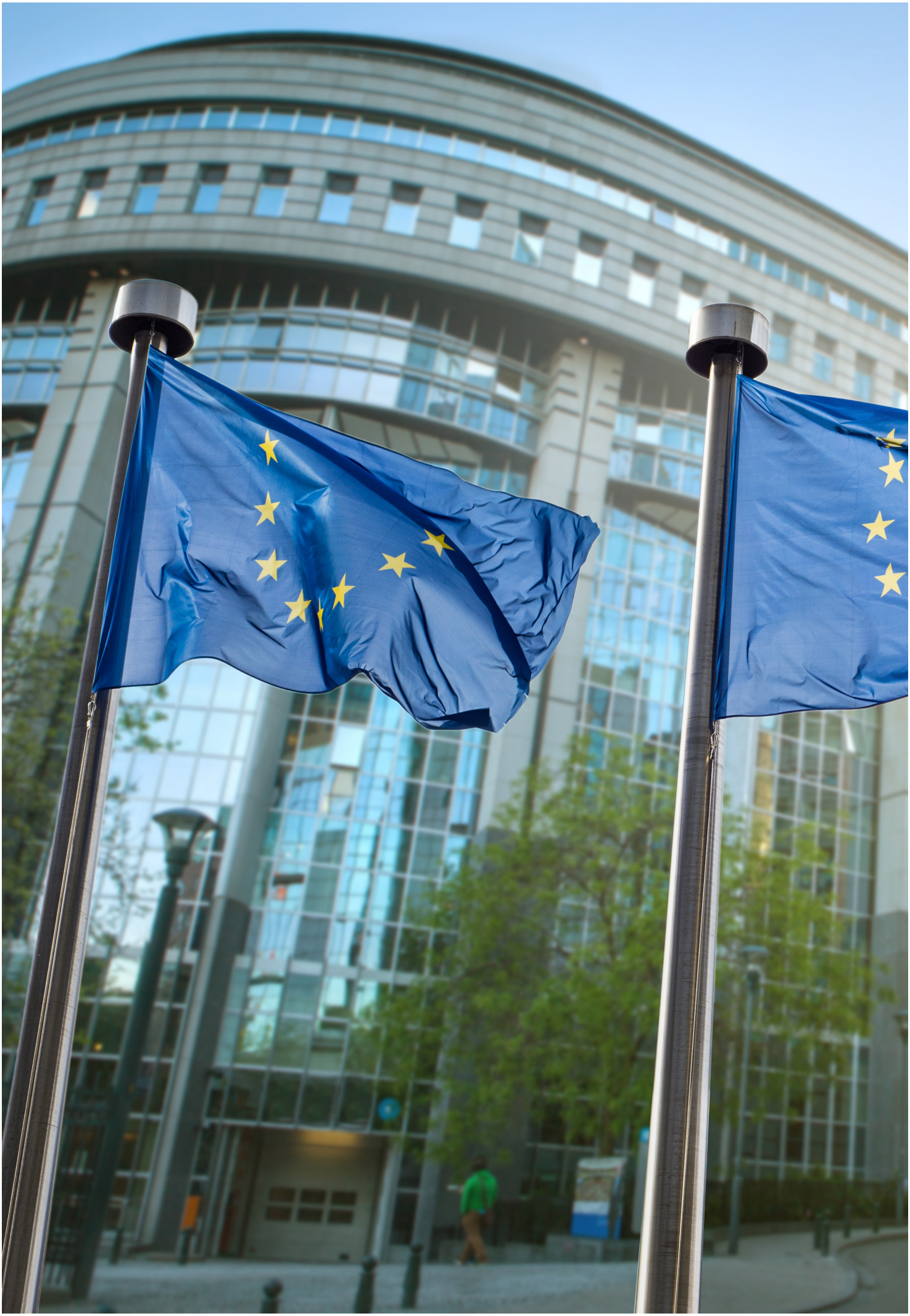
Hogan Lovells

EU-Singapore FTA Opinion of the Court of Justice

May 2017



EU-Singapore Opinion

Has the Court's opinion on the EU Singapore FTA shaped future EU trade agreements and a future EU-UK FTA?

The Opinion clarifies the EU competence to conclude trade agreements. The ability of the EU to conclude an agreement with the UK is reinforced by the way in which the Court approached the scope of the common commercial policy, by applying the test of whether specific commitments made by the EU are intended to promote, facilitate or govern trade and have a direct and immediate effect on that trade. The conclusions reached by the Court shall not be interpreted as expanding the EU exclusive competence.

On 16 May 2017, the Court of Justice of the European Union ("CJEU" or "the Court") delivered its much-awaited opinion on the EU – Singapore Free Trade Agreement ("EUSFTA" or "the Agreement").[1] The negotiations between the EU and Singapore lasted from March 2010 until October 2014 and resulted in a comprehensive "new generation" trade agreement covering several areas, often going beyond traditional trade-related matters. In addition to trade in goods and services, the Agreement covers investment, government procurement, intellectual property, as well as trade and sustainable development, labour and environmental standards, and transparency.

On July 2015, the European Commission ("Commission") requested the Court to give an Opinion in accordance with the procedure set out in Article 218(11) of the Treaty on the Functioning of the European Union ("TFEU"). In its request, the Commission sought guidance from the Court on the allocation of competences between the EU and its Member States for the conclusion of the EUSFTA. In particular, the Commission asked the Court whether the EU has exclusive competence to sign and conclude the Agreement or whether the Member States share competence over certain aspects, meaning that Member State parliaments also have to ratify the Agreement. The Commission also asked the Court which of the Chapters of the Agreement fall under the EU exclusive competence, which under the shared competence and which, if any, under the Member States' exclusive competence.

In its Opinion, the Court held that the EUSFTA cannot be concluded without the participation of the Member States because the commitments relating to portfolio investment and investor-State dispute settlement fall under the shared competence between the EU and its Member States. The Court noted that the EU enjoys exclusive competence with regard to the Chapters of the Agreement covering trade in goods, services, establishment and e-commerce, government procurement, intellectual property, foreign direct investment, competition, trade and sustainable development, labour and environment standards, because they "intended to promote, facilitate or govern trade and have direct and immediate effects on [trade]".[2]

1 Opinion 2/15 of the Court, 16 March 2017

2 Opinion, par. 37

EU ability to act: competences

Exclusive vs. shared, internal vs. external competence

This distinction between exclusive and shared competences has consequences on the process of conclusion of EU international agreements. EU competence can be either exclusive or shared. Exclusive competence entails that only the EU can legislate and adopt binding acts in a specific area.[3] By contrast, where the EU shares a competence with the Member States, both the EU and the Member States may legislate in that area.[4] It is further provided that Member States may exercise their competence in a specific area, to the extent that the EU has not exercised its own competence in that particular area. If an agreement falls under the shared competence of the EU and the Member States, it is considered a "mixed" agreement which needs to be ratified by both the EU and all Member States in accordance with their domestic legislation.[5]

Common Commercial Policy

Since the Treaty of Rome, the Common Commercial Policy ("CCP") has been one of the pillars of the development of the Common Market and the Customs Union. The Court of Justice held in 1975 that the CCP had been included in the EU Treaties "in the context of the operation of the Common Market, for the defence of the common interests of the Community, within which the particular interests of the Member States must endeavour to adapt to each other".[6]

Article 207(1) TFEU provides that the CCP "shall be based on uniform principles, particularly in regards to … the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

The tests applied by the Court

In its Opinion, the Court followed three tests to determine the nature of various competences covered by the EUSFTA.

- **Firstly**, the Court established whether each Chapter of the EUSFTA falls under the CCP as set out in Article 207(1) TFEU and thus under EU exclusive competence pursuant to Article 3(1) TFEU.

  Art. 3(1) TFEU defines expressly the areas in which the EU has exclusive competence, including the CCP. Once a certain area of action of the EU falls within the CCP, EU exclusive competence may be inferred by virtue of this provision. The Court's reasoning was based on whether the provisions of the EUSFTA relate specifically to trade, namely whether they have immediate and direct effects thereto.

- **Secondly**, the Court identified the areas that fall outside the CCP with a view to determining whether *implied* exclusive competence could be established by virtue of Article 3(2) TFEU. *Implied* exclusive competence is assigned to the EU for the conclusion of an international agreement when its conclusion (a) is provided for in a legislative act of the EU; or (b) is necessary to enable the EU to exercise its internal competence; or (c) may affect common rules or alter their scope.

- **Thirdly**, for the remaining areas of the Agreement, the Court examined whether the EU has shared competence with the Member States on the basis of Article 4 TFEU and on the basis of Article 216(1) TFEU, which provides for the conclusion of international agreements with third countries where the conclusion is "necessary in order to achieve … one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act […]."

3 Art. 2(1) TFEU

4 Art. 2(2) TFEU

5 The procedure to conclude international agreements is set out in Art. 218 TFEU

6 Opinion 1/75, Re Understanding on a Local Costs Standard [1975] ECR 1355, at 1363-64.

EU exclusive competence Art. 3(1) TFEU	EU implied exclusive competence Art. 3(2) TFEU	EU shared competence Art. 4 TFEU
Common Commercial Policy Art. 207(1) TFEU The pertinent provisions in the International Agreement specifically related to trade: Intended to promote, facilitate or govern trade Immediate and direct effect on trade	The conclusion of an international agreement a) Is provided for in a legislative act of the EU b) Is necessary to enable the EU to exercise its internal competence c) May affect common rules or alter their scope	Art. 216 TFEU **Conclusion of international agreements where:** a) The Treaties so provide b) Such conclusion is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties c) Such conclusion is provided for in a legally binding EU act d) Such conclusion is likely to affect common rules or alter their scope

EU competence in concluding the EUSFTA

The Court concluded that most of the areas covered by the EUSFTA, **except** the commitments relating to non-foreign direct investment and investor-State dispute settlement, fall under the EU exclusive competence.

The areas in which the Court concluded that the EU has exclusive competence in a straight-forward manner were the commitments relating to **trade in goods**, in particular the Chapters on national treatment and market access for goods, tariff and trade commitments relating to goods, trade remedies, technical barriers to trade, sanitary and phytosanitary measures, customs and trade facilitation.[7] The Court followed a similar conclusion regarding the provisions relating to **non-tariff barriers to trade and investment in renewable energy** generation[8] and **competition**.[9]

7 Ibid, par. 40-48.
8 Ibid, par. 72-74.
9 Ibid, par. 134-135.

The commitments in the Agreement relating to **intellectual property** were also determined as falling within the CCP and EU exclusive competence by virtue of Article 3(1) TFEU, as they "seek to facilitate the production and commercialisation of innovative and creative products and [...] to increase the benefits from trade and investment".[10] With regard to the non-commercial aspects of intellectual property, the Court ruled that, although the provisions of the EUSFTA on copyrights and related rights refer to multilateral conventions containing provisions relating to moral rights, the mere reference to such multilateral conventions does not suffice for that matter to be regarded as a component of the EUSFTA, which does not mention moral rights.[11]

The Chapter relating to **services, establishment and e-commerce** was also held to fulfill the direct and immediate link to trade.[12] The Court, in line with a previous Opinion on *Agreements modifying the Schedules of Specific Commitments under the GATS*, that held that all four modes of supply fell under the CCP (former Article 133 EC), held that that the four modes of supply fall under exclusive competence.[13] The Court noted that the meaning of "trade in services" in Article 207(1) TFEU is essentially identical to "trade in services" in Article 133 EC. For the purposes of "trade in services" in Article 207(1) TFEU, there is no reason to distinguish between the provisions of the EUSFTA relating to cross-border supply of services (modes 1 and 2) and those relating to the supply of services by establishment or by the presence of natural persons (modes 3 and 4 respectively). All modes of supply fall under the CCP.[14]

In the field of transport services, the Court applied the second test to determine if they fall under EU exclusive competence. Transport is explicitly excluded from the CCP by virtue of Article 207(5) TFEU. Therefore, the Court sought to determine which of the commitments relating to transport services in the EUSFTA are excluded from the CCP. Three of these transport services: in particular, (a) "aircraft repair and maintenance services during which an aircraft is withdrawn from service", (b) "the selling and marketing of air transport services" and (c) "computer reservation system services", are classified as "business services" in the EUSFTA and not as auxiliary services in the area of transport. Thus, the Court considered that they fall under the CCP.[15]

For maritime, rail, road and internal waterways transport services, the Court sought to establish whether they fall under EU exclusive competence by virtue of Article 3(2) TFEU. The commitments included in the EUSFTA regarding maritime, rail and road transport services were considered relating to areas already largely covered by common rules and that they may affect common rules or alter their scope (third ground of Article 3(2) TFEU).[16] The Court held that the commitments on internal waterways transport services in the EUSFTA were of extremely limited scope

10 Ibid, par. 125.
11 Ibid, par. 129.
12 Ibid, par. 52-53.
13 Ibid, par. 54-56.
14 Ibid, par. 54-55.
15 Ibid, par. 64-68.
16 Ibid, par. 192-193, 202, 210-211.

and they did not need to be taken into account in the determination of EU competence.[17]

With regard to government procurement, that chapter of the Agreement was considered to have the specific aim of determining the conditions under which economic operators of each party may participate in procurement procedures in the other party and thus have a direct and immediate effect on goods and services. The Court considered that it falls under EU exclusive competence as part of the CCP.[18] With regard to provisions relating to government procurement in the field of transport, the Court ruled that the area is largely covered by common rules and it established exclusive competence by virtue of Article 3(2) TFEU.[19]

The provisions of the EUSFTA relating to trade and sustainable development were also seen by the Court as having a direct and immediate effect on trade. In essence these provisions aim at not encouraging trade by reducing the levels of social and environmental protection below the levels set out in their international commitments.[20] Moreover, a breach of the labour and environmental protection provisions authorises the other party to terminate or suspend the liberalisation of that trade.[21]

In the area of investment protection, a distinction was drawn between foreign direct investment ("FDI") and other types of investment. The main difference is that FDI entails involvement in the management or control of a company carrying out an economic activity in the territory of the other Party. This is what establishes the direct link with trade and hence EU exclusive competence on the basis of the CCP.[22]

To the extent that the commitments in the EUSFTA relate to non-FDI investment (portfolio investment), the Court considered that it essentially constitutes movement of capital for the purposes of Article 63 TFEU which fall outside the CCP.[23] Furthermore, the Court concluded that exclusive competence on the basis of Article 3(2) TFEU could not be established.[24] This type of investment was considered to fall under the shared competence of the EU and the Member States by virtue of Article 4(2) TFEU because the conclusion of international agreements which contribute to the establishment of free movement of capital may be necessary in order to achieve one of the purposes of Title IV of Part Three of the TFEU, within the meaning of Article 216(1) TFEU.

Investor-State dispute settlement was also considered to fall under EU shared competence, on the ground that the EUSFTA does not exclude the possibility of a dispute being brought by a Singapore investor before the courts of a Member State, for which the consent of the Member States is needed.[25]

The question of the compatibility of the dispute settlement mechanism between the parties to the Agreement with EU law was outside the scope of the Opinion.[26]

The provisions of the Agreement relating to exchange of information, notification, verification, cooperation, mediation and decision-making, and transparency were deemed to be ancillary in nature and thus fall under the same competence (i.e. exclusive or shared) as the relevant substantive provisions.[27] Therefore, the institutional provisions related to portfolio investment

17 Ibid, par. 217.
18 Ibid, par. 75-77.
19 Ibid, par. 224.
20 Ibid, par. 158.
21 Ibid, par. 161.
22 Ibid, par. 83-84.
23 Article 63 TFEU provides: 1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. 2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.
24 Opinion, par. 230, 236-238.
25 Ibid, par. 290-292.
26 Ibid, par. 301-302.
27 Ibid, par. 276, 282.

and ISDS were considered to fall under the competences shared between the EU and the Member States.

EU trade policy: lessons for BREXIT?

The Opinion clarifies the EU competence to conclude international agreements. Therefore, it contributes to the shaping of new EU trade agreements. The conclusions reached by the Court should not be seen as expanding the exclusive competence of the EU as such, but rather as reflecting the development of international trade and the delineation included in the EU Treaties between the CCP and other areas of EU law, in line with previous rulings of the Court.[28]

The ability of the EU to conclude international agreements is reinforced by the way in which the Court approached the issue of the CCP, by applying the test of whether specific commitments made by the EU have an immediate and direct link to trade, by way of being intended to promote, facilitate or govern trade. Essentially, all areas that have such a link with international trade would fall under the CCP. This is reflected in the assessment of the sustainable development Chapter of the EUSFTA, where the Court emphasised the fact that EU trade policy now includes other aspects relevant to trade that are not among the traditional elements of trade agreements, reinforcing what are now called "new generation free-trade agreements".[29]

The Opinion is important for the future trade agreement between the EU and the UK because it clarifies the scope of the EU exclusive competences which do not require ratification by the Member States. It is likely that the EU-UK agreement will be broader than the EUSFTA and will cover more areas falling under "mixed" EU and Member States competence. A "bold and ambitious" EU-FTA is likely to be a mixed agreement which would need to be approved by all Member States in accordance with their domestic legislation. However, this should not prevent the EU-UK Agreement from being provisionally applied with respect to matters of exclusive competence shortly after its conclusion.

With regard to more sensitive areas not fully developed in the existing EU FTAs such as financial services, the EU exclusive competences have been clarified. The Court held that the CCP covers all modes of services supply.[30] An EU-UK FTA could cover financial services under the four modes and be subject to provisional application, namely before ratification by all Member States is completed. This is in line with previous Opinions of the Court.[31]

An aspect that would require particular attention would be transport services, in view of the express exception from the CCP included in Article 207(5) TFEU. The Court concluded that the provisions of the EUSFTA related to transport services fall under EU exclusive competence on the basis of the third ground of Article 3(2) TFEU, as they are largely covered by common rules which may be affected or be altered by the provisions of the EUSFTA. It would seem possible that wider commitments in transport services be included in a future EU-UK Agreement which would fall under the share competences of the EU and Member States.

The clarification that ISDS is a shared competence between the EU and the Member States provides useful guidance to the negotiators with regard to what type of dispute settlement procedure would be most adequate for a future EU-UK Agreement.

28 See Opinion 1/08, Agreements modifying the Schedules of Specific Commitments under the GATS, EU:C:2009:739, 30 November 2009, par. 118-119, 173; Opinion 1/94, Re World Trade Organisation Agreement [1994] ECR I-5267.

29 Opinion, par. 140.

30 Ibid, par. 54, citing Opinion 1/08, Agreements modifying the Schedules of Specific Commitments under the GATS, EU:C:2009:739, 30 November 2009, par. 4, 118, 119.

31 Opinion 1/08, Agreements modifying the Schedules of Specific Commitments under the GATS, 30 November 2009; Opinion 1/94, Re World Trade Organisation Agreement, 15 November 1994.

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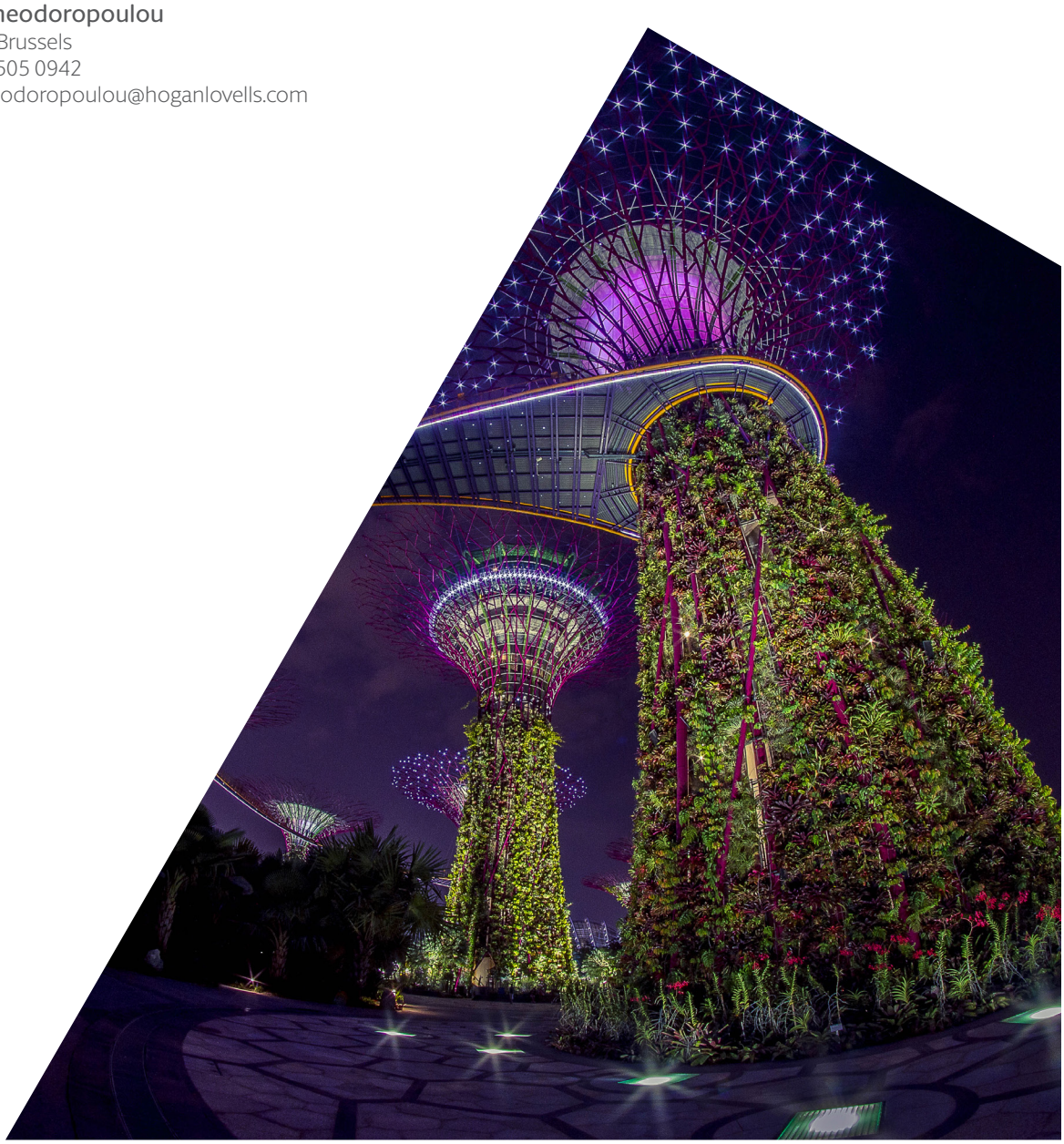

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