

Working Group III

Working Document 15

NOTE

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

Final Report

I. Explicit conferral of legal personality on the Union

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.
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. By the same consensus 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 Community and the Member States but also, where appropriate, the competences of the Community 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, if appropriate, by 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.
4. In this connection the Working Group took note in particular 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 higher profile for the Union not only in relation to third States, but also vis-à-vis European citizens.

II. The effects of explicit conferral of single legal personality

5. The explicit conferral of legal personality on the Union heightens its profile on the world stage and lays the foundations for a genuine foreign policy. The Union thus becomes a *subject of international law* – alongside the Member States but without jeopardising their own status as subjects of international law – and would as a result be able to avail itself of all means of international action (right to conclude treaties, right of legation, right to submit

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 101 EURATOM)). The ECSC Treaty has ceased to exist.

claims or to act before an international court or judge, right to become a member of an international organisation, right to enjoy immunities), as well as to bind the Union internationally.

A. The conferral of a single legal personality does not automatically involve other changes to the Treaties

6. It was found that, from the strictly legal viewpoint, explicit conferral of a single 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 respective procedures and powers of the institutions regarding in particular the opening, negotiation and conclusion of international agreements.
7. That being said, the Working Group considered it advisable to suggest certain amendments to some provisions of the treaties in order to enhance the effectiveness of the Union's external action 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)

8. As regards the procedure for negotiating and concluding international agreements (treaty-making power), the Working Group's point of departure was that the existing distribution of powers between the Member States and the Union as well as the respective powers of the institutions should be maintained. However, it thought that a clear indication should be given in a single treaty provision¹ of who negotiates and concludes such

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).

agreements. Consolidation of the various applicable procedures in a single provision is made easier by the fact that, whatever the area concerned, it is always the Council which:

- authorises the opening of negotiations and issues the negotiating directives, and
- concludes the agreements once they are negotiated.

9. In fact the applicable provisions could be consolidated into a single Article without changing the specific features of the procedure depending on the subject in hand. Hence 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 fell within the Community domain and at the same time came under Titles V and/or VI TEU ("cross-pillar mixity"), it would be necessary to consider whether a criterion might usefully be laid down whereby it could be clearly established which negotiating procedure applied.
10. Most members of the Working Group also felt it would be useful to make it clear that if the Council (and, in the case of traditional mixed agreements, the Member States) wanted to make the Commission responsible for conducting negotiations on all aspects of an agreement on behalf of the Union (or even the Member States), it would of course be free to do so. This already occurs 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 with 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) TEC).

11. As regards the right to initiate negotiations under the first pillar, informal contacts are made by the Commission, often at the request of third countries, and the Commission informs the Council. On the basis of these contacts, the Commission recommends to the Council that negotiations be opened and the Council takes the decision to authorise the Commission to negotiate (Articles 133(3) and 300(1) TEC). The Working Group considers that, while preserving the *acquis communautaire*, the Working Group on External Action could look into the question of who should have the right to initiate negotiations for agreements on matters under Titles V and VI (Council, Presidency, Member States, Commission, High Representative). The High Representative's role in the negotiation of such agreements could be discussed.

ii. The procedure for concluding agreements concerning Titles V and VI: need to adjust the wording of Article 24 TEU

12. At present, Article 24 TEC – which applies only to subjects covered by the second and third pillars – 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; the other members of the Council may agree that the agreement shall apply provisionally to them.*".
13. This clause can be taken to mean that before the Union is bound by an international agreement a Member State may initiate a national procedure for the ratification of the agreement by its national parliament. It is true that, if the subject-matter of an international agreement is covered partly by the exclusive competence of the Union and partly by the competence of the Member States (traditional "mixed agreements")¹, the Member States must approve the part of the agreement that comes within their national competence in accordance with their respective constitutional requirements. But insofar as Article 24 TEU refers to agreements covered by Union competence, and once the Union has legal personality and concludes them, there is no longer any justification for national ratification procedures.

¹ See, for example, Article 174(4) TEC.

14. This legal requirement must not be confused with the possibility open to any national parliament of examining its government's position on the decision-making procedure in the Council concerning the conclusion of an international agreement. Any national parliament is of course entitled to monitor its government politically, including by means of the "parliamentary reservation" procedure, *before* the Council takes the decision to conclude the international agreement in question. It could even oblige its government to oppose the conclusion of the agreement for "*important ... reasons of national policy*" (see Article 23(2) TEU), but this still concerns the internal decision-making procedure in the Council. Once the Council has decided to conclude the agreement, the Union has consented to be bound by the agreement in accordance with the rules of international law.
15. Moreover, the current wording of Article 24 TEU entails legal insecurity in agreements whose provisional application under this provision ought to be terminated if, following internal constitutional procedures, a Member State were to declare its intention of not associating itself with the agreement. While this mechanism has never been used, it appears to conflict with the legal personality of the Union and could seriously damage the coherence of the Union's external policy.
16. Accordingly, the Working Group proposes that the abovementioned passages from Article 24 TEU should be deleted. In this connection the Working Group would also refer to the positions expressed by the Legal Services of the Parliament, the Council and the Commission: all three of them saw no impediment to deleting the reference to "constitutional requirements" in Article 24 TEU.

iii. External representation of the Union

17. The Working Group stressed the idea that the Union's external political action would be effective and credible only if it succeeded in speaking with **a single voice**. As far as possible, arrangements should be made to ensure that the Union expresses a "common position" both in its representation in international organisations and in its representation vis-à-vis third countries.

18. 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*".
19. As long ago as 1991, the Court of Justice, referring to an agreement that fell partly within the competence of the Community and partly 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.
20. 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 pp. I-1061 et seq. (our underlining).

21. As regards the Union's international representation in the various international organisations and conferences ¹, 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. Of course, from a legal standpoint, the Union can only act within the limits of its own competence. 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 both of 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.
22. The latter solution could be adopted in particular for the Union's participation in international organisations in the economic and monetary sphere, in which the Union could have a single delegation representing the Member States.
23. 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.

¹ The nature of such representation depends 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).

24. For this purpose, the Working Group invites the Working Group on External Action to analyse the advantages and disadvantages of merging in a single individual the responsibilities of the High Representative and of the Commissioner responsible for external relations; in the same context, it could also look into the possibility of establishing synergies at staff level so as to avoid duplication of administration, which results in inconsistency and unnecessary expenditure.

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

25. 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.
26. 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.
27. 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).

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

28. 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.

v. The need to consult the European Parliament

29. 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. This also applies to Community matters where, in Article 300 TEC, the European Parliament should no longer be denied a role in relation to commercial agreements.

vi. Other technical modifications

30. 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 as of now:
- 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).

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

CONCLUSIONS

31. 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" (this will replace the existing legal personalities and the Union will be the successor to the existing organisations and take over all their obligations);*
2. *The merger of the existing legal personalities into a single legal personality does not in itself imply a merging of pillars, but if the Union enjoys a single legal personality enshrined in a single treaty, the current pillar structure will become obsolete for practical purposes and could be abolished; the provisions appearing in the current pillars would become specific procedures in a constitutional treaty without affecting the Community acquis;*
3. *If the Union had single legal personality, a sole article regarding international agreements between the Union and third States or international organisations would be sufficient, with the current division of competences between the Union and the States and between the institutions themselves being maintained; Article 300 TEC (as amended by the Treaty of Nice) could serve as the basis for this new article (with of course "Union" replacing "Community" throughout the Article) and the provisions of Articles 24/38 TEU (with some amendments) added to it. The negotiation and conclusion procedure applicable would be the one arising from the area of law concerned (Community law and/or Titles V or VI TEU). The Working Group felt that consideration should be given to the usefulness of establishing a criterion for determining the negotiating procedure in the case of mixed agreements covering several pillars. Finally, the Working Group felt it was permissible for the Council (and, in the case of mixed agreements, the Member States) to charge the Commission with conducting negotiations on behalf of the Union (and, where appropriate, the Member States) for all agreements;*

4. *With regard to the right of initiative for negotiating agreements relating to Titles V and VI TEU, the Working Group on External Action could consider who should have competence (Council, Presidency, Member States, Commission, High Representative); the future role of the High Representative in negotiating these agreements could also be considered;*
5. *As regards Article 24 TEU, there is a suggestion that this provision should no longer provide for the possibility of a procedure for national parliamentary approval of an agreement concluded by the Union on the basis of its competences;*
6. *The external policy of the Union will be effective and credible only if it manages to speak with a single voice; arrangements should therefore be made to ensure that the Union expresses a single position; the Union's representation in the various international organisations (in particular in the economic and monetary sphere) should hold a single position, or there should even be a single delegation representing the Member States; the Working Group on External Action could look into these issues and at the same time analyse the advantages and disadvantages of merging in a single individual the responsibilities of the High Representative and of the Commissioner responsible for external relations and also think about the synergies required at administrative level in order to avoid duplication;*
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 – and a ruling on interpretation and validity – Article 234 TEC) should be provided for in accordance with procedures to be determined;*
8. *Provision should be made for consultation of the European Parliament in the context of agreements concluded on the basis of Titles V and VI TEU and with regard to commercial agreements (Article 133 TEC).*