



Press and Information

Court of Justice of the European Union
PRESS RELEASE No 37/21
Luxembourg, 11 March 2021

Advocate General's Opinion in Avis 1/19
Istanbul Convention

Advocate General Hogan proposes that the Court hold that although the EU has signed the Istanbul Convention, the Council is entitled to wait, without however being forced to do so, for the common agreement of all Member States to be bound by that convention before deciding whether and to what extent the EU will accede to it.

*He further suggests that the Istanbul Convention may be concluded on the bases of **Articles 78(2), 82(2), 84 and 336 TFEU** by means of two separate decisions.*

The Istanbul Convention ¹ on preventing and combating violence against women and domestic violence was adopted by the Council of Europe on 7 April 2011 and was opened for signature on 11 May 2011. A first proposal by the Commission for a Council decision on the signing of the Istanbul Convention on behalf of the EU did not obtain sufficient support of the members of the Council. Consequently, it was decided to reduce the scope of the EU's proposed conclusion of the Istanbul Convention and to simply limit it to those competences that were considered as falling within the exclusive competence of the EU. In order to take account of the particular positions of Ireland and the United Kingdom as envisaged by Protocol No 21 annexed to the TEU and the TFEU, it was also decided to split the Commission's proposal for a Council decision to sign the Istanbul Convention into two separate decisions.

The two Council decisions were adopted on 11 May 2017. The first entails the signature of the Istanbul Convention by the EU with regard to its provisions falling within the EU's competences on judicial cooperation in criminal matters and mentioned as substantive legal bases Articles 82(2) and 83(1) TFEU ². The second covers the aspects of that convention which relate to asylum and non-refoulement and mentioned as a substantive legal basis Articles 78(2) TFEU ³. The recitals of both Council decisions included references to the competences of the EU and its Member States.

On 9 July 2019, the European Parliament requested, in accordance with Article 218(11) TFEU, the opinion of the Court of Justice on the accession of the EU to the Istanbul Convention. By its first question, the European Parliament asks which articles of the TFEU should constitute the appropriate legal bases for the Council act concluding the Istanbul Convention on behalf of the EU. It also asks whether it is necessary or possible to adopt two separate decisions on the signing and on the conclusion of the Istanbul Convention. By its second question, the European Parliament asks whether the conclusion by the EU of the Istanbul Convention in accordance with Article 218(6) TFEU is compatible with the Treaties in the absence of a common agreement of all the Member States to be bound by that convention.

In today's Opinion, Advocate General Gerard Hogan proposes that the Court should answer the questions referred by European Parliament as follows:

¹ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 7 April 2011.

² 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 matters (OJ, 2017 L 131, p. 11).

³ Council Decision (EU) 2017/866 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 asylum and non-refoulement (OJ 2017 L 131, p. 13).

If the Council's intentions with respect to the extent of the shared competences to be exercised upon conclusion of the Istanbul Convention remain unchanged, the decision to authorise that conclusion on behalf of the EU should be founded on Articles 78(2), 82(2), 84 and 336 TFEU as substantive legal bases.

The conclusion of the Istanbul Convention by the EU by means of two separate decisions is not of a nature to render those acts invalid.

The EU's decision to conclude the Istanbul Convention would be compatible with the Treaties if it were adopted in the absence of a common agreement of all Member States to be bound by that convention. However, it would also be compatible with the Treaties if that decision were adopted only after such common agreement had been established. It is exclusively for the Council to decide which of these two solutions is preferable.

The Advocate General considers that all the questions referred to the Court by the European Parliament should be regarded as admissible, except for the second part of the first question, but only in so far as it relates to the decision to sign the Istanbul Convention. [59] Indeed, since the European Parliament did not, as it could have done, contest the validity of the signature decisions and they have therefore become final, that institution cannot use the Opinion procedure to circumvent the time limits governing an action for annulment.

The appropriate legal bases regarding the conclusion of the Istanbul Convention

The Advocate General proposes to follow the Court's line of case-law according to which where an act pursues several objectives or has several components, that act must be based in principle on a single legal basis, and exceptionally on several, namely, those which correspond to the predominant or, at least, to the main purposes or components of that act. It follows that it is immaterial whether other competences were exercised in the course of the adoption of the act in question as long as those other competences cover objectives or components of that act that are ancillary.

Moreover, when the EU is not going to exercise all of its competences, it is important in the Advocate General's view that the decision authorising the conclusion of an international agreement be distinguished from that agreement itself. Given that as regards the accession to the Istanbul Convention, it is clear that the Council intends the EU to exercise only some of its competences, Advocate General Hogan believes that it is appropriate to consider not the whole Istanbul Convention, but rather only those parts of that convention that, from the point of view of EU law, will be binding on the EU.

In this respect, Advocate General Hogan notes that, in the present case it does not seem to be necessary to decide definitively whether the EU has, as the Council considers, exclusive competence to conclude the Istanbul Convention in the areas of asylum and immigration and judicial cooperation in criminal matters and consequently whether the EU is obliged to exercise the said competences. The question referred by the European Parliament is based on the premise that the EU will exercise, at the very least, the competences it holds in matters of asylum and immigration and judicial cooperation in criminal matters.

Having analysed the objectives and components of the Istanbul Convention, Advocate General Hogan notes that the conclusion by the EU of the Istanbul Convention is likely to concern a large number of competences that it holds alone or jointly with the Member States and therefore a large number of legal bases under the TFEU could theoretically be relevant. However, he adds, the legal basis or bases of an act are not supposed to reflect all the competences exercised for its adoption. The decision to authorise the conclusion of the Istanbul Convention by the EU should only be based on the legal basis or bases corresponding to what the centre of gravity of that decision will be. [130] In order to determine such a legal basis, Advocate General Hogan deems it necessary to have regard not only to the objectives and components of the Istanbul Convention, but also to have regard to those objectives and components more specific to that decision itself.

Advocate General Hogan also considers the relevance of legal bases other than those mentioned by the European Parliament in its question by examining different competences that are likely to be concerned by the Istanbul Convention. He then proposes that the Court answer the first question by saying that, having regard to the scope of the conclusion envisaged by the Council, the decision authorising the EU to proceed to that conclusion must be based on Articles 78(2), 82(2), 84 and 336 TFEU.

Whether the authorisation to conclude the Istanbul Convention can be given by means of two separate decisions

Advocate General Hogan notes that the question asked by the European Parliament concerns the formal future validity of the decision to conclude the Istanbul Convention. In this regard, it should be recalled that it flows from Article 263 TFEU that the formal validity of an act can only be called into question if an essential procedural requirement has been infringed. He finds that the conclusion of the Istanbul Convention by means of two decisions instead of one does not appear to be of such a nature that it might have consequences on the voting rules applied as was the case in a previous judgment of the Court.

This is because, first, it is not disputed that, whatever the number of decisions that will be adopted, their adoption will all fall within the competence of the EU. Second, concerning the voting rules, it should be noted that 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 applied. As it happens, however, in the present case, all the legal bases concerned lead to the application of the same procedure.

Advocate General Hogan thus proposes that the Court should reply to the question of the European Parliament that the conclusion of the Istanbul Convention by the EU by means of two separate acts is not of a nature to render those acts invalid.

The question on the validity of a decision by the Council to conclude the Istanbul Convention if it were adopted in the absence of a common agreement of all the Member States on their consent to be bound by that convention

In this respect, Advocate General Hogan finds 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 majority within that institution to exercise alone all the shared competences concerned by the said agreement.

He thus proposes to answer the second question by saying, first, that the EU's decision to conclude the Istanbul Convention would be compatible with the Treaties if it were adopted in the absence of a common agreement of all Member States on their consent to be bound by that convention. It would, however, also be compatible with the Treaties if the EU's decision to conclude the Istanbul Convention were adopted only after such common agreement had been established. It is exclusively for the Council to decide which of these two solutions is preferable.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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