

Working Group III

Working document 12

**Working group III « Legal personality »**

**Subject: The Comments of Lord MACLENNAN OF ROGART to the Preliminary draft report submitted by the Chairman at the meeting of 18 July 2002 (SN 03130/02)**

# **COMMENTS ON THE PRELIMINARY DRAFT REPORT OF THE WORKING GROUP ON LEGAL PERSONALITY**

## **THE NEED TO GIVE EXPLICIT LEGAL PERSONALITY TO THE UNION: THE UNION'S LEGAL PERSONALITY REPLACES EXISTING LEGAL PERSONALITIES**

At present the draft report devotes insufficient space to the need to give explicit legal personality to the Union. More detailed arguments could be presented, in order to strengthen the Working Group's case, on both the importance of explicitly granting legal personality to the Union and on why the Working Group decided to merge the Union and Community legal personalities. Furthermore, greater elaboration would help to explain and justify the particular form we wish the merger to take: creating a single instrument, falling into two parts.

## **THE EFFECTS OF EXPLICIT CONFERRAL OF SINGLE LEGAL PERSONALITY**

The draft paper only mentions the consequences of conferral with respect to competences and the pillar structure. It does not elaborate on what the internal and external effects of explicit conferral of legal personality would be. Perhaps these legal consequences could be spelled out without too much difficulty, e.g. the capacity to sue and be sued in international forums.

## **DESIRABLE AMENDMENTS**

A single legal personality should be seen as a reflection of the political reality of the unity of the Union in its dealings with third countries. The mandate of the group invites exploration of the extent to which the merger of legal personalities would facilitate a reduction in the number of instruments and procedures and/or the fusion of the treaties. Such developments are not a necessary consequence of the adoption of a single legal personality. Nonetheless the Working Group considers that its following recommendations, if introduced in parallel with the adoption of a single legal personality, would further facilitate the achievement of the goals, which underlie their recommendation on legal personality and are a natural adjunct to their principal recommendation.

For example, the external perception of the Union's unity in its external relations is currently blurred by the separate representation of the Council and the Commission in the conduct of negotiations and potentially by their separate representation in international organisations. Although the Working Group recognises that these are matters to be dealt with in greater detail by VP Dehaene, the following issues are closely related to the goals of simplification and clarification, which have driven the working group to recommend the merger of Union and Community legal personalities.

#### **THE PROCEDURE FOR NEGOTIATING AND CONCLUDING AGREEMENTS:**

Given the ongoing erosion of the distinction between domestic and foreign affairs, agreements with third countries will increasingly assume a cross-pillar nature. Consequently, it is doubtful if it makes sense to have personnel from different institutions, differently deployed, within the negotiations of cross-pillar agreements with third countries on behalf of the same entity, namely the Union. At present, the arrangement impairs the perception of the Union as a coherent actor on the international stage. This is compounded when the conduct of negotiations coincides with a change in the Union Presidency, which consequently results in the replacement of one set of negotiators.

The Working Group's draft makes a proposal, at page 3, paragraph 5, to deal with this problem. However, although the 'preponderance' suggestion has merit, it does not provide for a mechanism to determine where the 'preponderance' lies: who is to decide? One possible suggestion would be to place the presumption in favour of the Commission with respect to the whole negotiation unless the High Representative intervened as the representative of the Council. It could be his prerogative to determine 'preponderance'. If he believed something came preponderantly under Titles V or VI TEU a different procedure for developing the negotiating mandate would be employed. In these cases the Council would formulate and vote on the draft-negotiating mandate, which would then be given to the Commission under the supervision of the High Representative. The Council would also still need unanimously to approve agreements reached by the negotiators. The external coherence of the Union would be achieved by having one set of negotiators responsible for the entire agreement, albeit negotiating with different mandates in respect of different subjects. The Council would remain the principal actor in the proceedings: having the ultimate say in both approving the mandate of the Commission as well as in concluding the agreement. This would

constitute a partial merger of pillars one and two, while not constituting a take-over of one method by the other.

**AGREEMENTS CONCLUDED BY THE UNION ARE BINDING ON THE INSTITUTIONS AND  
THE MEMBER STATES:**

I favour the retention of article 24 in its present form. If deleted, countries having internal difficulties of a procedural kind in giving effect to a putative agreement might oppose a prospective agreement in order to escape domestic embarrassment. The so-called “safe-guard clause” Article 23(2), does not deal with this point as it serves as the “emergency break” available to a Member State to prevent specific internal CFSP decisions being taken by QMV.

**EMPOWERING THE COURT OF JUSTICE TO RULE ON THE COMPATIBILITY OF PROPOSED OR  
CONCLUDED AGREEMENTS OF THE UNION WITH UNION LAW:**

As it stands the section on the Court does not make a sufficiently strong case for the extension of its jurisdiction. Consequently, I would suggest inserting the following paragraph:

“It would be undesirable if the treaty making powers of the Union could be used to revoke or amend pre-existing Union law. If the Union wishes to enter into an agreement with a third party which would be incompatible with Union law then it should take the appropriate steps to amend the law. As the ECJ has the most authoritative voice to declare the content of Union law, it should be empowered (as in Article 300(6) TEC) when requested by a Member State, the Commission or the Council, to determine the compatibility of the particular terms of a Union agreement, proposed or concluded, with a third party with pre-existing union law.”

## **EXTERNAL REPRESENTATION OF THE UNION:**

This section of the paper is extremely important and I feel that its argumentation can only be strengthened by greater particularity in its proposals, which are seen to enjoy the support of the Working Group. For example, its articulation of the general principle that the Union ‘speak with a single voice as far as possible’ should be supported by further suggestions as to how that might be achieved.

The one firm proposal advanced for representation in international organisations by a single delegation is ambiguous. It might appear to exclude the right of member states to be represented separately, even when they might have national interests, which are considerable but not necessarily of concern to the Union. I do not think this is the intention of the group.

The subject of external representation would be greatly assisted by further discussion within the group, before formulating our conclusions. Many of the proposals we might make to ensure a ‘single voice’ could be contentious, but if we are able to discover support across the Working Group for particular suggestions then it would clearly be advantageous to put them forward for further consideration to the Dehaene group and the Convention as a whole.

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