

Working Group III

Working Document 10

NOTE

from :	Secretariat
to :	Working Group III on Legal Personality
Subject :	Draft report

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 (one vote against) 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. The Working Group took note of the positions expressed by the Legal Services of the European Parliament, Council and Commission, which all emphasised forcefully that explicit conferral of a single legal personality on the Union was fully justified for reasons of effectiveness and legal certainty, as well as for reasons of transparency and a better profile for the Union not only in relation to third States, but also vis-à-vis European citizens.

2. The Working Group considered the two possible options: 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.
3. 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 ¹.

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

¹ A majority of the Working Group felt that the Union's legal personality would replace that of the Community and of Euratom, although some members of the Group suggested that the inclusion of Euratom was not absolutely essential given the specific nature of that Treaty. (It is, however, to be noted that under the Euratom Treaty, it is the Commission which is competent in the matter of conclusion of international agreements, not just for negotiation, but also for conclusion, after obtaining the approval of the Council acting by a qualified majority (Article 206 Euratom)). The ECSC Treaty will in the meantime have ceased to exist.

II. The effects of explicit conferral of single legal personality

4. The explicit conferral of legal personality on the Union results in legal capacity for the Union, in particular, to:
- adopt legal acts under national law (e.g. unilateral acts – such as donations or subsidies – or contracts) or under international law (unilateral acts – such as declarations aiming to produce legal effects under international law, act of recognition, etc. – or acts of a bilateral or multinational nature (treaties, agreements));
 - exercise its international responsibility (right to submit a claim or act before an international court or judge, but also to play a passive role in such procedures as the liable party) ¹;
 - exercise a right of representation (diplomatic relations on behalf of the Union and the right to become a member of an international organisation) and to receive diplomatic representations from third States or international organisations;
 - enjoy diplomatic privileges and immunities for itself and for its officials.

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

5. 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.

¹ e.g. under national law for the violation of a contract, and under international law for the violation of a treaty – e.g. WTO – or for under other illegal action under public international law.

6. That being said, the Working Group considered it 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. Moreover, the Working Group felt that if in future the Union had a single legal personality, the current pillar structure could just as well be abandoned: the provisions currently appearing within the pillars would become specific procedures within a single treaty.

B. Some desirable amendments

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

7. As regards the procedure for negotiating and concluding international agreements, a clear indication should be given in a single treaty provision ¹ 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 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 ².

¹ In view of their specific nature, it is not proposed that the provisions concerning the conclusion of agreements in the field of EMU be incorporated into this single provision (see Article 111 TEC).

² Compare the arrangement that exists between the Community and the Member States within the FAO.

8. Most members of the Working Group felt it would be useful to stipulate that in any event the Council (and, in the case of mixed agreements, the Member States) could decide to charge the Commission with conducting negotiations on behalf of the Union (or even the Member States). This is already done to a large extent in practice and enables the Union to speak with a single voice when it negotiates agreements, which places it in a much stronger negotiating position. Here it would be appropriate to point out that, as in the procedure for negotiating international agreements in the context of EMU, "the Union expresses a single position" (see mutatis mutandis first subparagraph of Article 111(3)).

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 negotiation or conclusion procedure applicable would be the one arising – exclusively or "preponderantly" – from the area of law concerned (Community law and/or Titles V or VI TEU). The Council (and, in the case of mixed agreements, the Member States) could, in any event, charge the Commission with conducting negotiations on behalf of the Union (and, where appropriate, the Member States).

ii. The conclusion of agreements by the Union in the event of constructive abstention by a Member State

9. 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.*" This provision is the counterpart to Article 23(1) TEU, which provides for "constructive abstention", i.e. a Member State may abstain in a vote and is then not obliged to apply the decision in question. However, it accepts that the decision commits the Union and, in a spirit of mutual solidarity "refrains from any action likely to conflict with or impede Union action based on that decision" (second subparagraph of Article 23(1) TEU).

In other words, at **internal level** within the Union the Member State which abstains is not fully bound, but at **international level** the abstention declaration does not prevent the Union from concluding an international agreement.

10. Simply deleting the clause in Article 24 TEU which says 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" is likely to hamper the development of the Union's external policy, since one Member State can oppose the conclusion of an agreement. Rather than deleting the clause, the proposal is that it be amended so as to avoid the danger of diverging interpretations of the effects of applicable national procedures. Although this clause of Article 24 has never been used hitherto, it should be harmonised with Article 23(1). We might then propose the following clause: "no agreement shall be binding on a Member State whose representative in the Council states that it has to abstain pursuant to Article 23(1) TEU."

*It is proposed to amend the clause "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 replace it by the following: "no agreement shall be binding on a Member State whose representative in the Council states **that it has to abstain pursuant to Article 23(1) TEU.**"*

On the assumption that Article 24 TEU will be incorporated into a new provision based on Article 300 TEC, the following words should be added at the beginning of paragraph 7 of the latter Article "without prejudice to Article 24 TEU."

iii. External representation of the Union

11. The Working Group stressed the idea that the Union's external policy would be effective and credible only if it succeeded in speaking with **a single voice**.
12. 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."*
13. 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"*¹.
14. 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."

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

15. 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. Given the above, arrangements must be made to ensure that the Union expresses a **"single position"**, following the example of the Union's policy in the EMU context. To achieve this, the Working Group proposes that the responsibilities of the High Representative and of the Commissioner for External Relations should be merged and given to one person, and that this merger should also be reflected in the creation of a single body of officials to work in this area. The Working Group makes this recommendation to the Working Group on external relations, asking it to look at it in more detail and consider how it might be applied.

The external policy of the Union will be effective and credible only if it manages to express itself with a single voice; arrangements should therefore be made to ensure that the Union expresses a single position; it is proposed that the responsibilities of the High Representative and of the Commissioner for External Relations should be merged and given to one person, and that a single body of officials should assist him.

16. 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.

(a) Representation of the Union in international organisations

17. 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).

18. 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 expresses a single position, and is even 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 position and even a single delegation from the Union rather than a mixed participation.
19. 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 international conference, arrangements should be made to ensure that the Union expresses a single position, and even that it is represented by a single delegation so as to be able to defend its interests more effectively.

(b) Active right of legation

20. Article 20(1) of the TEU states that "the diplomatic and consular missions of the Member States and the Commission Delegations in third countries and international conferences, and their representations to international organisations, shall cooperate in ensuring that the common positions and joint actions adopted by the Council are complied with and implemented".
21. In practice, it seems that there is a sort of double representation of the Union and the Commission in third countries. The Union 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 also 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 Union. The activities of these delegations should consist of fully implementing the Union's general external policy. The Working Group believes that if the Union had a representative merging the current responsibilities of the High Representative for CFSP and the Member of the Commission responsible for external relations, its international representation would be considerably strengthened.

The appointment by the Union of a single person responsible for external relations, under whom the Commission's external offices would fall, would strengthen the development of the Union's external policy.

iv. The need for review by the Court of Justice of agreements concluded by the Union

22. 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 treaty¹. 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.
23. 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.

¹ Judgment of 23 April 1986, Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, paragraph 23.

24. Judicial review by the Court of Justice could be preventive (examination of the compatibility with the Treaty of the agreement envisaged, as provided in Article 300(6) TEC), or *a posteriori*, following conclusion of the agreement by the Union (review of legality as laid down in Article 230 TEC or ruling on validity as laid down in Article 234 TEC).
25. In this context it should be noted that, according to the case-law of the Court of Justice ¹, 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 - Article 230 TEC - or a ruling on interpretation and validity – Article 234 TEC) should be provided for in accordance with procedures to be determined.

v. The need to consult the European Parliament

26. 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. ²

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.

¹ Judgment of 9 August 1994, Case C-327/91 *France v. Commission* [1994] ECR I-3641, in particular paragraphs 14 and 15.

² The Working Group also favourably considered the need to provide for the consultation of the European Parliament on the subject of the commercial agreements described in Article 133 of the TEC, while being aware that this amendment to the Treaty – however desirable it might be – is not directly linked to giving explicit legal personality to the Union.

vi. Other technical modifications

27. A number of technical modifications will also undoubtedly be required. It is not necessary to analyse such changes exhaustively at this stage, but attention could be drawn 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 (and Euratom) and hence takes over all the international obligations assumed by those two organisations;
- 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).

CONCLUSIONS

28. In the light of the above, the Working Group submits the following recommendations to the Convention:

1. *The constitutional treaty should contain a new provision at the beginning of the text stipulating that "The Union shall have legal personality";*
2. *If the Union had single legal personality, a sole provision regarding international agreements (the provisions appearing in the current pillars would become specific procedures in a constitutional treaty text); 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 negotiation or conclusion procedure applicable would be the one arising – exclusively or "preponderantly" – from the area of law concerned (Community law and/or Titles V or VI TEU). The Council (and, in the case of mixed agreements, the Member States) could, in any event, charge the Commission with*

conducting negotiations on behalf of the Union (and, where appropriate, the Member States);

3. *It is proposed to amend the clause "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 replace it by the following "no agreement shall be binding on a Member State whose representative in the Council states that **it has to abstain pursuant to Article 23(1) TEU.**"*

On the assumption that Article 24 TEU will be incorporated into a new provision based on Article 300 TEC, the following words should be added at the beginning of paragraph 7 of the latter Article "without prejudice to Article 24 TEU";

4. *The external policy of the Union will be effective and credible only if it manages to express itself with a single voice; arrangements should therefore be made to ensure that the Union expresses a single position; it is proposed that the responsibilities of the High Representative and of the Commissioner for External Relations should be merged and given to one person, and that a single body of officials should assist him;*
5. *When the Union is admitted to an international organisation or international conference, arrangements should be made to ensure that the Union expresses a single position, and even that it is represented by a single delegation so as to be able to defend its interests more effectively;*
6. *The appointment by the Union of a single person responsible for external relations, under whom the Commission's external offices would fall, would strengthen the development of the Union's external policy;*
7. *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 - Article 230 TEC - or a ruling on interpretation and validity – Article 234 TEC) should be provided for in accordance with procedures to be determined;*

8. *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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