

Reading material for the lecture on Mixed Agreements by M. Chamon: paragraphs 67 to 104

OPINION OF ADVOCATE GENERAL

ĆAPETA

delivered on 12 March 2026 [\(1\)](#)

Opinion procedure 1/24

Initiated following a request made by the European Commission

(Opinion pursuant to Article 218(11) TFEU – Air transport – Agreement on air transport between the Sultanate of Oman, of the one part, and the European Union and its Member States, of the other part – Article 3(2) TFEU – International agreement which may affect common rules – Competence of the European Union to conclude alone said agreement)

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I. Introduction

1. 'The sky is the limit'.

2. The present case raises the question of whether the sky is (still) the limit to the exclusive competence of the European Union to conclude air transport agreements with third countries.

3. That question was raised by the European Commission by means of application of 13 September 2024 to request, pursuant to Article 218(11) TFEU, an Opinion from the Court on the following question:

'Does the European Union have exclusive competence to conclude the Agreement on Air Transport between the Sultanate of Oman, of the one part, and [the] European Union and its Member States, of the other part?'

4. The core issue underlying that question is whether the European Union has acquired exclusive competence to grant traffic rights to third countries. Such a grant of rights enables air carriers of third countries to fly between, over, and into the territory of the Member States.

5. In its *Open Skies* judgments, (2) the Court considered that, taking into account the state of EU law at that time, the European Union did not have exclusive competence in the area of air transport services. (3) The Commission, supported by the European Parliament, argues that the state of EU law today requires a different answer.

6. Should the Court's reply be in the affirmative, the consequence would be that Member States could no longer enter into air transport agreements with third countries – not only with the Sultanate of Oman, as is at issue in the present case, but with any third country.

7. The answer to the question posed by the Commission requires the Court to delve into the complex area of EU constitutional law which governs the external competences of the European Union. In particular, the Court is invited to clarify the methodology by which it assesses the third situation outlined in Article 3(2) TFEU, pursuant to which the European Union acquires exclusive competence to conclude an international agreement if that agreement 'may affect common rules or alter their scope'.

8. I will structure my Opinion in the following way. I will first explain the relevant background to the present request proceedings (Section II). Next, I will outline the events leading to the envisaged agreement, its content as well as the international and EU law context in which it should be placed. I will then turn to the analysis of the question put to the Court (Section III). Therein, I will first take a position on the alleged inadmissibility of the present request for an Opinion of the Court (Section III.A). After that, I will revisit the case-law on the existence and nature of external competences (Section III.B). That will then lead me to the assessment of the question of the existence of an EU competence to grant traffic rights to third countries, disputed by some of the parties to these proceedings (Section III.C), before turning to the possibly exclusive nature of that competence under Article 3(2) TFEU on the basis of necessity (Section III.D) or the *ERTA* effect (Section III.E).

II. Background

A. Events leading to the adoption of the proposal of the envisaged agreement

9. In 2018, the Commission was authorised by way of negotiating directives to conclude a comprehensive air transport agreement between the European Union and its Member States, on the one hand, and the Sultanate of Oman, on the other hand. (4)

10. Those directives were given by way of two separate decisions.

11. First, the Council authorised the Commission to open negotiations with the Sultanate of Oman in relation to *matters that fall within the exclusive competence of the European Union*. (5)

12. Second, another decision was adopted by the Member States meeting in the Council, and not by the Council as an EU institution. That decision authorised the Commission to negotiate the aspects of the envisaged agreement with the Sultanate of Oman *that do not fall within the exclusive competence of the European Union*. (6)

13. Neither of those two decisions specify which matters they consider to fall within, and which fall outside, exclusive EU competence.

14. At the meeting of the Committee of Permanent Representatives that followed the adoption of these two decisions, the Commission expressed its disagreement with the way in which the abovementioned negotiating directives were entrusted to it. Among other things, it contended:

‘2. The Commission considers that the Union is competent to negotiate and conclude comprehensive agreements in the field of air transport, in all their parts. It also recalls that, in accordance with the jurisprudence of the Court, as reflected in Case C-459/03 (points 92 to 95), the existence of the Union’s external competence is not in principle contingent on the adoption of measures of secondary law covering the area in question.

...

4. The Commission considers moreover that the negotiation of a comprehensive air transport agreement by the Union alone is the most effective way to achieve the objectives of the Common Transport Policy, in particular as regards a common treatment to be granted within the Union to air carriers established in third countries and a common treatment to be granted by third countries to Union air carriers.

5. In order for the benefits to be reaped from the international aviation agreements without undue delay, they should apply as soon as possible after their signature. The current practice

shows that the participation of Member States in such agreements causes considerably delays in their entry into force, while provisional application is not always ensured in those cases'. (7)

15. The negotiations on the envisaged agreement were concluded on 7 June 2020 and its text initialled on 1 December 2021.

16. The draft text of that agreement, as it was submitted to the Court, anticipates the signatures of both the European Union and all of its Member States. It follows that, in its current form, that agreement is drawn up to be concluded as a *mixed* agreement.

17. The Commission has not yet submitted a proposal for a Council decision on the signing of said agreement on behalf of the European Union. (8)

B. Procedure before the Court

18. Written observations on the Commission's request for an Opinion from the Court have been submitted by the Parliament, the Council and the governments of all Member States apart from Romania. While the Parliament supports Commission's position that the European Union has exclusive competence to conclude the envisaged agreement, the Council and all participating Member States are of the opposite opinion.

19. A hearing was held on 7 and 8 July 2025, at which the Parliament, the Council, the Commission, and the Belgian, Bulgarian, Czech, Danish, German, Greek, Spanish, French, Italian, Cypriot, Lithuanian, Luxembourg, Hungarian, Maltese, Netherlands, Austrian, Portuguese, Slovak and Swedish Governments and Ireland participated.

C. Context of the envisaged agreement

1. International legal context

20. In 1944, representatives of 54 States met at Chicago (United States) to 'make arrangements for the immediate establishment of provisional world air routes and services' and 'discuss the principles and methods to be followed in the adoption of a new aviation convention'. (9)

21. The Chicago Conference resulted in the adoption of the Convention on International Civil Aviation ('the Chicago Convention'). (10)

22. The Chicago Convention remains to this day the fundamental international legal instrument governing rights and obligations of States with respect to international civil aviation. (11) All Member States are signatories of that convention whereas the European Union itself is not. (12)

23. In Article 1, the Chicago Convention lays down the unequivocal recognition 'that every State has complete and exclusive sovereignty over their airspace above its territory'. (13)

24. For that reason, as provided for in Article 6 of that convention, 'no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorisation of that State, and in accordance with the terms of such permission or authorisation'.

25. By virtue of that framework, any permission to make an international flight across territorial borders must, in theory, be granted by the affected State(s) at issue, be that through either a bilateral or multilateral agreement. (14)

26. In parallel to the Chicago Conference – albeit separately from the convention (15) – negotiators formulated a set of commercial aviation rights, which are known as ‘the freedoms of the air’. (16)

27. Today, the International Civil Aviation Organisation (‘ICAO’) distinguishes nine freedoms of the air. They are depicted visually below: (17)

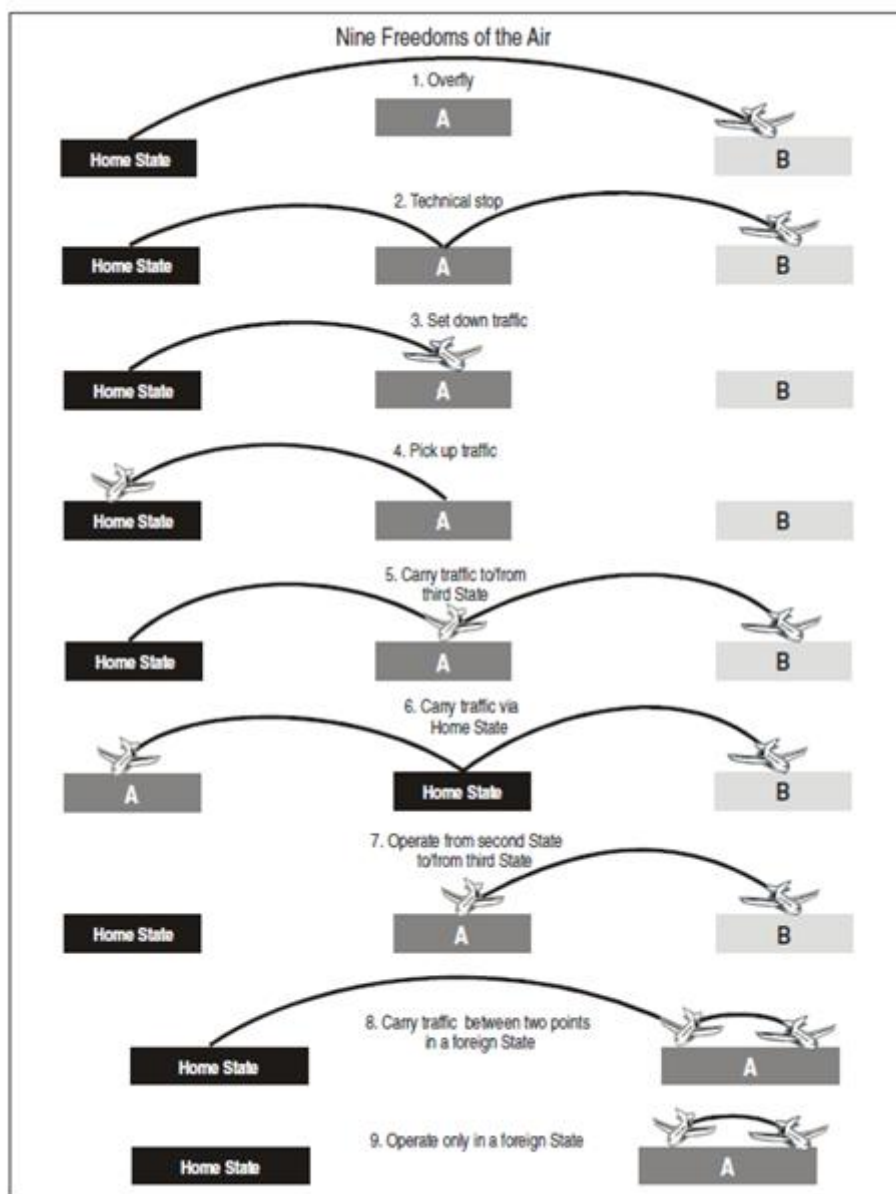


Figure 4.1-1. The Nine Freedoms of the Air

28. Only the third to ninth freedoms enable commercial air transport, and are often referred to as ‘traffic rights’. They open up market access for flights starting in one State and ending or stopping in the territory of another State. (18) The first and second freedoms are not seen to grant market access.

29. There were two multilateral agreements adopted at the Chicago Conference that provide for the exchange of traffic rights relating to certain freedoms of the air.

30. First, the International Air Services Transit Agreement (19) provides for the multilateral exchange of air transit rights, that is to say the right to overfly (the first freedom of the air) and

the right to land for technical purposes (the second freedom of the air). All Member States are parties to that agreement. (20)

31. Second, the International Air Transport Agreement was intended to provide for the multilateral exchange of the first to fifth freedoms. (21) However, it was only signed and accepted by a small number of States, and so essentially remains a dead letter. (22)

32. The lack of an agreement exchanging traffic rights at the multilateral level has led to the proliferation of bilateral or regional air transport agreements, which reciprocally open up the national airspace and market of the respective States for the operation of international air services. (23)

33. Accordingly, before the *Open Skies* judgments, the established practice in the European Union was that the Member States concluded air transport agreements bilaterally with third countries. (24) In 2003, it was estimated that there existed some 1 500 such bilateral agreements. (25)

34. As highlighted by the German Government, when exchanging traffic rights through bilateral agreements, it is the first to fourth freedoms that are most often exchanged, with the fifth and sixth freedoms usually restricted, the seventh freedom rarely agreed upon, and the eighth and ninth freedoms almost always excluded. (26)

35. The envisaged agreement with the Sultanate of Oman, at issue in the present case, concerns only the grant of traffic rights relating to the first to fourth freedoms. (27)

2. *Air transport agreements by the Member States and the European Union after the Open Skies judgments*

36. The situation in the European Union changed after the *Open Skies* judgments. It therefore merits a short description.

37. Starting in the early 1990s, and thus during a period when the EU legislature adopted various regulations establishing an internal market in air transport, (28) the Commission repeatedly sought directives from the Council to authorise it to negotiate an air transport agreement with the United States of America, with a view to replacing a number of bilateral agreements between that country and Member States. (29) The Commission also asked Member States to coordinate their positions before entering into negotiations with the United States.

38. Having been repeatedly denied such a mandate by the Council (up until 1996), (30) and finding that its requests for coordination among the Member States had not been complied with, the Commission commenced infringement proceedings against the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany. (31)

39. In its judgments in those cases, the Court upheld only part of the Commission's infringement claims. First, it agreed that the Member States had negotiated certain clauses covering issues that, due to the existence of internal EU rules, had become an exclusive EU competence. (32) Second, it considered that a particular clause included in each of the 'open skies' agreements concluded between the United States and the respective Member State, which limited the ownership and control of airlines, was in conflict with the right of establishment, as guaranteed by Article 52 TFEU. (33)

40. However, and this element is of particular importance for the present case, the Court considered that the state of EU law at the time did not regulate the grant of traffic rights or the

grant of operating licences to third-country air carriers. Therefore, an international commitment entered into by those Member States exchanging traffic rights with a third country could not be regarded as affecting EU legislation. (34)

41. In practice, the Court's conclusion that certain parts of bilateral air transport agreements with third countries fell within exclusive EU competence meant that the Member States could no longer enter into such agreements without the European Union also being a party. In other words, the European Union became a necessary party to such agreements. This gave the impetus to the Commission to start pursuing a common policy of EU external relations in the field of air transport. (35)

42. In order to resolve the infringements found in the *Open Skies* judgments, the Commission was granted a horizontal mandate to renegotiate the agreements with the United States. It was also granted directives to renegotiate agreements which had been bilaterally concluded by Member States and contained clauses that were considered to be of exclusive EU competence or contrary to EU law. (36)

43. The resulting horizontal agreements, however, did not replace the bilateral agreements of the Member States, but only amended or supplemented the relevant provisions in those agreements which were considered to be of exclusive EU competence or contrary to EU law.

44. The new external air transport policy pursued by the Commission after the *Open Skies* judgments includes the endeavour to conclude comprehensive air transport agreements with strategic EU partners and neighbouring States. Once those agreements enter into force, any bilateral agreements between Member States and third countries become obsolete and are replaced by them.

45. The majority of such agreements are concluded as 'mixed' agreements, including the comprehensive air transport agreement with the United States, (37) the multilateral agreement establishing a European Common Aviation Area with certain neighbouring countries, (38) and a number of bilateral agreements with certain third countries. (39)

46. However, certain comprehensive air agreements were concluded as 'EU-only' agreements. The first such agreement was concluded with the Kingdom of Norway in 1992. (40) An agreement with the Swiss Confederation followed in 2002. (41) The Trade and Corporation Agreement with the United Kingdom, (42) concluded after the latter's withdrawal from the European Union, was also concluded as EU-only but contains chapters on air transport and the grant of traffic rights. While those agreements are evidence of the possibility to conclude air transport agreements by the European Union alone, as I shall explain later, the non-participation of the Member States as parties to those agreements does not amount to proof of exclusive EU competence for all parts of such air transport agreements.

47. In its application and at the hearing, the Commission referred to those examples of EU-only air transport agreements to underline the argument that EU external aviation policy would be simplified and accelerated if the European Union alone could conclude such agreements with third countries. Among other examples, the Commission explained that the entry into force of mixed agreements often takes more than 10 years, which would postpone the benefits which EU air carriers, the EU aviation industry as a whole, and users of such services could obtain from said agreements.

48. Whether or not that is the case, such policy arguments cannot change the existence or the nature of external competences, as agreed under the Treaties. It is for the Court alone to decide whether the current state of EU air transport law, read in the light of the relevant EU constitutional framework, allows for the conclusion that an air transport agreement – such as the envisaged agreement with the Sultanate of Oman – *in its entirety* falls within the scope of exclusive EU competence.

49. In order to make that assessment, it is necessary to shortly lay out the content of the envisaged agreement. (43)

3. *The content of the envisaged agreement with the Sultanate of Oman*

50. The preamble of the envisaged agreement outlines its intended purpose, which is, inter alia, to enhance air services, ensure a high level of air safety and security, foster competition, market access, environmental protection and limitation of greenhouse gas emissions, achieve a high level of passenger protection, and facilitate access to capital by the air transport industry.

51. The agreement is composed of three titles. Preceded by an untitled section containing two provisions (Article 1 on definitions and Article 2 on the exclusion of direct effect), Title I regulates the ‘economic provisions’ of the envisaged agreement; (44) Title II concerns ‘regulatory cooperation’, (45) and Title III contains ‘institutional provisions’. (46) The envisaged agreement also contains an annex containing transitional provisions.

52. The list of signatures at the end of the envisaged agreement shows that it was intended to be concluded as a mixed agreement, encompassing the European Union and all its Member States as parties.

53. The parties to these proceedings agree, either expressly or impliedly, that the majority of the provisions of the envisaged agreement fall within exclusive EU competence, or are merely accessory to the exercise of that competence. There is however disagreement on the nature of that competence with regard to certain provisions falling within Title I of the envisaged agreement.

54. The most important disagreement relates to Article 3(2) of the envisaged agreement – the grant of traffic rights. Pursuant to that provision, traffic rights relating to the first to fourth freedoms of the air are mutually granted between the contracting parties. (47)

55. On the one hand, the Council and the Member States consider that the grant of those rights falls outside the scope of exclusive EU competence. Those parties assert that EU law, as it currently stands, does not lay down common rules governing that grant. Those parties refer, in particular, to the *Open Skies* judgments. As explained above, the Court held therein that European Community law, as it stood at the time of the judgments, did not govern the grant of traffic rights, and so could not be affected by the conclusion of an international agreement between the Member States and a third country. On the other hand, the Commission, supported by the Parliament, considers, that the state of EU law relating to air transport has significantly evolved since the *Open Skies* judgments were delivered. As it stands today, that area of EU law could therefore be affected if the envisaged agreement were concluded by the Member States.

III. Analysis

56. The area of external competences of the European Union is one of the most complex areas of EU constitutional law. It often reveals a confusion between pertinent concepts, most notably

the conferral of competences and their shared or exclusive nature, and the reasons for the mixity of agreements. (48)

57. In that respect, even if the question, as posed by the Commission, presupposes the *existence* of an EU competence, and therefore only questions its *nature*, a number of intervening Member States contend that the grant of traffic rights constitutes a Member States competence that was not conferred on the European Union.

58. For that reason, my analysis is structured as follows. After briefly dismissing the arguments on the admissibility of the present request for an Opinion from the Court (Section III.A), I shall delimit the concepts relevant for a finding of exclusive EU external competence (Section III.B). Thereafter, I will propose to the Court to reject the arguments denying the existence of an EU competence to grant traffic rights (Section III.C). That will allow me to turn to arguments in support of a finding of exclusive EU competence for the envisaged agreement. In the reverse order of how the Commission structured its application, I will first ask whether the European Union acquired the exclusive competence to conclude the envisaged agreement on the basis of the second situation of Article 3(2) TFEU; ‘the necessity argument’ (Section III.D). I will then explore whether an exclusive competence ensues on the basis of the third situation of Article 3(2) TFEU; ‘the *ERTA* effect’ (Section III.E).

A. Admissibility

59. A number of intervening Member States question the admissibility of the present request for an Opinion, arguing that it does not meet the conditions to initiate the procedure envisaged in Article 218(11) TFEU.

60. In that respect, it must be recalled that the Court has clearly explained that, under Article 218(11) TFEU, a Member State, the Parliament, the Council or the Commission may obtain the Opinion of the Court at ‘any time before the [European Union]’s consent to be bound by the agreement is finally expressed’. (49)

61. To date, the envisaged agreement with Oman remains ‘envisaged’ given that the Commission has yet to propose that the Council adopt a decision authorising its signature, pursuant to Article 218(5) TFEU. (50)

62. In that light, first, the fact, raised by some Member States, that the Commission has waited three years to file the present request for an Opinion under Article 218(11) TFEU does not alter the ‘envisaged’ nature of that agreement. It therefore cannot affect the admissibility of the Commission’s request. That is so even if, in the spirit of sincere cooperation, the Commission should have introduced that request as soon as possible.

63. Second, a number of Member States assert that the question of the distribution of competences as regards the envisaged agreement has already been settled by means of the decisions to authorise negotiations, adopted by the Council and the Member States in 2018. (51) Accordingly, the Commission could now no longer change that distribution. A request for an Opinion from the Court on the distribution of competences would thus be hypothetical.

64. That argument does not stand either. It is irrelevant for the question of the admissibility of a request under Article 218(11) TFEU whether or not the Council and the Member States and the Commission agree or disagree with the distribution of competences for the conclusion of a specific agreement. (52)

65. The opposite would entail that, in adopting a decision to authorise the opening of negotiations of an international agreement, the Council and the Member States could settle the distribution of competences of the European Union without regard to the powers and procedures laid down in the Treaties. (53) That would void the procedure envisaged by Article 218(11) TFEU of its purpose. (54)

66. It follows that the Commission's request for an Opinion from the Court is not hypothetical, given that the outcome of the present proceedings may affect the way in which the envisaged agreement is concluded.

B. The existence and nature of external EU competence

1. The existence of external EU competence

67. For the European Union to enter into an international agreement, it must be vested with the necessary competence to do so. In EU law, that principle is referred to as 'the principle of conferral'. (55)

68. As expressed in Article 5(2) TEU, that principle empowers the European Union to act 'only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein'. Therefore, as Article 4(1) and Article 5(2) TEU explain, unless conferred on the European Union, the competence to act remains solely with the Member States. That gives rise to a simple state of affairs: the European Union cannot act unless conferred the competence to do so.

69. Therefore, any assessment into whether an external EU competence is exclusive or shared presupposes that the Treaties have conferred on the European Union the necessary competence to act in the first place.

70. An external competence may be conferred on the European Union expressly or impliedly. (56)

71. Today, the question of whether the European Union has the competence to conclude an international agreement is governed by Article 216(1) TFEU. That provision covers both express and implied competences. (57) It was inserted into the FEU Treaty by the Treaty of Lisbon and reflects the preceding developments in judicial practice.

72. Article 216(1) TFEU provides for four situations in which the European Union may conclude an agreement with one or more third countries or international organisations. (58) That is so:

(i) where the Treaties so provide (express competence); or

(ii) 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 (implied competence, 'parallel external powers'); (59) or

(iii) where the conclusion of an agreement is provided for in a legally binding Union act (implied competence, as clarified in Opinion 1/94 (*Agreements annexed to the WTO Agreement*)); (60) or

(iv) where the conclusion of an agreement is likely to affect common rules or alter their scope (implied competence, as introduced for the first time in *ERTA*). (61)

73. As I will explain later in more detail, a number of Member States intervening in these proceedings consider that the competence to grant traffic rights remains only with the Member

States. It will, thus, first be necessary to assess whether that power was conferred on the European Union either expressly or impliedly (see Section C).

2. The nature of external EU competence

74. Once it is established that competence has been conferred on the European Union, the next question is whether that competence is shared or exclusive.

75. What does it mean that competence is shared or exclusive?

76. If the European Union has exclusive competence, the Member States cannot act in relation to a matter falling within that competence. That is so even where the European Union has not acted. (62) In other words, in the area of exclusive EU competences, only the European Union can act.

77. Applying this to the question put to the Court in the present proceedings, a finding that the European Union has exclusive competence to grant traffic rights to third countries would entail that the Member States could no longer enter into international agreements on air transport. That is so even in a situation in which the European Union decided not to conclude an air transport agreement with a particular third country, that is, unless the European Union were to delegate the exercise of its exclusive competence to the Member States to conclude such agreements without it.

78. Conversely, if the competence at issue is conferred as a shared one, both the Member States and the European Union may decide to exercise it. A decision as to whether the European Union should exercise that competence in relation to a particular third country or group of countries is a political decision, which is limited by the constitutional principles of subsidiarity and proportionality. (63)

79. When it comes to acts regulating EU policies internally, if a shared competence is exercised by the European Union, the second and third sentences of Article 2(2) TFEU preclude the Member States from acting for as long as the question remains regulated at EU level. That is known as the principle of pre-emption. The rationale behind that principle lies in the avoidance of conflict and the preservation of common EU rules. (64) Protocol (No 25) on the exercise of shared competences, annexed to the Treaty of Lisbon ('Protocol No 25'), explains that pre-emption concerns only those specific elements governed by an EU act, and not the whole area to which that act belongs. (65)

80. Pre-emption of Member State action has a similar consequence as where the European Union is conferred exclusive competence: the Member States can no longer regulate a particular issue. There is one notable difference, however: through pre-emption, the Member States do not 'lose' their right to exercise a shared competence; they may exercise that competence again if the European Union decides to revoke the EU measure concerning a particular subject matter. Conversely, in an area of exclusive EU competence, even where a particular subject matter is not occupied by an EU measure, the Member States are nevertheless prevented from acting. (66)

81. The European Union's exclusive competences are exhaustively enumerated in Article 3(1) TFEU. (67) The Member States cannot adopt internal acts or conclude international agreements in those areas.

82. In addition to the areas enumerated *ex ante* as exclusive, the Treaty of Lisbon added a paragraph 2 to Article 3 TFEU.

83. That paragraph entails that, under the particular circumstances provided therein, certain competences that are conferred as shared may become exclusive in their external dimension. In other words, those competences are not conferred *ex ante* by the TFEU as exclusive, but may acquire that nature through the adoption of EU legislation. Those types of competences have been referred to as ‘subsequent exclusivity’, ‘exclusivity by exercise’, (68) or ‘supervening exclusivity’. (69)

84. In principle, external competences of the European Union are shared, unless the international agreement at issue covers an issue that falls within the scope of an express exclusive EU competence covered by Article 3(1) TFEU, or which has subsequently become exclusive on the basis of Article 3(2) TFEU.

85. The European Union’s air transport policy, or transport policy more generally, is not among the policies enumerated as exclusive in Article 3(1) TFEU.

86. Instead, transport is one of policies enumerated (not exhaustively) in Article 4(2)(g) TFEU as a shared competence.

87. Therefore, the only way in which the Member States might be considered prevented from entering into an air transport agreement is if the exercise of that shared competence became exclusive for the subject matter at issue by virtue of the fulfilment of one of the conditions of Article 3(2) TFEU.

88. Article 3(2) TFEU therefore has the power to pre-empt the Member States from concluding an international agreement in an area in which they did not at the outset confer an (express) exclusive competence on the European Union – provided the conditions which that provision lay down are satisfied.

89. Given that the Treaties govern the type of pre-emption that leads to exclusivity in *external* relations in a different provision than the type of pre-emption that exists in the *internal* sphere, there is good reason to treat those two types of pre-emption differently. Thus, the Court has already considered that Protocol No 25 to the Treaty of Lisbon does not govern the type of pre-emption that establishes exclusive competence of the European Union to conclude an international agreement on the basis of Article 3(2) TFEU. (70) Rather, the effects of *internal* regulation by the European Union on the nature of its *external* competence are governed only by Article 3(2) TFEU, and not by Article 2(2) TFEU to which Protocol No 25 relates.

90. Article 3(2) TFEU lays down that the European Union shall have exclusive competence for the conclusion of an international agreement:

(i) when its conclusion is provided for in a legislative act of the Union; or

(ii) when it is necessary to enable the Union to exercise its internal competence (‘the second situation’ or ‘exclusivity by necessity’); or

(iii) in so far as its conclusion may affect common rules or alter their scope (‘the third situation’ or ‘the *ERTA* effect’).

91. At the outset, it is important to signal the high level of similarity in the language used in Article 216(1) TFEU and Article 3(2) thereof. While that similarity has (rightly, I submit) prompted scholarly criticism, (71) the Court cannot criticise, but must interpret the text of the Treaties.

92. In that respect, I observe that the two provisions relate to different issues and should accordingly be interpreted in their pertinent contexts. Whereas Article 216(1) TFEU concerns *the existence* of an external competence, and is thus linked to the principle of conferral, Article 3(2) TFEU concerns *the nature* of said external competence and determines the situations in which international agreements must be concluded as EU-only agreements. (72)

93. To the best of my knowledge, there does not exist an EU legislative act that requires the European Union to conclude an air transport agreement with the Sultanate of Oman specifically, or with third countries more generally. Therefore, I propose to read the arguments of the parties of these proceedings as relating solely to the second and the third situations under which exclusivity may arise under Article 3(2) TFEU.

3. **Mixed agreements**

94. Before I turn to examine whether the European Union has the exclusive competence to conclude the envisaged agreement, it is necessary to resolve another related question: whether any, and if so, which conclusions could be drawn from the proposal that the envisaged agreement be concluded as a mixed agreement?

95. The resolution of that question is relevant given that a number of parties to these proceedings, including the Commission, have raised arguments relating to the ‘mixity’ of international agreements.

96. ‘Mixed agreements’, as a specific category of international agreements, are not mentioned in the Treaties, but are a result of practice. The Court has defined mixed agreements as those ‘signed and concluded both by the European Union and by each of its Member States’. (73)

97. Scholarship distinguishes between obligatory and facultative mixed agreements. (74)

98. If an agreement contains parts which are Member States’ exclusive competence and parts which are either exclusive or shared EU competence, the European Union cannot conclude such an agreement alone, but only together with its Member States. In that scenario, mixity is obligatory.

99. Another scenario in which mixity might be obligatory, what one could call ‘reverse obligatory mixity’, is the situation addressed in the *Open Skies* judgments: where an international agreement negotiated by a Member State contains parts which fall within the European Union’s exclusive competence, that Member State cannot conclude that agreement alone. (75) In such a case, if the Member States want to be party to such an agreement, the European Union must join them. (76)

100. Of relevance to the present discussion on mixity is the fact that, in reaction to the *Open Skies* judgments, the European Union adopted Regulation (EC) No 847/2004. (77) Among other aspects, that act enables the Member States to conclude ‘State-only’ agreements, provided that those agreements contain standard clauses, and that the Member States inform the Commission about the agreements through a pre-determined type of procedure. (78) Regulation No 847/2004 – which is of importance to these proceedings also as regards the competence of the European Union to conclude alone the envisaged agreement – could be read as an example of an EU act enabling the Member States to enter into an international agreement without the European Union as a party, even where parts of that agreement concern matters of exclusive EU competence. (79)

101. Finally, where an agreement solely concerns matters that are a matter of shared competence, that agreement may be concluded either as a mixed agreement or as an EU-only agreement. The decision on how to conclude that agreement, be that mixed or EU only, belies a political choice; (80) not constitutional necessity. (81)

102. It follows that there are two reasons why an international agreement could be concluded as an EU-only agreement: either because the European Union indeed had exclusive competence over the entire agreement, or, because competence over the entire or parts of the agreement was shared, and it was decided, at the political level, that that competence be exercised by the European Union alone.

103. For the above reasons, it is not determinative for the purposes of the present exercise that, in the past, a grant of traffic rights with the Kingdom of Norway, the Swiss Confederation, and the United Kingdom occurred by means of EU-only agreements. (82) In fact, the EU-only nature of those agreements may as much be explained by the argument that it was deemed politically appropriate for the European Union alone to conclude those agreements as by the argument that the European Union holds exclusive competence over the entirety of the content of those agreements, including the grant of traffic rights.

104. In conclusion, even if the envisaged agreement (in part) falls within a shared competence, that does not prevent said agreement from being concluded as an EU-only agreement. Only where all the elements of the envisaged agreement fall within the scope of exclusive EU competence will constitutional rather than political reasons dictate the need for an EU-only agreement.

105. Whether such constitutional reasons exist is a matter of the analysis which I will conduct under Sections D and E.

C. The conferral of competence on the European Union to grant traffic rights to third countries

106. A number of Member States intervening in these proceedings contend that the power to grant traffic rights was not conferred on the European Union, but remains Member State competence. (83) They argue that authorising flights of third-country air carriers into their territory is an exercise of the principle of sovereignty over a State's airspace, as confirmed by Article 1 of the Chicago Convention. By virtue of that fact, the European Union could never grant traffic rights, as it was not conferred that competence.

107. Given that position, it is necessary to assess whether the European Union has been conferred the power to grant traffic rights to third countries.

108. As explained, it is possible that such a conferral was done expressly or impliedly. In order to establish express competence, one needs to look whether the Treaties contain a legal basis that specifically lays down that the European Union may conclude an agreement concerning that particular issue. (84)

109. In that respect, I observe that even if the number of provisions expressly empowering the European Union to act in relation to third countries or international organisations has increased since the Treaty of Rome, (85) the chapter governing transport policy still does not contain an express clause empowering the European Union to conclude international agreements in the field of transport.

110. The external dimension of the European Union's transport policy is expressly mentioned only in Article 207(5) TFEU.

111. However, that reference was done in order to exclude transport from the common commercial policy, and thus from the latter's expressly exclusive nature. (86)

112. Instead, Article 207(5) TFEU refers back to the Treaty chapter dealing with the common transport policy (Title VI of Part Three), which, in itself, does not expressly make reference to an EU competence to conclude international agreements. In my view, that is the reason why the reference in Article 207(5) TFEU to the common transport policy chapter (which today also includes air transport) for the purpose of the negotiation and conclusion of an international agreement in that area cannot be read as an *express* EU competence to conclude agreements on air transport. Rather, that cross-referral suggests that the external EU competence for the conclusion of air transport agreements is an *implied* external competence.

113. On the basis of Article 216(1) TFEU, an implied external competence *inter alia* exists whenever an internal competence is conferred on the European Union, whether or not that internal competence is exercised, and where the conclusion of that agreement is necessary to achieve one of the European Union's objectives. Such parallel competences, which recognise that EU policies might have internal and external dimensions, (87) were developed and confirmed in the case-law of the Court before being codified in Article 216(1) TFEU. (88)

114. However, an implied external competence is still subject to the principle of conferral. That means that Article 216(1) TFEU cannot, in itself, be used as the legal basis for the conclusion of an international agreement. The proper legal basis for such an agreement has to be found in the provisions of the Treaties conferring on the Union power to regulate a particular area or issue.

115. When the area covered by the international agreement is air transport, the legal basis for the implied competence to sign such an agreement is found in Article 100(1) TFEU.

116. Air transport (together with maritime transport) is a specific part of EU transport policy, as its development (both internally and therefore also externally) depends, by virtue of Article 100 TFEU, on the adoption of legislative measures by the Parliament and the Council.

117. By today, however, the internal dimension of the common air transport policy is regulated to a large extent by common EU rules. That fact expresses the European Parliament's and Council's political choice to implement that EU policy.

118. By virtue of the existence of an *internal* air transport policy it follows that there must also be an *implied external dimension*.

119. However, that still leaves open the question of whether all elements relevant for the exhaustive regulation of air transport were conferred on the European Union, or whether there are certain aspects, such as the grant of the traffic rights, which the Member States chose not to confer; that is, which they chose to retain.

120. In that respect, I must first observe that, by virtue of the principle of territorial sovereignty, expressed in Article 1 of the Chicago Convention, the realisation of any air transport policy within the European Union depends on the grant of traffic rights.

121. At least in its commercial dimension, without the grant of such rights, it is not possible to develop an air transport policy, be that in an EU-internal or EU-external dimension. In that sense, the inclusion in the Treaties of the possibility to develop a common EU air transport policy under

Article 100(1) TFEU must necessarily imply also the power of the European Union to decide whether, and to which countries, to grant traffic rights.

122. Internally, the exchange of traffic rights between the Member States, and the related rights of EU carriers to operate commercial services within the European Union, arises from Regulation (EC) No 1008/2008 ('the Air Services Regulation'). (89) Thereby, the EU legislature sought to establish an internal market in air transport. (90)

123. The Air Services Regulation does not deprive the Member States of their sovereignty over sky over their territories. That regulation is merely a product of the European Union's exercise of the Member States' sovereign rights, on the basis of conferral, to pursue an EU air transport policy. (91)

124. In order to develop the *external* dimension of the European Union's air transport policy, which can be brought to life only through the grant of traffic rights to third countries, the European Union thus possesses an *implied external competence*. (92)

125. That being resolved, I can now turn to the question posed by the Commission of whether that policy has, in its entirety, become an exclusive external competence, such that the envisaged agreement should be concluded by the European Union alone.

D. Exclusive EU competence to conclude the envisaged agreement on the ground of necessity

126. The Commission relies on the second situation of Article 3(2) TFEU to argue that the EU-only conclusion of the envisaged agreement is necessary to exercise the internal (shared) competence in the area of transport policy.

127. I can be brief as that issue was already resolved in *Open Skies* judgments. Therein, the Court first explained that, in the light of Opinion 1/76 (*Agreement on the establishment of a European Laying-up Fund for Inland Waterway Vessels*), (93) exclusive competence based on necessity arises where an *internal competence* may be effectively exercised only at the same time as an *external competence*; or, in other words, that said internal competence *cannot* be attained by establishing internal rules. (94)

128. This is where the difference lies between the necessity principle in Article 216(1) TFEU and Article 3(2) TFEU. Article 216(1) TFEU recognises parallel external powers within the policy areas conferred to the European Union, the exercise of which may be necessary to attain the objective which that policy serves within the Treaties. That competence exists, but that provision is silent on the question on whether the European Union should exercise it. Conversely, 'necessity' within the meaning of Article 3(2) TFEU signifies that it is the European Union that has the sole power to act because exercising its internal competence would be *impossible* without concluding an international agreement.

129. That is clear from the way in which the Court established the European Union's exclusive competence in Opinion 1/76 (*Agreement on the establishment of a European Laying-up Fund for Inland Waterway Vessels*). (95) That means that the Court opted for a narrow interpretation of the concept of 'necessity' as a reason for exclusivity. Thereby, it also avoided conflating the meaning behind the concepts of 'parallel external competences' and their 'exclusivity'. The contrary would result in the disappearance of the European Union's shared external competences, granting it exclusive power to act externally whenever it is empowered to implement a certain policy. Thus

far, however, the Court has not considered that that was the intention of the drafters of the Treaty of Lisbon when they included the concept of ‘exclusivity by necessity’ in Article 3(2) TFEU.

130. In the *Open Skies* judgments, the Court held that it had not been presented with sufficient evidence that, in order to realise the objective of establishing an internal market in services in the field of air transport, the European Union should also have exclusive competence to conclude air transport agreements with third countries. (96) Additionally, the Court observed that, at the time of those judgments, the internal market in air services was successfully established, refuting thus the necessity argument. (97)

131. In the present case, as its only new argument compared to the situation in the *Open Skies* judgments, the Commission submits that the field of air transport, which the Court, in those judgments, deemed to be regulated only in a ‘relatively limited’ way is now much more densely occupied by EU rules. That may be so, but it does not assist the Commission in claiming that the conclusion of the envisaged agreement with the Sultanate of Oman is ‘necessary’ for the European Union to exercise its internal competence within the meaning of Article 3(2) TFEU. Quite to the contrary, it adds to the argument that that internal policy was successfully established without the ‘necessity’ to conclude an international air transport agreement.

132. The Commission, however, claims that a larger number of new provisions of internal EU legislation apply not only to EU carriers, but also to third-country carriers (for example, Article 15(5) and Articles 22 to 24 of the Air Services Regulation). This, according to the Commission, creates necessity for the European Union to conclude international air transport agreements. To my mind, the Commission is formulating a topsy-turvy argument. Those provisions do not necessitate that third-country carriers are granted access to the EU air transport services market. Rather, those provisions exist for those types of situations in which such access was granted. It cannot, therefore, be argued that the European Union must have the sole competence to grant traffic rights to third-country carriers because it has the rules that govern their rights or obligations once such rights are granted.

133. I therefore propose to the Court to find that the European Union does not possess exclusive competence to conclude the air transport agreement with Oman on the basis of the second situation envisaged in Article 3(2) TFEU.

E. Exclusive EU competence to conclude the envisaged agreement on the basis of the *ERTA* effect

134. The most important and complex argument raised by this case concerns the third situation under Article 3(2) TFEU. Pursuant thereto, the European Union acquires exclusive competence to conclude an international agreement ‘in so far as its conclusion may affect common rules or alter their scope’.

1. On the burden of proof

135. Before I turn to the arguments on the application of Article 3(2) TFEU, I find it necessary to react to one submission of the Council. Implying that the Commission’s arguments are insufficient to establish the existence of the *ERTA* effect, that institution contends that it is for the party invoking the exclusive nature of the external competence of the European Union to put forward evidence or arguments to establish that competence.

136. While it is true that the Court has used similar wording, it made those observations in the context of direct actions brought pursuant to Article 263 TFEU. (98)

137. However, the procedure under Article 218(11) TFEU is not an adversarial procedure, with two confronted parties. The procedure for an Opinion from the Court does not have as its purpose to accept or reject a claim of the party that initiated proceedings. Rather, that procedure serves the public interest of preventing the conclusion of an international agreement that is contrary to the Treaties, and which might create difficulties (and embarrassment) for the European Union in relation to its international partners. (99)

138. In that sense, even if the arguments adduced by the institution that requested an Opinion under Article 218(11) TFEU, just like those of other parties to the proceedings, are valuable for the Court, the Court's answer is not dependent on those arguments.

2. *Main disagreement between the parties to these proceedings*

139. The Commission, supported by the Parliament, proposes a methodology for establishing the *ERTA* effect that is different from the one defended by the Council and the Member States.

140. The Commission and the Parliament submit that Article 3(2) TFEU codified the case-law on exclusive external EU competence as a positive attribution of competence. According to those parties, the *ERTA* effect should be understood to mean that once an 'area' is completely or at least 'largely covered' by common EU rules, such as is the case in the area of air transport, it must be concluded that an agreement on air transport, including on traffic rights, may affect common rules or alter their scope. EU competence must then be exclusive. It does not matter whether the grant of air traffic rights to third countries is regulated by EU rules, given that those rules fall within the larger area of air transport, for which common EU rules exist internally. As a consequence, those institutions reject a 'nucleatic' approach which would mandate assessing every commitment of an international agreement against the existence of specific common EU rules to that effect.

141. The Council and the Member States accept that there is a risk that common EU rules may be adversely affected or altered if international commitments fall within the scope of those common rules. They also agree that those common EU rules may be affected or altered even when the scope of the international agreement at issue and the relevant EU rules do not coincide entirely, so long as the commitments at issue nevertheless fall within an area which is already 'largely covered' by EU rules. However, according to those parties, the mere finding that a policy area is 'largely covered' by EU rules cannot in itself result in a finding of exclusive competence. They argue that what is necessary is a 'real' risk of affectation, which cannot be established by reference to a mere enumeration of multiple EU rules regulating a particular area. Instead, what is necessary is a specific explanation of how those rules might be affected by the envisaged international commitments. Therefore, the Court's assessment would entail two steps: first, assessing the scope and overlap between the two sets of rules at issue – that is to say the relevant EU rules at issue and the international commitments to be entered into – and, second, establishing a real risk of affectation of the relevant EU rules. That assessment must take place on a provision by provision basis to specifically identify the relevant risk of affectation. In Council's view, the Commission's application neglects this second step.

3. *The ERTA effect and affectation*

142. To recall, under Article 3(2) TFEU, the European Union acquires exclusive competence to conclude an international agreement if that agreement '*may affect* common rules or alter their scope'. What does 'affectation' entail?

143. Neither the text (100) of Article 3(2) TFEU nor its preparatory work provides much guidance. (101)

144. The origin of the idea underlying that provision – that is, that a shared EU competence may turn into an exclusive EU competence when an international agreement might affect or alter existing EU rules – goes back to the judgment in *ERTA*. The Court has confirmed that that case-law is still relevant, by holding that the third situation of Article 3(2) TFEU must be read ‘in the light of’ that judgment and the case-law that followed. (102)

145. Therefore, while *ERTA* was decided at a time far before the introduction of Article 3(2) TFEU into the text of the Treaty, its ‘idea’ remains relevant for the interpretation of the conditions under which exclusive competences arise. (103)

146. There are, in my view, two important aspects to the *ERTA* effect.

147. The first important aspect arises from paragraph 17 of the *ERTA* judgment, where the Court stated that ‘each time the [European Union], 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’. (104)

148. That statement suggests that the *ERTA* effect is based on the concept of pre-emption: when the European Union enacts common rules, it occupies that particular field of EU law, with the consequence that the Member States no longer have a right to occupy the same field. (105)

149. However, since the inception of the Treaty of Lisbon and the introduction of Article 3(2) TFEU, it became questionable whether the *ERTA* effect should be understood as one of pre-emption or, as the Commission submits in the present proceedings, as a positive grant of exclusive competence. (106)

150. As I have explained earlier (see point 89 of this Opinion), the Court has excluded the application of Protocol No 25 to Article 3(2) TFEU. By this, the Court therefore rejected the possibility that ‘*ERTA* pre-emption’ should be understood in the same way as ‘internal pre-emption’, which is confined to specific rule pre-emption.

151. However, in my view, that conclusion does not preclude the *ERTA* effect from being viewed through the prism of pre-emption in general. It merely implies that the *ERTA* effect is not confined *only* to the type of pre-emption recognised in the internal competence context, that is, limited merely to concrete rules, but that it could be broader.

152. In that respect, according to the Commission, Article 3(2) TFEU must be understood to even allow for ‘field pre-emption’.

153. The Council and the Member States, however, do not agree with that reading. The Swedish Government, for example, explained in the present proceedings that it does not consider that the non-applicability of Protocol No 25 has as the consequence that it is sufficient, under Article 3(2) TFEU, merely to find that a relevant ‘area’ is covered by EU rules ‘to a large extent’. That party thus argued that, even if the *ERTA* effect could not be understood through the prism of pre-emption, that does not mean that a specific analysis is not necessary to establish exclusivity.

154. That leads me to the second important aspect of the *ERTA* effect: that it may be explained, in part, through the principle of sincere cooperation, (107) today expressed in Article 4(3) TEU.

155. In the *ERTA* judgment, immediately after recalling the principle of sincere cooperation, the Court found that ‘to the extent to which [EU] rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the [EU] institutions, assume obligations *which might affect those rules or alter their scope*’. (108)

156. Accordingly, whereas the exclusion of Member States’ powers was based on the logic of pre-emption, it is the reliance on the principle of sincere cooperation and the obligations that flow from it that introduced, in *ERTA*, the ‘affectation’ logic. (109) By virtue of the *ERTA* effect, therefore, the Member States are pre-empted from entering into international commitments which may affect common rules.

157. In my view, the case-law that followed the judgment in *ERTA*, both before and after the entry into force of the Treaty of Lisbon struggled to explain clearly the *ERTA* effect, especially how to conclude that the *affectation that pre-empts* Member States’ action exists. In some instances, the case-law might be seen as even accepting the logic of ‘field pre-emption’, (110) and in others it seemed that it insisted on a thorough, rule-by-rule, analysis of affectation. (111) Understandably, therefore, scholarship has described the case-law as confusing and unclear. (112)

158. To my mind, however, the perception that the Court has taken different stances in different cases is often the result of a failure to take into account the specific context in which the respective cases were brought to the Court. That context might influence the steps that the Court considered necessary to undertake when finding or excluding exclusivity. (113)

159. Indeed, even if the Court has never placed the *ERTA* effect in one of the niches debated in legal theory, its case-law does not seem to support the field pre-emption interpretation proposed by the Commission.

160. On the other hand, even if, in my understanding, the steps required by the case-law appear to be more faithfully explained by the Council, the case-law nevertheless does not require that an article-by-article assessment is always undertaken.

161. In my view, the case-law may be understood if one starts from the objective of the *ERTA* effect. In Opinion 1/03 (*New Lugano Convention*) of 7 February 2006 (EU:C:2006:81), the Court explained said objective as being ‘to ensure a uniform and consistent application of the [Union] rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of [Union] law’. (114)

162. The uniform and consistent application of EU law and the proper functioning of the system established by it might be jeopardised if there is a *risk* that common rules be *affected* by a commitment at international level entered into by the Member States. Affectation, in that sense, means, as the Court explained, ‘an effect on the meaning, scope and effectiveness’ of the common EU rules. (115)

163. The question to be asked to establish the *ERTA* effect is, thus, whether a particular Member State’s commitments at the international level may have an effect on the meaning, scope or the effectiveness of the common EU rules.

164. Viewed in that light, the *ERTA* effect may be read as serving the objective of removing ‘obstacles’ that may be raised by Member States’ external action so as to preserve a uniform EU legal order characterised by common rules; that is, as a type of ‘obstacle pre-emption’. (116)

165. Whether an international commitment presents an obstacle to the preservation of the system as established by the common EU rules may be assessed differently in relation to a multilateral convention aiming to regulate at the international level a specific area which is already governed by common EU rules, (117) a comprehensive bilateral agreement that covers many policy areas, (118) or an area-specific international agreement concluded by the Member States which may contain rules that overlap with common EU rules. (119)

166. It is, however, undeniable that for the risk of affectation of EU rules to arise, there must be some interaction between the two sets of rules: those at international level and those at EU level. (120)

167. There are two situations in which that interaction occurs: in a situation of overlap and outside a situation of overlap.

168. The *first situation* of the *ERTA* effect is thus a situation in which international and EU rules overlap. It was in that sense, that the Court found affectation because the international commitments *fell within the scope* of the common EU rules. (121)

169. Take the examples of the Hague Convention (122) and the Convention of the Council of Europe on the protection of neighbouring rights of broadcasting organisations. (123) In Opinion 1/13 (*Accession of third States to the Hague Convention*) (124) and the judgment in *Commission v Council*, (125) the Court was able to infer from an assessment of *the mere overlap* (even where only partial) that the scope and nature of the two sets of rules that were undertaken internationally might affect existing rules of EU law and their foreseeable development. By virtue of the finding that the commitments at issue covered the same area and situations envisaged by EU law, an individual analysis of every single commitment was not necessary. The Court could, therefore, legitimately conclude that those international agreements taken ‘as a whole’ risk affecting common EU rules. (126)

170. To come to such a conclusion, it is not necessary that the two set of rules are in *conflict* with one another. (127)

171. The reason for granting exclusive competence to the European Union is precisely to *prevent* such conflict. Presence at the international level enables the European Union either to agree the same rules in an international agreement as those that exist as common rules, or to accept different international commitments with the knowledge that the common EU rules will have to be adjusted (something that only the European Union, and not its Member States, can agree to). In both cases, however, the dispute at the international level is avoided because the European Union and not the Member States undertake an international commitment.

172. Thus, the mere possibility that the Member States exercise externally a power already exercised by the European Union internally to regulate a particular subject matter might be sufficient to find a risk of affectation of the common system of EU rules.

173. For such a finding, it is also not necessary that the two set of rules coincide fully. (128)

174. Indeed, according to the Court, a risk of affectation (by virtue of overlapping commitments) may arise where the common rules of EU law cover an area that forms the subject matter of an international commitment ‘to a large extent’. (129)

175. However, the ‘largely covered area’ argument cannot be relied on if there is no overlap at all, for example, if the EU rules at issue regulate only an *internal* situation, but the international

commitments at issue exclusively concern an *external* situation. In such a scenario, there is no overlap between the common EU rules and an international commitment. Hence, the (internally) ‘largely covered area’ concept does not apply to establish a risk of affectation.

176. Therefore, even if, as the Commission and the Parliament appear to argue, the area of air transport, coupled with adjacent issues such as safety and security, or environmental protection, is, by now, completely covered by common rules of EU law *internally*, that is not sufficient to establish automatic *external* exclusive competence for a part of that area *not* concerned by common internal rules. In such a case, there is no overlap.

177. As I have already highlighted in point 167 of this Opinion, the *second situation* in which an international commitment is capable of interacting with common rules of EU law occurs outside of a situation of overlap.

178. In such a case, even if the international commitment does not concern the same issue as the one regulated by an EU rule, it may still have an effect on that EU rule.

179. To my mind, it is that type of affectation in the absence of overlap to which the Court refers in its case-law when it explains that the *ERTA* effect ‘must have its basis in conclusions drawn from a *comprehensive and detailed analysis of the relationship* between the envisaged international agreement and the EU law in force. That analysis must take into account the areas covered by the EU rules and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish’. [\(130\)](#)

180. Applied to the present proceedings, these two situations of possible affectation may result in the conclusion that the European Union has exclusive competence to conclude the envisaged agreement, *either* because the European Union has exercised internally its shared competence to grant traffic rights to third countries, *or*, in the absence of such internal rules, because the grant of traffic rights by the Member States to the Sultanate of Oman risks affecting the system of internal air transport established by the common EU rules.

181. Having set out the assessment to be undertaken by the Court, I shall now turn to the application of that framework to the commitments contained in the envisaged agreement.

4. Application to the envisaged agreement

(a) The commitments to be assessed

182. In point 50 et seq. of this Opinion, I have explained the structure of the envisaged agreement and its different types of provisions. To recall, the envisaged agreement is split into three sets of provisions: Title I on economic provisions, Title II on regulatory cooperation and Title III on institutional provisions.

183. The core of the parties’ disagreement – and indeed of the envisaged agreement as a whole – is the grant of traffic rights under Article 3 thereof. That provision falls within Title I of the envisaged agreement. As the Council and the Member States explain, it is the grant of traffic rights that constitutes the ‘*raison d’être*’ of international air transport agreements given that, absent their exchange, such agreements would be deprived of all reasonable effect. Therefore, I shall discuss that provision and the arguments raised in relation to it in depth (Subsection (b) below).

184. The parties also contest the exclusive nature of two other provisions falling within Title I: Article 8 (on fair competition) and Article 11 (on customs duties, taxes, fees and charges). I shall therefore analyse separately also those two provisions (Subsection (c) below).

185. The remaining (economic) provisions of Title I mostly relate to the exercise of air transport and related services. It is not disputed that at least some of those provisions coincide with an area that is already covered (partially or completely) by EU rules, or that they might affect EU rules which directly govern rights or obligations of third-country carriers once they enter the single European sky. For completeness, I shall nonetheless briefly assess most of those provisions (Subsection (d) below).

186. Conversely, I shall not analyse the exclusive EU nature of certain provisions of Title I and the provisions of Titles II and III for the following reasons.

187. First, Title II of the envisaged agreement covers regulatory cooperation. To the extent that those provisions actually contain binding commitments capable of triggering the third situation of Article 3(2) TFEU, (131) those provisions cover areas already subject to common EU rules. (132) For those aspects, it is clear (and uncontested) that said cooperation occurs under exclusive EU competence. That is because if regulatory cooperation pursuant to those provisions results in the adoption of certain standards relating, say, to aviation safety (133) or security (134) that are different or complementary to current standards adopted under EU law, the consequences of that regulatory cooperation may affect common EU rules. As I have explained in point 171 of this Opinion, only the European Union is capable of agreeing to such consequences, and therefore it is only the European Union that is permitted to participate in such cooperation. It follows that it is not necessary to assess separately the provisions of Title II.

188. Second, the envisaged agreement contains a number of provisions relating to the institutional framework thereof and other ancillary aspects relating to the envisaged agreement. Most of these are contained in Title III; however, Article 1 ('Definitions'), Article 2 ('Direct effect'), Article 6 ('Liberalisation of ownership and control of air carriers'), (135) Article 9 ('Doing business'), (136) and Article 14 ('Statistics') (137) of Title I also fall within that category. All of those provisions are intended to ensure the effectiveness of the substantive commitments which they serve. In relation to such provisions, 'the Court has already had occasion to point out that the competence of the European Union to enter into international commitments includes competence to couple those commitments with institutional provisions. Their presence in the agreement has no effect on the nature of the competence to conclude it. Those provisions are of an ancillary nature and therefore fall within the same competence as the substantive provisions which they accompany'. (138) Accordingly, those provisions, too, do not require a separate analysis.

(b) Article 3 of the envisaged agreement ('grant of rights')

(1) Is there an overlap?

189. I have explained that, in the *Open Skies* judgments, the Court found that, as EU law stood at that point in time, the European Union had not exercised its the internal shared competence to regulate the grant of traffic rights to third countries. (139) For that reason, the Court found that the grant of traffic rights by Member States to the United States could not affect the internal exercise of the European Union's shared competence in the area air transport.

190. However, the Commission contends that the state of affairs has evolved.

191. First, that institution considers that the common rules of EU law, in particular the Air Services Regulation, now cover the entirety of the air transport sector. Those rules have by now, in the Commission's words, superseded the 'historic spider web of bilateral agreements' so that those relationships are no longer governed by international law, but only by EU law.

192. I do not find that the increase in common rules, relied on by the Commission, has changed EU law in such a substantively relevant way (in relation to the situation when the *Open Skies* judgments were handed down) so as to allow for the finding that the shared competence for granting traffic rights externally was exercised internally.

193. As the Czech Government rightly contends, the Air Services Regulation is concerned with the *internal* market in air transport services, for which the right to exploit air services is automatic for EU carriers and implies the grant of traffic rights between the Member States. (140) That arises from Article 19 of that regulation, read alongside the definition of traffic right in Article 2(14) thereof. In other words, the Air Services Regulation constitutes an *internal* exercise of a shared EU competence to regulate the grant of traffic rights internally, between the Member States. As I have explained, that type of exercise of a shared EU competence is not capable of creating an *ERTA* effect – and of therefore precluding the Member States from exercising the *external* part of that shared competence, consisting in the grant of traffic rights to third countries.

194. It follows that by adopting the Air Services Regulation, the European Union did not exercise its shared competence to grant traffic rights to third countries, in relation to which the Member States' commitment relating to the grant of traffic rights to the Sultanate of Oman would overlap.

195. Second, the Commission relies on Regulation No 847/2004 to argue that there now exist common rules of EU law governing the grant of traffic rights to third countries. That regulation evidences, according to the Commission, that, as EU law stands today, even the grant of traffic rights to third countries is now regulated by common EU rules. Article 3(2) of the envisaged agreement therefore affects common rules of EU law.

196. I do not share the Commission's reading of the scope of application of that regulation.

197. It is true that Regulation No 847/2004 constitutes an example of an internal exercise of the European Union's shared competence to regulate an *external* aspect of air transport. However, the main aim of that regulation, which was adopted in reaction to the Court's decision in the *Open Skies* judgments, is to coordinate with the Commission the negotiations of bilateral agreements by which the Member States grant traffic rights to third countries, in order to secure conformity of such agreements with EU law and thus protect common EU rules. (141) For that purpose, Regulation No 847/2004 organises the Member States' competence for the conclusion of air transport agreements with third countries to address the findings of the *Open Skies* judgments, which found that certain provisions that usually form part of an air transport agreement might affect common EU rules. The regulation does so by requiring that bilaterally negotiated agreements contain standard clauses protecting common rules, and that they are notified to the Commission prior to their conclusion to enable that institution to assess whether any other rules risk affecting those common rules. (142)

198. However, Regulation No 847/2004 does *not* contain common rules governing the grant of traffic rights to third countries, nor does it restrict the Member States' liberty to grant such rights to third countries. To my mind, the Commission's interpretation, according to which that regulation delegates to the Member States the power to grant traffic rights, which has, in the meantime, become an exclusive EU competence, has no basis in that regulation or other EU

legislation. In fact, given that Regulation No 847/2004 regulates how the Member States may grant traffic rights, I consider that instrument an argument in support of the conclusion that, externally, traffic rights remain to be exercised by the Member States.

199. Accordingly, Regulation No 847/2004 does not constitute an internal exercise of the shared EU competence to grant traffic rights to third countries. For that reason, the commitment provided for in Article 3(2) of the envisaged agreement does not overlap with common rules contained in that regulation.

200. Finally, just because the European Union alone concluded an air transport agreement with a third country in the past (143) does not support the conclusion that a shared EU competence to grant traffic rights to third countries has been *definitely* exercised externally, such that that could justify exclusiveness for such agreements with any third country. As I have explained, those precedents merely evidence the possibility that air transport agreements can be concluded by the European Union alone as all their parts fall in the EU competence, but they do not demonstrate or act as a source of an external *exclusive* competence of the European Union over the entire air transport agreement.

201. In that regard, the Danish and Swedish Governments highlight two regulations that were adopted to enable the European Union to establish basic air connectivity with the United Kingdom after the expiry of the transitional period laid down in the Withdrawal Agreement (144) with a view to enabling the European Union to exercise its competences, including the grant of traffic rights in relation to the United Kingdom. (145) However, those regulations limit in time that exercise of competence by the European Union to the period of application of those regulations. On that point, both regulations specifically indicate that ‘the exercise of Union competence pursuant to this Regulation shall be without prejudice to the competence of the Member States concerning traffic rights in any ongoing or future negotiations, signature, or conclusion of international agreements related to air services with any other third country, and with the United Kingdom with respect to the period after this Regulation has ceased to apply’. (146)

202. Those regulations therefore demonstrate, if anything, the lack of political will to enable the exercise of the power to grant traffic rights to third countries by the European Union. However, the Court cannot make up for the lack of political willingness of the EU legislature to enable the coming into being of exclusive EU competence.

203. I therefore consider that the internal competence of the European Union relating to the grant of traffic rights to third countries has not yet been exercised through the adoption of common rules, such that Article 3(2) of the envisaged agreement does not overlap with such rules.

(2) *Is there affectation of common EU rules without overlap?*

204. Lacking the common provisions with which Article 3(2) of the envisaged agreement might overlap, the Court now needs to assess whether that provision is capable of affecting other rules of EU law.

205. In that regard, the Commission submits that, by virtue of the grant of traffic rights to the Sultanate of Oman, Omani air carriers could start participating in the internal market in air transport services. Certain rules of EU law that regulate that market would hence be made applicable to those third-country carriers. That in turn, would risk affecting those rules. In any event, even absent the grant of traffic rights, the Commission submits, there exist a number of internal rules that do not apply only internally, but also apply directly to third-country carriers.

206. Again, I do not consider that the Commission has established the existence of affectation, within the meaning of Article 3(2) TFEU.

207. First, as was also clarified at the hearing, the conclusion of the envisaged agreement will not have the effect of enabling Omani air carriers to participate on the EU market in air transport services. Those carriers will not be assimilated to EU carriers for intra-EU flights since the traffic rights that are granted by virtue of the envisaged agreement solely concern the first to fourth freedoms of the air. In other words, those carriers will not be permitted to transport passengers or freight between the airports of different Member States or of the same Member State (and thus will not participate on the internal market in air transport services). (147)

208. Second, the ability to fly to and from the Sultanate of Oman from and to certain points within the European Union entails the application of a number of common EU rules that relate to safety, security, environmental protection, airport rules – including the distribution of slots – and other rules. (148) However, as stated by several participating governments, that only means that those rules will be applicable to a number of additional carriers, not that they will be ‘affected’. In itself, the mere application of those rules is not such as to create ‘an effect on their meaning, scope and effectiveness’ (see point 1622 of this Opinion). In other words, the type of ‘factual’ affectation asserted by the Commission is not sufficient to trigger the *ERTA* effect. (149)

209. Finally, where certain common rules of EU law already now regulate the activities of EU and third-country carriers alike, or even specifically relate only to the third-country carriers, those rules, in any event, find application only *after* traffic rights are granted. They cannot, therefore, be affected *by* a grant of traffic rights as they become applicable *as a consequence of* that grant should one or more Omani air carriers decide to exercise those traffic rights going forward.

210. That of course does not mean that *other* provisions of the envisaged agreement that may be relevant for the exercise of traffic rights cannot affect those common EU rules that apply to EU and third-country carriers alike. However, at least in so far as the commitment contained in Article 3(2) of the envisaged agreement is concerned, I am not convinced that there is a risk of affectation within the meaning of the *ERTA* case-law.

211. Therefore, I consider that the European Union has not acquired exclusive competence to grant traffic rights to third countries by virtue of the risk of affectation of non-overlapping common rules of EU law.

212. For all those reasons, I propose that the Court finds that the European Union does not have exclusive competence for granting traffic rights to third countries on the basis of the *ERTA* effect, as provided for in Article 3(2) TFEU. That, at the same time, means that the European Union does not have exclusive competence to conclude the entire air transport agreement with the Sultanate of Oman.

(c) Article 8 (‘fair competition’)

213. Article 8 of the envisaged agreement lays down the joint objective of a fair and competitive environment. To that extent, both sides commit to adopt or maintain competition law, independent competition authorities equipped with the necessary powers and resources, commit to prohibit any forms of discrimination or unfair practices, and not grant or maintain subsidies distorting fair conditions of competition. That provision also lays down that the contracting parties may support air carriers in certain situations and subject to certain conditions.

214. Relying on the faculty to provide financial support to air carriers in certain circumstances, a number of Member States argued that Article 8 is not capable of affecting the common rules on EU law on competition and State aid enforcement, given that that provision does not mandate them to provide support measures that are incompatible with EU law.

215. Nevertheless, the fact that a provision of an international agreement conforms to existing EU rules does not exclude a finding of affectation in a situation of overlap. Irrespective of the precise conditions pursuant to which financial support measures may be granted under Article 8 of the envisaged agreement, the subject matter of that provision is covered by common rules of EU law – in fact, from two perspectives. There is therefore a risk that, if left to the Member States, a provision of that kind in an international agreement could affect common rules with which it overlaps.

216. First, there exist EU legislative instruments (150) governing *generally* the application of Articles 101, 102, 107 and 108 TFEU to activities capable of having an effect on the internal market, including where this concerns the area of air transport. (151) Second, the subject matter of Article 8 of the envisaged agreement also overlaps with certain rules of EU law *specifically* governing the application of the rules on competition and State aid *in the air transport sector with third countries*. Thus, Regulation (EC) No 487/2009 (152) lays down rules governing the application of Article 101(3) TFEU to certain categories of agreements and concerned practices in the air transport sector, including between the European Union and third countries. (153) More recently, the EU legislature also put in place Regulation (EU) 2019/712, (154) which lays down sector-specific rules seeking to safeguard competition in the air transport sector, and, to use the words of the Council, ‘targets especially third countries and third-country entities’. That regulation empowers the Commission to adopt measures to address practices, including subsidisation, in the territory of third countries which distort competition between EU air carriers and said third-country air carriers, and so cause or threaten to cause injury to EU air carriers. (155)

217. It follows that Article 8 of the envisaged agreement overlaps with common rules of EU law, such that that provision risks affecting those common rules. Therefore, the Member States can no longer agree with third countries on measures in respect of the issues concerning those common rules.

(d) Article 11 (‘customs duties, taxes, fees and charges’)

218. Article 11 of the envisaged agreement covers the exemption from import duties and taxes on fuel, equipment, spare parts and other goods (for example, food, beverages or other goods sold to passengers) which air carriers load, unload or use in the territory of the respective contracting party in the course of providing aviation services.

219. At least as regards the exemption of energy products intended for civil aviation, the Court has already recognised that there exist common EU rules in the form of Directive 2003/96/EC, (156) adopted with a view to ensuring compliance with, inter alia, the Chicago Convention. (157) Given that those rules apply both, to EU and third-country carriers, Article 11 of the envisaged agreement, at least to that extent, overlaps with a subject matter governed by EU law. The Council accepted that conclusion at the hearing.

220. The Council and several Member States nonetheless contend, that in so far as Article 11 of the envisaged agreement provides for an exemption from other duties and taxes, including for carrying spare parts and other goods, there exist no common rules of EU law.

221. However, it arises from the memorandum of consultations attached to the envisaged agreement, that, ‘in relation to Article 11 of the envisaged Agreement, the EU delegation explained that EU exemptions in relation to custom duties and value added tax (VAT) are governed by Council Regulation (EC) 1186/2009⁽¹⁵⁸⁾ (for customs duties) and Council Directive 2009/132/EC⁽¹⁵⁹⁾ (for VAT) and that Article 11 contains the exemptions related specifically to aviation as permitted by Council Regulation 1186/2009 and Council Directive 2009/132 in relation to recommended practices by the International Civil Aviation Organization’.⁽¹⁶⁰⁾

222. Neither the Council nor the Member States dispute that statement.

223. Regulation No 1186/2009 which lays down an EU system of duty relief for import duties, export duties and certain other measures, ⁽¹⁶¹⁾ in Article 132(b) thereof, provides that the provisions of that regulation apply ‘without prejudice to ... the stores of ... aircraft’. Directive 2009/132, which lays down the scope of certain exemptions from VAT, ⁽¹⁶²⁾ in Article 93(c) thereof, states that that directive ‘shall not prevent Member States from continuing to grant ... exemptions in the context of agreements entered into on the basis of reciprocity with third countries that are Contracting Parties to the [Chicago Convention] [...] for the purpose of implementing Recommended Practices 4.42 and 4.44 of Annex 9 to [that] Convention’.

224. In other words, EU law occupies the subject matter of duty and VAT relief for the import and export of certain goods, but leaves to the Member States the possibility to grant certain exemptions falling within that subject matter for the purposes of air transport services to and from third countries and to ensure compliance with their obligations under the Chicago Convention.

225. That type of regulation, too, constitutes an exercise of an EU competence since it interferes with the Member States’ freedom to regulate in that area of shared competences beyond those specific elements. Given that those rules apply both to EU and third-country carriers, the commitments contained in Article 11 of the envisaged agreement overlap with those rules and so are capable of affecting them.

226. As the Commission moreover explained at the hearing, without being contradicted to that effect, the above rules are complemented, on the one hand, under Directive (EU) 2020/262, ⁽¹⁶³⁾ by excise duty relief for aviation fuel and, under Regulation (EU) 2018/581, ⁽¹⁶⁴⁾ by customs duty relief for aeronautical equipment, and, on the other hand, by an extensive system of relief in the field of VAT on the basis of Directive 2006/112/EC, ⁽¹⁶⁵⁾ all of which apply equally to third-country carriers. The latter directive establishes the common system of VAT, ⁽¹⁶⁶⁾ and in points (e), (f) and (g) of Article 148 thereof, lays down a mandatory exemption of ‘the supply of goods for the fuelling and provisioning of aircraft used by airlines operating for reward chiefly on international routes’, of ‘the supply, modification, repair, maintenance, chartering and hiring of [such an aircraft] and the supply, hiring, repair and maintenance of equipment incorporated or used therein’, and of ‘the supply of services, other than those [just referred], to meet the direct needs of [such an aircraft] or of their cargoes’. According to the Commission, again without being contradicted, those VAT exemptions cover all items listed in Article 11 of the envisaged agreement.

227. Finally, it is necessary to take position on the Council’s and some Member States’ further assertion that the exemption from other taxes and levies, such as those on property or capital, does not concern an exercise of an EU competence.

228. That argument goes to the existence of a competence. However, as I have explained, the European Union holds the competence to regulate in the area of air transport. As part of the

exercise of that competence, the European Union is entitled to enter into any commitments that have the primary objective of helping to achieve that use of an EU power. (167)

229. That is the case for Article 11 of the envisaged agreement: that commitment seeks to exempt from duties, taxes, and other levies ‘aircraft operated in international air transport by the air carriers of the other Contracting Party’ and its regular equipment, supplies, and other items ‘intended for or used solely in connection with the operation or servicing’ of said aircraft. (168) It therefore serves the primary objective of the envisaged agreement of liberalising air transport services between the contracting parties. That means that it falls within the exercise of the European Union’s competence in the area of air transport.

230. While it may well be that, at least to the best of my knowledge, there do not exist, at present, common rules of EU law exempting third-country aircraft and any regular equipment, supplies and other items from capital levies and property taxes, that does not matter for the conclusion that Article 11 of the envisaged agreement as a whole affects a subject matter already largely covered by common EU rules, and can, therefore, notwithstanding that the overlap is only partial, be interpreted as constituting exclusive EU competence on the basis of Article 3(2) TFEU.

231. It follows that I consider that Article 11 of the envisaged agreement is capable of affecting common rules of EU law.

(e) *Other provisions of Title I*

232. Articles 4, 5, 7, 10, 12 and 13 of the envisaged agreement all relate to the substantive rules governing the access to, exercise of, and restriction to the exercise of air transport and ancillary services. Those commitments are composed of horizontal and specific obligations, some expressed in mandatory language, some with more loose wording, addressed either to the contracting parties themselves, or binding their respective air carriers.

233. First, Articles 4 and 5 of the envisaged agreement, in essence, regulate the conditions for the grant and refusal, revocation, suspension or limitation of operating authorisations (that is to say the condition subsequent to the grant of traffic rights). Those commitments inter alia require the treatment of Omani air carriers on the same terms and subject to the same conditions as EU carriers, (169) and require from Omani air carriers the compliance with the applicable rules of EU law for the grant, refusal, revocation, suspension, the imposition of conditions or limitations of an operation authorisation. (170) The conditions relating to the grant and the maintenance of an operating authorisation are covered by the Air Services Regulation. (171) Thus, Articles 4 and 5 of the envisaged agreement overlap with certain rules of EU law governing that subject matter. They so affect those common EU rules.

234. Second, Article 7 of the envisaged agreement is entitled ‘compliance with laws and regulations’ – at the hearing, that provision was also referred to as a ‘compliance clause’. In paragraph 1, that provision generally mandates compliance with all ‘laws and regulations relating to the admission to, operating within, or departure from’ the territory of the European Union mandatory for Omani air carriers when performing air transport services. Paragraph 2 adds to this by imposing that same obligation of compliance also ‘relating to the admission to, operating within, or departure from [the territory of the European Union] of passengers, crew, baggage, cargo and/or mail on aircraft’.

235. In other words, taken collectively, Article 7(1) and (2) of the envisaged agreement horizontally lay down that Omani air carriers exercising the air traffic rights granted by virtue of Article 3 thereof

must comply with all applicable rules of EU law governing air transport and ancillary services. In so doing, those paragraphs arguably reflect Article 11 of the Chicago Convention, which mandates compliance with local laws and regulations upon the exercise of air transport services in the respective territory of the other State.

236. Article 7 of the envisaged agreement thus contains a commitment to preserve the effectiveness and uniformity of the rules governing the exercise of air transport services in the European Union, and indeed the effectiveness of the EU legal order as a whole. Were that not so, the Member States would be capable of entering into an international commitment capable of requiring adjustment of common EU rules to accommodate certain flights of Omani air carriers to and from the European Union. For those reasons, Article 7 is a provision in exclusive EU competence, as its purpose is to prevent the affectation of common rules.

237. Third, Article 10 of the envisaged agreement, in essence, deals with commercial activities and services related to the operation of air transport services. Among others, those activities concern the right to provide ground handling services, the allocation of slots at airports, certain cooperative marketing arrangements like code sharing, and certain types of aircraft leasing arrangements. (172) Those commitments are all covered by EU law and apply equally, in the presence of a commitment such as that contained in the envisaged agreement, to third-country operators: thus, the provision of ground-handling services is covered by Directive 96/67/EC, (173) the allocation of slots is regulated by Regulation (EEC) No 95/93, (174) and cooperative marketing arrangements like code-sharing and air leasing arrangements are covered by the Air Services Regulation. (175) Article 10 of the envisaged agreement therefore overlaps with and affects a subject matter covered by common rules of EU law.

238. Fourth, Article 12 of the envisaged agreement concerns the payment of user charges for the use of air navigation and air traffic control and airport, aviation security and related facilities and services. Today, (176) that provision, too, covers a subject matter regulated by common rules of EU law: thus, Implementing Regulation (EU) 2019/317 (177) governs common rules for charging schemes for air navigation services and network functions, (178) which applies to any ‘airspace user’, (179) and so applies equally to EU and non-EU carriers, such as those from Oman.

239. Likewise, Directive 2009/12/EC (180) sets out common principles for the levying of airport charges at Community airports, (181) which apply to the charges paid by all ‘airport users’ (182) in a non-discriminatory manner, (183) and therefore irrespective of the third-country origin of an air carrier. It follows that Article 12 of the envisaged agreement overlaps with and affects common rules of EU law. (184)

240. Fifth, Article 13 of the envisaged agreement, in essence, relates to fares and rate for air transport services and seeks to ensure that airlines may set their own prices without undue influence by the public authorities. In the EU context, the subject matter of pricing and the setting and transparency of air fares and air rates is covered by the Air Services Regulation. Article 22 thereof specifically extends the freedom to set air fares and air rates also to air carriers from third countries in case of reciprocity. (185) Likewise, Article 23 of that regulation lays down specific obligations relating to the clarity and transparency of air fares and air rates and the idea that access to air fares and air rates should be non-discriminatory. Those rules apply ‘for air services from an airport located in the territory of a Member State’ (186) and therefore also to Omani air carriers operating in case of the conclusion of the envisaged agreement. Article 13 of the envisaged agreement therefore covers a subject matter regulated by EU law and is liable to affect those common rules.

241. It follows that I consider that Articles 4, 5, 7, 10, 12 and 13 of the envisaged agreement affect common rules of EU law.

IV. Conclusion

242. In the light of the foregoing considerations, I propose that the Court answer the question posed as follows:

The European Union does not have exclusive competence to conclude the Agreement on Air Transport between the Sultanate of Oman, of the one part, and the European Union and its Member States, of the other part.

The competence to grant traffic rights to third countries was not exercised internally and therefore remains within the shared competence of the European Union and its Member States.

[1](#) Original language: English.

[2](#) Judgments of 5 November 2002, *Commission v United Kingdom* (C-466/98, EU:C:2002:624); of 5 November 2002, *Commission v Denmark* (C-467/98, EU:C:2002:625); of 5 November 2002, *Commission v Sweden* (C-468/98, EU:C:2002:626); of 5 November 2002, *Commission v Finland* (C-469/98, EU:C:2002:627); of 5 November 2002, *Commission v Belgium* (C-471/98, EU:C:2002:628); of 5 November 2002, *Commission v Luxembourg* (C-472/98, EU:C:2002:629); of 5 November 2002, *Commission v Austria* (C-475/98, EU:C:2002:630); and of 5 November 2002, *Commission v Germany* (C-476/98, EU:C:2002:631) (together, ‘the *Open Skies* judgments’). For ease of reference, I shall refer to the numbering of judgment of 5 November 2002, *Commission v Belgium* (C-471/98, ‘*Commission v Belgium*’, EU:C:2002:628).

[3](#) See also judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraphs 69 and 70), in which the Court found that ‘whilst it is true that the European Union has in addition acquired certain exclusive powers to agree with third States commitments falling within the field of application of the European Union legislation on international air transport and, consequently, of the Chicago Convention ... the Member States have retained powers falling within the field of the Chicago Convention, such as those relating to the award of traffic rights’.

[4](#) Those directives are the result of the Commission’s 2015 initiative to open negotiations on comprehensive air transport agreements between the European Union and a number of Gulf Cooperation Council Member States. See Recommendation for a Council decision in order to authorise the Commission to open negotiations on comprehensive air transport agreements between the European Union and the six Member States of the Gulf Cooperation Council (COM(2015) 607 final). While the text of that recommendation is not publicly available, it was submitted to the Court by the Commission as an annex to its application.

[5](#) Council Decision authorising the Commission to open negotiations on a comprehensive air transport agreement between the European Union and its Member States and the Sultanate of Oman, as regards matters falling within the Union's exclusive competence (Document No 11258/18, 30 August 2018).

[6](#) Decision of the representatives of the governments of the Member States, meeting within the Council authorising the European Commission to negotiate, on behalf of the Member States, the provisions of a comprehensive air transport agreement between the European Union and its Member States and the Sultanate of Oman, as regards matters that do not fall within the Union's exclusive competence (Document No 11273/18, 30 August 2018).

[7](#) Summary Record of the Permanent Representatives Committee of 12 and 14 September 2018 (Document No 12469/18, 25 September 2018, p. 10).

[8](#) At the hearing, the Commission explained that the reason for not submitting a proposal to the Council was linked to an internal decision not to initiate the signing of the envisaged agreement until the Court delivers its Opinion in the present case.

[9](#) Proceedings of the International Civil Aviation Conference, 'Invitation of the United States of America to the Conference', Vol. 1, Part I, p. 1. On the vision of that conference, see also US Department of State Bulletin, Address by US Assistant Secretary Berle, then temporary president of the Chicago Conference, delivered at Chicago on 1 November 1944, Vol. XI, No 260, 5 November 1944, p. 530: 'the use of the air has this in common with the use of the sea: it is a highway given by nature to all men. It differs in this from the sea: that it is subject to the sovereignty of the nations over which it moves. Nations ought, therefore, to arrange among themselves for its use in that manner which will be of the greatest benefit to all humanity, wherever situated'.

[10](#) Convention on International Civil Aviation signed at Chicago on 7 December 1944 (*United Nations Treaty Series*, Vol. 15, No 102; 'the Chicago Convention').

[11](#) The field of application of the Chicago Convention is described in judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, 'ATAA', EU:C:2011:864, paragraphs 50 and 59).

[12](#) See ATAA, paragraph 60. See also, to that effect, Article 92(a) of the Chicago Convention.

[13](#) Mendes De Leon explains that the proclamation of the principle of sovereignty over a State's airspace had, among other things, a military background. Thus, with the rise of military aircraft flying over foreign national airspace during, in particular, the Second World War, it was viewed that

there was a need for strict control of the boundaries of airspace. The reliance on sovereignty served as a tool to safeguard that control. See Mendes De Leon, P., 'The Dynamics of Sovereignty and jurisdiction in International Aviation Law', in Kreijen, G., Brus, M., Duursma, J., de Vos, E. and Dugard, J. (eds), *State, Sovereignty, and International Governance*, Oxford University Press, Oxford, 2002, p. 484.

[14](#) See, to that effect, Weld, E., 'ICAO and the major problems of international air transport', *Journal of Air Law and Commerce*, Vol. 20, Issue 4, 1953, pp. 454-462, in particular pp. 454-456.

[15](#) Accordingly, the Chicago Convention does not define the types of traffic rights that a State can grant to another State.

[16](#) Salacuse explains that while the freedom to fly across the territory of another contracting party without landing had already been expressed in the Convention Relating to the Regulation of Aerial Navigation (1919) (11 LNTS 173), the conceptualisation of other freedoms only occurred during the Chicago Convention; see Salacuse, J.W., 'The Little Prince and the Businessman: Conflicts and Tensions in Public International Air Law', *Journal of Air Law and Commerce*, Vol. 45, Issue 4, 1980, p. 822.

[17](#) See *Manual on the Regulation of International Air Transport*, International Civil Aviation Organisation (Doc 9626, 2016, p 117).

[18](#) See, for example, Weber, L., 'The Chicago Convention', in Dempsey, P.S. and Jakhu, R. (eds), *Routledge Handbook of public Aviation Law*, Routledge, London, 2016, pp. 9-32, in particular pp. 14 and 15 (explaining that 'traffic rights are commercial rights, namely rights to fly into the territory of another State in order to take on board and/or drop off passengers, cargo or mail for commercial purposes. They comprise the third, fourth and fifth freedom rights, namely the right to carry passengers, cargo or mail to a point in another State, the right to take on board passengers, cargo or mail at a point in another State for carriage to the home State of the air carrier and the right to carry passengers, cargo or mail from a point in another State to a beyond point in the territory of a third State, respectively. Sometimes, sixth, seventh, eighth and ninth freedom rights or privileges are also referred to as traffic rights').

[19](#) International Air Services Transit Agreement signed in Chicago on 7 December 1944 (84 UNTS 389).

[20](#) See ICAO list of parties to the International Air Services Transit Agreement, available at: https://www.icao.int/sites/default/files/secretariat/legal/CurrentListofParties/Transit_EN.pdf.

[21](#) International Air Transport Agreement, *infra* footnote 26, at pp. 255 and 256.

[22](#) It appears that Greece (although reserving the grant of fifth freedom rights) and the Netherlands are the only Member States that have accepted the International Air Transport Agreement. See the ICAO list of parties to the International Air Transport Agreement, available at https://www.icao.int/sites/default/files/secretariat/legal/CurrentListofParties/Transport_EN.pdf.

[23](#) Pursuant to Article 83 of the Chicago Convention, States must register the conclusion of bilateral and multilateral international air transport agreements with the International Civil Aviation Organisation. However, I was not able to retrieve an exact number of air transport agreements in force.

[24](#) On the development of EU external air transport policy before and after the *Open Skies* judgments, see Savić, I., *Spreading the Wings of EU Aviation Acquis: Comprehensive Air Transport Agreements*, Faculty of Law, University of Zagreb, Zagreb, 2019, Title 2.3, p. 32.

[25](#) See House of Lords (United Kingdom), Select Committee on the European Union, “Open Skies” or open markets? The effect of the European Court of Justice (ECJ) judgments on aviation relations between the European Union (EU) and the United States of America (USA)’, Session 2002-03, 17th Report, 8 April 2003, p. 9.

[26](#) See also, to that effect, Salazar, J.C. and van Fenema, P., ‘International air transport agreements’, in Dempsey, P.S. and Jakhu, R. (eds), *Routledge Handbook of Public Aviation Law*, Routledge, London, 2016, pp. 252-294, in particular pp. 258 and 259.

[27](#) See Article 3(2) of the envisaged agreement.

[28](#) See, in that respect, Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems (OJ 1989 L 220, p. 1), Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1), Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8), Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ 1992 L 240, p. 15), and Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1).

[29](#) The agreements which the Member States had concluded with the United States were part of that country’s ‘Open Skies’ policy. Those agreements essentially sought to liberalise the right to fly between the United States and each of the Member States in question. Stadlmeier considers that that policy was based on a *divide et impera* strategy: it offered selected smaller European

States with internationally active airlines and at least one major airport as a supraregional hub limited liberalisation (through additional points of entry into the United States) in return for complete liberalisation in the opposite direction. In this way, pressure could be exerted on the larger European States with (at the time) stronger international airlines (such as the United Kingdom and France) by giving their competitors, notably KLM, Lufthansa and Sabena, an advantage on direct routes to the United States through larger points of entry into that country. At the same time, on the routes to the European Union, US airlines were able to compete more fiercely with Air France and British Airways due to unlimited fifth freedom rights. It is by virtue of those elements that Stadlmeier explains the Commission's concerns and interest to coordinate the position of the Member States. See Stadlmeier, S., 'Die Liberalisierung des Luftverkehrs in der EU und die Beziehungen mit Drittstaaten: Divide et Impera?', in Simma, B. and Schulte, C., *Völker- und Europarecht in der aktuellen Diskussion: Akten des 23. Österreichischen Völkerrechtstages*, Linde, Vienna, 1999, p. 167.

[30](#) The Commission's requests for a negotiating mandate for a comprehensive EU agreement with the United States is described by the Court in the *Open Skies* judgments; see *Commission v Belgium*, paragraphs 15 to 21.

[31](#) For further background, see Opinion of Advocate General Tizzano in *Commission v United Kingdom* (C-466/98, EU:C:2002:63, point 8 et seq.).

[32](#) More specifically, this concerns the rules relating to fares and rates charged on intra-EU routes, rules on computerised reservation system, and the rules on slot allocation, all of which the Court considered to be an exclusive EU competence. See, for example, *Commission v Belgium*, paragraphs 112, 114, 116 and 120.

[33](#) See *Commission v Belgium*, paragraph 142. That clause recognised the United States' right to withdraw, suspend or limit traffic rights in cases where air carriers designated by the Kingdom of Belgium were not owned by that State or its nationals.

[34](#) See *Commission v Belgium*, paragraphs 103 to 106.

[35](#) See, in that respect, Communication from the Commission of 11 March 2005 – Developing the agenda for the Community's external aviation policy (COM(2005) 79 final).

[36](#) In the annex to its request for an Opinion from the Court in the present proceedings, the Commission provided the Court with a list of such agreements, which are currently in force with 21 third States. Such agreements are concluded as EU-only agreements as they relate only to the areas that are of exclusive EU competence.

[37](#) Council Decision (EU) 2020/1110 of 23 January 2018 on the conclusion on behalf of the European Union of the Air Transport Agreement between the European Community and its Member States, of the one part, and the United States of America, of the other part (OJ 2020 L 244, p. 6).

[38](#) See Council Decision (EU) 2018/145 of 9 October 2017 on the conclusion, on behalf of the Union, of the Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area (OJ 2018 L 26, p. 1).

[39](#) See, for example, Council Decision (EU) 2019/702 of 15 April 2019 on the conclusion, on behalf of the Union, of the Air Transport Agreement between the European Community and its Member States, of the one part, and Canada, of the other part (OJ 2019 L 120, p. 1), and Council Decision (EU) 2020/948 of 26 June 2020 on the conclusion, on behalf of the Union, of the Common Aviation Area Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part (OJ 2020 L 212, p. 1). Other such agreements have also been concluded and signed by the European Union, but, pending ratification by the Member States, have not yet entered into force. Consider, for example, the agreement with the State of Qatar, which was concluded as a mixed agreement despite the Commission's proposal to conclude said agreement as EU-only; see Recommendation for a Council decision in order to authorise the Commission to open negotiations on comprehensive air transport agreements between the European Union and the six Member States of the Gulf Cooperation Council (COM(2015) 607 final), and Agreement on air transport between the European Union and its Member States, of the one part, and the State of Qatar, of the other part (OJ 2021 L 391, p. 3).

[40](#) Agreement between the European Economic Community, the Kingdom of Norway and the Kingdom of Sweden on civil aviation (OJ 1992 L 200, p. 21).

[41](#) Agreement between the European Community and the Swiss Confederation on Air Transport (OJ 2002 L 114, p. 73).

[42](#) See 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 (OJ 2021 L 149, p. 10), which covers air transport in Title I of Heading Two of Part Two, including the grant of traffic rights in Article 419 thereof.

[43](#) While the negotiated text of the envisaged agreement with the Sultanate of Oman is not publicly available at the time of writing, it was provided to the Court by the Commission alongside its application initiating the present proceedings.

[44](#) Title I of the envisaged agreement is composed of Article 3 ('Grant of rights'), Article 4 ('Operating authorisation'), Article 5 ('Refusal, revocation, suspension or limitation of authorisation'), Article 6 ('Liberalisation of ownership and control of air carriers'), Article 7 ('Compliance with laws and regulations'), Article 8 ('Fair competition'), Article 9 ('Doing business'), Article 10 ('Commercial opportunities'), Article 11 ('Customs duties, taxes, fees and charges'), Article 12 ('User charges'), Article 13 ('Tariffs'), and Article 14 ('Statistics').

[45](#) Title II of the envisaged agreement is composed of Article 15 ('Aviation safety'), Article 16 ('Aviation security'), Article 17 ('Air traffic management'), Article 18 ('Environment'), Article 19 ('Air carrier liability'), Article 20 ('Consumer protection'), Article 21 ('Computer reservation systems'), and Article 22 ('Social aspects').

[46](#) Title III of the envisaged agreement is composed of Article 23 ('Interpretation and implementation'), Article 24 ('The Joint Committee'), Article 25 ('Dispute resolution and arbitration'), Article 26 ('Relationship to other agreements'), Article 27 ('Amendments to the Agreement'), Article 28 ('Accession by new Member States of the European Union'), Article 29 ('Termination of the Agreement'), Article 30 ('Registration of the Agreement'), and Article 31 ('Entry into force and provisional application').

[47](#) There is also disagreement among the parties to the present proceedings as to whether Articles 8, 10 and 11 of the envisaged agreement fall within the scope of exclusive EU competence.

[48](#) These proceedings highlight in particular a certain confusion between the *existence* of a competence and its *nature*. For example, some Member States, after arguing that the grant of traffic rights constitutes a shared competence, also contended that if the Court were to recognise exclusive EU competence, it would be contrary to the principle of conferral.

[49](#) See, for example, Opinion 1/94 (*Agreements annexed to the WTO Agreement*) of 15 November 1994 (EU:C:1994:384, paragraph 12).

[50](#) See point 17 of this Opinion.

[51](#) See points 10 to 12 of this Opinion.

[52](#) See, by analogy, Opinion 1/20 (*Opinion pursuant to Article 218(11) TFEU (Modernised Energy Charter Treaty)*) of 16 June 2022 (EU:C:2022:485, paragraph 36 and the case-law cited) (explaining that the possibility of submitting a request for an Opinion under Article 218(11) TFEU does not require, as a precondition, a final agreement between the institutions concerned).

[53](#) See, to that effect, judgment of 9 April 2024, *Commission v Council (Signing of international agreements)* (C-551/21, EU:C:2024:281, paragraph 82 and the case-law cited) (explaining that a practice cannot alter the rules of the Treaties that the EU institutions are obliged to respect).

[54](#) One may add that the two decisions granting the negotiating mandate to the Commission have not, in any case, expressed the Council's and the Member States' position as to which parts of the envisaged agreement are in shared and which are in exclusive competence of the European Union. See, in that respect, point 14 of this Opinion.

[55](#) On the different understandings of the allocation of competences in federal legal orders, see Beaud, O., 'The Allocation of Competences in a Federation – A General Introduction', in Azoulai, L. (ed.), *The Question of Competence in the European Union*, Oxford University Press, Oxford, 2014, pp. 19-38.

[56](#) The concept of implied competences is not unique to the EU legal order. It is also accepted in international law in relation to international organisations. See, generally, Advisory Opinion on Reparations for Injuries suffered in the service of the United Nations (ICJ Reports 1949, p. 174).

[57](#) Article 216 TFEU opens Title V of the FEU Treaty, and is entitled 'International agreements'. Whereas Article 216 TFEU relates to the *existence* of the competence to conclude such agreements, Article 218 TFEU (falling within the same title), provides for the *procedure* for the conclusion of an international agreement. That procedure may, however, be modified, if provided for in other provisions of the Treaties.

[58](#) Schütze observes that the second and third situations in which Article 216(1) TFEU envisages implied competence for the conclusion by the European Union of an international agreement (see situations (iii) and (iv) of point 72 of this Opinion) are actually subsumed under the first situation (situation (ii) thereof), that of 'parallel external powers'. See Schütze, R., *European Union Law*, 4th edition, Cambridge University Press, Cambridge, 2025, p. 293. I can agree with that position, but would add that the mention of those two situations is not only unnecessary but, in fact, creates confusion between the notions of the existence of competence and its exclusive nature, governed in Article 3(2) TFEU by the same wording as in Article 216(1) TFEU.

[59](#) In its judgment of 31 March 1971, *Commission v Council* (22/70, 'ERTA', EU:C:1971:32, paragraph 16), the Court stated for the first time that the authority to conclude an international agreement 'arises not only from an express conferment by the Treaty ... but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions'. That language left some doubt as to whether internal measures are necessary for the existence of external competence. Subsequent case-law resolved this in favour of 'parallel external competence'. In paragraph 3 of Opinion 1/76 (*Agreement on the establishment of a European Laying-up Fund for Inland Waterway Vessels*) of 26 April 1977 (EU:C:1977:63), the Court explained that 'whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion'. Accordingly, the Court reasoned in paragraph 4 of that Opinion that such powers '[flow] by implication from the provisions of the Treaty creating the internal power'.

[60](#) Opinion of 15 November 1994 (EU:C:1994:384). See paragraph 95 thereof, in which the Court explains that 'whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts'. Only the second situation as envisaged in that paragraph was included in Article 216(1) TFEU.

[61](#) In paragraph 16 of *ERTA*, the Court stated that the authority to conclude an international agreement may flow from the provisions of the Treaty 'and from measures adopted, within the framework of those provisions, by the Community institutions'. In paragraph 17 of the same judgment, it continued to explain that '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'. That statement described at the same time a situation in which implied EU competence arises and when it becomes exclusive, the latter issue being a matter of Article 3(2) TFEU.

[62](#) See Article 2(1) TFEU.

[63](#) See Article 5(3) and (4) TEU.

[64](#) Pre-emption, within the meaning of Article 2(2) TFEU, entails that the field regulated by EU measures is 'occupied'. For that reason, Member States cannot regulate the same issue, even if they choose to regulate said issue in a way that is compatible with the EU rules at issue. Pre-emption thus *excludes* the possibility of a conflict of rules. Where, however, a Member State nonetheless regulates in the field occupied by EU law, and its national rules run contrary to the

common EU rules at issue, a different principle – that of primacy of EU law – resolves the ensuing conflict in favour of the application of the common EU rules.

[65](#) Protocol No 25 to the Treaty of Lisbon reads as follows: ‘With reference to Article 2(2) of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area’.

[66](#) See, in that respect, Timmermans, C., ‘ECJ Doctrines on Competences’, in Azoulai, L. (ed.), *The Question of Competence in the European Union*, Oxford University Press, Oxford, 2014, pp. 156-167, at p. 162: ‘This rule of blocking effect, of pre-emption, is to be distinguished from the situation of an exclusive Union competence, where there exists no national competence at all’.

[67](#) The enumerated areas are: customs union; the establishing of the 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 policy; and common commercial policy.

[68](#) See, in that respect, Schütze, R., ‘Parallel external powers in the European Union From “cubist” perspectives towards “naturalist” constitutional principles?’, in Schütze, R., *Foreign Affairs and the EU Constitution: Selected Essays*, Cambridge University Press, Cambridge, 2014, p. 272.

[69](#) See, for example, Chamon, M., ‘Implied exclusive powers in the ECJ’s post-Lisbon jurisprudence: The continued development of the *ERTA* doctrine’, *Common Market Law Review*, Vol. 55, Issue 5, 2018, pp. 1101-1141.

[70](#) See judgment of 4 September 2014, *Commission v Council* (C-114/12, EU:C:2014:2151, paragraph 73). For academic criticism of that position, see Chamon, M., ‘Implied exclusive powers in the ECJ’s post-Lisbon jurisprudence: The continued development of the *ERTA* doctrine’, *Common Market Law Review*, Vol. 55, Issue 5, 2018, pp. 1124-1126.

[71](#) See, for example, Dashwood, A., ‘The relationship between the Member States and the European Union/European Community’, in McDonnell (ed.), *A Review of Forty Years of Community Law: Legal Developments in the European Communities and the European Union*, Kluwer Law International, Alphen aan den Rijn, 2005, p. 55; Cremona, M., ‘The Union’s external action: Constitutional perspectives’, in Amato, G., Bribosia, H. and de Witte, B. (eds), *Genèse et destinée de la Constitution européenne – Genesis and destiny of the European Constitution*, Bruylant, Bruxelles, 2007, pp. 1184-1189; Schütze, R., ‘Lisbon and the federal order of

competences: A prospective analysis', *European Law Review*, Vol. 33, Issue 5, 2008, pp. 709-722, in particular pp. 713 and 714.

[72](#) See judgment of 5 December 2017, *Germany v Council* (C-600/14, EU:C:2017:935, paragraphs 46 to 50).

[73](#) See Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017 (EU:C:2017:376, paragraph 29). On mixed agreements see, generally, Rosas, A., 'Mixture Past, Present and Future: Some Observations', in Chamon, M. and Govaere, I. (eds), *EU External Relations Post-Lisbon*, Brill, Leiden, 2020, pp. 8-18.

[74](#) The terms 'obligatory' and 'facultative' mixity were coined by Allan Rosas, see Rosas, A., 'Mixed Union – Mixed Agreements', in Koskeniemi, M. (ed.), *International Law Aspects of the European Union*, Brill, Leiden, 1998, p. 131. See also Chamon, M. and Govaere, I., 'Introduction: Facultative Mixity, More than Just a Childhood Disease of EU Law?', in Chamon, M. and Govaere, I. (eds), *EU External Relations Post-Lisbon*, Brill, Leiden, 2020, p. 2; Govaere, I., "'Facultative" and "Functional Mixity" in light of the Principle of Partial and Imperfect Conferral', College of Europe Research Papers in Law 3/2019; Hillion, C. and Chamon, M., 'Facultative Mixity and Sincere Cooperation', in Chamon, M. and Govaere, I. (eds), *EU External Relations Post-Lisbon*, Brill, Leiden, 2020, p. 86

[75](#) See, in that respect, point 41 of this Opinion.

[76](#) Such agreements could, however, also be concluded as EU-only agreements, provided that the European Union is conferred the powers over all parts of that agreement. The latter is, however, possible only if none of the provisions at issue fall within the scope of exclusive Member State competence.

[77](#) Regulation of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries (OJ 2004 L 157, p. 7).

[78](#) See Article 1 of Regulation No 847/2004.

[79](#) I shall return to the relevance of that regulation for the answer to the question of whether the European Union has exclusive competence to conclude the envisaged agreement in Section III.E below.

[80](#) See my Opinion in *ÖBB-Infrastruktur Aktiengesellschaft* (C-500/20, EU:C:2022:79, point 30).

[81](#) See, to that effect, judgments of 5 December 2017, *Germany v Council* (C-600/14, EU:C:2017:935, paragraph 68), and of 20 November 2018, *Commission v Council (Antarctic MPAs)* (C-626/15 and C-659/16, EU:C:2018:925, paragraph 126).

[82](#) See point 46 this Opinion.

[83](#) At the hearing, in reply to a question put to them by the Court, that position was explicitly confirmed by the Bulgarian, Greek, Lithuanian and Hungarian Governments. To my mind, that same position was also supported, albeit not as explicitly, by the German and Cypriot Governments and Ireland.

[84](#) In the FEU Treaty, see, for example, Article 79(3) (concerning readmission agreements with third States), Article 191(4) (relating to the environment), or Article 207(3) (on the common commercial policy).

[85](#) The original Treaty contained only two provisions expressly conferring the competence on the Union to conclude international agreements: trade and tariffs agreement (Article 113 of the EEC Treaty) and association agreements (Article 238 of the EEC Treaty). For an overview and explanation of the express external competences of the Union after the Treaty of Lisbon, see Neframi, E., *L'action extérieure de l'Union européenne: Fondements, moyens, principes*, LGDJ, 2010, pp. 21-58.

[86](#) See Opinion 1/94 (*Agreements annexed to the WTO Agreement*) of 15 November 1994 (EU:C:1994:384, paragraph 48).

[87](#) See, in that respect, Cremona, M., 'EU External Competence-Rationales for Exclusivity', in Garben, S. and Govaere, I. (eds), *The division of competences between the EU and the Member States*, Hart, 2017, pp. 133-150, at p. 136, who suggests that 'the inclusion of Article 216(1) in the TFEU means that it is now probably more accurate to refer not to express and implied external powers, but rather to distinguish between competences which are explicitly part of the Union's external action ... and competences which are described as the "external aspects of [the Union's] other policies"'.

[88](#) See Opinion 1/76 (*Agreement on the establishment of a European Laying-up Fund for Inland Waterway Vessels*) of 26 April 1977 (EU:C:1977:63, paragraph 3; Opinion 2/91 (*ILO Convention No 170*) of 19 March 1993 (EU:C:1993:106, paragraph 7); Opinion 1/03 (*New Lugano Convention*)

of 7 February 2006 (EU:C:2006:81, paragraph 114); and Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014 (EU:C:2014:2303, paragraph 67).

[89](#) Regulation of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3) ('the Air Services Regulation'); see point (1) of the first paragraph of Article 15 thereof, which lays down that 'Community air carriers shall be entitled to operate intra-Community air services'. That liberalisation first took place with Regulation No 2408/92 (see Article 3(1) thereof, which stated that 'subject to this Regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community').

[90](#) In the *Open Skies* judgments, the Commission argued that the internal market in air services was 'achieved' in 1992 (see *Commission v Belgium*, paragraph 71).

[91](#) I should add that the Air Services Regulation expressly reserves the possibility for the Member States to limit or refuse the exercise of such rights in situations of serious environmental problems or emergency; see Articles 20 and 21 thereof. Outside of those situations, the Member States cannot limit or refuse the exercise of those traffic rights within the European Union for as long as the Air Services Regulation remains in force.

[92](#) The existence of such an implied external competence is not put into question by the argument, raised notably by the Hungarian Government, that air transport policy may have connections with national security, which, according to the last sentence of Article 4(2) TEU, remains the sole responsibility of each Member State. That link does not 'reserve' said grant of traffic rights to the exclusive power of the Member States. For the purposes of our case, Article 4(2) TEU merely requires that the European Union take into consideration the national security concerns of its Member States when deciding whether to conclude to grant traffic rights to a third country with a view to concluding an air transport agreement and to ensure that that grant and the resulting conclusion of said agreement does not hinder the proper performance of the essential functions of the Member States. See, by analogy, judgment of 15 July 2021, *Ministrstvo za obrambo* (C-742/19, EU:C:2021:597, paragraph 43).

[93](#) Opinion of 26 April 1977 (EU:C:1977:63).

[94](#) See *Commission v Belgium*, paragraph 68, where the Court refers to paragraph 89 of Opinion 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994 (EU:C:1994:384).

[95](#) Opinion of 26 April 1977 (EU:C:1977:63). Underlying that Opinion was the establishment of the management structure of waterways of the Rhine and Moselle in order to rationalise the

economic situation of the inland waterway transport industry in that geographical region. As that region encompassed the Swiss Confederation, the realisation of that objective could not be achieved without the participation of that third country. It is for that reason that the Court concluded that the European Union has an exclusive competence to enter into necessary international agreements with that country.

[96](#) See *Commission v Belgium*, paragraph 72.

[97](#) See *Commission v Belgium*, paragraph 71.

[98](#) Indeed, the only case-law that the Council refers to in relation to its burden of proof claim emanates from actions for annulment: see, judgments of 4 September 2014, *Commission v Council* (C-114/12, EU:C:2014:2151, paragraph 75); of 20 November 2018, *Commission v Council (Antarctic MPAs)* (C-626/15 and C-659/16, EU:C:2018:925, paragraph 115); and Opinion of Advocate General Szpunar in *Commission v Council (International Maritime Organisation)* (C-161/20, EU:C:2021:957, point 120).

[99](#) See, to that effect, Lenaerts, K., Gutman, K. and Nowak, J.T., *EU Procedural Law*, 2nd edition, Oxford European Union Law Library, Oxford, 2023, p. 521, point 12.01, who argue that the purpose of the Article 218(11) TFEU procedure is inter alia to forestall complications which could result from disputes concerning the compatibility with the Treaties of international agreements binding on the European Union and to prevent adverse consequences from arising in the context of international relations.

[100](#) A linguistic examination of the different language versions seems to reveal certain differences. On the one hand, certain language versions, notably the English- ('affect'), Spanish- ('affectar'), French- ('affecter') and Croatian- ('utjecati') language versions all use a term implying that even a potentially loose effect on EU law arising from the international commitments at issue would be sufficient for the purposes of Article 3(2) TFEU. Other language versions, such as the German ('beeinträchtigen') and Dutch ('aantasten') versions use a term implying that the commitments at issue must interfere with, prejudice, or leave a mark on the common rules of EU law.

[101](#) As already examined by Advocates General Kokott, Sharpston, and Jääskinen. Opinion of Advocate General Kokott in *Commission v Council* (C-137/12, EU:C:2013:441, points 111 to 117); Opinion of Advocate General Sharpston in *Commission v Council* (C-114/12, EU:C:2014:224, points 95 to 97); and View of Advocate General Jääskinen in Opinion 1/13 (*Accession of third States to the Hague Convention*), EU:C:2014:2292, points 69 and 70).

[102](#) See judgment of 4 September 2014, *Commission v Council* (C-114/12, EU:C:2014:2151, paragraphs 66 and 67); Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014 (EU:C:2014:2303, paragraph 71); and Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017 (EU:C:2017:376, paragraph 180 and the case-law cited).

[103](#) Space precludes me to go into detail in explaining the circumstances that led to the judgment in *ERTA*. In very short terms, that case concerned the conclusion of the European Road Transport Agreement in the auspices of the United Nations. So as to argue before the Court that the (then) European Community had competence to conclude that agreement, the Commission relied on Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonisation of certain social legislation relating to road transport (OJ 1969 L 77, p. 49) governing social aspects of road transport. Showing itself receptive to that argument, the Court first considered that the power to conclude an international agreement could be implied from the conferral of powers on the (then) European Community in that policy field, even if no express empowerment to conclude international agreements on road transport existed in the Treaty. At the same time, the Court considered that, in the area covered by the regulation at issue, the Member States no longer have power to conclude the envisaged agreement (see *ERTA*, paragraphs 16 and 17). *ERTA* is therefore an example of a judgment in which the Court founded two important concepts of EU law at the same time: the concept of implied competences and the possibility that, if exercised internally, such implied external competence might become exclusive. For a detailed description of the circumstances surrounding the *ERTA* judgment, see McNaughton, A., ‘Acts of Creation: The ERTA Decision as a Foundation Stone of the EU Legal System’, in Nicola, F. and Davies, B. (eds), *EU Law Stories, Contextual and Critical Histories of European Jurisprudence*, Cambridge University Press, Cambridge, 2017, pp. 134-153.

[104](#) See *ERTA*, paragraph 17, emphasis added.

[105](#) See Lenaerts, K., ‘Les Répercussions des compétences de la Communauté européenne sur les compétences externes des états membres et la question de “préemption”’, in Demaret, P. (ed.), *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels*, Bruges, 1986), pp. 39 and 42-43.

[106](#) However, considering the acquisition of exclusive competence on the basis of Article 3(2) TFEU as positive grant of competence creates theoretical constitutional problems. As Schütze observes, the fact that a competence may change its nature through EU legislation, rather than on the basis of the Treaty provisions, sits uncomfortably with the principle of conferral as a constitutional category. Thus, the logic of pre-emption may better explain the *ERTA* effect. See, Schütze, R., ‘Parallel external powers in the European Union: from “cubist” perspectives towards “naturalist” constitutional principles?’, in Schütze, R., *Foreign Affairs and the EU Constitution: Selected Essays*, Cambridge University Press, Cambridge, 2014.

[107](#) See *ERTA*, paragraphs 21 and 22. At the time, that principle was expressed in Article 5 of the Treaty establishing the European Economic Community.

[108](#) *ERTA*, paragraph 22, emphasis added. In the circumstances of the *ERTA* judgment, there already existed common rules on the standardisation of driving and rest periods for transport movements between the Member States and third States (through Regulation No 543/69). Therefore, the Member States could not enter into parallel international commitments for the same subject matter – that is to say, the rules governing driving and rest periods for such movements – through the conclusion of the international agreement.

[109](#) One may, however, also argue that there is no real difference, as the purpose of pre-emption is also to prevent affectation of EU rules.

[110](#) That is especially in cases in which it seems that the Court concluded in favour of exclusive competence on the basis of the ‘area largely covered by EU rules’ argument. See, for example, Opinion 2/91 (*ILO Convention No 170*) of 19 March 1993 (EU:C:1993:106, paragraphs 25 and 26).

[111](#) See, for example, Verellen, who explains that ‘at the level of principles, the Court draws an ambiguous picture. On the one hand, it endorses the “area largely covered” test. On the other, it emphasises the need for a “specific analysis” to be undertaken’. See, Verellen, T., ‘The ERTA Doctrine in the Post-Lisbon Era: Note under Judgment in Commission v Council (C-114/12) and Opinion 1/13’, *Columbia Journal of European Law*, Vol. 21, Issue 2, 2015, pp. 383-410, at p. 402.

[112](#) For example, Kuijper noted that ‘the ERTA doctrine has become so complicated as to be almost useless to the political institutions of the Community as guidance for further actions. See, Kuijper, P.-J., *Of Mixity and Double-hatting: EU External Relations Law Explained*, Vossiuspers UvA, Amsterdam, 2008, p 9.

[113](#) That includes taking into account the type of proceedings that led to a particular judgment. Indeed, the cases discussed by the parties to the present proceedings reached the Court in different ways: some were initiated by the requests for an Opinion of the Court under Article 218(11) TFEU (such as Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014 (EU:C:2014:2303)), some were brought as annulment actions (think judgment of 4 September 2014, *Commission v Council* (C-114/12, EU:C:2014:2151)), some reached the Court through the infringement proceedings (recall the *Open Skies* judgments), and some through preliminary reference (consider judgment of 26 November 2014, *Green Network* (C-66/13, EU:C:2014:2399)). Nevertheless, those procedural differences should not change the answer as to the meaning of the affectation, which leads to the exclusive competence of the European Union.

[114](#) See Opinion 1/03 (*New Lugano Convention*) of 7 February 2006 (EU:C:2006:81, paragraph 128). In that sense, Cremona has observed that, in the post-Lisbon case-law, ‘the emphasis [of the Court] is rather on identifying the degree to which the EU rules establish a unified system and whether its effective functioning may be jeopardised’. See Cremona, M., ‘External Relations of the European Union: The Constitutional Framework for International Action’, in Craig, P. and de Búrca, G. (eds), *The Evolution of EU Law*, Oxford University Press, Oxford, 2021, p. 458.

[115](#) See Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014 (EU:C:2014:2303, paragraph 85). See also, more recently, judgment of 20 November 2018, *Commission v Council (Antarctic MPAs)* (C-626/15 and C-659/16, EU:C:2018:925, paragraph 114 and the case-law cited).

[116](#) Along the same line, see Schütze, R., ‘Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption’, *Common Market Law Review*, Vol. 43, Issue 4, 2006, pp. 1023-1048, p. 1036 et seq. See also Chamon, M., ‘Implied exclusive powers in the ECJ’s post-Lisbon jurisprudence: The continued development of the ERTA doctrine’, *Common Market Law Review*, Vol. 55, Issue 4, 2018, pp. 1101-1142.

[117](#) See, for example, judgment of 4 September 2014, *Commission v Council* (C-114/12, EU:C:2014:2151), and Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014 (EU:C:2014:2303).

[118](#) See, for example, Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017 (EU:C:2017:376).

[119](#) Recall the subject matter at issue in the *Open Skies* judgments.

[120](#) See, similarly, Advocate General Szpunar, who considered that ‘should an international commitment have no effect whatsoever on EU law (taking into account its foreseeable future development), the fact that the two systems of rules concern the same area would be irrelevant for the purposes of Article 3(2) TFEU’. See Opinion of Advocate General Szpunar in *Commission v Council (International Maritime Organisation)* (C-161/20, EU:C:2021:957, point 117).

[121](#) See, for example, Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014 (EU:C:2014:2303, paragraph 71), and judgment of 4 September 2014, *Commission v Council* (C-114/12, EU:C:2014:2151, paragraph 68).

[122](#) At issue in Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014 (EU:C:2014:2303).

[123](#) At issue in judgment of 4 September 2014, *Commission v Council* (C-114/12, EU:C:2014:2151).

[124](#) Opinion of 14 October 2014 (EU:C:2014:2303).

[125](#) Judgment of 4 September 2014 (C-114/12, EU:C:2014:2151).

[126](#) See also Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017 (EU:C:2017:376, paragraph 201 and the case-law cited), in which the Court explains that ‘where an agreement between the European Union and a third State provides for the application, to the international relations covered by that agreement, of rules that will overlap to a large extent with the common EU rules applicable to intra-Community situations, that agreement must be regarded as capable of affecting or altering the scope of those common rules’.

[127](#) See, to that effect, judgment of 4 September 2014, *Commission v Council* (C-114/12, EU:C:2014:2151, paragraph 71 and the case-law cited), and Opinion 3/15 (*Marrakesh Treaty on access to published works*) of 14 February 2017 (EU:C:2017:114, point 113 and the case-law cited) (explaining that the risk that common EU rules might be adversely affected or altered by international commitments applies ‘even if there is no possible contradiction between those commitments and the common EU rules’). See also, to that effect, Opinion of Advocate General Tizzano in *Commission v United Kingdom* (C-466/98, EU:C:2002:63, points 71 and 75).

[128](#) See Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014 (EU:C:2014:2303, paragraph 72 and the case-law cited).

[129](#) See, for example, Opinion 2/91 (*ILO Convention No 170*) of 19 March 1993 (EU:C:1993:106, paragraph 25) (explaining that a certain part of an International Labor Organization Convention ‘is concerned with an area which is already covered to a large extent by Community rules progressively adopted since 1967 with a view to achieving an ever greater degree of harmonisation’, such that said commitments ‘must be considered ... [as] falling within the area covered by the directives cited above’), and Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014 (EU:C:2014:2303, paragraph 73) (explaining that ‘in particular, the scope of EU rules may be affected or altered by international commitments where such commitments are concerned with an area which is already covered to a large extent by such rules’).

[130](#) See, *ex multis*, Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014 (EU:C:2014:2303, paragraph 74 and the case-law cited), and Opinion 3/15 (*Marrakesh Treaty on access to published works*) of 14 February 2017 (EU:C:2017:114, paragraph 74). Emphasis added.

[131](#) As the Court explained in Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017 (EU:C:2017:376, paragraphs 275 and 276), where such commitments do not contain binding commitments, they are incapable of having an effect on the nature of the competence to conclude the envisaged agreement.

[132](#) For Article 15 ('Aviation safety') see, for example, 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, and amending Regulations (EC) No 2111/2005, No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 (OJ 2018 L 212, p. 1); for Article 16 ('Aviation security'), see, for example, Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002 (OJ 2008 L 97, p. 72); for Article 17 ('Air traffic management'), see, for example, Regulation (EU) 2024/2803 of the European Parliament and of the Council of 23 October 2024 on the implementation of the Single European Sky (OJ L, 2024/2803); for Article 18 ('Environment'), see, for example; Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021 (OJ 2017 L 350, p. 7) and Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable air transport (ReFuelEU Aviation) (OJ L, 2023/2405); for Article 19 ('Air carrier liability'), see, for example, Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents (OJ 1997 L 285, p. 1); for Article 20 ('Consumer protection'), see, for example, Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1); for Article 21 ('Computer reservation systems'), see Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Regulation No 2299/89 (OJ 2009 L 35, p. 47) and *Commission v Belgium*, paragraphs 115 to 117; and for Article 22 ('Social aspects'), see, for example, Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (OJ 2006 L 204, p. 1).

[133](#) Aviation safety is covered by common EU rules, as laid down, *inter alia*, in Regulation 2018/1139 (OJ 2018 L 212, p. 1).

[134](#) Aviation security is subject to common rules of EU law under, inter alia, Regulation 2018/1139 and Regulation No 300/2008.

[135](#) Article 6 of the envisaged agreement relates to the liberalisation of ownership and control of air carriers. It lays down that the contracting parties ‘recognise’ the potential benefits of the progressive liberalisation of ownership and control of their respective air carriers and that they ‘agree to explore’ at ‘an opportune juncture’ in the Joint Committee (established pursuant to Article 24 of the envisaged agreement) the reciprocal liberalisation of ownership and control, such that that committee ‘may recommend’ amendments to the agreement. That language exhibits the characteristics of the cooperation and exchange of ideas, unlike a commitment on the basis of which common rules of EU law could be affected.

[136](#) Article 9 of the envisaged agreement, titled ‘Doing business’, lays down an agreement between the parties that ‘obstacles to providing air services ... which are encountered by their respective air carriers could hamper the benefits to be achieved by this Agreement’. To that end, the contracting parties agree to ‘cooperate’ in removing such obstacles, and that the Joint Committee ‘shall monitor’ progress of that cooperation. Beyond laying down an obligation on the Joint Committee to act in a certain way, that provision does not appear to contain any commitment capable of being assessed under Article 3(2) TFEU.

[137](#) Article 14 of the envisaged agreement relates to statistics. In paragraph 1 of that provision, it lays down the obligation on each contracting party to exchange available statistics related to air transport, as covered by the envisaged agreement, in so far as permitted by the respective national laws, and ‘as may reasonably be required’. Paragraph 2 of that provision puts in place an agreement to cooperate to facilitate the exchange of said information. It is clear that the paragraph 2 of that provision contains no commitment capable of affecting the common rules (and therefore appears much more akin to the commitments contained in Title II of the envisaged agreement). While paragraph 1 of that provision is worded in such a way as to lay down an obligation to exchange statistics, that obligation relates solely to those statistics that relate to air transport between the contracting parties, as liberalised by virtue of the envisaged agreement. Moreover, as that paragraph’s reference to the joint committee indicates, said exchange takes place solely within the framework of that committee, and then only to ‘monito[r] the development of air transport under this Agreement’. Accordingly, it appears to me that that provision is geared, in reality, towards upholding the effectiveness of the envisaged agreement as a whole, and so is not capable of falling within the scope of Article 3(2) TFEU.

[138](#) See Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017 (EU:C:2017:376, paragraph 276 and the case-law cited).

[139](#) That Court recalled that same conclusion also in judgments of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraphs 70 and 71), and of 18 March 2014, *International Jet Management* (C-628/11, EU:C:2014:171, paragraph 39).

[140](#) In essence, that is also what the Court found in the *Open Skies* judgments as regards the predecessor regulation to the Air Services Regulation: Regulation No 2408/92; see *Commission v Belgium*, paragraph 104.

[141](#) See recital 16 of Regulation No 847/2004, which, in relevant part, states that ‘the objectives of this Regulation [are] the coordination of negotiations with third countries with a view to concluding air service agreements, the necessity to guarantee a harmonised approach in the implementation and application of those agreements and the verification of their compliance with Community law’.

[142](#) See recitals 2 to 4 of Regulation No 847/2004, which recalls certain findings of the Court in the *Open Skies* judgments and then lays down that, as a consequence of those judgments, a cooperation procedure should be put in place.

[143](#) See point 46 of this Opinion.

[144](#) 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 2019 C 384I, p. 1).

[145](#) See Regulation (EU) 2019/502 of the European Parliament and of the Council of 25 March 2019 on common rules ensuring basic air connectivity with regard to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union (OJ 2019 L 85I, p. 49) and Regulation (EU) 2020/2225 of the European Parliament and of the Council of 23 December 2020 on common rules ensuring basic air connectivity following the end of the transition period provided for in 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 2020 L 437, p. 86).

[146](#) See Article 2(2) of Regulation 2019/502 and Article 2(2) of Regulation 2020/2225.

[147](#) At the hearing, there was a discussion as to whether enabling code-sharing between EU and Omani air carriers, through Article 10(10) of the envisaged agreement, could enable such access to the market. However, it was clarified during those discussions that even Omani air carriers may, by virtue of that provision, enter into code sharing arrangements, advertise those arrangements, and sell tickets for those flights, those sections of intra-EU flights must be carried by the EU carriers, even if the flights share the same code. In that respect, Article 10(10) of the envisaged agreement does not enable Omani air carriers to participate in the internal EU market for air transport services.

[148](#) In fact, the applicability of the rules of the State from or to which an air carrier flies is provided for by Article 11 of the Chicago Convention, and the same type of obligation is restated in Article 7 of the envisaged agreement.

[149](#) See, to that effect, Opinion 1/94 (*Agreements annexed to the WTO Agreement*) of 15 November 1994 (EU:C:1994:384, paragraphs 78 and 79), and *Commission v Belgium*, paragraph 98.

[150](#) See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1) and Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ 2015 L 249, p. 1).

[151](#) See, to that effect, judgment of 30 April 1986, *Asjes and Others* (209/84 to 213/84, EU:C:1986:188, paragraph 45). Where anticompetitive conduct takes place outside the territory of the European Union but has effects on the internal market, the rules governing the application of Articles 101 and 102 TFEU have already been recognised to be capable of applying to practices confined entirely to the territory of third States. See, to that effect, judgments of 27 September 1988, *Ahlström Osakeyhtiö and Others v Commission* (89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, paragraphs 17 and 18), and of 6 September 2017, *Intel v Commission* (C-413/14 P, EU:C:2017:632, paragraphs 43 to 45).

[152](#) Council Regulation of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ 2009 L 148, p. 1).

[153](#) See recital 3 of Regulation No 487/2009, which explains that ‘the Commission should be empowered to grant block exemptions in the air transport sector ... in respect of traffic between the Community and third countries’.

[154](#) Regulation of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004 (OJ 2019 L 123, p. 4). That regulation seeks to put in place a sector-specific approach subsequently adopted as regards other economic sectors in Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (OJ 2022 L 330, p. 1).

[155](#) See recital 9 of Regulation 2019/712 (stating that ‘effective, proportionate and dissuasive legislation remains necessary in order to maintain conditions conducive to a high level of Union connectivity and to ensure fair competition with third-country air carriers. To that end, the

Commission should be entrusted with the power to conduct an investigation and to take measures where necessary. Such measures should be available where practices distorting competition cause injury to Union air carriers'). See also point 6 of Article 2 of that regulation, which defines 'practices distorting competition' as 'discrimination and subsidies', both of which are then defined in points 8 and 9 of Article 2 thereof.

[156](#) Council Directive of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51).

[157](#) See judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 67 and the case-law cited) (explaining that Directive 2003/96/EC 'in Article 14(1)(b), lays down a tax exemption for energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure-flying, in order that, as is apparent from recital 23 in the preamble to that directive, the European Union complies in particular with certain international obligations, including those connected with the tax exemptions on energy products intended for civil aviation which are granted to airlines on the basis of the Chicago Convention and of international bilateral air service agreements concluded by the European Union and/or the Member States with certain third States').

[158](#) Council Regulation of 16 November 2009 setting up a Community system of reliefs from customs duty (OJ 2009 L 324, p. 23).

[159](#) Directive of 19 October 2009 determining the scope of Article 143(b) and (c) of Directive 2006/112/EC as regards exemption from value added tax on the final importation of certain goods (OJ 2009 L 292, p. 5).

[160](#) See point 10 of the memorandum of consultations, attached to the agreement.

[161](#) See Article 1 of Regulation No 1186/2009.

[162](#) See Article 1 of Directive 2009/132.

[163](#) Council Directive of 19 December 2019 laying down the general arrangements for excise duty (OJ 2020 L 58, p. 4). The Commission refers to Article 11(f) of that directive, which exempts from excise duty payment goods 'for consumption under an agreement concluded with third countries or international organisations provided that such an agreement is allowed or authorised with regard to exemption from value added tax'.

[164](#) See Council Regulation of 16 April 2018 temporarily suspending the autonomous Common Customs Tariff duties on certain goods of a kind to be incorporated in or used for aircraft, and repealing Regulation (EC) No 1147/2002 (OJ 2018 L 98, p. 1), and in particular Article 1(1) thereof, which lays down that ‘the autonomous Common Customs Tariff duties laid down in [Council] Regulation (EEC) No 2658/87 [of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1)] for parts, components and other goods of a kind to be incorporated in or used for aircraft and parts thereof in the course of their manufacture, repair, maintenance, rebuilding, modification or conversion shall be suspended’.

[165](#) Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

[166](#) See Article 1(1) of Directive 2006/112.

[167](#) See, by analogy, Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017 (EU:C:2017:376, paragraph 163 and the case-law cited) (explaining that ‘it would, moreover, not be coherent to hold that the provisions liberalising trade between the European Union and a third State fall within the common commercial policy and that those which are designed to ensure that the requirements of sustainable development are met when that liberalisation of trade takes place fall outside it. The conduct of trade in accordance with the objective of sustainable development ... forms an integral part of that policy’).

[168](#) See Article 11(1) of the envisaged agreement.

[169](#) See Article 4(2) of the envisaged agreement, which explains that ‘when granting operating authorisations and technical permissions, the Contracting Parties shall treat all carriers of the other Contracting Party in a non-discriminatory manner’.

[170](#) See Article 4(1)(d) and Article 5(1)(c) of the envisaged agreement, both of which refer to the conditions ‘prescribed under the laws and regulations’ normally applied to the operation of international air transport. Article 5(1)(c) of the envisaged agreement also cross-refers to compliance with the laws and regulations referred to in Article 7 of the envisaged agreement as a reason for the refusal, revocation, suspension, imposition of conditions, or limitation of an operating authorisation.

[171](#) See Articles 3 to 14 of the Air Services Regulation. See also recital 5 and Article 8(2) of the Air Services Regulation as regards the existence of a monitoring obligation underlying the continued satisfaction of the conditions governing operating authorisations.

[172](#) Other aspects of that provision contain a clear commitment to comply with the applicable laws and regulations of the respective contracting party, and so includes an obligation to comply with EU law. See, in that respect, Article 10(2) and (3), (4), (5), (14), and (15) of the agreement.

[173](#) See Council Directive of 15 October 1996 on access to the groundhandling market at Community airports (OJ 1996 L 272, p. 36), and in particular recital 26 and Article 20(1) thereof, which extend the rights recognised by that directive to third-country suppliers of ground-handling services and third-country users of airports on the basis of reciprocity.

[174](#) Council Regulation of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1), and in particular recital 14 and Article 12 thereof, which offer third-country carriers equivalent treatment subject to reciprocity. See also *Commission v Belgium* (paragraph 120) for the Court's recognition that this subject matter constitutes an exclusive competence of the European Union.

[175](#) See recital 10 and Article 15(4) and (5) of the Air Services Regulation on code-sharing arrangements, offering code-sharing arrangements subject to reciprocity, and Article 13(3) and (4) of the Air Services Regulation on dry or wet lease agreements with a third-country nexus, again subject to reciprocity in the case of wet leases.

[176](#) Contrast this with the judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 70), where the Court considered that the setting of airport charges was not, at that point in time, covered by common rules of EU law.

[177](#) Commission Implementing Regulation of 11 February 2019 laying down a performance and charging scheme in the single European sky and repealing Implementing Regulations (EU) No 390/2013 and (EU) No 391/2013 (OJ 2019 L 56, p. 1).

[178](#) See Article 1 of Implementing Regulation 2019/317.

[179](#) See Article 2(5) of Implementing Regulation 2019/317, which defines the concept of 'airspace user' as 'the operator of the aircraft at the time when the flight is performed or, if the identity of the operator is not known, the owner of the aircraft, unless it can be proved that another person was the operator at that time'.

[180](#) Directive of the European Parliament and of the Council of 11 March 2009 on airport charges (OJ 2009 L 70, p. 11).

[181](#) See Article 1 of Directive 2009/12. As the Commission observes, those rules did not exist when the assessment was performed by the Court in judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 70).

[182](#) The concept of ‘airport users’ is defined in Article 2(3) of Directive 2009/12 as follows: ‘any natural or legal person responsible for the carriage of passengers, mail and/or freight by air to or from the airport concerned’.

[183](#) See Article 3 of Directive 2009/12, which lays down that ‘Member States shall ensure that airport charges do not discriminate among airport users’.

[184](#) I note that Article 12 of the envisaged agreement specifically requires that the air carriers of contracting parties are to be treated ‘on terms not less favourable than the most favourable terms available to any other air carrier’, and therefore Omani carriers in the European Union. Accordingly, irrespective of the fact that the EU rules at issue apply to any airport user, there is subject matter affectation by virtue of the fact that the commitment contained in the agreement specifically assimilates Omani carriers to EU carriers.

[185](#) See Article 22(1) of the Air Services Regulation.

[186](#) See Article 23(1) of the Air Services Regulation.