Provisional text

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 11 March 2021(1)

Opinion procedure 1/19

Initiated following a request made by the European Parliament

(Request for an Opinion under Article 218(11) TFEU – Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) – Accession of the Union – External competences of the Union – Appropriate legal bases – Article 78(2) TFEU – Article 82(2) TFEU – Article 83(1) TFEU – Article 84 TFEU – Splitting of signature and conclusion decisions into two according to the applicable legal bases – Compatibility with the EU and FEU Treaties – Practice of 'common accord' – Compatibility with the EU and FEU Treaties – Admissibility of the request for an Opinion)

I. Introduction

1. 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.

2. This, unfortunately, is also true of the international agreement – namely, the Convention on preventing and combating violence against women and domestic violence was adopted by the Committee of Ministers of the Council of Europe on 7 April 2011 ('the Istanbul Convention') – which is the subject matter of the present request for an Opinion pursuant to the provisions of Article 218(11) TFEU. While that convention seeks to advance the noble and desirable goal of combating violence against women and children, the question of whether the conclusion of that particular convention would be compatible with the EU Treaties presents complex legal questions of some novelty which must naturally be examined from a legal perspective in a detached and dispassionate manner. The issue arises in the following way.

II. The background to the Istanbul Convention

3. In 1979, the United Nations adopted the Convention on the Elimination of All Forms of Discrimination against Women ('the CEDAW'). That convention was supplemented by recommendations drawn up by the CEDAW Committee, including General Recommendation No 19 (1992) on Violence against women, which in turn was updated by General Recommendation No 35 on gender-based violence against women (2017). Those recommendations specify that gender-based violence constitutes discrimination within the meaning of the CEDAW.

4. The Council of Europe, in a recommendation addressed to the members of that organisation, proposed for the first time in Europe a comprehensive strategy for the prevention of violence against women and the protection of victims in all Council of Europe Member States.

5. In December 2008, the Council of Europe set up a committee of experts, called the Group of Experts on Action against Violence against Women and Domestic Violence ('the Grevio'). That body, composed of representatives of the governments of Council of Europe Member States, was charged with the task of drawing up one or more binding legal instruments 'to prevent and combat domestic violence, including specific forms of violence against women, other forms of violence against women, and to protect and support the victims of such violence and prosecute the perpetrators'.

6. The Grevio met nine times and finalised the text of the draft Convention in December 2010. The Union did not participate in the negotiations. (2)

7. The Convention on preventing and combating violence against women and domestic violence was adopted by the Committee of Ministers of the Council of Europe on 7 April 2011 ('the Istanbul Convention'). It was opened for signature on 11 May 2011, on the occasion of the 121st Session of the Committee of Ministers in Istanbul. (3)

8. On 5 and 6 June 2014, the Council of the European Union, in its Justice and Home Affairs configuration, adopted conclusions inviting the Member States to sign, conclude and implement that convention.

9. The Commission subsequently submitted to the Council of the European Union on 4 March 2016 a proposal for a Council Decision on the signing of the Istanbul Convention on behalf of the European Union. The proposal specifies that the conclusion of that convention falls under both the competences of the Union and the Member States. Regarding the Union, the Commission's proposal provided for the signature of the Istanbul Convention by means of a single decision based on Articles 82(2) and 84 TFEU.

10. Together with that proposal for a Council decision authorising the signature, on behalf of the Union, of the Istanbul Convention, the Commission submitted to the Council a proposal for a single Council decision to authorise the conclusion, on behalf of the Union, of that convention. The legal basis proposed by the Commission was the same as that set out in the Commission's proposal on the signature, that is to say, it was also based on Articles 82(2) and 84 TFEU.

11. During the discussions on the draft decision in the Council's preparatory bodies, it emerged that the conclusion of the Istanbul Convention by the Union covering certain areas proposed by the Commission would not obtain the support of the required qualified majority of the members of the Council. It was therefore decided to reduce the scope of the Union's proposed conclusion of the Istanbul Convention simply to those competences which were considered by those preparatory bodies as falling within the exclusive competence of the Union. Consequently, the legal bases of the proposal were amended by deleting the reference to Article 84 TFEU and by adding Articles 83(1) and 78(2) TFEU to Article 82(2) TFEU. It was also decided to split the Commission's proposal for a Council decision to sign the Istanbul Convention into two parts and to adopt two decisions 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.

12. Those changes, made at the Committee of Permanent Representatives (Coreper) meeting on 26 April 2017, were approved by the Commission.

13. On 11 May 2017, the Council adopted two separate decisions relating to the signing of the Istanbul Convention, namely:

– 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). That decision mentions as substantive legal bases Articles 82(2) and 83(1) TFEU;

– 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). That decision indicates Article 78(2) TFEU as a substantive legal basis.

14. Recitals 5 to 7 of both decisions state that:

‘(5) Both the Union and its Member States have competence in the fields covered by the [Istanbul] Convention.

(6) 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 [Istanbul] Convention may affect common rules or alter their scope. This applies, in particular, to certain provisions of the [Istanbul] Convention 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 the [Istanbul] Convention does not affect common rules or alter the scope thereof.

(7) The Union also has exclusive competence to accept the obligations set out in the [Istanbul] Convention with respect to its own institutions and public administration.’

15. According to recital 10 of Decision 2017/865, ‘Ireland and the United Kingdom are bound by [Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ 2011 L 101, p. 1) and Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ 2011 L 335, p. 1)] and are therefore taking part in the adoption of this Decision’.

16. According to recital 10 of Decision 2017/866, ‘in accordance with Articles 1 and 2 of 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, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Decision and are not bound by it or subject to its application’.

17. Recital 11 of both decisions states that, ‘in accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application’.

18. In accordance with the above two decisions on the signature of the Istanbul Convention, that convention was signed on behalf of the Union on 13 June 2017.(4) However, no decision was adopted on the conclusion of the Istanbul Convention.

19. On 9 July 2019, the European Parliament requested, in accordance with Article 218(11) TFEU, an Opinion of the Court of Justice on the accession of the European Union to the Istanbul Convention. The request for an Opinion is worded as follows: (5)

‘[(1)(a)] Do Articles 82(2) and 84 TFEU constitute the appropriate legal bases for the Council act concluding the Istanbul Convention on behalf of the Union, or should that act be based on Articles 78(2), 82(2) and 83(1) TFEU[?]

[(1)(b)] Is it necessary or possible to split each of the two decisions on the signing and on the conclusion of the convention as a result of this choice of legal basis?

[(2)] Is the conclusion by the Union of the Istanbul Convention in accordance with Article 218(6) TFEU compatible with the Treaties in the absence of a common agreement of all the Member States giving their consent to being bound by the convention?’

III. The admissibility of the European Parliament’s request for an Opinion

20. There are two main ways in which international agreements concluded by the Union may be brought for consideration by the Court. One is the consideration of an international agreement by the Court in the context of its general jurisdictional mandate, such as in judicial review, enforcement actions, or preliminary ruling procedures. The second, which is relevant in the present case, is by virtue of the procedure laid down by Article 218(11) TFEU, under which the Court is specifically empowered, if so requested by a Member State, the European Parliament, the Council, or the Commission, to give an Opinion as to the compatibility with the Treaties of an international agreement, the conclusion of which is envisaged by the Union. (6)

21. Article 218 TFEU prescribe a procedure of general application concerning the negotiation and conclusion of international agreements which the Union is competent to conclude in the fields of its activity. (7) The final paragraph – Article 218(11) TFEU – provides for the important mechanism of an *ex ante* constitutional review of the proposed agreement. This mechanism is important from a legal perspective because, by virtue of Article 216(2) TFEU, international agreements concluded by the Union are binding on the EU institutions and on its Member States and thus are capable, in principle, of determining the legality of acts adopted by those institutions. Politically, such a mechanism is also important because the making of the request for an Opinion itself brings with it possible impediments to the formal conclusion of the agreement. (8)

22. Although the use of the Article 218(11) TFEU procedure remains relatively rare, the Opinions of the Court based on that provision have nonetheless generally been of considerable practical importance, not least because of the clarification which they have provided regarding the scope of the Union’s competences in the field of international law, international agreements and cognate matters. The Court’s Opinions have accordingly enunciated fundamental principles of external relations law, ranging from the exclusivity of Union competences to the principle of autonomy and its application in particular to international dispute settlements. Some of the Opinions of the Court have laid down constitutional principles of significance which go beyond the immediate questions raised or even the confines of EU external relations law. (9)

23. The rationale for the procedure was clearly explained by the Court, in Opinion 1/75, (10) namely:

‘to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the [EU]. In fact, a possible decision of the Court to the effect that such an agreement is, either by reason of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty could not fail to provoke, not only in a[n EU] context but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries.

For the purpose of avoiding such complications the Treaty had recourse to the exceptional procedure of a prior reference to the Court of Justice for the purpose of elucidating, before the conclusion of the agreement, whether the latter is compatible with the Treaty.’

24. As the Court has pointed out, (11) a possible judicial decision *after* the conclusion of an international agreement that is binding upon the European Union, to the effect that such an agreement is, by reason either of its content or the procedure adopted for its conclusion, incompatible with the provisions of the Treaties, would indeed inevitably provoke serious legal and practical difficulties, not only in the internal EU context, but also in the field of international relations and might give rise to adverse consequences for all interested parties, including third countries.

25. The Opinion which the Court is asked for in the present case requires it to consider important preliminary issues regarding the admissibility of the questions addressed to the Court in the context of this exceptional procedure.

A. Objections of inadmissibility raised by the parties

26. The admissibility of the request for an Opinion has been questioned by various parties in a number of respects.

27. First of all, with regard to part (a) of the first question, the Council, together with Ireland and the Hungarian Government, maintains that it is inadmissible as it is out of time. They contend that since the Parliament could have challenged the decisions to sign the Istanbul Convention and, on that occasion, the validity of the legal bases adopted, it can no longer refer the matter to the Court, since that would be tantamount to circumventing the rules relating to the time limits for bringing an action for annulment and, in so doing, would distort the subject matter of the Opinion procedure.

28. With regard to part (b) of the first question, the Council disputes its admissibility in so far as it concerns the signing of the Istanbul Convention on the ground that the decisions relating to the signature have become final.

29. The Council also claims the second question is inadmissible on the ground that it is hypothetical. Aside from the fact that that question is formulated in a general manner, it is also based on the premiss that the Council acted in accordance with a self-imposed rule consisting in waiting, in the case of a mixed agreement, until all the Member States have concluded such an agreement before the Union concludes it in turn, without the existence of such a rule of conduct having been established by the Parliament.

30. More generally, the Council, as well as the Spanish and Hungarian Governments, contest the admissibility of the application as a whole. They point out, first of all, that the decision-making process is still at a preparatory stage and, in particular, that it has not reached the stage where the Council has to seek the Parliament's agreement. Since the Parliament would thus still have the opportunity to submit its observations on the draft decision to conclude the Istanbul Convention, the request for an Opinion is inadmissible as premature.

31. In addition, the Council considers that the Parliament is, in reality, objecting to the fact that the conclusion procedure has been slow. The Parliament should thus have brought an action for failure to act under Article 265 TFEU. Since the Opinion procedure has a different purpose and cannot be used to compel another institution to act, the application should be dismissed as inadmissible on that ground also. The Spanish, Hungarian and Slovak Governments share that view.

32. Finally, the Council, together with the Bulgarian Government, Ireland, and the Greek, Spanish, Hungarian and Polish Governments, maintains that, through its request for an Opinion, the Parliament is, in fact, seeking to challenge the Council's decision to limit the scope of the Union's conclusion to the Istanbul Convention to provisions falling within the exclusive competences of the Union and, consequently, to challenge the exact division of competences between the Union and the Member States. Since the Opinion procedure can only deal with the validity of a conclusion decision, the request for an Opinion should thus be rejected as inadmissible.

B. Analysis

33. At the outset, it should be pointed out that, in view of the legal and political significance of the procedure laid down by Article 218(11) TFEU, as outlined above, the Opinion procedure should, in principle, be given a relatively broad scope. (12)

34. The questions which may be referred to the Court pursuant to that procedure may thus concern both the substantive or formal validity of the decision concluding the agreement, (13) subject, in my opinion, to three limits which are aimed, in essence, at ensuring that the Court will not answer a question that would be of no concrete interest for the conclusion of a specific agreement. (14)

35. First, the questions raised must necessarily relate to an international agreement the conclusion of which is, but for the triggering of the Article 218(11) procedure, imminent and reasonably foreseeable. (15) This follows from the very language of Article 218(11) TFEU, which speaks of the question of whether an 'agreement envisaged' is compatible with the Treaties. Accordingly, the Parliament (or, for that matter, any other qualified applicant referred to in Article 218(11)) would not, for example, be entitled to invoke the Article 218(11) TFEU procedure in order to ask the Court to rule, on a purely abstract or entirely hypothetical basis, on the question of whether the conclusion of a particular international agreement would offend EU law, where the conclusion of that agreement has never been envisaged or the Union has made clear that it will not conclude that agreement.

36. As a matter of principle, the questions asked may, however, relate to any possible scenario in relation to the conclusion of the envisaged agreement, provided that the purpose of the procedure is to prevent the complications which may arise from the invalidation of the act of conclusion of an international agreement. (16) Indeed, since that procedure is not adversarial and takes place in advance of the conclusion of the proposed agreement by the Union, the case-law suggesting that the Court of Justice should refrain from delivering advisory opinions on general or hypothetical questions is obviously not applicable as such. (17) As that form of *ex ante* review necessarily involves some hypothetical element, any conclusion to the contrary would be tantamount to depriving Article 218(11) TFEU of its general '*effet utile*'. It is only in the particular situation where certain elements necessary to answer the question posed are not yet known that, in my view, a question posed in an application may be declared inadmissible on the ground not that it is hypothetical, but rather that it is materially impossible for the Court to answer it in view of the state of negotiations or proceedings.

37. Second, the request must question the compatibility with the Treaties of the conclusion of such an agreement. (18) Given the importance of the objective pursued by that procedure, that is to say, to prevent the complications which may arise from the invalidation of the act of conclusion of an international agreement, for the purposes of the interpretation of the provision itself, (19) the question asked must therefore concern only elements which may have an influence on the validity of the act of conclusion. (20) As the Court held in Opinion 1/75 (OECD Understanding on a Local Cost Standard) of 11 November 1975 (EU:C:1975:145), the Opinion procedure 'must … be open for all questions capable … in so far as such questions give rise to doubt either as to *the substance or formal validity* of the [decision to authorise the conclusion, on behalf of the Union, of an international] agreement with regard to the Treaty'. (21) However, while a request for an Opinion may concern the question of whether an agreement should be concluded exclusively by the Member States, by the Union or by both, it is not for the Court in the course of an Opinion procedure to rule on the *precise delimitation* of the competences held by each. Indeed, in Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001 (EU:C:2001:664), the Court ruled that where the existence of competences belonging to both the EU and the Member States has been established in the same area, their extent could not, as such, have any bearing on the very competence of the Union to conclude an international agreement or, more generally, on that agreement's substantive or procedural validity in the light of the EU Treaties. (22)

38. Apart from those two material conditions, it is also necessary to take into account the existence of a formal condition. Where there is a draft agreement and where the Court is required to rule on the compatibility of the provisions of the envisaged agreement with the rules of the Treaty, the Court must have sufficient information on the actual content of that agreement if it is to be able to discharge its role

effectively. (23) If, therefore, the request does not contain the requisite degree of information regarding the nature and content of the international agreement, it must be declared inadmissible. (24)

39. The various objections of inadmissibility raised by the parties can now be examined in the light of those principles.

40. As regards the *first two exceptions* of inadmissibility, concerning respectively, on the one hand, the absence of challenge by the Parliament, at the signature stage, to the choice of Articles 78(2), 82(2) and 83(1) TFEU as legal bases and, on the other hand, the possibility of questioning the Court about the validity of the decisions to authorise the signature, on behalf of the Union, of the Istanbul Convention, the considerations underlying the adoption of the judgment of 9 March 1994, *TWD Textilwerke Deggendorf* (C−188/92, EU:C:1994:90), in so far as they relate to the general principle of legal certainty, (25) are, in my view, fully transposable by analogy to the Opinion procedure. As a result, since the 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. Therefore, in my view, part (b) of the first question should be declared inadmissible, but only in so far as it relates to the decisions to sign the Istanbul Convention.

41. In expressing that view, I do not overlook the fact that the Court held, in Opinion 2/92 (Third Revised Decision of the OECD on National Treatment) of 24 March 1995 (EU:C:1995:83) that 'the fact that certain questions may be dealt with by means of other remedies in particular by bringing an action for annulment … does not constitute an argument which precludes the Court from being asked for an opinion on those questions beforehand under [Article 218(11) TFEU]'. (26) This, however, does not mean that the Article 218(11) TFEU procedure can itself be used as a substitute for an action for annulment, in so far as the signature decisions are concerned, as those decisions have become final and any ordinary legal challenge would, accordingly, be well out of time.

42. As I have, however, already noted, as far as the present request for an Opinion is concerned, it is the decision to sign – as distinct from any decision to conclude the agreement – which is out of time. The Court has already observed that the decision 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. (27) This, in any event, is what standard principles of international treaty law provide. It follows, therefore, that any decision to authorise the conclusion of the Istanbul Convention on behalf of the Union remains open to challenge.

43. The *third objection* raised is that the second question is based on the unstated premiss that the Council wrongly believed that it was obliged to wait for all the Member States to conclude the Istanbul Convention before being authorised to do so. It is argued that the reliance on the Article 218(11) TFEU procedure for that purpose is thus founded on an unsubstantiated hypothesis and, accordingly, the request should be rejected as inadmissible.

44. In that regard, as explained above, it should be pointed out that questions addressed to the Court in the context of a request for an Opinion may relate to any possible scenario in relation to the conclusion of the envisaged agreement, provided that the purpose of the procedure is to prevent complications which may arise from the invalidation of the act of conclusion of an international agreement.

45. Admittedly, in an action for annulment, a plea based on breach of the Treaties resulting from a practice may lead to the annulment of the contested decision only if the applicant can establish that the decision-maker felt bound by the alleged practice, or, alternatively, considered that it was binding and, accordingly, that the practice was the reason for or the basis of that decision. (28) However, in the context of a request for an Opinion, no burden of proof is placed on the Member State or institution requesting that Opinion and any question can be raised provided that it relates to situations that might have occurred. (29) Indeed, the Opinion procedure is, by its very nature, designed to ascertain the Court's position on hypothetical situations, since it can only relate, as a matter of principle, to a decision to conclude an agreement that has not yet been adopted. Accordingly, the fact that the Parliament has not shown that the

Council would have felt bound by the practice in question is not a ground for the second question to be declared inadmissible.

46. As regards, the *fourth objection*, on the premature character of the request for an Opinion, it is worth recalling that Article 218(11) TFEU does not lay down any time limits in that regard. (30) The only temporal condition specified in that provision is that the conclusion of an agreement must be envisaged. It follows that a Member State, the Parliament, the Council or the Commission may obtain the Court's Opinion on any matter relating to the compatibility with the Treaties of the decision to be adopted in order to conclude an international agreement in so far as its conclusion is envisaged by the EU (31) and for as long as that agreement has not yet been concluded by the Union. Since a request for an Opinion must be considered admissible even when the process leading to the adoption of the decision to conclude that agreement is still at a preparatory stage, this plea of inadmissibility cannot be accepted.

47. As regards the *fifth objection*, the Council's argument that the Parliament should have brought an action for failure to act rather than a request for an Opinion, it must be stressed that the procedure provided for by Article 265 TFEU aims at having a European institution condemned for an unlawful abstention with regard to EU law. In the present case, even if there are indeed elements in the Court's file suggesting that the Parliament is seeking to speed up the conclusion of the Istanbul Convention process, the fact remains that none of the questions asked by Parliament relates to a possible failure to act. Therefore, the present request for an Opinion cannot be declared inadmissible on such a ground. (32)

48. As regards, the *sixth objection* of inadmissibility raised on the ground that the questions posed, in fact, concern the delimitation of competences between the Union and the Member States, it should be noted that this particular objection relates, at most, to the first question, part (a). It is based on the premiss that, since the answer that the Court will give to that question cannot possibly concern the validity of the decision to conclude the convention, it seeks, in fact, a determination of the precise division of competences between the Member States and the Union.

49. In that regard, it must be recalled that, as the Court has repeatedly stressed, certain irregularities regarding the choice of the relevant legal basis do not necessarily lead to the invalidity of the act in question. It must instead be shown that those deficiencies are likely to have an impact on the applicable legislative procedure (33) or on the competence of the Union. (34)

50. For example, in its judgment of 18 December 2014, *United Kingdom* v *Council* (C-81/13, EU:C:2014:2449, paragraph 67), the Court ruled that an 'error in the citations of the contested decision' (the omission of a legal basis among the others mentioned) was a purely formal one, which did not affect the validity of the decision at issue. Similarly, in the judgment of 25 October 2017, *Commission* v *Council (WRC-15)* (C-687/15, EU:C:2017:803), although the Court stressed the constitutional importance of legal bases, (35) it took care to verify that, in the circumstances of that case, the irregularity in question was likely to have an effect on the competences of the Commission and of the Council and on their respective roles in the procedure relating to the adoption of the contested act. (36) In particular, in paragraphs 55 and 56 of that judgment, while the Court held that the absence of any reference to a legal basis is sufficient to justify the annulment of the act in question for failure to state reasons, it nevertheless pointed out that the failure to refer to a specific provision of the Treaty – where others were mentioned – may, in certain cases, not constitute a substantial defect.

51. In the present case, it is true that the different legal bases referred to in part (a) of the first question, namely Articles 78(2), 82(2), 83(1) and 84 TFEU, provide for the application of the ordinary legislative procedure, and will all lead to the adoption of a decision to conclude an agreement based on the same procedure, namely, the one provided for in Article 218(6)(a)(v) and (8) TFEU.

52. Admittedly, on the one hand, Articles 82(3) and 83(3) TFEU provide for the possibility for a Member State which considers that an act falling under these legal bases affects fundamental aspects of its legal system, to refer the matter to the European Council. On the other hand, those bases fall within the domain for which Protocols No 21 and No 22 to the TEU and the TFEU are likely to apply.

53. However, first, since the referral to the European Council only has the effect of suspending the legislative procedure, this option offered to Member States to refer the matter to the European Council does not appear to be of such a nature as to be irreconcilable with the procedures provided for in Articles 78 and 84 TFEU. Second, the Court has already held that Protocols No 21 and No 22 are not capable of having any effect whatsoever on the question of the correct legal bases to apply. (37) That view has been recently reaffirmed by the Court, as regards Protocol No 22, in Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592). (38)

54. In substance, therefore, while those protocols may certainly have an impact on the voting rules to be followed within the Council regarding the adoption of the act in question, they do not impact on the choice of its legal bases.(39) Indeed, the fact that part of an act falls under Part Three, Title V of the TFEU certainly has the consequence that the relevant provisions of that act are not binding, save in particular cases, on either Ireland or the Kingdom of Denmark. This, however, does not in itself mean that the area concerned by the provisions of that act falling within the scope of Part Three, Title V of the TFEU must be considered to be predominant, with the effect of making it compulsory to mention the corresponding legal bases. This only means that the voting rules within the Council provided for in those protocols will have to be followed when the provisions concerned are adopted, even if no legal bases referring to Part Three, Title V of the TFEU are mentioned.

55. In that context, one may thus fairly wonder whether part (a) of the first question actually seeks to ascertain the precise point of delimitation between the competences of the Union and those of the Member States. If the answer to that question were in the affirmative that would mean that part of the question would fall outside the scope of the Opinion procedure based on Article 218(11) TFEU.

56. It may be noted, however, that in order to answer part (a) of the first question, not only will the legal bases mentioned by the Parliament in its question have to be examined, but also the matter of whether any other legal basis will have to be included in the decision to conclude an agreement. Since it cannot be ruled out that a legal basis other than those mentioned by the Parliament may be relevant, it cannot be ruled out either that the Court's answer to the questions raised may have an impact on the validity of the decision to authorise the Union to conclude the Istanbul Convention. (40) Therefore, there is no reason, in my view, to declare part (a) of the first question inadmissible on the ground that it relates to issues unrelated to the validity of the decision to conclude the Istanbul Convention.

57. Regarding part (b) of the first question and the second question, in addition to the fact that these questions have nothing to do with the distribution of competences between the Union and the Members States, I consider, in any case, that given that the Court has never carried out an in-depth examination of whether those obligations might have an influence on the content of the decision to conclude an international agreement, those questions should be answered, precisely in order to rule on those issues. (41)

58. Contrary, however, to the assertion advanced by certain parties, the second question cannot be reinterpreted as one relating purely to the question of whether the Council is entitled to wait until all the Member States have concluded the Istanbul Convention. (42) Indeed, even if such a practice were to be considered as incompatible with the Treaties, that circumstance would not lead to the nullity of the decision to conclude that convention since, to repeat, tardiness in that matter is not, as a matter of principle, a cause of invalidity. In order to meet the admissibility criteria, that question is necessarily to be understood exactly as it is formulated, that is to say, as relating to whether the decision to conclude the Istanbul Convention would be compatible with the Treaties if it were to be adopted before that convention had been concluded by all Member States.

59. I therefore consider that all the questions referred to the Court by the Parliament should be regarded as admissible, except part (b) of the first question, but only in so far as it relates to the decision to sign the Istanbul Convention.

IV. Part (a) of the first question: the appropriate legal bases regarding the conclusion of the Istanbul Convention

60. By part (a) of its first question, the Parliament asks the Court to rule on whether Articles 82(2) and 84 TFEU are the appropriate legal bases for the Council's decision on the conclusion of the Istanbul Convention in the name of the Union or if that act must be based on Articles 78(2), 82(2) and 83(1) TFEU.

61. The Parliament notes that the Commission's proposal for a decision to authorise the signature, on behalf of the Union, of the Istanbul Convention and its proposal for a decision to authorise the Union to conclude the Istanbul Convention mentioned Article 218 TFEU as a procedural legal basis, and Articles 82(2) and 84 TFEU as substantive legal bases. However, when the Council adopted the decision to authorise the signature of the Istanbul Convention, the Council modified those substantive legal bases, referring to Articles 78(2), 82(2) and 83(1) TFEU.

62. In view of the objectives of the Istanbul Convention, which – as the provisions of Articles 1, 5 and 7 and Chapters III and IV thereof make clear – is to protect women who are victims of violence and to prevent such violence, the Parliament queries whether the Commission was justified in identifying Articles 82(2) and 84 TFEU as the two predominant elements of that convention. The Parliament therefore wonders whether the Council would be entitled to abandon Article 84 TFEU as a substantive legal basis and, instead, add Articles 78(2) and 83(1) TFEU, as it did when it adopted the decision to authorise the signature of the Istanbul Convention.

63. The Parliament has doubts in particular with regard to Article 78(2) TFEU, since this legal basis only covers Articles 60 and 61 of the Istanbul Convention. It queries whether those two provisions can be regarded as an autonomous and predominant element of that convention, or whether Articles 60 and 61 of that convention are not simply the transposition, to the specific field of asylum, of the general concern to protect all women who are victims of violence. If that were the case, those two provisions of the Istanbul Convention would be ancillary in nature and would not require the addition of a specific legal basis.

64. As regards Article 83(1) TFEU, the Parliament notes that this provision confers competence in criminal matters on the Union only in certain areas which do not include violence against women as such. Such violence could therefore be criminalised at EU level when it relates to trafficking of human beings, the sexual exploitation of women and children, and organised crime, which are the primary focus of the Istanbul Convention as such. Moreover, since the Member States have retained competence for the bulk of substantive criminal law covered by the Istanbul Convention and the elements for which the Union has competence appear to be secondary in nature, the addition of a specific legal basis related to criminal law would not be necessary.

65. It thus follows from the above that the first question relates to the choice of legal bases and not, as certain arguments developed by some parties may suggest, to the exclusive or non-exclusive nature of the Union's competence to conclude the Istanbul Convention. Admittedly, the exclusive or non-exclusive nature of certain competences will be examined, but only in so far as is necessary to answer that question. It may be convenient in that respect to make some remarks regarding the choice of methods before examining the content of the Istanbul Convention.

A. Methodological remarks

66. According to the Court's settled case-law, the choice of the legal bases 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 measure. (43)

67. If an examination of an EU act demonstrates that it pursues a twofold purpose or that it comprises two components and if one of these is identifiable as the main one, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component. (44)

68. Exceptionally, if it is established that the act simultaneously pursues several objectives or has several components which are inextricably linked, without one being incidental to the other, such that various provisions of the Treaties are applicable, such a measure will have to be founded on the corresponding different legal bases. (45) Nonetheless, recourse to dual legal bases is not possible where the procedures laid down for each legal basis are incompatible with each other. (46)

69. Hence, it is the objectives and components of an act that determine its legal basis – or in some instances, its multiple legal bases – and not the exclusive or shared nature of the competences held by the Union in relation to that act. (47) As I propose to explain later, it is true that the exclusive or shared nature of those competences can certainly, from the point of view of EU law, exert an influence on the extent, of the conclusion of an international agreement and will therefore circumscribe the available legal bases. However, the choice of the legal bases to be retained among those corresponding to the competences exercised will depend solely on the objectives and components of the act at stake.

70. As Advocate General Kokott has observed, such an approach should not be applied to the delimitation of the competences respectively held by the Union and by the Member States. Indeed, 'if … the [Union] is competent only in respect of certain components of a proposed act, while other components come within the competence of the Member States, … the [Union] cannot simply declare that it is competent for the entire act by way of a main-purpose test. Otherwise it would undermine the principle of limited conferred powers …'. (48)

71. Similar concerns might be raised in regards to the determination, among the competences held by the Union, of those on which the adoption of the act in question must rely and, therefore, to the determination of the relevant legal bases on which to adopt an act. The centre of gravity test leads to the applicable procedure for the adoption of an act being determined solely on the basis of the main legal bases. By definition, therefore, this approach implies to look only to the main competence(s) being exercised. It is important, accordingly, that vital procedural guarantees which are inherent in the exercise of certain other competences – such as unanimous voting by the Council – are not thereby circumvented. Indeed, whereas a legal provision might have been mandatorily adopted in isolation on the basis of a particular legal basis, when inserted into an act containing other provisions, that provision might be adopted on a different legal basis – which, for example, prescribe a different voting rule. This, in effect, might lead to strategies aimed at introducing legal riders (*cavalier législatif*). (49)

72. The Court has nevertheless systematically referred to the 'predominant objectives and components' test (also called 'centre of gravity test') in the existing case-law. For example, the Court once again pointed out in its judgment of 4 September 2018, *Commission* v *Council (Agreement with Kazakhstan)* (C−244/17, EU:C:2018:662, paragraph 38), that if 'a decision comprises several components or pursues a number of objectives, some of which fall within the [Common Foreign and Security Policy], the voting rule applicable 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 one(s) corresponding to the main objective(s) or component(s) of the act. (50) In addition, the risk of circumventing certain procedural rules, mentioned above, has been cut down since the entry into force of the Treaty of Lisbon, which has considerably reduced the particularities of certain procedures.

73. In certain judgments, starting with that of 10 January 2006, *Commission* v *Council* (C−94/03, EU:C:2006:2, paragraph 55), the Court has admittedly emphasised that a legal basis could serve not only to determine the applicable procedure and to verify that the Union was indeed, at least in part, competent to sign the agreement in question, but also to inform third parties about the extent of the EU competence exercised (51) and the scope of the act in question. (52) It might therefore be tempting to infer from that line of case-law that, in order to assume such a role, the 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 provision(s) of that agreement. (53)

74. Such an approach would, however, be at variance with the approach that the Court has so far adopted in order to avoid any conflict of legal bases. (54) For example, in Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592) – where the Court ruled that the decision to authorise the conclusion by the Union of the international agreement at issue should have two legal bases – the Court referred again to the abovementioned case-law. (55)

75. In addition, while these matters are, of course, of fundamental importance to the internal order of the Union (and its division of competences between the Union and its Member States) it is not of any direct concern to third States, since by virtue of Article 27 of the Vienna Convention on the Law of Treaties of 23 May 1969 (United Nations Treaty Series, vol. 1155, p. 331) – a treaty which itself codifies customary international law with regard to international agreements and is binding on the European Union (56) –, 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. (57)

76. Regarding the Member States, while it may indeed be of interest to them to be fully cognisant of the extent of the competences exercised by the Union at the time of the conclusion of an agreement, the legal bases of an act are not the only means of conveying this information. Indeed, it is settled case-law that the obligation to state reasons, provided for in Article 296(2) TFEU, is assessed in particular in the light of the content of the act as a whole, (58) especially its recitals. (59) Consequently, while it is important that the Member States should be able to determine what powers were exercised by the Union when it concluded a particular agreement, the fact that it is not possible to deduce this information from the legal bases actually chosen as the basis for the adoption of the decision authorising the conclusion of such an agreement does not appear to be decisive.

77. In that context, although there is much to be said for the contention that the legal basis of an act should faithfully reflect the competences exercised by the Union to adopt that act, it may nevertheless be observed that such an approach would be not entirely consistent with the state of the case-law. (60)

78. Accordingly, in the rest of this Opinion, I propose 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 such legal bases. Those legal bases must be those which are required by the predominant or, at least, by the main purposes or components of the international agreement. 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 concern objectives or components which are in substance ancillary or incidental.

79. It should also be noted that, according to the Court's case-law referred to above, the objectives and components to be taken into account are those of the act of the Union in question. With regard to the conclusion of an international agreement, it is therefore the objectives and precise content of the decision to authorise such a conclusion, and not the international agreement itself, that will prove decisive in determining the legal bases to be retained.

80. It is true that, in practice, the purpose and content of that decision will be, for the most part, the same as those of the envisaged agreement, since such an act is by its very nature intended to mark the consent of the Union to be bound by that agreement. (61) This, however, is not always the case. Indeed, it is important to bear in mind the existence of a significant difference of perspectives between international law and EU law in that regard, which is crucial to the present case.

81. From the point of view of international law, in the case of mixed agreements, the EU and the Member States are considered to accede to them jointly and not in parallel. (62) Consequently, unless a

reservation relating to the distribution of competences is made – which supposes that the agreement does not rule out such a possibility – the conclusion by the Union of an agreement entails an obligation on its part to apply it as a whole. (63) Issues such as the legal bases chosen to conclude such an agreement or the mixed nature of the agreement are considered to be issues internal to the European Union legal order, (64) which in themselves cannot prevent liability on an international level in the event of unjustified non-execution. (65)

82. However, from the point of view of EU law, when the Union accedes to an international convention, it does so to the extent of the competences exercised to adopt the decision to conclude that agreement. (66) Admittedly, it must exercise its exclusive external competences, but according to the Court's settled case-law, the Union is not obliged to exercise its shared competences when it concludes an agreement. (67) Accordingly, depending on the shared competences that the Union will choose to exercise on this occasion, the 'centre of gravity' *of the decision to conclude* the agreement might shift, with the effect of changing the applicable legal bases. A legal basis reflecting, for example, an exclusive competence, may thus find itself outweighed in importance to a certain extent by another legal basis reflecting a shared competence which the Union has chosen to exercise.

83. Since the decision authorising the conclusion of an international agreement on behalf of the EU might have a more restrictive purpose and content than those of that agreement, that decision may have to be adopted pursuant to a single legal basis where, for example, if the Union had exercised all the competences that it had hitherto shared with the Member States, the use of two or more legal bases might have been necessary, since that decision could have thus covered some other important objectives and components.

84. In addition, where the Union chooses not to exercise the competence that would have covered the main objectives and components of the international agreement at issue, certain objectives and components that would have been otherwise considered, from the point of view of the decision to authorise that conclusion, as incidental, will become predominant. That is why it is important, in my view, to distinguish the objectives and components of the agreement from those of the decision authorising the conclusion of an international agreement, which may be more limited.

85. That is the core issue in the present case, since it is clear that the Council intends the Union only to proceed to a partial conclusion of the Istanbul Convention. It is therefore appropriate to consider not the entirety of the Istanbul Convention, but rather only those parts of that convention which, from the point of view of EU law, will be binding on the Union.

86. In the context of an action for annulment, this is an issue which does not raise any particular difficulty, since the Court will carry out its review *ex post*, once the legislative act in question has been adopted and, therefore, once the competences exercised are known.

87. However, in the course of a request for an Opinion, where, as in the present case, a draft decision does not yet exist, the fact that the Council may exercise a greater or lesser number of shared competences might make the determination of the legal bases somewhat more complex, or even impossible, since the Court is being asked to address this question in a prospective manner.

88. Admittedly, it might seem appropriate to start by examining, for each part of the agreement, whether it falls within the exclusive competence of the Union, in so far as these competences will necessarily have to be exercised by the Union. However, once that analysis has been carried out, how can it be determined what will be the centre of gravity *of the decision to conclude* that agreement, since, as explained above, this centre will also depend on the modified shared competences that the Union will voluntarily choose to exercise? Indeed, unless the Council has already voted on a draft decision and the Court is questioned in parallel with the transmission of this draft to the Parliament, the extent of the shared competences that will be exercised cannot be taken for granted. (68)

89. In my opinion, in this very specific situation – which involves an issue which has never previously been examined by the Court – it is necessary to infer from the request (or, at least from the circumstances of the case) which particular shared competences will most likely be exercised by the Union. Otherwise, as I have explained in the part of this Opinion dealing with admissibility, I do not see how the Court could rule, as requested by the Parliament, on what legal basis the decision to conclude the Istanbul Convention must be based. (69) In those circumstances, however, the answer that the Court will formulate will therefore be valid only if the scenario envisaged is actually realised.

90. In the present case, it is clear from the wording of the question put by the Parliament that it is based on the premiss that, for the adoption of the decision authorising the conclusion, on behalf of the Union, of the Istanbul Convention, the Union will exercise, at the very least, the competences it holds in matters of, first, judicial cooperation in criminal matters and, second, asylum and immigration. The relevance of this premiss is, moreover, confirmed by the content of the decisions authorising the signature, on behalf of the Union, of the Istanbul Convention, which may be regarded, despite the case-law referred to in paragraph 42 of the present Opinion, as anticipating, to a certain extent, the competences that will be exercised at the time of conclusion.

91. However, such a premiss needs to be, at least, compatible with the current distribution of competences. This requires an assessment of whether, apart from those competences, the agreement deals with other EU competences that need to be exercised, since they are exclusive. As I have explained, that implies taking into account not only the competences that the Union intends to exercise, but also the competences which, because they belong exclusively to the EU, will necessarily have to be exercised if it wishes to conclude this agreement.

92. In that regard, it should be recalled that Article 3(1) TFEU sets out the list of competences which are, by nature, exclusive. In addition to this list, Article 3(2) TFEU specifies that the 'Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope'. (70)

93. As the Court's case-law makes clear, there is a risk that common EU rules might be adversely affected by international commitments, or that the scope of those rules might be altered, which is such as to justify an exclusive external competence of the European Union, where those commitments fall within the scope of those rules. (71)

94. A finding that there is such a risk does not presuppose that the area covered by the international commitments and that of the EU rules fully coincide. (72) In particular, such international commitments may affect EU rules or alter their scope when the commitments fall within an area which is already covered to a large extent by such rules. (73)

95. Contrary to the Commission's argument, it cannot be inferred from the Court's case-law that a holistic approach should be taken to determine whether, in the areas covered by an agreement, the Union has exclusive or shared competence. On the contrary, since the Union has only conferred competences, any competence, especially exclusive competence, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the international agreement envisaged and the EU law in force. (74)

96. In order to determine whether the agreement is capable of undermining the uniform and consistent application of some EU common rules and the proper functioning of the system which they establish, that analysis must take into account the areas covered by EU rules and by the provisions of the envisaged agreement which will be binding on the Union, since they correspond to competences that the Union has chosen to exercise at the time of the adoption of the decision to conclude that convention, as well as the foreseeable future development of those rules and those provisions. (75)

97. So far as those issues are concerned, Ireland argues that the Parliament did not, in its application, carry out a comprehensive and detailed analysis of the impact of the Istanbul Convention on secondary EU law. (76) Indeed, the Court has held that it is, for the purposes of such an analysis, for the party concerned to provide evidence to establish the exclusive nature of the external competence of the EU on which it seeks to rely. (77)

98. It is, however, significant that the reasoning of that line of case-law was contained in judgments delivered in the context of an action for annulment. In those cases, the Court is called upon to rule on the basis of the submissions exchanged between different parties. Such a requirement does not apply to the request for an Opinion procedure, which is marked by a spirit of collaboration between the Court, the other institutions of the Union and the Member States and aims at preventing complications from arising at a later stage. (78) Indeed, since that procedure is both *ex ante* and not adversarial, arguments based on the adversarial, *ex post* system of review entailed in an annulment action have little relevance in this context. Consequently, I consider that the fact that the Parliament has not carried out a comprehensive and detailed analysis of the impact of the convention on secondary EU law is not, in itself, material and that it is for the Court to carry out such an analysis.

99. However, it should be recalled that, according to the Court's case-law, the adoption of an international agreement will not affect common rules where both the provisions of EU law and those of the international agreement in question lay down minimum requirements. (79) Accordingly, even when an international agreement covers the same areas as common EU rules, that case-law suggests that the Court will not find that EU rules – and thus the shared competence – are affected where minimum standards are prescribed by both. (80)

100. In the case of the Istanbul Convention, Article 73 provides that 'the provisions of this Convention shall not prejudice the provisions of internal law and binding international instruments which are already in force or may come into force, under which more favourable rights are or would be accorded to persons in preventing and combating violence against women and domestic violence'.

101. In that context, therefore, in order for a competence shared by the Union with the Member States to be regarded as an exclusive one (that is to say, one that the Council will be obliged to exercise), it would be necessary to establish that the Union has already adopted common rules in this area which, first, do not lay down minimum standards and, second, that these standards are likely to be affected by the conclusion of the Istanbul Convention.

102. Regarding the two decisions authorising the signature, on behalf of the Union, of the Istanbul Convention, it is possible to have doubts as to whether the Council was correct in considering that the Union will be obliged to exercise those competences by virtue of the third situation mentioned in Article 3(2) TFEU.

103. On the one hand, as the Republic of Poland has sought to emphasise, Articles 82(2) and 83(1) TFEU, which concern judicial cooperation in criminal matters, simply provide for the adoption of minimum rules. Therefore, the common rules adopted in that area can validly lay down minimum standards only.

104. On the other hand, as far as Article 78(2) TFEU is concerned – which confers on the Union a competence in asylum and immigration – it seems at first glance that the common rules adopted by the Union in the field of asylum and immigration policy lay down only minimum rules or, where they do not, these rules, in my view, are unlikely to be affected by the Istanbul Convention provisions.

105. In that regard, it should indeed be noted that the Istanbul Convention contains three provisions that may be relevant to asylum and immigration policy, namely, Articles 59 to 61 thereof, which form Chapter VII of that convention.

106. With regard to Article 59 of the Istanbul Convention concerning the residence status of women victims of violence, the rules established by the Union regarding residency provide only minimum

requirements. (81) In particular, as Advocate General Bot mentioned in *Rahman and Others* (C−83/11, EU:C:2012:174, point 64), Directive 2004/38 (82) introduces minimum harmonisation, since it aims in particular to recognise a right of residence for the family member of a resident of the Union in certain situations without excluding that a right of residence may be granted in other cases.

107. It is also true that certain judgments regarding Directive 2004/38, such as *NA* (83) or *Diallo*, (84) might have given rise to doubts as to the minimum nature of some of the requirements contained in that directive. Those decisions must, however, be viewed in their proper context. Indeed, since, in a preliminary reference procedure, the Court has no jurisdiction either to interpret national law or to apply EU law to a given case, when it gives judgment it always does so by reference to the situation envisaged in the question(s) submitted, which may cover only certain aspects of the dispute. Consequently, when the Court is asked about the interpretation of a particular provision of a directive, even if this directive provides that it lays down only minimum standards, the Court will most often take a stand, depending on how the question is asked on the interpretation that should be given to the provision at stake irrespective of the possibility for Member States to adopt higher standards. (85) The answer given in this type of situation is therefore without prejudice to the possibility for States to grant, on the sole *basis of their national law*, a right of entry and residence on more favourable conditions. (86) Accordingly, once placed in the context of the preliminary ruling mechanism, the solutions adopted in *NA* (87) or *Diallo* (88) are to be understood not as forbidding Member States from issuing a residence permit in the cases referred to, but rather as not requiring Member States to do so. (89)

108. As for Article 60 of the Istanbul Convention, it provides that signatory parties must, in essence, recognise that gender-based violence against women can be recognised as a form of persecution within the meaning of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary or subsidiary protection.

109. Here, again, certain directives, mainly those referred to as ‘first–generation directives’, mention that they only set out minimum rules. (90) Admittedly, the more recent directives specify that Member States may introduce or retain more favourable standards only ‘in so far as those standards are compatible with [those] Directive[s]’, which might suggest that more favourable standards in regards to certain provisions might not be adopted. (91) However, those directives grant procedural rights or guarantees or, alternatively, oblige Member States to take into account certain circumstances without excluding the possibility that others may also be granted or taken into account. In particular, none of the grounds for the exclusion from refugee status or for cessation or revocation of subsidiary protection laid down in those instruments appears likely to contravene the provisions of the Istanbul Convention.

110. EU law does, of course, harmonise *to some extent* the conditions for third-country nationals or stateless persons by which such persons may qualify for refugee status or persons who otherwise need international protection, together with the content of such status. (92) Those conditions are, however, such that it seems possible to apply them in accordance with Article 60 of the Istanbul Convention. In particular, with regard to refugee status, I note that Article 2(d) of Directive 2011/95 (93) defines the notion of refugee as referring to any third-country national who is outside the country of nationality and is unable or unwilling to avail himself or herself of the protection of his or her state of nationality, owing to a well-founded fear of persecution for reasons, in particular, of ‘membership of a particular social group’, a concept which is defined very broadly in Article 10 of the same directive, as referring in particular to any group whose ‘members of that group share an innate characteristic’. (94) It further states that ‘gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group’.

111. Finally, with regard to Article 61 of the Istanbul Convention, one may observe that it provides that the parties must take the necessary measures to respect the principle of non-refoulement, an obligation that is already provided for in EU law. (95)

112. In any case, it does not seem to me necessary in the present case to decide definitively whether the Union has, as the Council considers, exclusive competence to conclude the Istanbul Convention in those two areas by virtue of Article 3(2) TFEU and consequently whether the Union is obliged to exercise those competences. Indeed, even if it turns out that, in the absence of any risk of EU common rules related to that area being affected by the conclusion of the Istanbul Convention, such competences will remain shared, the Council would nonetheless remain free to exercise them, which will in principle be the case. (96) As I have explained above, the question referred by the Parliament is indeed implicitly based on the premiss that the Union will exercise, at the very least, the competences it holds in matters of asylum and immigration and judicial cooperation in criminal matters.

B. Analysis of the objectives and components of the Istanbul Convention

113. According to its preamble, the objective of the Istanbul Convention is to 'create a Europe free from violence against women and domestic violence'. As stated in Article 1 of that convention, the achievement of such an objective is divided into five sub-objectives, which are namely, to:

– 'protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;

– contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;

– design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;

– promote international co-operation with a view to eliminating violence against women and domestic violence;

– provide support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.'

114. With regard to the content of the Istanbul Convention, this convention comprises 81 articles divided into 12 chapters, worded as follows:

– 'Chapter I – Purposes, definitions, equality and non-discrimination, general obligations';

– 'Chapter II – Integrated policies and data collection';

– 'Chapter III – Prevention';

– 'Chapter IV – Protection and support';

– 'Chapter V – Substantive law';

– 'Chapter VI – Investigation, prosecution, procedural law and protective measures';

– 'Chapter VII – Migration and asylum';

– 'Chapter VIII – International co-operation';

– 'Chapter IX – Monitoring mechanism';

– 'Chapter X – Relationship with other international instruments';

– 'Chapter XI – Amendments to the Convention';

– ‘Chapter XII – Final clauses’.

115. Chapter I of the Istanbul Convention contains provisions relating to the aims and definitions and the relationship of that convention to equality and non-discrimination as well as general obligations. In particular, it defines key terminology used throughout the text (97) and obliges parties to condemn all forms of discrimination by ensuring that the principle of equality between men and women is applied in their legal orders, and it is made clear that positive action may be taken. (98) All parties are also obliged to ensure that State actors refrain from engaging in any act of violence and to exercise due diligence so that acts of violence committed by non-State actors are prevented, investigated and punished, and that reparation is provided for such acts. (99) Finally, that chapter states that the parties shall, inter alia, promote policies of equality between women and men and the empowerment of women. (100)

116. Chapter II obliges the parties to implement a comprehensive policy of response to violence against women, by establishing effective cooperation between all relevant agencies, institutions and organisations, also involving, where appropriate, all relevant actors, such as government agencies, the national, regional and local parliaments and authorities, national human rights institutions and civil society organisations. (101) Parties are also required to collect disaggregated relevant statistical data and endeavour to conduct population-based surveys at regular intervals on cases of all forms of violence covered by the scope of the Istanbul Convention. (102)

117. Chapter III details the parties’ obligations in the area of prevention. Basically, parties are obliged to take a multifaceted approach, comprising awareness-raising, the inclusion of gender equality and the issue of violence in formal education at all levels through appropriate teaching material and curricula, and extending the promotion of non-violence and gender equality to informal education contexts, sports, culture, leisure and the media. (103) Parties must ensure that appropriate training is provided to professionals dealing with victims and perpetrators. (104) Measures also need to be put in place to provide preventive intervention and treatment programmes, (105) and to encourage the private sector to participate in the elaboration and implementation of those policies and in drawing up material and voluntary standards. (106)

118. Chapter IV defines the obligations of the parties with respect to the protection and support of victims. (107) Those obligations include that of providing adequate and timely information on available support services and legal measures in a language they understand (108) and to ensure the availability of general support services, such as health care and social services, legal and psychological counselling, financial assistance, housing, education, training and assistance in finding employment, (109) and specialist services, including shelters, cost-free and permanently reachable telephone hotlines, specific medical and forensic support to victims of sexual violence and consideration of the needs of child witnesses. (110) Moreover, measures need to be put in place to encourage reporting of violence by any witness to the commission of acts of violence or person who has reasonable grounds to believe that such an act may be committed or further acts of violence are to be expected, as well as rules on the conditions under which professionals’ reporting of violent acts or expected violent acts does not breach their general obligation to maintain confidentiality. (111)

119. Chapter V on substantive law contains the most detailed provisions. First, it requires the parties to provide victims with adequate civil remedies against perpetrators of physical or psychological violence, including compensation; to ensure that forced marriages may be voidable, annulled or dissolved without undue financial or administrative burden placed on the victim; and to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of the Istanbul Convention are taken into account. (112) Second, that chapter sets out a list of conduct that requires a criminal law response, namely psychological violence through threat or coercion, stalking, physical violence, sexual violence including rape, forced marriage, female genital mutilation, forced abortion or sterilisation, and sexual harassment. (113) That chapter also obliges parties to criminalise the aiding, abetting and attempted commission of the offences, as well as causing third persons to commit these crimes. (114) Third, Chapter V states that the parties must take measures to ensure that ‘honour’ cannot be invoked as a justification for any of those crimes (115) and that offences established in accordance with

that convention shall apply irrespective of the nature of the relationship between victim and perpetrator. (116) Fourth, it obliges the parties to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with that convention, as soon as that offence has a link with their territory or one of their nationals. (117) Fifth, it obliges the parties to provide for adequate and dissuasive sanctions (118) and to treat a list of situations as aggravating circumstances. (119) Finally, Chapter V allows the parties to take into account sentences passed by another party in relation to the offences established in accordance with that convention when determining the sentence (120) and prohibits the establishment of mandatory alternative dispute resolution processes. (121)

120. Chapter VI addresses procedural law and protection measures during investigations and judicial proceedings. (122) Parties must ensure inter alia that law enforcement agencies offer prompt protection to victims, including the collection of evidence, (123) and carry out an assessment of the lethality risk and the seriousness of the situation. (124) The availability of firearms to perpetrators needs to be given special attention. Legal orders must provide for the possibility to adopt emergency barring and restraining or protection orders, without placing undue financial or administrative burden on the victim. (125) Any breach of those orders issued shall be subject to effective, proportionate and dissuasive criminal or other legal sanctions. Parties shall ensure that evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary (126) and that the most severe offences must not be made wholly dependent upon a report or complaint filed by a victim. (127) The parties must also provide for the possibility for governmental and non-governmental organisations and domestic violence counsellors to assist and/or support victims, at their request, during investigations and judicial proceedings concerning the offences established in accordance with the Istanbul Convention. In that chapter, that convention sets down an open list of measures to protect the rights and interests of victims, including their needs as witnesses at all stages of investigations and judicial proceedings. The special needs of child victims and witnesses need particularly to be taken into account. (128) Lastly, the parties must provide for the right to legal aid (129) and the statute of limitations must be construed in such a way as to allow for the efficient initiation of proceedings after a victim has reached the age of majority, for the most serious offences. (130)

121. Chapter VII provides that the parties shall also take the necessary legislative steps to prevent the residence status of victims from being affected by measures to combat violence (131) and that gender-based violence against women as a form of persecution and as a form of serious harm give rise to complementary/subsidiary protection within the meaning of the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951. (132) Moreover, gender-sensitive asylum procedures need to be put in place by the parties. That chapter also aims to ensure that in all circumstances the principle of non-refoulement is applied to victims of violence against women. (133)

122. Chapter VIII is dedicated to ensuring international cooperation between the parties in the implementation of the Istanbul Convention. In particular, the parties need to ensure that claims can be brought in the victim's country of residence for crimes committed in the territory of another party to this convention. (134) In situations where a person is at immediate risk of violence, parties should inform one another, so that protection measures can be taken. (135) In addition, it entitles, in particular, claimants to be informed of the final result of the action taken under that chapter by organising exchanges of information on this subject between the parties to this convention. (136)

123. Chapter IX sets up the mechanism for monitoring the implementation of the Istanbul Convention whose implementation is entrusted to the Grevio.

124. Chapter X clarifies that the Istanbul Convention does not affect obligations of the parties under other international instruments, and that parties are free to conclude other international agreements on the matters covered by the convention to supplement or strengthen its provisions.

125. Chapter XI sets out the procedure for making amendments to the Istanbul Convention.

126. Chapter XII contains the final clauses. It specifically mentions that the Istanbul Convention is explicitly open for signature by the European Union. (137) That chapter also specifies that reservations are only possible in limited cases and under certain conditions. (138)

127. As noted by the Commission in its proposal for a Council decision 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, (139) the conclusion by the Union of the Istanbul Convention is likely to concern a large number of competences which it holds alone or jointly with the Member States. Accordingly, a large number of legal bases under the TFEU can theoretically be relevant, such as 'Article 16 (data protection), Article 19(1) (sex discrimination), Article 23 (consular protection for citizens of another Member State), Articles 18, 21, 46, 50 (free movement of citizens, free movement of workers and freedom of establishment), Article 78 (asylum and subsidiary and temporary protection), Article 79 (immigration), Article 81 (judicial cooperation in civil matters), Article 82 (judicial cooperation in criminal matters), Article 83 (definition of EU-wide criminal offences and sanctions for particularly serious crimes with a cross-border dimension), Article 84 (non-harmonising measures for crime prevention), and Article 157 (equal opportunities and equal treatment of men and women in areas of employment and occupation)'. To those bases, it might be added, while not cited by the Commission, Article 165 TFEU (development of quality education), Article 166 TFEU (implementation of a vocational training policy) or Article 336 TFEU (conditions of employment of EU officials and servants).(140)

128. However, as I have explained, 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 Union should only be based on the legal basis or bases corresponding to what the centre of gravity of that decision *will be*.

C. Determination of the main objectives and components of the decision to authorise the conclusion of the Istanbul Convention on behalf of the Union

129. If the answer to part (a) of the first question simply depended on the objectives and content of the Istanbul Convention, it would have been sufficient to point out that although this convention has several components, the objective of eliminating gender discrimination is nonetheless clearly the main objective and component. (141) Indeed, as the Explanatory Report to the convention states, that convention aims, as flows from its preamble, at recognising the existence of 'a link between eradicating violence against women and achieving gender equality in law and in fact'. (142) It further states that 'the definition of "violence against women" makes it clear that for the purpose of the convention, violence against women shall be understood to constitute a violation of human rights and a form of discrimination'. (143) Consequently, in the absence of a more specific legal basis, the relevant legal basis would appear to be Article 3(3) TEU, which, read in conjunction with Article 19 TFEU, gives competence to EU to 'take appropriate action to combat discrimination based on sex'.

130. As mentioned above, in order, however, to determine the legal basis which serves as the basis for the decision to authorise the conclusion of the Istanbul Convention on behalf of the Union, it is necessary to have regard not only to the objectives and components of that convention, but also to have regard to those objectives and components more specific to that decision itself.

131. In the present case, it is more or less taken for granted that the Council does not wish the Union to exercise competences other than those corresponding to the provisions referred to in the Parliament's question, which, as it happens, do not include Article 3(3) TEU or Article 19 TFEU.

132. Accordingly, the decision to authorise the conclusion of the Istanbul Convention, on the behalf of the Union, may only be based on those provisions if, at a minimum, it turns out that the Union must necessarily exercise the corresponding external competence.

133. In that respect, it should be noted that the elimination of gender discrimination is not one of the areas set out in Article 3(1) TFEU for which the Union has been expressly conferred exclusive competence. As

far as the various cases of exclusive external competence envisaged in Article 3(2) TFEU is concerned, only the third situation envisaged in the second paragraph of that provision (namely, that the Union has exclusive external competence for the conclusion of an international agreement, with regard to the provisions of the latter, which are likely to affect common EU rules) appears to be relevant.

134. As explained previously, since the Istanbul Convention lays down only minimum rules, for exclusive competence to be conferred on the Union on account of the existence of common rules liable to be affected by the conclusion of that convention, it is therefore necessary that those common rules should not be confined to laying down minimum standards. However, the common rules adopted in the field of the fight against sex discrimination, which arise from Directive 2000/78, (144) Directive 2004/113, (145) Directive 2006/54 (146) or Directive 2010/41, (147) provide only minimum rules since they all specify that Member States may introduce or maintain more favourable provisions.

135. In view of the current content of the common rules on fight against sex discrimination, it must be noted that the Union does not hold an external exclusive competence in that field. The Union is therefore not obliged to exercise its competence in the fight against sexual discrimination to conclude the Istanbul Convention. (148) Since, in so far as the question raised is based on the premiss that the Union would not exercise, in principle, other competences apart from those relating to asylum and judicial cooperation in criminal matters, Article 3(3) TEU or Article 19 TFEU are not appropriate legal bases to adopt the decision to conclude the Istanbul Convention on behalf of the Union.

136. In the light of this, I propose now to examine whether there are legal bases which, while not entirely covering that convention, are nevertheless likely to cover important parts of it, while at the same time corresponding to competences that the Union will have or intends to exercise at the time of the conclusion of that convention. Indeed, the fact that the Union must exercise competences other than those corresponding to the legal bases mentioned by Parliament in its questions is not in itself sufficient for them to be taken into account for this purpose; it is also necessary that those competences cover components of the Istanbul Convention of at least the same importance as those covered by the legal bases mentioned by Parliament.

137. To that end, I will start by examining whether there are competences other than those envisaged by the Parliament in its question that seem sufficiently relevant and that the Union will be obliged to exercise to conclude the Istanbul Convention.

D. On the existence of legal bases other than those mentioned by Parliament in its question which correspond, on the one hand, to competences that the Union would be obliged to exercise and, on the other hand, to objectives and components of the Istanbul Convention that are likely to be considered at least as important as those covered by the bases mentioned by Parliament

138. Among the different competences identified in paragraph 127 of the present Opinion likely to be concerned by the Istanbul Convention, only four appear to be sufficiently relevant to justify a more in-depth examination, namely, Article 165 TFEU (development of quality education), Article 166 TFEU (implementation of a vocational training policy), Article 81 TFEU (judicial cooperation in civil matters) and Article 336 TFEU (conditions of employment of the Union's officials and servants).

On the aspects of the Istanbul Convention relating to education and vocational training

139. According to Article 6 TFEU, the Union only has a supporting competence in educational and vocational training matters. Such competence cannot, by its very nature, be pre-empted by the Union and it follows that the Union is never obliged to exercise it.

On the aspects of the Istanbul Convention relating to judicial cooperation in civil matters

140. Under Article 81(1) TFEU, judicial cooperation in civil matters having cross-border implications falls within the competences that the Union shares with the Member States. The second sentence of that

provision specifies that such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. (149) Article 81(2) TFEU sets out an exhaustive list of objectives that the measures that might be adopted by the Union may pursue.

141. On the basis of that provision, the Union has adopted various rules. Some, such as Council Directive 2003/8/EC, which aims at improving access to justice in cross-border disputes, establish only minimum standards. (150) Similarly, Article 1(2) of Directive 2008/52 (151) specifies that that directive does not apply to rights and obligations which are not at the parties' disposal under the relevant applicable law. Therefore, that directive does not exclude the possibility that the Member States may prohibit the use of mediation in certain areas. (152)

142. However, other instruments contain rules that clearly do not only lay down minimal prescriptions. (153) In particular, the Court has already ruled, regarding the establishment of mechanisms for the recognition of judicial decisions, that the Union has acquired external competence. (154)

143. In so far as Article 62 of the Istanbul Convention provides that signatory parties shall cooperate to enforce relevant civil and criminal judgments rendered by the judicial authorities of the parties, including protection orders, the Union will be obliged to exercise at last its exclusive external competence for judicial cooperation in civil matters in respect of certain provisions of the convention, such as Article 62(1)(a).

On the aspects of the convention relating to the determination of conditions of employment of its officials and servants

144. Pursuant to Article 336 TFEU, the European Parliament and the Council shall, acting by means of regulations in accordance with the ordinary legislative procedure and after consulting the other institutions concerned, lay down the Staff Regulations of Officials of the European Union and the Conditions of Employment of other servants of the Union.

145. Admittedly, the conditions of employment by the Union of all of its staff do not relate to the areas referred to in Articles 3 and 6 TFEU. Accordingly, the Union shares that competence with the Member States, pursuant to Article 4(1) TFEU. However, it should be noted that that competence has been pre-empted by the adoption of Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (155) and that the Union is therefore to be considered as having acquired under Article 3(2) TEU exclusive external competence in the matter.

146. It follows that, in addition to the legal bases mentioned by the Parliament, it is also necessary to examine Articles 81 and 336 TFEU to determine on what legal basis or bases the decision to authorise, on behalf of the Union, the conclusion of the Istanbul Convention should be adopted.

147. In regards to competences other than the four previously examined or those envisaged by the Parliament in its question, I take the view that, even if certain provisions of the Istanbul Convention fall within these competences, those provisions are not likely to influence the centre of gravity of any decision by the Union to conclude that convention, for the reasons I have just stated. This is either because the Union is not obliged to exercise those competences or because the provisions in question may be regarded, in the circumstances, as being ancillary in nature.

E. Final assessment: on the relevance of the legal bases mentioned by the Parliament and of the ones previously identified as corresponding both to competences to be exercised and as covering sufficiently relevant objectives and components of the Istanbul Convention

148. Here it seems important at the outset once again to stress that which makes this case so specific, namely, that the Union will not exercise all of the competences it shares with the Member States. In particular, it seems that the Union will not have to exercise the competence that would have been

considered as covering the objectives and overriding components of the Istanbul Convention, namely, the fight against discrimination based on gender. (156)

149. As a result, other possible legal bases – which would otherwise have been incidental – may become relevant. However, it should be borne in mind that they only partially cover the objectives and components of the Istanbul Convention. It is, therefore, as I have explained, by comparison with the other possible bases, and not in an absolute manner, that it is necessary to determine what is or are the relevant legal basis or bases.

150. In its question, the Parliament asks whether the decision to authorise the conclusion of the Istanbul Convention can be validly based, as envisaged by the Council, by reference to Articles 82(2) and 84 TFEU or whether it should rather be based on Articles 78(2), 82(2) and 83(1) TFEU. In addition to those legal bases, which must be assumed to correspond to competences that the Union has chosen to exercise, it is also necessary to take into account, for the reasons mentioned above, Articles 81 and 336 TFEU. I propose to start with Articles 82(2), 83(1) and 84 TFEU, which are all included in Chapter 4 of Title V of Part Three of the TFEU and concern judicial cooperation in criminal matters, and with Article 81(1) TFEU.

151. It might first be observed that Article 82(2) TFEU confers competence on the Union to establish minimum rules aiming at facilitating the mutual recognition of judgments and judicial decisions in criminal matters and to establish or strengthen police and judicial cooperation in criminal matters having a cross-border dimension. The second subparagraph of that provision specifies, however, that those measures shall concern, in the absence of a prior decision of the Council identifying in advance any other specific aspects of criminal procedure, the mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure or the rights of victims of crime. (157)

152. As I mentioned earlier, Chapter VIII of the Istanbul Convention aims at establishing international judicial cooperation oriented towards the criminal field. The provisions set out in that chapter are therefore likely to fall within the scope of Article 82(2) TFEU. (158) In view of the fact that the Member States have largely retained exclusive competence in criminal matters, I consider that, of the possible legal bases, Article 82(2) TFEU constitutes, comparatively speaking, and in the absence of any desire on the part of the Union to exercise the competence it holds in matters of equal treatment, a legal basis likely to cover the legal centre of gravity of what will be the decision authorising the conclusion of the Istanbul Convention on behalf of the Union. In that regard, it is perhaps significant that the three institutions which submitted written observations − the European Parliament, the Council and the Commission − are unanimous in considering that Article 82(2) TFEU is one of the appropriate substantive legal bases for the adoption of the decision authorising the Union to conclude the Istanbul Convention.

153. Under those conditions, Article 81(1) TFEU cannot, in my opinion, be one of the legal bases for the decision to authorise the conclusion of the Istanbul Convention on behalf of the Union. Indeed, it is clear from the general scheme of that convention that the objectives and components thereof that are likely to fall within judicial cooperation in civil matters are ancillary to the establishment of an international cooperation in criminal matters. Indeed, it is clear from the provisions of Chapter VIII (Articles 62 to 65), as well as from the general scheme of that convention, that it seeks to prioritise a criminal response to violence against women and that the international cooperation envisaged is, above all, criminal in nature. In those circumstances, I consider that the provisions of the Istanbul Convention relating to the establishment of judicial cooperation in the field of civil law are essentially ancillary to the criminal cooperation which the same convention seeks to establish.

154. As for Article 83(1) TFEU, that provision confers competence on the Union to establish minimum rules concerning the definition of criminal offences and sanctions in the fields of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. The second subparagraph, however, exhaustively sets out the list of areas concerned, namely, terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. While the third subparagraph provides that the

Council may adopt a decision to expand that list, it does not appear that it has made use of this possibility to date. (159)

155. In view of the list of areas currently covered by Article 83(1) TFEU, it appears that the substantive criminal law provisions contained in the Istanbul Convention do not fall within the competence of the Union, but have rather been retained by the Member States. In my opinion, the mere fact that, in some cases, the violence covered by that convention may come under the umbrella of trafficking in human beings or of the sexual exploitation of women and children is not *in itself* sufficient to permit the conclusion that certain provisions of the Istanbul Convention are likely to fall within the competence that the Union derives from Article 83(1) TFEU. Any recourse to that legal basis thus seems to me, in any case, to be excluded.

156. Regarding Article 84 TFEU, the purpose of that provision is to enable the Union to establish measures to promote and support action by the Member States in the field of crime prevention, excluding any harmonisation of laws and regulations. The question to be asked, therefore, is whether the Istanbul Convention will require the Union, if it were to conclude this convention, to take supporting measures.

157. In that respect, that convention provides for several obligations for the signatory parties to undertake a certain number of preventive and protective actions, which fall directly on the signatory parties. However, in my opinion, Article 84 TFEU should not be read in too restrictive a sense as permitting only the adoption of measures whose addressees would be the Member States, but rather as permitting also, as is clear from its wording, the adoption of measures in support of State action, that is to say, in addition to those adopted by States, but without excluding that it may directly concern natural persons.

158. As regards the importance of the objectives and components of the Istanbul Convention which relate to the prevention of crime, since, as I have already explained, the Union will not exercise all its competences and in particular its competence in the fight against discrimination based on gender, the appreciation of the main character of a legal basis becomes a relative one. In other words, the predominant or main character of certain objectives and components concerned must be assessed in comparison with the other objectives and components of the Istanbul Convention which will be, because the Union has chosen to exercise the corresponding competences, binding on the Union.

159. Under those circumstances, since the Council intends to restrict the scope of the legal obligations subscribed to by the Union at the time of the conclusion of the Istanbul Convention, the objectives and components of the decision to authorise the conclusion, by the Union, of this convention, likely to come under Article 84 TFEU, seem to me to be as predominant as those covered by Article 82(2) TFEU. Besides, both the judicial cooperation in criminal matters and the prevention of the violence against women are each the subject of an entire chapter of that convention.

160. With respect to Article 78(2) TFEU, the latter refers to the competence of the Union to establish a common asylum system. It is true that, as pointed out by the Parliament, the Istanbul Convention contains only three articles which deal with migration and asylum. Article 59 of that convention obliges the parties to provide in their national legislation for the possibility for migrant women victims to acquire an autonomous residence status, while Articles 60 and 61 thereof respectively require, in essence, that the parties recognise violence against women as a form of persecution and examine applications for refugee status on the basis of a gender-sensitive interpretation and respect the principle of non-refoulement of victims of violence against women.

161. It should, however, be noted that, first, those three provisions nevertheless form a separate chapter, which illustrates that the Istanbul Convention attaches as much importance to those issues as it does to judicial cooperation or preventive measures. Second, those provisions, contrary to most of the provisions in respect of which the Union has competence, do not correspond to the law currently in force in the Union. As matters stand, EU law does not generally provide that the obligation to take account of violence against women as one of the forms of persecution that may give rise to refugee status and the adoption of such an express obligation might have important practical implications. Third, and above all, it should be

borne in mind that, since the Council envisaged a conclusion limited to certain competences, a very large number of the provisions of the Istanbul Convention will not, from the point of view of EU law, be binding on it.

162. In this context, I consider that Article 78(2) TFEU should be among the legal bases of the decision to conclude the Istanbul Convention on behalf of the Union since it covers objectives and components which, viewed at least comparatively with the other objectives and components that this decision will have, should be considered as predominant. Even if it could be said that certain objectives or components of that convention might fall within an exclusive competence of the Union which I have not mentioned, these can really, at best, be of an ancillary nature only.

163. Finally, with regard to the conditions of employment by the Union of all of its staff, it seems obvious to me that, normally, the mere fact that an international agreement is also likely to concern the agents of the Union is not sufficient to justify the mention of Article 336 TFEU as legal basis: it is necessary that the application of this agreement to those agents constitutes the objective or the main component of the decision to conclude that agreement.

164. In this case, however, in so far as the Union does not intend to exercise its competence in the fight against gender discrimination, I note that the other legal bases retained will only very partially cover that agreement. An important part of the objectives and components of the Istanbul Convention, in particular those aimed at criminalising certain conduct, will fall within the exclusive competence of the Member States. The obligations that the Union will have to assume, if it persists in its intention to make a limited accession, will in fact be quite limited. In those circumstances, it seems to me that the objectives and components of that convention that may be covered by Article 336 TFEU will, from the Union's point of view, be comparatively just as important as the objectives and components covered by Articles 78(2), 82(2) and 84 TFEU. Indeed, with regard to its staff, the Union's accession to the Istanbul Convention will have full effect. Consequently, the obligations which the ratification of this Convention will entail for the Union in respect of its staff will be broader *ratione materiae* than those arising, in respect of nationals of the Union, from the exercise of its other competences. In those circumstances, it seems to me that limited accession creates a special situation where the civil service component cannot be considered as ancillary to the other competences.

165. It is true that, according to the case-law of the Court, the adoption of an act must in principle be based on a single legal basis. But, as explained above, as soon as the Union intends to opt for a limited adhesion, by renouncing its competence in the area of combating discrimination based on gender, an accumulation of legal bases appears inevitable due to the fragmentation of the other competences. (160) In addition, those legal bases all provide for the same procedure with regard to the exercise of internal competences, namely the ordinary legislative procedure, which, with regard to the exercise of external powers, leads, in accordance with Article 218 TFEU, to the application of the same voting rules. Those legal bases and the exercise of the Union's external competence are therefore fully compatible.

166. In the light of the foregoing, I would therefore propose 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 Union to proceed to that conclusion must be based on Articles 78(2), 82(2), 84 and 336 TFEU.

V. The first question, part (b): whether the authorisation to conclude the Istanbul Convention can be given by means of two separate decisions

167. Part (b) of the first question raised by the Parliament relates essentially to whether if, as a consequence, inter alia, of the choice of the legal bases, the authorisation to conclude the Istanbul Convention by the Union were to be given by means of two separate decisions, such an authorisation would in turn be invalid.

168. The Parliament has noted that the reason given for adopting two separate decisions at the signing stage was that Articles 60 and 61 of the Istanbul Convention fell within the field of the common policy on asylum, subsidiary protection and temporary protection, referred to in Article 78 TFEU. This would have created particular difficulty with regard to the application of Protocol No 21, inasmuch as it provides that Ireland is not bound by the measures taken in that field or subject to their application and therefore does not participate in their adoption, save where it agrees so to participate. The Parliament considers, however, that the concerns voiced in relation to Protocol No 21 are unfounded since in the event that the Union were to conclude the Istanbul Convention, Ireland would then be bound by that conclusion in respect of all the competences exercised by the Union by virtue of that convention. For my part, however, I cannot agree, as that argument amounts to saying that in the event that this happened, the potential impact of Protocol No 21 would fall away since those provisions of that convention largely deal with common rules to which Ireland has agreed.

169. From the outset, I note that that question asked by the Parliament concerns the formal future validity of the decision to conclude the Istanbul Convention.

170. In that 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. One may therefore accordingly ask: what constitutes an essential formal requirement for that purpose?

171. As I have explained previously, those requirements include procedural and formal requirements which are likely to exert an influence on the content of the act concerned (161) or, with regard to the obligation to state reasons, to give rise to confusion as to the nature or scope of the contested act. (162) Accordingly, in order for the adoption of two separate decisions – rather than just one – to be contrary to EU law, it is necessary to examine, first, whether that which might be termed as the 'splitting procedure' infringes a rule or a principle and, second, whether this rule or principle can be considered as 'essential' in that sense.

172. With regard to the existence of such a rule or principle, it may be noted that none of the provisions set forth in the Treaties or in the Council's internal rules of procedure states a requirement which prohibits splitting the decision to authorise the conclusion of an international agreement into two separate decisions.

173. Admittedly, Article 218(6) TFEU refers, with regard to the procedure for the conclusion of an agreement, to the adoption by the Council of a decision to authorise such a conclusion. It is clear, however, that the use of the indefinite article 'a' refers to the general concept of 'decision', which designates the usual form taken by an act of the Council or the Commission which is not a text of general scope. Therefore, this does not refer to the concept, used in civil law countries, of instrumentum (form) as opposed to the negotium (substance). Read in its proper context, one must therefore doubt whether the drafters thereby intended by the mere use of the indefinite article to exclude the possibility that such a decision might take the form of two separate acts.

174. One may also struggle to see how dividing a decision to authorise the conclusion of an international agreement into two different acts could infringe Article 17(2) TEU or Article 293 TFEU. While both provisions concern only the legislative procedure, (163) it flows from the location of Article 218 within the TFEU – that provision appears in the Title V of Part Five (which is devoted to the Union's external action) and not in Title I of Part VI, Chapter 2, Section 2, as the legislative procedure does – together with the content of that provision, that the procedure for concluding international agreements is specific and special. As a matter of fact, not only are the prerogatives of the different institutions in each of those procedures different, but the terminology used in the Treaties is also different. For example, Article 218(3) TFEU provides for the procedure to commence, with regard to the signature of an international agreement, with a 'recommendation', whereas Article 294(2) TFEU mentions that, in the legislative procedure, the procedure begins with a 'proposal'. (164)

175. In addition, even if one were to consider that one of those provisions could be regarded as setting out a requirement, it does not seem to me that it could be considered to be 'essential' in the sense of Article 263 TFEU.

176. In this context, the only rule or principle likely to constitute an essential procedural or formal requirement – and, therefore, which would prevent the Council from splitting a decision to authorise the conclusion of an international agreement in two different acts – is simply that of respecting the prerogatives of the other institutions and of the Members States as well as the applicable voting rules, (165) since those rules are not at the disposal of the institutions themselves. (166)

177. Accordingly, for example, the Court ruled in its judgment in *Commission* v *Council*, (167) commonly referred to as the 'hybrid act judgment', that the Council and the representatives of the governments of the Member States cannot merge into one decision an act authorising the signature of an agreement between the Union and third States or international organisations and an act on the provisional application of that agreement by the Member States. As the Court pointed out, this is because Member States have no competence to adopt the first decision and, conversely, the Council has no role to play, as an institution of the Union, in the adoption of the act concerning the provisional application of a mixed agreement by the Member States. The latter act remains a matter for the domestic law of each of those States. (168) The Court moreover observed that that practice might have had consequences on the voting rules applied since the first act would have to be adopted, in accordance with Article 218(8) TFEU, by a qualified majority of the Council, whereas the provisional application of a mixed agreement by the Member States implies, as a matter for the domestic law of each of those States, a consensus of the representatives of those States, and therefore their unanimous agreement. (169)

178. In the present case, however, 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 raise similar concerns to those identified by the Court in the hybrid act judgment.

179. 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 Union.

180. 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 been applied. (170) As it happens, however, in the present case, for all the reasons I have earlier set out in the course of the examination of admissibility, all the legal bases concerned lead to the application of the same procedure.

181. Admittedly, it flows from the answer to the part (a) of the first question that the Union's signature – and, should it come to pass, the ultimate conclusion – of the Istanbul Convention implied and implies that the Union will exercise certain competences falling under Part Three, Title V of the TFEU. It follows, therefore, that the adoption of the decision to authorise the conclusion of that convention by the Union, as the latter is envisaged by the Parliament, must be considered as falling under Union competences covered by Protocols No 21 and No 22. Contrary, however, to what has been contended by the Parliament, the division of the conclusion of that convention into two separate acts will have the effect of respecting − rather than infringing − the applicable voting rules and the special position of Ireland as vouchsafed by Protocol No 21. (171)

182. In that regard, obviously, the adoption of two decisions is required when an act pursues several objectives or has several components, without one being incidental to the other, and these different bases are irreconcilable with each other, as they lead to the application of different voting rules. (172) In my view, it is also true that the adoption of several separate acts will be required when an act includes components that may fall, at least partially, within the scope of Protocols No 21 and No 22 and, for other, not. Indeed, because of Protocol No 21, Ireland does not participate in the adoption by the Council of proposed measures under Part Three, Title V of the TFEU unless that Member State expresses its wish to participate. (173) In accordance with Protocol No 22, the Kingdom of Denmark will not take part in the adoption by the Council of proposed measures pursuant to Part Three, Title V of the TFEU and is not bound by those, unless, after their adoption, it decides to implement them. (174)

183. Given that the Kingdom of Denmark does not take part in the adoption by the Council of any measures falling under Part Three, Title V of the TFEU, and Ireland only takes part in it if it expresses its intention to do so, whenever an act of the Union is to be adopted pursuant to several legal bases, some of which come under Part Three, Title V of the TFEU and others under other provisions of that Treaty, it might be necessary to split that act into several decisions.

184. In the present case, admittedly, the competences to be exercised or envisaged to be exercised by the Union all fall within Part Three, Title V of the TFEU. Consequently, the Kingdom of Denmark will not be bound by either of those decisions and will not participate in the vote for the adoption of either of those two decisions. Protocol No 22 is therefore not likely to change the applicable voting rules.

185. With regard to the situation of Ireland, the Parliament considers that, to the extent that the agreement would be largely covered by common rules which Ireland would have accepted, this Member State would necessarily be bound by the future agreement and, consequently, obliged to participate in the vote.

186. As I have already indicated, for my part, however, I cannot agree. Not only does it emerge from the answer to the first question that the secondary legislation of the Union does not fully cover the areas corresponding to the competences which the Union will be obliged to exercise in order to conclude the convention in question and the competences envisaged by Parliament in its request, but, in my view, the fact that Ireland has already agreed to participate in the adoption of certain items of EU legislation does not oblige it to do so in respect of the conclusion of an international agreement which would have the same object. This, in my view, flows from Article 4a of Protocol No 21, which provides that the provisions of the protocol 'apply … *also* to measures proposed or adopted pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union amending an existing measure by which they are bound'. (175) Accordingly, in so far as the conclusion of the Istanbul Convention might affect certain existing measures in the field of asylum, as stated in the course of the examination of part (a) of the first question, it seems plain that, by virtue of Protocol No 21, Ireland could decide not to be bound by the decision to authorise the adoption of the Istanbul Convention and therefore might not participate in the vote regarding that issue.

187. Admittedly, in Opinion 1/15, the Court held that the application of Protocols No 21 and No 22 was not such as to affect the voting rules within the Council. (176) Yet the reasoning in that case must be understood by reference to the circumstances at issue in that case. Indeed, in that case, Ireland and the United Kingdom had notified their wish to participate in the adoption of the relevant decision, so that, in accordance with Article 3 of Protocol No 21, there was no need to apply the voting rules laid down in Article 1 of that protocol. As regards Protocol No 22, the Court held, in substance, that, having regard to the content of the envisaged agreement, the Kingdom of Denmark would not be bound by the provisions of that agreement and that, consequently, whatever the legal basis adopted, the Kingdom of Denmark would not take part in the adoption of that decision. (177)

188. It may be noted here that, contrary to the arguments advanced at the hearing by the Commission, the fact the Union has an exclusive competence in that situation by virtue of Article 3(2) TFEU cannot have the effect of excluding the application of Protocol No 21. Indeed, if that were the case, Article 4a of Protocol No 21 would be devoid of any real meaning since, in my opinion, the purpose of that provision is precisely to specify that the protocol also applies when the Union has exclusive competence because the measure envisaged is likely to modify existing legislative acts.

189. Even for the provisions of the Istanbul Convention that do not modify an existing measure, I believe that Ireland's agreement is still necessary. Although Article 4a of Protocol No 21 refers to a measure that has the effect of modifying an existing one, the fact remains – as is emphasised by the use of the term 'also' – that even where a measure is not going to modify or amend an existing act, Article 1 of that protocol nonetheless applies as soon as the measure envisaged contains provisions falling under Part Three, Title V of the TFEU.

190. It is true, of course, that in so far as Ireland has agreed to be bound by certain acts of Union legislation, it could not then proceed to conclude a convention or other international agreement which

would undermine the effectiveness of that same legislation. The converse, however, is not true. The fact that it has agreed to be bound by those EU legislative instruments does not mean that Ireland then would be obliged to take part in the adoption of an act concluding a convention relating to the area covered by Part Three, Title V of the TFEU. Any such conclusion would be contrary to the clear wording of Protocol No 21.

191. While it is clear that if the Istanbul Convention entered into force for the Union it will impact on EU legislation in the field of asylum, the effect of Protocol No 21 is that, judged from the perspective of EU law, Ireland will not be bound by that convention in respect of all the competences exercised by it at the time of the conclusion of that convention unless it also manifests its intention to be so bound. Consequently, if Ireland agrees to be bound by the decision of the Union to authorise the conclusion of the Istanbul Convention only in respect of certain provisions of that convention, the adoption of two separate decisions is accordingly required.

192. The fact, moreover, that Ireland has already concluded the Istanbul Convention does not seem to me to be such as to call into question the foregoing analysis. (178) This is because the consequences produced by that conclusion are not the same as if Ireland were to agree to be bound by the decision of the Union to conclude that convention. In particular, if Ireland agrees to be bound by the Union's accession to that convention, this will have the consequence, on the one hand, that even if that Member State were ever to denounce that convention in accordance with Article 80 thereof, it will remain bound in respect of matters falling within the competence of the Union. On the other hand, that Member State may not wish to be bound by the decision to be taken by the Union in so far as, depending on the extent of the accession, that decision could override the reservations expressed by that Member State.

193. In those circumstances, depending on Ireland's intentions, not only would the adoption of two decisions be valid, but this approach would be appropriate and might even be legally necessary.

194. In those circumstances, I would propose that the Court should reply to the Parliament that the conclusion of the Istanbul Convention by the Union by means of two separate acts is not of a nature to render those acts invalid.

VI. On the second question

195. By its second question, the Parliament asks whether the EU's decision to conclude the Istanbul Convention would be valid if it were adopted in the absence of a common agreement of all the Member States to their consent to be bound by that convention.

196. In that regard, the Parliament acknowledges 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. It considers, however, that for the Council to wait until all the Member States have concluded that agreement before the Union does (a practice designated by the Parliament as the practice of 'common accord') goes beyond such cooperation. The Parliament maintains that that would in practice amount to requiring unanimity within the Council in order to adopt an international agreement despite the existence of the qualified majority rule. Moreover, such a practice would be tantamount to transforming the decision to authorise the conclusion of an international agreement by the Union into a hybrid act.

197. At the hearing, the Council seemed to admit that, in the case of a mixed agreement, its general practice is most often to wait for the conclusion by the Member States of that agreement (or, at least, until they confirm that they will conclude that agreement) before submitting the decision authorising the Union to conclude that agreement to a vote. The Council argues, however, that it does not consider itself bound by that practice, but that such a standby position is fully justified in the case of the conclusion of the Istanbul Convention.

198. In this context, it should first be recalled that when the European Union decides to exercise its competences, they must be exercised in a manner which conforms with international law. (179)

199. Under international law, the signature of an international agreement by an entity does not, in principle, establish its consent to be bound and, consequently, does not commit it, in principle, to conclude that agreement, nor even necessarily to invoke its own constitutional procedure (by, for example, seeking appropriate legislative or parliamentary approval) for authorising such a conclusion. The only obligation incumbent on such parties is that provided for in Article 18 of the Vienna Convention on the Law of Treaties of 23 May 1969, (180) namely, to act in good faith and to refrain from acts which would defeat the object or purpose of the agreement.

200. From the perspective of EU law, save as otherwise provided, the institutions are not obliged to adopt an act of general application. Nor are they obliged to do so within a certain period of time. In the case of the conclusion of an international agreement, since the Treaties do not lay down any time limit for the Council to adopt a decision in this regard and as this institution enjoys, in my view, a large margin of discretion to take that decision (181) – even where the Union has already signed that agreement – I consider that the Council may postpone its decision for as long as it deems necessary in order to take an informed decision.

201. Contrary 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.

202. 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. As I have already explained, 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. (182) 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.

203. 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. (183) 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.

204. In a case of this kind, it may autonomously establish, at the most, a duty of abstention. (184) In any case, since the duty of sincere cooperation also works to the benefit of the Member States, in that it requires the Union to respect the competences of the Member States, (185) the Union cannot rely on it to oblige them to conclude an international agreement.

205. In this context, 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 inexorable consequence of the principle of distribution of competences according to the internal constitutional law of the Union.

206. So far as the present case is concerned, it is agreed that, to conclude the Istanbul Convention, the Union will not exercise certain shared competences and, in particular, the one relating to the fight against gender discrimination. As a result, a significant number of obligations under that convention will fall

within the competence of the Member States. As it happens, several Member States have indicated that they have encountered serious difficulties with regard to conclusion at national level. All of this means that the Council is entitled to take a cautious and prudent approach regarding the conclusion of that agreement.

207. In that regard, it has sometimes been argued that it would not be legally acceptable for the Council to wait for the 'common agreement' of the Member States to conclude a mixed agreement, since the Union could solve any difficulty encountered simply by expressing a reservation in respect of the allocation of competences between the Union and the Member States. In the particular case of the Istanbul Convention, however, Article 78(1) thereof provides that no reservations are permitted except in the cases set out in Article 78(2) or (3). Neither of those two provisions provide for the possibility of the Union making a declaration of competence by means of a reservation in that manner.

208. Several parties to the proceedings argue nonetheless that, notwithstanding the provisions of the Convention, the Union could make a declaration of competence, as they argue that this would not in fact constitute a reservation within the meaning of international law. Such a declaration of competence would not, according to those parties, constitute a reservation because it would pursue a different purpose. They say a declaration merely reflects an objective legal situation, namely, that a party to an international agreement lacks the full capacity to conclude it whereas, by contrast, a reservation reflects a subjective choice by that party not to enter into in full that agreement. Therefore, a declaration may be made even where reservations are excluded by the agreement in question.

209. For my part, however, I cannot agree. It is clear from Article 2(1)(d) of the Vienna Convention (186) that a reservation means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. (187)

210. It therefore appears that, according to international law, the objective pursued by a declaration is irrelevant in determining whether or not it should be treated as a reservation. The only issue is whether the function of the declaration at stake is to exclude or modify the legal effect of certain provisions of the treaty. (188)

211. Within this context one may recall that one of the key principles governing international treaties, as set out in Article 27 of the Vienna Convention − as well as in Article 27 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 21 March 1986, (189) is that a party may not invoke the provisions of its internal law as justification for its failure to execute a treaty. This, however, would be precisely the objective pursued by a declaration of competence if it were to be used to limit the risk of the Union's liability being incurred as a result of the non-execution of a mixed agreement by a Member State. (190) It would therefore have to be regarded as a 'reservation' in the sense understood by Article 2(1)(d) of the Vienna Convention.

212. It follows that, for the purposes of international law, a declaration regarding the distribution of competence between an international organisation and its members must be regarded as constituting a reservation (191) and, accordingly, it may only be expressed if permitted by a provision in the agreement in question, as was the case, for example, for Article 2 of Annex IX of the United Nations Convention on the Law of the Sea at issue in the *MOX Plant* case. (192)

213. In practice, many conventions to which the Union is a party provide for the possibility of expressing reservations, or even require them on the part of international organisations that conclude those conventions to make a declaration of competence. (193) The most well-known example of a convention providing for such an obligation is Article 2 of Annex IX to the United National Convention on the Law of the Sea. (194)

214. Since, however, 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. Indeed, at the oral hearing held on 6 October 2020, the

Commission initially advanced the possibility of resorting to a declaration of jurisdiction. When pressed, however, it finally admitted that, from the point of view of international law, such a declaration would be devoid of any legal value and that it would simply have an informative value only. (195)

215. One can, I think, only regard (with respect) such an approach as unsatisfactory. Any such statement would not only be irrelevant from 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. (196)

216. In the same vein, one might observe that it would be pointless to wait given that Article 77 of the Istanbul Convention provides that any State or the European Union may, at the time of the signature or when depositing its instrument of ratification, acceptance, approval or accession, designate the territory or territories to which that convention shall apply. Yet, to my mind, there are essentially two reasons why it would not really be feasible for the Union to seek to rely on this provision in order to limit the Union's liability. First, any endeavour to limit the territorial scope of the agreement to specific Member States would run counter to the essential unity of EU law within the Union and the principle of equal treatment. A derogation from that essential unity and cohesion of EU law is normally expressly provided for at Treaty level, as Protocols No 20, No 21 and No 32 in their own way all amply testify. Second, Article 77 of the Istanbul Convention could only be implemented in practice once the position of all the Member States is known. Consequently, even if one were to allow that recourse to that provision were indeed possible, there are powerful practical and legal reasons in favour of the practice of 'common accord'.

217. Finally, the fact that the convention in question was adopted under the patronage of the Council of Europe – which would be perfectly aware of the complex nature of the rules governing the distribution of competences between the Member States and the Union – would not justify the Union disregarding the rules of international law were it to conclude that convention. On the one hand, the rules of international law apply to any international treaty without exception. On the other hand, it is clear from the wording of the Istanbul Convention that its drafters clearly had the particular situation of the European Union in mind when it was drawn up, yet they – deliberately, one assumes – excluded the possibility of formulating reservations of competence. (197)

218. In this context, the Union not only has no immediate obligation to conclude the convention within a particular period, but there are, as I have just sought to explain, strong practical reasons to wait until all the Member States have concluded it. Indeed, if one or more Member States were to refuse to conclude the Istanbul Convention, the Council might want to decide that the Union should exercise more of the shared competences initially envisaged in order to reduce the extent of accession falling within the competence of the Member States. (198)

219. In the case of the Istanbul Convention, such an approach appears all the more relevant since the Council and the Parliament could possibly infer from the existence of difficulties in some Member States in concluding this convention the existence of a special need to combat certain behaviour, within the meaning of Article 83(1) TFEU, which would authorise them, by virtue of the third subparagraph thereof , to extend areas of shared jurisdiction in areas relating to criminal law.

220. However, although the Parliament criticised the delay in concluding the Istanbul Convention in its Article 218 TFEU request, it phrased its question as relating to the question of whether the decision to conclude the Istanbul Convention would be valid if it was adopted without waiting for the common agreement of the Member States to be bound by that convention.

221. In that respect, the Court has already pointed out 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. (199)

222. Accordingly, I do not believe that the Council is required to have obtained confirmation from the Member States of what they were going to conclude in order to authorise the Union to conclude such an agreement. (200) First, the Treaties do not mention any such obligation. Second, while the Union and the Member States must ensure a unity in their international representation, as indicated, the Union must also ensure that the competences of the Member States are respected. Moreover, the fact that a Member State has not concluded a treaty does not prevent it from complying with the EU law principle of unity in international representation, in so far as it only requires that State to refrain from actions that are manifestly contrary to the positions adopted by the Union.

223. All of this leads me to conclude 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.

224. Last, although it is not necessary to do so, I propose to address the situation mentioned during the course of the oral hearing, 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.

225. 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. Here again, in my opinion, 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.

226. Accordingly, I propose to answer the second question by saying, first, that the Union'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 it were adopted only after such common agreement had been established. It is exclusively for the Council to decide which of those two solutions is preferable.

VII. Conclusion

227. In the light of the foregoing considerations, I would therefore propose that the Court should answer the questions referred by the Parliament as follows:

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 Union 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 Union by means of two separate acts is not of a nature to render those acts invalid.

The Union'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. In addition, however, it would also be compatible with the Treaties if it were adopted only

after such common agreement had been established. It is exclusively for the Council to decide which of those two solutions is preferable.

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1 Original language: English.

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2 According to the Council of the European Union, the reason for this is that the Commission never submitted to the Council of the European Union a recommendation for a decision to open negotiations and authorise the Commission to conduct negotiations on behalf of the Union.

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3 For a more comprehensive view of the context in which this convention was adopted, see the Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, *Council of Europe Treaty Series* – No 210.

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4 Under international law, the signing of an international agreement is equivalent to a form of preliminary approval. It does not entail a binding obligation, but indicates the intention of the party concerned to enter into the agreement. Although that signature is not a promise of conclusion, it commits the signatory party to refrain from acts contrary to the objectives or purpose of the treaty.

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5 At the time the request for an Opinion was submitted, 21 EU Member States had concluded the Istanbul Convention. However, in at least two Member States, Bulgaria and Slovakia, the conclusion process was suspended. In Bulgaria, the suspension resulted from a decision of the Konstitutsionen sad (Constitutional Court) which found a contradiction between the Istanbul Convention and the Constitution of that Member State. In Slovakia, the Národná rada Slovenskej republiky (National Council of the Slovak Republic) voted by a large majority against the conclusion.

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6 The procedure was already included in the original Treaty establishing the European Economic Community (1957), which is perhaps surprising, given the limited treaty-making powers granted expressly to the European Economic Community at that time. See Cremona, M., 'Opinions of the Court of Justice', in Ruiz Fabri, H. (ed.), *Max Planck Encyclopaedia of International Procedural Law (MPEiPro)*, OUP, Oxford, available online, paragraph 2.

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7 See, for example, judgment of 24 June 2014, *Parliament* v *Council* (C−658/11, EU:C:2014:2025, paragraph 52).

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8 Cremona, M., 'Opinions of the Court of Justice', in Ruiz Fabri, H. (ed.), *Max Planck Encyclopaedia of International Procedural Law (MPEiPro)*, OUP, Oxford, available online, paragraph 3.

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9 Ibid.

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10 Opinion 1/75 (OECD Understanding on a Local Cost Standard) of 11 November 1975 (EU:C:1975:145, pp. 1360-1361). See also to that effect, Opinion 2/94 (Accession of the Community to the ECHR) of 28 March 1996 (EU:C:1996:140, paragraphs 3 to 6), and Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 (EU:C:2014:2454, paragraphs 145 and 146).

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11 See Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, paragraph 69).

12 See, to that effect, Opinion 2/91 (ILO Convention No 170) of 19 March 1993 (EU:C:1993:106, paragraph 3).

13 In international law, an agreement is concluded by the exchange, deposit or notification of instruments that express the definitive commitment of the contracting parties. From the point of view of the European Union, the Council adopts, on a proposal from the negotiator, a decision concluding the agreement. See Article 218 TFEU and Neframi, E., 'Accords internationaux, Compétence et conclusion', *Jurisclasseur Fascicule*, 192-1, LexisNexis, 2019.

14 See, to that effect, Opinion 1/13 (Accession of third States to the Hague Convention) of 14 October 2014 (EU:C:2014:2303, paragraph 54).

15 The Court sometimes takes into account acts separate from the agreement in question, but directly related to it. See, to that effect, Opinion 1/92 (Second Opinion on the EEA Agreement) of 10 April 1992 (EU:C:1992:189, paragraphs 23 to 25).

16 Consequently, a request for an Opinion can be submitted to the Court before the commencement of international negotiations, where the subject matter of the envisaged agreement is known. See Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011 (EU:C:2011:123, paragraph 55).

17 For an example of that line of case-law in the context of a reference for a preliminary ruling, see the judgment of 10 December 2018, *Wightman and Others* (C−621/18, EU:C:2018:999, paragraph 28).

18 The Court has jurisdiction to take a position, in the context of the Opinion procedure, on the Union's competence to conclude a convention, the procedure to be followed for that purpose, or on the compatibility of that convention with the Treaties. See, to that effect, Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, paragraphs 70 to 72).

19 Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011 (EU:C:2011:123, paragraphs 47 to 48).

20 Accordingly, a question relating to the time limit for the adoption of the decision to conclude an international agreement act would not be admissible under the procedure laid down by Article 218(11) TFEU, since the amount of time taken to adopt a decision does not constitute, in the absence of a provision to the contrary, a ground for annulment. See, to that effect, for example, order of 13 December 2000, *SGA* v *Commission* (C−39/00 P, EU:C:2000:685, paragraph 44).

21 P. 1361. Emphasis added.

22 Paragraphs 15 to 17.

23 See Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011 (EU:C:2011:123, paragraph 49).

24 See Opinion 2/94 (Accession of the Community to the ECHR) of 28 March 1996 (EU:C:1996:140, paragraphs 20 to 22); Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011 (EU:C:2011:123, paragraph 49); and Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 (EU:C:2014:2454, paragraph 147). Given that in the present case the content of the Istanbul Convention and its 'essential features' are known, there is no reason to declare the questions asked inadmissible simply by reason of the date on which those questions were posed under the Article 218(11) TFEU procedure. The only time constraint is that the Article 218(11) TFEU procedure must be invoked prior to the date on which the international agreement in question has been concluded by the Union.

25 Judgment of 9 March 1994, *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90, paragraphs 16, 17 and 25).

26 Paragraph 14.

27 Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001 (EU:C:2001:664, paragraph 11).

28 This would presuppose that the practice in question was one of the reasons for the contested decision or that it had been crystallised in internal rules, or that the Council had referred to it in a position paper adopted in the context of the proceedings for failure to act.

29 Indeed, the purpose of the Opinion procedure is to prevent the complications that would arise at the international level if the decision to conclude an international agreement were subsequently declared invalid. Accordingly, this 'advisory procedure' must be able to deal with any question which may affect the validity of that decision. In my view, it is not for the Court to rule on the credibility, or lack thereof, of the scenario envisaged, since by definition it is only once the decision to conclude has been adopted that the Council's procedural choices may be known and acknowledged.

30 See Adam, S., *La procédure d'avis devant la Cour de justice de l'Union européenne*, Bruylant, Brussels, 2011, p. 166.

31 Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011 (EU:C:2011:123, paragraph 53). Prior to the opening of negotiations for the conclusion of an international agreement, a request for an Opinion may only relate to the Union's competence to conclude an agreement in the field in question, provided that the precise subject matter of the envisaged agreement is already known. See, to that effect, Opinion 2/94 (Accession of the Community to the ECHR) of 28 March 1996 (EU:C:1996:140, paragraphs 16 to 18).

32 In general, in so far as a request for an Opinion has been formulated in such a way as to meet the conditions of admissibility arising from the wording and objectives pursued by that procedure, it cannot be declared inadmissible. See, to that effect, Opinion 3/94 (Framework Agreement on Bananas) of 13 December 1995 (EU:C:1995:436, paragraph 22).

33 See, to that effect, judgment of 1 October 2009, *Commission* v *Council* (C-370/07, EU:C:2009:590, paragraph 48). More generally, according to the case-law of the Court, a violation of a rule of procedure would lead to the annulment of the disputed act only if that rule might have an influence on the content of that act. See judgment of 29 October 1980, *van Landewyck and Others* v *Commission* (209/78 to 215/78 and 218/78,

EU:C:1980:248, paragraph 47). It is, however, sufficient that the defect is *likely* to have had an impact on the decision for this decision to be annulled. See, *a contrario*, judgment of 21 March 1990, *Belgium* v *Commission* (C−142/87, EU:C:1990:125, paragraph 48).

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34 See, to that effect, Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, paragraphs 70 and 71).

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35 Paragraph 49. As the Court explained in Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, paragraph 71), the constitutional importance of mentioning the legal bases of an act stems from the fact that, since the Union has only conferring powers, it makes it possible to link the acts that the EU adopts to the provisions of the Treaties that actually empower it to do so.

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36 See paragraph 51. However, it should be recalled that in the judgment of 25 October 2017, *Commission* v *Council (WRC−15)* (C−687/15, EU:C:2017:803), as in the judgment of 1 October 2009, *Commission* v *Council* (C−370/07, EU:C:2009:590), where the Court also invalided an act due to a problem of legal bases, the act at issue did not contain any indication of the legal bases on which it was founded.

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37 Judgments of 27 February 2014, *United Kingdom* v *Council* (C−656/11, EU:C:2014:97, paragraph 49), and of 22 October 2013, *Commission* v *Council* (C−137/12, EU:C:2013:675, paragraph 73).

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38 Paragraph 117.

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39 In my view, the application of those protocols is determined by the scope of the act in question and not by the choice of the legal basis or bases thereof.

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40 Even in an action for annulment, the operative or inoperative character of a plea refers exclusively to its ability, in the event that it is well founded, to bring about the annulment sought by the plaintiff, but does not in any way affect the admissibility of that plea.

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41 Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, paragraph 74).

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42 Such an argument would in fact only operate in the context of an action for failure to act.

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43 Judgment of 4 September 2018, *Commission* v *Council (Agreement with Kazakhstan)* (C−244/17, EU:C:2018:662, paragraph 36).

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44 Judgments of 4 September 2018, *Commission* v *Council (Agreement with Kazakhstan)* (C−244/17, EU:C:2018:662, paragraph 37), and of 3 December 2019, *Czech Republic* v *Parliament and Council* (C−482/17, EU:C:2019:1035, paragraph 31). This approach has also sometimes been referred to as the ‘absorption doctrine’. See Maresceau, M., ‘Bilateral Agreements Concluded by the European Community’, *Recueil Des Cours De l’Academie De Droit International – Collected Courses of the Hague Academy of International Law*, vol. 309, 2006, Martinus Nijhoff, The Hague, p. 157. In essence, the main or predominant component(s) of an act are to be considered as absorbing any other objectives or components. See, judgments of 23 February 1999, *Parliament* v *Council* (C−42/97, EU:C:1999:81, paragraph 43); of 30 January 2001, *Spain* v *Council* (C−36/98,

EU:C:2001:64, paragraphs 60, 62 and 63); and, in particular, of 19 July 2012, *Parliament* v *Council* (C−130/10, EU:C:2012:472, paragraphs 70 to 74). See, also, Opinions of Advocate General Kokott in *Commission* v *Council* (C−94/03, EU:C:2005:308, point 31), and in *Parliament* v *Council* (C−155/07, EU:C:2008:368, point 66).

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45 Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, paragraph 77), and judgment of 4 September 2018, *Commission* v *Council (Agreement with Kazakhstan)* (C−244/17, EU:C:2018:662, paragraph 37). It follows from the case-law that recourse to dual bases presupposes the meeting of two conditions, namely that, first, the act in question simultaneously pursues several objectives or has several components, without one being incidental to the other, such that various provisions of the Treaties are applicable. Second, those objectives or components are inextricably linked (implicitly, failing which the act will have to be split up).

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46 Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, paragraph 78).

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47 See, to that effect, footnote 31 of the Commission's Proposal for a Council decision 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, COM(2016) 111 final.

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48 See Opinion of Advocate General Kokott in *Commission* v *Council* (C−13/07, EU:C:2009:190, point 113).

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49 If, in a hypothetical case, this were ever to occur then I consider that this would represent an abuse of process which would potentially lead to the annulment of the provision in question.

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50 Admittedly, in Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009 (EU:C:2009:739), the Court stated, in paragraph 166, that, in determining the legal basis or bases of an act, account must not be taken of provisions which are ancillary to one of the objectives of that act or which are extremely limited in nature. Similarly, in its judgment of 4 September 2018, *Commission* v *Council* (*Agreement with Kazakhstan*) (C−244/17, EU:C:2018:662, paragraphs 45 and 46), the Court considered that provisions of an international agreement which merely set out the contracting parties' declarations on the aims of their cooperation would pursue, without specifying how those aims would be realised concretely, are not to be taken into account to determine the relevant legal bases. However, it is not clear whether it can be inferred from this that, conversely, sets of provisions which do not fall within the scope of that specific scenario should be regarded as reflecting a principal component or objective of an act. Indeed, the Court has subsequently continued to reiterate its case-law on the centre of gravity test. In my view, the fact that the Court has taken the care to state the rather evident point that ancillary or very limited provisions need not be accounted for when determining the relevant legal basis rather shows that the Court is now undertaking a more detailed assessment than in the past and is now more willing to accept a plurality of legal bases, without, however, renouncing the view that the legal basis of an act does not need to reflect all the competences exercised to adopt that act and, therefore, all the objectives or components of that act. See, for example, Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:59, paragraph 90).

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51 This not without certain paradoxes, since it follows from the aforementioned case-law that the legal basis of an act reflects only part of the competences exercised. See judgment of 10 January 2006, *Commission* v *Council* (C−94/03, EU:C:2006:2, paragraphs 35 and 55).

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52 See, also, judgments of 1 October 2009, *Commission* v *Council* (C−370/07, EU:C:2009:590, paragraph 49), and of 25 October 2017, *Commission* v *Council (WRC−15)* (C−687/15, EU:C:2017:803, paragraph 58).

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53 The only condition for the Union to exercise a shared competence is that such exercise must be compatible with international law. See, judgment of 20 November 2018, *Commission* v *Council (Antarctic MPAs)* (C−626/15 and C−659/16, EU:C:2018:925, paragraph 127).

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54 See, to that effect, judgment of 10 January 2006, *Commission* v *Parliament and Council* (C−178/03, EU:C:2006:4, paragraph 57), or judgment of 19 July 2012, *Parliament* v *Council* (C−130/10, EU:C:2012:472, paragraph 49).

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55 In order to reach the conclusion that the decision in question also had the protection of Passenger Name Record data as its predominant component, the Court relied on the fact on that 'the content of the envisaged agreement … relates, *in particular* [('notamment' in French)], to the establishment of a system consisting of a body of rules intended to protect personal data'. The use of the term 'in particular' is quite revealing as it implies that the Court considers that there is no need exhaustively to examine the agreement in question. Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, paragraph 89). See also, to that effect, judgment of 22 October 2013, *Commission* v *Council* (C−137/12, EU:C:2013:675, paragraphs 57 to 58).

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56 Judgment of 25 February 2010, *Brita* (C−386/08, EU:C:2010:91, paragraph 42). See, regarding in general the articulation between international law and EU Law, Malenovský, J., « À la recherché d'une solution inter-systémique aux rapports du droit international au droit de l'Union européenne », *Annuaire français de droit international*, vol. LXV, CNRS Éditions, 2019, p. 3.

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57 It should be emphasised, furthermore, that the European Union differs from classical international organisations in that the division of competences between the Union and the Member States is subject to continuous change, which can make the analysis of that division of competences difficult from the perspective of international law.

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58 See, for example, judgment of 5 December 2013, *Solvay* v *Commission* (C−455/11 P, not published, EU:C:2013:796, paragraph 91).

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59 See, for example, judgment of 28 July 2011, *Agrana Zucker* (C−309/10, EU:C:2011:531, paragraphs 34 to 36).

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60 In fact, in the abovementioned judgments, the Court seems to have stressed the fact that the legal basis of an act might convey information on the competences exercised with a view to set aside two other lines of case-law. First, the failure to refer to a precise provision of the Treaty does not necessarily constitute an infringement of essential procedural requirements if the legal bases used to adopt a measure may be determined from its content. See judgments of 1 October 2009, *Commission* v *Council* (C−370/07, EU:C:2009:590, paragraph 56), and of 18 December 2014, *United Kingdom* v *Council* (C−81/13, EU:C:2014:2449, paragraphs 65 to 67). Second, as recalled earlier, for irregularities regarding the choice of the relevant legal bases to lead to the annulment of the act in question, in principle, it must be shown that those deficiencies are likely to have an impact on the applicable legislative procedure or on the competence of the Union. See, to that effect, judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C−491/01,

EU:C:2002:741, paragraph 98), and of 11 September 2003, *Commission* v *Council* (C−211/01, EU:C:2003:452, paragraph 52). The General Court frequently refers to that case-law. See, for example, judgment of 18 October 2011, *Reisenthel* v *OHIM – Dynamic Promotion (Hampers, crates and baskets)* (T−53/10, EU:T:2011:601, paragraph 41).

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61 See, to that effect, judgment of 26 November 2014, *Parliament and Commission* v *Council* (C−103/12 and C−165/12, EU:C:2014:2400, paragraph 52). In that regard, it may be recalled that under Article 27 of the 1969 Vienna Convention on the Law of Treaties, a party to an international agreement cannot invoke its internal rules to justify non-compliance with the agreement.

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62 See, to that effect, judgment of 2 March 1994, *Parliament* v *Council* (C−316/91, EU:C:1994:76, paragraphs 26 and 29). See, for example, Marín Durán, G., 'Untangling the International Responsibility of the European Union and Its Member States in the World Trade Organisation Post-Lisbon: A Competence/Remedy Model', *European Journal of International Law*, vol. 28, Issue 3, 2017, pp. 703-704: 'From an international law perspective, so long as both the EU and its member states remain parties to the WTO Agreement (and its covered agreements), the presumption is that they are each bound by all obligations therein and may not invoke internal rules as justification for non-performance of [Article 27 (1)-(2) of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations] … [T]he majority view in the academic literature [is] that the EU and its member states are jointly bound by all provisions of WTO law, and … this position has also been taken by the WTO dispute settlement organs'.

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63 See, for example, Fry, J.D., 'Attribution of Responsibility', in Nollkaemper, A. and Plakokefalos, I. (eds), *Principles of Shared Responsibility in International Law*, Cambridge, CUP, 2014, p. 99: '… under the mixed agreements between the European Union (EU) and its member states that fail to provide a clear division of power, both parties will be jointly responsible for a breach, without determining the attribution of conduct. This indicates that the EU or the member states shall be responsible even if the breach can be attributed to the other'.

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64 In addition, it should be recalled that the Court has stressed that Article 344 TFEU precludes the rules of EU law governing the division of competences between the Union and its Member States from being submitted to a court other than the Court of Justice. See Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 (EU:C:2014:2454, paragraph 201 et seq.), and judgment of 6 March 2018, *Achmea* (C−284/16, EU:C:2018:158, paragraph 32). It follows that, when it is involved in an international dispute, the Union cannot rely on the fact that the unjustified non-execution in question would fall within the competence of the Member States in order to prevent its liability in international law for this purpose, since such an argument could lead the international court seised to adjudicate on the rules of EU law governing the distribution of competences between the Union and its Member States.

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65 The only exception to the foregoing is, in my view, precisely when a reservation in that regard has been made or when the treaty provides for the obligation of any international organisation to declare the extent of their competences. Indeed, in this case, the international court will apply that reservation or that declaration, without assessing whether or not it conforms to the rules of EU law governing the distribution of competences between the Union and its Member States and, therefore, the requirement of a strict separation of competences between the Court of Justice and the international court – a point stressed in Opinion 1/17 (EU-Canada CET Agreement) of 30 April 2019 (EU:C:2019:341, paragraph 111) – will accordingly be respected. It is precisely for those reasons that it would generally be desirable for the Union, when negotiating such mixed agreements, to insist that the international agreement in question should provide for the possibility of such a reservation. Part of the difficulties in the present case have been created by the fact that the Istanbul Convention was negotiated by the individual Member States at Council of Europe level without originally involving the European Union at all.

That seems to have had the result that the possibility of expressing reservations was simply not provided by the drafters of that convention.

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66 See, for example, Olson, P.M., 'Mixity from the Outside: The Perspective of a Treaty Partner', in Hillion, C. and Koutrakos, P. (eds), *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford, Hart Publishing, 2010, p. 344: 'While the allocation of competence can affect *how the EU implements provisions* of a mixed agreement, that allocation does not dictate the answer to the question of liability and responsibility on the international plane'. Emphasis added.

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67 See, to that effect, Opinion 2/15 (EU-Singapore Free Trade Agreement) of 16 May 2017 (EU:C:2017:376, paragraph 68).

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68 One may recall in this regard that, according to the Court's case-law, the decision authorising the Union to conclude an international agreement is in no way a confirmation of the decision authorising the signature of that agreement. Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001 (EU:C:2001:664, paragraph 11).

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69 Otherwise, in my opinion, the question should be considered so abstract that it should be declared inadmissible.

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70 Clearly, the third situation referred to in Article 3(2) TFEU presupposes that this competence has been exercised. See Opinion 2/92 (Third Revised Decision of the OECD on National Treatment) of 24 March 1995 (EU:C:1995:83, paragraph 36), and Opinion 2/15 (EU-Singapore Free Trade Agreement) of 16 May 2017 (EU:C:2017:376, paragraphs 230 to 237).

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71 See, for example, judgment of 4 September 2014, *Commission* v *Council* (C−114/12, EU:C:2014:2151, paragraph 68). For this reason, in determining whether the Union has exclusive competence to conclude certain parts of an agreement, there is no need to take into account the acts establishing funding or cooperation programs, since such acts do not lay down any 'common rules'.

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72 Opinion 1/13 (Accession of third States to the Hague Convention) of 14 October 2014 (EU:C:2014:2303, paragraph 72).

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73 Opinion 3/15 (Marrakesh Treaty on access to published works) of 14 February 2017 (EU:C:2017:114, paragraph 107). In that respect, the Court held, in essence, that the terms 'covered to a large extent by such rules' correspond to those by which the Court, in paragraph 22 of the judgment of 31 March 1971, *Commission* v *Council* (22/70, EU:C:1971:32), defined the nature of the international commitments which the Member States are prohibited from entering into outside the framework of the institutions of the Union, where common rules of the Union have been adopted in order to achieve the objectives of the Treaty. Those terms must, therefore, be interpreted in the light of the clarifications provided by the Court in the judgment of 31 March 1971, *Commission* v *Council* (22/70, EU:C:1971:32), and in the case-law developed from that judgment. See judgment of 4 September 2014, *Commission* v *Council* (C−114/12, EU:C:2014:2151, paragraphs 66 and 67), which aim at preventing Member States from being able, 'unilaterally or collectively, to undertake obligations with third States which may affect common rules or alter their scope'. See judgment of 20 November 2018, *Commission* v *Council (Antarctic MPAs)* (C−626/15 and C−659/16, EU:C:2018:925, paragraph 111).

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74 Opinion 1/13 (Accession of third States to the Hague Convention) of 14 October 2014 (EU:C:2014:2303, paragraph 74).

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75 See, for example, Opinion 1/03 (New Lugano Convention) of 7 February 2006 (EU:C:2006:81, paragraphs 126, 128 and 133), or judgment of 26 November 2014, *Green Network* (C−66/13, EU:C:2014:2399, paragraph 33). In order, however, to ensure that the principle of the division of competences is not compromised, and in so far as the outcome of current legislative procedures cannot be predicted, consideration of the foreseeable development of the state of EU law, in my view, must be understood, in this context, as referring only to acts already adopted, but not yet entered into force.

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76 Without, however, drawing any precise consequences from that argument.

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77 See, judgment of 4 September 2014, *Commission* v *Council* (C−114/12, EU:C:2014:2151, paragraph 75), as well as judgment of 20 November 2018, *Commission* v *Council (Antarctic MPAs)* (C−626/15 and C−659/16, EU:C:2018:925, paragraph 115).

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78 See Opinion 2/94 (Accession of the Community to the ECHR) of 28 March 1996 (EU:C:1996:140, paragraph 6).

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79 See, to that effect, Opinion 2/91 (ILO Convention No 170) of 19 March 1993 (EU:C:1993:106, paragraphs 18 and 21), and judgment of 4 September 2014, *Commission* v *Council* (C−114/12, EU:C:2014:2151, paragraph 91).

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80 See, to that effect, Opinion 1/03 (New Lugano Convention) of 7 February 2006 (EU:C:2006:81, paragraphs 123 and 127), and judgment of 4 September 2014, *Commission* v *Council* (C−114/12, EU:C:2014:2151, paragraph 91). However, that solution does not apply where the provisions of EU law allow Member States to implement, within a fully harmonised area, an exception or limitation to a harmonised rule. See Opinion 3/15 (Marrakesh Treaty on access to published works) of 14 February 2017 (EU:C:2017:114, paragraph 119).

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81 See, for example, Article 3(5) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12; this directive applies in the Member States with the exception of Ireland and Denmark). Some other directives expressly provide that they apply without prejudice to more favourable provisions contained in an international agreement. See, for example, Article 3(3) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44; this directive applies in the Member States with the exception of Ireland and Denmark).

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82 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

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83 Judgment of 30 June 2016, *NA* (C−115/15, EU:C:2016:487, paragraph 51).

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84 Judgments of 27 June 2018, *Diallo* (C−246/17, EU:C:2018:499, paragraph 55).

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85 In paragraph 28 of the judgment of 27 June 2018, *Diallo* (C−246/17, EU:C:2018:499), the Court thus pointed out that it only had jurisdiction to rule on the interpretation of the directives referred to in the questions referred for a preliminary ruling.

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86 See, by analogy, judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification – sister of a refugee)* (C−519/18, EU:C:2019:1070 paragraph 43). Admittedly, that case concerned Directive 2003/86/EC, but it is interesting to note that the Court expressly refers to the judgment of 27 June 2018, *Diallo* (C−246/17, EU:C:2018:499), in paragraph 42.

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87 Judgment of 30 June 2016, *NA* (C−115/15, EU:C:2016:487).

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88 Judgment of 27 June 2018, *Diallo* (C−246/17, EU:C:2018:499).

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89 See, to that effect, the way in which the final conclusion reached by the Grand Chamber is worded in judgment of 18 December 2014, *M'Bodj* (C−542/13, EU:C:2014:2452, paragraph 49). This is all the more so since, according to recital 15 of Directive 2003/86, third-country nationals might be allowed to remain in the territories of the Member States for reasons falling outside the scope of that directive.

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90 See, for example, Article 1(1) of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18). This directive has been repealed, but still applies to Ireland.

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91 See, for example, Article 3 of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; this directive has been repealed, but still applies to Ireland). See also Articles 1 and 4 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13; this directive has been repealed, but still applies to Ireland); Article 4 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98; this directive applies in the Member States with the exception of Ireland and Denmark); Article 3 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9; this directive succeeded Directive 2004/83 and applies in the Member States, with the exception of Ireland and Denmark); Article 5 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60; this directive applies in the Member States with the exception of Ireland and Denmark); or Article 4 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96; this directive succeeded Directive 2003/9 and applies in the Member States, with the exception of Ireland and Denmark).

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92 See, to that effect, judgment of 18 December 2014, *M'Bodj* (C−542/13, EU:C:2014:2452, paragraph 44).

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93 Previously, Article 2(c) of Directive 2004/83.

94 See also Article 10 of Directive 2004/83.

95 See Articles 4, 5 and 9 of Directive 2008/15, Article 21 of Directive 2004/83 and Article 21 of Directive 2011/95.

96 I would point out in this respect that such a situation would not be comparable to that where, in the context of an individual decision, the competent authority wrongly considers itself to be in a situation of mandatory powers (*compétence liée*). If, in so doing, the authority in question vitiates its decision with an error of law justifying its annulment, it is because a higher-ranking standard required it to exercise its discretion in order to take account of one or more legal criteria. However, in the case of a decision to authorise the Union to conclude an international convention, it does not exercise any legal criteria that the Council should apply to determine the extent of the shared competences to be exercised. That is a purely discretionary power.

97 Article 3.

98 Article 4.

99 Article 5.

100 Article 6.

101 Article 7.

102 Article 11.

103 Articles 12, 13 and 14.

104 Article 15.

105 Article 16.

106 Article 17.

107 Article 18. Article 18(5) specifies that ‘Parties shall take the appropriate measures to provide consular and other protection and support to their nationals and other victims entitled to such protection in accordance with their obligations under international law’.

108 Article 19.

109 Articles 20 and 21.

110 Articles 22 to 26.

111 Articles 27 and 28.

112 Articles 29 to 32.

113 Articles 33 to 40.

114 Article 41.

115 Article 42.

116 Article 43.

117 Article 44.

118 Article 45.

119 Article 46.

120 Article 47.

121 Article 48.

122 Article 49.

123 Article 50.

124 Article 51.

125 Articles 52 and 53.

126 Article 54.

127 Article 55.

128 Article 56.

129 Article 57.

130 Article 58.

131 Article 59.

132 Article 60.

133 Article 61.

134 Article 62.

135 Article 63.

136 Article 64.

137 Article 75(1).

138 The Istanbul Convention is complemented by an appendix laying down the privileges and immunities enjoyed by the Grevio members and other members of delegations during country visits undertaken in the exercise of their functions.

139 COM(2016) 111 final.

140 As well as, regarding the ECB and the EIB, Article 36 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank and Article 11(7) of Protocol (No 5) on the Statute of the European Investment Bank.

141 See, on this subject, but with regard to whether or not the Union's external competence to combat discrimination is exclusive, Prechal, S., 'The European Union's Accession to the Istanbul Convention', in Lenaerts, K., Bonichot, J.-C., Kanninen, H., Naome, C. and Pohjankoski, P. (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas*, Hart Publishing, Oxford, 2019, p. 285 et seq.

142 Point 31 of the Explanatory Report.

143 Point 40 of the Explanatory Report.

144 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

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145 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37).

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146 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23).

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147 Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ 2010 L 180, p. 1).

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148 In this respect, the fact that declaration 19 annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, refers to the need to combat all forms of domestic violence does not seem to me to call this statement into question, in so far as that declaration, contrary to the protocols and the annexes to the Treaties, only has, at best, an interpretative value.

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149 Since Article 81(1) TFEU does not provide for any procedural rules, it must be inferred that the approximation measures in question must be linked to the objectives mentioned in those two provisions. In particular, while Article 81(3) TFEU refers to family law, it refers only to measures relating to family law which have a cross-border impact (which implies that, conversely, aspects of family law which do not have such a dimension remain the exclusive competence of the Member States).

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150 Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (OJ 2003 L 26, p. 41). See Articles 1(1) and 19 of that directive.

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151 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ 2008 L 136, p. 3).

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152 Besides, as set out in Article 4 thereof, this directive only provides that Member States must encourage the use of mediation.

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153 See, for example, Articles 67 to 73 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

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154 Opinion 1/03 (New Lugano Convention) of 7 February 2006 (EU:C:2006:81, paragraph 173).

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155 Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ, English Special Edition

II, 1968(I), p. 30), as last amended by Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union (OJ L 287 p. 15).

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156 In this respect, it cannot be excluded that the Member States were afraid that, if the Union exercises this competence, it then confers competence, on the basis of Article 83(2) TFEU, to act alone to criminalise the conducts referred to in that convention. See also, to that effect, judgment of 13 September 2005, *Commission* v *Council* (C−176/03, EU:C:2005:542, paragraph 48).

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157 In order for Article 83(1) TFEU to retain its *effet utile*, in my view the concept of 'rights of victims of crime' must be understood in a way that excludes the criminalisation of certain conduct.

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158 Admittedly, it may be noted that, first, Article 54 of Chapter VI of that convention establishes certain obligations of proof. Second, Articles 49 to 53 and 56 to 58 of the same chapter are intended to establish certain rights for victims in criminal proceedings. Third, the provisions of Chapter IV, as well as Articles 29 to 32 of Chapter V, set out a certain procedural law for the benefit of victims of crime. However, it should be recalled that, according to its wording, Article 82(2) TFEU only confers competence on the Union to adopt measures concerning 'the mutual admissibility of evidence between Member States; … the rights of individuals in criminal procedure; [or] the rights of victims of crime'. However, these various provisions are not intended to facilitate the recognition of judicial decisions and it seems difficult to me to consider that violence against women constitutes a criminal matter with a cross-border dimension, unless it is considered to be the case for all criminal behaviour. I note in that regard that in its judgment of 13 June 2019, *Moro* (C−646/17, EU:C:2019:489, paragraphs 29 to 37), the Court was very careful not to take a position on this issue.

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159 The Council could use this option if it happens that a Member State would not ratify the Istanbul Convention to reduce the Union's exposure to the risk of it being held liable for unjustified non-compliance with the Istanbul Convention by a Member State. Admittedly, Article 83(2) TFEU requires that it be established that 'the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been the subject of harmonisation measures', but this will be precisely the case if it should turn out that a Member State does not execute the Istanbul Convention, or even does not conclude it. Consequently, the Union could use that provision to grant itself exclusive jurisdiction over all the provisions of that convention aimed at criminalising certain conduct and, consequently, under the theory of State succession, assume alone the obligations arising from that convention. See also, to that effect, Prechal, S., 'The European Union's Accession to the Istanbul Convention', in Lenaerts, K., Bonichot, J.−C., Kanninen, H., Naome, C. and Pohjankoski, P. (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas*, Hart Publishing, Oxford, 2019, p. 290.

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160 See, for an example of accumulation of legal bases, judgment of 10 January 2006, *Commission* v *Council* (C−94/03, EU:C:2006:2, paragraph 54).

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161 See judgment of 29 October 1980, *van Landewyck and Others* v *Commission* (209/78 to 215/78 and 218/78, EU:C:1980:248, paragraph 47). However, it is sufficient that the defect was likely to have had an impact on the decision, since the Union judge does not have the power to substitute him or herself for the administration and therefore cannot assess the concrete impact of the defect on the decision. See, for example, judgment of 21 March 1990, *Belgium* v *Commission* (C−142/87, EU:C:1990:125, paragraph 48).

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162 In that regard, it should be stressed that the decision at stake here is the one to authorise the conclusion of the Istanbul Convention by the Union. The conclusion of that agreement is, for its part, carried out, in principle,

by means of a single instrument, namely a letter addressed to the depositary of the treaty, here the Council of Europe.

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163 See, to that effect, judgment of 14 April 2015, *Council* v *Commission* (C−409/13, EU:C:2015:217, paragraph 71). In addition, Article 17(2) TEU specifies that acts, in particular legislation, must be adopted on the basis of a Commission proposal 'except where the Treaties provide otherwise'. As for Article 293 TFEU, this provision indicates that it applies only when 'the Council acts on a proposal from the Commission'.

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164 To even consider that the legislative procedure would be partially applicable, Article 17(2) TEU provides that legislative acts must be adopted by the EU on the basis of a Commission proposal 'except where the Treaties provide otherwise' while, regarding the procedure laid down in Article 218 TFEU, this provision mentions that the decision to authorise the Union to conclude an agreement is adopted on the basis of a proposal by the negotiator, which may not be the Commission. Similarly, Article 293 TFEU states that it only applies when 'the Council acts on a proposal from the Commission'.

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165 Judgment of 25 October 2017, *Commission* v *Council (WRC−15)* (C−687/15, EU:C:2017:803, paragraph 42).

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166 See, for example, judgment of 6 May 2008 *Parliament* v *Council* (C−133/06, EU:C:2008:257, paragraph 54).

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167 Judgment of 28 April 2015, *Commission* v *Council* (C−28/12, EU:C:2015:282).

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168 Ibid., paragraphs 49 to 50.

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169 Ibid., paragraphs 51 to 52.

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170 This argument assumes that the legal bases of an act may not faithfully reflect the competences exercised (see question 1(a)). Indeed, if that were not the case, the legal bases appearing in the measure if it were taken in the form of a single decision would correspond to the combination of the legal bases mentioned in the two decisions, if that measure were divided in two. Consequently, either the procedure would be identical or, if those bases could not be reconciled with each other, it would be necessary to divide the measure into two decisions.

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171 In that regard, I would point out that the application of those protocols depends on the content of the act in question and not on the legal bases adopted. Consequently, whatever the answer given by the Court to the first question, where the Union intends to exercise powers under those protocols, account must be taken of them.

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172 See, to that effect, judgment of 24 June 2014, *Parliament* v *Council* (C−658/11, EU:C:2014:2025, paragraph 57).

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173 As the United Kingdom has left the European Union, there is no need to take account of it.

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174 Pursuant to Article 4 of that protocol, the Kingdom of Denmark may decide to transpose the measure, but in any event, if it does so, that measure only creates an obligation under international law between the Kingdom of Denmark and the other Member States.

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175 Emphasis added. In that case, Article 4a(2) provides for a specific mechanism where Ireland's non-participation is likely to make it impracticable for other Member States. However, even in that case, Ireland is not obliged to apply the measure.

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176 Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, paragraphs 110 and 117).

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177 Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, paragraphs 111 and 113).

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178 According to the information on the website of the Council of Europe, Ireland ratified this Convention on 1 July 2019.

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179 Judgment of 20 November 2018, *Commission* v *Council (Antarctic MPAs)* (C−626/15 and C−659/16, EU:C:2018:925, paragraph 127).

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180 *United Nations Treaty Series*, vol. 1155, p. 331 ('the Vienna Convention').

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181 Indeed, the decision to enter into an international agreement potentially involves making choices of a political, economic and social nature, and prioritising divergent interests or making complex assessments. Consequently, the Council must be given a broad discretionary power in that context. See, by analogy, judgment of 7 March 2017, *RPO* (C−390/15, EU:C:2017:174, paragraph 54).

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182 See Cremona, M., 'Disconnection clauses in EU Law and Practice', in Hillon, C. and Koutrakos, P. (eds), *Mixed Agreements Revisited: The EU and its Member States in the World*, Hart Publishing, Oxford, 2010, p. 180. Admittedly, the European Union is an international organisation of a special kind inasmuch as, according to the formula of the judgment of 15 July 1964, *Costa* (6/64, EU:C:1964:66, p. 593), it has established its own legal order, integrated into the legal system of the Member States upon the entry into force of the Treaty and which is binding on their courts. See also judgment of 28 April 2015, *Commission* v *Council* (C−28/12, EU:C:2015:282, paragraph 39). However, as is clear from the judgment of 20 November 2018, *Commission* v *Council (Antarctic MPAs)* (C−626/15 and C−659/16, EU:C:2018:925, paragraphs 125 to 135), that circumstance cannot lead to the unilateral imposition on third States of compliance with its rules on the allocation of jurisdiction.

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183 See, for example, judgment of 19 March 1996, *Commission* v *Council* (C−25/94, EU:C:1996:114, paragraph 48).

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184 See, *a contrario*, judgment of 20 April 2010, *Commission* v *Sweden* (C−246/07, EU:C:2010:203, paragraph 75).

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185 Judgments of 28 November 1991, *Luxembourg* v *Parliament* (C−213/88 and C39/89, EU:C:1991:449, paragraph 29), and of 28 April 2015, *Commission* v *Council* (C−28/12, EU:C:2015:282, paragraph 47).

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186 *United Nations Treaty Series*, vol. 1155, p. 331.

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187 Point 1.1 of the Guide to Practice on Reservations to Treaties 2011, adopted by the International Law Commission at its 63rd session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering work of that session (A/66/10, paragraph 75) in the Yearbook of the International Law Commission, 2011, vol. II, Part Two, also states that the term 'reservation' means 'a unilateral statement, however phrased or named, made by a State or an international organisation approving or acceding to a treaty … to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organisation'.

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188 International law practice indicates that declarations can be subsumed into reservations when they are made to perform the same function: see Edwards Jr, R.W., 'Reservations to Treaties', *Michigan Journal of International Law*, vol. 10, 1989, p. 368. See, also, to that effect, Tomuschat, C., 'Admissibility and Legal Effects of Reservations to Multilateral Treaties', *Heidelberg Journal of International Law*, vol. 27, 1967, p. 465, or Meek, M.R., 'International Law: Reservations to Multilateral Agreements', *DePaul Law Review*, vol. 5, 1955, p. 41.

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189 *United Nations, Treaty Series*, vol. 1155, p. 331. However, that convention has not entered into force due to the absence of 35 instruments of ratification deposited by States.

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190 In any event, to the extent that the Union may or may not decide to exercise some of the competences it shares with Member States, a declaration made by the Union concerning the extent of the competence exercised by it to conclude an international agreement cannot be considered as being based on objective findings.

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191 See, for example, regarding a declaration of competence made by the French Republic which was considered as constituting a reservation, Ad Hoc Court of Arbitration, *Delimitation of the Continental Shelf (United Kingdom v. France)*, 54 I.L.R. 6, 18 I.L.M. 397 (June 30, 1977). See, also, Dolmans, J.F.M., *Problems of Mixed Agreements: Division of Powers within the EEC and the Rights of Third States*, Asser Instituut, The Hague, 1984, at pp. 65-66.

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192 Judgment of 30 May 2006, *Commission* v *Ireland* (C−459/03, EU:C:2006:345). In that respect, I note that, even if a treaty would allow the formulation of reservations, a reservation relating to the distribution of competences between the Union and the Member States could only have limited effect. Indeed, given that shared competences not exercised may subsequently be pre-empted by the Union, such a declaration would necessarily be temporary. Accordingly, the formulation of reservations by the Union aimed at signalling that the EU has not exercised certain shared competences must be considered as proscribed when the treaty in question does not allow reservations to be withdrawn. Otherwise, this would be tantamount, in so far as such a reservation would commit the Union definitively to abdicating the shared competence in question, to transforming that competence into an exclusive competence of the Member States, in violation of the rules of primary law. In addition, even where the Treaty provides for the possibility, or even the obligation, to update declarations of competence, it would seem that the Union rarely carries out such an update. Indeed, according to Odermatt, by 2017, there was only one example of updated declarations of competence, namely those made within the framework of the Food and Agriculture Organisation. See Odermatt, J., 'The Development of Customary International Law by International Organisations', *International and Comparative Law Quarterly*, vol. 66(2), 2017, pp. 506-507.

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193 See, for example, judgment of 10 December 2002, *Commission* v *Council* (C−29/99, EU:C:2002:734, paragraph 70). For a list of conventions signed by the Union providing for the obligation of the Union to formulate a declaration of competence, see Heliskoski, J., 'EU declarations of competence and international

responsibility', in Evans, M. and Koutrakos, P. (eds), *The International Responsibility of the European Union International and European Perspectives*, Hart Publishing, Oxford, 2013, p. 201. In that article, its author considers only that scenario. See p. 189.

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194 See Heliskoski, J., 'EU Declarations of Competence and International Responsibility', in Evans, M. and Koutrakos, P. (eds), *The International Responsibility of the European Union: European and International Perspectives*, Hart Publishing, Oxford, 2013, p. 189.

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195 Admittedly, it could be argued that, to the extent that the practice of declarations of jurisdiction has always been accepted by third States, it has given rise to such a practice. However, the uncertain nature of such an argument (in so far as, inter alia, it clashes with the Vienna Convention) also militates, in my opinion, in favour of a certain caution on the part of the Council.

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196 It is interesting to note that a growing number of international agreements contain commitment clauses that oblige regional economic integration organisations such as the Union to declare which parts of the agreement fall within their competences. See, Klamert, M., *The Principle of Loyalty in EU Law*, OUP, Oxford, 2014, p. 195.

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197 Similarly, I do not think it can be seriously argued that Article 78 of the Istanbul Convention, which limits the possibility of making reservations, does not apply to the European Union on the grounds that it would not have the same nature as a State. Indeed, Article 78(2) expressly refers to both States and the European Union, which shows that the intention of the drafters of that convention was indeed to exclude also the possibility for the Union to make reservations.

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198 Indeed, 'the mere fact that international action of the European Union falls within a competence shared between it and the Member States does not preclude the possibility of the required majority being obtained within the Council for the European Union to exercise that external competence alone'. Judgment of 20 November 2018, *Commission* v *Council (Antarctic MPAs)* (C-626/15 and C-659/16, EU:C:2018:925, paragraph 126).

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199 See, to that effect, Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009 (EU:C:2009:739, paragraph 127).

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200 For example, the United Nations Convention on the Law of the Sea was concluded by the Community on 1 April 1998 even though the Kingdom of Denmark and Grand Duchy of Luxembourg had not yet done so.