European Act, successively with the 1992 Treaty of Maastricht, which instituted the European Union, then with the Treaty of Amsterdam, and, finally, with the Treaty announced at Nice in December 2000 and signed in February 2001.(6)

Until this “end”, the States operated through the EC, the ECSC, and the EURATOM. The Member States of these three Communities were, nevertheless, the same. The institutions of these organizations functioned based on partially different rules according to the sector of intervention: sector of EC’ authority, or respectively of ECSC’ and of EURATOM’. The institutions were, nevertheless, the same (save for the Consultative committees of the three Community organizations that remained separate). In synthesis, the three Communities masked the presence of “a single form of aggregation”.(7)

According to art.97 of the Treaty establishing the European Coal and Steel Community, “the Treaty is concluded for a period of 50 years of its entry into force”.(8) Like all international treaties, that of the ECSC could also be timely extended by its Member States. With the resolutions “of the Council and of the Representatives of the Governments meeting within the Council”, of July 20, 1998 and of June 21, 1999,(9) the Member States nevertheless decided not to renew the ECSC Treaty, as they wanted instead to continue operating in the Coal and Steel sectors through the EC.

In any case, the Treaty of ECSC did not explicitly regulate its own end and the events related to it. Here, it is then useful to observe how these questions were regulated by the creators of the Community system: the Member States.

1. The Acts upon the « end » of the ECSC [↑]

1.1. Financial resources and assets

The budget of the ECSC originally regarded the revenues and expenditures of the administration of its institutions. These balance sheet items constituted the “administrative budget” of the ECSC. The budget of the ECSC also regarded some other specific revenues and expenditures that constituted the “operating budget” of this Community.

In 1965, the Treaty of Brussels(10) created a single budget for all revenues and expenditures of the administration of the ECSC, EEC and EURATOM. This budget “substituted” the respective administrative budgets of the ECSC, EC, and EURATOM(11) and was named the “budget of the European Communities” in 1965(12) and the budget of the European Union in 1992.(13) It contained also the revenues and expenditures of the ECSC until its “end”. The operating budget of the ECSC remained instead in the ECSC.(14)

At the expiry of the ECSC Treaty certain financial operations “will [...] still need to be carried out, involving both revenue and expenditure and resulting from the implementation of the ECSC operating budgets for earlier years and ECSC borrowing and lending activities”.⁽¹⁵⁾ Hence, a Protocol “on the financial consequences of the expiry of the ECSC Treaty and on the Research Fund for Coal and Steel” was annexed to the Treaty of Nice.⁽¹⁶⁾ Then there was a decision of the “Representatives of the Governments of the Member States, meeting within the Council” of the European Union on February 27, 2002,⁽¹⁷⁾ and three decisions of the Council of the European Union of February 1, 2003, 2003/76/EC,⁽¹⁸⁾ 2003/77/EC,⁽¹⁹⁾ and 2003/78/EC.⁽²⁰⁾

The aforementioned decision of February 27, 2002 was adopted in expectation of the possibility that the Treaty of Nice and, therefore, the annexed ECSC Protocol, would not have entered into force before the expiry of the ECSC Treaty and, consequently, the decision had a transitory function. This decision established particularly that the existing assets and liabilities on July 23, 2002 “shall, as from 24 July 2002, be managed by the Commission on behalf of the Member States” and that the net worth of these assets and liabilities resulting from the liquidation would constitute a separate fund, denominated as the “Assets of the Research Fund for Coal and Steel”. This fund was inscribed into the general budget of the EU, as definitively adopted by the Parliament in the declaration of December 19, 2002, 2003/94/EC EURATOM,⁽²¹⁾ and is managed by the Commission according to the rules of the EC Treaty, and of the February 1, 2003 decisions of the Council of the European Union mentioned above. The scope of this fund is to stimulate research in sectors related to coal and steel industry.

More specifically, the first of the February 1, 2003 decisions establishes the measures necessary for the implementation of the ECSC Protocol. The second decision, 2003/77/EC, lays down multiannual financial guidelines for managing the assets of the ECSC in liquidation and, on completion of the liquidation, the assets of the Research Fund for Coal and Steel. As for decision 2003/78/EC, it lays down the multiannual technical guidelines for the Research fund for Coal and Steel.

1.2. The personnel and components of the Consultative Committee

At the expiry of the Treaty establishing the ECSC, there no longer existed “employees” of the ECSC, because those assigned to its institutions were progressively transferred to the single community apparatus, as created by the Merger Treaty.

On the other hand, there was still in existence the Consultative Committee of the ECSC, which was composed of 108 members. The destiny of this Committee needed to be decided”.⁽²²⁾ The October 23, 2002 decision of the EC Economic and Social Committee set up the “Consultative Commission on Industrial Change” (CCMI)⁽²³⁾, made up of 24 Economic and Social Committee members and of 30 “external delegates” coming initially from socio-occupational organizations in the coal and steel sector and progressively extended to other sectors affected by the modernisation of the economy and to all related interests.⁽²⁴⁾

1.3. International agreements

1.3.1. The survival of the international agreements of the ECSC

The ECSC concluded with third States various “pure” and “mixed” international agreements,⁽²⁵⁾ none of which provide for the eventuality of the expiry of the ECSC Treaty.⁽²⁶⁾

The Representatives of the Governments of the Member States meeting within the Council and the Council respectively adopted the decisions 2002/595/EC(27) and 2002/596/EC,(28) establishing that the rights and obligations arising under the international agreements concluded by the ECSC shall be “taken over”(29) by the EC.(30) Those decisions created a bridge that allowed the agreements concluded through the ECSC with third States to survive with the EC “hat”, within the single EU apparatus.

1.3.2. Subjective changes arising from the expiry of the ECSC ↑

This survival regards the pure agreements and the mixed ones. The mixed agreements are concluded with third-party states by the Member States acting as one and acting through the ECSC/EU apparatus. Naturally, the parties of these agreements concluded by third-party States and by Member States *uti singoli* remain the same despite of the expiry of the ECSC Treaty. The parties of these agreements concluded by third-party States and by Member States through the apparatus of the EU similarly remain the same, although they avail themselves of the name of the EC, rather than that of the ECSC. (31)

1.3.3. Substantial and procedural changes arising from the expiry of the ECSC ↑

Regarding the international agreements, the substantive and procedural regime of the ECSC was at least formally different from that of the EC. Anyway the community practice overcame those differences. It followed that in practical terms, the substantial and procedural changes arising from the expiry of the ECSC Treaty are likely to be limited.

First of all, art. 6, par. 2 of the ECSC Treaty expressly established the principle of symmetry between the internal and external competence of the ECSC. The Treaty establishing the EEC (now EC) remained instead silent on the point and established the external competence of the European Economic Community only in specific sectors. The prevailing opinion, therefore, maintained that the external competence of the European Economic Community was limited to this specific sector. (32)

Successive developments in the practice and in the Community case law have, nevertheless, consecrated the principle of symmetry between internal and external competence also in the EC. (33)

Another difference between the external competence of the ECSC and that of the EC concerned the commercial policy: the ECSC Treaty, “even without excluding the possibility that certain commercial agreements were to be concluded directly by the Community, left intact the competence of the Member States to stipulate” *uti singuli*. (34)

Article 71 par. 1 of the Treaty of the ECSC in fact reserved to the Member States all the powers in matters of commercial policy not directly or indirectly attributed to the community institutions by the Treaty itself, as such allowing for exclusive State management of relations with third countries in respect to community direction and supervision. Conversely, according to art.133 TCE (ex.133) and the relevant case law in the field, the competence of the EC in matters of common commercial policy is exclusive. (35)

In reality, the Court limited the significance of art.71 if the ECSC Treaty with the opinion of November 11, 1975, 1/75, recognizing the necessity to harmonize Community commercial relations in the International arena. (36)

For its part, the general practice of the community has been accomplished by “juridical acrobatics”(37) and as a result the actions of the single Member States were frequently substituted by decisions of the Representatives of the Governments of the Member States meeting within the Council. (38)

On the other hand, the exclusive competence of the Member States in relations with third States was substantially reduced, and the Member States and the ECSC most often formed mixed international agreements. (39) As well, the ECSC Treaty lacked an ad hoc rule concerning the agreements between the Community and other international organizations(40), differently from the EC, which has the power to establish opportune associations with any international organization (art.310 EC Treaty).

In reality, the ECSC established various associations with other international organizations, and, as such, the general community practice overcame also this difference, allowing the affirmation that the “ability” of the three communities “to establish international connections” with other organizations was identical. (41)

Moreover, the ECSC Treaty did not contain a rule similar to actual art.300, last par. TCE (ex art. 228, par. 2) according to which the agreements concluded through the EC bound the institutions of the Community and the Member States. Instead, it contained art. 86 ECSC Treaty, which specifically underlined the obligation of Member States: “to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from decisions and recommendations of the institutions of the Community and to facilitate the performance of the Community tasks” and “to refrain from any measures incompatible with the common market”. (42)

Art.86 ECSC consequently allowed applying the doctrinal and case law contributions regarding the agreements concluded by the EC to those concluded by the ECSC. (43) According to those contributions, the agreements concluded by the EC are automatically efficacious in the community legal system, bounding the Member States and the institutions to implement their dispositions(44), and producing direct effects, at least when they were comprised of clear, precise, and unconditioned orders. (45)

Finally, there remains a difference in the procedure by which the external competencies of the ECSC and those of the EC are exercised. (46) After the expiry of the ECSC Treaty, the procedure of the latter, by the express will of the Member States of the EU applies to the coal and steel sector as well.

1.4. Competition law

According to the dominant opinion, the acts adopted by an international organization expire in the moment of its extinguishment.(47) The binding acts of the ECSC would, therefore, have expired on July 23, 2002. The Italian government accepted this thesis with the action against the Commission of the European Community brought before the Court of Justice on 22 May 2003, in which it asked the Court of Justice to declare that following the expiration of the ECSC Treaty, “the powers and competence of the Commission of the European Communities [...] in the sectors assigned under the ECSC Treaty to the High Authority have lapsed with the result that any measure adopted or to be adopted by it in those sectors which have not formed the subject-matter of a new agreement by the signatory States, is to be deemed null and void and of no effect.”(48) Nevertheless, the Court held that it was without jurisdiction to hear the action and, consequently, rejected it with the December 9, 2003 ordinance, not resolving therefore the problem of procedural continuity.(49)

In reality, the Member States had decided to extend the tasks and the substantial and procedural EC competition rules to the coal and steel industry. The Council of the European Union and the Commission adopted some acts to regulate this extension.

The June 3, 2002 Council regulation 963/2002/EC “laying down transitional provisions concerning anti-dumping and anti-subsidy measures adopted pursuant to Commission decisions No. 2277/96/ECSC and No. 1889/98/ECSC as well as pending anti-dumping and anti-subsidy investigations, complaints, and applications pursuant to those decisions”, established that the pending anti-dumping measures, investigations, and complaints after July 7, 2002⁽⁵⁰⁾ were to be regulated by the December 22, 1995, Council regulation 384/96/EC on protection against dumped imports from countries not members to the EC.⁽⁵¹⁾ The July 23, 2002, Council regulation 1407/2002/EC,⁽⁵²⁾ for its part, regulated the granting of State aid to the coal industry. Finally, the June 3, 2002, Council regulation 963/2002/EC set out that the pending measures, investigations, and applications in the field of State aid to the steel industry were to be regulated through the October 6, 1997, Council regulation 2026/97 on the protection against subsidized imports from countries not members of the European Community.⁽⁵³⁾

Particularly significant in the field of competition and of State aid is also the June 18, 2002, Commission communication concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty⁽⁵⁴⁾. As it is well known the communications of the Commission are acts of soft law with binding force only vis-à-vis its author, the Commission: in any case in the field of competition and of State aid, the Commission has a discretionary power, and, consequently, its communications have a decisive value. The June 18, 2002, Commission communication is relevant also because it has inspired the December 17, 2002, decision of the Commission which sanctioned for a total value of 85 million euro certain Italian firms and which is at time being under discussion before the Court of First Instance⁽⁵⁵⁾. It is therefore worth the effort to synthetically reconstruct the relevant content of the June 18, 2002, Commission communication.

This communication recognized that, as a consequence of the will of the Member States, as manifested through international agreements and Community acts adopted by virtue of them,⁽⁵⁶⁾ the EC’ substantive and procedural rules in the field of antitrust, merger control and State aid control apply to the coal and steel industry as well, extending the EC Treaty to the coal and steel sector. Therefore, according to point 1 of this communication, there will be a continuity of the procedures eventually initiated under the ambit of the application of the ECSC Treaty, which “will be subject to the rules of the EC Treaty as well as the procedural rules and other secondary legislation derived from the EC Treaty.”⁽⁵⁷⁾ About this transitional regime, point 31 of the communication is important: ⁽⁵⁸⁾ according to this point when the Commission identifies an infringement in a field covered by the ECSC Treaty, “the substantive law applicable will be, irrespective of when such application takes place, the law in force at the time when the facts constituting the infringement occurred. In any event, as regards procedure, the law applicable after the expiry of the ECSC Treaty, will be the EC law.”

It remains that the principles that underlie the competition rules of the ECSC and the EC Treaties are “similar”,⁽⁵⁹⁾ because arts.81 and 82 of the EC Treaty are “clearly inspired”⁽⁶⁰⁾ by the corresponding arts.65 and 66, par. 7, of the ECSC Treaty. Furthermore, practices under the two Treaties have been converging “for many years”. It follows that “in practical terms, the changes, both substantial and procedural, arising from the expiry of the ECSC Treaty are likely to be limited in scope.”⁽⁶¹⁾

One of the changes of major relevance is the recognition of the national competition authorities and national courts jurisdiction to apply the European antitrust rules to the coal and steel sector.⁽⁶²⁾ The Commission retained in fact exclusive competence in the application of arts.65 and 66 of the ECSC Treaty.⁽⁶³⁾ As a consequence, the Commission and the national authorities and courts actually have parallel powers to apply Community competition law in the coal and steel sector as well.⁽⁶⁴⁾

Moreover, arts.65 and 66, par.7 of the ECSC Treaty did not include any condition relating to effect on trade, in contrast to arts.81 and 82 of the EC Treaty, which apply only if trade between Member States is affected.⁽⁶⁵⁾ “Thus, where agreements or practices restricting competition, or an abuse of dominant position, do not affect trade between Member States, the national competition authorities and the national courts will, from 24 July 2002, be authorized to apply their national competition rules in the field coal and steel”.⁽⁶⁶⁾

The aforementioned set of rules has created a bridge. This bridge allowed for the survival of the legal relationships based upon the ECSC Treaty in the field of competition under a regulatory and administrative umbrella created under EC Treaty, and under the general competition rules established by it.

1.5. The continuity of the procedures in intertemporal law

The community case law has now the opportunity to resolve the problem of the continuity of the procedures that was brought before the Court of Justice on 22 May 2003 by the Italian government ⁽⁶⁷⁾. In fact, pending before the Court of First Instance are various cases⁽⁶⁸⁾ initiated by actions brought before the Court by a group of Italian coal and steel companies sanctioned, for a total value of 85 million euro, by a December 17, 2002, decision,⁽⁶⁹⁾ adopted by the Commission in its fulfilment of the aforementioned June 18, 2002, communication.⁽⁷⁰⁾ The appellants request the overturning of the contested decision because it was in their view adopted by the Commission without competence to issue decisions based on art. 65 of the ECSC Treaty after its expiry in the absence of the express will of the Member States in that sense.

In reality the decision in question applies the transitional rules established by the June 18, 2002 Commission communication⁽⁷¹⁾, which was adopted by virtue of the Member States will to preserve the survival in the EC/EU of every legal relationship regulated by the ECSC Treaty, the will that manifested itself in international agreements and in community acts adopted by virtue of them. It therefore seems devoid of foundation the assertion of the Italian companies, according to which there was lacking an agreement between the Member States allowing the Commission’s intervention to guarantee the continuity of procedures. As a consequence, it is highly probable that the Court of First Instance will decide the cases before it by affirming the validity of the contested decision that respects the June 18, 2002, decision, which respects the will of the Member States.

2. The apparent death of the ECSC in international law

2.1. The transfer of tasks between international organizations according to international law

2.1.1. International conventions and customs

Until now, recognition has been made of the rules specifically adopted to regulate the EC/ESCS “succession”.⁽⁷²⁾ In the following paragraphs we will demonstrate that the transfer of legal

relationships between the ECSC and the EC does not constitute a true “succession” between international organizations in the international legal system, but a mere reorganization of the single EU apparatus.

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Above all, one must ask himself if there are certain international conventions or customs regarding the transfer of legal relationships between international organizations and, if so, if those rules apply to the event here in question.

Regarding international conventions, the rules of the 1969 Vienna Convention on the Law of Treaties that regulate the termination of the existence of international treaties apply also to the treaties establishing international organizations, but they do not regulate the transfer of legal relationships between those organization.(73) There are no other specific international conventions on the point. According to art.74 par.2 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, its provisions “shall not prejudice any question that may arise in regard to a treaty from [...] the termination of the existence of the organization”. In addition, the 1978 Vienna Convention on Succession of States in respect of Treaties did not enter into force.(74)

As far as international customary law is concerned, the creators of the events related to the existence of an international organization are its Member States and consequently those events are always different one to another and are impossible to codify.(75)

2.1.2. The constitutionalist theory ↑

Conversely, according to several authors, the treaties establishing certain international organizations modify the decentralized structure of international legal system and institute organizations with constitutional functions and superior powers over the State.(76) This theory, denominated “constitutionalist”, wants the Member States to be hierarchically subordinate to international organizations, which could extinguish themselves and succeed each other in the international legal system through mere unilateral acts of their own institutions(77) or even automatically.(78)

2.1.3. The opposing thesis, rooted in a contractual conception of international organizations ↑

According to an opposing thesis, rooted in a contractual conception of international organizations and in a dualistic conception of the relationship between international law and internal law, an international organization is, instead, only an apparatus with the international personality limited to the conjoined exercise of the “powers, faculties, or liberties” of its Member States “that the general or conventional international law, in any case, confers them”, and the survival of the organizations “depends on the Member States enduring will to continue to sustain and utilize it”.(79) According to this thesis, international organizations are not hierarchically supraordinate to their own Member States,(80) but these States are the only creators of the events in which the organizations are involved. Therefore, the termination of the existence of an international organization always constitutes a realization of the will of the Member States that could be expressed in the treaty establishing the organization in question, as in the case of the ECSC, or in an agreement concluded in another form, as in the case of the League of Nations.

2.1.4. The UN succession to the League of Nations

Favourable to the succession of international organizations by mere unilateral acts of their institutions, regarding specifically the UN succession to the League of Nations was Judge Read. (81)

In reality, the Secretary General of the League of Nations was fully conscious of the fact that the Assembly of the Organization would only have been able to construct a *forum* of discussion between the Member States, because « les pouvoirs nécessaires » to the dissolution of the Organization and to its succession « devant être obtenus des gouvernements ». (82)

The Secretary General had therefore sent a telegram to the Member States averting them of the necessity to present the question of the termination of the existence of the Organization to the Assembly and inviting them to «accuser réception de la présente communication par télégramme contenant éventuellement les observations qu'ils désireraient présenter. [...] Au cas où je ne recevrais pas d'observations avant le 5 octobre, l'acceptation sera considérée acquise». The Member States had not objected and the Assembly of the League of Nations met deliberately at Geneva from the 8th to the 18th of April 1946, « for the purpose of going out of existence and transferring its responsibilities and assets to the United Nations ». (83)

The Member States in Assembly then unanimously approved the resolution of dissolution of the League of Nations and of the devolution of its tasks to the UN, which was adopted in Geneva April 18, 1946. (84) The Member States that were not present in the Assembly at the moment of the adoption of this resolution did not raise a single objection. The unanimous vote of the Member States of the League of Nations present in Assembly April 18, 1946 and the successive acquiescent behaviour of those who were not present at the moment of the vote therefore constituted at close look a tacit agreement between the Member States. (85)

2.2. The end of the ECSC as internal reorganization of the single EU apparatus

According to the above mentioned constitutionalist theory, the ECSC would have been one of the organizations hierarchically supraordinate to its own Member States, that would have extinguished itself in the international legal order on July 23, 2002, and that would have transferred goods, services, and functions to the EC. Therefore, this transfer would have constituted a succession between two international organizations. This succession would have taken place through mere unilateral acts of the community institutions or even automatically.

According to the here accepted opposing contractualistic theory the end of an international organization instead only constitutes the realization of the will of its own Member States and takes place according to the precise instructions of those States, manifested in the treaty establishing the organization, in the acts adopted by virtue of it, as in the case of the ECSC, or in the agreements concluded in another form, as for the United Nations. Regarding, then, the “end” of the ECSC, the situation is even more complicated. The treaties establishing international organizations have both an organizational dimension and a substantive dimension. From the organizational point of view, the institutions of the EC and the ECSC were identical. From the substantive point of view, the EC Treaty instituted and regulated a general market. The ECSC Treaty regulated only the coal and steel market. The ECSC Treaty was therefore special with respect to that of the EC.

The “end” of the ECSC determined a termination of the existence of the Treaty establishing the organization and of the special regime that it founded, and a consequent expansion of the general regime regulated by the EC Treaty. The Member States had, in other words, decided to continue to operate in the coal and steel sector according to the substantive and procedural rules indicated for all other sectors by the EC Treaty, and through the community institutions that were already unified. Consequently, on July 23, 2002, only the ECSC Treaty extinguished itself, not the community organization that the Treaty established, which, instead, “survived” in the EC, into the apparatus of the EU.

The three European Communities, in other words, constituted the different titles of the single apparatus of the European Union in its activities,⁽⁸⁶⁾ the integrated parts of the single subject with international personality, that is the European Union:⁽⁸⁷⁾ and the end of the ECSC is not a true “death” of an international organization in international law, but only a reorganization of the EU apparatus.

To sum, the transfer of the legal relationships from the ECSC to the EC did not constitute a succession between those organizations, but realized the will of the Member States to intervene in the coal and steel field through the institutions of the EC and, always, within the EU apparatus, that already occupied itself with the coal and steel sector, albeit while wearing another “hat”. This transfer was regulated by agreements between the Member States of the same organization, adopted at the moment of the institution of the ECSC and at the moment of its “end”, and by community acts adopted by virtue of them and specifying them.⁽⁸⁸⁾

2.3. Conclusive remarks on the destination of juridical international and community legal relationships involved in the end of the ECSC Treaty ↑

As it has been seen, the survival of the existing legal relationships based on the ECSC Treaty under the EC Treaty was regulated primarily by several agreements between the Member States of the EU: the ECSC Treaty itself (that prescribed the date of termination of the existence of the Treaty) and the Protocol annexed to the Treaty of Nice.

Furthermore, there have been several acts of the representatives of the governments of the Member States meeting within the Council of the European Union on the termination of the existence of the ECSC Treaty in general and, added to these acts, two decisions of the same representatives of the governments of the Member States meeting within the Council — on financial resources and on the ECSC’ international treaties respectively. According to the prevailing opinion, these decisions constitute real agreements between the Member States, albeit in a simplified form.⁽⁸⁹⁾

There have been also: three decisions of the Council of the European Union on financial resources, a resolution of the Consultative Committee of the ECSC and a decision of the European Economic and Social Committee on the institution of the Consultative Commission on Industrial Change, a decision of the Council of the European Union, two communications of the Commission and three regulations of the Council of the EU on the application of EC’ competition rules to the coal and steel sector.

As it has been said, the Protocol annexed to the Treaty of Nice and the decisions of the representatives of the governments of the Member States meeting within the Council concerning the termination of the existence of the ECSC declared necessary the adoption of additional agreements to clarify and specify the obligations established by them. These additional agreements relating to the transition from the ECSC regime to that of the EC obviously could have been stipulated in different forms. The Member States decided to act through the EU apparatus, adopting the aforementioned acts of the institutions of the EU by virtue of the agreements between Member States (constituted, to sum, by the Treaty establishing the ECSC, by the ECSC Protocol, and by the decisions of the representatives of the governments of the Member States meeting within the Council).(90)

At this point, one must remember that the EU institutions were the same, notwithstanding the different titles under which they operated when acting as the ECSC or, respectively, the EC. They constituted part of the single EU apparatus, utilized at different times by the Member States in order to operate jointly and in concert with the organization. It is not important then the different title, ECSC or EC, utilized by the community institutions to adopt these acts. These acts constituted in fact in any case acts of the single EU apparatus.

The agreements and the acts in question explicitly regulated the transition of every legal relationship from the ECSC regime to that of the EC. In any case, these acts fulfil the will of the States to preserve the continuation, through the EC, within the single apparatus of the EU, of any legal relationship regulated by the ECSC Treaty: for this reason, the goods, services, and functions regulated by the ECSC Treaty and eventually “forgotten” are, in any case, subject to the EC Treaty.

Incidentally, it should be noted that the scheme of the normative packages has been retained by the Treaty establishing a Constitution for Europe. In fact, article IV-3 of this Treaty prescribes that the “European Union established by this Treaty shall be the successor to the European Union established by the Treaty on European Union and to the European Community”.(91) In other words, the international legal system will not perceive the termination of the existence of the EC and the succession of the EU to EC, but merely an internal reorganization of the EU apparatus and a redefinition of its tasks in the relationships between Member States and between Member States and third States. Naturally, this symmetry could reveal itself only to be in appearance if the nature of the European Union that will come out of the entrance into force and application of the Treaty establishing a Constitution for Europe will result substantially different from the current one.

3. The end of the ECSC in internal law [↑]

3.1. The events of the ECSC in internal law

Until now, it has been noted that the transfer of legal relationships between the ECSC and the EC does not constitute a true “succession” between international organizations in the international legal system, but a mere reorganization of the single EU apparatus. We will in the following paragraphs demonstrate that a true succession occurred in the internal Italian legal system between the internal legal entities ECSC and EC.

Since the moment of its end the ECSC operated as a legal person in the internal legal system of the Member States, among them that of the Italian.⁽⁹²⁾ The third paragraph of Art.6 of the Treaty establishing the ECSC prescribed, in fact, that “in each of the Member States, the Community shall [have] enjoyed the most extensive legal capacity accorded to legal persons constituted in that State; it may [have], in particular, acquire[d] and dispose[d] of movable and immovable property and [may have been] a party to legal proceedings”. Therefore, the ECSC Treaty and its art.6.3 founded an express and specific obligation on the Member States to attribute to an international organization the legal capacity in internal law.⁽⁹³⁾ Art.6 of the ECSC Treaty furthermore constituted a, not peremptory, but an exemplary rule on the manifestations of the legal capacity of an international organizations.⁽⁹⁴⁾

In the Italian legal system, the ECSC acquired its legal capacity from the moment in which Italy executed its institutional Treaty.⁽⁹⁵⁾ Whether the legal capacity of the ECSC was public or private in nature is under discussion.

According to some authors, the position of the Communities in international law would be different from their position in the internal legal systems of the Member States. These authors sustain that the Communities pursue public aims at the international level by not in the internal legal systems of the Member States,⁽⁹⁶⁾ and consequently the ECSC would only have had a private legal capacity in the internal system of its Member States.

The authors that sustain this thesis recognize nevertheless that as a consequence of the nature of the ECSC as an international organism its legal capacity could possess special characteristics, with respect to internal legal entities.⁽⁹⁷⁾ The special nature of the ECSC’ legal capacity would have determined an analogy between the ECSC and public Italian entities in some private legal relationships among which, those of employment or those for which the Italian State would have adopted apposite rules of assimilation.⁽⁹⁸⁾ This analogy could allow the legal operator to apply to the ECSC the rules governing legal relationships of public Italian entities, “appropriate to reflect the analogy of the situation”.⁽⁹⁹⁾ This application would not have mutated the private nature of the internal legal capacity of the ECSC.

In reality, any legal entity with public goals has, in order to achieve them, the need of a legal capacity of public law that would allow it some privileges similar to those of internal public entities.⁽¹⁰⁰⁾ The Member States decided to work through the ECSC to pursue public goals. This consideration confirms the opinion that the legal capacity attributed by the State to the community organization *de qua* was similar to that of internal public entities — in other words, was a legal capacity of public law.⁽¹⁰¹⁾ Additionally, the public nature of the capacity of the ECSC seems confirmed by the rules that extend to the ECSC some privileges of the internal public entities.

The public legal capacity of the ECSC determined the automatic extension to this organization of the internal regulations on public entities, even in the absence of specific dispositions in that sense. ⁽¹⁰²⁾

Within this regulatory scheme, private legal relationships were represented as well. The ECSC therefore had a capacity to act also in legal relationships of a private nature within the Italian State, and, as such, it also had contractual, patrimonial, and procedural capacity.⁽¹⁰³⁾

3.2. The destination of the juridical relationships of the ECSC as a subject of internal law [↑]

The end of the ECSC determined the termination of the existence of the legal subject ECSC in the internal Italian legal system, unlike in the international legal system.⁽¹⁰⁴⁾ It remains to be asked if this termination of the existence initiated the transfer⁽¹⁰⁵⁾ to the EC' internal legal person of all the private legal relationships to which the ECSC was titled and that were still pending at the moment of its end.

The Italian law executing in the internal legal system the Treaty of Nice, which gave force also to the ECSC Protocol annexed to it, established that, in internal law, the EC would succeed the extinct ECSC in all the legal relationships of a financial nature.

Italy did not adopt additional, *ad hoc* legislative dispositions upon the end of the ECSC in the Italian legal system; specifically, it did not do so with the community law of 2003.⁽¹⁰⁶⁾ This gap does not, on the other hand, seem fill able through the direct effect of the community acts relative to the transition from the ECSC regime to that of the EC, because these acts did not regulate the transfer of private legal relationships between the two internal legal entities ECSC and EC.

According to the theory of the private nature legal capacity of the ECSC, its end and the transfer of its legal relationships to the internal legal entity of the EC had some elements connected to foreign systems with respect to the Italian legal system. These extraneous elements could then, in principle, bring the internal rules of conflict of laws into play to establish the law applicable to the termination of the existence of the ECSC and to the EC succession to the ECSC in the Italian legal system.⁽¹⁰⁷⁾

In reality, according to the universally held opinion, the nature of "community entity" of the ECSC allows for the application to its extinctive and successive events, of the relevant dispositions of its legal system of belonging: the community one,⁽¹⁰⁸⁾ which is, itself, subordinate to that of the international legal system.⁽¹⁰⁹⁾ The rules of the community legal order on the transfer from the regime of the ECSC to that of the EC, into the single apparatus of the EU, have been adopted by community acts, which have been adopted by virtue of the international agreements, occurred between the Member States.⁽¹¹⁰⁾ These rules have, nevertheless, not specifically regulated the transfer of the private nature legal relationships here in question from the ECSC to the EC. As it has been seen,⁽¹¹¹⁾ these dispositions manifest, however, the will of the Member States to pursue every legal relationship of the ECSC through the EC. The Member States wanted, in other words, to transfer also the private legal relationships of the ECSC to the EC, and this general transfer in the Italian legal system constitutes a universal succession between the two legal entities, the EC and the ECSC.

Conclusion [↑]

To sum, as it has been demonstrate, the international legal system has not perceived the termination of the existence of the ECSC and the succession of the EC to ECSC, but merely an internal reorganization of the EU apparatus and a redefinition of its tasks in the relationships between Member States and between Member States and third-country States.

In fact, constituting the three European Communities, the different titles of the single apparatus of the European Union in its activities the integrated parts of the single subject with international personality, that is the European Union, the end of the ECSC is not a true “death” of an international organization in international law, but only a reorganization of the EU’ apparatus.

In other words, in the international legal order, the transfer of the juridical relationships from the ECSC to the EC did not constitute a succession between those two organizations, but realized the will of the Member States to intervene in the coal and steel field through the institutions of the EC and, always, within the EU apparatus, that already occupied itself with the coal and steel sector, albeit while wearing another “hat”.

This transfer was regulated by agreements between the Member States of the same organization, adopted at the moment of the institution of the ECSC and at the moment of its “end”, and by community acts adopting by virtue of them and specifying them.

The agreements and the acts in question explicitly regulated the transition of every legal relationship from the ECSC regime to that of the EC. In any case, these acts fulfil the will of the Member States to preserve the continuation, through the EC, within the single apparatus of the EU, of any legal relationship regulated by the ECSC Treaty: for this reason, the goods, services, and functions regulated by the ECSC Treaty and eventually “forgotten” are, in any case, subject to the EC Treaty.

However, unlike in the international legal system, the end of the ECSC should be qualified differently in the internal legal order of each Member State, among which the Italian one.

In fact the paper has demonstrated that the end of the ECSC determined a real termination of the existence of the legal subject ECSC and that a true succession between the internal legal entities ECSC and EC occurred in the internal legal system of each Member State.

This true succession was regulated by the same agreements between the Member States adopted at the moment of the institution of the ECSC and at the moment of its “end”, and by the same community acts adopted by virtue of those agreements and specifying them, which regulated also the transfer of legal relationship between the ECSC and the EC in the international legal order.

These dispositions manifest, however, the will of the Member States to pursue every legal relationship of the ECSC through the EC. The Member States wanted, in other words, to transfer also the private legal relationships of the ECSC to the EC, and this general transfer in the internal legal systems of each Member State, among which the Italian one, constitutes a universal succession between the two legal internal entities, the EC and the ECSC.

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Endnotes [↑]

(1) On the expiration of the ECSC Treaty, see: Zanghì C., *Comunità europea del carbone e dell'acciaio*, in *Enc. Dir. Aggiornamento*, V, Giuffrè, Milano, 2001, 238-240; Meunier P., *La Communauté européenne du charbon et de l'acier est morte, vive la fédération européenne*, in *Revue du Marché commun et de l'Union européenne* 2001, 509-515; Groenendijk N. and Hospers G.J., *A requiem for the European Coal and Steel Community*, in *De Economist* 2002, 601-612; Vallterra M.C., *La disolución de la Comunidad Europea del carbón y del acero: estado actual*, in *Revista de Derecho Comunitario Europeo* 2002, 393-432; Obwexer W., *Das Ende der Europäischen Gemeinschaft für Kohle und Stahl*, in *Europäische Zeitschrift für Wirtschaftsrecht* 2002, 517-524; AAVV., *CECA 1952-2002*, The Office of Official Publications of the European Community, Luxembourg, 2002, in which, see particularly: Gibellieri E., *President of the Consultative Committee of the ECSC at the time of the expiry of its Treaty*, pp. 126-136 ; see also, *Comunità europea del carbone e dell'acciaio: cenni storici e nuovi assetti*, in http://www.fiom.cgil.it/uff_inter/europa/c_180702.htm .

(2) On the rare cases of death of international organizations foreseen by the Treaties establishing them, *see for all*: Fois P., Sub art.97 of the ECSC Treaty, in Quadri R., Monaco R. and Trabucchi A., *Trattato istitutivo della Comunità europea del carbone e dell'acciaio. Commentario*, II, Giuffrè, Milano, 1970, 1373; Schwarzenberger G., *International Law as Applied by International Courts and Tribunals*, Sweet and Maxwell, London, 1976, 88; Schermers H.G. and Blokker N.M., *International Institutional law: unity within diversity*, Nijhoff, The Hague, 1995, 1015; Fumagalli Meraviglia M., *Studi sulle organizzazioni internazionali*, Giuffrè, Milano, 1997, 142; Zanghì C., *Diritto delle organizzazioni internazionali*, Giappichelli, Torino, 2001, 98.

(3) The event was of great importance: first of all, historically, as it began the movement towards European unification; secondly, politically, because the Member States gave themselves, in the ECSC, a very sophisticated instrument of collaboration in the production and distribution of coal and steel, at a time when they were contending to secure exclusive utilization of, what were then, vital resources. The establishment of the ECSC guided therefore the situation of peace and stability that still persists today in the community territory. Economically, the ECSC guaranteed equilibrium in

the production and distribution of coal and steel when a reduction in the demand of those goods could have started a strong recession. Socially, the ECSC protected the workers in the coal and steel sector when work in coal mines and steel factories was highly risky. See: Pilotti M., *C.E.C.A. (Comunità europea del carbone e dell'acciaio)*, in *Novissimo digesto italiano*, UTET, 1959, 75-87; Scovazzi T., *Carbone e acciaio nel diritto comunitario*, in *Digesto delle discipline pubblicistiche*, UTET, Torino, 1987, 493-502; Monaco R., *Comunità economica europea del carbone e dell'acciaio (CECA)*, in *Enc. giur.*, Istituto poligrafico e Zecca dello Stato, Roma, 1988, 1-7; Blumann C., *Communauté européenne du charbon et de l'acier*, in *Rép. communautaire*, Dalloz, Paris, 1992, 1; Meunier P., *La Communauté européenne du charbon et de l'acier est morte* cit., 509.

(4) The States named this Treaty the «Treaty establishing a Single Council and a Single Commission of the European Union». This Treaty is also denominated as the Merger Treaty. In reality, the States decided, with this Treaty, only to avail themselves a) of a single Commission to manage the respective sectors regulated by the Treaties of the EC, the ECSC, and the EURATOM and b) of the national ministers respectively competent to regulate the issues of the daily agenda of the Council relative to all of these Treaties.

(5) See Tesauo G., *Diritto comunitario*, 3 ed., CEDAM, Padova, 2003, 6; Ballarino T., *Manuale di diritto dell'Unione europea*, 6 ed., CEDAM, Padova, 2001, 31.

(6) Regarding the Single European Act, with a particularly emphasis on the realization of the internal market, see : Tizzano A., *L'atto unico europeo e la realizzazione del mercato interno*, in Tizzano A. (in treatment of), *Problematica del diritto delle comunità europee*, Edizioni de Il Foro italiano, Roma, 1992, 157. On the Treaty of Maastricht, see Tizzano A., *Appunti sul Trattato di Maastricht: struttura e natura dell'Unione*, in *Foro it.* 1995, IV, 210. On the Treaty of Amsterdam of 1997, see Strozzi G., *Le modifiche istituzionali e del progetto decisionale*, in AAVV., *Il Trattato di Amsterdam*, Estratto da *Dir. Un. Europea*, Giuffrè, Milano, 1999, 153; Tizzano A., *Il Trattato di Amsterdam. Con i testi coordinati del Trattato di Maastricht e del Trattato della Comunità europea*, CEDAM, Padova, 1998, 103 and Idem, *Profili generali del Trattato di Amsterdam*, in *Dir. Un. Europea* 1998, 267. On the institutional modifications introduced by the Treaty of Nice, see among all, Pocar F. and Secchi C., *Il Trattato di Nizza e l'Unione europea*, Giuffrè, Milano, 2001, 6. On the Treaty establishing a Constitution for Europe, see Forlati Picchio M.L., *Il fondamento giuridico dell'Unione europea: Trattato o costituzione? Prolusione tenuta il 24 marzo 2003 per l'inaugurazione del 781° aa. dell'Università di Padova*, in <http://www.unipd.it>, 2 and Tizzano A., *Prime note sul progetto di Costituzione europea*, in *Dir. Un. Europea* 2003, 249.

(7) See Gaja G., *Introduzione al diritto comunitario*, Laterza, Roma-Bari, 1999, 2 ed., 27. According to the Author there «formally exist[ed] three distinct communities and as such they [were] consider [ed] on the community level, but the fact that they [were] dealing with organizations that [had] the same States for members and that operat[ed] by means of the same institutions, albeit with slightly different rules, render[ed] manifest that we [were] in the presence a single form of aggregation. » See also Adam r., *op.ult.cit.*, 4. In reality, as we will see further on, the fact that the three Communities constituted a single form of aggregation excluded the existence of any distinction between them, which instead represented the different titles through which the Member States operated in the single apparatus of the EU.

(8) See Art. 97 of the Treaty of the ECSC. For a punctual comment on this rule, see Fois P., *Sub art.97 of the ECSC Treaty* cit., 1373.

(9) In *OJ C* 247 of August 7, 1998, p. 5 and respectively in *OJ C* 190 of July 7, 1999, p.1.

(10) On the Treaty of Brussels of 1965, see supra, footnote 4.

(11) In this sense, article 20 of the aforementioned Treaty of 1965. See Pocar F., *Diritto dell'Unione*

e delle Comunità europee, 8 ed., Giuffrè, Milano, 2003, 27-28.

(12) Art. 20 of the above mentioned Treaty of 1965.

(13) With the Treaty of Maastricht, the budget of the European Communities assumed the new denomination of the Budget of the EU. See article 2 of the EC Treaty, on which, see Parisi N., Sub art.268 of the EC Treaty, in Pocar F., *Commentario breve ai Trattati della Comunità e dell'Unione europea*, CEDAM, Padova, 2001, 915.

(14) See Caia G. and Aicardi N., *Carbone e siderurgia*, in Chiti M.P. e Greco G., *Trattato di diritto amministrativo europeo*, Giuffrè, Milano, II, 1997, 386, and Parisi N., Sub art.268 of the EC Treaty cit., 916.

(15) This is the second *whereas* of the draft decision of the Representatives of the Governments of the Member States meeting within the Council concerning the financial consequences of the expiry of the Treaty establishing the ECSC: COM/2000/0519 def. in *OJ C* 180 of June 26, 2001, 1. See also . according to which on July 16 and 17, 1997, the European Council of Amsterdam had invited the *Commission Comunità europea del carbone e dell'acciaio : cenni storici e nuovi assetti* cit. to adopt measures in order to transfer the net assets, 1.6 million Euro, of the ECSC to the general budget of the EU. On the international personality of the European Union, see Tizzano a., *Prime note* cit., p. 289, according to whom the Treaty establishing a Constitution for Europe is to be appraised positively where it enunciates « openly and formally » the international personality of the Union, in any case already deduced by major part of the doctrine from « implicit indications of the system and of the general practice ». See also Idem, *La personalità internazionale dell'Unione europea*, in *Dir. Un. Europea* 1998, 394 .

(16) In *OJ C* 80 of March 10, 2001, 43. See now the protocol (n.35) « on the financial consequences of the Treaty establishing the European Coal and Steel Community and on the research fund for coal and steel» annexed to the Treaty on the Constitution for Europe.

(17) *OJ L* 79 of March 22, 2002, p. 42.

(18) *OJ L* 29 of February 5, 2003, p.22.

(19) *Id.*, 25.

(20) *Id.*, 28.

(21) *OJ L* 54 of February 28, 2003, p. 1.

(22) To this end, the European Commission proposed with a communication on September 27, 2000 the creation of a “specific structure” within the Economic and Social Committee, whose remit would not be limited to the coal and steel sectors, but would extend to all “aspects of industrial change”. COM(2000) 588 final, available at <http://www.europa.eu.int/eur-lex/it/index.html>. On April 10, 2002, also the Consultative Committee of the ECSC adopted a resolution suggesting a possible solution. *OJ C* 128 of May 30, 2002, p. 4.

(23) The EC Economic and Social Committee adopted this decision *ex art.* 24 of its internal regulation and in conformity with the Commission and the Consultative Committee of the ECSC proposals, indicated in the preceding footnote. This decision is not a public document. Some of the information it contains are available on the European Economic and Social Committee internet website, under the links dedicated to the CCMI.

(24) This is the presentation of the CCMI on http://www.ces.eu.int/ccmi/presentation/index_fr.htm.

(25) The pure agreements are concluded by the community apparatus, as opposed to those that are mixed, the subject of which falls in part to the internal competition of the Community and in part to that of the Member States, and that, therefore, are concluded by the Member States *uti singuli* and by the community apparatus. On this point, see Tognazzi G., *Nozione e classificazione degli accordi misti*, in *DCSI* 1994, 590; Bourgeois J.H.J., Dewost J.L., and Gaiffe M.A. (in treatment of), *La Communauté européenne et les accords mixtes. Quelles perspectives?*, Presses interuniversitaires européennes, Bruxelles, 1997, 114; Nicolin S., *Modalità di funzionamento e di attuazione degli accordi misti*, in Daniele L. (in treatment of), *Le relazioni esterne dell'Unione europea nel nuovo millennio*, Giuffrè, Milano, 2001, 183-184; Gaja G., *Introduzione al diritto comunitario*, 3 ed., Laterza, Roma-Bari, 2003, 166-168. As pertaining to the mixed agreements in particular, we share the thesis according to which the mixed agreement is divided in two fractions: one attributed to the community apparatus, and another, instead, to the Member States as individuals. For the opinion that considers the mixed agreements analogously divisible in two fractions, one of which attributed to the Member States collectively considered, and, therefore, not to the community apparatus, that would be void of international subjectivity, and another attributed to the Member States as individuals, see Giardina A., *Comunità europee e Stati terzi*, Jovene, Napoli, 1964, 119; Idem, *Intervento al "terzo colloquio sulla fusione delle Comunità europee"*, in Melchior M. (in treatment of), *Les relations extérieures de la Communauté européenne unifiée. Actes du 3ème colloque sur la fusion des Communautés européennes organisé à Liège les 25, 26 et 27 octobre 1967*, Université de Liège, Liège, 1969, II, 137. On this theory see primarily the critical considerations of Forlati Picchio M.L., *La sanzione nel diritto internazionale*, CEDAM, Padua, 1974, 320, footnote 38, and see also in general the doctrine favourable to the recognition of the international personality of the community apparatus, in *supra* footnote 15. In any case, we reject the opinion that represents the Community as an autonomous entity in respect to third States, for the reasons that we will enunciate in paragraphs 7 and 8. With specific regards to the ECSC, see Pescatore P., *Les relations extérieures des Communautés européennes. Contribution à la doctrine de la personnalité des organisations internationales*, in 103 *RC* 1961, II, 137, according to which the agreements concluded through the ECSC would not produce any obligatory effect to the Member States. See further on, par. 2.1.1.-2.1.4. and 2.3.

(26) See the third *whereas* of the July 19, 2002, decision of the Representatives of the Governments of the Member States meeting within the Council, 2002/595/EC on the consequences of the expiry of the ECSC Treaty on international agreements concluded by the ECSC. *OJ L* 194 of July 23, 2002, p. 35.

(27) See the preceding footnote.

(28) Of July 19, 2002, in *OJ L* 194 of July 23, 2002, p. 35.

(29) This is art. 1 of the 595/2002 decision. In reality, in the international legal system, there did not occur any transfer of rights and obligations between the ECSC and the EC; see also, par. 2.1.1.-2.1.4.

(30) According to art.2 of the 596/2002 decision the agreements concluded by the ECSC remain in force, the EC is the successor to ECSC from July 24, 2002, and the Commission shall inform the third countries concerned of the EC succession to the ECSC' rights and obligations flowing from the agreements concerned, undertaking all necessary technical amendments in order to make the agreements compatible with EC rules, and negotiating those amendments with other contracting parties.

(31) See further on par. 2.3.

(32) The EEC had, therefore, only the competence to stipulate commercial agreements ex art. 111 and 113 of the Treaty of Rome, and agreements of association, ex art. 238 of the same Treaty. Art. 235 of the Treaty, today 308, initially seemed the only way to amplify the Community's sphere of

external competence. In this sense, see Tizzano A., *op. ult. cit.*, 34-35.

(33) See Court of Justice, March 31, 1971, case 22/70, *Commission v Council*, in *ECR* 263; November 11, 1975, opinion 1/75, in *ECR* 1359; July 14, 1976, cases 3, 4, and 6/76, *Kramer*, in *ECR* 1279; April 26, 1977, opinion 1/76, in *ECR* 755; October 4, 1979, opinion 1/78, in *ECR* 2871; December 14, 1991, opinion 1/91, in *ECR* I-6079; April 10, 1992, opinion 1/92, in *ECR* 2821; March 19, 1993 n. 2/91, in *ECR* I-1061; November 15, 1994, opinion, 1/94 in *ECR* I-5267; March 24, 1995, opinion 2/92, in *ECR* I-521; March 28, 1996, opinion 2/94, in *ECR* I-1759.

(34) See Adam R., *Le relazioni esterne*, in Pennacchini E., Monaco R., Ferrari Bravo L. and Puglisi S., *Manuale di diritto comunitario*, I, Utet, Torino, 1983, 409-410. For further details see paragraphs I, 10, and 14 of the Convention on the transitory dispositions annexed to the ECSC Treaty and Giardina A., *op.ult. cit.*, 55.

(35) On the extensive interpretation of the notion of a common commercial policy and on the relevant community case law in the field: Mengozzi P., *op.ult.cit.*, 11; Gaja G., *Introduzione cit.*, 2003, 147. On the distinction between the exclusive and the concurrent external competence see Giardina A., *La "comunitarizzazione" degli accordi internazionali in vigore fra Stati membri e Stati terzi*, *ibidem*, 5.

(36) See the opinion of the Court of Justice, November 15, 1994, 1/94 *cit.*. On this opinion and on that of 1975, *ibidem*, see Gaia, G., *op. ult. cit.*, 147; Tizzano A., *La gerarchia delle norme comunitarie*, in *Dir. Un. Europea* 1996, 61.

(37) Like this Boselli L., *La politica commerciale comune*, in Pennacchini E. *cit.*, II, 1984, 582.

(38) See Fois P., *Gli accordi degli Stati membri delle Comunità europee*, Giuffrè, Milano, 1968, 154.

(39) On the silence of the ECSC Treaty, like the EC Treaty, in the field of mixed agreements, as opposed to the explicit provisions in the ECSC Treaty, see Nicolin S., *op.cit.*, 177.

(40) There were only art. 93 and 94 TECSC and the Protocol on the relations with the Council of Europe which regarded the specific relationships with the UN, with the, then, OECE, and with the Council of Europe. See Gaja G., *Introduzione cit.*, 1996, 147.

(41) As such, Adam R., *op.ult. cit.*, 410. For some examples of the connections established between the ECSC and other international organizations, see De Soto M.J., *op.ult.cit.*, 85; Mathijsen P., *Le droit de la Communauté européenne du charbon et de l'acier. Une étude des sources*, Nijhoff, La Haye, 1958, 62.

(42) The contents of art. 86 of the TECSC was, therefore, identical to art. 10, ex art. 5, of the EC Treaty. On the relevance of the general obligations of cooperation in fields of external competence of the EC see for all : Mengozzi P., *op.ult.cit.*, 6; Tizzano A., *Note in tema cit.*, 38. This last author maintains, on the other hand that the Court of Justice has ultimately adopted a « more cautious attitude » in the field under examination, attributing a fundamental importance to the principle of subsidiarity.

(43) See, Giardina A., *op.ult.cit.*, 119, 148 e 208 . *Contra* Pescatore P., *op.ult.cit.*, 137.

(44) See Gaja G., *Introduzione cit.*, 2003, 169-170, and the community case law cited by the Author.

(45) On the direct effects of the agreements concluded by the EC, see for all : Mengozzi P., *op.ult.cit.*, 15; Bonafe B.I., *Principio di reciprocità ed effetti diretti degli accordi internazionali della C.E.*, in *Dir. Un. Europea* 2000, 601; D'Alessio M.T., *L'efficacia diretta degli accordi*

internazionali conclusi dall'Unione europea, ibidem, 69; Gaja G., *op.ult.cit.*, 170. In jurisprudence : Court of Justice, October 26, 1982, 108/81, *Kupferberg*, in *ECR* 1641 ; February 5, 1986, case 87/75, *Bresciani*, in *ECR* 129. With specific reference to the direct effect of the dispositions of GATT and of the « new » GATT, Gaia G., *op. ult. cit.*, 172, see Court of Justice, December 12, 1972, case 21-24/72, *International Fruit II*, in *ECR* 1219 ; October 5, 1994, case C-280/93, *Germany v. Council*, in *ECR* I-4973 ; November 23, 1999, case C-146/96, *Portugal v. Council*, in *ECR* I-3461.

(46) On the procedure for the passage of international agreements on behalf of the ECSC, see for all, Giardina A., *op. ult. cit.*, p. 75, according to whom, every organ had the power to conclude the international agreements that fell within its sphere of material competence and there existed a symmetry also between the modality of exertion the Community powers with regards to internal acts and the modality of exertion of the same powers with regards to the acts of external competence. See also, in this sense, De Soto M.J., *op.ult.cit.*, 43; Reuter P., *op.ult.cit.*, 121; Vignes D., *La Communauté européenne du charbon et de l'acier: un exemple d'administration économique internationale, avec une préface de Paul Guggenheim*, George Thone, Liege, 1956, 51. In the contrary sense, see Gaia G., *op. ult. cit.*, p. 151, according to whom, in the absence of specific dispositions on the procedure for the conclusion of agreements in the Treaty of the ECSC, one should have utilized art. 8 of the same Treaty, that conferred the task of securing the realization of the Treaty's objectives to the High Authority alone. On the procedure for the conclusion of international agreements on behalf of the EC and on its evolution, expressed in various amendments to art. 300, ex 228, TEC, see for all, Tizzano A., *La controversia tra Consiglio e Commissione in materia di competenza a stipulare della CEE*, in *Foro it.* 1971, IV, 339; *Idem*, *Recenti tendenze in tema di competenza a stipulare della Cee*, in *Foro it.* 1973, V, 24; *Idem*, *Recenti sviluppi in tema di accordi internazionali della Cee*, in *DCSI* 1981, 19; *Idem.*, *Note in tema di relazioni cit.*, 47; Furlan S., *La scelta dell'atto nella conclusione degli accordi della C.E.*, in *Dir. Un. Europea* 2000, 267. On the negotiation and conclusion of mixed agreements, see Nicolin S., *op. ult. cit.*, 1 p. 85.

(47) In this sense, Hahn H.J., *International Organizations, Succession*, in *Encyclopedia of Public International Law*, vol. II, North Holland, Amsterdam-Lausanne-New York-Oxford-Shannon-Tokyo, 1995, 1341 and Zanghi C., *Diritto delle organizzazioni internazionali cit.*, 105. Contra Amerasinghe C.F., *Principles of the Institutional Law of International Organizations*, Cambridge University Press, Cambridge, 1996, 476.

(48) See the *petitum* and the *causa petendi* of the action in *OJ C* 184 of August 2, 2003, p.20.

(49) Court of Justice, ord., December 9, 2003, case C-224/03, *Italy v. Commission*, currently only available on the website of the Court, <http://www.curia.eu.int>. The Court has accepted the observations of the Commission, according to which the request of the Italian Government to obtain a decision ex art. 230 TEC could not find acceptance due to the lack of jurisdiction of the Court to pronounce declarative sentences ex art. 230 TEC, and therefore, the Italian action must have been rejected ex art. 92 n.1 of the Court procedural rules. On the other proposed actions by Italian firms, currently pending before the Court of First Instance, see the following paragraph.

(50) *OJ L* 149, June 7, 2002, p.3, subsequently modified by the regulation of the Council, n.1310/2002, July 19, 2002 (*OJ L* 192, July 20, 2002, p. 9).

(51) *OJ L* 56, March 6, 1996, p. 1, subsequently modified by the regulation of the Council 2238/2000, October 9, 2000 (*OJ L* 257, October 11, 2000, p. 2).

(52) *OJ L* 205, August 2, 2002, p. 1.

(53) *OJ L* 288, October 21, 1997, p. 1. The Commission communication C(2002) 315 declared fully subject to the EC Treaty the State aid in the coal and steel sector. *OJ C* 70, March 19, 2002, p. 21.

(54) 2002/C 152/03, *OJ C 152*, June 26, 2002, p. 5.

(55) See the following paragraph.

(56) See further on par. 2.3.

(57) The communication is made up of 47 very detailed points, each articulated in numerous subpoints, in turn very specific, and pursues the objective to « summarize for economic operators and Member States, in so far as they are concerned by the ECSC Treaty and its related secondary legislation, the most important changes with regard to the applicable substantive and procedural law arising from the transition to the EC regime» (see point 1.2.) and, therefore, to « facilitate the changeover transition » from the « ECSC regime » to that of the EC, in the antitrust, merger control, and State aid control sectors. (see point 1.3.).

(58) This point figures in the section of the communication dedicated to the specific questions originated from the transition « from the ECSC regime ».

(59) Point 1.3 of the communication.

(60) Point 1.3 of the communication.

(61) Point 1.3 of the communication, that defers to the twentieth Report of the Commission on Competition Policy (1990), par.122, which announced that time had come to align the enforcement of the ECSC competition rules “as much as possible with the practice under the EC Treaty », and to the 1998 notice of the Commission « dealing with the alignment of procedures for processing mergers under the ECSC and EC Treaties », in *OJ C 66*, March 2, 1998, p. 36.

(62) For the other, more specific, changes, see the aforementioned communication of June 18, 2002, that completely examines every relevant modification determined by the transition from the ECSC regime to that of the EC.

(63) See Court of Justice, April 13, 1994, case C-128/91, *Banks*, in *ECR I-1209*, points 17 and 18. See also points 4 and 5 of the communication of the Commission, June 18, 2002.

(64) On the respective competencies of national and community authorities in the field of competition according to the EC Treaty, see for all : Nyssens H. and Pecchioli N., *Il regolamento n.1/2003: verso una decentralizzazione ed una privatizzazione del diritto della concorrenza*, in *Dir. Un. Europea* 2003, 357 .

(65) See point 6 of the June 18, 2002 communication.

(66) See the preceding footnote.

(67) See the preceding paragraph.

(68) See the following actions: case T-27/03, *S.P. s.p.a. v. Commission* ; T-45/03, *Riva Acciaio s.p.a. v. Commission* ; T-77/03, *Ferali Siderurgica s.p.a. v. Commission*; T-79/03, *Industrie Tiunite Odolesi I.R.O. s.p.a. v. Commission*; T80/03, *Lucchini s.p.a. v. Commission*; T-94/03, *Ferriere Nord s.p.a. v. Commission*; T-97/03, *Ferriera Valsabbia s.p.a. e Valsabbia Investimenti s.p.a. v. Commission*; T-98/03, *Alfa Acciai s.p.a. v. Commission*. The *petitum* and the motives of recourse of the Italian enterprises, proposed between January 30, 2003 and March 5, 2003, are published in *OJ*, respectively, C 70, March 22, 2003, p. 31 ; C 101, April 26, 2003, p. 40 ; C 101, April 26, 2003, p. 48 ; C 112, May 10, 2003, p. 42 ; C 112, May 10, 2003, p. 45 ; C 122, May 10, 2003, p. 45.

(69) C (2002) 5087/3 def., relating to a procedure of application of art. 65 of the TECSC (COMP/37.956—steel braces for reinforced cement).

(70) See the preceding paragraph.

(71) See point 31 of the Communication, mentioned in the preceding paragraph.

(72) On the improper use of the term transfer for the events related to the ECSC' succession in the international legal system, see *supra*, footnote 29 and *infra*, par. 2.2.

(73) According to art.5 of the 1969 Vienna Convention on the Law of Treaties the convention “applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within the international organization without prejudice to any relevant rules of the organization”.

(74) The 1978 Vienna Convention codifies some rules on the termination of the existence of an international organization. In reality, in this field, the States liberty of organization controls. This liberty is the object of an international custom: as a consequence, the convention diverges, on this point, from customary international law. In this sense, see for all, Giuliano M., Scovazzi T. e Treves T., *Diritto internazionale. Parte generale*, Giuffrè, Milano, 1991, 410 e Conforti B., *Diritto internazionale*, 6 ed., Editoriale Scientifica, Napoli, 2002, 115.

(75) See Mochi Onory A.G., *La succession d'Etats aux Traités et notes sur la succession entre organisations internationales*, Giuffrè, Milano, 1968, 149 and Cansacchi G., *Continuità, identità e successione delle organizzazioni internazionali*, in *DI* 1971, 16.

(76) See for all, Seyersted F., *International Personality of Intergovernmental Organizations. Do their Capacity really depend upon their Constitutions?*, in *Indian Journal of International Law* 1964, 39; *Idem*, *Is the International Personality of Intergovernmental Organizations valid vis-a-vis non members?*, *Ibidem*, 260; *Idem*, *United Nations Forces in the Law of Peace and War*, Sijthoff, Leyden, 1966, 143; Reuter P., *Organisations internationales et évolution du droit*, in *Mélanges Mestre*, Paris, Sirey, 1966, 456; Grandi B., *Principi delle Nazioni Unite e ricorso alla forza: il caso delle Falkland-Malvinas*, in Picchio Forlati M.L. and Leita F., *Crisi Falkland-Malvinas e organizzazione internazionale*, CEDAM, Padova, 1985, 34; Schermers H.G., *The International Organizations*, in Bedjaoui M., *International Law: Achievements and Prospects*, UNESCO, Paris, 1991, 69; Caron D., *The Legitimacy of the Collective Authority of the Security Council*, in *AJIL* 1993, 552; Sato T., *An emerging doctrine of the Interpretative Framework of Constituent Instruments as the Constitutions of International Organisations*, in *Hitotsubashi Journal of Law and Politics* 1993, 1; Tomuschat C., *Obligations Arising for States without or against their Will*, in *RCADI* 1993, 242 e 273; Blokker N. and Muller S., *Towards More Effective Supervision by International Organizations. A General Introduction and Some Concluding Observations*, in Blokker N. and Muller S., *Towards More Effective Supervision by International Organizations. Essays in Honour of Henry G. Schermers*, Nijhoff, Dordrecht-Boston-London, 1994, 1 e 275; Dormoy D., *Droit des organisations internationales*, Dalloz, Paris, 1995, 1; Tangney P., *The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany*, in *The Yale Journal of International Law* 1996, 395; Simonovic I., *State Sovereignty and Globalisation: are Some States more Equal*, in *Georgia Journal of International and Comparative Law*, 2000, 402; Brunnée J. and Toope S.J., *International Law And Constructivism: Elements of an International Theory of International Law*, in *Columbia Journal of Transnational Law* 2000, 19; Deldbrück J., *Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization*, in *Schweizerische Zeitschrift für internationales und europäisches Recht* 2001, 12-13 e 35; Chevallier-Govers C., *Actes constitutifs des organisations internationales et constitutions nationales*, in *Revue Générale de Droit International Public* 2001, 411; Simonovic I., *Relative Sovereignty of the Twenty*

First Century, in *Hastings International and Comparative Law Review* 2002, 381. See as well all of those who sustain the theory of implicit powers, among which Rama Montaldo M., *International Legal Personality and Implied Powers of International Organizations*, in *BYIL* 1970, 111; Amerasinghe C.F., *Interpretation of Texts in Open International Organizations*, in *BYIL* 1994, 196; Deldbrueck J., Sub art.24 of the UN Charter, in Simma B., *The Charter of the United Nations. A Commentary*, Oxford University Press, Oxford, 1994, p. 406; Zemanek K., *The Legal Foundations of the International System. General Course on Public International Law*, in *RCADI* 1997, 90-91; Idem, *Is the Security Council the sole Judge of its own Legality?*, in Yakpo E. and Boumedra T., *Liber amicorum Judge Mohammed Bedjaoui*, Kluwer, The Hague-London-Boston, 1999, 629, 633 and 642; Rosenne S., *The Perplexities of Modern International Law*, in *RCADI* 2002, 275 and 278; Cahin G., *La notion de pouvoir discretionnaire appliquée aux organisations internationales*, in *Revue Générale de droit International Public* 2003, 553 and 596.

(77) See par. 2.1.4.

(78) Favourable to the automatic succession of international organizations, with specific regards to the succession of the UN to the League of Nations, is Myers P.R., *Succession between International Organizations*, Kegan Paul International, London-New York, 1993, 77. See the separate opinion of Judge Read to the sentence of the ICJ, April 11, 1950, *Statuto internazionale dell’Africa sud-occidentale* ct., 167 mentioned above. On the automatic succession between international organizations, see for all Dormoy D., *Droit des organisations internationales* cit., 51-55; Schermers H.G. and Blokker N.M., *International* cit., 1024; Amerasinghe C.F., *Principles* cit., 471; Zanghi C., *Diritto delle organizzazioni internazionali* cit., 101-102.

(79) See Forlati Picchio M.L., *Introduzione*, in Forlati Picchio M.L. (eds.), *Le Nazioni Unite*, Reprinting revised and corrected of the 1st ed., Giappichelli, Turin, 2000, p. 11. See also the following studies of Forlati Picchio M.L.: *La sanzione nel diritto internazionale* cit., 307 footnote 9, and 440; Hague Academy of International Law Research Centre 2000, *Report on Economic Sanctions in International Law* by Picchio Forlati M.L., Nijhoff, The Hague-Boston-London, 2002, 219 and 235 and *Il fondamento giuridico dell’Unione europea: Trattato o costituzione?* cit., 2.

(80) See the following writings of Arangio-Ruiz G.: *Rapporti contrattuali tra Stati e organizzazione internazionale*, in *Arch.giur.Serafini* 1950, 132-134; *Diritto internazionale e personalità giuridica*, Clueb, Bologna, 1971, 255; *Stati e altri enti (soggettività internazionale)*, in *Novissimo Digesto*, UTET, Torino, 1971, 132; *Appendix: The Concept of International Law and the Theory of International Organization*, in Arangio-Ruiz G., *the Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, in *RCADI* 1972, 629; *L’Etat dans le sens du Droit des Gens et la Notion du Droit international*, in *Österreichische Zeitschrift für Öffentliches Recht* 1975, 36, 336 e 391; *The UN declaration on Friendly Relations and the System of the Sources of International Law*, Sijthoff, Germantown, Maryland, 1979, 233-298; *Le Domaine réservé, l’organisation internationale et le rapport entre droit international et droit interne*, in *RCADI* 1990, 402 e 435; *La pretesa “analogia federale”* cit., 274. See also : Mochi Onory A.G., *La successione d’Etats aux Traités* cit., 149; Cansacchi G., *Continuità, identità e successione* cit., 18; Leanza U., On article 6 of TECSC, in Quadri R., Monaco R. e Trabucchi A., *Trattato* cit., 127; Dupuy R.J., *Dialéctiques du droit international. Souveraineté des Etats, communauté internationale et droits de l’homme*, Pedone, Paris, 1999, 35 and 309; Schrijver N., *The Changing Nature of Sovereignty*, in *BYIL* 2000, 97 and the critical doctrine of the theory of implicit powers, within which Forlati Picchio M.L., *La sanzione nel diritto internazionale* cit., 307 footnote 9; Arangio-Ruiz G., *La pretesa “analogia federale”* cit., 252; Panebianco M. and Martino G., *Elementi di diritto dell’organizzazione internazionale*, Giuffrè, Milano, 1997, 48-50, and the authors, indicated in par.2.1.4., that attribute an essential rule to the will of the Member States of the League of Nations for its termination of the existence and for its succession.

(81) See his separate opinion to the sentence of the International Court of Justice (hereinafter, ICJ),

November 4, 1950, *Statuto internazionale dell'Africa sud-occidentale*, in *ICJ Reports 1950*, 167. On the theories expressed by Judge Read, see : Fumagalli Meraviglia M., *Studi sulle organizzazioni internazionali* cit., 157; Schermers H.G., *Les Organisations internationales*, in Bedjaoui M., *Droit international: bilan et perspectives*, I, Pedone, Paris, 1991, 82; Dormoy D., *Droit des organisations internationales* cit., 52; Zanghi C., *Diritto delle organizzazioni internazionali* cit., 104.

(82) Société des Nations, *Rapport sur les travaux de la Société pendant la guerre, présenté à l'Assemblée par le Secrétaire général par intérim*, Genève 1945, 7.

(83) *Provisional Record of the Twenty-First Ordinary Session of the Assembly*, in *Int.Org.* 1947, p. 141.

(84) The resolution is published in *Int.Org.* 1947, 246.

(85) On the event, see for all Kiss A., *Quelques aspects de la substitution d'une organisation internationale à une autre*, in *Ann.fr.droit.int.* 1961, 469; Cansacchi G., *Continuità, identità e successione* cit., 25; Hahn H.J., *International Organizations* cit., 1341; Arangio-Ruiz G., *La pretesa "analogia federale" nella Carta delle Nazioni Unite e le sue implicazioni*, in Forlati Picchio M.L. (in treatment of), *Le Nazioni unite*, Giappichelli, Torino, 274. See also the criticism of the theory of the automatic succession of the UN to the League of Nations, of Judge Gerald Fitzmaurice, in his dissenting opinion from the ICJ decision of June 21, 1971, *Legal consequences* cit., in Merrills J.G., *Judge Sir Gerald Fitzmaurice and the Discipline of International Law. Opinions on the International Court of Justice, 1961-1973*, Kluwer, The Hague-London-Boston, 295 and in *ICJ Reports 1971*, 227. Judge Gerald Fitzmaurice refused to consider the League of Nations a sort of organ hierarchically supraordinate to its Member States, the powers of which could have automatically been reabsorbed by another international organization or, in any case, without an agreement of its Member States. On this opinion, see Arangio-Ruiz G., *La pretesa "analogia federale"* cit., 274; Brownlie I., *op.cit.*, 642.

(86) See Forlati Picchio M.L., *Il diritto dell'Unione europea fra dimensione internazionale e transnazionalità*, in *Jus. Rivista di scienze giuridiche* 1999, 464.

(87) See, in this sense, Tizzano A., *Note in tema* cit., 65. The ECSC, instead, enjoyed an internal legal personality, see further on, part 3.

(88) See the successive paragraph.

(89) See Fois P., *Gli* cit., p. 154, according to whom the decisions of the representatives of the governments of the Member State meeting within the Council constitute agreements in a simplified form, inaugurated in the coal and steel sector. See also Tesauro G., *Diritto* cit., p. 30, according to whom the acts of the Council are juridically qualificable as agreements in simplified form between the Member States, with binding effect between the parties even without their ratification, when the representatives of the governments of the Member States « meet and deliberate as themselves and not as components of the Council », as when it is necessary « to make decisions that, according to the Treaty, are reserved to the governments of the Member States in common agreement »: Adam R., *op.ult.cit.*, 21 footnote 59. See also Ballarino T., *Manuale* cit., p. 124.

(90) The international law of Treaties recognizes the liberty of choice regarding the way of stipulation of a treaty. See Anzilotti D., *Corso di diritto internazionale*, 1, *Introduzione. Teorie generali*, 4 ed. with the additions of the unedited notes of the author and of a chapter on the Lateran agreements, CEDAM, Padua, 1955, p. 310 ; Decleva M., *Gli accordi taciti internazionali*, CEDAM, Padova, 1957, 5; Quadri R., *Diritto internazionale pubblico*, 3 ed., Priulla, Palermo, 1960, 125; Monaco R., *Manuale di diritto internazionale pubblico*, UTET, Torino, 1960, 68; Ferrari Bravo L., *Diritto internazionale e diritto interno nella stipulazione dei Trattati*, Morano, Pompei, 1964, 16; Mosconi F., *La formazione dei trattati*, Giuffrè, Milano, 1968, 28; Picone P., *L'applicazione in via*

provvisoria degli accordi internazionali, Jovene, Napoli, 1973, 9; Conforti B., *Diritto internazionale cit.*, 68; Gaja G., *Trattati internazionali*, in *Digesto delle discipline pubblicistiche*, UTET, Torino, 1999, 347; Pietrobon A., *Il sinallagma negli accordi internazionali cit.*, 68; Cassese A., *International Law*, Oxford University Press, New York, 2001, 128. The agreements here in question could then be concluded in any legal form: and, therefore, they also could be adopted in tacit or simplified form or also by means of acts of third grade legal production. See : Morelli G., *Nozioni di diritto internazionale*, 3 ed. revised and completed, CEDAM, Padua, 1951, p. 39 ; Vitta E., *Studi sui Trattati*, Giappichelli, Torino, 1958, 89; Conforti B., *La funzione dell'accordo nel sistema delle Nazioni Unite*, CEDAM, Padova, 1968, 117; Mosconi F., *La formazione dei trattati cit.*, 23; Monaco R., *Manuale di diritto internazionale pubblico*, 2 ed. revised and updated, UTET, Torino, 1971, 144; Pietrobon A., *Il sinallagma cit.*, 89; Cassese A., *International Law cit.*, 153-154. Regarding the community legal order, the discourse is partially different because it constitutes a separate legal system, in respect to those of the Member States and to the international one, by which it is, nevertheless, heavily conditioned. In this sense, see Ballardore Pallieri G., *Le Comunità europee e gli ordinamenti interni degli Stati membri*, in *DI* 1961, I, 3 . Also, see Forlati Picchio M.L., *Attività di mero rilievo internazionale delle Regioni: una "toppa per il vestito nuovo" dell'integrazione europea. Nota a Corte Costituzionale 14.2.1989, n.42*, in *le Regioni* 1990, II, 926 footnote 15, according to whom the community legal system would have progressively acquired some characteristics similar to those of the internal legal system, among those the interindividuality and the hierarchical structure. These characteristics would not, in any case, attribute to this legal system by the nature of the internal one. See among all, Tizzano A., *Appunti cit.*, 210; Ballarino T., *Manuale cit.*, 199. See also the December 27, 1973 and June 8, 1984, (n. 183 and n.170 respectively) decisions of the Italian Constitutional Court, according to which the community norms would not have an internal nature, neither foreign nor international. On these decisions and on the problem of the adaptation of the Italian legal system to that of the community, see Ballarino T., *op.ult.cit.*, p.241; Amadeo S., *La Corte di giustizia delle Comunità europee ed i rapporti tra diritto comunitario e diritto internazionale generale*, in *RDIPP* 2000, 895 . The doctrine maintains, furthermore, that the community acts are distinguished from acts of third level juridical production of other international organizations for the two fundamental elements of direct effect and of the application on the part of national tribunals. Those elements manifest, among the others, the specific nature of the community legal system. See Adam R., *op.ult.cit.*, 6-7; Ballarino T., *op.ult.cit.*, 311.

(91) Art. IV-438 establishes, furthermore, that "2. until new provisions have been adopted in implementation of this Treaty or until the end of their term of office, the institutions, bodies, offices and agencies existing on the date of the entry into force of this Treaty shall, subject to Article IV-439, exercise their powers within the meaning of this Treaty in their composition on that date. 3. The acts of the institutions, bodies, offices and agencies adopted on the basis of the treaties and acts repealed by Article IV-437 shall remain in force. Their legal effects shall be preserved until those acts are repealed, annulled or amended in implementation of this Treaty. The same shall apply to agreements concluded between Member States on the basis of the treaties and acts repealed by Article IV-437. The other components of the *acquis* of the Community and of the Union existing at the time of the entry into force of this Treaty, in particular the interinstitutional agreements, decisions and agreements arrived at by the Representatives of the Governments of the Member States meeting within the Council, the agreements concluded by the Member States on the functioning of the Union or of the Community or linked to action by the Union or by the Community, the declarations, including those made in the context of intergovernmental conferences, as well as the resolutions or other positions adopted by the European Council or the Council and those relating to the Union or to the Community adopted by common accord by the Member States, shall also be preserved until they have been deleted or amended. 4. The case law of the Court of Justice of the European Communities and of the Court of First Instance on the interpretation and application of the treaties and acts repealed by Article IV-437, as well as of the acts and conventions adopted for their application, shall remain, *mutatis mutandis*, the source of interpretation of Union law and in particular of the comparable positions of the Constitution. 5. Continuity in administrative and legal procedures commenced prior to the date of entry into force of this Treaty shall be ensured in compliance with the Constitution. The institutions, bodies, offices and agencies responsible for

those procedures shall take all appropriate measures to that effect”. Instead, the Member States have produced a Protocol (n.36) « amending the Treaty establishing the European Atomic Energy Community » and annexed it to the Treaty establishing a Constitution for Europe, to « adapt » the former Treaty « to the new rules laid down by the Treaty establishing a Constitution for Europe, in particular in the institutional and financial fields ». As such, the 2nd *whereas* of the aforementioned Protocol. The Member States want, in other words, to continue to manage in the nuclear energy sector as an autonomous sector, as always within the single EU apparatus.

(92) On the distinction between the « two different levels » of the international legal system and of the internal one, see for all Arangio-Ruiz G., *Diritto internazionale e personalità giuridica*, in *Novissimo dig.it.*, UTET, Torino, 1971, 191; Glavinis P., *Les litiges relatifs aux contrats passés entre organisations internationales et personnes privées (avec une préface de Philippe Fouchard)*, Paris, Librairie générale de droit et de jurisprudence, 1990, 26; Ballarino T., *Organizzazione internazionale* cit., 89; Manin A., *Organisations Internationales*, in *Rép.internat.Dalloz*, Dalloz, Paris, 1999, 9; Arangio-Ruiz G., Margherita L. e Arangio-Ruiz E.T., *Soggettività nel diritto internazionale*, in *Digesto delle discipline pubblicistiche*, UTET, Torino, 1999, 328 and above, par.2.1.3.

(93) See the institutional acts of the following international organizations : FAO art. 16, ILO art. 39, WHO art. 66, WIPO art. 12, UNESCO art. 12, and UN art. 104, according to which the organization « enjoys in the territory of each of its Members, such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes ». On this point, see for all Arangio-Ruiz G., *Diritto internazionale e personalità giuridica* cit., 208; Zanghì C., *Diritto delle organizzazioni internazionali* cit., 37 and Spatafora E., *La capacità degli enti internazionali nell'ordinamento italiano*, Giuffrè, Milano, 1991, 9. See also the doctrine on legal personality of the EU indicated in footnote 15 and Monaco R., *Osservazioni sui contratti conclusi da enti internazionali*, in *Studi in onore di Santoro Passarelli*, Jovene, Napoli, 1972, VI, 608. Art. 282 (ex 211) of the CE Treaty and art. 185 of the Treaty of EURATOM constitute some examples of specific attribution of the legal capacities of internal law to international organizations, see Ballarino T., *Manuale* cit., p. 281 and Venturini G., Sub art.282 of the EC Treaty, in Pocar F., *Commentario* cit., p. 941. See also art. III-426 of the Treaty establishing a Constitution for Europe, according to which « in each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws ; it may, in particular, acquire or dispose of movable and immovable property and may be a party to a legal proceedings».

(94) See for all, Spatafora E., *op.cit.*, par. 9.

(95) See Spatafora E., *op. cit.*, p. 12 and Leanza U., On article 6 of the TECSC cit., p. 128. For a parallel reasoning regarding the EC, see Conforti B, *La personalità* cit., p. 566.

(96) Their international nature would, in fact, render the internal legal capacity of the international organizations special with respect to the other internal private legal entities only from the point of view of immunity or of the regulation of their personal status but not from the point of view of the nature of their personality “given that this personality, as it happens *mutatis mutandis* for the States and for other foreign public entities, does not constitute the direct and immediate expression of the nature and of the attributes of the entity in its own legal system, but constitutes an autonomous creation (even if internationally imposed) made by the State that confers the personality, necessary to arrange the indispensable legal-formal instrument for the explication of the activities that the entity in whatever role must carry out in the State itself”. See Tizzano A., *Capacità privatistica e competenza contrattuale delle Comunità europee*, in *RDIPP* 1978, 15-16. See also Conforti B., *La personalità* cit., 569 and Tesauo G., *Sulla natura giuridica del prelievo C.E.C.A.*, in *Rass.dir.pub.* 1972, 221. In jurisprudence, see Corte di Cass. 9.9.1971, in *Foro it.* 1971, I, 29 ; and Trib. Torino, 10.5.1963, in *RDI* 1965, 622 with an annotation by Saulle M.R., *Su la natura giuridica dei crediti spettanti alla CECA a titolo di prelievo generale*, *ibidem* 1965, 634.

(97) See Leanza U., Sub art.6 of the Treaty of the ECSC cit., p. 130 and Conforti B., *La personalità* cit., 569.

(98) See *infra*, footnote 102.

(99) Tizzano A., *Capacità privatistica* cit., p. 17.

(100) See Perassi T., *Lezioni di diritto internazionale, II. Introduzione al diritto internazionale privato*, CEDAM, Padova, 1950, 51; Monaco R., *Osservazioni* cit., 597; Forlati Picchio M.L., *Attività* cit., 922; Glavinis P., *Les litiges* cit., 31; Spatafora E., *op.cit.*, 25.

(101) The public law capacity of the internal public entities implies the so-called administrative power. Cerulli Irene V., *Corso di diritto amministrativo*, Giappichelli, Turin, 2002, p. 330. Those who sustain the theory of the public nature of the capacity of the ECSC recognize, nevertheless, that, dealing with a mere assimilation, this capacity does not have equal contents as that of the public law legal entity. In other words, according to these authors, the ECSC would be lacking the entitlement to some public rights and public power in respect to the other subjects of the internal legal system. See Perassi T., *Lezioni di diritto internazionale* cit., 51; Forlati Picchio M.L., *Attività* cit., 923; Glavinis P., *Les litiges* cit., 13; Spatafora E., *op.cit.*, 26.

(102) For some examples of the analogical extension to the ECSC of rules applicable to the Italian State or to internal public entities, see the extension to the ECSC credits of the regime of privileges granted to internal legal entities credits ex art. 2783-bis *Italian Civil Code*. On this point, see the decisions of the Tribunal of Udine, March 9, 1992, *Ceca c. Curatela del fallimento Laminatolo di Buttrio Spa*, in *Dir. comunitario scambi internaz*, 1992, p. 420 and of the Tribunal of Brescia, November 19, 1991, *Ceca c. Fallimento Busseni Srl, Ibidem*, p. 419. See also art. 4 par.1 of the Italian law of December 9 1977, n. 956 that assimilates the obligatory titles issued by the BEI, by the ECSC and by EURATOM to those issued by the Italian State regarding the quotation in the stock market. See also the Italian D.P.R., July 13, 1978, n.474, see Cass. civ. March 15, 1988, n. 2443, in *Foro it.* 1988, I, 2098. The destiny of the ECSC obligations after its expiry was expressly regulated. The February 1, 2003 decision of the Council 2003/77CE, mentioned above, in fact contained an annex denominated “financial guidelines for managing the assets of the ECSC in liquidation and, on completion of the liquidation, the assets of the Research Fund for Coal and Steel”. According to art. 3 of this annex, during the liquidation, investments shall be permitted only in the asset categories indicated at letter a). Among these categories also figure «fixed and floating rate bonds, with a maturity not exceeding ten years, provided that they are issued by any of the categories of authorized issuers ». For another example of extension to the ECSC of rules applicable to the Italian State or to internal public entities, see the single article of the February 2, 1981 D.P.R. n. 173, in *GU* May 4, 1981, n. 120 and in http://www.avvocaturastato.it/chidifende_02a.htm#n, which had conferred to the « *Avvocatura* » of the State the representation and the legal defence of the community institutions, among which the ECSC. This constitutes a privilege conceded by the Italian State only to NATO and EU. Finally, the ECSC enjoyed the immunity from internal jurisdiction. On the privileges and immunities of the ECSC and of its functionaries, see for all Durante F., *Sui privilegi ed immunità dei funzionari della CECA e la competenza della Corte di giustizia delle Comunità europee. note a Corte di giustizia delle Comunità europee 16.12.1960*, in *RDI* 1962, 54; Panebianco M., Sub art.76 of the ECSC Treaty, in Quadri R., Monaco R. and Trabucchi A., *Trattato istitutivo della Comunità europea del carbone e dell'acciaio* cit., 1105. These extensions of the discipline of the public entities to the ECSC confirm the theory according to which the legal capacity of the ECSC had in the internal legal system also a public nature, even if it was a different public nature than that of the Italian public organs: see Forlati Picchio M.L., *Attività* cit., p.923.

(103) On the contractual capacity of international organizations in internal law, see Monaco R., *Osservazioni* cit., p. 595 ; Id., *Les capacités de droit privé des organisations internationales*, in Monaco R., *Scritti di diritto delle organizzazioni internazionali*, Giuffrè, Milan, 1981, p. 366-373 ;

Glavinin P., *Les litiges cit.*, p.10 ; Spatafora E., *op.cit.*, 55. See also the resolution adopted by the *Institut de Droit international* on « les contrats conclu par les organisations internationales avec des personnes privées » in *Annuaire de l'Institut de Droit international* 1977, II, p.332. On the contracts concluded by international organizations with local personnel see for all Casol I. and Forlati Picchio M.L., *Personale civile N.A.T.O., statuto dei lavoratori e diritti dell'uomo*, in *RDIPP* 1979, 458. On the contributive capacity of international organizations in internal law, see for all: Moschetti F., *Capacità contributiva*, in *Enc.giur.*, Istituto poligrafico e Zecca dello Stato, Roma, 1988, 1; Spatafora E., *op.cit.*, 219. On the procedural capacity of international organizations in internal law see Glavinin P., *Les litiges cit.*, 70; Moussé J., *Le contentieux des organisations internationales et de l'Union européenne (avec une préface de Ignaz Seidi-Hohenveldern)*, Bruylant, Bruxelles, 1997; Dominicé C., *Observations sur le contentieux des organisations internationales avec des personnes privées*, in *AFDI* 1999, 623.

(104) On the different levels of the internal legal system and of the international one, see *supra*, footnote 92.

(105) The Italian legal order unlike the international one, has witnessed to a true and proper transfer of the legal relationships between the extinct ECSC and the EC. See, on this point, *supra*, footnote 29.

(106) See the Italian February 3, 2003, n. 14 community law in *GU*, February 7, 2003, n. 31.

(107) The norms of the competent legal system according to the internal conflict of laws rules are relevant, for example, in the field of contractual liability of the EC. On this point, see article 288 (ex 215) of the EC Treaty and, lastly, art. III-431 of the Treaty establishing a Constitution for Europe, according to which « the Union's contractual liability shall be governed by the law applicable to the contract in question ». On the contractual liability of the European Communities, see for all Goffin L., Sub art.215 of the EEC Treaty, in Constantinesco V., Jacqué J.P., Kovar R. and Simon D., *Traité instituant la CEE. Commentaire article par article*, Economica, Paris, 1323; Ruppert M., Sub art.288 of the EC Treaty, in Calliess C. and Ruffert M., *Kommentar zu EU-Vertrag und EG-Vertrag*, Luchterhand, Neuwied, 1999, 2072; Berg W., Sub art.288 of the EC Treaty, in Schwarze J., *EU-Kommentar*, Nomos Verlagsgesellschaft, Baden-Baden, 2000, 2277; Weaterhill S., *Cases and Materials on EC Law*, Blackstone, London, 2001, p. 685 ; Venturini G., Sub art.288 of the EC Treaty, in Pocar F., *Commentario cit.*, p. 973.

(108) See for all Leanza U., Sub art.6 of the ECSC Treaty *cit.*, p. 130 ; Conforti B., *La personalità cit.*, p. 569. The termination of the existence of the ECSC in internal law is therefore subject to the norms of its system of belonging: that of the community. In this sense, see Tizzano A., *Capacità cit.*, p. 15-16 ; Venturini G., Sub art.282 of the EC Treaty in Pocar F., *Commentario cit.*, p. 942 ; Cerulli Irelli V., *op.cit.*, p. 221. According to another theory, the Communities would enjoy a uniform status in all of the Member States. This status would be traced from the general principles common to the national legislations. In this sense, see Manin P., Sub art.211 of the EEC Treaty, in Constantinesco V., Jacqué J.P., Kovar R., and Simon D., *Traité cit.*, p. 1304. This thesis is nevertheless, not sustained by any normative texts and has remained isolated because it can be « confuted on the basis of the consideration that, when the drafters of the Treaty wanted to invoke the common general principles, they did so expressly ». Venturini G., Sub art.282 of the EC Treaty, in Pocar F., *Commentario cit.*, 941.

(109) On the peculiarities of the community legal order and on its subjection to the international legal system, see *supra*, footnote 90.

(110) See *supra*, par. 2.3.

(111) See *supra*, par. 2.3.

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