

Working Group III

Working document 18

Working group III « Legal personality »

**Subject: The Comments of Lord MACLENNAN OF ROGART
on the draft report (WG III – WD 10)**

I. THE NEED TO GIVE EXPLICIT LEGAL PERSONALITY TO THE UNION: THE UNION'S LEGAL PERSONALITY REPLACES EXISTING LEGAL PERSONALITIES

A single legal personality and simplification of the Treaties

The positive case for the merger of the Treaties rests on the wish of the member states to strengthen the unity of the Union in its relations with third countries. The merger of the treaties is not necessitated by the ascription of a single legal personality to the Union but the two recommendations are arrived at by similar points of reasoning: clarity, simplification, coherence of policy-making, the avoidance of institutional duplication of effort and greater leverage in negotiations flowing from the unity of the Union's voice.

In that respect I fully agree with the proposal, in paragraph 6, to abolish the pillar structure. However, I feel the point requires greater argumentation. The retention of different procedures in respect of different functional competencies is an internal matter for the Union, secured by internal constitutional rules, not something, which should colour negotiations with third countries. Externally the existence of the different pillars clouds the necessary perception of unity and it is wholly unnecessary at this stage of the Union's development.

If the Working Group decides to advocate option 1 (b), (working document VI) for the merger of the TEU and the TEC- as we have already indicated we would- we also need to indicate which new constitutional desirable amendments we would recommend for inclusion in the basic part. Option 1(b) is not a mere exercise in consolidation. It is a step towards unification and simplification, which requires amendments to existing law. As Professor Bruno de Witte reminded us, Laeken invited consideration of amendment as much as consolidation, which would have the effect of 'reorganisation' as well as 'simplification'. Consolidation alone may make for somewhat simpler reading, but certainly not for simpler procedures.

What we should be seeking was well expressed by Professor de Witte: 'a substantive merger seeking to reinforce the common elements of the three pillars and to eliminate the flagrant inconsistencies within them.' Some of our "desirable amendments" e.g. in respect of the role of the ECJ do just that. We must ensure that these amendments are included in the basic constitutional provision of the new treaty, not left to be later decided as matter collected in the second part of the treaty dealing with the institutions' statutes.¹

It follows that we need to be explicit in our recommendations, specifying what 'desirable amendments' we are advocating for being incorporated into the basic constitutional provisions of the treaty to be agreed upon by the Convention.

¹ B. de Witte, 'Simplification and Reorganisation of the European Treaties', Common Market Law Review (forthcoming) 15.

II. SOME DESIRABLE AMENDMENTS

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

With respect to negotiations of a cross-pillar nature, the issue of whether or not an agreement is preponderantly under Titles V and VI TEU is one that can only be settled by political means. In my opinion, if the Council asserts that the issues **are** preponderantly under Titles V & VI then it would be difficult to reach any other conclusion. It would be clearer therefore to empower the Council to decide the matter. Where the Council decides subjects of negotiation are preponderantly under Titles V and VI, the negotiations will be overseen by the High Representative. The present arrangement entrusting such negotiations to the Presidency would be improved by the strengthened position of the High Representative.

In particular, I would propose the following amendments to Article 24 TEU:

*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 **High Representative**, 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 **High Representative**.*

ii. External Representation of the Union

I still believe that the proposed merger of the positions of High Representative and Commissioner for External Relations would be a step too far for most member governments and might undermine the important objective of unifying the bureaucracy responsible for external affairs. The High Representative, as currently conceived, is accountable to the Council, the Commissioner to the Commission. While one person can play two roles, it is important to acknowledge that there are two roles. The risk of unifying them in one person is that a ‘take-over’ of one role by the other would follow.

A possible compromise would be to treat the Commissioner for External Relations as the High Representative’s Deputy in respect of Titles V & VI of the TEU, thus giving both officials the possibility of playing two roles (double-double-hat), but with their lines of accountability being kept distinct. This arrangement would allow the High Representative to draw on the Commission’s resources and obviate the otherwise likely development of a parallel bureaucracy. To underline the overall operational unity of the Union, the High Representative could be invited to participate in Commission meetings where the agenda required it and conversely the Commissioner could attend Council meetings when similarly required.