

Working Group III

Working document 9

### **Working group III « Legal personality »**

**Subject: The Comments of Teija TIILIKAINEN (Governmental Representative of Finland) to the Preliminary draft report submitted by the Chairman at the meeting of 18 July 2002 (SN 03130/02)**

General Comment:

I very much support the general logic of the text proposing the conferment of single legal personality to the EU. As a motivation for this, the need to strengthen the Union's capacity for external action should be still more emphasised in the working group's report.

The report is based upon a status quo in terms of institutions and decision-making in the second pillar. This is a natural reason of the fact that the assessment of these questions is included in the mandate of the External Relations working group. This, however, leads to some of the suggestions of the working group being apparently incomplete and corresponding weakly to the general need of increasing the coherence of EU's external policies.

For the sake of the aforementioned coherence, all the elements that form the legal basis for external action should be brought together. Thus the new Treaty should contain one single chapter on external relations. This new chapter could be based on the general principle that the Union could act externally whenever that was necessary for the pursuance of one of the objectives of the Treaty.

**Preliminary draft report**

**I. The need to give explicit legal personality to the Union: the Union's legal personality replaces existing legal personality**

1. There was broad consensus within the Working Group as regards conferring explicit legal personality on the Union. The present situation was found to be ambiguous in a number of ways and likely to undermine affirmation of the Union's identity at international level and legal certainty, both of which are essential in international relations with third States and international organisations. In this regard two options would be possible: either the Union would have a legal personality alongside those of the Communities and Euratom, or it would be explicitly given a **single** legal personality to replace the existing legal personalities.
2. The Working Group chose the latter option, taking the view that giving the Union a legal personality additional to those that now exist would not go far enough in providing the clarification and simplification necessary in the Union's external relations. In particular, it was suggested that if the Union were to be involved in concluding mixed international agreements (touching not only on the competences of the Communities and the Member States but also, where appropriate, the competences of the Communities and of the Union under Titles V and VI of the TEU), the situation would be too complicated as the agreements would have to be concluded by both the Union and the Community (and the Member States).

With a single legal personality the subject of international law will be the Union, which will replace the Community for that purpose <sup>1</sup>.

*The constitutional treaty could contain a new provision at the beginning of text stipulating that "The Union shall have legal personality".*

## **II. The effects of explicit conferral of single legal personality**

### **A. Amendments to the treaties do not automatically ensue from the explicit attribution of legal personality**

3. It was found that, from the strictly legal viewpoint, explicit conferral of legal personality on the Union did not *per se* entail any amendment, either to the allocation of competences between the Union and the Member States or between the Union and the Community, or to the "pillar" structure or even to the procedures and respective powers of the institutions regarding the opening, negotiation and conclusion of international agreements.

### **B. Some desirable amendments**

#### **i. The procedure for negotiating and concluding agreements: the case of "mixed agreements" (traditional and cross-pillar)**

4. That being said, the Working Group must weigh up whether it is advisable to make certain amendments to some provisions of the treaties in order to enhance the effectiveness of the Union's external policy and simplify existing procedures.
5. As regards the procedure for negotiating and concluding international agreements, a clear indication should be given concerning who is negotiating and concluding the agreements. In this regard the provisions of Articles 24/38 TEU and 300 TEC would not need to be

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<sup>1</sup> The Union's legal personality would replace only that of the Community, since the inclusion of Euratom was not thought to be absolutely essential given the specific nature of that treaty (it would, however, be technically possible for the Union's legal personality to replace that of Euratom also). The ECSC Treaty will in the meantime have ceased to exist.

substantially amended. In other words, if the agreement under consideration fell solely under Community law, Article 300 TEC would apply; if the agreement came solely under Title V or Title VI, Articles 24/38 would apply; if, on the other hand, the agreement in question was covered by Community law and at the same time came under Titles V and/or VI TEU ("cross-pillar mixity"), it would be useful to include a provision in the treaty stating that, where the subject of the agreement came "preponderantly" under Titles V or VI TEU, the Presidency of the Council, assisted where necessary by the Commission, should conduct the negotiations and where, on the other hand, the subject of the agreement was "preponderantly" within the sphere of Community law, negotiation would be a matter for the Commission <sup>1</sup>. It would also be useful to state that the Council (or, in the case of mixed agreements, the Member States) could decide to charge the Commission with conducting negotiations on behalf of the Council (or even the Member States).

*If the Union had single legal personality, a sole provision regarding international agreements between the Union and third States or international organisations would be sufficient;*

*Article 300 TEC (as amended by the Treaty of Nice) could serve as the basis for this new provision (with of course "Union" replacing "Community" throughout the Article) and the provisions of Articles 24/38 TEU (as they stand or with some amendment) added to it.*

The Union should be able to pursue same goals internally and externally, and therefore have the possibility to enter into international agreements in all fields and within the limits of its internal competence. One should aim at one single legal basis, which could be article 300, and then add some exceptions relating to the current fields of the II and III pillars as deemed necessary.

## **ii. Agreements concluded by the Union are binding on the institutions and the Member States**

6. At present, Article 24 TEC lays down that "*no agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure.*" While this clause has never been applied hitherto, it is liable to give rise to some problems of interpretation or even impair the effectiveness of the Union's actions. It is true that, from the strictly legal viewpoint, the Union can enter into an

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<sup>1</sup> Compare the arrangement that exists between the Community and the Member States within the FAO.

international commitment without a Member State agreeing to be bound by that commitment. For reasons of consistency and legal certainty, however, one should ask whether the general clause laid down in Article 300(7) TEC whereby "*agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States*" could not also be applied to agreements concluded by the Union. This ought not to raise problems, given the safeguard clause laid down in Article 23(2) TEU which protects the position of a State that, on important national policy grounds, intends to oppose a Council decision.

*It is proposed that consideration should be given to deleting the phrase "no agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure" (Article 24 TEU) and, on the assumption that Article 24 TEU is incorporated in a new provision based on Article 300 TEC, the word "Community" should be replaced with "Union" in paragraph 7 of the latter Article.*

### **iii. The need for review by the Court of Justice of agreements concluded by the Union**

7. In accordance with the case law of the Court of Justice, the Community is a community based on the rule of law in that neither the Member States nor the institutions escape review to ensure that their acts comply with the basic constitutional charter that is the treaty<sup>1</sup>. It is difficult to imagine that the Member States, when ratifying the TEU, wished to confer on the Union's political institutions the power to derogate from the treaty by concluding international agreements while expressly reserving for themselves the power to review the treaty in accordance with a procedure which requires the approval of their parliaments, or even the amendment of their constitutions.
8. Moreover, Article 6 TEU expressly provides that the Union is founded on the principles of the rule of law and respect for fundamental rights as general principles of Community law.

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<sup>1</sup> Judgment of 23 April 1986, les "Verts" v. European Parliament, 294/83, ECR p. 1339, paragraph 23.

9. In this context it should be noted that, according to the case law of the Court of Justice<sup>2</sup>, the subject of an action for annulment is not the agreement itself but the act by which the institution concerned concludes the agreement. It follows that if the agreement is incompatible with the treaty or the general principles of Community law, the act by which the institution approved its conclusion is annulled or declared null and void, not the agreement itself.

*Articles 41 and 46 TEU, which exclude any judicial control in the framework of Title V, should be revised and an "ex ante" review based on Article 300(6) TEC (as amended by the Treaty of Nice) and an "ex post" review (judicial review of legality) should be provided for in accordance with procedures to be determined.*

Serious consideration should be given to this proposal as it relates to one of those issues whose consideration is hampered by the way in which the working groups' mandates are drawn. The final position of the working group (*Articles 41 and 46....*) should be formulated in a more clear manner as far as the extension of judicial review of current II pillar matters are concerned. The reinforcement of the judicial control of the current second pillar – already necessitated by art 6 TEU – should be seriously considered by this working group as well as by the one of External Relations in the framework of their respective mandates.

#### **iv. The need to consult the European Parliament**

10. At the political level – while being aware of the particular features specific to international agreements within the CFSP framework – it seems difficult to justify the exclusion of the European Parliament from all consultation as regards these agreements.

*Consultation of the European Parliament should be provided for. To this end the Council could fix a time limit within which the European Parliament could deliver its Opinion according to the urgency of the matter, on the lines of the procedure laid down in Article 300(3) TEC.*

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<sup>2</sup> Judgment of 9 August 1984, *France v. Commission*, C-327/91, ECR p. I-3641, in particular paragraphs 14 and 15.

**v. External representation of the Union**

11. Article 18(1) TEU stipulates that "*the Presidency shall represent the Union in matters coming within the common foreign and security policy*". Article 19(1) TEU lays down that "*Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the common positions in such fora.*"
12. As long ago as 1991, the Court of Justice, referring to an agreement that fell in part within the competence of the Community and in part within that of the Member States (traditional mixed agreement), emphasised the need "*to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community*"<sup>1</sup>.
13. There is no doubt that the position of the Court as expressed above is transferable to the situation in which the Union would possess a legal personality replacing that of the Community. Moreover, Article 11(2) TEU stipulates that the Member States "shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations."
14. The current provisions of the treaties provide for separate representation of the Union and of the Community. It is worth emphasising that a complex system, involving in particular more than one representative in international negotiations, makes it more difficult for the Union's action to be effective in that it could generate incomprehension or even resistance on the part of the Union's partners in international relations.
15. The Union's international representation concerns in particular the possible status of the Union in various international organisations and conferences, but also its active right of legation, i.e. accreditation in third countries of the Union's diplomatic representations.

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<sup>1</sup> Opinion 2/91 of the Court of Justice, 19 March 1993, ECR p. I-1061 et seq. (our underlining).

**(a) Representation of the Union in international organisations**

16. The nature of such representation depends of course on the treaty establishing the international organisation or the rules of procedure of the international conference in question. Some international fora are open only to States (e.g. ILO) whereas others provide for membership by international organisations (e.g. FAO).
17. Even in cases in which the Union as such were admitted, it would be advisable to establish mechanisms in the treaty to ensure that the Union is represented by a single delegation. From a legal standpoint, the Union would only be able to act within the limits of its own competences. In theory, therefore, if a matter came partly under the competence of the Union and partly under that of the Member States, that situation of mixed competence would imply, in principle, participation by representatives of both the Union and of each of the Member States in the negotiations. Even in such cases, however, it would undoubtedly be more efficient to provide for a single delegation from the Union rather than a mixed participation.
18. The latter solution could be retained in particular for the Union's participation in international organisations in the area of economic and monetary union.

*When the Union is admitted to an international organisation or conference, it should be represented by a single delegation so as to be able to defend its interests more effectively.*

**(b) Active right of legation**

19. The present situation is that, in practice, there is double representation (by both the Council and the Commission) in third countries. The Council is represented by the diplomatic representation of the Member State holding the Presidency of the Council. The question arises as to whether diplomatic representations of the Union should be established in certain third countries, replacing the diplomatic representations of the Member States. The Commission has delegations in over 128 third countries, which are established on the basis of the Commission's powers of organisation and fulfil practical needs. Despite their name, these



delegations are recognised as having diplomatic status by the host State. If the Union had legal personality, these delegations could become delegations of the European Union, even if the Commission continued to perform the same functions it has performed to date. The question arises, however, of how to coordinate the activities of these delegations with the Union's general external policy, in the event of a representative merging the current responsibilities of the High Representative for CFSP and the Member of the Commission responsible for external relations being appointed.

*The development of a genuine external policy for the Union requires certain changes, particularly of an institutional nature, which need to be identified and examined in detail; the Working Group considers that, for the Union's action to be effective, it is essential for the Union to speak with a single voice as far as possible. This should apply not only in relation to negotiating agreements, but also as regards the participation of the Union in international organisations and the representation of the Union by external offices.*

*The external representation of the EU is related to the legal personality of the Union as well as to the internal institutional structures in the Union's external relations. In legal terms, the EU necessarily takes over the Commission's delegations on the basis of the conferment of legal personality to the Union. These representations, consequently, expressly promote the Union's interests in all fields of its competence. This logic is not enough explicit in the working group's statement. The relationship between the Union's representations and those of the Member States reflects the division of competences between the EU and its Member States in external relations and should be evaluated in this framework.*

**vi. Other technical modifications**

20. A certain number of technical modifications will also undoubtedly be required. It is not necessary to analyse such changes exhaustively at this stage, but it is worth drawing attention to two points:

- in the event of the Union being given single legal personality, the need to stipulate that the Union replaces and supersedes the EC (starting from the assumption that the Euratom Treaty is set aside) and hence takes over all the international obligations assumed by the EC;
- the fact that the Union will also have internal legal personality and that, in each of the Member States, it will enjoy the most extensive legal capacity accorded to legal persons under their laws, being able, in particular, to acquire or dispose of movable and immovable property and to be a party to legal proceedings. To that end, it will be represented by the Commission (Article 282 TEC).

The EU taking over the obligations of the EU is, again, a more comprehensive issue that has to be carefully studied. From the point of international law, the taking over of the EC's international obligations by the Union is a matter of recognition – at least a tacit one – by third states.