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OPINION OF THE LEGAL SERVICE[1]

From:	Legal Service
To:	WP on the European Free Trade Association (EFTA)
Subject:	Draft Agreement establishing an association between the European Union and the Principality of Andorra and the Republic of San Marino, respectively – Nature of the competence of the Union and form of the agreement (mixed or EU-only agreement)

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I. INTRODUCTION

1. On 26 April 2024, the Commission submitted to the Council proposals for a Council Decision on the signing and provisional application of the Agreement establishing an association between the European Union ('the Union') and the Principality of Andorra and the Republic of San Marino respectively[2] and for a Council Decision on the conclusion, on behalf of the European Union, of that agreement.[3]

[1] This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

[2] COM(2024) 191 final; 9663/24.

[3] COM (2024) 189 final; 9493/24.

2. The Commission proposed to sign and conclude the agreement in question (hereinafter the 'Agreement') in the form of a 'Union-only' agreement, i.e. by the Union alone without the Member States.[4] The proposals submitted by the Commission are based on Article 217 of the Treaty on the Functioning of the European Union ('TFEU'), in conjunction with the relevant procedural legal bases.

3. In the EFTA Working Party, several Member States sought the views of the Council Legal Service on the nature of the competence of the Union to sign and conclude the Agreement and on the consequences of signing and concluding the Agreement in the form of a 'Union-only' agreement, as proposed by the Commission.

4. At the meeting of the EFTA Working Party on 10 December 2024 and on several occasions thereafter, the representative of the Council Legal Service provided an oral answer to this question. This opinion confirms and expands in writing the legal reasons presented at those meetings.

II. LEGAL FRAMEWORK: THE AGREEMENT

5. The Agreement establishes an association between the Union and, respectively, Andorra and San Marino – qualified as the 'Associated States' –, with the aim in particular to ensure the participation of those two States in the internal market and the application, to those two States or in their relation with the Union, of the Union *acquis* in the fields covered by the Agreement. The Agreement consists of a Framework Agreement (**A**), seven Framework Protocols (**B**), and two Associated State Protocols – one for Andorra and one for San Marino –, including the Annexes thereto (**C**).

[4] The explanatory memorandum accompanying the Commission proposals does not specify the reasons for this choice.

A. The Framework Agreement

6. While Part I of the Framework Agreement is about its objectives, values and principles, Part II lays down provisions aiming to ensure the free movement of goods (Chapter 1); the free movement of persons, workers and self-employed persons (Chapter 2); the freedom of establishment (Chapter 3); the freedom to provide services (Chapter 4), and the free movement of capital (Chapter 5). Those five chapters contain provisions replicating, in substance, the provisions of the TFEU on those topics and provide, notably, for the application of the Union *acquis*, as specified in the Annexes to the Associated State Protocols, to the Associated States and/or in the relations with those States. Part II of the Framework Agreement also contains a chapter on combined, road, rail, inland waterway and maritime transport (Chapter 6).

7. Part III of the Framework Agreement contains rules on competition (Chapter 1), on State aids (Chapter 2) and on public procurement and intellectual, industrial and commercial property rights (Chapter 3).

8. Part IV of the Framework Agreement lays down rules on social policy, including health and safety of workers, labour law, equal pay for equal work and equal treatment of men and women and social dialogue (Chapter 1); rules on consumer protection (Chapter 2); rules on environment and climate (Chapter 3); rules on statistics (Chapter 4), and rules on company law (Chapter 5).

9. Part V of the Framework Agreement contains provisions on anti-fraud cooperation, entrusting some tasks to OLAF (Article 62), as well as rules on cooperation in tax matters (Article 63).

10. Part VI of the Framework Agreement provides for cooperation, dialogue and consultation in certain areas identified in Article 64 thereof, namely research and technological development; information services; environment; climate action; education, training and youth; social policy; consumer protection; small and medium-sized enterprises; tourism; audiovisual policy; civil protection; judicial cooperation in civil matters; culture; communication; trans-European networks; regional policy, and public health, in so far as those matters are not regulated under the provisions of other parts of the Agreement. In particular, Part VI sets up a framework for the participation of the Associated States in Union programmes.

11. Part VII of the Framework Agreement lays down the institutional provisions governing the Agreement, including the institutional framework set up (Chapter 1); the rules on the involvement of the Associated States in the drawing up of Union acts in the fields covered by the Agreement (Chapter 2); rules aiming to ensure homogeneity, namely, on the one hand, the incorporation into the relevant Annexes to the Associated State Protocols, and/or the application to the Associated States, of Union acts in the fields covered by the Agreement, and, on the other hand, the uniform interpretation of the provisions of the Agreement and of the Union acts referred to therein (Chapter 3); the surveillance procedure (Chapter 4); the dispute settlement and judicial review mechanism (Chapter 5), and rules governing the adoption of safeguard measures and measures that may be taken in the case of force majeure (Chapter 6).

12. Part VIII of the Framework Agreement lays down the general and final provisions.

B. The Framework Protocols

13. Framework Protocol 1 lays down rules on horizontal adaptations, governing the incorporation of the relevant Union acts in the Annexes to the State Protocols and the application of those acts to, and/or in the relations with, the Associated States. Framework Protocol 2 identifies certain bilateral agreements which must continue to apply after the entry into force of the Agreement. Framework Protocol 3 lays down provisions aiming, in particular, to establish a framework for the gradual compliance of regulations and supervisory measures of the Associated States with the Union acquis in the field of financial services, to facilitate the progressive extension of the Union internal market for financial services to the Associated States, to ensure the integrity of the enlarged internal market and to promote the prevention of potential risks to financial stability. Framework Protocols 4 and 5 lay down specific rules on the application of competition rules and on cooperation in the field of statistics, respectively. Framework Protocol 6 provides for the rules governing the arbitration procedures. With regard to the latter it is noted that the Agreement foresees the possibility, in specific cases, of arbitration between the Contracting Parties, but not between a legal or natural person and a contracting party. Framework Protocol 7 concerns the statute of the parliamentary association committee established under Article 78 of the Framework Agreement.

C. The Associated State Protocols and the Annexes thereto

14. The two Associated States Protocols, namely the Andorra Protocol and the San Marino Protocol, lay down certain specific provisions for each of those States in the fields covered by the Agreement. The Annexes to each Associated State Protocol,[5] for the most part thereof, lay down lists of Union acts to be applied by the Associates States and/or in the relations therewith in the fields covered by the Agreement. The Annexes include several sectoral or specific adaptations to take account of the specificities of Andorra and San Marino arising from their specific relations of proximity with their neighbours, their size and their relatively small populations. The Annexes also include transitional periods for the take-over, implementation, and application of certain Union legal acts by those two States.

III. LEGAL ANALYSIS

15. This opinion will recall the main rules governing the external competence of the Union, as interpreted by the Court of Justice (**A**), before analysing the nature of the Union competence with respect to some specific provisions of the Agreement which are of particular interest for the purpose of this legal analysis (**B**) and identifying the legal options available to the Council for the signing and conclusion of the Agreement and the consequences of each option (**C**).

16. In view of the length of the Agreement, this opinion does not provide an in-depth examination of the competence of the Union on all aspects of the Agreement.

[5] Each Associated State Protocol is accompanied by 25 annexes.

A. General rules governing the external competence of the Union

1) Determination of the nature of the Union competence

17. Pursuant to Article 216(1) TFEU, the Union may conclude international agreements with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. The existence of a Union external competence is without prejudice to the nature – shared or exclusive – of that competence: it follows from the Court of Justice's settled case-law that a distinction must be made between whether the Union has an external competence and whether any such competence is exclusive or shared.[6]

18. In accordance with Article 3(1) TFEU, the Union has exclusive competence in the following areas: customs union, the establishing of competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policies, and the common commercial policy.

19. In accordance with Article 3(2) TFEU, the Union '*also* [has] *exclusive competence for the conclusion of an international agreement* […] *in so far as its conclusion may affect common rules or alter their scope*'. As clarified by the Court of Justice,[7] this last limb of Article 3(2) TFEU codifies the so-called ERTA case-law.[8]

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[6] See, to that effect, judgment of 5 December 2017, *Germany v Council*, C- 600/14, EU:C:2017:935, paragraphs 46 to 49 and the case-law cited.

[7] See judgment of 4 September 2014, *Commission v. Council* ('*Broadcasting Convention'*), C-114/12, EU:C:2014:2151, paragraphs 66 and 67, as well as Opinion 1/13 of 14 October 2014, *Child Abduction Convention*, EU:C:2014:2303, paragraphs 69 to 74.

[8] A line of cases starting with judgment of 31 March 1971, *Commission v Council* ('ERTA'), 22/70, EU:C:1971:32, paragraphs 17 to 19:

'*17. In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.*

18. As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.

19. With regard to the implementation of the provisions of the Treaty, the system of internal Community measures may not therefore be separated from that of external relations.'

20. According to settled case-law, there is a risk that Union common rules may be adversely affected by an international agreement, or that the scope of those rules may be altered, such as to establish that the Union has exclusive external competence pursuant to Article 3(2) TFEU, where the agreement in question falls within the scope of the said rules. A finding that there is such a risk does not presuppose that the area covered by the international agreement in question and that covered by Union rules coincide fully. In particular, the scope of Union rules may be affected or altered by an international agreement where the latter falls within an area which is already covered to a large extent by such rules. Furthermore, such a risk of common Union rules being affected may be found to exist where the international agreement at issue, without necessarily conflicting with those rules, may have an effect on their meaning, scope and effectiveness.[9]

21. That said, since the Union is vested only with conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the international agreement at issue and the Union law in force. That analysis must take into account the areas covered, respectively, by the rules of Union law and by the provisions of that agreement, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the said agreement is capable of undermining the uniform and consistent application of the Union rules and the proper functioning of the system which they establish.[10]

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[9] See, inter alia, judgment of 20 November 2018, *Commission v Council*, joined cases C-626/15 and C-659/16, EU:C:2018:925, paragraphs 113 and 114 and the case-law cited. In paragraph 115 of that judgment the Court also recalled that it is for the party concerned to put forward evidence or arguments to establish that the exclusive nature of the external competence of the European Union on which it seeks to rely has been disregarded.

On the specific issue of provisions of an international agreement laying down minimum requirements, see CLS opinion 13484/21 and the case-law referred to therein.

[10] See, to that effect, Opinions 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014, EU:C:2014:2303, paragraph 74, and 3/15 *(Marrakesh Treaty on access to published works)* of 14 February 2017, EU:C:2017:114, paragraph 108 and the case-law cited.

2) The form of international agreements concluded by the Union

22. As explained by the Council Legal Service, in particular in its opinion 5591/21 on the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, the exercise by the Union of its competence internally has consequences on the Member States insofar as, if the Union thereby acquires exclusive competence, Member States may no longer enter into international commitments outside the framework of the EU institutions in the areas falling within Union exclusive competence.[11] Accordingly, where an international agreement falls entirely within Union exclusive competence, it must, in principle, be concluded in the form of a 'Union-only' agreement.[12]

23. Conversely, where an international agreement does not fall within Union exclusive competence, e.g. in case the Union has not (yet) exercised its shared competences in a given area internally and the conditions for exclusivity set out in Article 3(2) TFEU, as interpreted by the Court of Justice, are not met, Member States can still exercise their competences externally.[13] In that case, a distinction must be made between, on the one hand, agreements falling under so-called 'obligatory mixity' and, on the other hand, agreements falling under so-called 'facultative mixity'.

24. Mixity is obligatory where, in addition to areas of Union competence, the international agreement in question covers one or several matters for which the Union has no competence whatsoever, i.e. where the Treaties have not conferred any competence on the Union in that particular area. In such a case, the agreement must be concluded in the form of a mixed agreement both by the Union and its Member States, without it being legally possible to conclude it in the form of a 'Union-only' agreement.[14]

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11 CLS opinion 5591/21, paragraph 18 and case-law cited.

12 One exception is where Member States must act jointly in the interest of the Union in the field of Union exclusive competence because the Union is legally prevented from concluding an international agreement, for example for the conclusion of international agreements with or in the framework of an international organisation the membership of which is not open to regional organisations such as the Union.

13 See CLS opinion 5591/21, paragraph 19.

14 See, to that effect, Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017, EU:C:2017:376, paragraph 292; see also CLS opinion 12866/19, paragraph 8, and CLS opinion 5591/21, paragraphs 22 and 26.

25. Mixity is facultative where the international agreement covers one or several areas where the Union has shared competences which have not yet been exercised or are not yet covered by Union common rules and are not capable of affecting such rules or altering their scope within the meaning of Article 3(2) TFEU (also called Union 'potential competence(s)'). In such a case, the agreement may be concluded either in the form of a mixed agreement by the Union and its Member States or in the form of a 'Union-only' agreement by the Union alone, depending on whether the Council decides that the Union is to exercise externally all its potential competences in the areas covered by the agreement or not.[15] The Council may decide, for a particular agreement, to exercise externally the potential Union competence in accordance with the voting rules of the relevant Treaty legal basis. In the case of facultative mixity, whether to exercise the Union's potential competence externally when concluding an agreement, and thus concluding it in the form of a 'Union only' or in the form of a mixed agreement, is a political choice to be made by the Council.[16]

B. The specific case of the envisaged Association Agreement with Andorra and San Marino

26. **DELETED**

27. **DELETED**

[15] If, exceptionally, an international agreement falls entirely under shared (potential) competence, without any of its provisions falling under EU exclusive competence, it may also be concluded by Member States acting alone while respecting their obligations under the Treaties and the EU *acquis* (in accordance with Article 4(3) TEU), without any involvement of the Union (see CLS opinion 13484/21, paragraphs 58 to 60). However, as explained in paragraph **Error! Reference source not found.** of this opinion, this is not the case here.

[16] See judgment of 5 December 2017, *Germany v. Council*, C-600/14, EU:C:2017:935, paragraphs 62 to 68 and the case-law cited, and judgment of 20 November 2018, *Commission v Council (Antarctic MPAs)*, joined cases C- 626/15 and C- 659/16, EU:C:2018:925, paragraph 126. In that latter judgment, the Court of Justice clarified that '*the mere fact that international action of the European Union falls within a competence shared between it and the Member States does not preclude the possibility of the required majority being obtained within the Council for the European Union to exercise that external competence alone*' (paragraph 126). See also CLS opinion 12866/19, paragraph 6; CLS opinion 5591/21, paragraphs 22 to 25.

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C. Options for the signing and conclusion of the Agreement

42. As mentioned in paragraph 0 above, the Commission has proposed to sign and conclude the Agreement in the form of a 'Union-only' agreement on the basis of Article 217 TFEU, in conjunction with the relevant procedural legal bases.

43. Article 217 TFEU empowers the Union to conclude with a third State an international agreement establishing an association involving reciprocal rights and obligations, common action and special procedure. The areas covered by such an agreement should be within the limits of the powers that the Member States have conferred on the Union in the Treaties to attain the objectives set out therein.[30] Article 217 TFEU can be used whenever the Treaty confers the appropriate competence on the Union in the different areas covered by the agreement in question even if this competence has not been exercised fully or is only potential. Article 217 TFEU allows the Union to conclude, by unanimity, a wide-ranging agreement on matters of Union competence without the need to identify in detail the areas where the Union has already exercised or not its competence and regardless of whether the sectoral legal basis relevant for each area covered by the international agreement in question requires unanimity or qualified majority voting. However, Article 217 TFEU cannot be used as a legal basis if there is no underlying competence, i.e. the underlying sectoral competence must exist for Article 217 TFEU to be used as a legal basis.[31]

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[29] **DELETED**

[30] See judgment of 18 December 2014, *United Kingdom v Council*, C-81/13, EU:C:2014:2449, paragraphs 61 and 62.

[31] See CLS opinion 5591/21, paragraphs 33 and 34.

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46. **DELETED** [32].

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IV. CONCLUSION

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