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OPINION OF THE LEGAL SERVICE¹

From:	Legal Service
Subject:	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, of the other part <ul style="list-style-type: none">– EU-only agreement– Exercise by the EU of its potential competence

I. INTRODUCTION

1. At the meeting of Coreper on 23 November 2020, the representative of the Council Legal Service (CLS) made an oral intervention on the legal nature of the future agreement with the United Kingdom (UK) which was being negotiated, and more particularly on the issue of mixity and on the possible EU-only nature of that future agreement, through the exercise by the EU of its so-called potential competence. In the meantime, the Trade and Cooperation Agreement between the EU and Euratom, of the one part, and the UK, of the other, was signed on 30 December 2020 (the Trade and Cooperation Agreement).

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2. In reply to a request by several delegations, in particular at the meeting of the UK Working Party on 13 January 2021, this opinion confirms and develops in writing the answers already provided orally by the CLS. It focuses more particularly on the issue of the EU exercising externally its potential competence - i.e. the exercise of its competence in areas of shared competence which are not already subject to common rules within the meaning of Article 3(2) TFEU and the related case-law - and the legal consequences of such an exercise of competences.
3. In view of the short time available in the ongoing conclusion process, this opinion focusses on the Trade and Cooperation Agreement and does not provide an in-depth examination of all its aspects, nor does it provide a comprehensive and detailed competence analysis.

II. FACTUAL AND LEGAL BACKGROUND

4. On 25 February 2020, the Council adopted its decision² authorising the opening of negotiations for a future agreement with the UK, to which the negotiating directives were annexed³. This decision also nominated the Commission as the EU negotiator. In parallel, the Council and the Representatives of the Governments of the Member States recorded a statement⁴ to the Council minutes. In this statement, the Member States' representatives authorised the Commission to conduct negotiations in areas of the future relationship that fall within their competences and stated that the question whether the new agreement would be concluded by the EU or by the EU and its Member States remained to be determined at the end of the negotiations⁵

² Council Decision (EU, Euratom) 2020/266 of 25 February 2020 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement (OJ L 58, 27.2.2020, p. 53).

³ Doc 5870/20 ADD 1 REV 3, Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, 25 February 2020.

⁴ Annex B of Doc. 6239/20.

⁵ "[T]he Member States' representative authorise the Commission to conduct negotiations in areas (...) that fall within the competences of the Member States (...)" and "the question of whether the (...) agreement will be concluded by the Union or by the Union and its Member States will be determined at the end of the negotiations." (emphasis added).

5. The negotiations, which were completed on 24 December 2020, resulted in three agreements: the Trade and Cooperation Agreement; the Agreement between the EU and the UK concerning security procedures for exchanging and protecting classified information, which supplements the Trade and Cooperation Agreement; and an Agreement between the Government of the UK and Euratom for Cooperation on the Safe and the Peaceful Uses of Nuclear Energy. As indicated above, this opinion focusses on the first Agreement.
6. Under its first Article, the Trade and Cooperation Agreement "*establishes the basis for a broad relationship between the [EU and the UK] within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties' autonomy and sovereignty*"⁶. When deciding to sign the Agreement, the Council characterised it as "[establishing] *the basis for a broad relationship between the [EU and the UK] involving reciprocal rights and obligations, common actions and special procedures*" which is the wording from Article 217 TFEU on association agreements, on the basis of which the Council chose to sign the Trade and Cooperation Agreement with the UK⁷.
7. The Trade and Cooperation Agreement with the UK sets out arrangements in a vast array of areas such as trade in goods, services, investments, digital trade, capital movements and payments, intellectual property, public procurement, energy, aviation and road transport, fisheries, social security coordination, the absence of visas for short term visits (Part Two of the Agreement), law enforcement and judicial cooperation in criminal matters (Part Three), thematic cooperation (health and cybersecurity) (Part Four) and participation in EU programmes (Part Five).

⁶ See Article COMPROV.1 (Purpose) of the Agreement. This wording is similar to that in Article 8(1) TEU on the EU's relationships with neighbouring countries.

⁷ See recital 5 of Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of 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, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (OJ L 444, 31.12.2020, p. 2).

It is underpinned by provisions ensuring a common institutional framework (Part One of the Agreement), including a dispute settlement mechanism (Part Six), and a level playing field between the Parties. There are 49 annexes and three protocols to the Agreement : a Protocol on administrative cooperation and combating fraud in the field of value added tax and on mutual assistance for the recovery of claims relating to taxes and duties; a Protocol on mutual administrative assistance in customs matters; and a Protocol on social security coordination.

The Agreement provides in its second Article that future bilateral agreements between the EU and the UK "*shall constitute supplementing agreements to this Agreement, unless otherwise provided for in those agreements*" and that "*such supplementing agreements shall be an integral part of the overall bilateral relations as governed by this Agreement and shall form part of the overall framework*"⁸.

8. On 29 December 2020, the Council adopted Decision No (EU) 2020/2252, on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement and of the Security of Information Agreement ('the decision on signature')⁹.
9. Through this decision, the Council, "*in view of the exceptional and unique character of the Trade and Cooperation Agreement, which is a comprehensive agreement with a country that has withdrawn from the Union (...) [decided] to make use of the possibility for the Union to exercise its external competence with regard to the [UK]*" (recital 6). The Council hence made the political choice that the Trade and Cooperation Agreement was to be concluded as an EU-only agreement. This is explicitly indicated in the decision on signature.

⁸ See Article COMPROV.2 (supplementing agreements).

⁹ See above footnote 7.

The reasons for this political choice are explained in recital 6 - "*in view of the exceptional and unique character of the [Agreement]*" - but also, indirectly, in recital 16 of the decision on signature which explains the reasons for the Council deciding to provisionally apply the Agreement by the fact that it concerns "*a country that has withdrawn from the Union*", the UK being therefore "*in a different and exceptional situation with regard to the Union compared to other third countries*". The level of cooperation between the EU and the UK was indeed going to decrease from a very high level at the end of the transition period - during which the EU *acquis* still applied to the UK - to a lower level of cooperation as from the end of that period, thus causing disruption the severity of which could be limited through provisional application of the Trade and Cooperation Agreement.

10. The consequences, and limits, of having made the above political choice are expressly set out in recital 15 and in Article 10 of the decision on signature where it is stated that "*the exercise of Union competences through the Trade and Cooperation Agreement shall be without prejudice to the respective competences of the Union and of the Member States in any ongoing or future negotiations for, or signature or conclusion of, international agreements with any other third country, or in relation to any future negotiations for, or signature or conclusion of, any supplementing agreements [to the Trade and Cooperation Agreement]*".
11. On 25 December 2020, the Commission submitted a proposal for a Council decision on the conclusion of the Trade and Cooperation Agreement¹⁰. The discussions within the Council on this proposal are ongoing.

¹⁰ COM (2020) 856 final.

III. LEGAL ANALYSIS

12. The views of the CLS have been sought in relation to the legal nature of the Trade and Cooperation Agreement, and more specifically, on the issue of the EU exercising its potential competence, on the issue of the EU-only nature of the Agreement and on the issue of the legal consequences for Member States of such an exercise of competences. As indicated in paragraph 3 above, the CLS will not examine each title of the agreement or proceed to a comprehensive and detailed competence analysis.

A. **EU exclusive and shared competences, as interpreted by the Court of Justice**

13. In accordance with Article 3(1) TFEU, the EU has exclusive competence, in particular, in the following areas: customs union, the establishment of competition rules necessary for the functioning of the internal market, the conservation of marine biological resources under the common fisheries policies, and the common commercial policy.
14. In accordance with Article 3(2) TFEU, the EU "*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 in its judgment in the Broadcasting Convention Case¹¹, this last limb of Article 3(2) codifies the so-called AETR, or ERTA, jurisprudence¹².

¹¹ Case C- 114/12, *Commission v. Council ('Broadcasting Convention')*, judgment of the Court (Grand Chamber) of 4 September 2014, EU:C:2014:2151, paragraphs 66 and 67. See also Opinion 1/13 of the Court of Justice (Grand Chamber) of 14 October 2014, *Child Abduction Convention*, EU:C:2014:2303, paragraphs 69 to 74.

¹² Case 22/70, *Commission v Council ('ERTA')*, judgment of 31 March 1971, 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.*"

15. On shared competences, Article 4(1) and (2) TFEU provides the following:

"1. *The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.*

2. *Shared competence between the Union and the Member States applies in the following principal areas:*

- (a) *internal market; (...)*
- (e) *environment;*
- (f) *consumer protection;*
- (g) *transport; (...)*
- (i) *energy*
- (j) *area of freedom, security and justice*
- (k) *common safety concerns in public health matters (...)"*

16. The Court has consistently held that there is a risk that common EU rules may be affected by commitments undertaken by Member States, or that the scope of those rules may be altered, such as to justify an exclusive external competence of the EU under Article 3(2) TFEU, where those commitments fall within the scope of the said common EU rules¹³.

17. A finding that there is such a risk does not presuppose that the area covered by the international commitments (whether actual or envisaged) and that covered by the EU rules coincide fully. In particular, the scope of common EU rules may be affected or altered by international commitments where those commitments fall within an area which is already largely covered by such rules. Furthermore, such a risk of common EU rules being affected may be found to exist where the international commitments at issue, without necessarily conflicting with those rules, may have an effect on their meaning, scope and effectiveness¹⁴.

¹³ Opinion 2/91 of the Court of Justice of 19 March 1993, *ILO*, EU:C:1993:106, paragraph 25; Case C-467/98, *Commission v Denmark ('Open Skies')*, judgment of the Court of 5 November 2002, EU:C:2002:625, paragraph 82; and Opinion 1/03 of the Court of Justice (Full Court) of 7 February 2006, *Lugano Convention*, EU:C:2006:81, paragraphs 120 to 126.

¹⁴ See Opinion 2/91 *ILO* (op. cit. footnote 13), paragraphs 25 and 26; Judgment in '*Open Skies*' (op. cit. footnote 13), paragraph 82; Opinion 1/03 *Lugano Convention* (op. cit. footnote 13), paragraphs 120 and 126; Judgment in '*Broadcasting Convention*' (op. cit. footnote 11), paragraphs 68 to 73; as well as Joined Cases C-626/15 and C-659/16, *Commission v Council ('Weddell')* judgment of the Court (Grand Chamber) of 20 November 2018, EU:C:2018:925, paragraphs 113 and 114 and the case-law cited.

When analysing the relationship between the international instrument at stake and the relevant EU rules, that analysis must take into account the areas covered, respectively, by the rules of EU law and by the provisions of that instrument, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the said instrument is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish¹⁵.

B. Consequences of EU exclusive competences on the Member States

18. The exercise internally, by the EU, of its competence has consequences on the Member States insofar as, if the EU 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 EU exclusive competence¹⁶.
19. Conversely, internally, where the EU has not (yet) exercised its shared competences in a given area, the Member States can continue exercising their competences in that area "*to the extent that the Union has not exercised its competences*" (Article 2(2) TFEU). The same is true, externally, where it would result from the analysis of an (envisaged) international commitment that the conditions for exclusivity set out in Article 3(2) TFEU, as interpreted by the Court in its extensive case-law on external competences (see paragraphs 16 and 17 above), are not met and that, as a consequence, Member States can still exercise their competences externally.

¹⁵ See Opinion 3/15 of the Court of Justice (Grand Chamber) of 14 February 2017, *Access Rights*, EU:C:2017:114, paragraph 108 and the case-law cited.

¹⁶ Opinion 2/91 *ILO* (op. cit. footnote 13), paragraphs 25 and 26; Judgment in '*Open Skies*' (opt. cit. footnote 13), paragraph 82.

20. By way of example, the EU has not yet adopted common internal rules with regard to air traffic rights granted to third countries. The competence to conclude agreements with third countries on such matters has therefore not become an exclusive competence of the EU¹⁷ and can be exercised either by the Member States or by the EU¹⁸.

C. Mixity of international agreements: obligatory or facultative

21. It is recalled that, in accordance with the principle of conferral (Article 5 TEU), an international agreement is mixed, i.e. it is signed and concluded both by the EU and its Member States, if it concerns competences that belong both to the EU and to its Member States.
22. There are, in practice, two types of mixity: obligatory or facultative.

Mixity is obligatory where, in addition to areas of EU competence, the envisaged agreement covers one or several areas that fall outside EU competences, i.e. where the Treaties have not conferred competences on the EU in that particular area. In such a case, there is no political choice: the agreement must be concluded both by the EU and its Member States.

Mixity is facultative where the envisaged agreement covers one or several areas where the EU has shared competences which are potential, i.e. not yet exercised or not yet covered by EU common rules regarding which the envisaged agreement would have consequences as mentioned in Article 3(2) and the related case-law. In such a case, the agreement may be concluded either by the EU and its Member States or by the EU alone. Depending on whether the Council decides to exercise all the EU potential competences or not, the agreement will be an EU-only or a mixed agreement. This is a political choice to be made by the Council on the basis of the relevant Treaty provisions which confer competence on the EU.

¹⁷ Judgment in '*Open Skies*' (opt. cit. footnote 13), paragraphs 90 to 92.

¹⁸ See CLS opinion in 5990/18 on the Regulation on competition in air transport, paragraphs 23 and 24.

23. In its *Singapore FTA* Opinion,¹⁹ the Court provided clarifications as to the division of competence between the EU and the Member States in the field of trade and investment. The Court concluded that most of the Free Trade Agreement with Singapore fell within the exclusive competence of the EU either because it was covered by the Common Commercial Policy, including on foreign direct investment, as defined in Article 207(1) TFEU, or because it was covered by the Common Transport Policy (Articles 91 and 100(2) TFEU)²⁰.
24. In the same Opinion, the Court recalled that foreign direct investment is an exclusive competence of the EU. However, to the extent that the FTA provisions related to indirect investment (i.e. portfolio investment), the competence for that was "*shared between the European Union and the Member States pursuant to Article 4(1) and (2)(a) TFEU*"²¹. On the possible exercise of such potential shared competence, the Court clarified in its judgment in *Weddell*, that "(...) *the mere fact that international action of the [EU] 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 [EU] to exercise that external competence alone*"²².
25. In the case of facultative mixity, where the EU has competence for the matters covered by an agreement, of which at least some fall within its potential competence, that potential competence can still be exercised by the Member States if they wish. The Council may however decide, for a particular agreement, to exercise the potential EU competence on the basis of the relevant Treaty legal basis,²³ in accordance with the voting rules provided therein. Exercising or not the EU potential competence externally when concluding an agreement is a matter of political choice for the Council²⁴.

¹⁹ Opinion 2/15 of the Court of Justice (Full Court) of 16 May 2017, *Singapore FTA*, EU:C:2017:376.

²⁰ In the case of transport services, the Court deduced this from its AETR case law: see Opinion 2/15 *Singapore FTA* (op. cit. footnote 19), paragraph 170 and further. Note however that air transport services were not covered in the Singapore agreement, see paragraph 63 of that Opinion.

²¹ Opinion 2/15 *Singapore FTA* (op. cit. footnote 19), paragraph 243.

²² Judgment in '*Weddell*' (opt. cit. footnote 14), paragraph 126.

²³ See CLS opinion in 12866/19 on the CETA Investment Court System (ICS), paragraph 6.

²⁴ See Case C-600/14, *Germany v. Council ('OTIF')*, judgment of the Court (Grand Chamber) of 5 December 2017, EU:C:2017:935, paragraph 68; see also Judgment in '*Weddell*' (opt. cit. footnote 14), paragraphs 126 and 127.

26. This is to be distinguished from cases of obligatory mixity where the subject matter of an agreement partially covers matters for which the EU has competence, and partially matters for which the EU has no competence whatsoever. In such a situation, as said above in paragraph 22, mixity is not a political choice but a legal obligation²⁵.
27. It is recalled that the conclusion of mixed agreements presents procedural and political complexity as the process relating to the conclusion of recent mixed agreements testifies. Indeed, the entry into force of a mixed agreement requires ratification not only by the EU (conclusion by the Council, usually after obtaining the consent of the European Parliament), but also by all its Member States in accordance with their constitutional requirements. As a consequence, in principle, the EU will wait for ratification by all Member States before ratifying itself. Such a process may take a long time and depends on whether the ratification runs smoothly or not in all Member States. By contrast, in order to enter into force, an EU-only agreement needs only to be ratified by the EU, and can in practice be concluded within a shorter period of time than a mixed agreement.

D. The particular case of the trade and cooperation agreement with the UK

28. While not entering into a detailed examination of its different Titles and provisions, a rapid examination of the Trade and Cooperation Agreement shows that no situation of obligatory mixity arises: the EU has competence in all the fields covered by it.

²⁵ See Opinion 2/15 *Singapore FTA* (op. cit. footnote 19), paragraph 292. See also CLS opinions in 12866/19 (CETA ICS) and 6442/19 (UN Convention on Investor-State Arbitration).

29. The CLS recalls in this context that, by way of example, provisions related to trade or fisheries contained in Heading One of Part Two (Trade) and Heading Five of Part Two (Fisheries) are exclusive competences of the EU by virtue of Article 3(1) TFEU. Other provisions of the Agreement, for instance, Title II of Heading Two (Aviation safety) or of Part Three (Law enforcement and judicial cooperation in criminal matters), cover matters that have become exclusive by exercise or are largely covered by EU *acquis* that will be or risk being affected by the Agreement²⁶.
30. Conversely, there are certain other provisions, for instance traffic rights in the aviation area, which belong to shared EU competences not yet exercised internally, and which are therefore only potential EU competences. In relation to these potential competences, the Council could decide, when adopting the decision on signature, that the EU would exercise this type of non-exclusive potential competences, thus making the Trade and Cooperation Agreement an EU-only agreement.
31. When it adopted the decision on signature on 29 December 2020, the Council made this political choice and decided to exercise the EU competence in the areas of potential EU competence. That decision produces legal effects not least because it has entered into force on the day of its adoption by the Council (29 December 2020) and the Trade and Cooperation Agreement is being provisionally applied since 1 January 2021. It follows that the Agreement must also be concluded as an EU-only agreement.
32. As indicated above in paragraphs 21 to 25, only where the EU is vested with the competence to do so in the Treaties, can it conclude an international agreement, in accordance with the relevant legal basis. In the case at stake, the Trade and Cooperation Agreement was signed and provisionally applied on the basis of Article 217 TFEU, as the substantive legal basis, in conjunction with the relevant procedural legal bases (Article 218(5) and (8) TFEU).

²⁶ See, *inter alia*, Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency (OJ L 212, 22.8.2018, p. 1) and Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (OJ L 119, 4.5.2016, p. 132).

33. Article 217 TFEU empowers the EU to conclude with a third country an 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 EU in the Treaties to attain the objectives set out therein.²⁷ Article 217 TFEU can be used whenever there is EU competence - i.e. where the Treaty confers the appropriate competence on the EU in the different areas covered by the agreement - even if this competence has not been exercised fully or is only potential. Article 217 TFEU however is not to 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.
34. Article 217 TFEU allows the EU to conclude, by unanimity, a wide ranging agreement on matters of EU competence without the need to identify in detail the areas where the EU has already exercised or not its competence. It can include areas of EU competence where the sectoral legal basis requires unanimity or qualified majority voting, as well as areas of potential EU competence not yet exercised internally.

²⁷ See Case C-81/13, *UK v Council ('social security Turkey')*, judgments of the Court (Grand Chamber) of 18 December 2014, EU:C:2014:2449, paragraphs 61 and 62.

E. Exercise vis-à-vis the UK of the EU shared competence in social security coordination and aviation traffic rights

35. By way of example, the EU has a shared competence in the area of social security coordination (Articles 48 TFEU). The EU has concluded several agreements with third countries that contain rules on the coordination of social security. This is typically the case for association agreements based on Article 217 TFEU. The lack of completion of free movement of persons is not a hindrance to the conclusion of an EU agreement in the field of social security coordination²⁸. So far, agreements with third countries covering also the area of social security coordination have been generally concluded as mixed agreements. However, given that the EU has competence in this area, this is a matter of political choice. It is equally possible for the EU to choose to exercise its competence externally and to conclude such an agreement as an EU-only agreement.
36. Similarly, the EU has shared competence in the area of air transport (Articles 91 and 100(2) TFEU). Once and to the extent that the EU exercises internally such shared competence, it becomes exclusively competent externally for matters affecting those internal rules. As the EU has not yet exercised this shared competence internally with regard to traffic rights granted to third countries, agreements with third countries on such matters are often concluded as mixed agreements (facultative mixity). The Council can choose whether or not to use it externally.

²⁸ As regards Turkey, for example, the Court compensated for the lack of completion of free movement with the addition of Article 217 TFEU to Article 48 TFEU as a substantial legal basis for the adoption of the EU position, to be taken within the Association Council set up by the EU-Turkey Association Agreement, with regard to the adoption of provisions on the coordination of social security systems (see judgment in '*social security Turkey*' (op. cit. footnote 27), paragraph 63).

F. Effect for Member States of the EU exercising its shared (potential) competence

37. The external exercise of the above EU competences with regard to a given third country does not prevent Member States from exercising their competence on that same matter vis-à-vis other third countries. To take an example, the EU has an aviation agreement with Switzerland that has existed for more than 20 years²⁹ and which covers traffic rights. The existence of this agreement has not prevented the Member States from concluding agreements on traffic rights with other third countries.
38. Hence, the fact that the Council has decided to opt, in the specific case of the Trade and Cooperation Agreement with the UK, for an EU-only agreement does not prevent Member States from continuing to exercise their national competences vis-à-vis other third countries in that same area of potential EU competence. Exercise by the EU of its potential competences in the concerned area vis-à-vis the UK does not trigger a situation of exclusivity as regards its relations with other third countries nor a situation of exclusivity for the area of traffic rights concerning other third countries as if that competence had been exercised internally. Therefore, Member States remain free to continue concluding international agreements in these areas of shared competence with third countries other than the UK under the same conditions as before the signature of the Trade and Cooperation Agreement. As explained above in paragraph 10, this possibility is explicitly confirmed in recital 15 and Article 10 of the decision on signature.

²⁹ Agreement between the European Community and the Swiss Confederation on Air Transport, signed on 21 June 1999 (OJ L 114, 30.4.2002, p. 73).

G. Provisions on possible so-called "top-ups" by Member States

39. Moreover, the Trade and Cooperation Agreement provides for, or does not exclude, the possibility for Member States to enter into bilateral agreements with the UK concerning specific matters covered by the Agreement in the areas of air transport, administrative cooperation in the field of customs and VAT and social security coordination.³⁰ Member States may do so provided such agreements are compatible with EU law, do not undermine the functioning of the Agreement and are otherwise compatible with the conditions set out in Articles 6 to 8 of the decision on signature, which foresees an internal mechanism of information and cooperation between the Member States and the Commission, culminating with the possibility of authorising bilateral arrangements or agreements that Member States would conclude with the UK in those areas.
40. This internal mechanism is an expression of the duty of sincere cooperation incumbent on the Member States (Article 4(3) TEU)³¹, which is of general application and does not depend on whether the competence concerned is exclusive³². On this basis, Member States have a duty to refrain from any action which could jeopardise the attainment of the EU objectives, and to ensure that such arrangements or agreements are compatible and do not undermine the functioning of the Trade and Cooperation Agreement. To the extent that it frames and organises the possibility of certain bilateral agreements supplementing the Trade and Cooperation Agreement (so-called 'top-ups') as allowed or not prohibited by the Agreement itself, this internal mechanism is also an expression of the fact that the Agreement is part of EU law, is binding in accordance with Article 216(2) TFEU, and has therefore primacy.

³⁰ See Article AIRTRN.3 and Article 41 of the VAT Protocol.

³¹ Article 4(3) TEU: "*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out the tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*"

³² C-246/07, *Commission v Sweden*, judgment of the Court (Grand Chamber) of 20 April 2010, EU:C:2010:203, paragraph 71.

41. The existence of the internal mechanism is independent of the nature of the competence at stake. To take the example of traffic rights, the EU is exercising in the Trade and Cooperation Agreement its external competence on certain traffic rights vis-à-vis the UK. Certain bilateral agreements supplementing the Trade and Cooperation Agreement are permitted by the Agreement itself in accordance with the conditions set out therein³³. The Agreement itself specifically prohibits further top-ups (Article AIRTRAN.23)³⁴. The internal empowerment mechanism in Article 6 of the decision on signature regulates how the permitted top-ups are going to be authorised. Therefore, at least as far as top-up agreements concerning air traffic rights are concerned, the authorisation mechanism is not only an expression of the duty of sincere cooperation. It is also necessary because the shared, previously unexercised, external competence on traffic rights vis-à-vis the UK is now governed by the provisions of the Trade and Cooperation Agreement which has primacy, and is a matter of exclusive EU competence vis-à-vis the UK. However, as stated above in paragraphs 37 to 38 and explicitly confirmed in recital 15 and Article 10 of the decision on signature, that EU competence is not exclusive vis-à-vis other third countries.

³³ Article AIRTRN.3(5) TCA: "*the rights mutually granted in accordance with paragraph 4 (i.e. top-ups) shall be governed by the provisions of this Title.*"

³⁴ "*The United Kingdom and a Member State may not grant each other any rights in connection with air transport to, from or within their respective territories other than those expressly laid down in this Title, save as provided for in Article AIRTRN.3 (4) and (9) [traffic rights].*"

42. Lastly, the CLS takes this opportunity to clarify, as it did in Coreper on 22 January 2021, that contrary to the statement made by the Commission to the minutes of the Council on 29 December 2020, in connection with the adoption of the decision on signature,³⁵ it does not see any legal obstacle for a legal act based on Articles 217 and 218 TFEU, such as the decision on signature, or the future Council decision concluding the agreements, to contain such an internal mechanism for authorisation of bilateral arrangements or agreements between individual Member States and the UK. Such internal authorisation or empowerment mechanisms may be set out either in a legal act adopted on the basis of the relevant sectoral substantial legal basis (i.e. a legislative act) or in a legal act adopted by the Council for signing and concluding international agreements³⁶.

IV. CONCLUSION

43. In conclusion, the Council Legal Service confirms its view that, as it only covers areas where the EU has competence, whether exclusive or potential, the Trade and Cooperation Agreement may be concluded as an EU-only agreement on the basis of Article 217 TFEU. The Council decided to make this choice when it adopted the decision on signature on 29 December 2020.

³⁵ Doc. 5525/20 ADD 1.

³⁶ The CLS recalls that Article 4 of the Council Decision on the conclusion of the Withdrawal Agreement establishes a similar internal mechanism in relation to agreements in areas of EU competence that certain Member States are allowed, under the conditions referred in that provision, to conclude with the UK (see Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020, p. 1).