



**The Treaties do not prohibit the Council from waiting, before adopting the decision concluding the Istanbul Convention on behalf of the European Union, for the ‘common accord’ of the Member States, but the Council cannot alter the procedure for concluding that convention by making that conclusion contingent on the prior establishment of such a ‘common accord’**

*The Court specifies the appropriate substantive legal basis for the adoption of the Council act concluding the part of the Istanbul Convention covered by the envisaged agreement and holds that the act concluding that convention may be divided into two separate decisions where an objective need to do so is established*

The Istanbul Convention on preventing and combating violence against women and domestic violence <sup>1</sup> falls, in part, within the competences of the European Union and, in part, within those of the Member States. It is therefore intended to be a mixed agreement, concluded as such by the European Union and the Member States. The Commission proposal for a decision on the signing of that decision, on behalf of the European Union, indicated, as the substantive legal basis, Article 82(2) TFEU and Article 84 TFEU. Since that proposal did not obtain sufficient support within the Council of the European Union, the Council decided to limit the signature of that convention to the matters covered by it which fall within the exclusive competence of the European Union, as identified by the Council. The Council therefore replaced the abovementioned substantive legal basis with Article 78(2), Article 82(2) and Article 83(1) TFEU. Furthermore, in order to take account of Ireland’s particular situation, in the light of Protocol No 21, <sup>2</sup> the signature decision was divided into two separate decisions.

Those two decisions concern the signature of the Istanbul decision as regards, respectively, the matters linked to judicial cooperation in criminal matters <sup>3</sup> and to asylum and non-refoulement. <sup>4</sup> In accordance with those two decisions, the Istanbul Convention was signed on behalf of the Union on 13 June 2017. However, to date, no decision on the conclusion of that convention by the European Union has been adopted, since the Council appears to regard the adoption of such a decision as being contingent on the prior existence of a ‘common accord’ of all the Member States to be bound by that convention in the areas within their competence.

On 9 July 2019, the European Parliament submitted to the Court a request for an opinion under Article 218(11) TFEU concerning the conclusion of the Istanbul Convention by the European Union. By its first question, the Parliament asks, first, what the appropriate legal bases for the Council act concluding that convention are and, secondly, whether it is necessary or possible to split both the act authorising the signature of the convention and the act concluding that convention

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<sup>1</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted on 7 April 2011 (‘the Istanbul Convention’).

<sup>2</sup> Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU (‘Protocol No 21’).

<sup>3</sup> 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).

<sup>4</sup> 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).

into two separate decisions. By its second question, the Parliament asks, in essence, 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.

In its Opinion, the Court, sitting as a Grand Chamber, answers the Parliament's questions as follows.

First, subject to full compliance, at all times, with the requirements laid down in Article 218(2), (6) and (8) TFEU, the Treaties do not prohibit the Council, acting in conformity with its Rules of Procedure, from waiting, before adopting the decision concluding the Istanbul Convention on behalf of the European Union, for the 'common accord' of the Member States. However, the Treaties do prohibit the Council from adding a further step to the conclusion procedure laid down in that article by making the adoption of the decision concluding that convention contingent on the prior establishment of such a 'common accord'.

Secondly, the appropriate substantive legal basis for the adoption of the Council act concluding, on behalf of the European Union, the part of the Istanbul Convention covered by the envisaged agreement is made up of Article 78(2) TFEU, Article 82(2) TFEU and Articles 84 and 336 TFEU.

Thirdly, Protocols No 21 and No 22<sup>5</sup> justify the division of the act concluding the Istanbul Convention into two separate decisions only in so far as that division is intended to take account of the circumstance that Ireland or the Kingdom of Denmark are not participating in the measures adopted in respect of the conclusion of the envisaged agreement which fall within the scope of those protocols, considered in their entirety.

### *Findings of the Court*

#### *Admissibility of the request for an Opinion*

The purpose of the opinion procedure is to forestall complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the European Union. Having regard, inter alia, to that purpose, the Court finds that the request for an opinion is admissible, with the exception of the second part of the first question, in so far as it relates to the division of the act authorising the signature of the Istanbul Convention into two decisions. The Istanbul Convention was signed by the European Union more than two years before the request for an opinion was submitted, with the result that the preventive objective pursued by Article 218(11) TFEU could no longer be achieved. Furthermore, the Parliament could have challenged the signature decisions by means of an action for annulment.

#### *The practice of 'common accord'*

As regards the practice of waiting for the 'common accord' of the Member States to be bound by a mixed agreement, the Court observes, first of all, that the Treaties prohibit the Council from making the initiation of the procedure for concluding a convention contingent upon the prior establishment of such a 'common accord'. If that practice were to have such a scope, the European Union's ability to conclude a mixed agreement would depend entirely on each Member State's willingness to be bound by that agreement in the fields falling within their competences. Such a hybrid decision-making process is incompatible with Article 218(2), (6) and (8) TFEU, which envisages the conclusion of an international agreement as an act which is adopted by the Council acting by a qualified majority.

That being said, within the limits of the procedure laid down in those provisions, both the decision whether or not to act on the proposal to conclude an international agreement, and, if so, to what extent, and the choice of the appropriate time for adopting such a decision fall within the Council's political discretion. Consequently, nothing precludes the Council from extending its discussions in

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<sup>5</sup> Protocol (No 22) on the position of Denmark, annexed to the TEU and the TFEU ('Protocol No 22').

order to achieve closer cooperation between the Member States and the EU institutions in the conclusion process, which may involve waiting for a 'common accord'.

However, 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 by its Rules of Procedure, require the closure of the debate and the adoption of the decision concluding the international agreement.

### *The appropriate legal bases for the conclusion of the Istanbul Convention*

In the context of the question concerning legal bases, the Court is first required to define the subject-matter and scope of its examination. In that regard, since the decision concluding the Istanbul Convention must be adopted by the Council by qualified majority, after obtaining the consent of the Parliament, it is for those institutions to specify, within the limits of the question referred, the scope of the 'agreement envisaged' within the meaning of Article 218(11) TFEU. Accordingly, the Court examines the Istanbul Convention solely in the light of the parts of that convention which, according to the wording of that question and according to the content of the signature decisions, are to be covered by the act concluding that convention. In the light of those factors, the Court starts from the premiss that that act will relate to the provisions of the Istanbul Convention which are linked to judicial cooperation in criminal matters, asylum and non-refoulement and the obligations of the institutions and public administration of the European Union, in so far as those provisions fall within the competence of the European Union.

As regards, in the first place, judicial cooperation in criminal matters, having regard to the number and scope of the provisions of the Istanbul Convention which fall within the competence of the European Union referred to in Article 82(2) TFEU<sup>6</sup> and Article 84 TFEU,<sup>7</sup> the Court holds that those two provisions should be among the legal bases of the act concluding that convention. By contrast, the scope of the obligations contained in the Istanbul Convention falling within the area covered by Article 83(1) TFEU<sup>8</sup> is extremely limited for the European Union, with the result that the act concluding that convention cannot be based on that provision.

As regards, in the second place, asylum and non-refoulement, although the Istanbul Convention contains only three articles relating to those matters, they form a separate chapter which cannot be regarded as incidental or extremely limited in scope, with the result that Article 78(2) TFEU<sup>9</sup> should form part of the substantive legal basis of the act concluding that convention.

In the third place, as regards its public administration, the European Union must ensure that the obligations imposed by the Istanbul Convention which fall within the scope of Article 336 TFEU<sup>10</sup> are fully satisfied, and that provision must therefore be one of the legal bases.

### *The division of the act concluding the Istanbul Convention into two separate decisions*

The question concerning the division of the act concluding the Istanbul Convention into two decisions is linked to the applicability of Protocol No 21 as regards Ireland, as a result of the identification of provisions falling within Title V of Part Three of the TFEU as legal bases for the conclusion of the envisaged agreement. In principle, Ireland does not take part in the adoption by the Council of measures falling under that title unless it notifies its wish to take part. On the basis of that protocol, Ireland intended not to take part in the conclusion, by the European Union, of the part

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<sup>6</sup> Under that provision, the European Union may establish minimum rules concerning, inter alia, the admissibility of evidence between Member States, the rights of individuals in criminal proceedings and the rights of victims of crime.

<sup>7</sup> That provision confers on the European Union the competence to establish measures to promote and support the action of Member States in the field of crime prevention.

<sup>8</sup> In accordance with that provision, European Union has competence to establish minimum rules concerning the definition of criminal offences and sanctions in, inter alia, the area of trafficking in human beings and sexual exploitation of women and children.

<sup>9</sup> That provision concerns the European Union's competences in the area of asylum, subsidiary protection and temporary protection.

<sup>10</sup> Relating to the Staff Regulations of Officials of the European Union and the Conditions of Employment of other servants of the Union.

of the Istanbul Convention relating to asylum and non-refoulement, while participating in the conclusion of other parts of that convention.

However, selective participation in a single measure covered by Protocol No 21 is precluded. Similarly, a division of the act concluding the envisaged agreement into two decisions in order to enable Ireland to participate in the adoption of one of the two decisions but not in the other is not authorised, even though each of the decisions concluding the agreement would concern measures falling within Title V of Part Three of the TFEU.

That being said, if it is established that different legal bases are applicable to an act concluding an international agreement, there may be an objective need to divide that act into two or more decisions. That may be the case, inter alia, if such a division is intended to take account of the fact that Ireland or the Kingdom of Denmark is not taking part in the measures envisaged in respect of the conclusion of an international agreement which fall within the scope, respectively, of Protocols No 21 and No 22, whereas other measures envisaged in respect of that conclusion do not fall within that scope. In the present case, since the substantive legal basis for the act concluding the envisaged agreement includes Article 336 TFEU, which does not fall within the scope of Protocols No 21 and No 22, an objective need to divide the act concluding the Istanbul Convention may be established.

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**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 or as to competence to conclude that agreement. 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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