

Working group III « Legal personality »

Subject : Note on effects on making Union legal personality explicit and on the merger of Union and Community legal personalities

I. BACKGROUND

1. The general criteria of legal personality for an international organisation may be summarised as follows: (1) a permanent association of states, with lawful objects, equipped with organs; (2) a distinction between the organisation and its member states; (3) the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states¹. International legal personality can be defined as the capacity to bear legal rights and duties under international law². An "international person" can be defined as an entity having the power of independent action on the international plane³.

¹ See Brownlie, *Principles of Public International Law*, 4th edition, 1990, pp.680-683.

² J. Klabbers, *Presumptive Personality: the European Union in International Law*, in *International Law Aspects of the European Union*, edited by M. Koskenniemi, 1998, p.231.

³ D.W. Greig, *International Law*, 2nd edition, 1976, p.92.

2. Whereas a State possesses the totality of international rights and duties recognised by international law, the rights and duties of an entity such as an international organisation "must depend on its purposes and functions as specified or implied in its constituent documents and developed in practice"¹.
3. In order to assert the existence of the legal personality of the European Communities and of the European Union it is necessary to take into account the tasks they have been given by the respective treaties. In this respect it is important to underline that the existence of their international personality is a matter for international law itself to determine. In legal terms the new Treaty stemming from this Convention and the IGC 2004 cannot give the Union international legal personality, because the existence of such personality is a matter for international law itself. All the new treaty can do is possibly to make manifest the intention of the member States that the Union should be capable of acting as an independent subject of the international legal order, namely with capacity to the conclusion of international agreements. It would then be for the international law to draw the appropriate conclusions².
4. Each of the European Communities is expressly declared, by its respective founding Treaty, to have legal personality¹. Article 101, first paragraph Euratom reads as follows:

"The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organisation or a national of a third State."

¹ Advisory Opinion of the International Court of Justice on *Reparation for Injuries suffered in the Service of the United Nations*, ICJ Reports, 1949, p.174. This case was a request for an opinion addressed to the ICJ by the UN General Assembly on the question of the possibility of the UN to take action in relation to the injurious act, allegedly by terrorists, of killing Count Bernadotte, the Chief UN truce negotiator in Jerusalem. The UN General Assembly wanted to know whether the UN as an international organisation had the capacity to bring an international claim against the Israeli government with a view to obtaining reparation in respect of damages caused to the UN or the victim himself. To answer this question it was necessary to investigate whether the UN had the legal personality. The ICJ derived the legal personality of the UN from its Charter and the functions it was empowered to fulfil : *"the Organisation was intended to exercise and enjoy, and it is in fact exercising and enjoying, functions and rights which only can be explained on the basis of the possession of a large measure of international legal personality and the capacity to operate upon an international plane"*. The ICJ thus considered that State practice supported the attribution of legal personality to the UN in two ways: first, the Member States of the UN concluded a treaty by which they gave the UN a certain independent power to act. Second, the way in which such powers were exercised was itself further evidence of the specific consequences on the international plane and of the acceptance by States of the extent of that personality.

² See A. Dashwood, *External Relations provisions of the Amsterdam Treaty*, Common Market Law Review, n° 35, 1998, p.1040.

5. According to Article 281 EC *"The Community shall have legal personality"*. The Court of Justice has interpreted this provision as entailing acknowledgement of the external capacity of the EC in all policy areas falling within its competence². It is beyond doubt that the Communities possess legal personality and the recognition of their capacity to pursue their objectives has been confirmed by a long period of time.
6. As for the Union, the TEU contains no provision stating that the Union shall have legal personality. As a matter of fact, the Union was created by the Maastricht Treaty as an encompassing framework aimed at including on the one side the pre-existing Communities and on the other hand two newly born intergovernmental pillars (CFSP and JHA). The TEU set a number of objectives for the Union, such as: *"to assert its identity in the international scene(...); to strengthen the protection of the rights and interests of the nationals of its Member States (...); to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured (...)"* (Article 2 TEU). In order to attain its objectives, the Union shall provide itself with the means necessary (Article 6, para.4 TEU) and *"be served by a single institutional framework"* (Article 3 TEU). The Council shall be responsible for ensuring that the Union shall respect fundamental rights (Article 6, para.2).
7. After the Treaty of Maastricht, two proposals were made during the IGC 1996 for the insertion in the Treaty of a provision stating explicitly that the Union shall have legal personality. According to one proposal, the legal personality of the Union should be juxtaposed with the existing personalities of the Communities³. According to the other proposal, a single legal personality of the Union as a whole should be created, into which those of the Communities would be assimilated⁴. During the IGC 1996 the European Parliament and the Commission defended the position that the Union should have a single legal personality. While none of these proposals was eventually adopted, the Treaty of Amsterdam introduced a new provision (Article 24), which reads as follows:

¹ Cf. Art.205 (1) EC; Art.6 first para. ECSC; Art.184 Euratom.

² Case 22/70, *Commission v. Council, (AETR)* [1971] ECR 263, para.14.

³ See *"Endowing the Union with legal personality"*, text submitted by the Irish Presidency to the European Council in Dublin in December 1996 (doc. CONF 2500/96).

⁴ See proposal put forward by the Netherlands Presidency (doc. CONF 2500/96 ADD1 CAB, 20.3.1997, p.47).

"When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title, the Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency. 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; the other members of the Council may agree that the agreement shall apply provisionally to them.

The provisions of this Article shall also apply to matters falling under Title VI".¹

8. The doctrine has given different interpretations to this provision. According to some authors, the latter merely establishes a simplified procedure, enabling the institutional machinery of the Treaty to be used for the purpose of negotiations and concluding, on behalf of the Member States, international agreements to which they, and not the Union, will be parties. The reference, in the second sentence to the possibility of national ratification procedures, and to the possibility of provisional application in respect of the other members of the Council, is argued in favour of this construction. To other commentators, this provision confers implicitly to the Union the legal personality by acknowledging the capacity of the Union as such to enter into international agreements relating to Title V or Title VI matters. One argument in favour of this interpretation is the fact that the power to authorise the opening of negotiations and to conclude any agreement, is expressed to belong to the Council, and not to the representatives of the governments of the Member States meeting within the Council².
9. As for the interpretation of Article 24 TEU in the light of subsequent practice, it is worth noting that meanwhile two international agreements have been concluded by the Union (based both on Article 24 TEU) with the Federal Republic of Yugoslavia (FRY) concerning the activities of the Union monitoring mission in the FRY³. In the Council Decisions concerning the conclusion of these agreements, it is stated that *"The President of the Council is hereby authorised to designate the person empowered to sign the Agreement **in order to bind the European Union**".*

¹ This provision was subsequently modified in the Treaty of Nice

² See Dashwood, *European Union Law*, 4th edition, 2000, p.184.

³ Council Decision of 9 April 2001 (2001/352/CFSP) (OJ L 125/1) and Council Decision of 30 August 2001 (2001/682/CFSP) (OJ L 241/1).

II. QUESTIONS TO BE CONSIDERED

10. It is worth noting that the Laeken Declaration does not mention the "Communities", but uses throughout the text the word "Union". Although no reference is made to the question of the legal personality of the Union, the Declaration enumerates some questions, which are directly or indirectly linked to it, such as:

- "Should the distinction between the Union and the Communities be reviewed?
- What of the division into three pillars?
- How should the coherence of European foreign policy be enhanced?
- Should the external representation of the Union in international fora be extended further?"

11. The Praesidium considered appropriate to create the current working group and indicated the following questions:

"What would be the consequences of explicit recognition of the EU's legal personality? And of a merger of the Union's legal personality with that of the European Community? Could these contribute to the simplification of the Treaties?"

12. In order to facilitate the discussions of the working group, the Praesidium proposed in connection with (a) making Union legal personality explicit and (b) proceeding to the merger of Union and Community legal personalities, the three following questions to be considered by the group:

- i. What should be the nature of the effects, if any, on current delimitation of competences, and procedures?
- ii. Would the Union be enabled to act more effectively in the international plane?
- iii. What would be the effects, if any, on the Union's status in international organisations?

The working group also needs to consider the implications of explicit legal personality and merger for the issue of the simplification of the treaties¹.

¹ See CONV 73/02, p.5.

13. It is not the purpose of this paper to provide at this stage first answers to these questions, but rather to develop them in order to enable the working group to address, as fully as possible, the main aspects of the issues raised. More important than assessing whether the Union has already legal personality today, is to evaluate the implications of endowing the Union with legal personality.

Questions relating to the explicit recognition of the legal personality to the Union

14. It should be recalled that the consequences of the existence of the legal personality of international organisations vary on the basis of the tasks given to them by the constitutive treaty, in this case the provisions applying to the current second and third pillars. The objectives of the Union are certainly of a different nature compared to those of the EC and some entail long-term projects of a political nature. Yet, since the creation of the Common Foreign and Security Policy (hereafter, CFSP) by the Treaty of Maastricht, the European Union has increasingly been acting, and also been perceived as such, in its relations with third States or other international organisations, as an entity distinct from its Member States. In this perspective, the following questions could be considered:

- i. *Should the EU have **one** explicit legal personality or a **forth** explicit legal personality (parallel to the legal personalities of the EC, ECSC and Euratom)? What are the advantages and inconvenients of each of these options?*
- ii. *To what extent is the explicit recognition of the legal personality of the Union to be considered a fundamental development in order to obtain a high degree of coherency and efficiency in the action of the Union in the CFSP as well as on JHA matters?*
- iii. *In case of the explicit recognition of the legal personality of the Union, does that have any effect on the existing delimitation of competences between the Union and the Member States¹?*

¹ Declaration n°4 on Article 24 and 38 TEU annexed to the Treaty of Amsterdam reads as follows: "The provisions of Articles 24 and 38 of the Treaty on European Union and any agreements resulting from them shall not imply any transfer of competence from the Member States to the European Union".

Some questions relating to the external relations of the Union

15. Without going into the difficulties of interpretation of Article 24 TEU referred above (paragraphs 7 and 8), the explicit recognition of the legal personality of the Union would in any case acknowledge the capacity of the Union to enter into international agreements. This would raise specific questions concerning in particular the treaty making powers of the Union, like for example the following:
- i. *Would the procedure of national ratification by the Member States be excluded concerning agreements concluded by the Union? Should the possibility of opting out be safeguarded? What would be the consequences for the Member States, as for the conclusion of international agreements with third States or international organisations, when the Council had already concluded agreements on the same subjects binding the Union?*
 - ii. *How to define the potential role of the Commission in the negotiations of the agreements in particular in the CFSP? Should the Council authorise the Commission to negotiate as pursued by Article 300 TEC or the Presidency of the Council would retain the exclusive responsibility for the negotiations?*
 - iii. *Would the voting rule in the Council be always unanimity? If yes, at all stages? Only for some subjects?*
 - iv. *What type of consultation of the European Parliament?*
16. The other consequence of endowing legal personality to the Union has to do with the representation of the Union on the international plane. This question is also linked with the efficiency and coherency of the Union's foreign policy. So far, only the EC has a status as full member, acting alone (vg. North West Atlantic Fisheries Organisation) or in conjunction with the Member States or more generally as an observer in international organisations (permanent observer in the General Assembly of the United Nations). According to Article 19 TEU *"The Member States shall co-ordinate their action in international organisations and at international conferences. They shall uphold the common positions in such fora"*.

- i. *Should henceforth the external representation of the Union not be assured by the latter replacing the EC in the full respect of the different powers and procedures foreseen in the treaties, as well as the division of competences between the Union and the Member States?*
- ii. *In this perspective, should the Union in all cases be represented by the Commission or by the Presidency of the Council or by both? What is the type of representation serving better the interests of the external policy of the Union?*
- iii. *How should the external representation of the Union in international fora be extended further?*

Questions related to the merger of legal personalities

17. The issue of merging the legal personalities is related to the pillar structure of the Union. The reason accounting for this structure created by the Maastricht treaty was to make clear that the so-called second and third pillars would be operating according to methods radically different from the Community method. If the Union was given a legal personality juxtaposed to that of the Communities, the pillar structure would be preserved. Conversely, if the legal personalities were to be merged, the pillar structure could be at stake. Some consider that such a merger would imply the suppression of the current system of pillars¹. Some defend the opposite thesis and claim that it is legally possible to have the EU replacing the legal personalities of the Communities while maintaining the three existing pillars with their different internal procedures under the existing treaties. In other words, the Union would operate under different powers and procedures depending on the "sub-order" under which a given activity falls.
18. These questions were already considered during the IGC 1996. The Treaty of Amsterdam did not eventually adopt any provision on this matter (see above, paragraph 7). They should now be carefully examined by the working group, which may consider the advantages and the inconveniences to endowing the Union with full-fledged and single legal personality.

¹ In its Resolution on the Legal personality of the European Union of 14 March 2002, following a draft report submitted by Mr. Carnero Gonzalez, the European Parliament concluded that a single legal personality of the Union was the most adequate way of proceeding (see doc. A5-0409/2001).

19. Also, it should be bear in mind that the question of merging the legal personality of the Union with that of the Communities is linked with the merger and simplification of the treaties themselves. It is true that, from a theoretical point of view, it would be possible to merge the treaties without merging the organisations. It is possible to conceive a merger of the organisations without merging the treaties¹. However, if the organisations were merged, would not the simplification of the treaties be substantially facilitated? Furthermore, if "sub-orders" were to be maintained within a single organisation, the working group could examine how to present the "sub-orders" structure in a more coherent and simple way than the pillar structure is currently presented.

¹ According to the proposal made by the Government of Netherlands during the 1996 IGC 1996, the Union should have legal personality and replace and succeed to the Communities. The treaties would yet remain.