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I love the smell of a leaked legal service opinion in the morning

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OPINION OF THE LEGAL SERVICE [1]

From:	Legal Service
Subject:	Trade and Cooperation Agreement between the European Union and the Europea n Atomic Energy Comunity, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part – 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).

The conclusion: the EU Council legal service says that it's OK for the Brexit deal to be concluded with the UK by the EU only, not needing Member States' participation

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.

The reasoning: the legal service distinguishes between competences reserved to Member States, and competences shared with the EU. For the latter, the EU has the choice of concluding an EU-only treaty.

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.

The legal service summarises the prior case law backing up its interpretation.

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 Council[24].

It refers to the Weddell case, concerning competence to conclude a treaty on the Antarctic environment, where Member States *could* be involved. But that was based on the particular legal features of the Antarctic treaty; and the UK is not Antarctica.

Applying this reasoning to the UK deal, the legal service says that there's nothing in it which involves exclusive Member State competence. Therefore the EU can choose to conclude it as an EU-only treaty.

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 Agreement[26].

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.

In particular competence is shared as regards the social security and aviation parts of the treaty. But again: this means that there's a choice to conclude the treaty as an EU-only treaty, or also with Member States as parties.

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 coordination[28]. 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.

The legal service also notes that the UK and individual Member States can sign bilateral agreements within the scope of the Brexit deal - subject to the limits set out in the agreement.

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 exclusive[32]. 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.

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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 therein[33]. 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

Just thinking of all the times people argued that the treaty would *have* to be ratified by all the Member States - and all the times I replied that we would have to wait and see.

An initial reaction to the legal service opinion from the Walloon Parliament...

Full text of the Council legal service opinion on the Brexit deal now here - https://t.co/zqemdVtQNn