Provisional text
OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 11 June 2026 ([1])

Provisional text

Joined Cases C‑706/25 and C‑707/25 [Comeri and Sidilli] ([i])

Questura di Roma
v
SG (C‑706/25)
and
JA (C‑707/25)

(Request for a preliminary ruling from the Corte d'Appello di Roma (Court of Appeal, Rome, Italy))

(Reference for a preliminary ruling – Area of freedom, security and justice – Asylum and immigration – Migration policy – Transfer of a third-country national to a facility situated in the territory of a third country for the purpose of enforcing a return decision – Application for international protection – Detention of the applicant in the territory of a third country – Division of competences between the European Union and the Member States – External relations – Article 3(2) TFEU – Agreement concluded by a Member State with a third country for the purpose of managing migration flows – Territorial lease – Affecting common rules or altering their scope – Directive 2013/32/EU – Directive 2013/33/EU – Common procedures for granting and withdrawing international protection – Territorial scope – Detention – Grounds for detention – Geographical places of detention – Effective judicial protection –

Representation by a lawyer – Rights of communication and access – Obligation for immediate release – Health care)

I. **Introduction**

1. The present requests for a preliminary ruling (2) are made in the context of a bilateral international agreement concluded by the Italian Republic, namely the Protocol between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania on the strengthening of cooperation in the field of migration, signed in Rome on 6 November 2023 ('the Italy-Albania Protocol'), ratified by Law No 14/2024. (3) By that protocol, the Republic of Albania undertook to authorise the Italian Republic to use certain areas located within Albanian territory (4) ('the areas concerned') to set up facilities for detaining, inter alia, third-country nationals who are the subject of detention measures in order to manage inward and outward migration flows.

2. The present cases concern two Moroccan nationals, SG and JA ('the persons concerned'), who were initially the subject of a decision to remove them from Italian territory under Directive 2008/115/EC. (5) Detained on that basis, the Italian authorities transferred them to the areas concerned, where they lodged applications for international protection. The Questore di Roma (Police Commissioner, Rome) ordered their detention in the areas concerned. An application for validation of those detention decisions is before the Corte d'Appello di Roma (Court of Appeal, Rome, Italy), the referring court.

3. The Italy-Albania Protocol is liable to interact with common rules on asylum, particularly considering the likely future development of those rules, represented by the entry into force of the New Pact on Migration and Asylum. (6) The pact is due to enter into force soon, (7) but is not applicable *ratione temporis* in the main proceedings.

4. The present cases thus concern, in essence, first, the consequences, for Member States, of the exclusive competence conferred on the European Union by Article 3(2) TFEU for the conclusion of international agreements that may affect common rules of EU law or alter their scope, in so far as that exclusive competence deprives Member States of the right to conclude such agreements on the detention of applicants for international protection, and, second, the compatibility of the actual conditions of such detention, organised in areas outside national territory under the Italy-Albania Protocol and Law No 14/2024, with Directives 2013/32/EU (8) and 2013/33/EU. (9)

II. **Legal context**

A. **European Union law**

1. ***Regulation (EU) No 604/2013***

5. Article 28 of Regulation (EU) No 604/2013, (10) entitled 'Detention', provides that applicants for international protection may not be held in detention for the sole reason that they are subject to the procedure for the determination of the Member State responsible for examining their application, but may be detained in order to secure their transfer to that Member State where there is a significant risk of absconding, on the basis of an individual assessment and in a proportional manner. Detention must be for as short a period as possible and the safeguards provided for in Articles 9, 10 and 11 of Directive 2013/33 apply.

2. ***Directive 2013/32***

6. Paragraphs 1 and 2 of Article 3 of Directive 2013/32, entitled 'Scope', are worded as follows:

'1. This Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection.

2. This Directive shall not apply to requests for diplomatic or territorial asylum submitted to representations of Member States.'

7. Article 12 of that directive, entitled 'Guarantees for applicants', provides, in paragraph 1(b), that Member States must ensure that all applicants are

provided with the services of an interpreter for submitting their case to the competent authorities whenever necessary.

8. Article 22(1) of Directive 2013/32, under the heading 'Right to legal assistance and representation at all stages of the procedure', provides:

'Applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision.'

9. Article 26 of Directive 2013/32, entitled 'Detention', is worded as follows:

'1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU.

2. Where an applicant is held in detention, Member States shall ensure that there is a possibility of speedy judicial review in accordance with Directive 2013/33/EU.'

10. Article 46 of that directive, entitled 'The right to an effective remedy', guarantees applicants for international protection the right to an effective remedy before a court against decisions taken on their application for international protection, including those taken at the border or in transit zones.

3. ***Directive 2013/33***

11. Paragraphs 1 and 2 of Article 3 of Directive 2013/33, entitled 'Scope', provides:

'1. This Directive shall apply to all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law.

2. This Directive shall not apply in cases of requests for diplomatic or territorial asylum submitted to representations of Member States.’

12. Article 8 of that directive, entitled ‘Detention’, states the following in paragraphs 1 to 3:

‘(1) Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with Directive [2013/32].

(2) When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

(3) An applicant may be detained only:

…

(d) when he or she is detained subject to a return procedure under Directive 2008/115, in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

…’

13. Under Article 9 of Directive 2013/33, entitled ‘Guarantees for detained applicants’:

‘1. An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable.

Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.

2. Detention of applicants shall be ordered in writing by judicial or administrative authorities. The detention order shall state the reasons in fact and in law on which it is based.

3. Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted *ex officio* and/or at the request of the applicant. When conducted *ex officio*, such review shall be decided on as speedily as possible from the beginning of detention. When conducted at the request of the applicant, it shall be decided on as speedily as possible after the launch of the relevant proceedings. To this end, Member States shall define in national law the period within which the judicial review *ex officio* and/or the judicial review at the request of the applicant shall be conducted.

Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.

4. Detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation.

…

6. In cases of a judicial review of the detention order provided for in paragraph 3, Member States shall ensure that applicants have access to free legal assistance and representation. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant.

…'

14. Article 10 of that directive, entitled 'Conditions of detention', provides in paragraph 4:

'Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit

applicants in conditions that respect privacy. Limits to access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible.'

15. Article 17 of Directive 2013/33 provides for the general rules on material reception conditions and health care and Article 19(1) of that directive states that Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders.

B. **The Italy-Albania Protocol**

16. Article 1(1)(c) of the Italy-Albania Protocol provides that for the purposes thereof, 'areas' means 'immovable property owned by the State, as referred to in Annex 1 to this Protocol'.

17. Article 3(1) of that protocol requires that the 'Albanian Party shall recognise the Italian Party's right to use the Areas, in accordance with the criteria laid down in this Protocol'.

18. Article 4(1) to (4) and (8) of the protocol provides:

'1. The Italian Party may set up in the Areas the facilities indicated in Annex 1. The Parties agree that the total number of migrants present at any one time in Albanian territory pursuant to this Protocol may not exceed 3 000 (three thousand).

2. The facilities referred to in paragraph 1 shall be managed by the competent authorities of the Italian Party in accordance with the applicable Italian and European legislation. Disputes which may arise between those authorities and the migrants hosted in those facilities shall be subject exclusively to Italian jurisdiction.

3. The competent Albanian authorities shall allow the entry and stay in the Albanian territory of migrants accommodated in the facilities referred to in paragraph 1, for the sole purpose of carrying out the border or return procedures provided for by Italian and European legislation and for the time strictly necessary for those procedures to be carried out. In the event that, for any reason whatsoever, the

grounds for staying in the facilities are no longer met, the Italian Party shall immediately transfer those migrants out of the Albanian territory. The transfers to and from these facilities shall be carried out by the competent Italian authorities.

4. The entry of migrants into the territorial waters and territory of the Republic of Albania shall take place exclusively with the means of transport of the competent Italian authorities. Upon arrival in the territory of Albania, the competent authorities of each of the Parties shall carry out separately the procedure provided for in their respective national legislation and in compliance with this Protocol.

...

8. In the event of healthcare needs that the Italian authorities are unable to meet within the facilities referred to in paragraph 1, the Albanian authorities shall cooperate with the Italian authorities responsible for those facilities in order to ensure that migrants held there receive any necessary medical treatment that cannot be postponed.'

19. Article 6(3), (5) and (6) of the Italy-Albania Protocol provides:

'3. The competent authorities of the Italian Party shall be responsible for maintaining order and security within the Areas. The competent authorities of the Albanian Party may access the Areas, subject to the express agreement of the person in charge of the facility. Exceptionally, the authorities of the Albanian Party may access the facilities, after informing the Italian manager, in the event of fire or other serious and imminent danger requiring immediate intervention.

...

5. The competent Italian authorities shall adopt the necessary measures to ensure that migrants remain within the Areas, ensuring that they do not enter the territory of the Republic of Albania without authorisation, both during the administrative procedures and at the end thereof, regardless of the outcome.

6. If migrants leave the Areas without authorisation, they shall be returned there by the Albanian authorities. The costs incurred in implementing this paragraph shall be borne by the Italian Party in accordance with Article 10(1) of this Protocol.'

20. Article 9(1) and (2) of that protocol provide:

‘1. The duration of a migrant’s stay in the territory of the Republic of Albania for the purpose of implementing this Protocol may not exceed the maximum duration of detention permitted under the Italian legislation in force. Upon completion of the procedures carried out in accordance with Italian legislation, the Italian authorities shall ensure that the migrants are removed from Albanian territory. The costs of those procedures shall be borne entirely by the Italian Party, in accordance with the provisions of this Protocol.

2. To guarantee the rights of defence, the Parties shall allow access to the facilities provided for in this Protocol to lawyers, their assistants, as well as international organisations and European Union agencies providing advice and assistance to applicants for international protection, within the limits provided for by the applicable Italian, European and Albanian legislation.’

21. Article 13(2) of the Italy-Albania Protocol provides:

‘The Protocol shall remain in force for five years. Subject to notification by one of the parties, which gives notice of six months preceding the date of expiry, of its intention not to renew the present Protocol, it shall renew tacitly for an additional period of five years’.

C. **Italian law**

1. ***Law No 14/2024***

22. Under Article 3(2) to (4) of Law No 14/2024:

‘2. Persons embarked on vessels of the Italian authorities outside the territorial sea of the Italian Republic or of other Member States of the European Union, including following rescue operations, and persons who are the subject of detention measures which have been endorsed or extended pursuant to Article 14 of Legislative Decree No 286/1998 may be taken to the areas referred to in Article 1(1)(c) of the Protocol.

3. For the purpose of implementing the Protocol, the areas referred to in Article 1(1)(c) of the Protocol shall be treated in the same way as the border or transit zones

identified by the decree of the Minister for the Interior adopted in accordance with Article 28-bis(4) of Legislative Decree No 25/2008.

4. … A foreign national transferred to the facility referred to in Annex 1(B) to the Protocol shall remain there, pursuant to Article 6(3) of Legislative Decree No 142 of 18 August 2015, when there are reasonable grounds to believe that the application for international protection has been submitted there for the sole purpose of delaying or preventing refusal of entry or removal.'

23. Under Article 4(1), (3) and (5) of that law:

'1. The consolidated law referred to in Legislative Decree No 286 of 25 July 1998, Legislative Decree No 251 of 19 November 2007, Legislative Decree No 25 of 28 January 2008, Legislative Decree No 142 of 18 August 2015, and the Italian and European provisions concerning the requirements and procedures relating to the admission and residence of foreign nationals in Italian territory shall apply, in so far as they are compatible, to the migrants referred to in Article 1(1)(d) of the Protocol. The procedures provided for by the provisions referred to in the first sentence shall remain subject to Italian jurisdiction and the Corte d'Appello (Court of Appeal, Italy) shall have sole territorial jurisdiction …

…

3. The Italian official referred to in Article 5(1) shall adopt the measures necessary to ensure the full and timely exercise of the rights of defence of the foreign national who is the subject of the procedures referred to in paragraph 1 of this article. The certified email address or any other electronic registered mail service available to that official shall be used for sending and receiving the documents necessary to exercise the rights of the defence. The right to confer with the lawyer shall be exercised using audiovisual means of communication that ensure confidentiality, by remote link between the location of the foreign national and that of his or her lawyer.

…

5. The migrant's lawyer referred to in Article 1(1)(d) of the Protocol shall participate in the hearing from the room in which the judge is present, which shall be connected

via remote link to the migrant's location. Only if that remote link is not possible and the postponement of the hearing is incompatible with the procedural time limits shall the migrant's lawyer, where one has been appointed, if he or she travels to the areas referred to in Article 1(1)(c) of the Protocol, as well as the interpreter, be reimbursed for travel and subsistence expenses. The amount reimbursed, which may not in any event exceed EUR 500, as well as the conditions for reimbursement, shall be established by decree of the Minister of Justice …'.

2. ***Legislative Decree No 142/2015***

24. Article 6, entitled 'Detention', of Legislative Decree No 142/2015 (11) provides:

'1. An applicant may not be detained for the sole purpose of examining his or her application.

…

3. Except in the cases referred to in paragraph 2, an applicant who is in a facility referred to in Article 14 of Legislative Decree No 286 of 25 July 1998, pending enforcement of a refoulement or removal decision within the meaning of Articles 10, 13 and 14 of that legislative decree, shall remain at the facility when there are reasonable grounds to believe that the application was made merely in order to delay or frustrate the enforcement of the refoulement or removal. The provision of the first sentence shall also apply where the facility is situated at the border or in a transit zone within the meaning of Article 28-*bis*(4) of Legislative Decree No 25 of 28 January 2008.

…

5. The decision by which the police commissioner orders or extends detention shall be adopted in writing, shall be accompanied by a statement of reasons, and shall indicate that the applicant is entitled to submit written statements or observations in person or through a defence counsel. The decision shall be transmitted without delay and, in any event, within 48 hours of its adoption, to the Court of Appeal …'.

III. **The disputes in the main proceedings and the questions referred for a preliminary ruling**

25. The persons concerned entered Italy on 22 November 2024 (SG) and 1 January 2008 (JA) respectively.

26. On 28 August 2025, JA was the subject of a removal order issued by the Prefetto di Biella (Prefect, Biella, Italy), while SG was the subject, on 20 September 2025, of a removal order issued by the Prefetto di Imperia (Prefect, Imperia, Italy).

27. Since they did not have the necessary travel documents for their removal, the two third-country nationals were detained at a facility in Turin (Italy) on 28 August 2025 and 21 September 2025 respectively ('the initial detention decisions').

28. Those orders were then validated by the Giudice di Pace di Torino (Magistrate, Turin, Italy) by decisions of 1 September and 24 September 2025 respectively. On 24 October 2025, in accordance with Article 4(1) of Law No 14/2024, the two third-country nationals were transferred to the detention facility in Gjadër (Albania), one of the two facilities referred to in the Italy-Albania Protocol, with a view to their removal from Italian territory.

29. On 3 November 2025, the two third-country nationals, while detained at that facility, lodged an application for international protection. On the same day, the Police Commissioner, Rome, decided to order their detention at that facility ('the detention decisions concerned'). In particular, in accordance with Article 6(2) and (3) of Legislative Decree No 142/2015, SG was detained on the grounds of both the improper nature of his application for international protection – which, in view of the timing and the place where it was submitted, was merely intended to delay or frustrate the enforcement of the removal – and the danger he posed in the light of the numerous convictions, including final convictions, he had received for several offences. By contrast, the decision concerning JA was taken solely on account of the improper nature of his application for international protection, pursuant to Article 6(3) of Legislative Decree No 142/2015.

30. On the same day, the Police Commissioner, Rome, sent the referring court the request for validation of the detention orders. According to the referring court, the Court of Appeal must rule within 48 hours, otherwise the measure restricting personal freedom ceases to have effect. (12)

31. In the first place, the referring court has doubts as to the competence of the Italian Republic to conclude the Italy-Albania Protocol, taking into account the provisions of Article 4(3) TEU, Article 3(2) and Article 216(1) TFEU. In particular, that court questions the possibility, in the event that the Italian Republic does not have competence to conclude the Italy-Albania Protocol, of detaining applicants for international protection in facilities set up in Albanian territory.

32. In the second place and in the alternative, the referring court expresses its uncertainty as to whether the arrangements for the transfer of third-country nationals, including when they are applicants for international protection, to areas outside the territory of the Union, is compatible with the legal regime for the detention of applicants for international protection provided for by EU law, as well as the rights of the defence and the right to visit the detained person, along with the right to health.

33. In those circumstances, the Corte di appello di Roma (Court of Appeal, Rome) decided to stay the proceedings and to refer the following questions, worded identically in both of the cases, to the Court of Justice for a preliminary ruling:

'(1) Do Article 4(3) TEU, Article 3(2) and Article 216(1) TFEU – according to which the Union has 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, with the result that, in accordance with the principle of cooperation in good faith, the power to conclude agreements with third countries, which affect common rules or alter their scope, or which affect an area that is completely governed by [EU] rules and falls under the exclusive competence of the Union, is centralised at Union level – preclude the

conclusion by a Member State of an international agreement with a country outside the European Union for the management of migration flows such as the Italy-Albania Protocol?

(2) If the answer to that question is in the negative, does EU law, and in particular:

– Article 26 of [Directive 2013/32] and Article 8(1), (2) and (4) and Article 9(2) and (3) of Directive 2013/33, read in conjunction with recital 15 thereof, and interpreted in the light of Article 6 of the Charter of Fundamental Rights of the European Union, as regards detention;

– Article 46 of Directive 2013/32 and Article 10(4) of Directive 2013/33, interpreted in the light of Article 47 of the Charter [of Fundamental Rights of the European Union], as regards the rights of the defence and visiting the detainee;

– Article 17(2) and (3) and Article 19 of Directive 2013/33 as regards the right to health of the applicant for international protection;

preclude third-country nationals, including applicants for international protection, from being transferred to and staying in areas located outside the territory of the European Union pursuant to an international agreement such as the [Italy-Albania Protocol]?'

34. By decision of the President of the Court of 8 December 2025, Cases C-706/25 and C-707/25 were joined for the purposes of the written and oral parts of the procedure and the judgment.

35. By order of the President of 15 January 2026, it was decided that they be determined pursuant to the expedited procedure in accordance with Article 105 of the Rules of Procedure of the Court of Justice.

36. JA, the Italian, Czech and Netherlands Governments and the European Commission submitted written observations. With the exception of the Czech Government, they all participated in the hearing which took place on 23 March 2026.

IV. **Analysis**

A. **Admissibility**

37. The Italian Government disputes the admissibility of the questions referred. It considers that in no event may the referring court adopt the

validation measure submitted to it, and that the answer provided by the Court of Justice is not necessary to enable it to determine the cases before it. It argues that the judgment of the Court, rather than being an answer to a specific and current question, is merely an advisory opinion on hypothetical and future questions. The Italian Government adds that the hypothetical nature of the requests for a preliminary ruling stems from the orders for reference themselves, which note that the Court's answer to the questions referred is necessary in general terms for future hypothetical cases.

38. In that regard, as is apparent from the wording of Article 267 TFEU, the preliminary ruling sought must be 'necessary' to enable the referring court to 'give judgment' in the case before it. A national court or tribunal is not empowered to bring a matter before the Court by way of a request for a preliminary ruling unless a case is pending before it in which it is called upon to give a decision which is capable of taking account of the preliminary ruling. In such proceedings, there must therefore be a connecting factor between that dispute and the provisions of EU law whose interpretation is sought, by virtue of which that interpretation is objectively required for the decision to be taken by the referring court. (13) Furthermore, the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute. (14)

39. In the present case, the detention measures at issue ceased to have effect before the Court was able to rule, since the statutory period of 48 hours expired without a validation decision having been adopted. The persons concerned have thus been released, such that the Court's answer can no longer have any impact on the concrete situation that gave rise to the references for a preliminary ruling.

40. In its answer to the Court's request for information, the referring court states that 'the legality of the detention which is the subject of the proceedings' 'may be established after the Court of Justice has given its answer'. Although it is not for the Court of Justice to take the place of the national court in order to determine, in the light of national procedural rules, the decision that it must in

fact take, it must be noted that the referring court specifies neither the nature of the decision it intends to adopt after the Court's answer, nor the actual purpose it might serve, when the detention measures at issue have already ceased to have effect.

41. To that end, it is solely for the referring court to determine, in the light of national procedural rules, whether a decision is still to be given in the present cases, and the Court cannot substitute its assessment for that of the national court on that point. On that basis, and given the presumption of relevance of the questions referred, the requests for a preliminary ruling may be declared admissible. (15)

42. However, it should be noted that neither the brevity of the period for validation, which resulted in the automatic termination of the detention measures prior to the Court's ruling, nor the frequency of similar cases before the referring court, are sufficient to justify admissibility. Proceedings under Article 267 TFEU are not intended to answer abstract or general questions, but only those strictly necessary for the resolution of a specific and current dispute. The admissibility of the present applications is therefore based solely on the referring court's assertion that it is still required to adopt a decision in the cases pending before it.

43. I therefore propose that the Court of Justice reject the abovementioned two grounds and declare the requests for a preliminary ruling admissible for the sole reason that the review of the legality of the detention by the referring court requires, in the cases before it, an answer from the Court of Justice.

B. **The first questions referred**

1. ***The subject matter of the disputes in the main proceedings***

44. As a preliminary point, it is necessary to clarify the exact nature of the measure at issue in the present cases. Article 3(4), *in fine*, of Law No 14/2024 provides that a foreign national transferred to the return facility referred to in Annex 1(B) to the Italy-Albania Protocol is to remain there, pursuant to Article 6(3) of Legislative Decree No 142/2015, when there are reasonable grounds to believe that the application for international protection was made merely in

order to delay or frustrate the enforcement of the refoulement or removal. The wording of that provision ('remain') could imply that the person concerned has merely remained in detention following the initial detention decisions.

45. That is not the case here, however. The persons concerned were each initially the subject of return decisions adopted under Directive 2008/115 and were detained on that basis in Italian territory before being transferred to the areas concerned. (16) The submission of an application for international protection in those areas led the Italian authorities to adopt fresh detention decisions on the basis of Article 6(3) of Legislative Decree No 142/2015, implementing Directives 2013/32 and 2013/33. Those detention decisions were submitted for validation to the referring court. (17)

46. It follows that the measures at issue cannot be regarded merely as the continuation of detention following the initial detention decisions based on Directive 2008/115, but as separate and self-standing detention decisions adopted on the basis of Article 6(3) of Legislative Decree No 142/2015, implementing Directives 2013/32 and 2013/33, and, accordingly, subject to all the requirements and guarantees laid down by those two directives. This is the specific procedural framework for the question referred to the Court of Justice on the competence of the Italian Republic to conclude the Italy-Albania Protocol and to implement it by means of Law No 14/2024 and Legislative Decree No 142/2015 (together 'the Italy-Albania Protocol and the national measures at issue').

47. In that regard, it follows from the case-law of the Court of Justice that, where a person who is the subject of a return decision adopted under Directive 2008/115 makes an application for international protection, the return procedure is suspended for the entire duration of the examination of that application. In effect, the submission of an application for international protection has the effect of conferring on the person concerned the status of applicant within the meaning of Article 2(c) of Directive 2013/32, which is incompatible with the status of illegally staying national who is the subject of a return procedure within the meaning of Directive 2008/115, since the two legal regimes are mutually exclusive during the examination of the application.

During that period, it is the legal framework of Regulation No 604/2013 and Directives 2013/32 and 2013/33 that governs the situation of the applicant, who retains his or her status as an applicant for international protection until a final decision is adopted in relation to his or her application, thus benefiting from all the rights guaranteed by Directive 2013/33. (18)

48. It is therefore proposed that, in examining whether there is any exclusive competence in the area covered by the detention regime established by the Italy-Albania Protocol and the national measures at issue, the Court limit its answer to the specific provisions on the detention of applicants for international protection that the referring court cited in its orders for reference, namely Article 28 of Regulation No 604/2013, Articles 8 to 10 of Directive 2013/33 and Article 26 of Directive 2013/32, which are the only provisions relevant for determining whether the detention is valid. (19)

2. *The provisions of primary law applicable to the first questions referred for a preliminary ruling*

49. As is clear from their wording, the first questions referred for a preliminary ruling concern in substance the interpretation of Article 3(2) TFEU, Article 216 TFEU and Article 4(3) TEU.

50. In that regard, Article 3(2) TFEU grants the Union supervening exclusivity (20) for the conclusion of an international agreement, arising from the adoption of a legislative act of the Union, or from the need to enable the Union to exercise its internal competence, or in so far as the adoption of an international agreement may affect common rules of EU law or alter their scope.

51. It is common ground that the conclusion of an international agreement for the management of applicants for international protection in the territory of a third country is not expressly provided for in any act of secondary EU legislation. Moreover, such an agreement is not necessary to enable the EU to exercise its internal competence in the matter of asylum, since this is already exercised, pursuant to Article 78(2) TFEU, by means of Regulation No 604/2013 and Directives 2013/32 and 2013/33, without the need for any international agreement to that effect.

52. Consequently, the question as to competence should be examined in the light of the last part of Article 3(2) TFEU, according to which the EU has exclusive competence for the conclusion of an international agreement in so far as its conclusion may affect common rules or alter their scope. (21) In addition, the wording of that part of Article 3(2) TFEU corresponds to that used by the Court in paragraph 22 of *Commission* v *Council*, (22) in which it defined the nature of the international commitments which Member States cannot enter into outside the framework of the Community (now EU) institutions, where common EU rules have been promulgated for the attainment of the objectives of the Treaty. (23)

53. However, under the principle of conferral provided for in Article 5(2) TEU, the common policy on asylum, subsidiary protection and temporary protection falls within the area of freedom, security and justice, and constitutes a *shared competence* between the Union and the Member States under Article 4(2)(j) TFEU. (24) In that regard, all areas of shared competence, with the exception of cases of parallel competence covered by Article 4(3) and (4) TFEU, are capable of becoming exclusive in accordance with Article 3(2) TFEU. (25)

54. Regulation No 604/2013 as well as Directives 2013/32 and 2013/33 were adopted by exercising that shared competence. (26) In so far as those acts govern, at EU level, the detention of applicants for international protection, the Member States therefore remain competent only for the elements not governed by those instruments, their discretionary power being limited to the implementation of those instruments for the matters that they govern.

55. It follows that the question of the division of external and internal competences in the present cases must be assessed in the light of Article 3(2) TFEU, in order to determine whether the exercise of the shared competence in the field of the detention of applicants for international protection has generated an exclusive external competence of the Union extending to the elements specifically governed by the applicable instruments of secondary law, such that the conclusion of the Italy-Albania Protocol and the adoption of the national measures at issue exceed the residual competence of the Italian Republic.

56. Furthermore, I am of the view that Article 216(1) TFEU, to which the referring court refers, is not applicable in the present cases, since that provision governs the existence of the Union's external competence, in order to determine whether the Union has the power to conclude an international agreement in the matter in question. Such an issue arises where the Union acts or intends to act externally, as was the situation in the case giving rise to the judgment of *Germany* v *Council*, (27) and in the procedure giving rise to Opinion 2/15. (28) In the present cases, it is not disputed that the Union is authorised to conclude an agreement in the field of international protection, such authority flowing directly from Article 78 TFEU. The question is rather whether the Italian Republic has infringed an exclusive competence of the Union by concluding the Italy-Albania Protocol. That question arises with regard to the competence of the Member States, and as such falls under Article 2(2) and Article 3(2) TFEU.

57. Lastly, as regards the applicability of Article 4(3) TEU, which enshrines the principle of sincere cooperation, it should be noted that Article 3(2) TFEU codifies the doctrine resulting from *ERTA*. (29) It alone provides a sufficient basis for determining both the existence and extent of the Union's exclusive competence to conclude international agreements, including where it may affect common rules or alter their scope. Article 4(3) TEU does not require a separate analysis therefore, since Article 3(2) TFEU constitutes its direct and sufficient legislative expression for the purposes of that competence.

58. In the light of the foregoing, I propose that the Court consider that, by its first questions for a preliminary ruling, the referring court asks, in essence, whether Article 28 of Regulation No 604/2013, Article 26 of Directive 2013/32 and Articles 8 and 9 of Directive 2013/33, read in the light of Article 3(2) TFEU, must be interpreted as precluding a Member State from concluding, ratifying and implementing an international agreement with a third country, pursuant to which the third country undertakes to make available areas within its territory, placed under the State prerogatives of the Member State, and adopting the national legislation for its ratification and internal implementation, in this case Law No 14/2024 and Legislative Decree No 142/2015, under which the Member

State allows applicants for international protection to be detained in those areas pending the examination of their application.

59. Before examining whether the Italian Republic has encroached upon the exclusive competence of the Union within the meaning of Article 3(2) TFEU by concluding the Italy-Albania Protocol and adopting the national measures at issue, it is necessary to determine whether EU law is applicable to a situation such as that at issue in the present cases, namely the detention of applicants for international protection in areas outside the territory of the Member States, but placed under the State prerogatives of a Member State.

3. *The applicability of EU law in the areas concerned in the cases in the main proceedings*

60. It must be examined at the outset whether the detention of applicants for international protection in the areas concerned falls within the territorial, material, personal and temporal scope of EU law.

(a) *The territorial application of EU law*

61. I note that the Italian and Netherlands Governments and the Commission take the view that applications for international protection made in the areas concerned do not fall within the territorial scope of Directives 2013/32 and 2013/33, those areas being comparable to representations of the Member States in the territory of a third country. According to those parties, EU law still applies in those areas, not by virtue of the directives themselves, but by the reference to EU law contained in the ratification instruments or the national acts transposing those directives.

62. In that regard, it should be recalled that Directives 2013/32 and 2013/33 define their territorial scope in a precise and detailed manner. The territorial scope of those directives is essentially the same. Specifically, Articles 3(1) of those directives respectively limit their territorial scope to applications for international protection made ‘in the territory, including at the border, in the territorial waters or in the transit zones of the Member States’. Furthermore, Article 3(2) of those directives expressly excludes from their scope requests for diplomatic or territorial asylum submitted to representations of Member States.

63. Nevertheless, it is clear from the orders for reference, the Italy-Albania Protocol and Law No 14/2024 that the Italian authorities exercise effective territorial control over the areas concerned, despite the fact that they remain formally subject to the sovereignty of the Republic of Albania.

64. First, as regards legislative power, according to Article 5(1) of the Italy-Albania Protocol, the structures are built and managed in accordance with Italian law, without it being necessary to obtain an Albanian construction licence. Under Article 4(1) of Law No 14/2024, Italian and EU legislation applies to migrants detained in the areas concerned, to the extent that it is compatible, which confers exclusive power on the Italian authorities in those areas.

65. Second, as regards judicial power, under Article 4(1) of that law, exclusive jurisdiction is conferred on the Italian courts for all proceedings concerning migrants detained in the areas concerned, while Article 4(2) of the Italy-Albania Protocol provides that disputes between the Italian authorities and the migrants detained in those areas fall exclusively within Italian jurisdiction.

66. Lastly, concerning executive power, under Article 6(3) of that protocol, the Italian authorities alone are responsible for maintaining order and security inside those areas, and the Albanian authorities may only access them with the express consent of the Italian manager of the facility. That provision thus deprives the sovereign State of its unrestricted access to part of its own territory. Under Article 6(5) of the Italy-Albania Protocol, the Italian authorities must adopt the necessary measures to prevent migrants leaving the facilities without authorisation, while Article 6(6) of that protocol provides that the Albanian authorities are obliged to return migrants to the areas concerned, if they leave the facilities without authorisation. According to Article 4(3) of that protocol, all transfers to and from those areas are handled exclusively by the Italian authorities.

67. Taken as a whole, those factors indicate that the areas concerned are, in the present case, under the exclusive territorial control of the Italian authorities, which exercise all legislative, executive and judicial powers under the Italy-Albania Protocol and the national measures at issue.

68. In that respect, it follows from the case-law of the Court of Justice that a treaty may bind a State in respect of another territory if such an intention is apparent from that treaty or is otherwise established. (30) That principle confirms that public international law recognises the possibility for a State to modify, by treaty, the legal relations it has with a foreign territory. That is precisely what the Italy-Albania Protocol does by transferring to the Italian republic the effective exercise of its jurisdiction over the areas concerned, without the transfer of territorial sovereignty in the formal sense.

69. Having regard to the facts set out in point 63 of the present Opinion, it seems to me that the Italy-Albania Protocol may be classified as a territorial lease within the meaning of public international law. (31) The concept of territorial lease is characterised by three elements, (32) all of which exist in the present case. First, the protocol is concluded for a renewable fixed term of five years, which meets the temporality requirement inherent in the territorial lease. Second, the Italian Republic is responsible for financing the construction and operation of the facilities. This is the typical consideration for the territorial lease, which is not necessarily monetary under international law. Lastly and most importantly, the Italian Republic exercises its State prerogatives in the areas concerned on an exclusive basis, while the Albanian Republic retains its formal sovereignty over those areas. This corresponds precisely to the legal structure of a territorial lease, in which the lessee exercises authority without holding the sovereign right to do so. It follows that the areas concerned may be considered as territories leased by the Albanian Republic to the Italian Republic under international law.

70. That characterisation of the Italy-Albania Protocol as a territorial lease under public international law is decisive for the purposes of the application of EU law. (33) In the present case, the territorial lease transfers to the Italian Republic the effective and exclusive exercise of its State prerogatives over the areas concerned, notably its jurisdiction, applicable law and competent authorities, without however transferring to it sovereignty over those areas.

71. Still, the concept of 'territory of a Member State' within the meaning of Article 3(1) of Directives 2013/32 and 2013/33 cannot be interpreted as referring

exclusively to the territory over which the Member State exercises its sovereignty in the formal sense of international law, but must be understood as encompassing any geographical area over which a Member State *effectively* exercises its jurisdiction by virtue of an instrument recognised in public international law as entitling it to do so. A contrary interpretation would allow a Member State to avoid the obligations imposed on it by those directives by relocating, by means of a treaty, the exercise of its competence to a third State territory, thus rendering the guarantees harmonised by the EU legislature meaningless. It is the transfer of the persons concerned decided by the Member State, which has placed them in a situation in which the effective application of those guarantees depends on the practical arrangements for the operation of the facilities, whereas they would have benefited from them automatically in the national territory. To accept that a Member State could avoid the obligations imposed on it under those directives by the mere fact of having made a choice of location, by means of a treaty, would be tantamount to potentially depriving those directives of their effectiveness.

72. Consequently, without it being necessary to classify those areas as the 'territory' of the Italian Republic, Directives 2013/32 and 2013/33 apply to them since that Member State effectively and exclusively exercises its State prerogatives there under the Italy-Albania Protocol.

73. That finding is supported by the fact that, in the present case, the Italian authorities implement, in the areas concerned, Italian law transposing Directives 2013/32 and 2013/33 by the reference made in the national measures at issue. (34) That reference does not constitute the basis for the applicability of EU law in the areas concerned, which stems from the international classification of the Italy-Albania Protocol as set out above, (35) but confirms it in the domestic legal order. (36)

74. In addition, Law No 14/2024 treats the areas concerned as Italian border and transit zones, which confirms that the Italian Republic intended to exercise its own jurisdiction in those areas. It should be pointed out, however, that such a domestic legislative classification cannot determine the status of the areas concerned under EU law, since a national law cannot determine the territorial

scope of EU law. The classification of the areas concerned as belonging to the 'territory' of the Italian Republic within the meaning of Directives 2013/32 and 2013/33 stems from the Italy-Albania Protocol as an instrument of public international law conferring on the Italian Republic the effective and exclusive exercise of its State prerogatives over those areas, since Law No 14/2024 merely draws the relevant consequences in domestic law, but cannot constitute its basis. As a result, that classification under Law No 14/2024 cannot, in itself, be the basis of the applicability of those directives.

75. Moreover, it is my view that the areas concerned cannot be classified as 'border' zones or 'transit' zones within the meaning of Directives 2013/32 and 2013/33, since those concepts refer to geographical areas situated at the boundaries of the national territory of a Member State, and not to areas located within the territory of a third country. (37) That finding applies a fortiori in the circumstances of the present cases, in which the persons concerned were transferred from Italian territory to the areas concerned, and not intercepted at sea and then taken directly to Albania.

76. With regard to the arguments put forward by the Italian Government, in the first place, I am of the view that the analogy with diplomatic representations does not stand up to scrutiny. In *X and X*, (38) the Court held that an application for international protection made in an embassy of a Member State could not be treated as an application made in the territory of that Member State, precisely because diplomatic representations are expressly excluded from the scope of the directives. The areas concerned differ from that situation, given that the Italian Republic has not simply established a consular presence there, but exercises, under a territorial lease formalised by the Italy-Albania Protocol, its State competences with regard to persons who have been forcibly taken to those areas, without having consented to go there and without being free to leave by virtue of the restriction laid down in Article 6(5) of that protocol.

77. In the second place, the Italian Government relies on the judgment of 9 November 2021, *Bundesrepublik Deutschland (Maintaining family unity)*, (39) to argue that, when a Member State voluntarily applies the objectives of a directive outside its territorial scope, it has a duty not to undermine the attainment of

those objectives or the effectiveness of the common rules. Nevertheless, it seems to me that that argument is based on a misreading of that judgment. The case that gave rise to that judgment concerned the extent to which a Member State could, in the context of the transposition of a minimum harmonisation directive, opt for more favourable legislation than that imposed by the directive. It had nothing to do with the delimitation of the territorial scope of a directive, nor the possibility for a Member State to opt out of that scope by relying on the voluntary application of its objectives. Directives 2013/32 and 2013/33 apply to the areas concerned as long as those areas are under Italian jurisdiction, as demonstrated above. In accordance with the requirement for those directives to be effective and the principle of the primacy of EU law, (40) a Member State cannot, by means of treaty, avoid its obligations under those directives in the areas within its jurisdiction, even if they are located outside the territory of the European Union. (41)

78. In the third place, the assertion that the effectiveness of Directives 2013/32 and 2013/33 is maintained by the mere fact that applicants can lodge an application for international protection and have it examined under Italian law cannot be accepted. It does not satisfy the specific safeguards at issue in the present proceedings, namely, inter alia, the exhaustive nature of the grounds for detention listed in Article 8(3) of Directive 2013/33, the procedural guarantees provided for in Article 9 of that directive, and the right to an effective remedy enshrined in Article 46 of Directive 2013/32. The effectiveness of those provisions is not limited to the existence of a formal asylum procedure: it requires the material and procedural conditions they establish to be fulfilled.

79. It follows that the areas concerned, whose status in public international law is determined by the Italy-Albania Protocol, which confers on the Italian Republic the effective and exclusive exercise of its State prerogatives over those areas, may be considered to fall within the 'territory of a Member State' within the meaning of Article 3(1) of both Directives 2013/32 and 2013/33.

(b) ***The material, personal and temporal application of EU law***

80. As regards the substantive scope, the procedures in the main proceedings fall within the scope of EU law in so far as the detention decisions at issue were

adopted on the basis of national provisions, in this case Article 6(2)(c) and (3) of Legislative Decree No 142/2015, which implements the harmonised regime of Directive 2013/33. ([42]) That provision transposes the grounds for detention listed in Article 8(3) of the directive, namely the protection of public order and national security (under (e)), as well as the improper nature of the application for international protection, which was made merely in order to frustrate a return decision (under (d)). The fact that the detention is enforced outside the national territory has no bearing on that characterisation, since it is the legal basis of the measure, and not the place of its enforcement, that determines the material applicability of EU law. In that regard, the Court has already held that the detention of an applicant for international protection, within the meaning of Article 2(h) of Directive 2013/33, is an autonomous concept of EU law understood as any coercive measure that deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter. ([43])

81. With regard to the personal scope, Article 3(4), *in fine*, of Law No 14/2024 expressly designates, among the categories of third-country nationals who may be held in facility B, ([44]) those who have made an improper application for international protection aimed at delaying or frustrating their removal. However, that category corresponds precisely to the one referred to, first, in Article 8(3)(d) of Directive 2013/33, namely persons placed in detention by a Member State in the context of a procedure for their return on the ground that there are reasonable grounds to believe that the application for international protection was made merely in order to delay or frustrate the enforcement of a removal decision, and, second, that referred to in Article 31(8)(g) of Directive 2013/32, which authorises an accelerated procedure for applications made merely in order to delay or frustrate the enforcement of the refusal of entry or removal. The persons concerned therefore fall within the personal scope of Directives 2013/32 and 2013/33, which is not in dispute.

82. As for the temporal scope, it should be pointed out that, at the time of the events, the applicable legal framework is that provided by Regulation No

604/2013 and Directives 2013/32 and 2013/33. The New Pact on Migration and Asylum, and in particular Regulation 2024/1351 and Regulation (EU) 2024/1348, (45) as well as Directive (EU) 2024/1346, (46) although they entered into force on 11 June 2024, will only take effect from 12 June 2026 for the regulations and from 1 July 2026 for the directive, at the end of their respective transition and transposition periods. Those instruments are therefore not applicable *ratione temporis* to the present cases.

83. It follows from all those considerations that the cases in the main proceedings are governed, in all respects, by EU law, notwithstanding the fact that the applicants were detained in the areas concerned in Albania. The central question is therefore whether the Italian Republic has jurisdiction to conclude an international agreement governing the detention of applicants for international protection.

4. ***The delimitation of competences to adopt an international agreement governing the detention of applicants for international protection***

(a) ***The application of Article 3(2) TFEU to the Member State exercising an external competence***

84. First, the exercise of competence by the Union in an area of shared competence may entail a pre-emption mechanism, leading to the exclusive competence of the Union. (47) In particular, such a pre-emption occurs when the EU has fully harmonised a certain field, which has the effect of thereby depriving the Member States of their competence to legislate (*field pre-emption*), or when national law impairs the proper functioning or hinders the attainment of the objectives it pursues (*obstacle pre-emption*), or when national law is contrary to a rule of EU law (*rule pre-emption*). (48)

85. The extent and degree of harmonisation by the EU legislature may vary depending on the legal instrument used and its content. (49) The extent of harmonisation determines which aspects of the relevant field are covered by EU legislation, while the degree of harmonisation determines the intensity of the regulation of those aspects. In effect, minimum harmonisation leaves the Member States a margin of discretion to go even further than the common

requirements, while full harmonisation leaves them no residual competence in the aspects thus governed.

86. Accordingly, the legal framework applicable to the present cases should be examined, in my view, in the light of the extent and degree of harmonisation achieved in relation to the detention of applicants for international protection, in order to determine to what extent the EU legislature exercised a field pre-emption, or, on the contrary, whether it has left Member States a certain margin of discretion in the implementation of EU law.

87. Second, the expression ‘may affect common rules or alter their scope’ in Article 3(2) TFEU corresponds to the nature of the international commitments which Member States cannot enter into outside the framework of the EU institutions, where common EU rules have been promulgated for the attainment of the objectives of the Treaty. (50) According to the case-law, that expression must be interpreted in the light of the Court’s explanation in the judgment in *ERTA* and in the case-law developed from that judgment. (51)

88. 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. (52) Moreover, it is not necessary for the areas covered by the international agreement and the EU legislation to coincide fully. (53) In particular, the scope of EU rules may be affected or altered by international commitments where the latter fall within an area which is already covered to a large extent by such rules. (54) In addition, Member States may not enter into such commitments outside the framework of the EU institutions, even if there is no possible contradiction between those commitments and the common EU rules. (55) Indeed, such a risk of common EU rules being affected may be found to exist where the international commitments at issue, without necessarily conflicting with those rules, may have an effect on their meaning, scope and effectiveness. (56)

89. Furthermore, since the EU has only conferred powers, any competence, especially where it is exclusive, must be the subject of a *comprehensive and*

detailed analysis of the relationship between the envisaged international agreement and the EU law in force. (57) However, before carrying out that examination, it should be noted that, as regards the detention of applicants for international protection, the field covered by the Italy-Albania Protocol and the national measures at issue has not been fully harmonised in EU law. It follows that the application of Article 3(2) TFEU must be assessed separately, depending on the matter concerned and the degree and extent to which that field has been harmonised by the EU legislature. In that regard, it is necessary to distinguish between three aspects: first, the geographical location of the detention; second, the grounds for the detention; and, third, the material and procedural conditions for its implementation. It is in the light of that distinction that I will examine whether the Italy-Albania Protocol and the national measures at issue are liable to affect common EU rules or alter their scope, within the meaning of that provision.

90. Lastly, the question could arise whether the national measures at issue also fall, as such, within the scope of Article 3(2) TFEU, since those measures implement the Italian Republic's international commitments and contribute, together with the Italy-Albania Protocol, to the definition of their practical scope. In that regard, it should be noted that, as demonstrated above, (58) owing to its specific characteristics as a territorial lease, Article 4(2) of the protocol expressly provides that the facilities are to be managed by the Italian authorities in accordance with Italian and EU legislation. It follows that the national measures at issue are not self-standing domestic measures, but are inseparable from the protocol and contribute to the definition of its practical scope. Therefore, the case-law flowing from *ERTA* and Article 3(2) TFEU are applicable to the Italy-Albania Protocol and the national measures at issue, considered as a whole.

(b) *The geographical determination of the places of detention of applicants for international protection*

91. It should be noted at the outset that no provision of EU law provides for the geographical location of detention facilities for applicants for international protection. As the Court has already held, that law does not impose specific places where applicants for international protection may be detained. (59)

Specifically, such a geographical location cannot necessarily derive from Directive 2013/32 or Directive 2013/33. (60) Therefore, the geographical location of detention facilities for applicants for international protection remains at the discretion of the Member States when transposing the relevant directives, such that the decision to locate those facilities in Albanian territory cannot, as such, be regarded as falling within the exclusive competence of the Union within the meaning of Article 3(2) TFEU.

92. Nevertheless, by exercising that discretion when concluding and ratifying the Italy-Albania Protocol, the Italian Republic was obliged to ensure full respect for the conditions and guarantees provided for in Directives 2013/32 and 2013/33 in the areas concerned. Indeed, the fact that the areas concerned are located outside the territory of the Union cannot, as such, have the effect of relieving the Italian Republic of its obligations under EU law, since those areas fall within its jurisdiction, as established above. (61) It follows that it is not the choice to locate the facilities in the territory of the Republic of Albania that may affect common EU rules or to alter their scope, within the meaning of Article 3(2) TFEU, but the combination of that choice with the practical arrangements for the organisation of detention provided for by the Italy-Albania Protocol and the national measures at issue, in so far as they affect matters harmonised by EU law – namely, the grounds for detention and the material and procedural conditions governing that detention, which will be examined below.

(c) ***The harmonisation of the grounds for detention of applicants for international protection***

93. First, it should be recalled that Article 28 of Regulation No 604/2013, Article 26(1) of Directive 2013/32 and Article 8(1) of Directive 2013/33 provide that Member States are not to hold a person in detention for the sole reason that he or she is an applicant for international protection. In addition, the detention of an applicant for international protection, within the meaning of Article 2(h) of Directive 2013/33, is an autonomous concept of EU law understood as any coercive measure that deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population,

by requiring him or her to remain permanently within a restricted and closed perimeter. ([62])

94. Furthermore, in accordance with Article 28(2) of Regulation No 604/2013, Article 26(2) of Directive 2013/32 and Article 8(3) of Directive 2013/33, Member States may detain an applicant on the basis of an individual assessment, where other less coercive measures cannot be effectively applied, in the light of recitals 15 and 20 of Directive 2013/33.

95. In that regard, Article 8(3) of Directive 2013/33 lists the grounds on which Member States may detain applicants for international protection. Recital 17 of that directive states, moreover, that the grounds for detention set out in that directive are without prejudice to other grounds for detention, including those of a criminal nature, which are applicable under national law, unrelated to the third country national's application for international protection. ([63]) According to settled case-law, the same provision lists exhaustively the various grounds that may justify the detention of an applicant for international protection. Each of those grounds meets a specific need and is self-standing. ([64])

96. I consider that such an exhaustive list constitutes a *field pre-emption*, which leaves no margin of discretion to the Member States in the transposition of EU law concerning the grounds for detention of applicants for international protection. The Member States may not add such grounds, either through the adoption of domestic legislation or the conclusion of an international agreement.

97. It should be noted that the grounds for detention relied on in the present cases correspond exactly to those provided for in Article 8(3)(d) and (e) of Directive 2013/33, transposed respectively in Article 6(3) and Article 6(2)(c) of Legislative Decree No 142/2015. ([65]) First, the implementation of Directives 2013/32 and 2013/33 by the national measures at issue does not depart, on that point, from the grounds for detention exhaustively permitted by EU law. Secondly, the Italy-Albania Protocol is limited to defining the geographical and organisational framework in which that detention is enforced. It follows that, as regards the grounds for detention, the Italy-Albania Protocol and the national

measures at issue are not liable to affect common EU rules or alter their scope, within the meaning of Article 3(2) TFEU. In any event, if the EU legislature were to amend the regulatory framework applicable in the matter, the Italy-Albania Protocol, which was concluded for an initial five-year period, includes a clause for its tacit renewal for successive five-year periods, coupled with an option for termination on six months' notice before its expiry, (66) which could, if necessary, allow the Italian Republic's international commitments to be adapted to such changes.

(d) *The harmonisation of guarantees for detained applicants for international protection*

(1) *The right to liberty and security*

98. As regards the detention of an applicant for international protection, Article 9(1) of Directive 2013/33 provides that an applicant for international protection is to be detained only for as short a period as possible and only for as long as the grounds set out in Article 8(3) of that directive are applicable, and that the administrative procedures relevant to those grounds for detention are to be executed with due diligence. Delays in those procedures that cannot be attributed to that applicant cannot justify a continuation of detention. (67)

99. Since the concept of 'detention' falls within the scope of EU law, the provisions of the Charter of Fundamental Right of the European Union ('the Charter') are applicable by virtue of Article 51(1) thereof. (68) The detention of applicants for international protection constitutes a serious interference with the fundamental right to liberty and security enshrined in Article 6 of the Charter, therefore applying only in so far as is strictly necessary. (69) In so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), Article 52(3) of the Charter provides that the meaning and scope of those rights must be the same as those laid down by the ECHR, while specifying that EU law may provide more extensive protection. For the purposes of interpreting Article 6 of the Charter, account must therefore be taken of Article 5 ECHR, as the minimum threshold of protection. (70)

100. In that regard, it is settled case-law of the European Court of Human Rights ('the ECtHR') that the right to liberty and security is essentially intended to protect the individual against arbitrary or unjustified deprivations of liberty. (71) Such legal protection thus applies in the context of immigration control, requiring that the detention of third-country nationals outside criminal proceedings also have a legal basis, in order to ensure that the general principle of legal certainty is satisfied. (72) Furthermore, it follows from Article 52(1) of the Charter that any limitation on the exercise of that right must be provided for by law and must respect the essence of that right and be subject to the principle of proportionality.

101. Although the Court has already clarified that the detention of a third-country national who is the subject of a removal procedure, which constitutes a serious interference with his or her right to liberty, is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness, (73) such a conclusion is a fortiori necessary in the event of the detention of an applicant for international protection, who, exercising his or her fundamental right to asylum as set out in Article 18 of the Charter, is thus affected in his or her right to liberty and security enshrined in Article 6 of the Charter.

102. To provide such a degree of legal certainty, in accordance with Article 9(2) of Directive 2013/33, detention of an applicant for international protection is to be ordered in writing by a judicial or administrative authority and the detention order is to state the reasons in fact and in law on which it is based. (74)

103. It follows that Directives 2013/32 and 2013/33, interpreted in the light of Article 6 of the Charter, fully harmonise the minimum procedural guarantees governing the detention of applicants for international protection, below which the Member States may not go.

104. In the present case, at first sight, the legal framework consisting of the Italy-Albania Protocol and the national measures at issue does not appear to formally deviate from the requirements imposed, as described above. The grounds for detention, (75) the requirement for the shortest possible time and

due diligence in the execution of administrative procedures related to detention under Article 9(1) of Directive 2013/33, the form of the decision and the remedies are established in accordance with the minimum procedural guarantees harmonised by those instruments.

(2) *The right to effective judicial protection*

105. As regards the judicial review of the detention, in the first place, the first subparagraph of Article 9(3) of Directive 2013/33 requires that where detention of the applicant for international protection is ordered by an administrative authority, Member States are to provide for a speedy judicial review of the lawfulness of detention to be conducted *ex officio* or at the request of the person detained. (76) In that regard, a judicial authority's review of compliance with the conditions governing the lawfulness of the detention of a third-country national which derive from EU law must lead that authority to raise of its own motion, on the basis of the material in the file brought to its attention, as supplemented or clarified during the adversarial proceedings before it, any failure to comply with a condition governing lawfulness which has not been invoked by the person concerned. (77) Thus, the Court has already clarified that that provision precludes a Member State from making no provision for any judicial review of the lawfulness of the administrative decision ordering the detention of an applicant for international protection. (78) Furthermore, in accordance with the case-law of the Court, the characteristics of the remedy provided for in Article 46 of Directive 2013/32 relating to applications for international protection must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection. (79)

106. In the present case, Article 6(5) of Legislative Decree No 142/2015 requires the detention decision to be sent to the Court of Appeal within 48 hours, while Article 4(1) of Law No 14/2024 provides for the hearings to take place by audiovisual link. (80) Although those provisions do not dispense with judicial review, they do require it to take place remotely. On the face of it, it does not appear that the Italian Republic formally departs from the judicial review

requirement, such that there is no encroachment upon the competence exercised by the Union within the meaning of Article 3(2) TFEU.

107. In the second place, under Article 9(6) of Directive 2013/33, free legal assistance and representation, access to which the Member States are to ensure, include, at least, the preparation of the necessary procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant. Thus, the assistance of a lawyer is necessary to ensure the effectiveness of that remedy. (81) Moreover, pursuant to Article 9(2) and (4) of that directive, the detention decision, delivered in a language which they understand or are reasonably supposed to understand, also indicates the appeal procedures, as well as the possibility of requesting free legal assistance and representation, within the meaning of national law. (82)

108. Furthermore, Member States remain free, in accordance with the principle of procedural autonomy, to determine the conditions for the granting of free legal assistance and representation, in accordance with the provisions laid down in Article 9(7), (8) and (9) of Directive 2013/33, those conditions being governed by the national law of the Member States pursuant to paragraph 10 of that article. For example, Member States may limit free legal assistance and representation to applicants for international protection who lack sufficient resources (paragraph 7(a)), subsequently asking to be reimbursed for those costs if and when the applicant's financial situation has improved considerably, or if the decision to grant such costs was taken on the basis of false information supplied by the applicant (paragraph 9). Member States may also impose monetary limits and/or time limits on the provision of free legal assistance and representation, provided that such limits do not arbitrarily restrict access to free legal assistance and representation (paragraph 8(a)).

109. In the present case, Article 4(5) of Law No 14/2024 provides for the lawyer's participation in the hearing by audiovisual link as the default procedure, as well as the reimbursement of travel expenses, capped at EUR 500, (83) incurred by the court-appointed lawyer in exceptional cases where the audiovisual link is not possible and the postponement of the hearing is incompatible with respecting the procedural time limits. Since Directive 2013/33 leaves Member

States a margin of discretion regarding the arrangements for legal assistance, communication by audiovisual link does not in itself constitute an encroachment on a competence pre-empted by the Union within the meaning of Article 3(2) TFEU.

110. Nevertheless, the relocation of detention facilities outside the national territory is liable to give rise to a risk of incomplete or altered implementation of the guarantees harmonised by Directives 2013/32 and 2013/33. Indeed, the effectiveness of those guarantees cannot be satisfied merely by the formal existence of a legal basis, but requires that the practical arrangements for their exercise be expressly provided for in the applicable legislation. That is all the more true where they are exercised in structurally different conditions from those prevailing in the national territory.

111. There are several aspects that illustrate that risk. In the first place, although Article 4(3) of Law No 14/2024 provides that the right to meet with the lawyer must be exercised by confidential audiovisual link, without that confidentiality being expressly extended to conversations taking place immediately outside the hearing, such as communications during breaks in the hearing, or immediately before or after it. Those exchanges necessarily take place in that audiovisual context without the confidentiality regime governing them being explicitly laid down. Article 4(5) of that law provides that the lawyer must participate in the hearing from the courtroom where the judge is located, while being connected by remote link to the migrant's location in Albania, such that lawyer and client are in geographically separate locations for the entire duration of the proceedings. Owing to the practical difficulties of physically travelling to the areas concerned, face-to-face discussions between the applicant and his or her lawyer are structurally difficult, if not impossible, which makes audiovisual communication inevitably the only option. Therefore the confidentiality of those discussions must be expressly and fully guaranteed by the applicable national legislation. In the present case it appears that the Italo-Albanian Protocol and the national measures at issue do not contain any rule expressly providing, in the context of audiovisual communications, for confidentiality during breaks in

the hearing, or immediately before or after it, which could affect the effective exercise of the rights of the defence. (84)

112. In the second place, I note that Article 4(5) of Law No 14/2024 establishes the lawyer's participation in the hearing by audiovisual link as the default arrangement, with physical travel to the areas concerned being the exception, only in cases where the link is not possible and where the postponement of the hearing is incompatible with respecting the procedural time limits. Such an arrangement, which makes the lawyer's physical meeting with his or her client the exception rather than the rule, is liable not to guarantee the requirements flowing from Article 9(3), (4) and (6) of Directive 2013/33, read in conjunction with Article 22(1) of Directive 2013/32, which guarantees to applicants the right to consult a legal adviser at all stages of the procedure, interpreted in the light of Article 47 of the Charter, since it does not guarantee the applicant effective and confidential access to his or her legal counsel.

113. In addition, and for the sake of completeness, I note that Law No 14/2024 does not contain any rule expressly providing for access to an interpreter in the areas concerned, except for the ancillary reference to Article 4(5) relating to the reimbursement of the interpreter's travel expenses solely in the event that the lawyer travels to those areas. However, access to an interpreter is essential in order for the applicant for international protection to understand the procedure and the decisions that concern him or her, to be able to communicate effectively with his or her legal counsel and effectively to submit his or her observations before the competent court. Such a legal lacuna, if it is confirmed in the context of the verification to be carried out by the national court, is liable to deprive the remedy of any real effectiveness, contrary to Article 12(1)(b) of Directive 2013/32, which requires Member States to provide for the assistance of an interpreter for the submission and examination of applications for international protection, and Article 15(3)(c) of that directive, which provides for the use of an interpreter during a personal interview, read in conjunction with Article 9(4) of Directive 2013/33, interpreted in the light of Article 47 of the Charter. (85)

114. In the third place, the ceiling for reimbursement of EUR 500 provided for by Article 4(5) of Law No 14/2024 in exceptional cases where the lawyer travels to the areas concerned requires particular attention. Where that amount proves insufficient to cover the actual travel expenses, which it is for the referring court to determine, it could constitute an arbitrary limitation on access to legal assistance under Article 9(6) of Directive 2013/33. If so, that measure does not restrict legal assistance in the abstract, but it does so by reason of the relocation provided for by the Italy-Albania Protocol. It is precisely because physical access to the areas concerned necessarily entails travelling to Albania, with the constraints and costs inherent in any international travel to a third country, that that EUR 500 ceiling, which might be acceptable for travel within the territory of the Member State, potentially becomes arbitrary, in that it is likely to deprive the person concerned of effective judicial protection within the meaning of Article 47 of the Charter.

115. Lastly, in the fourth place, a separate question arises as to the scope of the limitation of lawyers' access to the areas concerned, with regard to the 'limits provided for by the applicable Italian, European and Albanian legislation' under Article 9(2) of the protocol. It should be observed that that provision places Albanian law on an equal footing with Italian and EU law, without providing for any conflict-of-laws rule between those legal orders. Thus, if Albanian law were to impose restrictions on lawyers' access to the facilities, the exercise of the right to legal assistance guaranteed by Article 9(3), (4) and (6) of Directive 2013/33, interpreted in the light of Article 47 of the Charter, would be subject to conditions resulting from the legal order of a third country, outside EU law and not controlled by the Member State concerned. (86) Such subordination would amount to an alteration of the practical scope of the common rules within the meaning of Article 3(2) TFEU, in so far as it would deprive the Member State of effective control over the exercise of a right it is required to guarantee under EU law.

116. It is the combination of the Italy-Albania Protocol and Law No 14/2024 that is thus liable to alter the practical scope of the common rules within the meaning of Article 3(2) TFEU.

(3) *Visiting rights for family members*

117. As a preliminary point, it should be noted that, in the present cases, the persons concerned were released at the end of the 48-hour period provided for by the Italian Constitution for the validation of the detention decision, such that the question of access of family members to the detained applicant did not specifically arise in the disputes in the main proceedings. The following analysis is therefore only applicable in the event that the Court deems it necessary to examine that question, which could be the case since the first questions referred for a preliminary ruling concern the assessment of the Italian Republic's competence to conclude the Italy-Albania Protocol and to adopt the national measures in question in the abstract – that is to say, independently of the specific circumstances of the present cases. It is provided for the sake of completeness, so as to furnish the Court with the relevant elements of analysis should it deem it necessary to rule on that point.

118. In that regard, Article 10(4) of Directive 2013/33 provides that Member States are to ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to such access may be imposed only where, by virtue of national law, they are objectively necessary to ensure security, public order or administrative management of the detention facility, provided that access is not severely restricted or rendered impossible. (87)

119. In particular, where access to family members is concerned, that provision must be interpreted in such a way that fundamental rights, including the right to respect for family and private life, as stated in Article 7 of the Charter, are respected. (88) That provision guarantees everyone the right, inter alia, to respect for his or her family life, it having been specified that existence of 'family life' is a question of fact depending upon the real existence in practice of close personal ties. (89)

120. In the present case, I note that neither the Italy-Albania Protocol nor Law No 14/2024 lay down clear and precise rules governing the scope and

procedures for exercising the right of access and communication of family members in the areas concerned, even though the protocol sets out in detail the arrangements for access by the Italian authorities to those areas. Such a legislative lacuna is liable to have a tangible impact on the effectiveness of the right of access guaranteed by Article 10(4) of Directive 2013/33, interpreted in the light of Article 7 of the Charter, in three respects. First, the location of the areas concerned imposes a geographical and administrative constraint liable to significantly hinder, or even compromise in practice, the physical access of family members. Second, no alternative arrangement, including by remote means, is envisaged for them, contrary to that expressly provided for lawyers. Lastly, access to the areas concerned is subject to prior entry into Albanian territory, which falls within Albanian law and is beyond the control of the Member State concerned. In those circumstances, the lack of adequate provision for access by family members is liable to render ineffective the right guaranteed by Article 10(4) of Directive 2013/33.

121. It follows that the silence of both the Italy-Albania Protocol and the national measures at issue combined, in relation to the specific operating conditions of the areas concerned, is an obstacle to the attainment of the objectives of the abovementioned common rule (*obstacle pre-emption*). Indeed, such a legislative lacuna, together with the structural constraints particular to the areas concerned, is liable to alter the effective scope of that common rule within the meaning of Article 3(2) TEU.

(e) ***The requirement for the immediate release of a detained person following a judicial review, including where the period for validation has expired***

122. In the first place, as regards the requirement for the release of a person detained in the areas concerned where a judicial review concludes that the detention is unlawful, including where the validation decision was not taken within the prescribed statutory period ('the expiration of the validation period'), it is clear from the removal orders, inter alia, that applicants for international protection cannot be released immediately, but must wait for the Italian authorities to collect them from the facility and transfer them to the national territory.

123. At the hearing, the Italian Government explained that the period between the expiration of the validation period and the arrival in Bari (Italy) does not constitute detention, for three reasons. First, only a short period of time elapses between the expiration of the period of validation of the detention (and therefore the release) and the arrival in Italian territory. (90) Second, no means of coercion is used, since the person concerned travels freely on the ferry and is only ‘accompanied’ by the police to facilitate border formalities. Third, the procedures are initiated seamlessly upon the expiration of the validation period, since the time limits are purely technical.

124. First, although duration is not the determining factor in characterising a situation as detention, effective deprivation of liberty of movement is. From that perspective, the concept of detention provided for in Article 2(h) of Directive 2013/33 must be interpreted in the light of Article 6 of the Charter, which corresponds to Article 5 of the ECHR. It follows from the case-law of the ECtHR that the difference between deprivation of liberty within the meaning of Article 5 ECHR and mere restrictions on liberty of movement is simply one of degree or intensity, and not one of nature or substance. It is determined in the light of the concrete situation of the person concerned, including the type, effects and manner of implementation of the measure in question, irrespective of the absence of formal physical constraint. (91)

125. Secondly, it is apparent from the case file submitted to the Court of Justice that, during the entire time between the expiration of the validation period and arriving in Bari (Italy), the person concerned cannot freely choose where he goes. He cannot remain in Albania, since Article 6(5) of the Italy-Albania Protocol prohibits him from leaving the areas subject to the State prerogatives of the Italian Republic by his own means. Nor may he return to the national territory by his own means. However, I note that neither Law No 14/2024 nor Legislative Decree No 142/2015 govern the transfer from the areas concerned to Italian territory. The silence of those provisions leads, in my view, to that situation being characterised as de facto detention. Indeed, during the transfer, the person concerned is confined to a prescribed route (first the ‘neutral’ area of the facility, then the ferry), without effective liberty of movement. The purpose

of the police escort is to restrict the person concerned to a designated route. The person concerned cannot travel independently to a destination other than the one chosen by the authorities. It follows that, during that period, the person's situation corresponds to detention within the meaning of Article 2(h) of Directive 2013/33, read in the light of Article 6 of the Charter. (92)

126. Following the release of the person concerned, none of the grounds listed in Article 8(3) of Directive 2013/33 can still be applied to him. Since the detention decisions concerned have been deprived of legal effect, there is no basis in EU law for the person concerned to remain under the control of the Italian authorities pending his transfer from the area concerned to Italian territory. Accordingly, since none of the grounds envisaged in that provision are capable of justifying such a situation following the expiration of the validation period, keeping the person concerned under the control of the Italian authorities pending his transfer to the national territory must, if it is characterised as detention within the meaning of Article 2(h) of Directive 2013/33, be regarded as contrary to Article 9(1) of that directive.

127. It follows that the legislative lacuna affecting the procedures for return to the national territory, combined with the inability of the person concerned to leave the areas concerned by his own means following the expiration of the validation period, is liable to prevent the attainment of the objectives of the abovementioned common rule (*obstacle pre-emption*). Indeed, such a lacuna, together with the structural conditions specific to the areas concerned, is liable to alter the scope of that rule by depriving it of its effectiveness, in so far as the requirement for immediate release that it enshrines is, in practice, devoid of effect.

128. Consequently, the Italy-Albania Protocol and the national measures at issue are apt to reveal an incompatibility with the rules on the division of competences laid down in Article 3(2) TFEU.

5. ***Conclusion on the first questions referred for a preliminary ruling***

129. I therefore propose that the Court should answer the first questions referred to it as follows:

(1) Article 8(3) of Directive 2013/33 must be interpreted as meaning that the list of grounds for detention provided for therein is exhaustive, which prohibits Member States from introducing additional grounds, either by legislative means or under an international agreement.

(2) Directives 2013/32 and 2013/33 must be interpreted as meaning that their provisions do not determine the geographical location of detention facilities for applicants for international protection, such that the choice to locate such facilities outside the territory of the Union, in that of a third country placed under the jurisdiction of the Member State concerned, does not, as such, fall within the exclusive competence of the Union within the meaning of Article 3(2) TFEU, but falls within the margin of discretion available to the Member States. In exercising that discretion, a Member State remains obliged to ensure full respect for the conditions and guarantees provided for in those directives in the areas hosting such facilities. The fact that those areas are located outside the territory of the Union cannot have the effect of relieving that Member State of its obligations under EU law since those areas fall within its jurisdiction.

(3) Article 3(2) TFEU precludes a Member State from concluding an international agreement and adopting national ratification and enforcement measures which, taken together, alter the practical scope of the minimum procedural guarantees harmonised by Article 9(3),(4) and (6) of Directive 2013/33, read in conjunction with Article 22(1) of Directive 2013/32, interpreted in the light of Article 47 of the Charter , in that:

– the geographical separation between the lawyer, present in the courtroom in that Member State, and the applicant detained in the areas situated outside national territory, but under the jurisdiction of that Member State, which host facilities for the detention of applicants for international protection, as laid down in national legislation, is liable to undermine the confidentiality of the discussions between the applicant and his or her counsel, which is a guarantee intrinsic to the right to effective judicial protection within the meaning of Article 47 of the Charter, which it is for the referring court to determine;

– the lawyer’s participation in the hearing by audiovisual link as the default arrangement, his or her physical travel to those areas only being envisaged in exceptional cases, where the link is not possible and where the postponement of the hearing is incompatible with respecting the procedural time limits, does not

guarantee the applicant effective and confidential access to his or her legal counsel under equivalent conditions to those he or she would have had in the national territory, and

– the ceiling for reimbursement imposed by national legislation for the exceptional cases where the lawyer travels to the areas concerned is liable to constitute an arbitrary limitation of access to free legal assistance and representation within the meaning of Article 9(6) of Directive 2013/33, precisely because of the constraints and costs inherent in any journey that involves passing through Albanian territory, which it is for the referring court to determine.

(4) Article 3(2) TFEU precludes a Member State from concluding an international agreement and adopting national ratification and enforcement measures which, taken together, first, by prohibiting the detained persons from leaving those areas by their own means and, second, by failing to establish the arrangements for the return transfer to the national territory, affect the common rules laid down in Article 9 of Directive 2013/33, interpreted in the light of Article 6 of the Charter, by rendering ineffective the requirement for immediate release following expiration of the statutory period in which the decision to validate the detention must be taken.

130. As is apparent from their wording, the second questions referred for a preliminary ruling are asked in the event that the answer to the first questions would mean that the Italian Republic has not encroached upon the exclusive competence of the Union within the meaning of Article 3(2) TFEU. In the light of the answer that I propose to give to the first questions, in principle there is no need to answer the second questions. Nevertheless, in case the Court does not share that conclusion and for the sake of completeness, I will examine those questions below.

C. **The second questions referred for a preliminary ruling**

131. By its second questions, which should be answered in the alternative, in the event that the Court concludes that the Italian Republic has not encroached upon the exclusive competence of the Union within the meaning of Article 3(2) TFEU by concluding the Italy-Albania Protocol and adopting the national measures at issue, the referring court asks, in essence, whether the abovementioned provisions of Directives 2013/32 and 2013/33 on detention, the rights of the defence, the right of communication and access and the right

to health care of applicants for international protection ([93]) must be interpreted as precluding third-country nationals, transferred to facilities under Italian jurisdiction, situated outside the territory of the Union, where they have lodged an application for international protection, from being placed in temporary detention there pursuant to that protocol and the national measures at issue.

1. ***Detention***

132. In the first place, as regards Article 26 of Directive 2013/32, the referring court states that the applicants have been detained in the context of a return procedure and that there are reasonable grounds to believe that their application for international protection is intended to delay the enforcement of the return decision, a situation covered in Article 8(3)(d) of Directive 2013/33. ([94]) Nevertheless, it is appropriate to determine, first, whether that assessment is based on an individual reasoned assessment of each situation in accordance with Article 8(2) of Directive 2013/33; secondly, whether detention after the application for international protection has been lodged constitutes de facto detention for the sole reason that they are applicants, which would be contrary to Article 26 of Directive 2013/32 and Article 8(1) of Directive 2013/33; and, thirdly, whether the conditions of Article 8(3) of Directive 2013/33 remain effectively applicable throughout the detention.

133. In the present case, as regards the first of those tests, it was found that there were reasonable grounds to believe that the persons concerned had made applications for international protection merely in order to delay or frustrate the enforcement of the return decision. In that regard, it is true that Article 3(4), *in fine*, of Law No 14/2024, which refers to Article 6(3) of Legislative Decree No 142/2015, as the basis for the detention of the person concerned in facility B, corresponds, inter alia, to the ground for detention provided for in Article 8(3)(d) of Directive 2013/33. ([95]) As I previously noted in the context of the first questions, and subject to verification by the referring court, first, the Italy-Albania Protocol merely provides the geographical and organisational framework for that detention and, secondly, the measures at issue do not deviate, in that respect, from the grounds exhaustively permitted by Directive 2013/33. ([96])

134. In the second place, as regards the conditions of detention pursuant to Article 10(1) of Directive 2013/33, Member States must detain applicants for international protection in a specialised detention facility and must separate them from other third-country nationals who have not lodged an application for international protection. That provision, read in conjunction with Article 18(9) of that directive, does, however, permit partial derogation from those provisions where the housing capacity in detention facilities is exhausted. In that case, the detained applicant is separated from ordinary prisoners. Under Article 10(2) of that directive, detained applicants are to have access to open-air spaces.

135. Furthermore, Article 10(5) of Directive 2013/33 provides that Member States are to ensure that detained applicants are systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations in a language which they understand or are reasonably supposed to understand. Member States may derogate from this obligation in duly justified cases and for a reasonable period which shall be as short as possible, in the event that the applicant is detained at a border post or in a transit zone. (97) However, such derogations should be excluded in the context of the specific procedures referred to in Article 43 of Directive 2013/32. (98)

136. It follows that Article 10 of Directive 2013/33 harmonises the material conditions of detention of applicants for international protection by establishing a minimum level that Member States cannot go below in exercising their discretion.

137. In the present case, it is for the referring court to determine whether those conditions were met during the detention of the persons concerned.

138. In the third place, according to the referring court, the persons concerned were not released immediately, as required by Article 9(1) of Directive 2013/33. (99) That question has already been examined in the context of the first questions, to which I refer. (100) In that regard, I note that the referring court does not provide any information on the time required for the transfer of the persons concerned to Italy and their release. It will therefore be for that court to determine how the Italian authorities gave effect to the obligation provided

for in Article 9(1) of Directive 2013/33 and to ensure that it does not undermine the effectiveness of the provisions of that directive.

2. ***The right to effective judicial protection and the right of communication and access by lawyers***

139. According to the referring court, the detention provided for by the Italy-Albania Protocol infringes the right to effective judicial protection of applicants for international protection in that the fact that they are far from Italian territory, where the lawyers assisting them are conducting their defence, is liable in practice to affect the exercise of their rights of defence and, consequently, to render ineffective not only Article 46 of Directive 2013/32, but also Article 47 of the Charter.

140. In that regard, although the practical arrangements for access to legal representation fall within the procedural autonomy of the Member States, the Member States must still ensure that applicants detained in the areas concerned have access to legal assistance equivalent to that applicants would have in detention facilities located in the national territory.

141. In addition, as can be seen from the orders for reference, the practical arrangements provided for by Law No 14/2024 are not capable of ensuring, in the specific circumstances of the present cases, access to legal assistance equivalent to that the applicants would have received in the national territory. Indeed, as has already been observed, (101) Article 4(5) of that law establishes the hearing by audiovisual link as the default arrangement, (102)the physical travel of the lawyer only being provided for on a residual basis, solely in cases where the link is not possible and where the postponement of the hearing is incompatible with respecting the procedural time limits. (103) Furthermore, the ceiling for reimbursement provided for in that provision could prove insufficient to cover the actual costs of a journey that involves passing through Albanian territory.

142. It is for the referring court to determine whether, in the light of those elements, the applicants have had genuine and not merely theoretical access to

a lawyer, in accordance with the requirements of Article 9(3), (4) and (6) of Directive 2013/33, interpreted in the light of Article 47 of the Charter.

143. Lastly, the question relating to the risk that Albanian law imposes restrictions on lawyers' access to the facilities, already examined in the section on the first questions referred for a preliminary ruling, (104) must be determined by the referring court.

3. ***The right of communication and visiting rights for family members***

144. According to the referring court, detention in the areas concerned also affects the right of communication and visiting rights for family members, as enshrined in Article 10(4) of Directive 2013/33.

145. In that regard, I observe that neither the Italy-Albania Protocol nor Law No 14/2024 contains provisions organising access or visiting rights for family members in the areas concerned; (105) the Italian Government merely asserts that that right would not be subject to any limitation. That assertion alone cannot suffice to establish compliance with the obligation laid down in Article 10(4) of Directive 2013/33, interpreted in the light of Article 7 of the Charter, (106) in the absence of legislative provisions that specifically provide for it to be exercised in the particular conditions of the areas concerned. However, that question is hypothetical in the present cases, since the files submitted to the Court contain no reference to a request to that effect made by the persons concerned.

4. ***The right to health care***

146. With regard to the right to health care, it should be noted that Article 4(6) of the Italy-Albania Protocol provides that the Italian authorities must establish medical facilities in the areas concerned in order to ensure the necessary health care provision. Article 4(8) of the protocol further provides that, if the Italian authorities are unable to meet the health care needs of the persons detained in the areas concerned, the Albanian authorities must cooperate with the Italian authorities in order to provide them with essential medical care that cannot be postponed.

147. Although those provisions demonstrate a willingness to guarantee access to health care in the areas concerned, they are incompatible with Article 19 of Directive 2013/33. By making medical care contingent on the capacity of a non-Member State, the Italy-Albania Protocol makes the effectiveness of a right guaranteed by EU law dependent on a legal framework external to it, over which the Member State has no control. The mere existence of legislative provisions is therefore not sufficient to establish compliance with that article; it is still necessary to ascertain that access to health care is effectively ensured in the actual operating conditions of the facilities.

148. However, that question is hypothetical in the present cases, since the files submitted to the Court contain no reference to a request to that effect made by the persons concerned. It is for the referring court to determine, in the event that such a request is made, whether the practical arrangements for access to health care in the areas concerned make it possible to ensure the effectiveness of the right guaranteed by Article 19 of Directive 2013/33.

5. ***Conclusion on the second questions referred for a preliminary ruling***

149. On the basis of the foregoing, I propose that the following answer be given to the second questions referred to the Court:

(1) Article 26 of Directive 2013/32 and Article 8(1), (2) and (3) of Directive 2013/33, read in the light of Article 6 of the Charter, must be interpreted as not precluding an applicant for international protection from being detained in facilities outside the territory of the Union under the jurisdiction of a Member State, where that detention is based on the ground provided for in Article 8(3)(d) of Directive 2013/33. Conversely, those provisions require that detention to be based on an individual reasoned assessment of the situation of each applicant and preclude it from constituting de facto detention for the sole reason of the applicant’s status. It is for the referring court to determine whether the detention of the persons concerned meets those requirements and whether the conditions of the applicable ground for detention remain effectively met throughout the detention.

(2) Article 10 of Directive 2013/33 must be interpreted as harmonising the material conditions for the detention of applicants for international protection by establishing a minimum level that the Member States cannot go below, including

where the detention takes place in facilities located outside the territory of the Union under the jurisdiction of a Member State. It is for the referring court to determine whether those conditions were met during the detention of the persons concerned.

(3) Article 9(1) of Directive 2013/33 must be interpreted as requiring the competent authorities of the Member State to release the applicant immediately where the detention measure ceases to have effect due to the absence of validation within the prescribed time limits, including where the detention takes place in facilities outside the territory of the Union under the jurisdiction of that Member State. It is for the referring court to determine whether the practical arrangements for the transfer of the persons concerned to the national territory are compatible with that requirement for immediate release.

(4) Article 9(3),(4) and (6) of Directive 2013/33, read in the light of Article 47 of the Charter, must be interpreted as meaning that, although the practical arrangements for access to legal representation fall within the procedural autonomy of the Member States, the Member States must still ensure that applicants detained in the areas concerned have access to a lawyer equivalent to that they would have had in a detention facility located in the national territory. It is for the referring court to determine whether, in the light of those requirements, the applicants actually had such access.

V. **Conclusion**

150. In the light of the foregoing, I propose that the Court answers the questions referred by the Corte d'Appello di Roma (Court of Appeal, Rome, Italy) as follows:

(1) Article 8(3) 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 must be interpreted as meaning that the list of grounds for detention provided for therein is exhaustive, which prohibits Member States from introducing additional grounds, either by legislative means or under an international agreement.

(2) 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 and Directive 2013/33 must be interpreted as meaning that their

provisions do not determine the geographical location of detention facilities for applicants for international protection, such that the decision to locate such facilities outside the territory of the Union, in the territory of a third country placed under the jurisdiction of the Member State concerned, does not, as such, fall within the exclusive competence of the Union within the meaning of Article 3(2) TFEU, but falls within the margin of discretion available to the Member States. In exercising that discretion, a Member State remains obliged to ensure full respect for the conditions and guarantees provided for in those directives in the areas hosting such facilities. The fact that they are located outside the territory of the Union cannot have the effect of relieving that Member State of its obligations under EU law, since those areas fall within its jurisdiction.

(3) Article 3(2) TFEU precludes a Member State from concluding an international agreement and adopting national ratification and enforcement measures which, taken together, alter the practical scope of the minimum procedural guarantees harmonised by Article 9(3),(4) and (6) of Directive 2013/33, read in conjunction with Article 22(1) of Directive 2013/32, interpreted in the light of Article 47 of the Charter of fundamental rights of the European Union, in that:

– the geographical separation between the lawyer, present in the courtroom in that Member State, and the applicant detained in areas outside the national territory, but under the jurisdiction of that Member State, which host detention facilities for applicants for international protection, as laid down in national legislation, is liable to undermine the confidentiality of the discussions between the applicant and his or her counsel, which is a guarantee intrinsic to the right to effective judicial protection within the meaning of Article 47 of the Charter, which it is for the referring court to determine;

– the lawyer’s participation in the hearing by audiovisual link as the default arrangement, his or her physical travel to the areas concerned only being envisaged in exceptional cases, where the link is not possible and where the postponement of the hearing is incompatible with respecting the procedural time limits, does not guarantee the applicant effective and confidential access to his or her legal counsel under equivalent conditions to those he or she would have had in the national territory, and

– the ceiling for reimbursement imposed by national legislation for the exceptional cases where the lawyer travels to the areas concerned is liable to

constitute an arbitrary limitation of access to free legal assistance and representation within the meaning of Article 9(6) of Directive 2013/33, precisely because of the constraints and costs inherent in any journey that involves passing through Albanian territory, which it is for the referring court to determine.

(4) Article 3(2) TFEU precludes a Member State from concluding an international agreement and adopting national ratification and enforcement measures which, taken together, first, by prohibiting the detained persons from leaving the areas concerned by their own means and, second, by failing to establish the arrangements for the return transfer to the national territory, affect the common rules laid down in Article 9 of Directive 2013/33, interpreted in the light of Article 6 of the Charter of Fundamental Rights, by rendering ineffective the requirement for immediate release following expiration of the statutory period in which the decision to validate the detention must be taken.

1 Original language: French.

i The names of the present cases are fictitious names. They do not correspond to the real names of any of the parties to the proceedings.

2 I note that in Cases C-736/25, *Peordi I*, C-737/25, *Peordi II*, C-11/26, *Peordi III*, C-178/26, *Peordi IV*, C-226/26, *Peordi V* and C-377/26, *Peordi VI*, two identical questions were referred to the Court of Justice for a preliminary ruling by the same referring court.

3 Legge n. 14 – Ratifica ed esecuzione del Protocollo tra il Governo della Repubblica italiana e il Consiglio dei ministri della Repubblica di Albania per il rafforzamento della collaborazione in materia migratoria nonché norme di coordinamento con l’ordinamento interno (law ratifying the protocol between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania on the strengthening of cooperation in the field of migration and provisions for coordination with domestic legislation; ‘Law No 14/2024’) (GURI No 44 of 22 February 2024).

4 These are the areas referred to in Annex 1 of the Protocol.

5 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).

6 See, inter alia, Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 (OJ L 2024/1351), and other instruments of the pact.

7 Although some of the provisions of that pact are already partially in force, the date of entry into force of the abovementioned regulations is either 12 June or 1 July 2026.

8 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).

9 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).

10 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31).

11 Decreto legislativo No 142 – Attuazione della direttiva 2013/33/UE recante norme relative all’accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale (Legislative Decree No 142 implementing Directive 2013/33/EU laying down standards for the reception of applicants for international protection as well as Directive 2013/32/EU on common

procedures for granting and withdrawing international protection), of 18 August 2015, (GURI No 214 of 15 September 2015, p. 1), in the version applicable to the facts in the main proceedings ('Legislative Decree No 142/2015') provides:

12 The referring court notes that 'the validation of detention orders must be requested by the Police Commissioner before the Court of Appeal of the place where he or she is based within 48 hours of the commencement of detention; the Court of Appeal is to take a decision within the following 48 hours'.

13 Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraphs 45 to 48and the case-law cited).

14 Judgments of 15 June 1995, *Zabala Erasun and Others* (C-422/93 to C-424/93, EU:C:1995:183, paragraph 29), and of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 28 and the case-law cited).

15 See, by analogy, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraphs 24 to 26).

16 In his Opinion in *Sedrata* (C-414/25, EU:C:2026:334), Advocate General Emiliou examined the compatibility, in the light of Directive 2008/115, of the transfer, to the areas concerned, of third-country nationals who were the subject of return procedures.

17 According to the information provided by the referring court, the subject matter of the main proceedings is the request to detain SG and AJ. The referring court notes that it is called upon to 'validate the decision ordering [the detention of those persons], as detained person[s] seeking asylum'.

18 See, to that effect, judgments of 15 February 2016, *J.N.* (C-601/15 PPU, EU:C:2016:84, paragraph 75), and of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraphs 61 to 63).

19 It should be clarified that, in the context of the first questions referred for a preliminary ruling, Article 46 of Directive 2013/32, on the right to an effective

remedy against decisions on applications for international protection, is not relevant, since it is Article 9 of Directive 2013/33, which specifically governs the procedural guarantees offered to applicants for international protection who have been detained, which is the most relevant provision for determining the existence of any exclusive competence of the Union. Furthermore, the right to health care of applicants for international protection who have been detained, guaranteed by Articles 17 and 19 of Directive 2013/33, will not be examined in the context of the first questions referred for a preliminary ruling, since that question does not have a sufficiently direct link with the determination of exclusive competence of the Union within the meaning of Article 3(2) TFEU; instead, it will be analysed in the context of the second questions referred for a preliminary ruling, which must be answered in the alternative.

20 Chamon, M., *Implied Exclusive Powers in the ECJ's Post-Lisbon Jurisprudence: The Continued Development of the* ERTA *Doctrine*, in *Common Market Law Review*, vol. 55, No 4, 2018, pp. 1101–1141; Rosas, A., *Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such Distinctions Matter?*, in I. Govaere, I., Lannon, E.,Van Elsuwege P, and Adams, S (ed.), *The European Union in the World : Essays in Honour of Marc Maresceau*, Brill, Leyde, 2024, p. 17 to 43.

21 See, by analogy, Opinion 1/13 (Accession of third States to the Hague Convention) of 14 October 2014 (EU:C:2014:2303, paragraph 70).

22 Judgment of 31 March 1971 (22/70, 'the *ERTA* judgment', EU:C:1971:32).

23 See judgment of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraph 66).

24 Under Article 2(2) TFEU, in areas of shared competence, the Union and the Member States may legislate and adopt legally binding acts. However, the Member States may only exercise their competence to the extent that the European Union has not exercised its competence, it being specified that they regain it to the extent that the European Union decides to cease exercising its competence. In accordance with Protocol (No 25) on the exercise of shared competence, when the Union has

taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.

25 See Rosas, A., cited in the footnote 20 of the present Opinion, p.22.

26 It should be noted that Regulation No 604/2013 was adopted on the basis of Article 78(2)(e) TFEU. Directive 2013/32 was adopted on the basis of Article 78(2)(d) TFEU, while the legal basis of Directive 2013/33 is Article 78(2)(f) TFEU. Those legal bases fall under the Common European Asylum System (CEAS), which is part of the common policy on asylum, subsidiary protection and temporary protection, which the Union is required to develop pursuant to Article 78(1) TFEU.

27 See, to that effect, judgment of 5 December 2017 (C-600/14, EU:C:2017:935, paragraphs 45 to 49 and the case-law cited).

28 EU-Singapore Free Trade Agreement of 16 May 2017 (EU:C:2017:376, paragraphs 239 to 242).

29 See paragraph 21 of the *ERTA* judgment, which refers to Article 5 EC. See also, for example, Opinion 2/91 (ILO Convention No 170) of 19 March 1993 (EU:C:1993:106, paragraphs 10) and Opinion 1/03 (New Lugano Convention) of 7 February 2006 (EU:C:2006:81, paragraph 119).

30 See, to that effect, judgments of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973, paragraphs 95 and 98), and of 12 November 2019, *Organisation juive européenne and Vignoble Psagot* (C-363/18, EU:C:2019:954, paragraph 29).

31 Strauss, M.J., *Territorial Leases*, in Nollkaemper, A., Plakokefalos, I., *The Practice of Shared Responsibility in International Law*, Cambridge University Press, Cambridge, 2017, pp. 67–70.

32 See Ronen, Y., ‘Territory, Lease’, *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2019, which defines the territorial lease as an

arrangement whereby a State receives the right to exercise the territorial authority of another State over a given territory, with full sovereignty remaining residual with the ceding State (accessed 27 May 2026, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1120). The territorial lease is a specific subcategory of the territorial concession, characterised by three elements: a fixed or determinable term; a consideration (which is not necessarily monetary); and an exclusive right to exercise State prerogatives in the territory concerned during the term of the lease. According to State practice and the terminology of territorial leases, ultimate sovereignty remains with the ceding State, since the difference between cession and lease may be small in practice, particularly during the term of the lease (see the section 'Cession' of that entry in the encyclopaedia).

33 In that respect, it should be noted that the Court has held, in the cases giving rise to the judgments of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), and of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118), that the international characterisation of the territory is relevant for delimiting the territorial scope of EU law, and in particular that territories over which a third country claims sovereignty which is not internationally recognised do not automatically fall within the scope of the agreements concluded by the Union with that State.

34 In that regard, the Court has already held that even if the facts of the case in the main proceedings do not fall directly within the field of application of EU law, provisions of EU law may be rendered applicable by domestic law due to a renvoi made by that law to the content of those provisions (see, to that effect, judgment of 7 November 2018, *C and A* (C-257/17, EU:C:2018:876, paragraph 31).

35 See points 69 and 70 of the present Opinion

36 See, *a contrario*, judgment of 7 March 2017, *X* and *X* (C-638/16 PPU, EU:C:2017:173, paragraphs 42 to 45).

37 See Articles 3(1), 10(5), 11(6) and 18(1)(a) of Directive 2013/33, which reserve the application of certain derogations to detention at the border or in a transit zone. See, also, the background to the case that gave rise to the judgment of 17 December 2020, *Commission v Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029).

38 Judgment of 7 March 2017 (C-638/16 PPU, EU:C:2017:173).

39 C-91/20, EU:C:2021:898, paragraph 40.

40 In accordance with the principle of the primacy of EU law, as established since the judgment of 15 July 1964, *Costa* (6/64, EU:C:1964:66), and consistently confirmed by subsequent case-law, in particular the judgment of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraphs 250 and 251), the law of the Member States may not undermine the effect accorded to EU rules, without domestic provisions, whatever they may be, being able to prevent that.

41 The conclusion of a bilateral agreement with a third state cannot have the effect of releasing a Member State from its obligation of ensuring compliance with fundamental rights (see, by analogy, ECtHR, 23 February 2012, *Hirsi Jamaa and Others v. Italy* (CE:ECHR:2012:0223JUD002776509, § 129)).

42 In the present cases, the detention decisions concerned are based, in the case of both applicants, on the ground provided for in Article 8(3)(d) of Directive 2013/33, transposed in Article 6(3) of Legislative Decree No 142/2015, namely the existence of reasonable grounds to consider that the application for international protection was made merely in order to delay or frustrate the enforcement of a return decision adopted under Directive 2008/115. In the *SG* case, the detention decision is also based on the ground provided for in Article 8(3)(e) of Directive 2013/33, transposed in Article 6(2)(c) of Legislative Decree No 142/2015, namely the danger posed by the person concerned to public order and public security in the light of his criminal convictions..

43 See judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C‑808/18, EU:C:2020:1029, paragraph 159).

44 According to Annex I of the Italy-Albania Protocol, facility B corresponds to the area intended for examining the conditions required for the recognition of international protection and for the return of migrants who do not have the right to enter and remain on Italian territory.

45 Regulation of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (OJ L, 2024/1348).

46 Directive of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (OJ L 2024/1346).

47 See, to that effect, Klamert, M., 'Article 2 TFEU', in Kellerbauer M., Klamert M., Tomkin J., *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, Oxford, 2019, p. 356.

48 Schütze R., *European Union Law*, Oxford University Press, Oxford (4th ed.) 2025, pp. 229–234. Chamon, M., 'Implied exclusive powers in the ECJ's post-Lisbon jurisprudence: The continued development of the ERTA doctrine', *Common Market Law Review*, Vol. 55, Issue 4, 2018, pp. 1101–1141 . Arena, A., 'The Twin Doctrines of Primacy and Pre-Emption', in Schütze, R, and Tridimas, T (eds), *Oxford Principles of European Union Law: The European Union Legal Order,* Oxford University Press, Oxford,*:* Vol. I (2018;, Oxford Law Pro), accessed 27 May 2026, https://doi.org/10.1093/oso/9780199533770.003.0012.

49 Schütze, R., *European Union Law*, Oxford: Oxford University Press, Oxford, 2025, (4th ed.) p. 234.

50 Judgment of 4 September 2014, *Commission* v *Council* (C‑114/12, EU:C:2014:2151, paragraph 66).

51 Judgment of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraph 67).

52 See, to that effect, judgments of 31 March 1971, *ERTA* (paragraph 30), and of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraph 68).

53 Opinion 1/03 (New Lugano Convention) of 7 February 2006 (,EU:C:2006:81, paragraph 126).

54 Judgment of 20 November 2018, *Commission* v *Council (Antarctic MPAs)*, (C-626/15 and C-659/16, EU:C:2018:925, paragraph 113 and the case-law cited).

55 Judgment of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraphs 70 and 71).

56 Judgment of 20 November 2018, *Commission* v *Council (Antarctic MPAs)*, (C-626/15 and C-659/16, EU:C:2018:925, paragraph 114 and the case-law cited).

57 See, to that effect, Opinion 1/13 (Accession of third States to the Hague Convention) of 14 October 2014 (EU:C:2014:2303, paragraph 74); judgment of 26 November 2014, *Green Network* (C-66/13, EU:C:2014:2399, paragraph 33); and Opinion 3/15 (Marrakesh Treaty on access to published works) of 14 February 2017 (EU:C:2017:114, paragraph 108).

58 See points 62 to 64 [63 to 69] of the present Opinion.

59 See, to that effect, judgment of 16 April 2026, *Danané and Others* (C-50/24 to C-56/24, EU:C:2026:301, paragraphs 43 and 47). Furthermore, in paragraph 62 of that judgment, the Court states that the dual classification of the same place complies with Directive 2013/33 only on condition that the Member States ensure full respect for the guarantees provided for in Articles 8 and 9 of that directive.

60 See, to that effect, judgment of 16 April 2026, *Danané and Others* (C-50/24 to C-56/24, EU:C:2026:301, paragraphs 42 to 54), and Opinion of Advocate General Emiliou in those joined cases (C-50/24 to C-56/24, EU:C:2025:493, point 40).

61 See points 63 to 69 of the present Opinion.

62 See judgment of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 159 and the case-law cited).

63 See judgments of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 252 and the case-law cited), and of 17 December 2020, *Commission* v *Hungary (Reception of applicants for international protection)* (C-808/18, EU:C:2020:1029, paragraph 168).

64 Judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 250 and the case-law cited.

65 See the footnote 42 of the present Opinion.

66 See Article 13(2) of the Italy-Albania Protocol.

67 See, to that effect, judgment of 25 June 2020, *Ministerio Fiscal (Authority likely to receive an application for international protection)* (C-36/20 PPU, EU:C:2020:495, paragraph 112).

68 See, to that effect, judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 19), and of 1 August 2025, *BAJI Trans* (C-544/23, EU:C:2025:614, paragraph 49).

69 See, to that effect, judgment of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 56).

70 See, to that effect, judgment of 6 October 2022, *Politsei- ja Piirivalveamet (Detention – Risk of committing a criminal offence)* (C-241/21, EU:C:2022:753, paragraph 47).

71 See judgment of the ECtHR of 22 December 2020, *Selahattin Demirtaş v. Türkiye* (CE:ECHR:2020:1222JUD001430517, § 311 and the case-law cited).

72 See, to that effect, judgment of the ECtHR of 15 December 2016, *Khlaifia and Others v. Italy* (Application No 16483/12, CE:ECHR:2016:1215JUD001648312, §§ 64 to 72 and the case-law cited).

73 See, to that effect, judgment of 6 October 2022, *Politsei- ja Piirivalveamet (Detention – Risk of committing a criminal offence)* (C-241/21, EU:C:2022:753, paragraph 50 and the case-law cited).

74 See, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 257). In particular, when the detention of an applicant for international protection is not limited in time, the determining authority, within the meaning of Article 2(f) of Directive 2013/32, must act with appropriate due diligence (paragraphs 262 to 264 of that judgment).

75 See footnote 42 of the present Opinion.

76 See also recital 15 of Directive 2013/33.

77 See, to that effect, judgment of 8 November 2022, *Staatssecretaris van Justitie en Veiligheid (*Ex officio *review of detention)* (C-704/20 and C-39/21, EU:C:2022:858, paragraph 84).

78 See, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 261).

79 See, to that effect, judgment of 1 August 2025, *Alace and Canpelli* (C-758/24 and C-759/24, EU:C:2025:591, paragraph 77).

80 See also Article 4(3) and (5) of Law No 14/2024 which sets out the practical arrangements for that remote link between the location of the foreign national concerned and that of his or her lawyer or the judge.

81 See, to that effect, judgment of the ECtHR of 9 October 1979, *Airey v. Ireland* (CE:ECHR:1979:1009JUD000628973, § 26) on legal aid in non-criminal proceedings, and judgment of the ECtHR of 9 April 1984, *Goddi v. Italy* (CE:ECHR:1984:0409JUD000896680, § 31) on legal aid in criminal proceedings.

82 See, to that effect, judgments of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 62), and of 14 September 2017, *K.* (C-18/16, EU:C:2017:680, paragraph 45).

83 The wording of Article 4(5) of Law No 14/2024 states that that reimbursement is restricted to a 'court-appointed' lawyer, which appears to exclude lawyers freely chosen by their client.

84 In that regard, the ECtHR has held that participation in the proceedings by videoconference is not, as such, incompatible with the notion of a fair and public hearing, but it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for (ECtHR, 2 November 2010, *Sakhnovskiy v. Russia*, CE:ECHR:2010:1102JUD002127203, § 98).

85 That observation is made for the sake of completeness and will not be included in the operative part, since the referring court has not referred that question to the Court of Justice and that point has not been raised before the Court.

86 It should be recalled that the Republic of Albania is not a Member State of the European Union, and is not, for that reason, bound by the obligations under Directive 2013/33 or by the rights guaranteed by Article 47 of the Charter. The limitations that Albanian law may impose on access of lawyers to the areas

concerned cannot therefore be subject to the same requirements of compatibility with EU law as those which are imposed on Member States.

87 When detaining applicants for international protection, Article 10(4) of Directive 2013/33, read in conjunction with Article 8(2) of Directive 2013/32, guarantees that certain organisations have the right of access to applicants for international protection located at the external borders of the Member States or who are detained in their territory (see, to that effect, judgment of 16 November 2021, *Commission v Hungary (Criminalisation of assistance to asylum seekers)* (C-821/19, EU:C:2021:930, paragraph 87).

88 See, by analogy, judgment of 15 September 2011, *Gueye and Salmerón Sánchez* (C-483/09 and C-1/10, EU:C:2011:583, paragraph 55 and the case-law cited).

89 See, to that effect, judgment of 3 June 2025, *Kinsa* (C-460/23, EU:C:2025:392, paragraph 47).

90 The Italian Government explained at the hearing that the formalities took around 30 minutes, departing from Albania at 22:00 and arriving in Bari at 08:00.

91 ECtHR, 6 November 1980, *Guzzardi v. Italy CE:ECHR:1980:1106JUD000736776*, §§ 92 to 95.

92 As regards Article 5 ECHR, the case-law of the ECtHR has held that administrative formalities associated with release cannot justify a delay of more than a few hours (see ECtHR, 4 June 2015, *Ruslan Yakovenko v. Ukraine* (CE:ECHR:2015:0604JUD000542511, §§ 68 and 69), (delay of 2 days), and of 22 March 1995, *Quinn v. France* (CE:ECHR:1995:0322JUD001858091, §§ 39 to 43) (delay of 11 hours)). See also the judgment of 21 September 2021, *Kerem Çiftçi v. Türkiye* (CE:ECHR:2021:0921JUD003520509, §§ 32 to 34), regarding deprivation of liberty of one and a half hours, where the arrest of a person lacked any legal basis.

93 The wording of that question refers inter alia to Articles 8 to 10, 17, 19 and 26 of Directive 2013/33, as well as to Articles 26 and 46 of Directive 2013/32

94 See, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 258 and 291), in which the Court held that detention could not result from the mere fact that the applicant was in a specific place because of circumstances created by the national authorities themselves.

95 See footnote 42 of the present Opinion.

96 See point 97 of the present Opinion.

97 On the autonomous interpretation of those terms, see point 75 of the present Opinion

98 See, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 238).

99 I note that Article 9(3) of Council Directive 2013/33/EC provides for the immediate release of the applicant concerned where the detention is 'held to be unlawful'. A situation in which the measure restricting personal freedom ceases to have effect, due to the absence of validation within the prescribed time limits, appears to be comparable with the situation covered by that provision.

100 See points 125 and 126 of the present Opinion.

101 See points 109 and 112 of the present Opinion.

102 The geographical separation between the lawyer and his or her client during the hearing, such as is arranged by Article 4(5) of Law No 14/2024, is likely to compromise the confidentiality of their exchanges during that hearing.

103 At the hearing, JA's lawyer indicated that his client's mobile phone had been confiscated, and that he only had 15 minutes each day to interview his client, whereas the persons placed in other facilities in the Italian Republic had greater access to their lawyer.

104 See points 109 and 112 of the present Opinion.

See point 115 of the present Opinion.

105 Article 9(2) of the Italy-Albania Protocol provides for access only as regards the guarantee of the rights of the defence.

106 See points 119 and 120 of the present Opinion.