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EDITORIAL COMMENTS

The European Union – A new international actor

The Council of the European Union has for the first time concluded, pursuant to Article 24 TEU,[1] an international agreement which explicitly purports to be made between the Union, on the one hand, and a third country, the Federal Republic of Yugoslavia ("FRY"), on the other. This is the agreement between the EU and the FRY on the activities in the latter of the European Union Monitoring Mission ("EUMM").[2] It sets out the detailed arrangements governing the operations of the EUMM in the areas of its responsibilities, as foreseen by Article 6 of the Joint Action on the EUMM, which was adopted by the Council on 22 December 2000.[3] There is no fudging of the issue as to who are the parties to the Agreement. They are identified by the opening words of the preamble as the EU and the FRY, who are together designated "the Participating Parties". The decision on the conclusion of the agreement was adopted unanimously, with no Member State invoking its right to ratify individually (as to which, see below).

The Member States of the EU have thus taken the step of acknowledging that, for some purposes at least, the Union is capable of functioning as an independent subject of the international legal order – in other words, that it enjoys legal personality – and that it has capacity to enter into binding international agreements. Since Article 24 TEU has nothing at all to say about the personality or capacity of the Union (as neither does any other provision of the TEU), an effort of interpretation was needed to reach that result. On its face, the Article is a purely procedural legal basis, identifying the formal steps to be taken in negotiating and concluding international agreements for the purposes of the Common Foreign and Security Policy and, in combination with Article 38 TEU, those of Police and Judicial Cooperation in Criminal Matters; it is the equivalent as regards Titles V and VI TEU of Article 300 EC in the field of Community external relations. The text of the Article is, moreover, notoriously ambiguous as to whether the procedural powers it

1. Introduced by the Treaty of Amsterdam.
2. Council Decision 2001/352/CFSP of 9 April 2001, O.J. 2001, L 125/1.
3. Joint Action 2000/811/CFSP of 22 Dec. 2000, O.J. 2000, L 328/53.

confers on the Council are intended to be exercised on behalf of the Member States or of the Union as such.[4]

One possible interpretation of Article 24 is that it merely provides a simplified procedure for the collective exercise by the Member States of their respective powers as international actors in the areas of Titles V and VI TEU. Support for that interpretation can be found in the provision that no agreement concluded pursuant to the Article "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"; in which event, "the other members of the Council may agree that the agreement shall apply provisionally *to them*".[5] The right of individual ratification which has thus been reserved for the Member States sits uncomfortably with the idea that the procedure of Article 24 has been made available for the exercise of powers recognized as belonging to the Union. The italicized words at the end of the quotation appear. moreover, to provide a textual indication that the international responsibility resulting from agreements concluded in accordance with that procedure attaches, not to the Union, but to the Member States.

On the other hand, power to authorize the opening of negotiations by the Presidency, and power to conclude any agreements, is given by Article 24 TEU to the Council, an institution of the Union.[6] If the procedure had been conceived for the collective exercise of national powers, the designated body would more naturally have comprised the representatives of the governments of the Member States meeting within the Council.

That Article 24 presupposes (though it does not state) that the Council is being authorized to act on behalf of an EU possessed of international legal personality and capacity, would tend to be confirmed by amendments to the text due to be introduced under the Treaty of Nice. (The assumption that the Treaty will enter into force, despite the negative outcome of the referendum in Ireland, seems a reasonable one, in view of pronouncements made by the Irish Prime Minister and the European Council of Gothenburg). In the first place, the Council is to be empowered to act by a qualified majority in respect of certain categories of agreements (which would have included the Agreement on EUMM activity in the FRY):[7] this would be startling if the powers exercisable under the procedure of Article 24 were national ones.

4. The ambiguity of Art. 24 was noted by Dashwood, "External relations provisions of the Amsterdam Treaty", 35 CML Rev., 1019 at 1040–1041.

5. Emphasis added.

6. For present purposes, there is no need to enter into the discussion as to whether the Council is an institution of the Union, strictly speaking, or an institution of the Communities which is placed at the disposal of the Union. It is noted, however, that the phrase "the institutions of the European Union" appears in the Preamble of the Treaty of Nice, and the phrase "institutions of the Union" in the new para (6) of Art. 24.

7. See the new para (3) as regards Title V matters, and para (4) as regards Title VI matters.

Secondly, the provision governing the situations where the representative of a Member State has claimed the right of compliance with national constitutional procedures, has been redrafted so as to read: "the other members of the Council may agree that the agreements shall nevertheless apply provisionally".[8] The deletion of the words "to them" seems clearly intended to counteract the impression that Article 24 agreements are not binding on the Union as such, which, we have seen, might be gathered from the present drafting.

Of course, the questions as to whether the EU is endowed with international legal personality and capacity (and as to the scope of the latter) are ultimately ones for public international law. The answers given will, however, be strongly influenced by the intention of the Member States in this regard.[9] Those intentions, though they may once have seemed obscure, have now been made manifest. Nor is the FRY the only one of the international partners of the Union to have recognized it as a legal subject capable of enjoying rights and shouldering responsibilities. The well-established habit of third countries' accrediting their representatives to the Union, and no longer to the Communities, is an indication that international opinion may have been running ahead of that in the Member States.

The developments which have been discussed above open up intriguing possibilities for the future. Two of these seem worthy of receiving an airing.

First, the possibility has been created for a new kind of mixed agreement. We have become familiar with international agreements simultaneously concluded by the EC and by the Member States, in cases where either certain parts of the subject matter fall within the excusive national competence, or there are matters falling under shared Community and Member State competence and a political decision has been taken to exercise the latter in preference to the former. In the future, it is submitted, those aspects of complex international agreements, like the Europe Agreements or the Partnership and Cooperation Agreements with countries of the former Soviet Union, which fall within the scope of the objectives defined by Article 11 TEU for the Common Foreign and Security Policy, or by Article 29 TEU for Police and Judicial Cooperation in Criminal Matters, could be concluded by the Council on behalf of the EU, under the procedure laid down by Article 24. We say "could" rather than "must" because, in both the present and the post-Nice versions of the Article, the language concerning authorization to open negotiations is permissive (". . . the Council *may* authorize the Presidency . . . "). This may be contrasted with the mandatory language of Article 300 EC (". . . the Commission *shall* make recommendations to the Council, which *shall* authorize the Commis-

8. See the new para (5).

9. See the Advisory Opinion of the International Court of Justice on *Reparations for Injuries suffered in the Service of the United Nations*, ICJ Reports, 1949, p. 174.

sion to open the necessary negotiations . . . ").[10] Mixed EC/Member State agreements still remain possible, therefore; but the further possibility exists of mixed EC/EU, or of doubly mixed EC/EU/Member State, agreements.

Would the Court of Justice have difficulty in countenancing reliance on legal bases contained in different treaties – say Article 310 EC in combination with Article 24 TEU? The issue may have to be litigated, but at first sight it appears unlike the Court would raise objections, given that EC/Member State mixity has been accepted without demur. The problems liable to arise in cases of EC/EU mixity are similar, in principle, to ones with which the Court is familiar (such as the scope of its Article 234 jurisdiction), and will surely be tackled in similar fashion; while, in exercising their different powers under the EC Treaty and the TEU, the institutions will be bound by the duty of loyal cooperation.

Secondly, and more radically, it may be asked whether the international legal capacity of the EU must necessarily be confined to the implementation of Title V and Title VI TEU. As defined by Article 1 TEU, the Union comprehends the European Communities and "the policies and forms of cooperation" established by the TEU, as well as, arguably, the whole range of organized relations between the Member States. May it not be conceivable that all international agreements involving the exercise of Community powers, of powers under Title V and VI TEU, and of the powers of the Member States acting within the framework of the Union – or any combinations of these – should be concluded in the sole name of the EU? Could not a future Europe Agreement, for instance, be concluded between the EU and the candidate country in question? Such a solution would have the immense advantage of enabling the Union to maintain a single identity in all the multifarious aspects of its international activity. Nor need it mean altering the balance of powers between the institutions, or between the Communities, the Union and the Member States: decisions on the negotiating and conclusion of agreements would still fall to be adopted under the appropriate substantive and procedural legal bases of the EC Treaty and the TEU; or, where appropriate, by common accord of Member State governments. But that would be a matter of internal *cuisine*. For third countries, there would be only one party to negotiate with; and, should the need arise, only one party to proceed against.

That, however, may be going ahead too fast; the prospect of agreements being concluded in the name of the Unions in the matters covered by Titles V and VI TEU is challenging enough. And it is hoped that the Council and successive Presidencies will rise to that challenge.

10. Emphasis added.