

Dr hab. Monika Niedźwiedź

Jagiellonian University
ORCID [0000-0002-4822-6119](https://orcid.org/0000-0002-4822-6119)

**COMMENT ON THE OPINION 1/19
OF THE COURT OF JUSTICE OF THE EUROPEAN
UNION REGARDING CONVENTION ON PREVENTING
AND COMBATING VIOLENCE AGAINST WOMEN AND
DOMESTIC VIOLENCE (ISTANBUL CONVENTION)
OF 6 OCTOBER 2021**

1. Introduction

On the 11 May 2011 under the auspices of the Council of Europe, the Istanbul Convention on preventing and combating violence against women and domestic violence was signed. It entered into force on 1 August 2014. Currently, the total number of ratifications (accessions) are 38.¹ All Member States of the European Union have signed the Convention. However, some (Bulgaria, Czech Republic, Hungary, Latvia, Lithuania, Slovak Republic) have not ratified the Convention so far. The Convention aims to create a framework at pan-European level to protect women against all forms of violence, and prevent, prosecute, and eliminate violence against women and domestic violence.

On 4 March 2016 the European Commission submitted proposal for a Council Decision on the conclusion, by the European Union,

¹ 37 States and the European Union, which ratified the Convention on 28 June 2023. The Convention will enter into force as regards the European Union on 1st October 2023

of the Istanbul Convention.² In the proposal the European Commission held that ‘the Convention’s approach is fully in line with the Union’s multifaceted approach to the phenomenon of gender-based violence and the thrust of measures in place through internal and external EU policies.’³ It has also observed that

whereas the Member States remain competent for substantial parts of the Convention, and particularly for most of the provisions on substantive criminal law and other provisions in Chapter V to the extent that they are ancillary, the EU has competence for a considerable part of the provisions of the Convention, and should therefore ratify the Convention alongside Member States.⁴

The Commission has pointed out a number of provisions both of primary as well as secondary law as a basis for the EU’s decision to conclude the Convention. The proposal has opened a debate on the EU competences in the areas covered by the Convention, both in terms of substantive legal basis as well as in terms of the appropriate procedure and the role of the Member States in that procedure.

On 11 May 2017, the Council adopted two separate decisions relating to the signing of the Istanbul Convention. The Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters⁵ was based on Articles 82(2) and 83(1) TFEU. The second decision 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe the Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement⁶ was based on Article 78(2) TFEU. In preambles to both decisions, it has been provided that both the Union and its Member States have competence in the fields covered by the Istanbul Convention. The Istanbul Convention should be signed on behalf of the Union

2 Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, COM/2016/109 final.

3 See point 1.3 of the proposal.

4 See point 2.1 of the proposal.

5 OJ 2017 L 131, p. 11.

6 OJ 2017 L 131, p. 13.

as regards matters falling within the competence of the Union in so far as the Istanbul Convention may affect common rules or alter their scope. This applies, in particular, to certain provisions relating to judicial cooperation in criminal matters and to the provisions of the Istanbul Convention relating to asylum and non-refoulement. The Member States retain their competence insofar as Convention does not affect common rules or alter the scope thereof. The Union also has exclusive competence to accept the obligations set out in the Convention with respect to its own institutions and public administration.

The Convention consists of provisions referring to the notions with words such as ‘gender’,⁷ ‘non-stereotyped gender roles’,⁸ ‘stereotyped roles for women and men’.⁹ This ideological context has affected the issue of the conclusion by the EU of the Convention, making this issue not purely legal, but also political.

Against this backdrop, the European Parliament has submitted to the Court of Justice of the European Union (CJEU) under Article 218(11) of the TFEU questions regarding the conclusion of the Istanbul Convention by the EU.¹⁰

2. Legal and Factual Background

On 9 July 2019 the European Parliament submitted to the CJEU a request for an opinion regarding two issues. Firstly, the Parliament asked whether Articles 82(2) and 84 TFEU constitute the appropriate legal bases for the Council of the European Union’s act concluding the Council of Europe Convention on preventing and combating violence against women and domestic violence and whether it necessary or possible to split each of the two decisions on the signing and on the conclusion of the Istanbul Convention as a result of this choice of legal basis. Secondly, the Parliament asked whether the conclusion by the EU of the Istanbul Convention in accordance with Article 218(6) TFEU would be compatible with the Treaties in the absence of a common accord of all the Member States giving their consent to being bound by the said Convention.

7 Article 3(c) of the Convention.

8 Article 14 of the Convention.

9 Article 12 of the Convention.

10 Request for an opinion submitted by the European Parliament pursuant to Article 218(11) TFEU, OJ C 413, 9.12.2019, p. 19.

It was not disputed that the conclusion of the Convention is only partially within the competence of the EU and as a result it shall be concluded as mixed agreement.¹¹ In the areas covered by the Istanbul Convention, the European Union has adopted a number of legal acts.¹² Most of them are directives of minimum harmonization. The Council of the European Union was of the opinion that the Istanbul Convention should be signed on behalf of the Union as regards matters falling within the competence of the Union in so far as the Convention may affect common rules (adopted legal acts) or alter their scope. This applies, in particular, to certain provisions of that Convention relating to judicial cooperation in criminal matters and to asylum and non-refoulement. The Member States retain their competence in so far as the Convention does not affect common rules or alter the scope thereof. Moreover, the Union also has exclusive competence to accept the obligations set out in the Convention with respect to its own institutions and public administration. In this context and since the competence of the Union and the competences of the Member States are interlinked, the Union should become a party to the Istanbul Convention alongside its Member States, so that together they can fulfil the obligations laid down by that Convention and exercise the rights vested in them in a coherent manner. The Council, however, proposed the two separate decisions as regards the signature of the Istanbul Convention. The first regarding the provisions of the Convention on the judicial cooperation in criminal matters in so far as those provisions may affect common rules or alter their scope. The second should have concerned Articles 60 and 61 of that convention. The first one shall be based on Articles 82(2) and 83(1) of the TFUE and the second shall be based on the Article 78(2) of that Treaty.

The Parliament was, however, of the view that the separate decision regarding Articles 60 and 61 of the Istanbul Convention was not necessary as the legal basis concerns only the area of asylum, covered by Articles 60 and 61 of the Istanbul Convention alone, and therefore questions whether the latter articles can properly be regarded as a separate, main component of that Convention, or if those articles are not rather the manifestation, in the particular area of asylum, of the broader concern to protect all victims of violence against women, with the result that they are merely auxiliary

11 Paragraph 59 of the Court's opinion.

12 Listed in paragraphs 2-14 of the Court's opinion.

provisions which do not call for the use of Article 78(2) TFEU as part of the substantive legal basis for those signature decisions.¹³

With regard to the second problematic issue, the Parliament was of the view that it is essential to ensure close cooperation between the Member States and the EU institutions in the negotiation, conclusion and the fulfilment of the commitments entered into. However, it points out that waiting for a ‘common accord’ of all the Member States for the conclusion of that Convention goes beyond such cooperation and amounts to applying, in practice, an unanimity rule within the Council despite the fact that, under the TFEU, only the qualified majority rule applies.

It is worth mentioning that in the meantime since the opening of the Istanbul Convention for signature, 21 Member States of the European Union, with the exception of the Republic of Bulgaria, the Czech Republic, the Republic of Latvia, the Republic of Lithuania, Hungary and the Slovak Republic, have ratified that convention, without considering whether those ratifications interfere with the exclusive competence of the European Union.¹⁴

The European Commission opted for the broad approach to the issue of the EU competence to conclude the Istanbul Convention, meaning that it shall be signed and concluded by means of a single decision and noted the respective competences of the European Union, exclusive or shared, and of the Member States.

However, the Council did not follow the Commission’s approach insisting that the conclusion of the Convention shall be preceded by the common accord of the Member States. According to the Council it follows from the principle of conferral, as enshrined in Article 5 TEU, that any competence not conferred on the European Union remains with the Member States and submits that it follows that no EU institution can order a Member State to adopt an act which falls within that Member State’s competence. Furthermore, there is no obligation on the Council to adopt the decision to conclude the Istanbul Convention and that institution cannot be forced to exercise potential EU competence where the required majority is not reached.¹⁵

13 Paragraphs 54-58 of the Court’s opinion.

14 Paragraph 63 of the Court’s opinion.

15 Paragraph 173 of the Court’s opinion.

3. Opinion of the Advocate General

Advocate General Gerard Hogan gave his opinion on the 11th of March 2021. The opinion began started with the observation that

the relationship between the Member States and the Union in respect of the conclusion of international agreements which bind both parties is apt to present some of the most difficult and complex questions of European Union law. The delineation of the respective competences of the Member States and the Union (and their interaction with each other) invariably involves difficult questions of characterisation, often requiring a detailed and minute analysis of an international agreement which has not always been drafted with the subtle complexities of the European Union's institutional architecture (and its division of competences) in mind,¹⁶

which – as he points out – is also the case with regard to the conclusion of the Istanbul Convention. In the subsequent paragraphs, the Advocate General presents the background of the Convention¹⁷ and the issue of admissibility of the application of the European Parliament.¹⁸ Then he turns to analysis of the three key issues.

With regard to the appropriate legal basis for the conclusion of the Istanbul Convention he reiterated the settled case-law of the Court regarding the appropriate legal basis for the conclusion of international agreements.¹⁹ It is worth paying attention to his considerations anchored in certain judgments of the Court, described by him as ‘tempting’ that

legal bases of an act should reflect *all the competences* exercised by the Union to adopt the act at issue. In particular, such an approach may seem justified when an international agreement falls within several competences shared between the Union and the Member States, since the Union might decide to not exercise some of its competences, which consequently means that it will fall to the Member States to implement the corresponding provisions of that agreement in question.²⁰

16 Paragraph 1 of the AG's opinion.

17 Paragraphs 3-18 of the AG's opinion.

18 Paragraphs 20-59 of the AG's opinion.

19 Paragraphs 66-71 of the AG's opinion.

20 Paragraph 73 of the AG's opinion.

However, he promptly observes that ‘such an approach would, however, be at variance with the approach that the Court expressed in other judgments so far adopted and referring to the so-called ‘predominant objectives and components test’ or ‘centre of gravity test’, according to which

if a decision comprises several components or pursues a number of objectives the legal basis for its adoption must be determined in the light of its main or predominant purpose or component. As a result, while an act might pursue several objectives and require the mobilisation of different competences, the legal basis on which its adoption relies will not reflect all the competences exercised to adopt that act, but only the ones corresponding to the main objectives or components of the act.²¹

The Advocate General then makes an extensive analysis of the competence of the EU in the areas covered by the Istanbul Convention, having regard also to the character of the competences and their dynamic nature.²² Then he considers the objectives and components of the Istanbul Convention²³ as well as the main objectives and components of the decision to authorise the conclusion of the Istanbul Convention on behalf of the Union,²⁴ having in mind the commonly adopted EU rules (directives), he comes to the conclusion that ‘having regard to the scope of the conclusion envisaged by the Council, the decision authorising the Union to proceed to that conclusion must be based on Articles 78(2), 82(2), 84 and 336 TFEU’.²⁵

Subsequently the Advocate General took into consideration the question whether the authorisation to conclude the Istanbul Convention can be given by means of two separate decisions due to the specific situation of Ireland (based on the Protocol No. 21 to the TFUE) and Denmark (based on the Protocol No. 22 to the TFUE) with regard to these parts of the Convention which refer to the common policy on asylum, subsidiary protection and temporary protection, referred to in Article 78 TFEU, i.e. measures in which Ireland and Denmark – according to Protocol No. 21 and 22 as a rule do not participate. He pointed out that

21 Paragraph 72 of the AG’s opinion.

22 Paragraphs 88-112 of the AG’s opinion.

23 Paragraphs 113-128 of the AG’s opinion.

24 Paragraphs 129-147 of the AG’s opinion.

25 Paragraph 166 of the AG’s opinion.

to split a decision into two separate acts might vitiate the conclusion of an international agreement if the first act to be adopted were adopted according to a certain voting rule and the second adopted by reason of another voting rule in circumstances where, if only one act were to have been adopted, only one single rule would have been applied. As it happens, however, in the present case (...) all the legal bases concerned lead to the application of the same procedure.²⁶

He paid attention that the division of the act of confirmation into two separate acts will have the effect of respecting – rather than infringing – the applicable voting rules and the special position of Ireland as provided by Protocol No. 21 and with regard to Denmark as provided for in Protocol No. 22.²⁷

He summarises that the conclusion of the Istanbul Convention by the Union by means of two separate acts would not make these acts invalid.²⁸

In turn the Advocate General analyses the issue of a common accord of all the Member States as a condition for the conclusion of the Convention by the EU. He paid attention that the applicant (the European Parliament) acknowledged the importance of ensuring close cooperation between the Member States and the institutions of the Union in the process of negotiating, concluding and implementing an international agreement. The Advocate General pointed out that:

[C]ontrary to the assertion made by the Parliament, waiting until all Member States have concluded the mixed agreement in question does not amount to changing the rules governing the decision authorising the Union to conclude this agreement, nor does it transform the decision that is going to be taken into a hybrid act. Indeed, such conduct does not imply that if a Member State were to decide in the end not to conclude that agreement, the Union would not conclude it. Accordingly, such a practice is in no way equivalent to merging the national procedure for concluding an international agreement with the procedure provided for in Article 218 TFEU. As a matter of fact, even though it is not for the Court to rule on the relevance of such conduct, such a practice seems to be fully legitimate. (...) once the Union and the Member States conclude a mixed agreement, they are, from the point

26 Paragraph 180 of the AG's opinion.

27 Paragraphs 181-193 of the AG's opinion.

28 Paragraph 194 of the AG's opinion.

of view of international law, jointly responsible for any unjustified failure to implement the agreement. Regarding the Istanbul Convention, as it happens, several Member States have indicated that they have encountered serious difficulties with regard to conclusion at national level. Admittedly, when the Union intends to conclude a mixed agreement, the Member States have obligations both in respect of the process of negotiation and conclusion and in the fulfilment of the commitments entered into which flow from the requirement of unity in the international representation of the Union. However, such obligations do not imply that the Member States are nonetheless obliged to conclude such an agreement. Such an approach would indeed infringe the principle of division of competences set out in Article 4(1) TEU.²⁹

Further he observed that the conclusion by the Union of a mixed agreement may accordingly have the effect of making it liable, under international law, for the conduct of certain Member States, even though the latter would act in such circumstances within the framework of their exclusive competences. This, however, is the consequence of the principle of distribution of competences according to the internal constitutional law of the Union.³⁰ The Advocate General reiterated the case-law of the Court in which the Court held that the possible difficulties which might arise in the management of the agreements concerned does not constitute a criterion against which the validity of the decision to authorise the conclusion of an agreement can be assessed.³¹ He concludes on the basis of his considerations that that

the Council is under no obligation to wait for the common agreement of the Member States, nor is it under any obligation to conclude an international agreement, such as the Istanbul Convention, immediately after signing it. It is rather up to it to assess what is the best solution, in view of factors such as the extent of the risk of unjustified non-execution of the mixed agreement in question by a Member State or the possibility of obtaining the necessary

29 This part seems to be one of the most interesting parts taking into account the fact that the Court did not entirely follow his opinion with this regard. That explains why it is quoted extensively and these arguments will be further referred to in part 5 of this article.

30 Paragraph 205 of the AG's opinion.

31 Paragraph 221 of the AG's opinion.

majority within that institution to exercise alone all the shared competences concerned by the said agreement.³²

Apart from the questions addressed to the Court, the Advocate General considered a particular situation,³³ namely what might arise if a Member State were to denounce that convention once it had been concluded by the Member States and the Union. And he gives as answer that

in those circumstances, although the duty of sincere cooperation would doubtless impose an obligation to inform the Union in advance on the part of the Member State concerned, it cannot go so far as to prevent a Member State from withdrawing from an international agreement. Indeed, the logical and inescapable consequence of the principle of attribution of competences is that a Member State may withdraw from a mixed agreement as long as part of the agreement still falls within the competence of the States, either because the Union has not yet pre-empted all the shared competences, or because certain parts of the agreement fall within the exclusive competence of the Member States. That possibility would not, however, oblige the Union to leave the agreement as well. (...) it would simply fall to the Council, if necessary, to assess the trade-off between the importance of the agreement in question and the risks generated by its imperfect conclusion by the Union and the Member States.³⁴

4. Opinion of the Court

The Court in the first place considered the admissibility of the application. In this regard it held that the measure authorising the signature of an international agreement and the measure concluding it are two distinct legal acts giving rise to fundamentally distinct legal obligations for the parties concerned, the second measure being in no way a confirmation of the first. Accordingly, failure to bring an action for annulment of the first measure does not preclude such an action against the measure concluding

32 Paragraph 223 of the AG's opinion.

33 As he points out the situation was raised during oral hearing, see paragraph 224 of the opinion of Advocate General.

34 Paragraph 225 of the AG's opinion.

the envisaged agreement or render inadmissible a request for an opinion raising the question whether the agreement is compatible with the Treaty.³⁵

Subsequently the Court considered the issue whether the Treaties allow or require the Council to wait, before concluding the Istanbul Convention on behalf of the European Union, for the ‘common accord’ of the Member States to be bound by that Convention in the fields falling within their competences. The Court started that by recalling the autonomy of the EU legal order and the Member States have, by reason of their membership of the European Union, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the European Union are governed by EU law, to the exclusion, if EU law so requires, of any other law.³⁶ In the next step the Court reiterated that with regard to EU external competence Article 218 of the TFUE lays down a single procedure of general application concerning, in particular, the negotiation and conclusion of such agreements, except where the Treaties lay down special procedures.³⁷ The procedure is of general application, and it is based on the symmetry between the adoption of legal measures internally and externally (the well-known doctrine of parallelism). Within the framework of this procedure the institutions of the EU shall respect the principle of institutional balance meaning that each institution must act within the limits of the powers conferred on it by the Treaties, and in conformity with the procedures, conditions and objectives set out in them.³⁸ It is therefore the Council which adopts a decision on the conclusion by the EU of an international agreement, where appropriate after obtaining the consent or consulting the Parliament. No competence is granted to the Member States for the adoption of such a decision. The Council shall act by the qualified majority unless otherwise follows from Article 218(8) TFUE, after obtaining the consent of the European Parliament.³⁹ It has been clear for the Court that the Istanbul Convention is a mixed agreement. However, it does not allow for amendments to well-defined treaty procedures of the conclusion by the EU of an international agreement. It cannot be perceived as a stage or the condition of a procedure aiming at the conclusion of an agreement. As such it would be contrary to the Treaties and it would make the European Union’s ability to conclude

35 Paragraph 201 of the Court’s opinion.

36 Paragraphs 230-231 of the Court’s opinion.

37 Paragraph 234 of the Court’s opinion.

38 Paragraphs 232 -235 of the Court’s opinion.

39 Paragraphs 237-238 of the Court’s opinion.

a mixed agreement dependent entirely on each Member State's willingness to be bound by that agreement in the fields falling within their competences and, therefore, on the Member States' sovereign choices in those fields. Nevertheless it is not excluded that within the framework of the principle of loyalty it is essential to ensure close cooperation between Member States and EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into.⁴⁰ It is not therefore excluded that in the light of the principle of loyalty the attainment of the common accord of the member states would be desirable. That explains why

nothing precludes the Council from extending its discussions in order to achieve, inter alia, the greatest possible majority with a view to concluding an international agreement, the majority required for a broader exercise of the external competences of the European Union or, in the case of mixed agreements, closer cooperation between the Member States and the EU institutions in the process of concluding that agreement, which may involve waiting for the 'common accord' of the Member States.⁴¹

In that regard, the Court noted that,

in accordance with Article 218(8) TFEU, that political discretion is to be exercised, in principle, by a qualified majority, so that such a majority within the Council may, at any time and in accordance with the rules laid down in the Council's Rules of Procedure, including those conferring on any Member State and the Commission the right to request the opening of a voting procedure and governing the transparency of that procedure, pursuant to Article 15(3) TFEU, require the closure of discussions and the adoption of the decision concluding the international agreement. The Council must therefore exercise that discretion on a case-by-case basis and having regard to the current state of discussions within the Council, in full compliance with the requirements laid down in Article 218(2), (6) and (8) TFEU.⁴²

With regard to the appropriate legal basis for the conclusion of the Istanbul Convention the Court reminded that as far as procedural legal basis is concerned the appropriate legal basis is Article 218(2), (6) and

40 Paragraph 241 of the Court's opinion.

41 Paragraphs 253-254 of the Court's opinion.

42 Paragraph 255 of the Court's opinion.

(8) of the TFUE, meaning that it shall be concluded by the Council acting by the qualified majority with the consent of the European Parliament, with no precondition such as the common accord of the Member States.⁴³ As far as the substantial legal basis is concerned the Court highlighted that the issue covers only matters within the competence of the Union.⁴⁴ In this context the Court referred to its settled case-law that the choice of the legal basis for an EU act, including one adopted in order to conclude an international agreement, must rest on objective factors amenable to judicial review, which include the aim and the content of that measures.⁴⁵ It reminded that

an international agreement which pursues several purposes or has several components, it is necessary, therefore, to verify whether the provisions of that agreement which pursue an objective or which constitute a component of that agreement are a necessary adjunct to ensure the effectiveness of the provisions of those agreements which pursue other purposes or which constitute other components or whether they are ‘extremely limited in scope.’⁴⁶

Subsequently the Court analyses the provisions of the Istanbul Convention through the lenses of the Treaty provisions and the two Council’s decisions regarding the signature of the Convention. It concludes that the appropriate substantive legal basis are the articles Article 78(2), Article 82(2) and Articles 84 and 336 TFEU. In particular the Court paid attention that the provisions on asylum and non-refoulement

form a separate chapter of that convention and lay down specific and substantive obligations requiring, where necessary, the amendment of the law of the parties to that convention on those matters. In those circumstances, that aspect cannot be regarded as being incidental or ‘extremely limited’ in scope.⁴⁷

The Court considered that also Article 336 TFUE should be taken into account as a legal basis, as in the light of the number of provisions concerned and the scope of the obligations assumed in that respect by

43 Paragraph 277 of the Court’s opinion.

44 Paragraph 279 of the Court’s opinion.

45 Paragraph 284 of the Court’s opinion.

46 Paragraphs 285-286 of the Court’s opinion.

47 Paragraphs 302-303 of the Court’s opinion.

the European Union with regard to its public administration and the limited number of matters covered by the envisaged agreement, that component of the envisaged agreement is neither purely incidental nor ‘extremely limited’ in scope.⁴⁸

The third issue considered in the Opinion by the Court was whether it is necessary or possible to divide the act concluding, on behalf of the European Union, the part of the Istanbul Convention covered by the envisaged agreement into two separate decisions.⁴⁹ The question is connected with the special status of the Ireland and Denmark. It shall be reminded that according to Article 2, Protocol No. 21 to the TFUE none of the provisions of Title V of Part Three of the TFEU, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in Ireland and no such provision, measure or decision shall in any way affect the competences, rights and obligations of that Member State. In addition, no such provision, measure or decision shall in any way affect the Community or Union *acquis* nor form part of Union law as they apply to Ireland. However, according to Article 3 of Protocol No. 21 Ireland may notify that it wishes to take part in the adoption and application of any such proposed measure, whereupon Ireland shall be entitled to do so. As a result, Ireland is bound by Directives 2011/36 and 2011/93, whereas it is not bound by Directives 2011/95 and 2013/32, which, according to the applicants, has implications on the procedure on the conclusion of the Convention. As far as Denmark is concerned according to the Protocol No. 22 to the TFUE that State does not participate in the adoption of the measures under Part III, Title V of the TFUE. In short, the situation of the two Member States is such that they do not participate in all measure which may be covered by the Convention In some they participate, in some they may participate and in the others they do not participate. With regard to this situation the Court held that

Protocols No. 21 and No. 22 justify the division of the Council act concluding, on behalf of the European Union, the part of the Istanbul Convention covered by the envisaged agreement into two separate decisions only in so far as that division is intended to take account of the circumstance that Ireland

48 Paragraph 308 of the Court’s opinion.

49 Paragraph 312 of the Court’s opinion.

or the Kingdom of Denmark is not participating in the measures adopted in respect of the conclusion of that agreement which fall within the scope of those protocols, considered in their entirety.⁵⁰

5. Commentary

5.1. Preliminary Remarks. Mixed Agreements

The Advocate General begins his opinion with the words that

the recent case-law of this Court provides ample evidence that the relationship between the Member States and the Union in respect of the conclusion of international agreements which bind both parties is apt to present some of the most difficult and complex questions of European Union law. The delineation of the respective competences of the Member States and the Union (and their interaction with each other) invariably involves difficult questions of characterisation, often requiring a detailed and minute analysis of an international agreement which has not always been drafted with the subtle complexities of the European Union's institutional architecture (and its division of competences) in mind.

This is certainly true.

The mixed nature of an international agreement stems from the division of competences between the European Union and the Member States.⁵¹ This issue always arises whenever the European Union itself cannot be a party to a given international agreement because its subject matter goes beyond the exclusive competence of the European Union. The substantive legal criterion – the division of competences between the European Union and the Member States – is the factor determining the mixed nature of the agreement. Mixed international agreements are usually concluded

⁵⁰ Paragraph 337 of the opinion of the Court's opinion.

⁵¹ The literature on mixed agreements is enormous; however, I would like to refer to the classics: O'Keefe, Schermers (ed.), *Mixed Agreements*; Dolmans, *Problems of Mixed Agreements*; MacLeod, Hendry, Hyett, *The External Relations of the European Communities: a Manual of Law and Practice*; Heliskoski, *Mixed Agreements as a Technique for Organising the International Relations of the European Community and its Member States*; Hillion, Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World* and the recent publications referred to by the AG in his opinion.

jointly by the European Union and the Member States (acting as one party to the agreement or as separate parties to an international agreement). However, it may be the case that an international agreement is a mixed agreement but only the Member States are parties to it. This takes place when the subject of the agreement also covers issues falling within the competence of the European Union, but, for example, the agreement is open for signature only by states, and not by international organizations. In such a situation, within the scope of EU competence, the Member States act under the authority and on behalf of the European Union.⁵²

In the light of the views of the doctrine and jurisprudence, a distinction is made between obligatory and optional mixed agreements. This division is the result of the evolution of the jurisprudence of the Court of Justice regarding the competence of the European Union to conclude international agreements. In the past, it was assumed that the shared competence of the European Union (thus the non-exclusive nature of this competence) requires that an agreement should be concluded jointly by the European Union and the Member States. Currently, it is recognized that in such a situation the conclusion of a mixed agreement is not obligatory but optional. Thus, as a factor determining the mixed nature of the agreement, the issue of the existence of European Union competences is currently assumed, and not its nature, as it has been so far. For the agreement to be concluded by the Union itself, it is sufficient to have (even non-exclusive) competence with respect to all issues regulated in the agreement. In this case, however, the conclusion of a mixed agreement is still allowed. However, if some of the issues covered by the contract fall within the exclusive competence of the Member States, concluding the contract as a mixed contract is obligatory.

In the present case it was not questioned that – because of exclusive competence of the Member States in some areas covered by the Convention – it

52 The last example of such agreement is the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, see Council Decision 2008/431/WE of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law – Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, OJ L.2008.151.36.

shall be concluded by the EU and the Member States.⁵³ It must be noted that a majority of the Member States signed and ratified the convention on their own behalf. It follows from the foregoing that their competences covered all the provisions of the Convention. The exclusive competence of the EU was claimed to accept the obligations set out in the Convention with respect to its own institutions and public administration. The EU competence was also claimed with regard to certain provisions of the Convention relating to judicial cooperation in criminal matters and to the provisions of the Convention relating to asylum and non-refoulement as the Convention may affect these provisions or alter the scope thereof, despite the fact that the so called ‘common rules’ in fact were directives of minimum harmonization. The Court was not clear on this issue, restricting itself to the questions raised in the Parliament’s application.⁵⁴

5.2. Arguments of the Court in light of its recent Jurisprudence of the Court

The preliminary remarks of the Court with regard to the procedure of the conclusion by the EU of the Istanbul Convention refer to settled case-law of the Court.⁵⁵ Generally speaking one may say that the opinion does not bring about the breaking line of the Court’s jurisprudence, remaining within the framework of the settled jurisprudence regarding EU competence to conclude mixed agreements. In my opinion it is the political context of the case which makes it more complicated than it really is.

It is not disputed, that after the Lisbon Treaty Article 218 TFUE lays down a single procedure of general application concerning, in particular, the negotiation and conclusion of such agreements, except where the Treaties lay down special procedures. In this context it is difficult to question the Court’s conclusion that the addition to that requirement that the Council should wait for the ‘common accord’ of the Member States to be bound by a mixed agreement in the fields falling within their competences is a prerequisite which is not provided for in the Treaties. For mixed agreements it is of vital importance, however, to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments

53 Paragraphs 5-8 of the Council Decision 2017/865 and Council Decision 2017/866 and par. 239–240 of the Court’s opinion.

54 Paragraph 280 of the Court’s opinion

55 Paragraphs 229-232 of the Court’s opinion.

entered into. Requirement for ratification of mixed international agreement by all of the Member States used to be a practice in EU external relations aiming at safeguarding proper implementation of the agreement, especially when the Member States have exclusive competence with regard to some provisions of the agreement.

As from the perspective of the international law parties to an international agreement, whether they are a State or an international organisation, may not invoke the provisions of their internal law as justification for their failure to execute a treaty, in case of mixed agreements the principle of sincere cooperation becomes a condition of effective implementation of mixed agreement after its entry into force for the EU and Member States. The Court is well aware of the fact and refers to its settled case-law in this respect.⁵⁶ However, on the other hand it allows for the Council to end up the procedure of close cooperation in the process of conclusion leaving the decision to the Council's political discretion.⁵⁷ At the end of the day, in the Court's opinion,

the Council may at any time in accordance with the rules laid down in the Council's Rules of Procedure, including those conferring on any Member State and the Commission the right to request the opening of a voting procedure and governing the transparency of that procedure, pursuant to Article 15(3) TFEU, require the closure of discussions and the adoption of the decision concluding the international agreement.⁵⁸

In legal writing, it is observed in this context that in the opinion 1/19 the Court took the formalist path taken in *US Air Transport Agreement*⁵⁹ by emphasising that legally nothing prevents the Council from adopting its decision to conclude the Istanbul Convention.⁶⁰

In fact, this formalist path depreciates the principle of sincere cooperation rooted in primary law (Article 4(3) TUE) and may affect

56 Paragraph 241 of the Court's opinion.

57 Paragraphs 252-254 of the Court's opinion.

58 Paragraph 255 of the Court's opinion.

59 *C28/12 Commission v. Council*, ECLI:EU:C:2015:282. The Court in Opinion 1/19 starts with the same observations as in the *US Air Transport Agreement* on the EU procedure to conclude international agreements, see paragraphs 38-43.

60 Verellen, "Opinion 1/19: no common accord among the Member States required for the Council to conclude a mixed agreement", 16 December 2021, <https://europeanlawblog.eu/2021/12/16/opinion-1-19-no-common-accord-among-the-member-states-required-for-the-council-to-conclude-a-mixed-agreement>.

implementation of the agreement. According to Article 216(2) TFUE EU-only agreement is binding not only upon the EU, but also on its Member States, notwithstanding the way they voted in the Council. If there is no common accord on the side of the Member States it may at least potentially result in difficulties in implementing an agreement. In such a situation there is always, however, an option for the EU not to conclude to the Convention or at least postpone the conclusion.

Also with regard to the substantive legal basis of the international agreement the Court based its considerations on the settled case-law which by the Advocate General is described as ‘the centre of gravity test’, which ‘leads to the applicable procedure for the adoption of an act being determined solely on the basis of the main legal bases.’⁶¹ In searching for appropriate legal basis the Court focuses on the issue whether provisions of the Convention are or are not within the scope of the Treaty provisions. In other words, it determines the existence, not the nature of the EU competences. The main substantive legal basis determines also the voting procedure with regard to the conclusion of the agreement. The recourse to a dual legal basis is precluded where the procedures laid down for each legal basis are incompatible with each other (e.g., one provides for unanimous voting the other for qualified majority voting).

The considerations of the Court regarding division of the act concluding the Istanbul Convention into two separate decisions are extremely interesting because they reflect a complexity of the EU external relations. It may be the case that not all the Member States are bound by the EU common rules as was the case of Ireland and Denmark. In such a situation there is a need for searching for appropriate procedural basis in order to take into account the specific situation. One must agree with the Court that it may be necessary to adopt two or more decisions for the purpose of adopting an act concluding an envisaged international agreement.

5.3. Arguments of the Court in the light of the AG Opinion

The opinion of Advocate General is obviously more extended, and it places the questions raised by the European Parliament in a broad context of EU external relations.

61 See considerations of the Court, paragraphs 284-286.

The Advocate General seems to be a great deal more focused on the legal and political difficulties resulting from the conclusion of the Istanbul Convention. He pointed out that

once the Union and the Member States conclude a mixed agreement, they are, from the point of view of international law, jointly responsible for any unjustified failure to implement the agreement. Regarding the Istanbul Convention, as it happens, several Member States have indicated that they have encountered serious difficulties with regard to conclusion at national level. Admittedly, when the Union intends to conclude a mixed agreement, the Member States have obligations both in respect of the process of negotiation and conclusion and in the fulfilment of the commitments entered into which flow from the requirement of unity in the international representation of the Union. However, such obligations do not imply that the Member States are nonetheless obliged to conclude such an agreement. Such an approach would indeed infringe the principle of division of competences set out in Article 4(1) TEU.⁶²

Unlike the Court, the Advocate General, takes into account the possibility that not all Member States would become alongside the EU the parties to the Istanbul Convention, as a result there is no need and even it is not allowed to require the consent of all Member States. The situation when not all Member States are parties to a mixed agreement is in legal doctrine considered as incomplete mixity.⁶³ On the other hand, he is aware of the fact that such a situation may affect the execution of the future agreement.⁶⁴ In the Courts' opinion this concern is not that visible.

I would not agree with the considerations of the Advocate General regarding the reservations and declaration on competence.⁶⁵ In his view

since the Istanbul Convention does not allow a party to make reservations regarding the rules of jurisdiction, any declaration made in this respect by the Union might be regarded as being devoid of legal effect for the purposes of international law. Any such statement would not only be irrelevant from

62 Paragraphs 202-203 of the AG's opinion.

63 See e.g., Granvik, "Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness", 255.

64 Paragraph 205 of the AG's opinion.

65 Paragraphs 206-215 of the AG's opinion.

the standpoint of international law, but, viewed from that perspective, such a statement could also be regarded as apt to mislead. Accordingly, in my opinion, the Union should refrain from making such a declaration of competence when the convention in question does not allow reservations to be made.

However, the statements on competences are a frequent instrument to inform the contracting parties on the division of competences between the EU and Member States, especially when the competence is shared and based on EU internal legislation.⁶⁶ They do not amount to reservations as they do not aim to exclude or modify the legal effect of certain provisions of the treaty, as in the case of reservations. Therefore, in my opinion, an act on conclusion by the EU of the Istanbul Convention could, if necessary, be accompanied by a declaration on competences.⁶⁷

It is also worth paying attention to the Advocate General's considerations regarding possible denouncing by the Member State of the convention once it had been concluded by the Member States and the Union. He was enhanced to consider such an issue because e.g., in Poland which concluded the Istanbul Convention, the possibility to denounce the Convention has been discussed and another party to the Convention, not being a Member State of the EU, namely Turkey indeed denounced it. He points out that in those circumstances, although the duty of sincere cooperation would doubtless impose an obligation to inform the Union in advance on the part of the Member State concerned, it cannot go so far as to prevent a Member State from withdrawing from an international agreement. Indeed, the logical and inescapable consequence of the principle of attribution of competences is that a Member State may withdraw from a mixed agreement as long as part of the agreement still falls within the competence of the States, either because the Union has not yet pre-empted all the shared competences, or because certain parts of the agreement fall within the exclusive competence of the Member States. That possibility would not, however, oblige the Union to leave the agreement as well.⁶⁸ I find tremendously accurate his reflection that in case of mixed agreements it is sometimes necessary to balance

66 Then legal instruments adopted by the EU may be listed in such a declaration.

67 Indeed, in the instrument of approval deposited by the EU on 28 June 2023 the European Union declares the specific areas of its competence in the matters covered by declaration.

68 Paragraph 224-225 of the AG's opinion.

the importance of the agreement in question and the risks generated by its imperfect conclusion by the Union and the Member States.⁶⁹

5.4. What the Court did not Consider – regrettably

In the Court's opinion it touches upon issues which do not further develop indicating that this is not within the European Parliament's application. The Court usually was eager for a broad reading of the Article 218(11) TFUE procedure. This has enabled the CJEU to elaborate a substantial part of the doctrine on EU external relations, and in particular the division of the competences between the EU and its Member States and to conclude international agreements, only to mention the 1/94 Opinion. This time the Court was reluctant to elaborate on issues raised by the participants to the proceeding, which were not strictly in line with the questions submitted by the applicant. However, in my opinion, these issues are worth considering.

The first issue regards the argument based on the national identity of the Member States. Some Member States, which have not ratified the Istanbul Convention (Bulgaria, Hungary and Slovakia) raised the argument that

accession of the European Union would entail a breach by the European Union of its duty of sincere cooperation and of the obligation, set out in Article 4(2) TEU, to respect the national identity of the Member States, inherent in their fundamental political and constitutional structures, in that it may give rise to a situation in which those Member States must, in order to ensure compliance with the European Union's international commitments, implement measures contrary to their Constitutions.⁷⁰

The Court held that the issue does not fall within the scope of the present proceedings because

any incompatibility between that conclusion and those obligations could be established only after a specific examination of the obligations which the European Union might assume following the conclusion of the Istanbul Convention, which is not covered by the present request for an opinion.⁷¹

69 Paragraph 225 of the AG's opinion.

70 Paragraph 265 of the Court's opinion.

71 Paragraph 266 of the Court's opinion.

With that regard it must be pointed out that once the Convention is concluded, the eventual violation of the national identity principle could have been undertaken. Therefore, it would be better to consider an issue in the procedure, which is of a preventive nature, rather than later on in the violation procedure.

The Court also seems to avoid, with the same argumentation, the question regarding the functioning of the GREVIO, a body established under Article 66 of the Convention. The French Republic and the Council observed that

conclusion of the Istanbul Convention by the European Union in the absence of a ‘common accord’ of the Member States to be bound by that convention in the fields falling within their competences is not compatible with the autonomy of EU law, since it would entail externalising, *inter alia* to GREVIO, an internal EU issue relating to the division of competences between the European Union and its Member States.⁷²

The Court replied that the answer to the question ‘requires a precise examination of the substantive compatibility of the Istanbul Convention with the Treaties, which is not covered by the present request for an Opinion and does not therefore fall within the scope of the present proceedings.’⁷³ Also with regard to that issue it seems that a broad reading of the submitted applications based on Article 218(11) TFUE could have made it possible to decide on the fundamental issues.

The third issue left aside by the Court regards consequences that might arise from a future infringement of that law in the implementation of that agreement. Further the Court held that

in particular the potential liability which the European Union might incur at the international level when implementing the Istanbul Convention, because it could not properly fulfil its commitments, would not, as such, be capable of calling into question the validity of the decision by which the Council concluded that convention on behalf of the European Union.⁷⁴

72 Paragraph 266 of the Court’s opinion.

73 Paragraph 269 of the Court’s opinion.

74 Paragraph 272 of the Court’s opinion.

Once again the Court explained that the issue is not within the framework of the procedure provided for in Article 218 TFUE, which does not concern the compatibility with public international law of the conclusion of an international agreement by the European Union or, accordingly, the consequences that might arise from a future infringement of that law in the implementation of that agreement. However, one may argue that these consequences are the result of the way in which the EU will bind itself with the international agreement, whether it will conclude it alone or alongside the Member States, whether it will be accompanied by the declaration of competences or not. Once again it is regrettable that the Court did not face the extremely complex and sensitive issues of the implementation of the mixed agreements, especially owing to the fact that some of the problems may well be anticipated and considered at the stage of its conclusion in order to avoid future disputes.

5.5. Conclusions

To sum up, the opinion seems to be well suited in the settled jurisprudence of the Court on the external relations of the EU.

In that sense it does not bring anything breaking new. One would risk the statement that it is much more interesting with regard to the issues which have been raised, but not considered by the Court.⁷⁵ The Court postponed the most controversial issues at the time of implementation of the agreement. It may be, however, too late from the perspective of Member States, being afraid of the violation of their *ordre public* and the national and constitutional identity.

As it has already been mentioned, I find tremendously accurate the reflection of Advocate General Hogan that in the case of mixed agreements it is sometimes necessary to balance the importance of the agreement in question and the risks generated by its imperfect conclusion by the Union and the Member States. He is correct that it is an evitable consequence of the principle of distribution of competences according to the internal constitutional law of the European Union.

It is appreciated that both the Advocate General and the Court highlight the need of close cooperation between the EU and Member States in the process of negotiation and conclusion and in the fulfilment

75 As mentioned in point 5.4.

of the commitments entered into. However, one must also think over whether, having in mind all the legal and political problems, the conclusion of the Convention by the EU alongside the Member States is really necessary, especially having in mind that the majority of Member States have already ratified the Convention, that its enforcement is based on national authorities. It is regrettable that the Court did not clarify in its opinion the nature of EU competence and the type of mixity which was at stake. It rather focused on the existence of EU competence. Since there was insufficient support for a ‘broad’ accession, it was clear that only a signature decision limited to the exclusive competence of the European Union could obtain a qualified majority in the Council. However, except for Article 336 TFUE, the Court was rather not precise with regard to the nature of the EU competence, especially with regard to the rules established by the directives. The choice between a ‘narrow’ accession and a ‘broad’ accession to the convention is a political choice for the Council.⁷⁶

5.6. Epilogue

Following the opinion of the Court on 1 June 2023 the Council of the EU adopted two decisions on the conclusion of the EU the Istanbul Convention. The first decision⁷⁷ concerned the conclusion of the Convention with regard to institutions and public administration of the EU, thus covering the exclusive competence of the Union. The second decision⁷⁸ was adopted with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement, covering the matters falling within the exclusive competence of the Union acquired according to the well-known ERTA-doctrine, namely insofar as the relevant provisions may affect common rules or alter their scope.

The instrument of approval was deposited by the EU on 28 June 2023 and alongside its deposition the European Union has declared the specific

76 Paragraph 68 of the Court’s opinion.

77 Council Decision (EU) 2023/1075 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to institutions and public administration of the Union, OJ L 143 of 2.6.2023, p. 1.

78 Council Decision (EU) 2023/1076 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement, OJ L 143 of 2.6.2023, p. 4.

areas of its competence in the matters covered by declaration. The Convention will enter into force with regard to the EU on 1 October 2023.

A Code of Conduct laying down the internal arrangements regarding the exercise of rights and obligations of the Union and Member States under the Convention has been drawn up between the Council, the Member States who are party to the Convention, and the Commission. These arrangements cover, inter alia, the Commission's role as coordinating body within the meaning of Article 10 of the Convention for matters falling under Union's exclusive competence, without prejudice to the respective competences of the Member States and the autonomy of the institutions of the Union in matters relating to their respective operations. The purpose of the Code of Conduct is to enable the Union and its Member States to achieve coherent, comprehensive and unified external representation with regard to the Convention.⁷⁹

It remains to be seen whether abovementioned instruments turn out to be sufficient for the effective and trouble-free implementation of the Convention by the EU and its Member States.

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⁷⁹ Code of Conduct laying down the internal arrangements regarding the exercise of the rights, and the fulfilment of the obligations, of the European Union and Member States under the Council of Europe Convention on preventing and combating violence against women and domestic violence, OJ L 143 of 2.6.2023, p. 7-11.

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