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OPINION OF THE LEGAL SERVICE¹

From:	Legal Service
To:	Law Enforcement Working Party
Subject:	Proposal for a Council Decision authorising Member States to become party, in the interest of the European Union, to the Council of Europe Convention on an Integrated Safety, Security, and Service Approach at Football Matches and Other Sports Events (CETS n°218) - procedural aspects

I. INTRODUCTION

1. On 27 April 2018, the Commission adopted a proposal for a Council Decision authorising Member States to become party, in the interest of the European Union, to the Council of Europe Convention on an Integrated Safety, Security, and Service Approach at Football Matches and Other Sports Events (CETS n°218)² (hereinafter "the proposed Decision").

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² 8577/18.

2. When the Commission presented the proposed Decision at the meeting of the Law Enforcement Working Party (LEWP) on 17 May 2018, several delegations asked questions relating to the necessity and the effects of the proposed Decision, in particular against the background that many Member States have already signed and some also ratified the Council of Europe Convention on an Integrated Safety, Security, and Service Approach at Football Matches and Other Sports Events (CETS n°218) (hereinafter "the Convention").
3. At the same meeting, the representative of the Council Legal Service (CLS) gave initial oral answers to these questions. This opinion confirms in writing and further elaborates on the content of the statements made by the representative of the CLS.

II. LEGAL AND FACTUAL BACKGROUND

4. The Convention aims to provide a safe, secure and welcoming environment at football matches and other sports events (Article 2 of the Convention). It requires the Parties to the Convention to take a number of measures to ensure safety, security and service in the context of major sports events. Article 11 of the Convention deals with international cooperation. It obliges the Parties to set up national football information points to act as the designated sole point for exchanging all information and intelligence regarding football matches with an international dimension and for arranging other matters of international police cooperation (Articles 11(2) and (4) of the Convention).
5. The Convention is open for signature by States only.³ To date, a number of Member States have signed the Convention and a few Member States have also ratified it.⁴

³ Cf. Article 16(1) of the Convention "*This Convention shall be open for signature by the member States of the Council of Europe, the States Parties to the Cultural Convention and any non-member State of the Council of Europe having (...)*" (emphasis added) and Article 18(1) of the Convention "*After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Parties, may invite any non-member State of the Council of Europe to accede to the Convention (...)*" (emphasis added).

⁴ The full list of States that have signed and ratified the Convention is available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/218/signatures?p_auth=w5uajkFt.

6. For the purpose of preventing and combating football-related violence, Council Decision 2002/348/JHA concerning security in connection with football matches with an international dimension⁵ facilitates the exchange of information in relation to football events by obliging Member States to set up or designate a national football information point of a police nature (Article 1(1) of Council Decision 2002/348/JHA). Article 2 of Council Decision 2002/348/JHA sets out the tasks of the national football information points and Article 3 and 4 of that Decision lay down specific rules regarding the exchange and the handling of police information between national football information points before, during and after football events with an international dimension.

III. LEGAL ANALYSIS

1. Need for the authorisation

7. The need for an authorisation of the Member States to become, in the interest of the Union, party to the Convention only arises if the Convention or parts thereof fall within exclusive Union competence. The authorisation granted in the proposed Decision is limited "*in respect of those parts falling under the exclusive competence of the Union*"⁶. Recital 3 of the proposed Decision clarifies that "*those parts*" refers to Articles 11(2) and (4) of the Convention. No claim has been made that parts of the Convention other than Article 11(2) and (4) fall within exclusive Union competence. The following analysis of competences is therefore limited to these provisions.

⁵ Council Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension, OJ L 121, 8.5.2002, p.1.

⁶ Article 1 of the proposed Decision.

8. The obligation laid down in Articles 11(2) and (4) of the Convention, namely the obligation to set up or designate national football information points within the police force that are responsible for exchanging information and facilitating the implementation of police cooperation in connection with football matches with an international dimension, falls within the area of police cooperation. Although police cooperation is in principle an area of shared competence between the Union and the Member States (Article 4(2) (j) TFEU), the Union has exclusive external competence where the conditions of Article 3(2) TFEU are fulfilled.
9. Article 3(2) TFEU reads: "*The Union shall also have exclusive competence for the conclusion of an international agreement (...) in so far as its conclusion may affect common rules or alter their scope.*"⁷
10. According to the case-law of the Court of Justice, it "[i]n order to assess whether (...) commitments (...) 'may affect common rules or alter their scope', within the meaning of Article 3(2) TFEU, regard must be had to the Court's settled case-law according to which there is a risk of that where those commitments fall within the scope of those rules." ⁸ The CLS notes that Article 11(2) and (4) of the Convention coincide with certain provisions of Articles 1 and 2 of Council Decision 2002/348/JHA⁹. These articles of the Convention therefore fall within the scope of common rules within the meaning of Article 3(2) TFEU, which may be affected by the international commitments.

⁷ This provision reflects the ERTA judgment (EU:C:1971:32) and the case-law developed as from that judgment.

⁸ Opinion 2/15 of 16 May 2017, *Singapore FTA*, EU:C:2017:376, paragraph 180; Opinion 3/15 of 14 February 2017, (*Marrakesh Treaty on access to published works*), EU:C:2017:114, paragraph 105; Judgment of the Court of Justice of 4 September 2014 in Case C-114/12, *Commission v Council* (Council of Europe Broadcasters), EU:C:2014:2151, paragraph 68; Opinion 1/13 of 14 October 2014 (*Hague Convention child abduction*), EU:C:2014:2303, paragraph 71; and Judgment of the Court of Justice of 26 November 2014 in Case C-66/13, *Green Network*, , EU:C:2014:2399, paragraph 29.

⁹ In detail, the introductory wording of Art. 11(2) of the Convention corresponds to Article 1(1) Council Decision 2002/348/JHA, Article 11(2)(a) of the Convention reflects the content of Articles 1(3) and 2(1) of Council Decision 2002/348/JHA, Article 11(2)(b) of the Convention that of Article 2(2) of Council Decision 2002/348/JHA and Article 11(2)(c) of the Convention that of Article 2(3) of Council Decision 2002/348/JHA. Article 11(4) of the Convention corresponds to Article 1(2) of Council Decision 2002/348/JHA.

11. The Court has clarified that a risk of affectation of common rules ("*may affect common rules*") does not presuppose a contradiction between the international commitments and those common rules¹⁰. The lack of contradiction between the provisions of the Convention and those of Council Decision 2002/348/JHA therefore do not change the conclusion that a risk of affectation of common rules exists.
12. Parts of the Convention, namely its Article 11(2) and (4), therefore fall within the Union's exclusive competence according to Article 3(2) TFEU.

2. Procedural questions

13. According to Article 2(1) TFEU, "[W]hen the Treaties confer on the Union exclusive competence, only the Union may legislate or adopt legally binding acts and the Member States are only able to do so themselves if they are empowered by the Union (...)". Since the Convention does not allow the EU itself to become party although parts of the Convention fall within exclusive Union competence, only the Member States can become party to the Convention. However, for the parts that fall within the exclusive competence of the Union, they need to be empowered by the Union. The proposed Decision, once adopted, would grant this empowerment by authorising Member States to become party to the Convention, in the interest of the Union, for the parts that fall within exclusive Union competence.

¹⁰ Opinion 2/15, *Singapore FTA*, EU:C:2017:376, paragraph 201; Opinion 3/15 of 14 February 2017, (*Marrakesh Treaty on access to published works*), EU:C:2017:114, paragraphs 113-114; Opinion 1/13 of 14 October 2014, (*Hague Convention child abduction*), EU:C:2014:2303, paragraphs 84 to 90 and in particular: paragraph 86; Judgment of the Court of Justice of 26 November 2014 in Case C-66/13, *Green Network*, EU:C:2014:2399, paragraphs 48 and 49); Judgment of the Court of Justice of 4 September 2014 in Case C-114/12, *Commission v Council* (Council of Europe Broadcasting Convention), EU:C:2014:2151, paragraphs 70 and 71; and Opinion 1/03 of 7 February 2006, (*New Lugano Convention*), EU:C:2006:81, paragraphs 143 and 151 to 153.

14. The CLS has already in the past given detailed explanations regarding the applicability of the procedural legal basis of Article 218(6) TFEU to agreements concluded through the intermediary of the Member States.¹¹ The Council has used this procedure in a number of instances in different fields¹² and that practice can find support in the case-law of the Court; two methods for the Union to conclude international agreements have been recognised: conclusion either by the Union itself or through the intermediary of the Member States.¹³
15. Since the procedural legal basis of the proposed Decision is Article 218(6)(v) TFEU, the Council needs to obtain the consent of the European Parliament before its adoption.

¹¹ CLS Opinion in 15370/14.

¹² Council Decision (EU) 2015/2071 of 10 November 2015 authorising Member States to ratify, in the interests of the European Union, the Protocol of 2014 to the Forced Labour Convention, 1930, of the International Labour Organisation as regards Articles 1 to 4 of the Protocol with regard to matters relating to judicial cooperation in criminal matters, OJ L 301, 18.11.2015, p. 47; Council Decision (EU) 2015/799 of 18 May 2015 authorising Member States to become party, in the interest of the European Union, to the International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, of the International Maritime Organization, OJ L 127, 22.5.2015, p.20, and Council Decision (EU) 2014/195 of 17 February 2014 authorising Member States to sign, ratify or accede to the Cape Town Agreement of 2012 on the Implementation of the Provisions of the Torremolinos Protocol of 1993 relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977, OJ L 106, 9.4.2014, p. 4.

¹³ Cf. in particular in Opinion 2/91, paragraph 27, Opinion 1/13, paragraphs 44-46 and 50, in particular paragraph 44, which reads: "*In any event, the question whether it may not be possible for the EU formally to become a party to an international agreement is irrelevant. In a situation where the conditions for being a party to such an agreement preclude the EU itself from concluding the agreement, although the latter falls within the EU's external competence, that competence may be exercised through the intermediary of the Member States acting in the EU's interest (see, to that effect, Opinion 2/91, EU:C:1993:106, point 5)*".

16. Several delegations have asked questions relating to the fact that some Member States have already signed and in some cases also ratified the Convention. The validity of these signatures and acts of ratification is determined by the national law of the Member State concerned as well as by public international law. The proposed Decision does not affect the validity of those acts. Its purpose is rather to ensure that Member States becoming or having become a party to the Convention comply with the Treaty provisions on competences.¹⁴ That purpose will be achieved through the adoption by the Council of the proposed Decision.

IV. CONCLUSION

17. Parts of the Council of Europe Convention on an Integrated Safety, Security, and Service Approach at Football Matches and Other Sports Events (CETS No 218), more precisely its Article 11(2) and (4), fall within exclusive Union competence.
18. Since the Union cannot become a party to the Convention, the Member States need to be authorised, for the parts of the Convention falling under exclusive Union competence, to become a party to the Convention. Such an authorisation does not affect the validity of signatures and acts of ratification of the Convention that have already taken place.

¹⁴ Such an authorisation is equally applicable to situations where Member States have already lawfully become a party in their own right in the past but where, due to the extension of EU competence, they can only continue to be regarded as continuing to be a party in the interest of the EU.