

CONV 170/02

WG III 5

**NOTE**

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from :	Secretariat
to :	Working Group on "Legal personality"
Subject :	Note summarising the meeting on 26 June 2002

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**Adoption of the revised timetable**

1. The Working Group adopted the following **timetable of meetings** <sup>1</sup>:
  - 10 July (Wednesday) : 09.00 - 12.30 (European Parliament - room ASP 1H1);
  - 18 July (Thursday) : 10.00 - 13.15 (Justus Lipsius);
  - 11 September (Wednesday) : 10.00 - 13.15 (Justus Lipsius);
  - 19 September (Thursday) : 14.30 - 18.00 (Justus Lipsius);
  - 26 September (Thursday) : 10.00 - 13.15 (Justus Lipsius);
  - 2 October (Wednesday) : 10.00 - 13.15 (Justus Lipsius);
  - 17 October (Thursday) : 14.30 - 18.00 (Justus Lipsius).

**Continuation of the general exchange of views**

2. The Working Group continued the general exchange of views initiated at the first meeting on 18 June. It was mentioned that the Group's proceedings might concern two series of issues: firstly, the consequences of the attribution of legal personality and of the possible merger of the Treaties for external relations (role of the Council/Commission, negotiation procedure for the Treaties, arrangements for the international representation of the Union with international organisations), and secondly, the consequences for the structure of the pillars (take over or merger ?) and simplification of the Treaties.

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<sup>1</sup> The revised timetable has been forwarded to all the members of the Convention (CONV 103/1/02).

3. It was proposed that initially the problems arising from the existing situation be identified and the practical effects of attributing legal personality to the Union be assessed.

### **Hearing of experts**

4. The Group then heard Mr Jean-Claude PIRIS, Jurisconsult at the Council, Mr Pieter-Jan KUIJPER, Director at the Commission's Legal Service, and Mr Gregorio GARZÓN CLARIANA, Jurisconsult at the European Parliament.

### **Presentation by Mr PIRIS**

5. Mr PIRIS (speaking in a personal capacity) emphasised four aspects: (a) the Union was already a recognised player on the international scene; (b) why was it advisable to take this reality into account and make legal personality explicit, and what were the consequences (merger of the legal personality of the Union with that of the Communities) ? (c) were any fears justified ? (d) political issues to be considered.
6. (a) Referring to the 1949 Opinion of the International Court of Justice, he pointed out that it was not essential for a treaty constituting an international organisation to indicate that that organisation had international personality for it to possess that personality (e.g. UN). In the Treaty on the Union, there was a series of elements which pointed towards the Union having an existence distinct from that of the Member States.
7. In particular, the EU Treaty conferred on the Union a treaty-making power (Articles 24 and 38 TEU) which has been used on many occasions <sup>2</sup>. Article 24 TEU enables a Member State to invoke constitutional rules in order to submit an agreement to its national authorities, but this possibility has never been used.
8. (b) As the EU already has *de facto* legal personality, it is desirable that this should be explicitly recognised for reasons of transparency and visibility, as well as of legal certainty.

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<sup>2</sup> Agreement on behalf of the EU with the former Yugoslavia of 9 April 2001; Agreement on behalf of the Union with the Former Yugoslav Republic of Macedonia (FYROM) of 30 August 2001; exchange of letters between the Union and Lebanon, signed recently in Luxembourg; Agreement with Iceland and Norway on the implementation of Schengen (the legal basis is not Articles 24 or 38 TEU, but it is binding on the Community and the Union simultaneously). Other agreements are envisaged: Agreement between the EU/EC and Switzerland (negotiating directives adopted by the Council on 17 June 2002), negotiating directives to conclude an agreement between the EU and Albania, another with the USA on cooperation in criminal matters and, lastly, an Agreement between the EU and NATO. These agreements will be concluded on behalf of the Union.

9. (c) Single legal personality or alongside that of the European Communities ? Preferably merger for the following reasons:
- the Union encompasses the EC (Article 1 TEU) and it would be strange legally for the EC to be able to commit itself separately at international level;
  - singleness of the external representation of the EC and of the Member States of the Union could be a vector for ensuring such singleness;
  - multiplicity of legal personalities for the EU and the EC would pose a problem of coherence and visibility, and that would hinder one of the objectives of the Treaty which is to affirm the identity of the Union on the international scene.
10. (d) There are certain false arguments concerning explicit recognition of the Union:
- it might prejudice the competences of the EC or of the Member States;
  - it would jeopardise the "pillar" structure;
  - it would jeopardise the "Community method";
  - it would complicate external representation of the EC and of the Member States.

According to Mr PIRIS, these arguments are unfounded as they are based on false premises. In particular, the question of the delimitation of competences is **distinct** from that of the legal personality of the Union. Even if the legal personalities of the Union and of the Community were to be merged, the internal allocation of competences, institutional powers and procedures would not necessarily be affected by it. In legal terms, the allocation of competences and procedures could be maintained as it stands. This would in no way imply that the EC would lose any competences.

11. Moreover, as regards external representation, there were no provisions in the Treaty stipulating that the Commission should always represent the EC towards the outside world. The Commission delegations in the outside world did not represent the EC. External representation of the EU was provided for by the EU Treaty: by the Presidency of the Council, assisted by the High Representative for the CFSP, assisted by the Commission.
12. Attribution of explicit legal personality to the Union may, however, raise certain questions of a **political nature**: who negotiates ? Who represents it towards the outside world ? Who decides according to what procedure ? How is its action controlled ?

13. The Union's legal personality would in no way determine the procedure for negotiating and concluding international agreements. The content of the provisions of Titles V and VI, and particularly Articles 24 and 38 TEU, could remain intact, despite explicit attribution of legal personality to the Union. The Convention and the IGC could, of course, modify these provisions, for example by stipulating that the Commission negotiates the agreements coming under Title VI, but not those under Title V. External representation is also a political question which should be answered separately from the question of attribution of legal personality to the Union. The same would apply to the legal status of the EU within international organisations and any linkage between it and the representations of the Member States, as it would also apply to the decision-making powers of the institutions (they could remain unchanged) or to political or judicial control. Everything would depend on the way in which the article attributing legal personality to the Union was worded, and whether or not it limited its powers of action regarding foreign policy or Title VI of the TEU.

**Presentation by Mr KUIJPER**

14. Mr KUIJPER began by highlighting the difficulties facing the Union because the three Communities had distinct legal personalities; these difficulties prejudiced the Union's objective "to assert its identity on the international scene" (Article 2 TEU). He referred in this connection to the abovementioned Agreement with Switzerland concerning that country's participation in the Schengen *acquis*. The negotiations under way were conducted by the Commission (in consultation with a Council committee) which represented the Community for the Community part of the Agreement, and by the Presidency of the Council for that part of the Agreement coming under Title VI TEU. However, it would be a **single agreement**, which would be concluded by the EU, probably on the basis of Articles 24 and 38 TEU and 62 and 63 TEC. In view of the legal complexity of this cross-pillar mixity, the Commission and the Council had made declarations.
15. He referred to another topical example concerning negotiations with Iran to conclude two international agreements: one being commercial (Article 133 TEC) and the other concerning matters covered by Titles V and VI TEU. Here the question was whether a political link could be established between the two agreements by means of a declaration. Some feared that in acting in this way, the fate of a trade agreement (with procedures under Community law) might be made subject to mechanisms coming under Titles V and VI, for example in

suspending or putting an end to the agreement on the grounds that the other party has not complied with the clause on political dialogue or the clause on combating terrorism. This would be likely to cause problems in view of Article 47 TEU, according to which procedures coming under Community law cannot be affected by procedures coming under Titles V and VI.

16. As for the question of whether explicit attribution of legal personality to the EU would have an impact on the current structure of the Treaties, Mr KUIJPER pointed out that the latter was rather the result of the various Treaties. If a **single treaty** were to be drawn up, the latter could establish a single organisation - i.e. the Union - with a single legal personality under international and internal law. This could be done, moreover, by retaining the procedures currently provided for in Titles V and VI TEU. The former Treaties/pillars would thus become sub-parts of the unified Treaty. If this were the intention, the Union would be able to act in the external sphere in accordance with procedures which differed according to the areas of competence and with different forms of external representation. This would in principle cause no problems, as the Community currently already acted according to different procedures in the external sphere (e.g. trade agreements, association agreements). The question was what would become of Article 47 TEU. In particular, the problem would arise of determining the procedure applicable in the case of an agreement affecting both Community law and Titles V and VI. How would Article 24 TEU be applied ? What would be the negotiating procedure ? And what of provisional application of the agreement by certain Member States, whereas others would need to use the national ratification procedure ? In such cases, the protective role of Article 47 should continue, unless Article 24 TEU were aligned on the rules contained in Article 300 TEC with regard to negotiation and conclusion.
17. As regards the jurisdiction of the Court of Justice, this resulted from the pillar structure: full jurisdiction under the first pillar, limited under the third (Article 35 TEU) and non-existent under the second (Article 41 TEU). Attribution of legal personality to the Union would not have the effect of changing this situation, which could therefore theoretically remain the same. However, Article 6 TEU stipulates that the Union is founded on respect for fundamental rights, and it might be asked whether this obligation is compatible with the non-existence of judicial control concerning the acts adopted on the basis of the second pillar. A revision of Article 41 TEU might appear to be necessary.

18. Similarly, the attribution of legal personality to the Union could not *ipso facto* affect the delimitation of competences between the Union/Community and the Member States. Where competence goes to both the Union/Community and the Member States, mixed agreements would continue to be concluded.
19. As regards the consequences for external relations of the attribution of legal personality to the Union, it should be ensured that with regard to third countries, the "new subject of international law" - i.e. the Union - succeeds the Community as regards all the international obligations to which the latter has committed itself (see, for example, the proposal made by the Commission to transfer to the EC all the obligations arising out of the ECSC Treaty, and, more generally, the transition of the GATT towards the WTO).

**Presentation by Mr Garzón Clariana**

20. Referring to the European Parliament Resolution of 14 March 2002 on the international personality of the Union, he pointed out that the European Parliament had proposed a **merger** of the existing legal personalities so as to give "coherence, visibility and effectiveness" to action at international level.
21. Regarding the delimitation of competences between the EU and the Member States, explicit conferment of legal personality on the Union would not result in a transfer of competences. This would have two consequences: firstly, there would always be "mixed agreements", in that competence to negotiate and conclude them would still go partly to the EU (the successor of the EC) and partly to the Member States<sup>3</sup>; secondly, the protection of citizens referred to in Article 20 TEC would always be a matter for the authorities of the Member States, and not for the EU.

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<sup>3</sup> Participation by the EU in the agreement would only be possible by means of joint action with the Member States, see CJEC, Opinion 1/78 and Kramer ruling.

22. As for the procedures for the negotiation and conclusion of international agreements, Mr Garzón Clariana referred to the aforementioned EP resolution, according to which the procedures could be different at internal level depending on the sphere of action. In other words, the attribution of legal personality to the Union would not alter the inter-procedural conflicts, with all the difficulties inherent in the participation of each institution in accordance with the procedure applicable.
23. As for international representation, three comments were made:
- the personality of the EU would not involve the same legal capacity in the various international organisations or conferences, in that such capacity would depend on the treaty establishing the organisation or the rules of procedure of the conference (e.g. international organisations open to States only, such as the ILO);
  - even where the EU as such were admitted and there were single representation of the European institutions, the Union would only be able to act within the strict limits of its competences. If a matter came partly under the competence of the Union and partly under that of the Member States, that mixity would mean representation of both the Union and the Member States (which would mean that the Member States would retain their seats and their votes);
  - there remained the matter of who would represent the Union at meetings at which its competence was recognised: the Commission or the Council ? This would depend on the new provisions of the Treaty, but a complex system involving more than one representative in international negotiations could hinder the effectiveness of the Union's action in that such a situation would foster a lack of understanding or even resistance on the part of our partners.
24. On the consequences for the pillar structure, Mr Garzón Clariana pointed out that single legal personality would not have a direct impact on the competences of the institutions and the institutional balance. He suggested that the latter could result in some approximation between the provisions of Articles 24 and 38 TEU and those of Article 300 TEC.

**Brief summary of the exchange of views with the experts**

25. Following the exchange of views, it emerged, *inter alia*, that:

- i. the current situation was ambiguous and likely to harm the effectiveness of Union action in the international sphere: the attribution of **single** legal personality would simplify relations with the Union's partners and increase the effectiveness of the Union's action; it would also facilitate simplification of the Treaties;
- ii. explicit attribution of legal personality to the Union would not have legal consequences such as to affect the current system of delimitation of competences between the Union and the EC or between the Union/EC and the Member States, nor the pillar structure, nor the existing procedures for negotiating and concluding international agreements nor the respective attributes of the institutions laid down in the Treaties;
- iii. the external representation of the Union in international fora could remain as it was, but the multiplicity of representatives of the institutions (particularly at the negotiating stage) was perceived as an obstacle to the effectiveness of Union action;
- iv. the question of the Union's delegations in the outside world (external offices) could remain as it was, or be reviewed;
- v. the question of mixed agreements involving both the Union/EC and the Member States was not affected by the attribution of legal personality to the Union;
- vi. the procedures for negotiating and concluding international agreements involving different internal competences (Community law and Titles V and/or VI) (cross-pillar mixity) could remain as they were, but the need to simplify the procedures provided for in Articles 300 TEC and 24/38 TEU was raised by several members;
- vii. judicial control by the Court of Justice concerning those international agreements relating to external policy should be reviewed;
- viii. the future of Article 47 TEU would also have to be examined more closely in the event of legal personality for the Union and a single Treaty;
- ix. if the Union were to succeed the EC, the EU would have to assume clearly vis-à-vis third States all the international obligations already assumed by the EC.

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