

Working Group VII

Working document 22

Working group VII – "External Action"

Subject: "Comments on the sections of the report of Working group III on Legal Personality which relate to the external action of the Union"
- Paper by Mr Bobby Mc Donagh, alternate member of the Convention

Members of the Working Group VII will find hereafter a paper by Mr Bobby Mc Donagh, alternate member of the Convention.

From: Bobby McDonagh, Alternative Representative of the Irish Government

To: Chairperson of Working Group VII on External Action

Subject: Comments on the sections of the report of Working Group III on Legal Personality which relate to the external action of the Union

1. The proposal that the Union should be conferred with an explicit legal personality is framed with the objective of enabling the Union to conduct its relations with third parties in a more coherent and effective manner. Contributions to the External Action Working Group have emphasised this aspect. This is distinct from any proposals that would have the effect of transferring sovereignty from the Member States to the Union in the field of external relations. The proposals contained in the report of Working Group III on Legal Personality that relate to the external action of the Union should be considered with this important distinction in mind.

A. The procedure for the negotiation and conclusion of agreements

2. There is merit in the proposal to state in a single treaty article the procedure for the negotiation and conclusion of agreements which maintained the existing distribution of competences between the Member States and the Union as well as the respective powers of the institutions. Likewise, it appears sensible that a clear basis should exist for determining the negotiating procedure to be adopted for mixed-competency or ‘cross-pillar’ agreements. This should be determined by the Council. As the report recognises, in some circumstances it will continue to be desirable that the Commission and the Council should be represented in the negotiation of certain categories of mixed competency agreements.
3. The proposal that the Council should have the option to request the Commission to conduct negotiations on all aspects of a mixed competency agreement would appear unproblematic. The decision would be taken by the Council on a case-by-case basis and by unanimity. In such circumstances, the body entrusted with negotiations should be mandated to provide regular written reports to the Council on the progress in negotiations.
4. There is considerable merit in the proposal, contained in paragraph 26, to extend the right of initiative to propose the initiation of negotiations for an agreement with a third party under Title V to include the Presidency of the Council and the High Representative. The proposal that this should also be the case for agreements under Title VI should be considered in the Working Group on Justice and Home Affairs.

B Proposal to amend the wording of Article 24 TEU

5. The proposal that Article 24 TEU be amended by the deletion of 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; the other members of the

Council may agree that the agreement shall apply provisionally to them' (the Treaty of Nice amends this clause by deleting 'to them') will require further detailed consideration before a definitive position can be taken in view of our domestic constitutional and legal requirements.

C External representation of the Union

6. The Working Group proposes, at paragraph 38 of its report, that 'the treaty contain mechanisms to ensure that the Union can express a single position, or even be represented by a single delegation, at least in some fields and within international organisations to be determined on a case-by-case basis'. It is broadly recognised that the Union would enhance both the visibility and coherence of its external actions if it were able, where appropriate, to speak with a single voice. This could be given effect through a number of practical measures, including the proposal here for a single Union delegation (Council Secretariat and Commission) in both third country capitals and international organisations. A number of other practical measures in this area are outlined in the paper 'Improving the efficiency and effectiveness of the CFSP' submitted at the last session of the Working Group in my name.
7. However, the Working Group on Legal Personality appears to go further in its report where it states, at paragraph 19, that the conferral of an explicit conferral of legal personality on the Union would establish the right, *inter alia*, to become a member of an international organisation or become party to international conventions as a consequence.
8. This is a sensitive and complex issue that will require careful consideration. A number of contributions to the Working Group, including Commissioner Patten's, have highlighted the scope under the present institutional structure to enhance the coordination among Member States in international organisations, including under Article 19 TEU. There remains considerable scope under existing arrangements to ensure such enhanced coordination and coherence.
9. The proposal that the Union should have the right to become a member of an international organisation in its own right would have to be qualified by a statement that it would be for the Council to decide on the basis of the allocation of competences between the Union and the Member States. Any proposal in this area should not undermine the position of the Member States as members of international organisations or the present voting strength of the Union as a whole under existing arrangements. It is also worth noting that the question of whether the Union can accede to an international organisation will be largely determined by the criteria laid down by individual organisations, and that many organisations reserve full membership to States alone.

D Review by the Court of Justice of agreements concluded by the Union

10. The Legal Personality Working Group proposed, at paragraph 44 of its report, that the jurisprudence of the Court of Justice be extended to cover certain categories of agreements concluded by the Union. This is a complex issue that, as the Working Group itself acknowledges, will require examination in greater depth. It would be premature, in the

absence of the more in-depth examination, for the Working Group to arrive at conclusions on this proposal.

11. The proposal that the jurisdiction of the Court of Justice should be extended to agreements concluded under Title VI is a matter for consideration by the Justice and Home Affairs Working Group.
12. With regard to the proposal that the Court of Justice be accorded jurisdiction under Title V, it would appear that the recommendation that this jurisdiction should apply *ex ante* deserves further consideration. However, the proposals that the Court of Justice be accorded jurisdiction *ex post* in preliminary ruling proceedings (Article 234 TEC), for annulment (Article 230 TEC) and liability (Articles 235 and 288(2) TEC) would create significant difficulties and should be rejected on the grounds that it would involve the Courts in adjudicating on what are, essentially, political decisions under the Common Foreign and Security Policy.

E Consultation with the European Parliament

13. Proposals in relation to consultation with the European Parliament should reflect the existing balance and competences between the institutions of the Union.
14. The question of whether consultation should be extended to agreements concluded under Title VI is for consideration by the Justice and Home Affairs Working Group.