



TREATY-MAKING BY THE EU, PROCEDURES AND INSTITUTIONS

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Abstract

The aim of this thesis is to analyze and give conclusions on whether the institutions participating in the treaty-making process of the EC and the EU have powers which correspond to their function. Every identified disproportionality in the mutual system of “checks and balances” will be critically analyzed and possible solutions will be proposed on how it can be eliminated by future institutional changes. Special focus will be dedicated to the problem of democratic deficit and to the role of the European Parliament in the treaty-making process.

The research will be based on actual wording of Article 300 of the Treaty establishing the European Community and Article 24 of the Treaty on European Union as interpreted by the European Court of Justice and opinions of legal scholars. In addition to this, the role of the executive and legislature under national constitutions will serve as inspiration for finding proper institutional balance.

By the means of concluding and implementing international agreements the Union can enhance its status on international stage and contribute to stabilization of conflicting regions as well as promotion of its fundamental values abroad. Classical example of this activity is the incorporation of so called “human rights clauses” into the agreements establishing development cooperation with third countries. This is why it is so vital to achieve mutual trust and effective collaboration among the institutions involved in the treaty-making process.

Introduction

International agreements are the most reliable source of international law, as they clearly and undoubtedly express the will of the states, which are their contracting parties, to define their mutual relationship by this instrument of international law. By concluding them, the subject of international law becomes firmly embedded in the complicated system of international relations. The founding states of the European Community (EC) and European Union (EU) delegated this important type of action in international relations also on these newly created subjects, and international agreements are the most common instrument that the EU uses to act on the international scene. However the EU does not have the power to conclude international agreements in every subject matter, as the founding states had to authorize it with this power in every specific area. But this power is not contained in one provision, in fact it is scattered in many provisions of the Treaty establishing the European Community (EC Treaty), and the Treaty on European Union (EU Treaty). In addition to that, the European Court of Justice (ECJ) ruled that not only explicit provisions can be a legal basis for a conclusion of international agreement. So far there are hundreds of various international agreements concluded by the EC and the EU on various subjects and each day this number is rising. To make things even more complicated, the conditions for the conclusion of international agreements by the EC differ from those of the EU.

Every international agreement is concluded by complicated procedure, which includes all major institutions. In addition to this, some more complex agreements also include the member states` national organs` intervention. These procedures have a more comprehensive description than substantial powers and are defined by Article 300 of EC Treaty and Article 24 of EU Treaty. These provisions refer to all the phases of the existence of international agreement –

negotiation, conclusion, implementation and termination.

Although the provisions on substantial powers are more often decided by the ECJ and thus can be perceived as more significant, the procedural ones provide important instruments to the EU institutions and member states in their foreign action. These instruments are not connected only with areas where EU power is present, but today actually relate to all foreign actions undertaken by the member states due to actual restrictions laid down in Article 307 of the EC Treaty. All actors in the foreign field must therefore be well aware of their available means and effectively use them in the process of conclusion of international agreements.

Although the current state of affairs represents a consensus achieved by member states which created the institutional framework of the EU, it does not mean that it is deprived of flaws and shortcomings which affect the quality of the treaty making process. The distribution of powers among the institutions and member states does not always reflect the proper role of each of these subjects and can result in the fact, that those interests, which the subject should represent, can not be defended properly. For example, according to Piet Eeckhout¹ the role of European Parliament in EC treaty making, which is limited mostly to consultation, omits the fact that for the adoption of internal acts the assent of Parliament is necessary. On the other hand Panos Koutrakos² argues that this limited role of Parliament is justified with regard to practical implications stemming from the length and difficulties that are often to be found in the ratification procedure. However the discussion should emphasize the distinctions and similarities of European Parliament with national legislatures thus significantly contributing to determine ideal framework of powers for this European institution. After examining the role of the Parliament from this perspective, especially in the process of international negotiations, it will be

1 P. Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations* (Oxford EC Law Library, 2004), 178.

2 P. Koutrakos, *EU International Relations Law* (Hart Publishing, 2006) 144.

shown that the problem of democratic deficit can not be raised to every procedural area.

The role of the European Commission is to a certain extent also controversial as the question arises whether it has a power to conclude international agreements by itself, without intervention from other institutions. Delano Verwey³ claims that this power relates only to administrative arrangements and supports this argument by the current wording of Article 300 of EC Treaty. Trevor C. Hartley⁴ agrees with this opinion, referring also to ECJ jurisprudence⁵, however he views this position of ECJ as inconsistent with its previous decisions. If we admit that Commission possesses this important power it could avoid control from other institutions and threaten institutional balance of the EU. Current discussions also omit to emphasize the position of the Commission as a group of experts and view it solely as political institution protecting certain interests.

After clarifying the areas where the EU and the EC can conclude international agreements this thesis identifies the role of each institution⁶ in the treaty making process and finds whether the existing instruments in the treaty making process are proportionally balanced to give to these subjects sufficient power to defend the interests of those groups which they are supposed to represent. It will be shown that these subjects do not always have adequate competences to achieve effective protection of interests of these groups.

In order to confirm the above mentioned statement in depth law analysis will be made with respect to Article 300 of the EC Treaty and Article 24 of the EU Treaty, and high importance will be laid upon ECJ jurisprudence. In order to correctly identify the role of the

3 D. Verwey, *The European Community, the European Union and the International Law of Treaties* (T. M. C. Asser Press, 2004) 97.

4 T. C. Hartley, *European Union Law in a Global Context* (Cambridge University Press, 2004) 238.

5 Case C-327/91, *France v. Commission* [1994] E.C.R. I-3641.

6 Here the term institution means only those directly involved in the treaty making process – the European Commission, the Council of EU and the European Parliament.

institutions and member states, the decisions of all these subjects in the treaty making process will be analyzed and set into context with substantial and procedural legal basis in the treaties. Literature will be also reviewed in order to give a comprehensive context to this issue and clarify the intention of law makers when creating relevant provisions.

Comparative method will be also used since there are a lot of aspects that make the EC and the EU treaty-making power significantly different, for example absencing jurisdiction of ECJ in the international agreements in the area of Common Foreign and Security Policy. Comparative method is also important as to show similarities and differences with the treaty making process of national legislatures.

The thesis will be divided into four chapters. The first shall have introductory nature and deal with substantial aspect of the EU treaty making. It will identify the areas where EU and EC can conclude international agreements, distinguish them with so called theory of implied powers and discuss international legal personality of the EU. The second chapter will focus on the role of the institutions in the first phase of the treaty making process, in international negotiations and make conclusions on whether these roles are strong enough to protect interests of those groups they are representing. Accordingly the third and fourth chapter will deal with the phase of expressing consent to be bound by the agreements and implementation phase and also give conclusion on the proper institutional balance.

1. Competence of the EC and the EU to conclude international agreements, legal personality of the EC and the EU

As already mentioned, international agreements express undoubtedly the wish of contracting parties to enter into mutual obligation. They are binding upon subjects which concluded them and all the parties can ask for these obligations to be fulfilled. If a subject in international relations follows important interest, the most reliable way to achieve it is to conclude international agreement with other subject to secure this vital interest. For the subject to express the consent to be bound by the agreement the intervention of competent authorities is absolutely necessary. In the case of a sovereign state it is the executive and legislature who gives assent. However when the EC and EU conclude international agreement these, in addition to bind these international organizations, become binding upon the sovereign member states even though the assent of national authorities is absent. It is for this reason that the issue of giving the EC and EU this power was perceived in a very sensitive way.

In order to avoid competence conflicts the stipulation of supranational and intergovernmental organization powers should have been done in a very precise way. Unfortunately this is not the case in the EU, and it is illustrated by a number of so called “mixed agreements” where both member states and the Community takes part. According to one of the basic principle of international law international organizations do not have general power to act in international relations. Rather they have only such powers by which they were equipped by the founding states. These powers can be either explicitly stipulated in the founding instruments or can implicitly stem from the wording of these documents.⁷ In other words international organizations have a treaty-making capacity only when this is provided for in the founding

⁷ M. N. Shaw, *International law* (Cambridge University Press, 2003), 1195.

document or it is necessary for the attainment of its goals.⁸ EC and EU are not exceptions in this sense. There are many provisions in both EU and EC Treaty which give power to both these entities to act externally in various areas and by various instruments. In addition to that ECJ ruled that except for supporting its external action on explicit treaty rules, EC can base its external action simply on Community objective if this action is necessary for attainment of this objective.⁹ This approach must be seen as enabling EC to be more flexible and adaptable to dynamic international development. As the jurisdiction of ECJ in EU affairs is very limited so far ECJ did not have a chance to apply this doctrine to external relations of EU.

International agreements are not the only available tools for EU and EC to act in international relations. Other available instruments include for example decisions in international bodies, establishing diplomatic posts in non-member countries and with international organizations etc.¹⁰ Still international agreements remain to be the most common and reliable instrument and therefore stay under permanent research of legal scholars. This chapter will try to identify the areas where both EU and EC treaty making competence comes into question emphasizing the constitutional dimension of so called theory of implied powers. At the end the international legal subjectivity of both EC and EU will be discussed, whose existence is usually deemed as a consequence of a treaty making power. The example of the EU will show that this presumption does not always apply.

1.1. Competence of the EC to conclude international agreements

It was already outlined that the competence of the EC to conclude international agreements can be both explicit and implicit. For finding explicit competences the best way is to

⁸ A. Aust, *Treaty Law and Practice* (Cambridge University Press, 2000) 54.

⁹ Case 22/70, *AETR* [1971] E.C.R. 263.

¹⁰ D. Verwey, *The European Community, the European Union and the International Law of Treaties* (T. M. C. Asser Press, 2004), 15.

look into EC Treaty and find all those provisions which create this power.¹¹ The enumeration of treaty-making fields can bring impression that only the above mentioned are the areas where the EC can conclude international agreements. This premise however became doubted and the question arose, whether implied powers can be also found in EC Treaty.¹² It was answered by the ECJ in several decisions. The first decision that introduced existence of this principle was so called AETR judgment¹³, which established principle that “conferment of internal competence in specific area of activities upon the Community by the EC Treaty implies the conferment of external competence in that area”.¹⁴ In its next decision the Court widened the scope of implied powers and ruled that external competence was present even when no internal legislation has been adopted before and stems purely from the EC Treaty provision which confers competence to adopt internal legislation.¹⁵ The main contribution of this judgment was perceived mainly in separation of implied powers from previous exercise of internal competences¹⁶.

The concept of implied competences should not be however read as enabling conclusion of international agreement in any area where the EC has internal power to act. Important condition is the fact that exercise of external powers “is necessary to further one of the objectives of the Community”¹⁷ In addition to this, the EC must be capable to adopt internal rules in the field where the treaty is to be concluded. It was also the fact, that the EC does not have a competence to adopt rules in human rights matters, why the ECJ refused to accept the conclusion

11 They are the following: Article 111 (monetary and foreign-exchange regime matters), Article 133 (Common Commercial Policy), Article 169 (education), Article 150 (vocational training), Article 151 (culture), Article 152 (public health) Article 155 (trans-European networks), Article 170 (research and technical development), Article 174 (environment), Article 181 (development cooperation), Article 181a (economic, financial and technical cooperation) and Article 310 (association agreements).

12 P. Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations* (Oxford EC Law Library, 2004), 58.

13 Case 22/70, *AETR* [1971] E.C.R. 263.

14 P. Koutrakos, *EU International Relations Law* (Hart Publishing, 2006) 78.

15 Opinion, 1/76, (*re: Draft Agreement establishing a European laying-up fund for inland waterway vessels*) [1977] E.C.R. 741.

16 P. Koutrakos, *EU International Relations Law* (Hart Publishing, 2006) 93.

17 Case 22/70, *AETR* [1971], E.C.R. 263

of the European Convention for the Protection of Human Rights and Fundamental Freedoms by the EC.¹⁸

One of the main concerns of the ECJ in establishing the implied powers theory was surely the unity of the EC law because the member states lost the power to conclude international agreements where those agreements could affect the common rules adopted by the Community. Interestingly, other constitutional rules enacted by the ECJ like direct effect and supremacy of EC law were also founded on the unity of the EC law. In this light the implied powers emerge as another constitutional principle of the EC law. After all it is incorporated in the draft of the Constitutional Treaty, in Article III-225.

1.2. Competence of the EU to conclude international agreements

The conclusion of the EU Treaty and creation of the EU did not also mean delegation of a power to conclude international agreements on this newly created subject, neither in the area of Common Foreign and Security Policy (CFSP), nor in Police and Judicial Cooperation in Criminal Matters (PJCCM). However, after some time, this absence of an effective instrument appeared to be blocking the operability of EU foreign actions. Clear evidence of this shortcoming was the fact that in order to be able to cover the mission in the Bosnian city of Mostar the agreement covering this issue had to be concluded by the EU member states and Western European Union member states instead of the EU itself.¹⁹ This became incentive for a major discussion in the Amsterdam intergovernmental conference on whether give the EU international legal personality, or just the power to conclude international agreements. Finally the last version prevailed and this power was granted. However it raised further questions regarding the international legal personality of the EU which will be pointed out later in this chapter.

18 P. Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations* (Oxford EC Law Library, 2004), 84.

19 Ibid 157.

The power of the EU to conclude international agreements is contained in Articles 24 and 38 of the EU Treaty. Although they have rather procedural than substantial nature, the areas which they cover are clearly defined in their wording. Article 24 relates to conclusion of agreements concluded for implementation of Title V of the EU Treaty, which contains provisions on CFSP, and Article 38 can be applied as a legal basis for adoption of agreements covering Title VI, which covers PJCCM.²⁰

1.3. Exclusive competences of the EC and shared competences with member states

Probably the simplest way to describe the word exclusivity is to say that “competence over a particular matter has been transferred completely from member states to the Communities”.²¹ On the other hand if both of these parties retain their power to act in certain area the competences are shared.²² Legal scholars in general agree that in addition to explicit EC Treaty provision, exclusivity can be inferred from explicit provision of internal act, the scope of such an act and finally it can be established in the case when the exercise of internal powers does not suffice for the attainment of Community goal and parallel exercise of external powers is necessary.²³ Exclusivity has impairing impact on the external action of member states, which loose the right to act in areas where EC has this type of competence. On the other hand, the concept of exclusivity enables the EC to conclude international agreements without interference from the member states, which makes the ratification process faster and independent from the constitutional procedures of member states.

20 D. Verwey, *The European Community, the European Union and the International Law of Treaties* (T. M. C. Asser Press, 2004) 75.

21 I. MacLeod, I.D. Henry, S. Hyett, *The External Relations of the European Communities* (Oxford University Press, 1996), 56.

22 Ibid.

23 D. Verwey, *The European Community, the European Union and the International Law of Treaties* (T. M. C. Asser Press, 2004) 29.

Contrary to this, shared competences are reason for the participation of the member states in the whole conclusion process. The practical consequences of shared competence are already mentioned “mixed agreements”²⁴. This type of agreements is ratified by both the EC and by the member states, which makes the adoption of these agreements dependent on the completion of national constitutional procedures.

1.4. Legal personality of the EC and the EU

Legal personality of the EC does not give rise to much discussion because of the provision of Article 281, which explicitly recognizes the legal personality of the EC. On the other hand the legal personality of the EU is one of the most controversial issue in the debate of legal scholars. The problem arises mainly from the fact that Articles 24 and 38 of the EU Treaty provide for the conclusion of international agreements in the area of CFSP and PJCCM. In international law the capacity to conclude international agreements is a consequence of international legal personality. However both these provisions do not specify whether these agreements are concluded by the EU or Council as one of the main institution or just by the member states. The main argument against the legal personality of the EU is the absence of explicit provision granting this attribute to the EU.²⁵ On the other hand, Piet Eeckhout claims that EU possesses legal personality. He supports his view with recent practice in the conclusion process, where he finds no participation of member states.

According to Theodore Georgopolous the “essential question is not whether EU has legal personality or not, but what it is legally capable of doing”²⁶. The main concern should be

24 K. Lenaerts, P. Van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell, 2005), 892.

See also Jürjo Loo, LL.M., “Mixed agreements in the external relations of the European Community and their importance for Estonia as a new member state“ http://www.vm.ee/eng/kat_411/3516.html

25 D. Verwey, *The European Community, the European Union and the International Law of Treaties* (T. M. C. Asser Press, 2004) 69.

26 T. Georgopoulos, “What kind of treaty-making power for the EU? Constitutional problems related to the

whether it is possible for the EU as such to conclude international agreements. Jorg Monar provides three arguments in favor of this presumption.²⁷ According to the first one, the objectives in the CFSP and PJCCM for attainment of which the conclusion of international agreements may be necessary are not objectives of a group of member states rather of Union as such. The second is the fact that according to Article 24 of the EU Treaty the Union institutions, not the member states initiate, conduct and conclude the treaty-making process. The last argument points out, that Article 24 is open for the possibility that some agreements can be adopted by majority voting in the Council, which is contrary to the idea of agreements concluded by all member states.

In reviewing the problem of EU treaty-making the discussions omit to compare the effect of EU and EC agreements on member states and institutions. According to Article 300 of the EC Treaty the agreements concluded under this provision are binding both for the Community institutions and member states. Article 24 of the EU Treaty creates explicit binding effect only for the Union institutions, not for the member states. However, the same provision contains rather procedural rule, enabling the representatives of any member states to declare that international agreement must comply with relevant constitutional procedures. If the representative makes this declaration the agreement is not binding on a member state. From this it can be inferred that if no declaration is made, the agreement is binding on the member state. The effect of international agreements concluded by the EC and the EU is therefore the same on both member states and institutions which further supports the idea that it is the EU who concluded the agreements and contributes to presumption that the EU has legal personality. All this leads to conclusion that the EU indeed possess international legal personality, reference to

conclusion of the EU-US Agreements on Extradition and Mutual Legal Assistance" (2005) 30 *European Law Review* 192

27 J. Monar, "The EU as an International Actor in the Domain of Justice and Home Affairs" (2004) 9 *European Foreign Affairs Review* 400-401.

which was incorporated into Article I-7 of the draft Constitutional Treaty.

This chapter outlined basic principles of the EU and the EC treaty-making competence. It clarified when the treaty-making capacity comes into question and accented the constitutional dimension of the theory of implied powers as one of main accelerators of the treaty-making activity. Examining various arguments it concluded that current wording of the EU Treaty supports the idea of international legal personality of this entity.

2. Treaty negotiations

Treaty negotiations are initial phase of the treaty making process. Proposals to begin them can be made by various actors, as for example governments, organs of international organizations or even NGOs.²⁸ The manner in which they are conducted is to be decided solely by the negotiating parties.²⁹ The process of negotiations consists of preparation of various working papers, nomination of representatives and discussion about various proposals, which sometimes serves as a reason to compare the negotiations with national legislative process.³⁰

The name of this chapter can give impression that its mere purpose will be to describe the initial phase of the treaty-making process. This is not the case, it will rather focus on finding, if each institution possess adequate instruments to protect efficiently the interests given to it by establishing documents of the EC and EU. The treaty-making process is sufficiently described in the existing literature and this analysis will use these sources as a basis for conclusions to be given.

2.1. European Commission – de iure only with right to initiative but de facto with negotiations under control

To find out the tasks of the Commission, the best way is to look at the EC Treaty. Its function here is defined as what is often being referred to as “Guardian of the Treaties”, which means that it “ensures that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied”.³¹ This means that the Commission should protect the interests of the Community. In order to achieve this, the Commission has power to check the other institutions, member states and other relevant subjects and possess also limited legislative

28 J. E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005), 279.

29 M. N. Shaw, *International law* (Cambridge University Press, 2003), 1195.

30 T. Buergenthal, S. D. Murphy, *Public International Law* (West, 2003), 106.

31 Article 211 of the EC Treaty

power. This power contains mainly an exclusive competence to initiate legislation, for which the Commission is equipped with professional capacities. If we look at the treaty-making process the role of the Commission is essentially the same – according to Article 300 of the EC Treaty it is the Commission who initiates the conclusion of international agreements.

It is however not the only institution, which acts in the process of negotiation and conclusion of international agreements. In order to start the negotiations, the Commission must obtain authorization from the Council. The question arises whether this necessity of approval from the Council limits excessively the role of the Commission in the treaty-making process. In order to answer it we have to consider the distribution of powers among the member states and the Community.

It is natural that the member states want to be aware of all the legal acts, which produce binding effects upon them. As already mentioned, according to Article 300(7) of the EC Treaty international agreements belong to this category. The obligations resulting from these agreements can conflict with national interests of the member states. In spite of the fact that formally it is possible to amend the text anytime before the official act of signature, it is the process of negotiation, when the text of the agreement is being formed and when proposals from all the parties can be included in. This is why the role of the Commission is limited on one side by the necessity of the approval from the Council and on the other side by the assistance of the special committees appointed by the Council. The protection of interests of member states is sufficient ground for certain limitation of the Commission in the course of international negotiations.

On the other hand, the role of the Commission is significantly different in the Union matters. Here, in accordance with article 24 of the EU Treaty, the main subject responsible for

the negotiation process is the Presidency. The Commission assists only when it is appropriate. According to some scholars such position “reflects the general principle that the Commission is fully associated with the work carried out in the CFSP field”.³² What arises here is the issue how the third parties will perceive dual representation from one international organization, not to mention that it can be truly ridiculous to start the negotiation process by explaining the differences between the EC and the EU to the foreign partners. Paradoxically, some authors suggest in slightly amended way this possibility as the only available solution to avoid confusion of the opposing party.³³ If we compare the negotiating capacity of the EU to that of the sovereign state, this dual system is not so surprising. National government is the only representative in international negotiations, whilst in the EU it is both the Council and the Commission who fall in the category of executive power. The cooperation of both these institutions is therefore necessary and reality shows that in most cases it is successful.

In general we can say that the in order to provide unified external action in the process of negotiation and signature of international agreements the Commission should be justified to take more steps under the effective control of the Council. It is without any doubt that the Commission has enough professional capacities to achieve smooth functioning of international negotiations.

2.2. Council of the EU– supervision with almost no restrictions

Article 300 makes the Council the most powerful institution in this phase of treaty-making. According to this provision it has two possible means to enter into the process of negotiations. First it authorizes the Commission to start the negotiations after its proposal by

32 S. Marquart, “The Conclusion of International Agreements Under Article 24 of the Treaty on European Union”, in V. Kronenberg (ed.), *The EU and the International Legal Order: Discord or Harmony?* (T.M.C. Asser Press, 2001), 340

33 D. Verwey, *The European Community, the European Union and the International Law of Treaties* (T. M. C. Asser Press, 2004) 111.

issuing directives which are binding and second it appoints special committees which assist the Commission in the process of negotiations. The Council has no obligation to authorize the proposal and has free discretion to agree or not.³⁴ After the negotiations in its subsequent decision the Council also designates the person who will sign the agreement for the Community. This system looks very similar to general legislative procedures where the Commission has the right of legislative initiative and the Council decides. The different approach is however visible as to the role of the Parliament, which will be considered later.

Such a strong role of the Council in the treaty-making seems to be adequate, as it provides the member states with the capacities to defend their national interests during the phases when the shape of the agreements is being formed the most. On the other hand there are certain limits in this competence of the Council. Firstly the special committees have no real power with regard to the Commission and their role is only advisory.³⁵ Secondly although the Council issues at the beginning of the negotiating process the directives which the Commission must follow “it may not seek to regulate the conduct of the negotiations on a line-by-line basis”³⁶. These restrictions create proper institutional balance and support the idea that the position of the Council should be left untouched whilst there is a room to discuss the roles of other two institutions.

2.3. European Parliament - no to democratic deficit but not without further considerations

34 I. MacLeod, I.D. Henry, S. Hyett, *The External Relations of the European Communities* (Oxford University Press, 1996) 87.

35 Case 61/94, *Commission v. Germany* [1996], E.C.R. I-3989.

36 I. MacLeod, I.D. Henry, S. Hyett, *The External Relations of the European Communities* (Oxford University Press, 1996) 89.

One of the significant features in the history of the EC was the permanent fight of the Parliament to enhance its weak position in the initial phase of treaty-making, either by changing the primary law, or reaching formal agreement with other institutions.³⁷ This effort was not very successful with regard to the former, as no formal role has been recognized by Article 300 of the EC Treaty. On the other hand the latter has been fulfilled by several arrangements, namely so called Luns Procedure, Westerp procedure and Solemn Declaration on European Union of 1981, effect of whose should not be underscored, however they are in no way binding upon the institutions.³⁸ The most relevant result was however the Framework Agreement between the Commission and the Parliament³⁹ according to which the Commission has to “provide early and clear information to Parliament both during the phase of preparation of the agreements and during the conduct and conclusion of international negotiations”. This met with strong opposition from the Council which declared that this agreement encroached institutional balance and it retains power to take appropriate steps if acts stemming from this agreement would threaten institutional balance.⁴⁰

What is apparent from this state of affairs is permanent process of enhancing the powers of the Parliament in the phase of negotiations of international agreements, which resulted in above mentioned arrangements. In general however, in spite of these achievements, the power of the Parliament is not being perceived as sufficient due to the fact that its real competences are still lacking behind those of national legislative bodies.⁴¹ In addition to this, the argument of democratic deficit is often being used to show one of major flaws in proper functioning of the

37 R. Corbett, F. Jacobs, M. Shackleton, *The European Parliament* (Catermill Publishing, 1995), 213.

38 I. MacLeod, I.D. Henry, S. Hyett, *The External Relations of the European Communities* (Oxford University Press, 1996), 98-100

39 Framework agreement on relations between the European Parliament and the Commission, CS-0349/2000 [2000] OJ C 121/122

40 P. Koutrakos, *EU International Relations Law* (Hart Publishing, 2006), 149

41 N. Nugent, *The Government and Politics of the European Union* (Palgrave MacMillan, 2003), 233

EU, which encompasses a number of further issues.⁴² All this serves as a ground to challenge the current institutional balance in favor of the Parliament.

There is no doubt that these arguments are justified and following them will bring the institutions closer to people. However, it is necessary to distinguish between the democratic control of certain act and unnecessary interference of parliamentary deputies with the act in the early phase if they can scrutinize this act later. After all, if the comparison is often being used with national parliaments, why not to compare their powers and the powers of the European Parliament in the phase of negotiation of international agreements? In most states it is the executive who negotiates and concludes international agreements and the legislative bodies subsequently decide on whether they will agree with the agreement as a whole or refuse it. The basic philosophy behind this stems from the presumption that it is the executive who possess the professional capacities in the field in which the agreement is being concluded. After this process is successfully completed, the legislature steps in and decides whether it will accept the agreement as such or not. Sometimes, when the agreement implicates important structural change, the legislative vote is replaced by referendum as in the case when the founding treaties of the EU are being amended.

To bring this to actual situation, the question arises whether the European Parliament should decide already in the early phase of negotiation if it can interfere at the later stage. The argument against the intervention during this phase is, that it will prevent the most frequent Community instrument in external relations from being adopted effectively. In addition to this, political considerations, which can be expected from this institution, can not do much help to the experts from the Commission. They can be discussed at the later stages as a whole package. In

⁴² P. Craig, "The Nature of the Community : Integration, Democracy and Citizenship" in P. Craig, G. De Burca, *The Evolution of EU Law* (Oxford University Press, 1999), 23 - 24

other words, it is desirable to cope with the democratic deficit, but not without further considerations as to the effect of possible involvement of the Parliament at any cost. This is however not to say that the Parliament should not be informed about the process that precedes the conclusion of the treaty. All these matters should be taken into account when discussing the role of the Parliament in the process of negotiation and signature of international agreements by the Community. In other words the information duty towards the Parliament should be adhered to rigorously, but real powers should be kept for a later stage of treaty-making process.

Article 24 of the EU Treaty, which is legal basis for conclusion of international agreements by the EU, does not mention the Parliament at all. According to some opinions “the modest role reserved by the EU Treaty for the European Parliament in law making related to these matters demonstrates the specific principles being applied”.⁴³ There are however other provisions of the EU Treaty which enable the Parliament to obtain some information about the negotiations, as for example Article 21.⁴⁴ In addition to this, the argument of democratic deficit can be partly rebutted by participation of national legislatures under specific circumstances, which is presumed by Article 24(5). This possibility reflects the intergovernmental nature of the EU. Although the participation of national legislatures is possible after the process of negotiation has ended, “a negotiation process characterized by as much transparency as is practically possible in international relations would meet national constitutional standards and simultaneously reduce the risk of a negative reaction from national Parliaments on scrutinizing the agreements”.⁴⁵ Indeed, it is hard to expect consent from the body which received absolutely

43 T. Georgopolous, “What kind of treaty-making power for the EU? Constitutional problems related to conclusion of the EU-US Agreements on Extradition and Mutual Legal Assistance” (2005) 30 *European Law Review* 194.

44 P. Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations* (Oxford EC Law Library, 2004), 175.

45 T. Georgopolous, “What kind of treaty-making power for the EU? Constitutional problems related to conclusion of the EU-US Agreements on Extradition and Mutual Legal Assistance” (2005) 30 *European Law Review* 194.

no information at all during the preparation process. On the other hand any suggestions to incorporate formally European Parliament and national legislatures into the preparation process of treaty-making should be refused having regard to previous arguments.

The process of negotiations is specific by its need to provide high level of expert knowledge in the subject matter of the agreement. Although the issue of democratic deficit arises here as well, it should not be applied without further consideration. They should be focused on how the intervention from representatives of people will help to manage successful outcome of the negotiations. This shows that argument of democratic deficit can not be applied in all the phases. Instead, dominant position of the Commission disposing with professional capacities should be left intact.

3. Expressing consent to be bound by the treaty (signature and ratification)

Vienna Convention on the Law of Treaties recognizes numerous ways to express consent to be bound by the treaty and it is upon the subjects who enter into contractual obligations to choose the form. Signature is one of them. It can be either the only condition for the agreement to enter into force or ratification may be necessary as well. The former one is not so desirable in international organizations, as the member states prefer to scrutinize further the content of the agreement. This presumption is confirmed by current wording of Article 300 of EC Treaty, which does not enable the ratification by signature itself.⁴⁶ According to Article 300 the agreements are concluded by the Council after a proposal from the Commission, which in practice means that the Council decides about the conclusion of the agreements and authorizes a competent person, usually the President of the Council, for a signature of the agreements.⁴⁷

Although Article 300 of the EC Treaty provides for the conclusion of international agreements, it does not give further explanation to this word. Interestingly this is also the case of the Vienna Convention. Literature provides explanation that bilateral treaty is concluded when signed by both parties whilst multilateral on the signature of Final Act or on the day when it is open for the signature.⁴⁸ For purposes of Article 300 of the EC Treaty it is hard to suppose that this to be the case as Article 300(2) uses both conclusion and signature separately.

3.1. European Commission – expert without real powers

46 D. Verwey, *The European Community, the European Union and the International Law of Treaties* (T. M. C. Asser Press, 2004), 116-117.

47 For example Council Decision of May 21, 1997 concerning the conclusion of the Agreement between the European Community and the United States of America on customs cooperation and mutual assistance in customs matters [1997] O.J. L222, or Council Decision of January 24, 1994 concerning the conclusions of an Agreement between the European Community and Australia on trade in wine [1994] O.J. L086

48 A. Aust, *Treaty Law and Practice* (Cambridge University Press, 2000) 74.

It is worth to mention that the EC Treaty does not allow the Commission to conclude any international agreement on its own. Although there were attempts in the past to bypass this rule by reserving this power for the Commission in the case of administrative agreements, they were refused by the ECJ.⁴⁹ The question however arises, whether in this phase of the treaty-making process the role of the Commission is not restricted too much. It is the Commission, who negotiates the agreements and according to Article 302 EC Treaty ensures the maintenance of relations with United Nations and other international organizations. In other words, it represents the interests of the Community in the I. pillar matters in foreign relations. Having in mind all this, it would be appropriate to endow the Commission also with power to sign the agreements. This would also support the credibility of Community in the eyes of foreign partners – they would be signing the agreements with the same institution, which negotiated them. After all the signature is formal, sometimes even ceremonial act. Of course the argument can be raised that the decision of the Council can always empower the representative of the Commission to sign the agreements. There is however no pledge that this will be so.

In the EU treaty-making the only power for the Commission is to assist the Presidency during the international negotiations. The philosophy behind this is based on the intergovernmental nature of II. and III. pillar. There might be some issues where professional intervention from the Commission is needed in order to protect the interests of the Community, especially in the matters of PJCCM. In order to achieve this however the intervention in the form of assistance is sufficient.

3.2. Council of the EU – dominant player on the scene

In spite of not forming the final text of the agreements, it is the Council who decides on

49 Case 327/91, *France v. Commission* [1994] E.C.R. I-3641

whether the agreement will be concluded thus binding both the Community institutions and member states. In the past, after the Community was founded, there were expectations that the role of the Council in general will decline with rising trust among the states and the Commission will be taking over the responsibilities, what in fact did not happen.⁵⁰ Indeed, even today it is undoubtedly the Council who has the most powerful position. This is also with regard to the treaty-making process.

There is however a certain form of restriction, which presumes involvement of the Parliament. Under international law signature itself without ratification can be a way to express the consent to be bound by the treaty. In other words, signature includes also ratification. In case of the EC this would create possibility for the Council to decide on its own by signing and ratifying the agreement at the same time and thus bypassing the Parliamentary engagement. This is prevented by the current wording of Article 300 of the EC Treaty, which does not explicitly allow the Council ratification of the agreement without the involvement of the Parliament.⁵¹

This is however the only one, and it must be admitted that insufficient limitation for the dominant position of the Council in the treaty-making process. This is supported, according to some authors, by actual wording of Article 300 of the EC Treaty.⁵² The only way out seems to be therefore amendment of this provision and changing of institutional balance less favorably for the Council.

In the EU the role of the Council is even more dominant than in the EC. Article 24 of the EU Treaty does not stipulate any limitations from other institutions for the Council. This is even more alarming taking into account the fact that the agreements are not concluded by the member

50 N. Nugent, *The Government and Politics of the European Union* (Palgrave MacMillan, 2003), 233

51 D. Verwey, *The European Community, the European Union and the International Law of Treaties* (T. M. C. Asser Press, 2004), 117

52 I. MacLeod, I.D. Henry, S. Hyett, *The External Relations of the European Communities* (Oxford University Press, 1996), 92

states acting jointly, but rather by the Union.⁵³ If they are concluded by Union as such, the fact that the Council as the only institution has the sole right to negotiate, decide and conclude them and other institutions are completely excluded brings serious question marks.

3.3. European Parliament – so far the main loser

The role of the Parliament is probably the most apparent flaw in the treaty-making process of the EC and EU. It is heavily criticized by some authors, who support the idea of giving the Parliament more powers. For example, according to Eeckhout “no role for the Parliament in the conclusion of EU agreements is from democratic perspective deplorable and unsustainable”.⁵⁴

To give a precise picture of what the Parliament can and can not do in the treaty-making process it is worth to look at Article 300(3) of the EC Treaty. According to this provision the Council must consult the Parliament always, except for the agreements based on Article 133(3), which involves tariff and trade agreements. There are four types of agreements for which assent of the Parliament must be obtained. They include association agreements based on Article 310 of the EC Treaty, agreements establishing specific institutional framework, agreements having important budgetary implications for the Community and finally agreements entailing amendment of an act adopted under the procedure stipulated by Article 251. Interestingly, they do not include agreements containing matters for which under internal acts co-decision or cooperative procedure applies. This is sometimes explained by endeavor to speed up the whole treaty-making process of the Community.⁵⁵ It seems to be rather poor argument to completely

53 S. Marquart, “The Conclusion of International Agreements Under Article 24 of the Treaty on European Union”, in V. Kronenberg (ed.), *The EU and the International Legal Order: Discord or Harmony?* (T.M.C. Asser Press, 2001), 340

54 P. Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations* (Oxford EC Law Library, 2004), 183.

55 P. Koutrakos, *EU International Relations Law* (Hart Publishing, 2006), 149

outweigh the will of democratically elected representatives of international organization by the will of member states representatives, who are not elected directly but derive their legitimacy from national deputies. This is confirmed by Eeckhout, who claims that “there is no compelling logic for limiting the assent requirement to such cases as one does not see on what grounds the Parliament should be less involved in the conclusion of agreements laying down, for the first time, rules which in internal decision-making process require co-decision as opposed to amendment of existing rules”.⁵⁶ Example is given by Monar, who mentions the readmission agreement with Hong Kong. According to him the fact that the Parliament has a binding competence under the co-decision procedure for the adoption of internal rules in the area of asylum and for the conclusion of international agreements in this field in needs to be only consulted creates certain institutional imbalance.⁵⁷ It is this imbalance which should be eliminated first. Therefore it is very promising that according to the changes presupposed by Article III-325 of the draft Constitutional Treaty consent of the Parliament is required not only for the agreements entailing amendments to an existing act adopted under the co-decision procedure, but for all agreements covering fields to which ordinary legislative procedure applies.⁵⁸ This is the first step in a long course to bring the institutions closer to people in the area of international relations of the EC. In spite of the Constitutional Treaty not being ratified, this provision should be insisted upon in any form of agreement resulting from the institutional change of the EU.

In addition to this, it was already mentioned that the Parliament together with the Council represent the political dimension in the treaty-making whilst the Commission disposing with

56 P. Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations* (Oxford EC Law Library, 2004), 177.

57 J. Monar, “The EU as an International Actor in the Domain of Justice and Home Affairs” (2004) 9 *European Foreign Affairs Review* 404.

58 K. Lenaerts, P. Van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell, 2005), pg. 887.

professional capacities acts as an expert. Therefore in the initial phase of treaty-making it is the Commission, who justifiably plays prime role. After the initial phase is finished, both political actors should enter the stage with equal force. There is no reason to prefer only one, in this case the Council.

The problem of democratic deficit with regard to the Parliament can be also raised in the case of treaty-making process of the EU, as this provision presupposes absolutely no involvement of the Parliament.⁵⁹ This is explained by the reluctance of the member states to give the Parliament any formal role in the field of CFSP because foreign policy agreements are perceived as exclusive domain of the governments.⁶⁰ Although this explanation seems justifiable in case of CFSP, it can be hardly accepted in the area of PJCCM, where international agreements can directly impact the rights of citizens.⁶¹

If Article 24 is examined closely, objections against the argument of democratic deficit argument can be raised. Although the Parliament is not involved in the treaty-making process by the EU, Article 24(5) gives under specific circumstances power to scrutinize these agreements to national legislatures. For the national legislature to be able to do it, the representative of the member state in the Council must state that the agreement must comply with the requirements of its own constitutional procedure. This means that national legislature is in scrutinizing the agreement dependent on the will of the executive member, who is free to decide whether he will make the statement or not. Such disproportionality can be eliminated by national legislatures, who will create effective national EU coordination system in which they will be able to oblige the member of executive to make this statement. The participation of democratically elected

⁵⁹ This is demonstrated by current wording of Article 24 of the EU Treaty which does not mention the Parliament at all.

⁶⁰ J. Monar, "The EU as an International Actor in the Domain of Justice and Home Affairs" (2004) 9 *European Foreign Affairs Review* 405-406.

⁶¹ Ibid.

representatives is therefore possible, the question however arises whether it is sufficient.

All this debate presumes, that national legislatures will be able to substitute the Parliament, because they equally represent the will of people in the EU. This is based on the view, that the will of all peoples in the EU represented by national parliaments altogether is the same as the will of all people in the EU expressed by the European Parliament. This is essentially wrong hypothesis. National legislatures of one state can have diametrically different interest in the same international agreement than the other one. The national legislature wants to achieve maximum benefit for its electors by establishing as little obligations and as much advantages as possible. Although the EU agreements are specific by having one contracting party composed of all member states and the other of one subject of international law, the conflict of the national legislatures in the EU is likely to happen. Contrary to this, the Parliament acting as European institution aims at finding the common will of all the peoples in the EU, which naturally has a form of compromise. This clearly implies that replacement of the Parliament by national legislatures in the treaty-making process of the EU is not adequate and should be corrected. Again the wording of Constitutional Treaty is promising as it requires at least the duty to consult the Parliament prior to the conclusion of any international agreements outside the field of CFSP.

This chapter proved that the substance of institutional change should focus on enhancing the role of the Parliament in order to achieve the state of affairs in which international agreements will not lack democratic legitimacy. This is not only the case of the EC, but above all the EU in spite of certain involvement on national parliaments.

4. Implementation

Articles 300 of the EC Treaty and 24 of the EU Treaty explicitly or implicitly state that international agreements concluded according to these provisions are binding both upon the member states and the institutions of the Community and the Union. This means that all the institutions are obliged to apply them within their respective competences. Again the question arises whether these competences are adequate to the interests they should protect. This chapter should provide answer to this. The question of implementing the EU agreements will not be examined here as Article 24 does not contain any other rule on this issue than the mentioned binding effect on member states and EU institutions.

4.1. European Commission – to represent and to serve

According to Article 211 of the EC Treaty it is the Commission who shall ensure that the acts taken by the institutions are applied. It has a duty to ensure that institutions and member states do not block the implementation of the international agreements and in order to attain this it has power to bring an action to the ECJ. It is therefore this institution who bears primary responsibility for the implementation of international agreements. Looking at the fact that the Commission should protect the interests of the Community it is necessary that it possesses adequate powers. That is why the current wording of the EC Treaty with regard to the role of the Commission in the implementation of international agreements seems to be appropriate and it is not necessary to amend it. In fact the Constitutional Treaty makes it easier for the Commission to bring an action to ECJ when member states fail to fulfill its commitment under the international agreement.⁶²

4.2. Council of the EU – appropriate position

62 K. Lenaerts, P. Van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell, 2005), pg. 440.

This institution is bound by the international agreements in the same manner as the others. It has a “duty to act in a manner which enables the Community to give effect to its obligations according to their terms”.⁶³ In other words the fulfillment of the obligations does not include only active action but also refraining from any acts which can contradict the purpose of international commitment. The Council is also involved in establishing the positions of the Community in the bodies set up by international agreements. Its role is according to Article 300(2) exactly the same as in the conclusion of international agreements. All this can be summarized as that the role of the Council is appropriate to its function and further improvements are not needed.

4.3. European Parliament – why not to reinforce its powers?

Looking at the constitutional rules of sovereign states it is clear that the role of national legislatures in the implementation of international agreements concluded by this states is limited. The foreign policy is deemed to belong under the domain of the executive. It seems that the role of the Parliament copies in this sense national legislatures and this position is accurate.

In spite of this, there is one defect with regard to the position of the Parliament, which concerns the decision making for the positions of the Community in the body established by the agreement. According to Article 300(2) the procedure for establishing this position should follow general procedure for the conclusion of international agreements, except for the fact that the only possible way for the involvement of the Parliament is that it is being “immediately and fully informed”. The reason for this is that the positions are being adopted very often and involving the Parliament would restrain the effectiveness of the Community action.⁶⁴ Again two interests

63 I. MacLeod, I.D. Henry, S. Hyett, *The External Relations of the European Communities* (Oxford University Press, 1996), 129.

64 S. Martenczuk, “Decisions of Bodies Established by International Agreements and the Community Legal Order”, in V. Kronenberg (ed.), *The EU and the International Legal Order: Discord or Harmony?* (T.M.C. Asser Press,

must be considered, on one hand the need for effective external action of the Community and on the other hand the effort to eliminate the democratic deficit and include the Parliament into the decision making. It is true that in order to act efficiently, speedy procedure is necessary. But why not to select the most important decisions and for these require at least consultation if not assent from the Parliament? Under this philosophy, the types of selected decisions in the bodies established by international agreements, for which consultation and in better case assent of the Parliament would be required would simply copy the types of agreements, for which assent of the Parliament is needed according to current wording of Article 300(3). This would bring more involvement for the Parliament into the implementation process of international agreements. However the Constitutional Treaty does not propose anything of this nature and conserves the status quo.

In the phase of implementation the roles of the institutions are distributed more proportionally than in the phase of expressing consent to be bound. There is however one exception with regard to the capability of the Parliament to participate in adoption process decisions taken by the bodies established by the international agreements.

Conclusion

This paper showed that in the treaty-making process of the EC and the EU still persist imbalanced relations especially with regard to the European Parliament. It is hard to describe the treaty-making process as democratic, if in most of the cases the only involvement of the Parliament is consultation and sometimes it is limited only to receiving information. On the other hand it was pointed out that eliminating democratic deficit through automatic involvement of the Parliament into all phases of treaty-making, especially into the international negotiations, is not the right way, as this might hamper the effectiveness of the external action of the EC and the EU. That is why in order to achieve institutional balance it is necessary to carefully examine existing instruments of each institution and consider further improvements. In this sense the actual draft of the Constitutional Treaty promises only small step forward, as the role of the Parliament remains to be consultative in most cases.

The Union will continue to conclude treaties with third subjects of international law in order to protect its interests and to act as a stabilizing actor on the international scene. If this type of external action should represent the interests of all constituent groups, it has to find a proper compromise in which these parties can actively participate. Everybody knows that institutional change in the EU is inevitable, so why not to use this opportunity to achieve optimal balance?

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