

## Legal Responsibility for Agreements concluded by the European Union<sup>1</sup>

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Over the past few years the European Union has engaged actively in legal relations with third States and other international organisations. By now the Union has become a party to some eighty international agreements. With the increasing legal activity of the European Union on the international plane, particularly reflected in the coming of age of the European Security and Defence Policy (ESDP),<sup>2</sup> the question of its legal accountability becomes more prominent. Whereas the international legal responsibility of the European *Community* has been subject to extensive legal analysis,<sup>3</sup> the same does not hold true for the European *Union*.<sup>4</sup> It is unclear whether the Union as such may be held accountable for any wrongful act. While there are good reasons to assume that the Union already enjoyed an international legal status from the outset,<sup>5</sup> this does not imply that its external relations regime is therefore also comparable to the rules we know from Community law. The general perception is that the relationship between the European Union and its member states in the Common Foreign and Security Policy (CFSP) – and to a lesser extent in the Police and Judicial Cooperation in Criminal Matters (PJCC) is still clearly different from the relation the same member states maintain with the European Community, and that therefore different rules apply in relation to the legal effects of agreements concluded by the Union.

Both the conclusion of international agreements by the Union and its international activities in relation to military missions call for a fresh look at the relation between the Union and its member states in terms of international responsibility. If Henry Kissinger were in office, he would have every reason to raise the question 'Whom should I sue?', now that his famous question on the telephone number of Europe has been answered by the availability of the number of the High Representative for CFSP, Javier Solana.

### Shared Competences in European Foreign Policy

With regard to international agreements

concluded by the Union, Article 24 TEU is the applicable provision. The scope of this provision extends to police and judicial cooperation in criminal matters, as the cross-references in Articles 24 (CFSP) and 38 (PJCC) indicate. This turns the provision into the general legal basis for the Union's treaty-making, which may even be used to conclude cross-pillar (second and third) agreements.<sup>6</sup> The debate on whether such agreements are concluded by the Council on behalf of the Union or on behalf of the member states seems to be superseded by practice now that the Union has become a party to a number of international agreements on the basis of Article 24.<sup>7</sup> And even before that it was clear that 'it would hardly be persuasive to contend that such treaties are in reality treaties concluded by individual Member States.'<sup>8</sup> Most agreements are concluded within the framework of the ESDP, and relate to the participation of a third country in an EU mission or to the status of an EU mission in a third country. But agreements have also been concluded in the PJCC area and between the EU and other international organizations. Examples include the 2005 Agreement between the EU and Canada establishing a framework for the participation of Canada in the EU crisis management operations, the Agreement between the EU and the Democratic Republic of Congo on the status and activities of EUPOL Kinshasa, the 2006 Agreement between the EU and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security, or the 2006 Agreement between the International Criminal Court and the EU on cooperation and assistance.<sup>9</sup>

While 'mixity' has become the solution in the Community to overcome the division of competences, the international agreements concluded under CFSP are – perhaps ironically – *exclusively* concluded by the European Union.<sup>10</sup> It would of course go too far to conclude on an exclusive competence for the Union on this basis. In fact the whole system of CFSP as described above seems to point to the existence of 'shared', or better, 'parallel' competences: both the Union and its member states seem to be competent to conclude treaties in the area of CFSP (including ESDP). This implies that, once the Union has concluded an international agreement, there is no direct legal relationship between the member states and the contracting third party.

### Conclusion of Agreements by the Council

The international agreements to which the Union has become a party may largely be categorised

as follows:

1. Agreements between the EU and a third state on the participation of that state in an EU operation;
2. Agreements between the EU and a third state on the status or activities of EU forces;
3. Agreements between the EU and a third state in the area of PJCC;
4. Agreements between the EU and a third state on the exchange of classified information;
5. Agreements between the EU and other international organisations;
6. Agreements between the EU and a third state in the form of an exchange of letters;
7. Joint Declarations and Memoranda of Understanding between the European Union and a third state;
8. Agreements concluded by European Union agencies.

The Treaty regime in Article 24 TEU is reflected in the way this provision has been used by the Union in practice. Recent research by Thym reveals that the procedure through which agreements are concluded confirms the central position of the Union's institutions and organs at all stages of the decision-making process.<sup>11</sup>

It is indeed striking that all agreements are concluded by the 'European Union' only; the member states are not mentioned as parties. This clearly deviates from earlier arrangements in which the Union was merely used to coordinate the external policies of the member states.<sup>12</sup> The entire decision-making process as well as the conclusion of the agreement does not reveal a separate role for the member states. Apart from the references to the European Union in both the texts and the preamble of the agreements and the fact that adoption and ratification is done 'on behalf of the Union', this is confirmed by the central role of the Union's institutions and organs (including the Presidency, the Council's working parties and the Council Secretariat), and the final publication in the L-series of the Official Journal (decision on *inter se* agreements of the member states are published in the C-series).<sup>13</sup> Indeed, 'fairly strange operations would be needed to demonstrate that a treaty concluded under such circumstances has instead created legal bonds between the third party concerned and each one of the Member States of the European Union.'<sup>14</sup>

It goes beyond the scope of this contribution to investigate the parliamentary procedures related

to these agreements in all 27 member states, but based on some discussions it seems that member states generally do not consider the EU agreements relevant to be put through their regular parliamentary procedure.<sup>15</sup> As ratification by the governments of the member states is not required for agreements concluded by the Union, their constitutional requirements simply do not apply.

### **Conclusion: Mixed Responsibilities for the Union and its Member States?**

Returning to the renewed 'Kissinger question': it seems that responsibility should first of all be sought at the level of the EU as this is the only contracting party. International treaty law seems to point to the presumption that member states are not liable for any conduct of the organisation. This presumption may, however, be rebutted and in the case of the EU no provisions or procedures on the non-contractual liability exist and a collective responsibility may be the result. An example could be the inability of the Union to live up to either its obligations arising out of the agreement or to more general (customary) obligations for instance related to the protection of human rights. Some recent case law could be interpreted as supporting this view.<sup>16</sup>

In practice, situations in which the question of international responsibility needed to be answered have not yet come up. Generally, claims – for instance related to the liability of a military mission – are dealt with within a private law system and born by the responsible national contingent in a mission. This may very well flow from the fact that even member states themselves have not concluded on their own immunity and accept responsibility for their behaviour in EU operations. While concrete issues are thus settled on a case by case basis, Naert recently presented some more general rules of guidance in these matters.<sup>17</sup> In his view member states remain responsible for any violation of their own international obligations, including through or by the EU, whenever the opposite would lead to an evasion of their international obligations.

This 'piercing of the institutional veil' may certainly be required from a practical point of view. After all, it remains difficult to sue international organisations even if they have violated agreements to which they are a party. On a more principled note, however, the question remains whether holding the member states responsible is legitimate, taking into

account the fact that in almost all cases the EU agreements have not even been dealt with at the domestic level: national parliamentary involvement has been excluded and governmental involvement has been limited to a vote as a member of one of the organisations institutions. The conclusion could therefore be that in cases where the Union is simply not able and/or willing to answer any legitimate demands of a third party, the proper route for the Union would nevertheless be to accept responsibility at the international level and to seek for compensation on the basis of internal EU law in relation to its own member states. After all, to conclude with a politico-legal statement: 'An entity discarding any notion of liability for its conduct could not be taken seriously in international dealings. As strange as it may seem, the capacity to incur international responsibility is an essential element of the recognition of international organisations in general and of the European Union in particular as entities enjoying personality under international law.'<sup>18</sup> ♦

<sup>1</sup> This contribution is based on my 'The European Union as Party to International Agreements: Shared Competences? Mixed Responsibilities', forthcoming in A. Dashwood and M. Maresceau (Eds.), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press, 2007).

<sup>2</sup> More extensively, M. Trybus, *European Union Law and Defence Integration* (Oxford: Hart Publishing, 2005); and R.A. Wessel, 'The State of Affairs in EU Security and Defence Policy: The Breakthrough in the Treaty of Nice', *Journal of Conflict & Security Law* (2003), pp. 265-288.

<sup>3</sup> See for a recent overview P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford: Oxford University Press, 2004).

<sup>4</sup> See, however, F. Naert, *International Law Aspects of the EU's Security and Defence Policy* (Dissertation to be defended at the University of Leuven, 2007); as well as S. Blockmans, *Tough Love: The European Union's Relations with the Western Balkans*, dissertation to be defended at the University of Leiden and to be published by Asser Press, The Hague, 2007. Draft manuscripts in possession of the author.

<sup>5</sup> R.A. Wessel, 'The International Legal Status of the European Union', *European Foreign Affairs Review*, (1997), pp. 109-129; see also 'Revisiting the International Legal Status of the EU', *European Foreign Affairs Review*, vol. 5, 2000, pp. 507-537.

<sup>6</sup> See the 2006 Agreement between the European Union and the United States of America on the processing and transfer of passenger name records (PNR) data, which is based on Decision 2006/729/CFSP/JHA of the Council of 16 October 2006, OJ 2006 L 298, *supra* n. 6. This refers to both Articles 24 and 38.

<sup>7</sup> See, however, some early agreements which mention 'The Council of the European Union' as the contracting party, including the 1999 Agreement with Republic of Iceland and the Kingdom of Norway, and the 2000 Agreement with Republic of Iceland and the Kingdom of Norway.

<sup>8</sup> C. Tomuschat, 'The International Responsibility of the European Union', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International, 2002), p. 181.

<sup>9</sup> OJ 2005 L 315, OJ 2005 L 256, OJ 2006 L 298, OJ 2006

L115 respectively.

<sup>10</sup> As the 2004 Agreement with the Swiss Confederation concerning the latter's association with the so-called Schengen *acquis* shows, combined EC/EU agreements are possible. A similar construction has been debated for the 2006 Cooperation Agreement with Thailand. In the end, however, the agreement was concluded as a traditional Community/Member State mixed agreement; see D. Thym, 'Die völkerrechtlichen Verträge der Europäischen Union', *ZaöRV* (2006), p. 48. A similar debate took place on the EU's accession to the ASEAN Treaty of Amity and Cooperation. As the relevant documents (such as Council Doc. 15772/06) are not in the public domain, the final outcome is not yet clear.

<sup>11</sup> See D. Thym, *ibid*, pp. 8-13.

<sup>12</sup> The prime example is formed by the *Memorandum of Understanding on the European Union Administration of Mostar*, which was concluded by the 'The Member States of the European Union acting within the framework of the Union in full association with the European Commission'; signed in Geneva on 5 July 1994. The Agreement was signed by the Presidency after approval by the Council on the basis of the very first CFSP Decision: 93/603/CFSP of 8 November 1993, OJ 1993 L 286; see also J. Monar, 'Editorial Comment – Mostar: Three Lessons for the European Union', *European Foreign Affairs Review*, vol. 2, 1997, pp. 1-6.

<sup>13</sup> More extensively, see D. Thym, *op.cit.*, p. 11-2.

<sup>14</sup> C. Tomuschat, *op.cit.*, p. 181-2.

<sup>15</sup> This is confirmed by G. De Kerchove and S. Marquardt, 'Les accords internationaux conclus par l'Union Européenne', *Annuaire Français de Droit International* (2004), p. 813: '[...] dans la pratique suivie jusqu'à présent aucun État membre n'a invoqué le respect de ses règles constitutionnelles lors de la conclusion par le Conseil d'accords dans le domaine de la PESC.'

<sup>16</sup> See in particular Case T-49/04 *Hassan*, para. 116 and Case T-253/02 *Ayadi*, judgments of 12 July 2006, nyr. The CFI held that: 'the Member States are bound, in accordance with Article 6 EU, to respect the fundamental rights of the persons involved, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

<sup>17</sup> F. Naert, *op.cit.*, Chapter 3.

<sup>18</sup> C. Tomuschat, *op.cit.*, p. 183.