OPINION 1/19 OF THE COURT (Grand Chamber)

6 October 2021

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In Opinion 1/19,

REQUEST for an Opinion pursuant to Article 218(11) TFEU, made on 9 July 2019 by the European Parliament,

THE COURT (Grand Chamber)

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev (Rapporteur), A. Prechal, M. Vilaras, M. Ilešič, L. Bay Larsen, A. Kumin and N. Wahl, Presidents

of Chambers, T. von Danwitz, F. Biltgen, K. Jürimäe, L.S. Rossi, I. Jarukaitis and N. Jääskinen, Judges,

Advocate General: G. Hogan,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 6 October 2020,

after considering the observations submitted on behalf of:

–the European Parliament, by D. Warin, A. Neergaard and O. Hrstková Šolcová, acting as Agents,
– the Belgian Government, by C. Pochet and J. C. Halleux, acting as Agents,
–the Bulgarian Government, by E. Petranova, L. Zaharieva, T. Mitova and M. Georgieva, acting as Agents,
–the Czech Government, by M. Smolek, J. Vláčil, M. Švarc and K. Najmanová, acting as Agents,
– the Danish Government, by M. P. Jespersen, acting as Agent,
–Ireland, by M. Browne, G. Hodge and A. Joyce, acting as Agents, and by P. McGarry and S. Kingston, Senior Counsel,
– the Greek Government, by K. Boskovits, acting as Agent,
– the Spanish Government, by S. Centeno Huerta, acting as Agent,
–the French Government, by J.-L. Carré, D. Dubois, T. Stéhelin and A.-L. Desjonquères, acting as Agents,
– the Hungarian Government, by M.Z. Fehér and P. Csuhány, acting as Agents,
–the Austrian Government, by J. Schmoll, E. Samoilova and H. Tichy, acting as Agents,
– the Polish Government, by B. Majczyna and A. Miłkowska, acting as Agents,
– the Slovak Government, by B. Ricziová, acting as Agent,
– the Finnish Government, by H. Leppo and J. Heliskoski, acting as Agents,
–the Council of the European Union, by S. Boelaert, B. Driessen and A. Norberg, acting as Agents,
–the European Commission, by A. Bouquet, T. Ramopoulos, C. Cattabriga and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 March 2021,

gives the following

Opinion

I. The request for an Opinion

1 The request for an Opinion submitted to the Court by the European Parliament is worded as follows:

‘[(1)] [(a)] Do Articles 82(2) and 84 TFEU constitute the appropriate legal bases for the [Council of the European Union] act concluding the [Council of Europe Convention on preventing and combating violence against women and domestic violence (“the Istanbul Convention”)] on behalf of the [European] Union, or should that act be based on Articles 78(2), 82(2) and 83(1) TFEU and

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

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

II. Legal context

A. The relevant directives on judicial cooperation in criminal matters

2 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ 2011 L 101, p. 1), applicable to all Member States, with the exception of the Kingdom of Denmark, provides in Article 1:

'This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings. It also introduces common provisions, taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof.'

3 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ 2011 L 335, p. 1, and corrigendum OJ 2012 L 18, p. 7), applicable to all Member States, with the exception of the Kingdom of Denmark, states in Article 1:

'This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes. It also introduces provisions to strengthen the prevention of those crimes and the protection of the victims thereof.'

4 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ 2012 L 315, p. 57), applicable to all Member States, with the exception of the Kingdom of Denmark, states in recital 11 thereof:

'This Directive lays down minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection.'

B. The relevant directives relating to the common asylum policy

5 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12), which is applicable to all the Member States, with the exception of the Kingdom of Denmark and Ireland, states in Article 3(4)(a) and (5):

'4. This Directive is without prejudice to more favourable provisions of:

(a) bilateral and multilateral agreements between the [European Union] or the [European Union] and its Member States, on the one hand, and third countries, on the other;

…

5. This Directive shall not affect the possibility for the Member States to adopt or maintain more favourable provisions.'

6 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44), which is applicable to all Member

States, with the exception of the Kingdom of Denmark and Ireland, provides in Article 3(3)(a) and (b):

‘This Directive shall apply without prejudice to more favourable provisions of:

(a) bilateral and multilateral agreements between the [European Union] or the [European Union] and its Member States, on the one hand, and third countries, on the other;

(b) bilateral agreements already concluded between a Member State and a third country before the date of entry into force of this Directive’.

7 Under Article 13 of that directive:

‘Member States may issue residence permits of permanent or unlimited validity on terms that are more favourable than those laid down by this Directive. Such residence permits shall not confer the right of residence in the other Member States as provided by Chapter III of this Directive.’

8 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), which is applicable to all Member States, with the exception of the Kingdom of Denmark and Ireland, provides in Article 4:

‘1. This Directive shall apply without prejudice to more favourable provisions of:

(a) bilateral or multilateral agreements between the [European Union] or the [European Union] and its Member States and one or more third countries;

(b) bilateral or multilateral agreements between one or more Member States and one or more third countries.

2. This Directive shall be without prejudice to any provision which may be more favourable for the third-country national, laid down in the [European Union] acquis relating to immigration and asylum.

3. This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.

4. With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall:

(a) ensure that their treatment and level of protection are no less favourable than as set out in Article 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions) and

(b) respect the principle of non-refoulement.’

9 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9), which succeeded Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12) and is

applicable to all the Member States, with the exception of the Kingdom of Denmark and Ireland, provides, in Article 3:

'Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.'

10 Directive 2004/83 – which, although repealed by Directive 2011/95, continues to apply to Ireland – provides in Article 1:

'The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.'

11 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), which is applicable to all the Member States, with the exception of the Kingdom of Denmark and Ireland, provides in Article 5:

'Member States may introduce or retain more favourable standards on procedures for granting and withdrawing international protection, in so far as those standards are compatible with this Directive.'

12 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13) – which, although repealed by Directive 2013/32, continues to be apply to Ireland – states in Article 1:

'The purpose of this Directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status.'

13 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), which is applicable to all the Member States, with the exception of the Kingdom of Denmark and Ireland, provides in Article 4:

'Member States may introduce or retain more favourable provisions in the field of reception conditions for applicants and other close relatives of the applicant who are present in the same Member State when they are dependent on him or her, or for humanitarian reasons, in so far as these provisions are compatible with this Directive.'

C. The Staff Regulations of Officials of the European Union and the Condition of Employment of Other Servants of the European Union

14 Regulation No 31 (EEC) 11, (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and of the European Atomic Energy Community (OJ, English Special Edition, Series I 1959-1962, p. 135), as last amended by Council Regulation (EU) No 1416/2013 of 17 December 2013 (OJ 2013 L 353, p. 24), states, inter alia, in the second recital thereof, that the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union are intended to 'enable [the officials and other servants of the European Union] to discharge their duties in conditions which will ensure maximum efficiency'.

III. The Istanbul Convention and its signature by the European Union

A. Analysis of the Istanbul Convention

15 The Istanbul Convention, the final text of which was adopted by the Committee of Ministers of the Council of Europe on 7 April 2011, was opened for signature on 11 May 2011 at the 121st session of that committee in Istanbul (Turkey). That convention, which entered into force on 1 August 2014, includes a preamble, 81 articles, divided into 12 chapters and an annex on privileges and immunities which apply to the members of the 'Group of experts on action against violence against women and domestic violence' ('GREVIO') referred to in Article 66 of that convention.

16 In its preamble, the Istanbul Convention refers to, inter alia, the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, the Council of Europe Convention on Action against Trafficking in Human Beings. the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (United Nations Treaty Series, vol. 1249, p. 13) and international humanitarian law, in particular the Convention relative to the Protection of Civilian Persons in Time of War, signed in Geneva on 12 August 1949 (United Nations Treaty Series, vol. 75, p. 287).

17 That preamble recognises that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men, the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.

18 Pursuant to Article 1 of that convention, in Chapter I thereof, entitled 'Purposes, definitions, equality and non-discrimination, general obligations', the purposes of the Istanbul Convention are, inter alia, to protect women against all forms of violence, and to prevent, prosecute and eliminate such violence, to contribute to the elimination of all forms of discrimination against women and to design a comprehensive framework, policies and measures of protection and assistance. That provision also states that that convention establishes a specific monitoring mechanism.

19 Under Article 3(c) of that convention, the term 'gender' means the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men. In accordance with point (f) of that article, the term 'women' includes girls under the age of 18.

20 In accordance with Articles 5 and 6 of the Istanbul Convention, the parties to that convention undertake to act in order to prevent, investigate, punish and provide reparation for acts of violence covered by that convention and to include a gender perspective in the implementation and evaluation of the impact of the provisions of that convention.

21 Under Articles 7, 8, 10 and 11 of the Istanbul Convention, set out in Chapter II thereof, entitled 'Integrated policies and data collection', the parties to that convention undertake, inter alia, to implement State-wide effective, comprehensive and coordinated policies to prevent and combat all forms of violence covered by that convention, to allocate appropriate financial and human resources for that purpose, to designate official bodies responsible for the coordination, implementation, monitoring and evaluation of policies, to collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by the scope of that convention and to support research concerning the root causes and effects, incidences and conviction rates of the forms of violence covered by that convention.

22 Chapter III of the Istanbul Convention, entitled 'Prevention', includes inter alia Articles 12 to 16 thereof, which set out the obligations on the parties to that convention to promote changes in the social and cultural patterns of behaviour with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men, to prevent all forms of violence covered by that convention, to put the specific needs of vulnerable persons and victims at the centre of measures taken, to ensure that culture, custom, religion, tradition or so-called 'honour' shall not be considered as justification

for any acts of violence, to promote or conduct, on a regular basis and at all levels, awareness-raising campaigns or programmes, to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity in education, sports, cultural and leisure facilities and the media and to set up programmes aimed at teaching perpetrators of domestic violence to adopt non-violent behaviour.

2 Chapter IV of the Istanbul Convention, entitled 'Protection and support', provides, in Articles 18
3 to 28 thereof, that the parties to that agreement are to take the necessary measures to protect all victims from any further acts of violence, including mechanisms for effective cooperation between all relevant state agencies, adequate and timely information on available support services and legal measures, legal and psychological counselling, financial assistance, health care and social services, information on individual/collective complaints mechanisms, appropriate, easily accessible shelters in sufficient numbers, round-the-clock telephone helplines free of charge, rape crisis or sexual violence referral centres for victims, age-appropriate psychosocial counselling for child witnesses of violence and the necessary measures to ensure that the confidentiality rules imposed on certain professionals do not constitute an obstacle to their reporting to the competent organisations of a serious act of violence committed or expected.

2 Chapter V of the Istanbul Convention, entitled 'Substantive law', contains, first, Articles 29 to 32
4 thereof, under which the parties undertake to provide victims with adequate civil remedies against the perpetrator and against State authorities that have failed in their duty to take the necessary preventive or protective measures, in order to obtain, within a reasonable time, adequate compensation from perpetrators for any offences or from the State for serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources. Those provisions also require that, in the determination of custody and visitation rights of children, incidents of violence are taken into account and that marriages concluded under force may be annulled or dissolved without undue financial or administrative burden placed on the victim.

2 Secondly, Chapter V includes Articles 33 to 48 of that convention, by which the parties to that
5 convention undertake to ensure that the following conduct is criminalised and punishable by effective, proportionate and dissuasive sanctions: inter alia, the commission, attempt to commit, aiding or abetting the commission of impairing a person's psychological integrity through coercion or threats, threatening conduct directed at another person, causing her or him to fear for her or his safety, acts of physical violence, non-consensual acts of a sexual nature with a person, forcing an adult or a child to enter into a marriage, excising, infibulating or performing any other mutilation to a woman's genitals, performing an abortion on a woman without her prior consent, performing surgery which terminates a woman's capacity to naturally reproduce without her consent and any form of unwanted verbal, non-verbal or physical conduct of a sexual nature which violates the dignity of a person, in particular when it creates an intimidating, hostile, degrading, humiliating or offensive environment.

2 It is also provided, in Article 44(4) of the Istanbul Convention, that jurisdiction for the
6 prosecution of the offences established in accordance with Articles 36 to 39 of that convention, namely those concerning sexual violence, forced marriage, genital mutilation, forced abortion and forced sterilisation is not to be subordinated to the condition that the prosecution can only be initiated following the reporting by the victim of the offence or the laying of information by the State of the place where the offence was committed. Under Article 46 of that convention, the commission of acts against a former or a current spouse or cohabiting person, vulnerable persons or children, inter alia, constitute aggravating circumstances. Article 48(1) of the Istanbul Convention provides that the parties to that convention are to take the necessary measures to prohibit mandatory alternative dispute resolution processes in relation to all forms of violence covered by the scope of that convention.

2 Chapter VI of the Istanbul Convention, entitled 'Investigations, prosecution, procedural law and

protective measures', contains Articles 49 to 58 thereof, according to which the parties are to ensure that the responsible law enforcement agencies respond promptly and appropriately by offering adequate and immediate protection to victims of violence, in particular by ensuring that investigations and judicial proceedings are carried out without undue delay, by employing preventive operational measures and by carrying out an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence.

Furthermore, the parties to the Istanbul Convention are to provide that appropriate restraining or protection orders are available without undue financial or administrative burdens placed on the victim, inter alia in situations of immediate danger, by ordering a perpetrator of domestic violence to vacate the residence of the victim. Victims must be protected from retaliation and be informed when the perpetrator escapes or is released. They must be informed of their rights and the services at their disposal, be provided with appropriate support, including legal assistance and free legal aid, and allowed the possibility to be heard in such a way that contact between victims and perpetrators is avoided, inter alia by enabling victims to testify without being physically present. Under Articles 54 and 56 of the Istanbul Convention, the competent authorities are to protect the privacy and the image of the victim, inter alia by ensuring that evidence relating to the sexual history and conduct of the victim is permitted only when it is relevant and necessary.

Article 56(2) of that convention provides that a child victim and child witness of violence against women is to be afforded special protection measures and Article 58 of that convention provides that the statute of limitation for initiating any legal proceedings with regard to the offences established in accordance with Articles 36 to 39 thereof are to continue for a period of time that is sufficient and commensurate with the gravity of the offence in question, to allow for the efficient initiation of proceedings after the victim has reached the age of majority.

In Chapter VII of the Istanbul Convention, entitled 'Migration and asylum', Article 59 thereof lays down, first, the obligation for the parties to that convention to ensure that victims whose residence status depends on that of the spouse or partner are granted, in the event of particularly difficult circumstances, an autonomous residence permit and the obligation to take the measures necessary to ensure that victims may obtain the suspension of expulsion proceedings in relation to that residence status. That article then provides for the issue of a renewable residence permit to victims where their stay is necessary owing to their personal situation or for the purpose of their cooperation in investigation or criminal proceedings. Finally, under that article, victims of forced marriage brought into another country for the purpose of the marriage and who, as a result, have lost their residence status must be able to regain this status.

Under Article 60 of the Istanbul Convention, gender-based violence against women must be recognised as a form of persecution within the meaning of Article 1(A)(2), of the 1951 Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, and as a form of serious harm giving rise to subsidiary protection. In addition, in accordance with Article 60 thereof, the parties to the Istanbul Convention must ensure that a gender-sensitive interpretation is given to each of the grounds of the Convention relating to the Status of Refugees in assessing whether to grant refugee status, and that measures are taken to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures.

Under Article 61 of the Istanbul Convention, victims of violence against women who are in need of protection cannot be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.

Chapter VIII of that convention, entitled 'International co-operation', contains Articles 62 to 65, which provide that the parties to that convention undertake inter alia to cooperate in civil and criminal matters for the purpose of preventing, combating and prosecuting all forms of violence covered by that convention; protecting and providing assistance to victims; carrying out investigations or proceedings concerning the offences and enforcing civil and criminal

judgments, to ensure that victims of an offence established and committed in the territory of a party to the Istanbul Convention other than the one where they reside may make a complaint before the competent authorities of their State of residence and to consider the Istanbul Convention to be the legal basis for mutual legal assistance in criminal matters, extradition or enforcement of civil or criminal judgments.

3 Articles 63 and 64 of the Istanbul Convention encourage the parties to that convention to forward
4 information which might assist in preventing criminal offences or in initiating or carrying out investigations and to transmit without delay information according to which a person is at immediate risk of being subjected to acts of violence for the purpose of ensuring that appropriate protection measures are taken, while respecting the protection of personal data, as provided for in Article 65 of that convention.

3 In Chapter IX of the Istanbul Convention, entitled 'Monitoring mechanism', Article 66 of that
5 convention establishes GREVIO, tasked with monitoring the implementation of that convention. In accordance with Article 68 of that convention, the parties there are to submit, based on a questionnaire prepared by GREVIO, a report on legislative and other measures giving effect to the provisions of the Istanbul Convention, for consideration by GREVIO, which is to consider the report submitted with the representatives of the party concerned. It may also receive information on that implementation from non-governmental organisations and civil society, and is to take due consideration of the information available from other instruments and bodies. GREVIO may also organise country visits, and may be assisted by specialists during those visits. GREVIO is to prepare a report on the party to the Istanbul Convention subject to evaluation, intended to enable the Committee of the Parties, established in Article 67 of that convention, to adopt recommendations addressed to that party.

3 In Chapter X of the Istanbul Convention, entitled 'Relationship with other international
6 instruments', Article 71 thereof states that that convention is not to affect obligations arising from other international instruments and that the parties to that convention may conclude agreements for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

3 Chapter XII, entitled 'Final clauses', of that convention contains Articles 73 to 81 thereof. Under
7 Article 73 of the Istanbul Convention, the provisions of that convention are not to prejudice provisions under which more favourable rights are or would be accorded.

3 Article 75 of that convention provides that it is open for signature by the Member States of the
8 Council of Europe, the non-member States which have participated in its elaboration and the European Union and that it is subject to ratification.

3 Under Article 77 of that convention, any State or the European Union may, at the time of
9 signature or when depositing its instrument of ratification, specify the territory or territories to which the Istanbul Convention is to apply and any party may, at any later date, extend the application of that convention to any other territory on whose behalf it is authorised to give undertakings, or withdraw such declarations.

4 Article 78 of the Istanbul Convention states that no reservation may be made in respect of any
0 provision of that convention, with the exception of the possibility for any State or the European Union to declare that it reserves the right not to apply or to apply only in specific cases or conditions the provisions laid down in Article 30(2); Article 44(1)(e), (3) and (4); Article 55(1) in respect of Article 35 regarding minor offences; Article 58 in respect of Articles 37, 38 and 39 and Article 59 of the Istanbul Convention and the right to provide for non-criminal sanctions, instead of criminal sanctions, for the behaviours referred to in Articles 33 and 34 of that convention.

B. The proposals for decisions on the signing and conclusion of the Istanbul Convention

4 On 4 March 2016, the European Commission submitted to the Council both its proposal for a
1 Council decision on the signing, on behalf of the European Union, of the Council of Europe

Convention on preventing and combating violence against women and domestic violence (COM(2016) 111 final; 'the proposal for a signature decision') and its proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence (COM(2016) 109 final; 'the proposal for a conclusion decision'). The latter proposal, the content of which is essentially identical to that of the proposal for a signature decision, is worded as follows:

'2.1 EU competence to conclude the [Istanbul] Convention

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

…

To the extent that the [Istanbul] Convention may affect or alter the scope of these common rules, the Union is exclusively competent pursuant to Article 3(2) TFEU. This is, for example, the case as regards matters pertaining to the residence status of third-country nationals and stateless persons, including beneficiaries of international protection, as far as it is covered by Union legislation, and the examination of applications for international protection, and also as regards the rights of crime victims. Even if many of the existing provisions referred to [in the foregoing paragraphs] are minimal rules, it cannot be ruled out that, in the light of recent case-law, some of them may also be affected or their scope altered.

2.2 Legal basis for the proposed Council Decision

…

The legal bases under the [TFEU] which are of relevance here are: Article 16 (data protection), Article 19(1) (sex discrimination), Article 23 (consular protection for citizens of another Member State), Articles 18, 21, 46, 50 (free movement of citizens, free movement of workers and freedom of establishment), Article 78 (asylum and subsidiary and temporary protection), Article 79 (immigration), Article 81 (judicial cooperation in civil matters), Article 82 (judicial cooperation in criminal matters), Article 83 (definition of EU-wide criminal offences and sanctions for particularly serious crimes with a cross-border dimension), Article 84 (non-harmonising measures for crime prevention), and Article 157 (equal opportunities and equal treatment of men and women in areas of employment and occupation).

Taken as a whole, although the [Istanbul] Convention has several components, its predominant purpose lies in the prevention of violent crimes against women, including domestic violence, and the protection of victims of such crimes. It therefore appears appropriate to base the Decision on the competences of the Union under Title V TFEU and in particular on Article 82(2) and Article 84 thereof. The provisions of the [Istanbul] Convention on other matters are ancillary or, for example for data protection, incidental to the measures that constitute the focus of [that convention]. As a consequence, for the [European Union] to exercise its competences over the entirety of [that convention] and excluding elements over which it would have no competence, the main legal bases are Article 82(2) and Article 84 TFEU.'

C. Signature decision 2017/865

42 The first citation in the preamble to Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters (OJ 2017 L 131, p. 11; 'signature decision 2017/865'), is worded as follows:

'Having regard to the [TFEU], and in particular Article 82(2) and Article 83(1), in conjunction with Article 218(5) thereof'.

43 Recitals 1 to 11 of that decision state:

'(1) The Union participated alongside the Member States as an observer in the negotiation of the [Istanbul Convention] …

(2) In accordance with Article 75 of the [Istanbul] Convention, the Convention is open for signature by the Union.

(3) The [Istanbul] Convention creates a comprehensive and multifaceted legal framework to protect women against all forms of violence. It seeks to prevent, prosecute and eliminate violence against women and girls and domestic violence. It covers a broad range of measures, from data collection and awareness raising to legal measures on criminalising different forms of violence against women. It includes measures for the protection of victims and the provision of support services, and addresses the gender-based violence dimension in matters of asylum and migration. The [Istanbul] Convention establishes a specific monitoring mechanism in order to ensure effective implementation of its provisions by the Parties.

(4) The signing of the [Istanbul] Convention on behalf of the Union will contribute to the realisation of equality between women and men in all areas, which is a core objective and value of the Union to be realised in all its activities in accordance with Articles 2 and 3 [TEU], Article 8 [TFEU] and Article 23 of the Charter of Fundamental Rights of the European Union. Violence against women is a violation of their human rights and an extreme form of discrimination, entrenched in gender inequalities and contributing to maintaining and reinforcing them. By committing to the implementation of the [Istanbul] Convention, the Union confirms its engagement in combating violence against women within its territory and globally, and reinforces its current political action and existing substantial legal framework in the area of criminal procedural law, which is of particular relevance for women and girls.

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

(6) The [Istanbul] Convention should be signed on behalf of the Union as regards matters falling within the competence of the Union in so far as [that convention] may affect common rules or alter their scope. This applies, in particular, to certain provisions of [that convention] relating to judicial cooperation in criminal matters and to the provisions of [that convention] relating to asylum and non-refoulement. The Member States retain their competence in so far as the [Istanbul] Convention does not affect common rules or alter the scope thereof.

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

(8) Since the competence of the Union and the competences of the Member States are interlinked, the Union should become a Party to [that convention] alongside its Member States, so that together they can fulfil the obligations laid down by the [Istanbul] Convention and exercise the rights vested in them in a coherent manner.

This Decision concerns the provisions of [that convention] on judicial cooperation in criminal matters in so far as those provisions may affect common rules or alter their scope. It does not concern Articles 60 and 61 of [that convention], which are addressed by a separate Council decision on signing to be adopted in parallel with this Decision.

(9)

Ireland and the United Kingdom are bound by Directives [2011/36 and 2011/93] and are therefore taking part in the adoption of this Decision.

(10)

In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, [the Kingdom of] Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.'

(11)

4 Article 1 of that decision provides:

'The signing, on behalf of the European Union, of the [Istanbul Convention] with regard to matters related to judicial cooperation in criminal matters is hereby authorised, subject to the conclusion of the said Convention.'

D. Signature decision 2017/866

4 The first citation in the preamble to Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement (OJ 2017 L 131, p. 13; 'signature decision 2017/866') is worded as follows:

'Having regard to the [TFEU], and in particular Article 78(2), in conjunction with Article 218(5) thereof'.

4 Recitals 1 to 8 and 11 of that decision are identical to those recitals of signature decision 2017/865. Recitals 9 and 10 of signature decision 2017/866 state:

'This Decision concerns only Articles 60 and 61 of the [Istanbul] Convention. It does not concern the provisions of [that convention] on judicial cooperation in criminal matters, which are addressed by a separate Council decision on signing to be adopted in parallel with this Decision.

(9)

In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Decision and are not bound by it or subject to its application.'

(10)

4 Article 1 of signature decision 2017/866 provides:

'The signing, on behalf of the European Union, of the [Istanbul Convention] with regard to asylum and non-refoulement is hereby authorised, subject to the conclusion of [that convention].'

IV. The Parliament's assessments in its request for an Opinion

A. Facts and procedure

4 The Parliament observes that, on 4 March 2016, the Commission adopted both the proposal for a signature decision, citing Article 218(5) TFEU as the procedural legal basis and Article 82(2) and Article 84 TFEU as the substantive legal basis, and the proposal for a conclusion decision, citing Article 218(6) TFEU as the procedural legal basis and the same substantive legal basis as that of the proposal for a signature decision.

4 In authorising the signing of the Istanbul Convention by the European Union, the Council

replaced those substantive legal bases with Article 78(2) , Article 82(2) and Article 83(1) TFEU. In addition, on 11 May 2017, it adopted two separate decisions for the purposes of that authorisation, namely, signature decision 2017/865, based on Article 82(2) and Article 83(1) TFEU, and signature decision 2017/866, based on Article 78(2) TFEU.

Although the Istanbul Convention was signed on behalf of the European Union on 13 June 2017, the Council has not yet adopted any decision on the conclusion of that convention by the European Union, since, according to the Parliament, the Council seems to want to make the adoption of such a decision contingent on securing the prior 'common accord' of all the Member States.

B. The appropriate legal bases for concluding the Istanbul Convention

Having regard to the aims of the Istanbul Convention, relating to the protection of victims of violence against women and the prevention of such violence, as set out in Articles 1, 5 and 7 and specified in Chapters III and IV thereof, the Parliament submits that the Commission was justified in considering those aspects to be the two main components of that convention.

The Parliament therefore has doubts, in the first place, about the reasons justifying the Council's decision not to use Article 84 TFEU as the legal basis for the adoption of signature decisions 2017/865 and 2017/866 and the addition of Article 78(2) and Article 83(1) TFEU as legal bases for, respectively, signature decision 2017/866 and signature decision 2017/865.

As regards Article 78(2) TFEU, the Parliament states that that legal basis concerns only the area of asylum, covered by Articles 60 and 61 of the Istanbul Convention alone, and therefore questions whether the latter articles can properly be regarded as a separate, main component of that convention, or if those articles are not rather the manifestation, in the particular area of asylum, of the broader concern to protect all victims of violence against women, with the result that they are merely auxiliary provisions which do not call for the use of Article 78(2) TFEU as part of the substantive legal basis for those signature decisions.

As regards Article 83(1) TFEU, the Parliament submits that that provision limits the competence of the European Union to certain areas of criminal law, which do not include violence against women. Violence against women thus fall within the competence of the European Union only in the context of human trafficking, sexual exploitation of women and children and organised crime.

Accordingly, since the Member States have retained their competence in most of the areas of substantive criminal law addressed by the Istanbul Convention and the components of that convention which concern aspects of that law for which the European Union is competent appear secondary, they do not necessitate the addition of Article 83(1) TFEU as a basis for signature decisions 2017/865 and 2017/866.

C. Division of each of the acts on the signing and on the conclusion of the Istanbul Convention into two separate decisions

The Parliament submits that the fact that Ireland could invoke the provisions of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU ('Protocol No 21'), in relation to Articles 60 and 61 of the Istanbul Convention, cannot in itself justify the choice of Article 78(2) TFEU as a legal basis for the act on the signing of that convention. Accordingly, if Articles 60 and 61 cannot be regarded as a separate, main component of that convention, the use of Article 78(2) TFEU is unnecessary and the division of the act on the signing of that convention into two separate decisions is unjustified.

In addition, the Parliament maintains that Articles 60 and 61 of the Istanbul Convention are in any event largely covered by common rules which apply to Ireland, since Directives 2004/83 and 2005/85 were repealed only as regards those Member States which are bound by Directives

2011/95 and 2013/32. Accordingly, even if the addition of Article 78(2) TFEU as a legal basis were justified, the question arises as to the necessity of splitting the decision on the signing of that convention into two separate decisions.

D. The practice of ‘common accord’ of the Member States

59 The Parliament states that the ‘mixed’ nature of the Istanbul Convention – the subject matter of which falls, in part, within the competences of the European Union and, in part, within those reserved for the Member States – is not disputed. However, Article 218(6) TFEU provides, as regards the conclusion of an international agreement on behalf of the European Union, for a Council decision adopted by a qualified majority after obtaining the consent of Parliament. The Parliament thus questions the Council’s approach of ensuring, before concluding the Istanbul Convention, that all the Member States consent to be bound by it.

60 The Parliament acknowledges in that regard that it is essential to ensure close cooperation between the Member States and the EU institutions in the negotiation, conclusion and the fulfilment of the commitments entered into, but submits that waiting for a ‘common accord’ of all the Member States for the conclusion of that convention goes beyond such cooperation and amounts to applying, in practice, an unanimity rule within the Council despite the fact that, under the TFEU, only the qualified majority rule applies.

61 The Parliament also submits that the present situation differs from that in which the Council had merged the decisions of the European Union and of the Member States into a ‘hybrid’ act, since, in this case, there is no decision at all until the ‘common accord’ of the Member States has been secured. The Parliament notes, however, that the ‘common accord’ approach appears to be a general practice of the Council and not a requirement applied only in the present case.

V. Summary of the observations submitted to the Court

62 In the present proceedings, observations have been submitted to the Court by the Republic of Bulgaria, the Czech Republic, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, Hungary, the Republic of Austria, the Republic of Poland, the Slovak Republic, the Republic of Finland, the Council and the Commission.

A. Facts and procedure

1. The signing and ratification of the Istanbul Convention by the Member States

63 According to the Republic of Bulgaria and the Council, since the opening of the Istanbul Convention for signature, 21 Member States of the European Union, with the exception of the Republic of Bulgaria, the Czech Republic, the Republic of Latvia, the Republic of Lithuania, Hungary and the Slovak Republic, have ratified that convention, without considering whether those ratifications interfere with the exclusive competence of the European Union.

64 Furthermore, according to the Council, several Member States expressed reservations and made declarations whilst signing or ratifying the Istanbul Convention, concerning inter alia the compatibility of certain provisions of that convention with their national Constitutions. In addition, some parties to that convention, including four EU Member States, raised objections to those reservations and declarations under public international law.

65 The Council also submits that it is common knowledge that certain elements and definitions set out in the Istanbul Convention are contentious in some Member States of the Council of Europe, questions having been raised as to whether the obligations laid down in that convention are compatible with national traditions, laws and constitutions. Thus, some national delegations in the working party on ‘Fundamental Rights, Citizens’ Rights and Free Movement of Persons’

('FREMP'), which is a Council working party responsible, inter alia, for examining the proposals relating to accession to the Istanbul Convention, stated that they had encountered serious difficulties as regards ratification of that convention. However, none of those Member States have officially notified the Council of those difficulties or of the irreversible nature of the difficulties encountered.

2. The procedure for signing the Istanbul Convention within the Council

6 The Commission submits that the proposal for a signature decision, which has Article 82(2) and
6 Article 84 TFEU as its substantive legal basis, envisaged the signature of the Istanbul Convention by means of a single decision and noted the respective competences of the European Union, exclusive or shared, and of the Member States. However, the Council did not follow the Commission's approach set out in that proposal.

6 The Council states that discussions within FREMP on the proposal for a signature decision were
7 difficult in several respects. In the first place, FREMP challenged, in the light of the principle of conferral, the Commission's assertion in that proposal that the EU 'has competence for a considerable part of the provisions of the [Istanbul] Convention', in view of the competences conferred on the European Union under Article 3(2) TFEU, and requested that a rigorous analysis be carried out, within the Council, of the European Union's exclusive competences in relation to the conclusion of the Istanbul Convention. Following that analysis, FREMP concluded that the European Union's exclusive competence was limited to certain matters related to judicial cooperation in criminal matters and to asylum and non-refoulement.

6 In the second place, while the Commission and the Parliament advocated a 'broad' accession by
8 the European Union to the Istanbul Convention by making the European Union a party to that convention to the full extent of its exclusive or shared competences, whether exercised or potential, many national delegates in FREMP considered that such an accession might lead to complications for the Member States which had already ratified that convention. Since there was insufficient support for a 'broad' accession, it was clear that only a signature decision limited to the exclusive competence of the European Union could obtain a qualified majority in the Council. The choice between a 'narrow' accession and a 'broad' accession to that convention is a political choice for the Council.

6 In the third place, the Council considered that the decision to sign the Istanbul Convention had to
9 have Article 78(2), Article 82(2) and Article 83(1) TFEU as its substantive legal basis. In addition, the Council considered that it was legally necessary to split the signature decision into two separate decisions. By virtue of the application of Protocol No 21, the calculation of the voting majorities in the Council for asylum and non-refoulement matters differed from that for judicial cooperation in criminal matters. Ireland shares the Council's view.

3. The procedure for concluding the Istanbul Convention within the Council

7 The Commission states that the proposal for a conclusion decision, which has Article 82(2) and
0 Article 84 TFEU as its substantive legal basis, has been the subject of discussions within the Council since 26 April 2016. The European Union's conclusion of the Istanbul Convention has thus been blocked for several years, without the Council having initiated the procedures laid down by the Treaties to enable the European Union to commit itself at the international level. That situation is the consequence of the practice of 'common accord' of the Member States, as a result of which the decision-making process provided for in Article 17(2) TEU and Article 218(6) TFEU remains 'blocked' until a consensus has been reached among the Member States.

7 According to the Commission, that practice applies to agreements the mixed nature of which is
1 considered to be necessary, in view of the powers reserved to the Member States, but also to agreements concluded on the basis of shared competences. In the present case, the Council is

unable to establish that ‘common accord’, since at least one of the Member States has expressed its disagreement because of a potential conflict between the Istanbul Convention and its constitutional law.

72 The Commission submits that although Article 218 TFEU lays down a single procedure of general application for the negotiation, signing and conclusion of international agreements by the European Union, the approach taken by the institutions thus diverges as regards mixed agreements, which gives rise to deadlocks affecting the European Union’s capacity to act internationally. It was because of that deadlock situation that the Parliament made the present request for an Opinion.

73 The Council submits that, following the adoption of signature decisions 2017/865 and 2017/866, FREMP worked on several issues relating to the accession of the European Union to the Istanbul Convention, including the drawing up of a code of conduct between the European Union and the Member States intended to deal with matters such as the establishment of positions, coordination and reporting under that convention’s monitoring mechanisms. In-depth discussions were also undertaken concerning the conclusion of that convention by the European Union, which were halted by the present request for an Opinion.

B. Admissibility of the request for an Opinion

1. The appropriate legal bases for concluding the Istanbul Convention

74 According to the Council, the Parliament and the Commission delayed challenging signature decisions 2017/865 and 2017/866 under Article 263 TFEU. Ireland and the Council submit in that regard that challenging those decisions, in the context of the present request for an Opinion, more than two years after their adoption calls into question the compatibility of such a step with the ratio legis of Article 218(10) TFEU, which provides that the Parliament is to be immediately informed at each stage of the procedure in order, inter alia, to ensure that it is able to verify that its powers are respected as regards the choice of legal basis and to enable it to react immediately in the event of a problem. Thus, by the present request for an Opinion, the Parliament undermines that ratio legis, circumvents the time limits for bringing an action for annulment, which Hungary also submits, and potentially undermines the principle of sincere cooperation and the international status of the European Union.

75 The Republic of Finland submits that the Court has jurisdiction to examine, in the present opinion procedure, the appropriate legal basis for the adoption of the Council act on the conclusion of the Istanbul Convention on behalf of the European Union, since an incorrect legal basis could result in the annulment of the conclusion decision.

76 The Republic of Poland argues that the Parliament is seeking to call into question the Council’s decision that the European Union should accede to the Istanbul Convention only on the basis of its exclusive competences, with a view to reverting to a ‘broader’ accession. Such a request cannot form the subject matter of the opinion procedure, since that choice is of a political nature and is reserved to the Council. Hungary agrees with that analysis and adds that, as formulated, the first question does not make it possible to determine the European Union’s exclusive competences.

77 According to Hungary, the request for an Opinion does not concern the compatibility of the Istanbul Convention with the Treaties and relates only indirectly and marginally to the division of competences between the European Union and the Member States. It thus concerns, at most, the delimitation of competences between the European Union and the Member States. Even if the extent of the European Union’s competences could be determined, that would not justify the delivery of an opinion, since that opinion would not contribute to preventing the Member States or the European Union from assuming international obligations which are incompatible with the division of competences between them, the Member States and the European Union being, in any

event, jointly liable for such obligations. Having regard to signature decisions 2017/865 and 2017/866 and to the fact that the Istanbul Convention has already been signed by all the Member States and ratified by the majority of them, it is difficult to maintain that the request for an Opinion could forestall future legal complications concerning the division of competences between the European Union and its Member States.

77 Furthermore, if the first question concerns a Council decision on the conclusion of the Istanbul Convention, Hungary considers that that question is hypothetical and premature, since the Council has not yet decided on the content of that decision and has not reached the stage at which it will have to seek the Parliament's consent, at which stage the Parliament may raise any objections.

2. Division of the acts on the signature and conclusion of the Istanbul Convention into two separate decisions

79 Hungary also disputes the admissibility of the first question raised by the Parliament in its request for an Opinion in so far as it concerns the division of the acts on the signature and conclusion of the Istanbul Convention into two separate decisions, for reasons similar to those set out in paragraphs 74 and 78 above. The Council also disputes the admissibility of that question, submitting in particular that the question of the manner in which it might envisage in the future concluding the Istanbul Convention on behalf of the European Union is premature at this stage.

80 The Republic of Finland, on the other hand, considers that the Court has jurisdiction to examine whether, having regard to Protocol No 21, it is necessary or possible to split into two separate decisions the acts on the signature and conclusion of the Istanbul Convention according to the appropriate legal basis. Such a division could call into question not only the voting rules within the Council, but also the legal effects of the decision approving the Istanbul Convention with regard, in particular, to Ireland.

3. The practice of 'common accord' of the Member States

81 The Hellenic Republic submits, in order to challenge the admissibility of the second question posed by the Parliament in its request for an Opinion, that that institution has not sufficiently clarified how the Council's conduct is detrimental.

82 The Republic of Bulgaria and Hungary also challenge the admissibility of the second question and state in that regard that that question concerns neither the compatibility of the Istanbul Convention with the Treaties, nor the competence of the European Union or of one of its institutions to conclude that convention, nor the legal basis of the Council's decisions, but rather the Council's Rules of Procedure, annexed to the Council Decision of 1 December 2009 adopting its Rules of Procedure (OJ 2009 L 325, p. 35). In addition, the Republic of Bulgaria considers that the practice of 'common accord' does not alter the competences of the European Union or those of its institutions or the procedure laid down in Article 218(8) TFEU.

83 Hungary adds that, as long as the Council has not made a decision on the conclusion of that convention, no complications can arise in relation to international law, and the request for an Opinion is therefore unnecessary. The Council also submits that the second question is purely hypothetical because it is based on speculation as to the manner in which the Council will act. Similarly, Ireland, the Hellenic Republic and the Kingdom of Spain state that no steps have been taken by the Council to require a 'common accord' of the Member States before adopting its decision on the conclusion of the Istanbul Convention.

84 While acknowledging that it is possible under the opinion procedure to consider whether or not the conclusion of an agreement falls within the competences of the European Union, the Kingdom of Spain, Hungary and the Council point out, first, that the decision-making process within the Council is still at the preparatory stage before FREMP. Furthermore, according to

Hungary and the Council, accession to the Istanbul Convention requires a prior review process with a view to revising and supplementing the internal rules of the institutions, bodies, offices and agencies of the European Union, including those of the Staff Regulations of Officials of the European Union. Such measures have not yet been proposed. It is only after the procedure has followed its normal course that the conclusion of that convention is to be submitted to the Council for decision, in accordance with Article 218(6) TFEU. Hungary adds that the Council is not bound by any time limit for the adoption of decisions concluding international agreements and that the reason why the Council does not take such a decision is irrelevant.

85 Secondly, the Council submits that the Parliament should have asked whether the conclusion of that convention by the European Union is compatible with international law and the sovereign rights of the Member States in the absence of a 'common accord' of all the Member States. However, while the Council must ensure that the conclusion by the European Union of the Istanbul Convention does not give rise to problems with regard to international law, such a question could not be the subject of a request for an Opinion. The Kingdom of Spain considers that the second question raised by the Parliament in its request for an Opinion should relate to whether it is consistent with the principle of conferral and with Article 218(6) TFEU to make the adoption of the decision concluding the Istanbul Convention on behalf of the European Union contingent on the 'common accord' of the Member States to be bound by the Istanbul Convention as regards their national competences.

86 In any event, according to the Council, the conclusion of the Istanbul Convention by the European Union will take place by means of a Council decision adopted in accordance with Article 218(6) TFEU, without any further vote being required. Furthermore, such a decision cannot be regarded as being vitiated by the fact that the Member States have previously expressed their consent to be bound by that convention as regards their national competences. Such an expression of consent cannot, moreover, be regarded as a complication which the opinion procedure is intended to prevent.

87 If the Parliament considers that the Council must act before the Member States express their wish to be bound by the agreement concerned, the Kingdom of Spain, Hungary, the Slovak Republic and the Council consider that the Parliament could have brought an action for failure to act under Article 265 TFEU. The opinion procedure has a different purpose and cannot be used to compel the Council to act.

88 Thirdly, the adoption by the European Union of the decision concluding the Istanbul Convention must be distinguished from the deposit of the instrument of accession. Since neither of those two acts has, at this stage, been adopted by the Council and the procedure is still ongoing, the request for an Opinion is based on faulty assumptions and is premature and hypothetical. While acknowledging that the Istanbul Convention is an 'agreement envisaged' within the meaning of Article 218(11) TFEU, the Council denies that its internal procedures or its schedule may be the subject of an opinion procedure under that provision. Hungary shares that view.

89 On the other hand, the Republic of Finland takes the view that the practice of 'common accord' may be the subject of the present opinion procedure, since the conclusion of that convention without the 'common accord' of the Member States would be liable to be invalidated if such an accord were required by the Treaties. In addition, it is possible to examine in the context of that procedure not only whether the European Union has competence to conclude a specific international agreement, but also whether the European Union acts in conformity with the Treaties.

C. Substance of the request for an Opinion

1. The appropriate legal bases for concluding the Istanbul Convention

(a) 'Broad' or 'narrow' accession of the European Union to the Istanbul Convention

90 Ireland and the Republic of Finland point out that the analysis presented by the Parliament
concerning the appropriate legal bases for signature decisions 2017/865 and 2017/866 appears to refer to the Istanbul Convention in its entirety. However, those decisions concern only the areas of that convention which, according to the Council's analysis, fall within the exclusive competence of the European Union. The Council may indeed limit the accession of the European Union to those areas only.

91 The Republic of Finland submits that it is therefore necessary to determine the appropriate legal bases for the adoption of the decisions on the signing of the Istanbul Convention according to the provisions of that convention which fall within the exclusive competence of the European Union, while adding that it is possible that the Council may still decide to exercise shared competences also.

92 Since the choice of the legal basis for an EU measure, including one adopted with a view to concluding an international agreement, must be based, inter alia, on the aim and content of that measure, it is entirely appropriate, according to Ireland, to determine the legal bases for the decisions on the signing of that agreement solely in the light of the content of those decisions and not in the light of the entirety of the international agreement concerned, in this case the Istanbul Convention.

93 The Republic of Poland also points out that the scope of the accession determines the purpose and content of the decisions on the signing and conclusion of the Istanbul Convention. The choice of the legal basis for those decisions is therefore the result of a political decision of the Council, which the Parliament seeks to challenge.

(b) The criteria for identifying the competences of the European Union

94 According to the Commission, the finding that the European Union has an exclusive external competence under Article 3(2) TFEU must be based on a specific analysis of the relationship between the envisaged international agreement and the EU law in force. That analysis should take into account the fields covered, their foreseeable future development and the nature and content of the rules and provisions in question, in order to determine whether that agreement is liable to undermine the uniform and consistent application of EU rules. Such a risk exists where a field is largely covered by EU rules and provisions of the TFEU, such as Article 82(2)(d) and Article 83(1), in fine, which may give rise to such future developments since they provide for the possibility of extending the European Union's competences.

95 According to the Council, an exclusive competence on the part of the European Union as regards the conclusion of the Istanbul Convention can be based only on the third hypothesis set out in Article 3(2) TFEU, namely where that conclusion may affect common rules or alter their scope. However, the Council states that, in the context of that third hypothesis, the Court has held that an internal competence can give rise to exclusive external competence only if it is exercised. If that is not the case, there can be no implied exclusive competence in the context of that third hypothesis. The provisions of primary law to which the Commission referred in its proposal for a signature decision and its proposal for a conclusion decision cannot therefore form the basis for such competence. Furthermore, for the purposes of identifying the 'common rules' of the European Union, within the meaning of Article 3(2) TFEU, it is necessary to take into account not only the state of EU law as it exists at the time of the analysis of the competences of the European Union, but also its future development, in so far as that is foreseeable at the time of that analysis, which requires, at a minimum, that the Commission has presented a proposal to the EU legislature. The Commission's assertion in the explanatory memorandum to the proposal for a signature decision that it cannot be 'ruled out' that the European Union has exclusive competence for some parts of that convention runs counter to the principle of conferral and is insufficient to establish such a competence.

96 In so far as the Istanbul Convention and the relevant EU legislation contain only minimum

requirements, the Council states that, in principle, that there can be no exclusive EU competence for the conclusion of that convention within the meaning of Article 3(2) TFEU. The Council cites in that regard the case-law of the Court according to which an international agreement containing minimum requirements cannot lead to an exclusive external EU competence. The Republic of Finland submits that it follows from the very wording of Article 82(2) and Article 83(1) TFEU that the European Union's competence is limited to the adoption of minimum requirements.

97 The Council considers, however, that that case-law should not be applied in a mechanical fashion, but that it is necessary to examine specifically whether the envisaged international agreement and EU law leave the Member States a genuine degree of freedom. Such an examination is necessary to determine whether the fact that only the Member States would adhere to that agreement for a particular provision would be capable of undermining the uniform and consistent application of EU law.

98 In the light of those criteria, the Republic of Bulgaria and the Council consider that the provisions of the Istanbul Convention fall within the shared competences of the European Union and its Member States, the European Union's supporting competence, its exclusive competence and the competences reserved to the Member States. The European Union has exclusive competence in respect of some of the provisions of that convention set out in Chapters IV, V and VI thereof, since those provisions concern victims of violence covered by Directives 2011/93 and 2011/36, and in respect of two of the three provisions of Chapter VII of that convention.

99 The Republic of Finland disputes that analysis, emphasising that the Court did not specifically examine the extent of the freedom left to the Member States when it previously determined, solely on the basis of the wording of the provisions of the EC Treaty or the fact that the secondary legislation laid down minimum requirements, that the conditions for exclusive competence of the European Union were not satisfied. In any event, the exclusive competence of the European Union is so limited that it is doubtful whether such a 'narrow' accession is possible, with the result that the European Union should also accede to the Istanbul Convention on the basis of its shared competences.

(c) The relationship between the Istanbul Convention and the EU acquis

100 According to the Commission, the objectives set out in Chapter I of the Istanbul Convention and, more specifically, in Article 1(a) to (e) thereof, correspond to the objectives of the European Union referred to in Article 2 TEU and Articles 8, 19 and 67 TFEU. The key definitions in Article 3(a) and (b) of that convention correspond to Article 22 and recitals 17 and 18 of Directive 2012/29.

101 The obligations laid down in Chapter II of that convention, designed to place the rights of victims at the centre of all the measures adopted in order to prevent and combat all forms of violence covered by that convention, correspond inter alia to Articles 1, 8, 26 and 28 of Directive 2012/29 and to financial programmes designed to promote equality between women and men, in particular recitals 7, 10, 15 and 17 and Article 4(1)(e) of Regulation (EU) No 1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020 (OJ 2013 L 354, p. 62), Article 5 of Regulation (EU) No 1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020 (OJ 2013 L 354, p. 73), and recitals 2, 3 and 10 and Article 2(1)(b)(ix) of Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide (OJ 2014 L 77, p. 85).

102 The subject matter of Chapter III of the Istanbul Convention, concerning the prevention of all forms of violence covered by that convention, is governed in EU law by Article 84 TFEU, by Article 18 of Directive 2011/36, by Articles 22 and 23 of Directive 2011/93, by Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention

Network (EUCPN) and repealing Decision 2001/427/JHA (OJ 2009 L 321, p. 44), by financial programmes, including Article 5(1)(b) of Regulation No 1381/2013, Article 4(1)(b) and Article 6(1)(b) of Regulation No 1382/2013 and Article 3(3)(c) and (d) of Regulation (EU) No 513/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA (OJ 2014 L 150, p. 93), and by Article 25 of Directive 2012/29.

103 As regards the measures provided for in Chapter IV of the Istanbul Convention to protect victims of violence from any further act of violence, the Commission submits that Directive 2012/29 was adopted, on the basis of Article 82(2) TFEU, to ensure that victims of crime receive support, inter alia, and Directives 2011/36 and 2011/93 were adopted, on the basis of Article 82(2) and Article 83(1) TFEU, to protect victims of specific types of crime.

104 As regards Chapter V of that convention, which contains substantive provisions of civil and criminal law, the European Union has adopted, on the basis of, inter alia, Article 83(1) TFEU, Directives 2011/36 and 2011/93, which provide for certain offences also covered by that chapter. Moreover, since the European Union has shared competence under Article 83(1) TFEU, in fine, in those areas of civil law and criminal law, nothing precludes it from exercising that competence by concluding that convention.

105 The procedural obligations relating to investigations and prosecutions imposed by Chapter VI of that convention correspond to those set out in Directives 2011/36 and 2011/93, Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (OJ 2011 L 338, p. 2), Directive 2012/29 and Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (OJ 2013 L 181, p. 4).

106 In the field of migration and asylum, which is the subject of Chapter VII of the Istanbul Convention, Directives 2011/95, 2013/32 and 2013/33 on international protection, common procedures for granting and withdrawing that protection and standards for the reception of applicants for that protection were adopted. Furthermore, in that field, Ireland continues to be bound by Directives 2004/83 and 2005/85, of which Directives 2011/95 and 2013/32 are a recast.

107 Lastly, as regards international cooperation in civil and criminal matters, referred to in Chapter VIII of that convention, the European Union has adopted a wide range of legal instruments as regards both civil cooperation and judicial cooperation in criminal matters.

108 The Council observes at the outset that there is no specific EU legislation dealing in a comprehensive manner with the prevention of all forms of violence against women and combating that phenomenon.

109 As regards Chapters I to III of the Istanbul Convention, the Council submits that they relate, at most, to matters under a non-exercised shared competence of the European Union. As regards the obligations falling within Chapter II of that convention, relating to research, the European Union's competence exists, pursuant to Article 4(3) TFEU, parallel to that of the Member States. For those linked to the prevention of crimes, the European Union has competence only to support the action of the Member States under Article 2(6) and Article 84 TFEU.

110 The Council does not share the Commission's view that Chapter IV of that convention contains rules that are broadly comparable to those set out in Chapter 2 of Directive 2012/29 and takes the view that Chapter IV falls, with three exceptions, under a non-exercised shared competence of the European Union.

111 In the first place, that directive has a limited scope of application, since it applies only to victims of crime, particularly in the framework of criminal proceedings, which take place on the territory of the European Union, provided that there is a cross-border intra-EU element.

112 In the second place, Directives 2012/29 and 2011/93 contain minimum standards, as is apparent from the title, from recitals 11 and 67, Article 9(3) and Article 26 of Directive 2012/29 and from

recitals 25, 27, 38, 41 and 43 and Article 1 of Directive 2011/93, with the result that the Member States may also comply with the provisions of Chapter IV of the Istanbul Convention, without breaching either that convention or EU law, since a close analysis of those provisions confirms that the Member States retain genuine freedom in relation to Chapter IV.

113 In the third place, the Council takes the view that a different conclusion must nevertheless be reached in relation to two specific categories of victims, namely, first, child victims of sexual offences, defined in the Istanbul Convention as women under the age of 18, in respect of whom the European Union has adopted detailed rules in Directive 2011/93, on the basis of Article 82(2) and Article 83(1) TFEU. Article 1(2), Article 22(4) and Articles 23 and 24 of Directive 2012/29 are also relevant.

114 Secondly, Directive 2011/36, in particular Articles 12 to 16 thereof, contains detailed obligations for assistance and support to child victims of human trafficking. The detailed provisions of those directives leave the Member States little freedom, with the result that they are, despite the fact that those directive contain minimum requirements, two areas largely covered by EU rules, for the purposes of Article 3(2) TFEU.

115 In the fourth place, the Commission wrongly asserted, in the proposal for a signature decision and the proposal for a conclusion decision, that Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC (OJ 2015 L 106, p. 1) – which is based on Article 23 TFEU, under which it is for the Member States to adopt the necessary provisions and start the international negotiations required to secure that protection – confers exclusive competence on the European Union concerning the aspects of consular protection referred to in Article 18(5) of the Istanbul Convention. In addition, in accordance with recital 13 thereof, complaints made to competent authorities outside the European Union, such as embassies, do not trigger the obligations set out in Directive 2012/29.

116 As regards Chapter V of the Istanbul Convention, Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJ 2004 L 261, p. 15), including Article 12(2) thereof; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37), including recital 26 and Article 7 thereof; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23), including Article 27 thereof; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ 2010 L 180, p. 1), including recitals 18 and 23 thereof; Directive 2011/36, including Article 17 thereof, and Directive 2012/29 contain, according to the Council, minimum standards relating to the matters set out in Article 29(1) and Article 30(1), (2) and (3) of the Istanbul Convention which do not fall under the exclusive competence of the European Union. Moreover, Directive 2004/113, in Article 3(3) thereof, and Directive 2006/54, in Article 8 thereof, contain exclusions from their material scope. Furthermore, there is no EU legislation in relation to the other provisions in that chapter. That being said, the European Union has acquired exclusive competence over the provisions of Chapter V of the Istanbul Convention, in so far as they concern the victims covered by Directives 2011/93 and 2011/36.

117 The Council considers that Articles 49 to 54 and 56 of Chapter VI of that convention contain obligations that correspond in large measure to those in Articles 1, 3, 4, 6, 8, 9, 11, 18, 19, 20 and 22 to 24 of Directive 2012/29. Article 15(2) and Article 20 of Directive 2011/93 are also relevant, as are the instruments for mutual recognition between Member States in civil and criminal matters, namely Regulation No 606/2013, Council Directive 2003/8/EC of27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common

rules relating to legal aid for such disputes (OJ 2003 L 26, p. 41, and corrigendum OJ 2003 L 32, p. 15), Directives 2004/80 and 2011/99, Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ 2008 L 220, p. 32), Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ 2008 L 337, p. 102), Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (OJ 2009 L 93, p. 23), and Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA (OJ 2009 L 93, p. 33). However, since the provisions in question constitute minimum standards, the European Union has not acquired exclusive competence, except in relation to the matters covered by certain provisions of Directives 2011/93 and 2011/36.

118 As regards the three articles in Chapter VII of that convention, the Council submits that Article 13(1) and (2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (JO 2004 L 158, p. 77 , and corrigendum OJ 2004 L 229, p. 35), Article 3(5) and Article 15(3) of Directive 2003/86, Directive 2003/109 and the other instruments of EU law which are relevant as regards Article 59(1) to (3) of the Istanbul Convention contain only minimum requirements and that there is no EU legislation corresponding to Article 59(4) of that convention.

119 By contrast, as regards matters falling within Article 60(1) to (3) and Article 61 of that convention, the Member States do not appear to have much leeway, in the light of the detailed rules stemming, inter alia, from recitals 30 and 39, Article 4(3)(c) and (4), Article 9(2)(a) and (f), Article 10(1)(d) and Article 30 of Directive 2011/95 (which is not, however, binding on Ireland or the Kingdom of Denmark), Article 10(3)(d), Articles 18 and 24 and recital 32 of Directive 2013/32, Article 11, Article 17(2), Article 18(3), (4) and (7), Articles 19 and 21 to 25 of Directive 2013/33 and Article 5 of Directive 2008/115.

120 The Council therefore considers that, in the light of the EU law in force, the European Union has exclusive competence as regards matters falling within Articles 60 and 61 of the Istanbul Convention, but not as regards matters covered by Article 59 thereof which fall within a shared competence not exercised by the European Union.

121 Chapters VIII, IX and XI of the Istanbul Convention, follow, according to the case-law, the divisions of competence observed in relation to the previous chapters of that convention, with the result that they fall partly under shared EU competence, partly under supporting EU competence, partly under exclusive EU competence and partly under Member State competence. No separate analysis is needed for Chapters X and XII of that convention.

122 Lastly, the Council states that there was insufficient support within the Council for a ‘broad’ accession of the European Union to the Istanbul Convention, with the result that it decided, by a qualified majority, to authorise the signature of that convention limited to matters under exclusive EU competence.

123 Ireland shares the Council’s position.

(d) Article 82(2) TFEU

124 Noting that, according to the Parliament, the Council and the Commission, Article 82(2) TFEU constitutes one of the appropriate legal bases for the decision concluding the Istanbul Convention, the Commission and the Slovak Republic consider that that provision does not

require any particular examination.

125 The Council submits that the European Union has exclusive competence to conclude the Istanbul Convention as regards certain specific articles of that convention relating to judicial cooperation in criminal matters, in so far as those articles concern victims of violence covered by Directives 2011/93 and 2011/36.

126 The Republic of Finland and the Republic of Poland contend that, since it confers on the European Union only competence to adopt minimum rules, the very wording of Article 82(2) TFEU precludes the European Union's having exclusive competence to conclude the Istanbul Convention as regards its provisions on judicial cooperation in criminal matters.

127 If, on the other hand, the European Union wished also to accede to the parts of that convention falling under its shared competence, that provision would, according to the Republic of Finland, be one of the appropriate legal bases for concluding the Istanbul Convention.

(e) Article 84 TFEU

128 The Commission submits that the objective of the Istanbul Convention is the prevention of violence against women and the protection of victims. By concluding that convention, the European Union would support the preventive action of the Member States by providing a framework for their individual and specific measures. If the European Union's conclusion of that convention were limited solely to the protection of victims, the EU institutions could be regarded as exempt from preventive obligations, which would be inconsistent.

129 Moreover, Article 82(2) TFEU does not in itself cover all the preventive measures which are not linked to criminal procedures within the meaning of Article 82(2) TFEU. Such measures are most often lacking in the specific context of violence against women and the Istanbul Convention seeks to remedy that shortcoming.

130 The Republic of Poland submits that Article 84 TFEU does not confer on the European Union either exclusive competence or shared competence, but merely refers to measures to support the action of the Member States. Accordingly, that provision cannot confer exclusive competence on the European Union and an accession of the European Union to the Istanbul Convention on the basis of that article would have the consequence of binding not the European Union, but the Member States.

131 The Republic of Finland considers that, if the European Union wished to accede to that convention by exercising its shared competences, Article 84 TFEU would be an appropriate legal basis.

(f) Article 78(2) TFEU

132 Since Articles 60 and 61 of the Istanbul Convention cover matters which do not fall within the scope of either Article 82(2) TFEU or Article 84 TFEU, the Commission considers that those matters are ancillary in nature, with the result that the addition of legal bases covering those matters is excluded. Articles 60 and 61 of that convention, which are intended to ensure that a 'gender'-sensitive perspective is taken into account in decisions on the grant of international protection and in the reception conditions for victims of violence, are merely a manifestation, in the field of asylum, of the general objectives of that convention and do not make that convention an asylum law measure.

133 The Council maintains that the European Union has exclusive competence in relation to the matters falling under those two provisions of the Istanbul Convention. It submits, moreover, like the Slovak Republic, that those matters cannot be regarded as ancillary to the provisions of that convention relating to judicial cooperation in criminal matters.

134 The Republic of Finland and the Republic of Poland submit that, since the relevant secondary legislation in this area merely lays down minimum requirements, the European Union cannot

have exclusive competence for the conclusion of the Istanbul Convention as regards Articles 60 and 61 thereof. According to the Republic of Finland, if the European Union wished to accede to the Istanbul Convention by exercising its shared competences, Article 78(2) TFEU would concern only an ancillary aspect of the Istanbul Convention, and that provision would therefore not be a relevant legal basis.

(g) Article 83(1) TFEU

135 The Commission submits that although the Istanbul Convention also applies to victims of human trafficking and sexual exploitation of women and children, its scope ratione personae is much broader. Moreover, those victims are covered by specific conventions of the Council of Europe and, at EU level, by Directives 2011/36 and 2011/93. That convention therefore does not constitute an act the primary purpose of which is combating specific forms of crime.

136 The Council considers that the European Union has supporting competence in the fields covered by certain provisions of that convention.

137 The Republic of Finland and the Republic of Poland submit that, since the wording of Article 83(1) TFEU grants the European Union only competence to adopt minimum requirements, it cannot be regarded as conferring exclusive competence on the European Union for the conclusion of the Istanbul Convention.

2. Division of the acts on the signing and conclusion of the Istanbul Convention into two separate decisions

138 The Republic of Bulgaria states that, if the decision concluding an international agreement pursues two objectives, one of which is the main objective whereas the other is incidental, it must be based on the primary legal basis alone. If, on the other hand, the decision pursues two objectives without one being incidental to the other, it must be founded on the various corresponding legal bases. In that case, two decisions may be necessary if the applicable procedures are incompatible with each other.

139 The Commission reiterates that Article 78(2) TFEU is not an appropriate legal basis for the conclusion of the Istanbul Convention. In any event, the addition of that provision would not necessarily lead to the division of the decision concluding that convention into two separate acts, since Ireland is bound by the relevant EU acquis. It is true that it is not the most recent acquis, but Protocol No 21 is not such as to release that Member State from its obligations or alter the criteria for identifying the appropriate legal basis.

140 Thus, the mere fact that Article 4a of Protocol No 21 allows Ireland not to participate in the amended version of an existing measure is irrelevant, since the rules on exclusive external competence are laid down in Article 3 TFEU and the possibility of exercising an ‘opt-out’ cannot be regarded as conferring competence on a Member State to conclude international agreements in breach of Article 3(2) TFEU.

141 The Republic of Finland submits that, as regards all the envisaged legal bases, the adoption of decisions by the Council is subject to Protocol No 21 and Ireland is therefore not required to take part in those decisions. Since the decision-making procedure is therefore identical, it was not necessary to split the decision on signing the Istanbul Convention into two.

142 The Council states that Article 78(2) and Article 82(2) TFEU trigger the application of Protocol No 21 and Protocol (No 22) on the position of Denmark annexed to the TEU and to the TFEU (‘Protocol No 22’). Since the Kingdom of Denmark is not bound by any of the secondary legislation relevant to the conclusion of the Istanbul Convention, the applicability of Protocol No 22 did not lead to any particular difficulty. However, since Ireland is participating in the judicial cooperation in criminal matters established by Directives 2011/36 and 2011/93, but is not bound by Directives 2011/95, 2013/32 and 2013/33 on asylum law, that Member State had

to participate in the adoption of signature decision 2017/865, but not, under Articles 1, 3 and 4 of Protocol No 21, in that of signature decision 2017/866, with the result that it was necessary to adopt two separate signature decisions. The Republic of Bulgaria, Ireland, the French Republic and the Slovak Republic share that view.

143 Ireland submits that the adoption of two separate decisions is therefore essential in order to enable it to exercise its right, pursuant to Protocol No 21, to be bound only by the measures of the Istanbul Convention falling under Title V of the TFEU that it wishes to adopt. Had the Council had adopted a single decision, it would have been impossible for Ireland to distinguish between those aspects of the decision where the European Union's competence is based on legislation that Ireland is bound by, and aspects where that competence is based on legislation that does not apply to it.

144 Such an approach would be contrary to Protocol No 21 and would undermine the fundamental parallelism between EU internal and external competences which forms the basis of the doctrine resulting from the judgment of 31 March 1971, Commission v Council (22/70, EU:C:1971:32), known as the 'ERTA doctrine', as laid down in Article 3(2) TFEU. The specific analysis required relates to the relationship between the agreement envisaged and the EU law 'in force'; that law is not however in force in Ireland and the agreement is therefore not capable of affecting it within the meaning of Article 3(2) TFEU. Ireland adds that, since it may have passed its own laws in the matter, it would be in a very difficult situation if it were also bound, under EU law, by different obligations.

145 Ireland observes that the Parliament has asked not only whether the adoption of two separate decisions is 'necessary', but also whether it is 'possible', without explaining why that might not be the case. According to Ireland, there is no reason why the adoption of two separate decisions would not be possible, and such adoption in no way adversely affects the substance of those decisions. The Republic of Bulgaria also considers that the adoption of two decisions does not infringe the procedure laid down in Article 218 TFEU.

146 The Council observes that, as Ireland has decided, since the adoption of signature decisions 2017/865 and 2017/866, to opt-in to Directive 2013/33, it is possible that the situation may be different as regards the possible conclusion of the Istanbul Convention.

147 The Republic of Bulgaria states that, under Article 7 of Protocol No 22, the Kingdom of Denmark may decide no longer to avail itself of all or part of that protocol, and it therefore cannot be ruled out that it may become necessary to vote within the Council, depending on the respective content of the various parts of the Istanbul Convention, both with and without the participation of that Member State.

3. The practice of 'common accord' of the Member States

(a) Presentation of the practice of 'common accord'

148 The Republic of Austria submits that the practice of 'common accord' was developed under the EC Treaty and was set out, as regards certain mixed agreements in the field of commercial policy, in the second subparagraph of Article 133(6) EC, because of the particular structure of competences in that field, which made it necessary for the European Community and the Member States to exercise their respective competences in concert. According to that practice, the President of the Council consults the Member States and ensures that all of them agree to be bound by the mixed agreement concerned before the Council approves the conclusion of that agreement.

149 The Republic of Austria adds that the practice of 'common accord' merely establishes, on a given date, a consensus between the Member States as to their consent to be bound by the mixed agreement at issue, although ratification may nevertheless subsequently fail before the parliaments of the Member States. Furthermore, nothing precludes a mixed agreement from

becoming asymmetric after the accession of the European Union to that agreement, since the Member States may withdraw from it at any time.

150 The French Republic states that that practice is intended to ensure the consent of the Member States to be bound by the provisions of the agreement falling within their national competence, where joint accession of the European Union and the Member States to that agreement is indispensable, namely where the agreement cannot be implemented in a consistent manner without being concluded jointly by the European Union and its Member States. That would be the case where the provisions of that agreement falling within the competences of the European Union and those falling within the competences of the Member States are, as in the present case, inextricably linked.

151 The Commission submits that, having been criticised by the Court for adopting 'hybrid acts', that is to say decisions of the Council and of the Representatives of the Governments of the Member States meeting within the Council concerning the conclusion of agreements, the Council changed its approach without changing the aim of its previous practice. The Council seeks to reintroduce a 'hybrid' character by adding a step prior to the adoption of a formal decision in accordance with the procedures laid down by the Treaties, during which it checks the existence of a 'common accord' of the Member States.

152 The effect of that practice is that, in a large number of subjects, the Commission's proposals on the signing and conclusion of agreements and conventions remain blocked within the Council, even though the required qualified majority would clearly be reached.

153 The Council states that it has stopped using 'hybrid acts' and that its current practice stems from the legitimate concern to avoid doubts as to the scope and validity in the EU legal order of the instruments of international law which it adopts. To that end, it ensures that all the Member States concerned agree to be bound as regards their national competences before proceeding to adopt, by the required majority, the Council's decision.

154 Contrary to what is suggested by the Parliament, that practice is, according to the Council, neither a voting rule nor a particular procedure, since the Member States are free to decide the practicalities of determining that such a consensus exists. Thus, there have been decisions made by representatives of the governments within or in the margins of the Council meetings, entries in the minutes of meetings of the Council or the Permanent Representatives Committee (Coreper), comments in notes from working parties and purely implicit agreements. Ireland states that, in the present case, no steps have been taken by the Council to establish a 'common accord' between the Member States.

(b) Whether the practice of 'common accord' is compatible with Article 13(2) TEU and with Articles 2 to 6 and Article 218(2), (6) and (8) TFEU

155 The Republic of Austria and the Commission submit that, by requiring a 'common accord' between Member States, the Council infringes the first sentence of Article 13(2) TEU and Article 218(2), (6) and (8) TFEU, which designate it as the institution empowered to authorise, on a proposal and with the consent of the Parliament, the conclusion, by the European Union, of international agreements. No such requirement is provided for in those provisions, and the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves.

156 Accordingly, although the Council may decide not to conclude an agreement, for example in the event of a blocking minority opposed to its conclusion, it cannot, however, without infringing Article 13(2) TEU, under which each institution is to act within the limits of its powers, add to the applicable procedure the step of prior verification of the existence of a 'common accord' between the Member States.

157 Furthermore, since the competences of the European Union are defined in Articles 2 to 6 TFEU and are clearly distinguished from those of the Member States, it is not possible to carry out, by

adding such a step, a de facto merger with the intergovernmental decision-making process, even if the two instruments remain formally distinct. That practice distorts the procedure laid down in Article 218 TFEU.

158 Although the act formally adopted is indeed 'non-hybrid', the decision-making process remains 'hybrid', since the position of the Member States, taken individually, has priority over that of the European Union, without any basis in the Treaties, in disregard of the letter and spirit of Article 4(3) TEU and circumventing the requirements laid down by the Court in order to preserve the autonomy of the EU legal order.

159 The Commission observes that, according to the preamble to the TEU, the general objective of that treaty and the TFEU is to mark a new stage in the process of European integration. With a view to achieving that objective, the TFEU further specifies the division of and arrangements for exercising the European Union's competences in the field of external relations, in particular by clarifying the competences of the European Union (Articles 2 to 6 TFEU), specifying in which cases the European Union may conclude international agreements (Article 216(1) TFEU) and by further specifying the procedure for the negotiation, signature and conclusion of all types of international agreements (Article 218 TFEU).

160 The Commission therefore considers that it is manifestly contrary to the objectives of the Treaties to use, as a general practice applicable to all mixed agreements, a 'hybrid' decision-making process which hinders the European Union's ability to decide to commit itself at the international level and which indicates to the international community that the European Union is not empowered to take an independent decision, but depends on the decisive involvement of the Member States.

161 Accordingly, by the practice of 'common accord', the Council is in breach of its duty of sincere cooperation enshrined in the second sentence of Article 13(2) TEU, which also applies in inter-institutional relations.

162 Furthermore, that practice disturbs the institutional balance of the European Union, in so far as it confers on the Member States a role, within the European Union, not provided for by the Treaties, since Article 218 TFEU describes only the respective rights and duties of the Parliament, the Council, the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The role thus conferred on the Member States would undermine the effectiveness of the institutional framework of the European Union and could give precedence to the interests of the Member States over those of the European Union.

163 The Commission submits that Article 218(8) TFEU provides that the Council is to act by a qualified majority and infers from this that the practice of 'common accord' of the Member States infringes that provision, in that it renders it ineffective. That practice would compromise the effectiveness of EU procedures. The Republic of Austria shares that view and points out that the Treaties contain exhaustive provisions on the procedure for the conclusion of conventions by the European Union, which preclude the introduction of a preliminary 'common accord' step.

164 By contrast, the Slovak Republic maintains that, because the Council has not yet voted, it cannot have infringed Article 218(8) TFEU.

165 According to Ireland, it is clear that Article 218(6) and (8) TFEU governs the voting procedure and that neither the Council nor the Member States may depart from that provision. In so far as the Council seeks, prior to the vote, to coordinate the action of the European Union and the Member States, the practice of 'common accord' arises – where the competences of the European Union and the Member States are, as in the present case, closely linked – from the duty of sincere cooperation.

166 Since the search for a 'common accord' of the Member States precedes the adoption of the decision concluding the Istanbul Convention pursuant to Article 218(6) and (8) TFEU, the French Republic and Hungary consider that that practice does not alter that decision or the qualified majority voting rule or amount to adopting a 'hybrid act'.

(c) The compatibility of the practice of ‘common accord’ with the principles of conferral, sincere cooperation between the European Union and its Member States, unity in the external representation of the European Union and public international law

167 The Commission submits that the requirement of unity in the international representation of the European Union entails a duty of cooperation governing the conclusion, by the Member States and the European Union, of mixed agreements, such as the Istanbul Convention. In addition, the principle of effectiveness and the obligation to protect the reputation and international credibility of the European Union require the institutions of the European Union and its Member States to facilitate the implementation of its decisions.

168 Thus, from the signing, and a fortiori following the conclusion of a mixed agreement on behalf of the European Union, the Member States are required to assist the European Union in implementing that agreement. Since the joint conclusion of the Istanbul Convention by the European Union and its Member States is necessary, within the meaning of Article 216 TFEU, in order to attain the objectives of the Treaties in relation to the protection of human dignity, the latter are therefore required to endeavour to remove obstacles preventing the European Union from depositing, together with the Member States, the instruments of ratification to the Council of Europe. They are therefore required, at the very least, to make all relevant proposals to the competent national bodies in order to facilitate the conclusion of that convention by the European Union.

169 In any event, according to the Commission, the instrument of accession of the European Union to that convention may be accompanied by a declaration which notes the evolving nature of the European Union’s competences, which states that the European Union does not have competence in all the areas covered by that convention and which specifies the areas in which it will adopt implementing measures. Since the Council of Europe is well aware of the limited nature of the European Union’s competences, that possibility is inherent in the provision permitting the accession of the European Union.

170 The Republic of Finland submits that no provision of EU law makes the conclusion of the Istanbul Convention contingent on the accession of all the EU Member States. There is therefore no legal basis for the practice of ‘common accord’. The mere fact that close cooperation between the Member States and the EU institutions is necessary for the negotiation, conclusion and implementation of international agreements does not, according to the Republic of Finland and the Republic of Austria, permit the inference that a ‘common accord’ between the Member States is necessary in order for the European Union to be able to enter into a commitment nor that the Member States need the Council’s agreement in order to enter into a commitment within their own sphere of competence, since each may act alone within its sphere of competence.

171 According to the Republic of Austria, when concluding a mixed agreement, the European Union and its Member States are linked but separate parties to the agreement; each must act within its sphere of competence and with due respect for the competences of any other contracting party, by applying its own constitutional procedures concerning negotiation, signature, conclusion and ratification. The Republic of Finland and the Republic of Austria submit that an accession of the European Union without the ‘common accord’ of the Member States cannot lead to the European Union being bound other than within its own sphere of competence.

172 In the light of those considerations, the Republic of Finland argues that requiring a ‘common accord’ between the Member States is contrary to both Article 13(2) TEU and Article 218 TFEU and to the principle of the autonomy of EU law, since it means that the European Union cannot exercise autonomously the powers conferred on it and the adoption of the Council decision requires the unanimous agreement of the Member States rather than a qualified majority. The principle of sincere cooperation which must be observed by the Member States, inter alia, also precludes such a requirement.

173 The Council states, first of all, that it follows from the principle of conferral, as enshrined in Article 5 TEU, that any competence not conferred on the European Union remains with the Member States and submits that it follows that no EU institution can order a Member State to adopt an act which falls within that Member State's competence. Furthermore, there is no obligation on the Council to adopt the decision to conclude the Istanbul Convention and that institution cannot be forced to exercise potential EU competence where the required majority is not reached. The Council and Hungary submit that Article 218(6) TFEU does not lay down any time limit for the adoption of such a decision.

174 The Council states that, unlike other international agreements, the Istanbul Convention was negotiated without the active participation of the European Union and infers from this that it was not negotiated with any concern in mind for the division of competences between the European Union and its Member States. In that regard, the Council submits that, whilst it is possible to delineate clearly the competences involved in certain provisions of that convention, that is not the case for Chapters IV to VI and VIII to XII thereof. In particular, since the European Union's exclusive competence under Article 3(2) TFEU concerns only particular aspects of Directives 2011/36 and 2011/93, the Member States also have competence in respect of each relevant provision of that convention, relating to aspects not covered by those directives.

175 The Council argues that the competences of the European Union and those of the Member States are therefore inextricably linked in this case and notes that Article 133(6) EC provided that certain agreements could not be concluded by the Council if they included provisions going beyond European Union's powers. Since certain areas fell within the shared competence of the European Union and the Member States, that provision stipulated that the negotiation of such agreements required the 'common accord' of the Member States and that they were to be concluded jointly by the European Union and the Member States. The fact that that provision no longer appears in the TFEU is not the result of a rejection of that practice, but rather the consequence of the transfer to the European Union, by Article 207(1) and (4) TFEU, of competences in the field of commercial policy.

176 Furthermore, the requirement laid down in Article 102 EAEC, according to which a mixed agreement may be concluded by the European Union only when all the Member States concerned have ratified it, ensures consistency between the international action of the European Union and the internal division of competences and powers, in accordance with the principle of unity in the external representation of the European Union.

177 According to the Council, it also follows from Article 207(6) TFEU, which provides that the exercise of the powers conferred by that article does not affect the delimitation of competences between the European Union and the Member States or entail harmonisation of the laws or regulations of the Member States in so far as the Treaties exclude such harmonisation, that the European Union, when exercising its own competence, cannot ignore that of the Member States. The principle of unity in the international representation of the European Union requires mutual cooperation between the Member States and the EU institutions throughout the negotiation, conclusion and implementation of mixed agreements.

178 The Kingdom of Spain submits that, since the Istanbul Convention concerns inextricably linked areas, that principle requires coordination of, inter alia, the signature, conclusion and, as far as possible, the entry into force of that convention. The practice of 'common accord' is the only practice which ensures mutual respect for competences in such a situation. The Republic of Bulgaria submits that, if the European Union were to accede to that convention even though some Member States do not wish to accede to it, the European Union would exceed its competences, impinge upon the competences of the Member States and therefore infringe the principle of conferral.

179 The Republic of Bulgaria, the Hellenic Republic, the Kingdom of Spain, the French Republic and Hungary point out that, in the context of such mixed agreements, each party must act within its own sphere of competence while respecting the competences of every other contracting

party. In view of the inextricable links between the competences of the European Union and those of the Member States for the conclusion of the Istanbul Convention, the principle of conferral, legal certainty, sincere cooperation and consistent implementation of obligations require the European Union and the Member States to become parties to that convention. The Kingdom of Spain points out that the implementation of that convention requires changes both to EU law and to the laws of the Member States.

180 In that regard, the Council notes that, according to Articles 27 and 46 of the Vienna Convention on the Law of the Treaties of 23 May 1969 (United Nations Treaty Series, vol. 1155, p. 331, 'the VCLT'), neither the European Union nor its Member States can invoke vis-a-vis the other parties to the Istanbul Convention the division of competence between them as an excuse for non-compliance. In addition, the French Republic and the Council submit that the invocation of an issue of competence before GREVIO would not be compatible with the autonomy of EU law, since that body would be responsible for resolving a matter which corresponds to the jurisdiction reserved to the Court of Justice.

181 The Republic of Bulgaria, the Czech Republic, the Kingdom of Spain, the French Republic and Hungary infer from this that, in the absence of a 'common accord' of the Member States, the European Union would not be in a position to guarantee the proper fulfilment of its commitments which would relate to the entirety of the Istanbul Convention, with the result that it would expose itself to liability at the international level for an action or omission for which no competence is conferred on it.

182 If the European Union were to enter into commitments which do not fall within its exclusive competence, it would nevertheless, according to the Hellenic Republic and the Council, be held liable under international law for the full implementation of the agreement. Moreover, the accession of the European Union to an agreement for which it has only partial competence, in the absence of accession by all the Member States, would result not only in a 'patchwork of obligations', depending on the Member State concerned, but would also raise the question whether and, if so, to what extent the agreement is in force in the territory of the Member States. If the accession exceeds the competences of the European Union, the act of accession is also liable to be annulled.

183 Moreover, although certain multilateral conventions provide for the possibility of a declaration of competence, that is not the case as regards the Istanbul Convention, which is also noted by the Hellenic Republic and Hungary. In any event, according to the Council, it is doubtful whether such a declaration would resolve the issue, having regard to the development of the division of competences between the European Union and its Member States.

184 In the light of the foregoing, the Czech Republic, Ireland, the Hellenic Republic, Hungary and the Council submit that if, as in the present case, the full implementation of the international commitments resulting from an agreement is possible, in law and in fact, only where all the Member States participate in that agreement, whereas they do not all agree to be bound by that agreement with respect to their national competences, the principles of sincere cooperation, unity in the external representation of the European Union and the conferral of competences prohibits the European Union from adopting decisions on the signing and conclusion of that agreement on the ground that that would impinge upon the competences of the Member States.

185 The Council disputes that the duty of sincere cooperation means that a Member State may not cause an obstacle to the accession of the European Union to a convention for which it is partially competent, entailing the obligation for the Member States to accede to it themselves. That duty cannot entail any obligation for a Member State to ratify an agreement, which the Czech Republic, the French Republic, Hungary and the Republic of Austria also submit, and the French Republic adds that such an interpretation of that duty is contrary to the principle of conferral and also infringes public international law which recognises, as shown by the preamble to the VCLT, the principle of the free consent of States to be bound by an international agreement. According to the Czech Republic, such an interpretation also infringes

the principle of international law ‘pacta tertiis nec nocent nec prosunt’ (treaties do not create obligations or rights for third states), as codified in Articles 34 to 38 of the VCLT.

186 Although it is apparent from the case-law that the duty of sincere cooperation may prevent the conclusion of agreements by the Member States, in particular where an accession procedure is ongoing at EU level, according to the French Republic and the Council, no obligation on the Member States to act in an area of EU competence has, as yet, been established, which applies a fortiori to areas in which the European Union has no competence. The Kingdom of Spain, the French Republic and the Council submit that the European Union’s wish to accede to an agreement cannot trump a Member State’s right not to accede to it, since the EU institutions also have a duty of sincere cooperation as regards the Member States.

187 The French Republic infers from this that that duty requires the European Union to wait for the ‘common accord’ of the Member States and concludes that the conclusion of the Istanbul Convention by the European Union in the absence of such a ‘common accord’ would infringe both EU law and international law. The Kingdom of Spain adds that it cannot be presumed from the fact that it may be difficult to obtain the consent of the Member States that the exercise of the European Union’s competence has been adversely affected.

188 Although the Council’s current practice appears somewhat inconvenient, in that it may delay the conclusion of a mixed agreement for a considerable amount of time, that practice is justified, according to the Council, by institutional and political considerations, including the legitimacy of mixed agreements. The legitimacy of those agreements, but also that of the European Union would be undermined if the European Union required a Member State to ratify a mixed agreement despite a negative referendum or the opposition of a State entity without taking the time to find an inclusive solution to overcome the difficulties encountered.

189 The Council and Hungary add that elements of the Istanbul Convention may affect the national identities of certain Member States, which the European Union is required to respect under Article 4(2) TEU. In that regard, the Republic of Bulgaria observes that, according to the Konstitutsionen sad (Constitutional Court, Bulgaria), certain provisions of that convention include concepts that are incompatible with the Bulgarian Constitution and public policy, including the concepts of ‘socially constructed roles’, ‘stereotypical roles’ and ‘gender’, which seek to define the concept of ‘sex’ in a manner incompatible with the definition set out in the Bulgarian Constitution. If the European Union nevertheless acceded to that convention, the Republic of Bulgaria would risk being obliged, in order to ensure compliance with the European Union’s international commitments, to implement measures contrary to its Constitution. Such an accession would therefore infringe the principle of sincere cooperation.

190 Similarly, the Slovak Republic, while taking an approach similar to that of the Council, submits that the Národná rada Slovenskej republiky (National Council of the Slovak Republic) has opposed the ratification of the Istanbul Convention by the Slovak Republic and by the European Union.

191 In any event, Ireland, the Kingdom of Spain and the Slovak Republic consider that the Council may wait for the ‘common accord’ of the Member States, since it is an EU institution and, as such, enjoys independence. The institutional balance means, inter alia, that the Council is not required to adopt a decision concluding the Istanbul Convention, since it has freedom of choice within its remit. Waiting for the ‘common accord’ of the Member States therefore does not infringe any provision of EU law and makes it possible to avoid having to settle political disputes.

VI. Opinion of the Court

A. Admissibility of the request for an Opinion

192 Under Article 218(11) TFEU, a Member State, the Parliament, the Council or the Commission

may obtain the opinion of the Court as to whether an envisaged agreement is compatible with the Treaties.

193 In the first place, it is settled case-law of the Court that that provision has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements that are binding upon the European Union. A possible decision of the Court, after the conclusion of an international agreement that is binding upon the European Union, to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaties would inevitably provoke serious difficulties, not only in the internal EU context, but also in that of international relations, and might give rise to adverse consequences for all interested parties, including third countries (Opinion 1/15 (EU-Canada PNR Agreement), of 26 July 2017, EU:C:2017:592, paragraph 69).

194 Having regard to the function of the procedure provided for in Article 218(11) TFEU, which is to forestall, by a prior referral to the Court, possible complications at EU level and at international level which would result from the invalidation of an act concluding an international agreement, the mere risk of such invalidation suffices for the referral to the Court to be allowed (Opinion 1/15 (EU-Canada PNR Agreement), of 26 July 2017, EU:C:2017:592, paragraph 74).

195 However, that procedure is not intended specifically to protect the interests and rights of the Member State or EU institution which has requested the Opinion, which may bring an action for annulment of the Council's decision to conclude the agreement and may in that context apply for interim relief (see, to that effect, Opinion 3/94 (Framework Agreement on Bananas), of 13 December 1995, EU:C:1995:436, paragraphs 21 and 22).

196 Nor is that procedure intended to solve difficulties associated with implementation of an envisaged agreement which falls within shared EU and Member State competence (Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001, EU:C:2001:664, paragraph 17).

197 In the second place, it is apparent from the case-law that it must be possible, therefore, for all questions that are liable to give rise to doubts as to the substantive or formal validity of the agreement with regard to the Treaties to be examined in the context of the procedure provided for in Article 218(11) TFEU. A judgment on the compatibility of an agreement with the Treaties may in that regard depend, inter alia, not only on provisions concerning the powers, procedure or organisation of the institutions of the European Union, but also on provisions of substantive law (Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 70).

198 However, as regards EU internal rules, the fact that they constitute internal EU law precludes them from forming the subject matter of the present opinion procedure, which can only relate to international agreements which the European Union is proposing to conclude (Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 149).

199 In the third place, it should be borne in mind that the choice of the appropriate legal basis for the Council decision on the conclusion of the envisaged agreement has constitutional significance, since, having only conferred powers, the European Union must link the acts which it adopts to provisions of the TFEU which actually empower it to adopt such acts. Consequently, proceeding on an incorrect legal basis is liable to invalidate the act concluding the agreement itself, and so vitiate the European Union's consent to be bound by the agreement it has signed (see, to that effect, Opinion 2/00 (Cartagena Protocol on Biosafety), of 6 December 2001, EU:C:2001:664, paragraph 5, and Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraphs 71 and 72).

200 That is so in particular where the Treaty does not confer on the European Union sufficient competence to ratify the agreement in its entirety, a situation which entails examining the allocation as between the European Union and the Member States of the powers to conclude the

envisaged agreement, or where the appropriate legal basis for the measure concluding the agreement lays down a legislative procedure different from that which has in fact been followed by the EU institutions (see, to that effect, Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001, EU:C:2001:664, paragraph 5).

201 In the fourth place, the Court has observed that the measure authorising the signature of an international agreement and the measure concluding it are two distinct legal acts giving rise to fundamentally distinct legal obligations for the parties concerned, the second measure being in no way a confirmation of the first. Accordingly, failure to bring an action for annulment of the first measure does not preclude such an action against the measure concluding the envisaged agreement or render inadmissible a request for an Opinion raising the question whether the agreement is compatible with the Treaty (Opinion 2/00 (Cartagena Protocol on Biosafety) of 6 December 2001, EU:C:2001:664, paragraph 11).

202 Moreover, the fact that certain questions may be dealt with by means of other remedies, in particular by bringing an action for annulment, does not constitute an argument which precludes the Court from being asked for a preliminary Opinion under Article 218(11) TFEU (Opinion 2/00 (Cartagena Protocol on Biosafety), of 6 December 2001, EU:C:2001:664, paragraph 12).

203 The procedure for obtaining an opinion must permit any question capable of submission for judicial consideration to be settled provided that such questions are consonant with the purpose of that procedure (Opinion 1/13 (Accession of third States to the Hague Convention) of 14 October 2014, EU:C:2014:2303, paragraph 54).

204 In the fifth place, it should be noted that the possibility of submitting a request for an Opinion under Article 218(11) TFEU does not require, as a precondition, a final agreement between the institutions concerned. The right accorded to the Council, the Parliament, the Commission and the Member States to ask the Court for its Opinion can be exercised individually, without any coordinated action and without waiting for the final outcome of any related legislative procedure (Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011, EU:C:2011:123, paragraph 55).

205 Accordingly, the fact that the adoption of the agreement concerned cannot occur until after consulting, and obtaining the approval of, the Parliament, and that the adoption of any related legislative measures within the European Union will be subject to a legislative procedure involving that institution, has no effect on the power accorded to it, under Article 218(11) TFEU, to request an Opinion from the Court (Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011, EU:C:2011:123, paragraphs 55 and 56).

206 It is in the light of that case-law that it is necessary to examine whether the questions referred by the Parliament are admissible.

207 In the present case, as regards, in the first place, the admissibility of part (a) of the first question, it must be pointed out that, contrary to Hungary's submissions, it is intended to identify the appropriate legal basis for the adoption of an EU measure concluding the Istanbul Convention, which corresponds to the purpose of the opinion procedure, in the light of the case-law referred to in paragraphs 193, 195, 197, 199 and 200 above.

208 In so far as Hungary nevertheless calls into question the usefulness of the present proceedings, since an accession to that convention by both the European Union and the Member States is necessary in the two situations referred to by the Parliament in the context of part (a) of the first question, it suffices to note that, if an inappropriate legal basis were chosen for the conclusion of that convention by the European Union, the validity of the measure concluding the agreement could subsequently be called into question in the course of proceedings before the Court, thus giving rise to the difficulties which the opinion procedure is specifically intended to prevent, as noted in paragraph 193 above.

209 As regards the arguments of the Republic of Poland and Hungary that part (a) of the first question in the request for an Opinion calls into question the Council's political choice to accede in part to the Istanbul Convention, it should be noted that that circumstance, if it were

established, would be such as to influence the scope of the 'agreement envisaged' in respect of which the appropriate legal basis for the conclusion of that convention must be identified. Since, as pointed out in paragraphs 199 and 200 above, a request for an Opinion may have as its subject matter, inter alia, the choice of the appropriate legal basis for the conclusion of an envisaged international agreement, that circumstance is therefore capable only of influencing the answer to part (a) of the first question, without being able to call into question the admissibility of that question.

210 As regards the circumstance raised by Hungary that the Parliament will participate subsequently in the procedure for concluding the Istanbul Convention and could, if necessary, refuse to give its consent at that stage, it is sufficient to note that it follows from the case-law referred to in paragraphs 204 and 205 above that that circumstance in no way precludes that institution from initiating the present proceedings.

211 In so far as Hungary submits that the first question is premature and hypothetical since it concerns a future EU measure concluding the Istanbul Convention, the content of which has not yet been finalised, it should be noted that the opinion procedure – in view of its objective of forestalling the complications at international and EU levels which would arise from a decision of the Court finding that an international agreement concluded by the European Union is incompatible with the Treaties – allows the Court to hear a request for an Opinion where the subject matter of the envisaged agreement is known, even though there are a number of alternatives still open and differences of opinion on the drafting of the texts concerned, if the documents submitted to the Court make it possible for the Court to form a sufficiently certain judgment on the question raised (Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011, EU:C:2011:123, paragraph 53 and the case-law cited).

212 In the present case, the Court not only has the text of the Istanbul Convention, but the request for an Opinion also provides sufficient information concerning both the conduct of the procedure for accession to that convention which was followed up to the time when that request was lodged and the positions taken by the Parliament, the Council and the Commission with regard to that accession, with the result that the Court is able to form a sufficiently certain judgment on the envisaged agreement in respect of which the appropriate legal basis for the conclusion of that convention by the European Union must be identified.

213 Nor can the Court accept the claim made by the Council, Ireland and Hungary that the Parliament, by its request for an Opinion, calls into question the choice of legal basis for signature decisions 2017/865 and 2017/866, and thus circumvents the time limits for bringing an action for annulment of those decisions. First, part (a) of the first question does not refer to those decisions and, secondly, as noted in paragraph 201 above, failure to bring an action for annulment of a decision authorising the signing of an agreement does not preclude the admissibility of a request for an Opinion concerning the compatibility of that agreement with the Treaties.

214 In the light of the foregoing considerations, it must be held that part (a) of the first question is admissible.

215 In the second place, as regards the admissibility of part (b) of the first question, it should be noted at the outset that, in so far as it concerns the division of the act concluding the Istanbul Convention into two decisions, that question concerns the procedure for concluding that convention and, accordingly, the formal compatibility with the Treaties of the European Union's accession to that convention. In accordance with the considerations set out in paragraph 197 above, such a question is admissible since it corresponds to the purpose of the opinion procedure.

216 However, part (b) of the first question is not admissible in so far as it concerns the division of the act authorising the signature of the Istanbul Convention by the European Union into two decisions.

217 It is common ground that the signature of the Istanbul Convention by the European Union,

which was authorised by signature decisions 2017/865 and 2017/866, was performed on 13 June 2017, that is to say, more than two years before the present request for an Opinion was lodged, and has therefore been in effect since that date.

218 In those circumstances, even if a measure authorising the signature of an international agreement could, as such, be the subject of a request for an Opinion, it must be noted that the preventive intent of Article 218(11) TFEU can, in any event, no longer be achieved as regards such a measure if the question of its compatibility with the Treaties is brought before the Court only after its adoption (see, by analogy, Opinion 3/94 (Framework Agreement on Bananas) of 13 December 1995, EU:C:1995:436, paragraph 19).

219 In that respect, Ireland, Hungary and the Council observe, correctly, that the Parliament could have challenged signature decisions 2017/865 and 2017/866 by means of an action for annulment and that compliance with the requirement to inform the Parliament laid down in Article 218(10) TFEU is intended, inter alia, to put that institution in a position to review the Council's action in good time.

220 Consequently, part (b) of the first question is admissible only in so far as it pertains to the measure concluding the Istanbul Convention on behalf of the European Union.

221 In the third place, as regards the admissibility of the second question, concerning a practice of 'common accord' of the Member States prior to the conclusion of a mixed agreement, it is necessary to reject at the outset the Hellenic Republic's objection that the Parliament has not sufficiently identified harmful conduct on the part of the Council. That question does not seek to identify such conduct, but rather to ascertain whether the conclusion of the Istanbul Convention by the European Union is compatible with the Treaties, and in particular with Article 218 TFEU, in the absence of a 'common accord' of all the Member States to be bound by that convention in the fields falling within their competences.

222 It also follows that, contrary to the submissions of the Republic of Bulgaria, the Kingdom of Spain, Hungary and the Council, that question does not relate to the Council's Rules of Procedure, mentioned in paragraph 82 above, the Council's schedule or its internal procedures, to public international law, or to the sovereign rights of the Member States, but rather concerns the procedural requirements stemming from the Treaties, in particular Article 218 TFEU, as regards the conclusion of the Istanbul Convention.

223 As the Republic of Finland has pointed out, if it were necessary, under the Treaties, to wait for such a 'common accord', the conclusion of the Istanbul Convention by the European Union, prior to such an accord, would be liable to be invalidated, thereby giving rise to the difficulties which the opinion procedure is specifically intended to forestall, as noted in paragraph 193 above.

224 It also follows that the second question is not intended to establish, as would be possible by an action for failure to act under Article 265 TFEU, that the Council failed to act in breach of the Treaties and the Kingdom of Spain, Hungary, the Slovak Republic and the Council cannot therefore validly claim that the second question involves an abuse of the opinion procedure.

225 The Council's objection that, once the 'common accord' of all the Member States to be bound by the Istanbul Convention in the fields falling within their competences has been established, the conclusion of that convention will take place in strict compliance with the procedural requirements of the Treaties must also be rejected. That assertion is not capable of resolving the question whether the practice of 'common accord' is consistent with the procedures expressly laid down by the Treaties and cannot therefore bar the admissibility of that question.

226 Lastly, in so far as Ireland, the Hellenic Republic, the Kingdom of Spain, Hungary and the Council submit that the second question is premature and hypothetical, it suffices to recall, as is apparent from paragraph 211 above, that a request for an Opinion may be made to the Court where the subject matter of the envisaged agreement is known, even though there are a number of alternatives still open and differences of opinion on the drafting of the texts concerned, if the documents submitted to the Court make it possible for the Court to form a sufficiently certain

judgment on the question raised.

227 Since the subject matter of the envisaged agreement is known, the existence of the practice of ‘common accord’ is not denied either by the Member States participating in the present proceedings or by the Council and the Council emphasises that it envisages concluding the Istanbul Convention on behalf of the European Union only once that ‘common accord’ is established, the second question cannot be regarded as inadmissible on the ground that it is allegedly premature or hypothetical.

228 In the light of the foregoing considerations, the request for an Opinion is admissible, with the exception of part (b) of the first question, in so far as it relates to the signature of the Istanbul Convention by the European Union.

B. The practice of ‘common accord’ of the Member States

229 By the second question, which it is appropriate to examine first, the Parliament asks, in essence, whether the Treaties allow or require the Council to wait, before concluding the Istanbul Convention on behalf of the European Union, for the ‘common accord’ of the Member States to be bound by that convention in the fields falling within their competences.

230 It should be recalled that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, inter alia, Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011, EU:C:2011:123, paragraph 65; Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 157, and judgment of 28 April 2015, Commission v Council,C-28/12, EU:C:2015:282, paragraph 39).

231 Furthermore, the Member States have, by reason of their membership of the European Union, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the European Union are governed by EU law, to the exclusion, if EU law so requires, of any other law (Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 193, and judgment of 28 April 2015, Commission v Council, C-28/12, EU:C:2015:282, paragraph 40).

232 In addition, the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves (judgment of 28 April 2015, Commission v Council, C-28/12, EU:C:2015:282, paragraph 42 and the case-law cited).

233 Thus, as provided in Article 13(2) TEU, each institution must act within the limits of the powers conferred on it by the Treaties, and in conformity with the procedures, conditions and objectives set out in them.

234 As regards in particular international agreements which the European Union is competent to conclude in the fields of its activity, Article 218 TFEU, in order to satisfy requirements of clarity, consistency and rationalisation, lays down a single procedure of general application concerning, in particular, the negotiation and conclusion of such agreements, except where the Treaties lay down special procedures (see, to that effect, judgment of 4 September 2018, Commission v Council (Agreement with Kazakhstan), C-244/17, EU:C:2018:662, paragraph 21 and the case-law cited).

235 The Court has observed that, precisely because of its general nature, that procedure must take account of the specific features which the Treaties lay down in respect of each field of EU activity, particularly as regards the powers of the institutions, and that it is designed to reflect externally the division of powers between the institutions that applies internally, in particular by establishing symmetry between the procedure for adopting EU measures internally and the procedure for adopting international agreements in order to guarantee that the Parliament and

the Council enjoy the same powers in relation to a given field, in compliance with the institutional balance provided for by the Treaties (judgment of 4 September 2018, Commission v Council (Agreement with Kazakhstan), C-244/17, EU:C:2018:662, paragraph 22 and the case-law cited).

236 Article 218(1) TFEU thus requires that agreements between the European Union and third countries or international organisations which, in accordance with Article 216(2) TFEU, are binding upon the institutions of the European Union and on Member States once they have been concluded, are to be negotiated and concluded in accordance with the procedure laid down in the relevant paragraphs of Article 218 TFEU.

237 In that regard, in accordance with Article 218(2) and (6) TFEU, the decision concluding such agreements is to be adopted by the Council, where appropriate after obtaining the consent or consulting the Parliament. No competence is granted to the Member States for the adoption of such a decision.

238 In addition, it follows from Article 218(8) TFEU that, as regards a decision such as that mentioned in the previous paragraph, the Council is to act by a qualified majority in the event that such a decision does not correspond to any of the situations in which the second subparagraph of Article 218(8) TFEU requires a unanimous vote (see, to that effect, judgment of 2 September 2021, Commission v Council (Agreement with Armenia), C-180/20, EU:C:2021:658, paragraph 30 and the case-law cited).

239 In the present case, it is common ground between the parties to the present proceedings, first of all, that the Istanbul Convention is, assuming it is concluded, to be a mixed agreement, concluded as such by the European Union and the Member States, next, that the Council's decision concluding that convention on behalf of the European Union may be adopted only after obtaining the consent of the Parliament and, lastly, that, in accordance with the provisions of the first subparagraph of Article 218(8) TFEU, it is by qualified majority that the Council is, in that scenario, to act in adopting that decision, since it does not correspond to any of the situations for which the second subparagraph of Article 218(8) requires a unanimous vote.

240 The contracting parties to a mixed agreement concluded with third countries are, first, the European Union and, secondly, the Member States. When such an agreement is negotiated and concluded, each of those parties must act within the framework of the competences which it has while respecting the competences of any other contracting party (judgment of 28 April 2015, Commission v Council, C-28/12, EU:C:2015:282, paragraph 47).

241 It is true that the Court has acknowledged that, where it is apparent that the subject matter of an agreement falls partly within the competence of the European Union and partly within that of the Member States, it is essential to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into (judgment of 28 April 2015, Commission v Council, C-28/12, EU:C:2015:282, paragraph 54 and the case-law cited).

242 However, that principle cannot justify the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in Article 218 TFEU (judgment of 28 April 2015, Commission v Council, C-28/12, EU:C:2015:282, paragraph 55).

243 The Court has thus specified that it is not permissible to bring together in a single decision, or adopt under a single procedure, two different acts, one of which entails a consensus of the representatives of the Member States, and therefore their unanimous agreement, whereas the other must be adopted in accordance with Article 218(8) TFEU, which provides that the Council must act, on behalf of the European Union, by a qualified majority (see, to that effect, judgment of 28 April 2015, Commission v Council, C-28/12, EU:C:2015:282, paragraph 52).

244 In the present case, it is admittedly common ground that the practice of 'common accord' does not lead to two different acts – one being the result of a consensus of the Member States while the other is adopted by the European Union – being brought together in a single hybrid decision, such as the one annulled in the judgment cited in the previous paragraph.

245 However, in so far as that practice entails that the establishment of the ‘common accord’ of the Member States to be bound by a mixed agreement in the fields falling within their competences is a prerequisite, in the Council’s view, for initiating the conclusion procedure laid down in Article 218(2), (6) and (8) TFEU, it results in the addition to that procedure of a step which is not provided for in the Treaties and which is therefore inconsistent with the case-law referred to in paragraph 232 above and with the considerations in paragraphs 237 to 243 above.

246 More specifically, as rightly pointed out by the Republic of Austria, the Republic of Finland, the Parliament and the Commission, in so far as that practice makes the initiation of that procedure contingent upon a consensus of the representatives of the Member States, and therefore on their unanimous agreement – whereas Article 218(2), (6) and (8) TFEU envisages the conclusion by the European Union of an international agreement as an autonomous act of the European Union which is adopted by the Council acting by a qualified majority, where appropriate after obtaining the consent of or consulting the Parliament – it establishes a hybrid decision-making process which is incompatible with the requirements set out in those provisions and contrary to the case-law resulting from the judgment of 28 April 2015, Commission v Council (C-28/12, EU:C:2015:282).

247 If the practice of ‘common accord’ were to have a scope such as that set out in paragraph 245 above, the European Union’s ability to conclude a mixed agreement would depend entirely on each Member State’s willingness to be bound by that agreement in the fields falling within their competences and, therefore, on the Member States’ sovereign choices in those fields.

248 In accordance with Article 218(2), (6) and (8) TFEU, where the conclusion of an international agreement is proposed to the Council, it is for the Council alone to decide on the conclusion of that agreement, acting, in principle, by a qualified majority and, where appropriate, after obtaining the consent of or consulting the Parliament. It has also been held in that respect that the Council may, in that situation, decide that the European Union should exercise alone the external competence that it shares with the Member States in the field of activity concerned, provided that the required majority to do so is obtained within the Council (see, to that effect, judgment of 5 December 2017, Germany v Council, C-600/14, EU:C:2017:935, paragraph 68).

249 It follows that the Treaties not only do not require the Council to wait, before concluding the Istanbul Convention on behalf of the European Union, for the ‘common accord’ of the Member States to be bound by that convention in the fields falling within their competences, but that they prohibit it from making the initiation of the procedure for concluding that convention, set out in Article 218(2), (6) and (8) TFEU, contingent on the prior establishment of such a ‘common accord’.

250 That being said, the conclusion of an international agreement by the European Union depends on whether the Council is able to obtain the required majority.

251 Furthermore, as the Advocate General observed in point 200 of his Opinion, the Treaties do not lay down any period of time within which the Council is required to adopt a decision concluding such an agreement.

252 It follows that, within the limits of the procedure laid down in Article 218(2), (6) and (8) TFEU and subject to the consent of the Parliament, where it is required, both the decision whether or not to act on the proposal to conclude an international agreement, and, if so, to what extent, and the choice of the appropriate time to adopt such a decision fall within the Council’s political discretion.

253 It follows that, in so far as it acts in accordance with its Rules of Procedure and the effectiveness of Article 218(2), (6) and (8) TFEU is guaranteed, nothing precludes the Council from extending its discussions in order to achieve, inter alia, the greatest possible majority with a view to concluding an international agreement, the majority required for a broader exercise of the external competences of the European Union or, in the case of mixed agreements, closer cooperation between the Member States and the EU institutions in the process of concluding that agreement, which may involve waiting for the ‘common accord’ of the Member States.

254 Such close cooperation between the Member States and the EU institutions during the process of concluding a mixed agreement, such as the Istanbul Convention, required by the principle mentioned in paragraphs 241 and 242 above, in particular where the provisions of that agreement falling within the competences of the European Union and those falling within the competences of the Member States are inextricably linked, allows account to be taken, as the Council has pointed out, where necessary by means of an extended discussion, of institutional and political considerations liable to affect the perceived legitimacy and effectiveness of the European Union's external action.

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

256 Those findings, and in particular the finding that the Council cannot, in disregard of the procedure for concluding an international agreement laid down in Article 218(2), (6) and (8) TFEU, make the conclusion by the European Union of the Istanbul Convention contingent on the 'common accord' of the Member States to be bound by that convention in the fields falling within their competences, are not invalidated by the arguments of the Republic of Bulgaria, the Czech Republic, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, Hungary, the Slovak Republic and the Council alleging that the conclusion of that convention by the European Union in the absence of such a 'common accord' would be incompatible with the principles of conferral, sincere cooperation, legal certainty, unity in the external representation of the European Union, autonomy of the European Union and respect by the European Union for the national identity of Member States nor by the arguments of those Member States and the Council concerning the risk that the European Union might incur international liability if that convention were concluded without the accession of all the Member State to that convention in the fields falling within their competences.

257 In the first place, those Member States and the Council cannot reasonably argue that, if one or more Member States do not accede to the Istanbul Convention in the fields falling within their competences, the accession of the European Union to that convention would impinge upon the competences of those Member States and, consequently, infringe the principles of conferral, sincere cooperation, legal certainty and unity in the external representation of the European Union.

258 Indeed, it was noted in paragraph 240 above that, inter alia, when negotiating and concluding a mixed agreement, the European Union and the Member States must act within the framework of their competences, while respecting the competences of any other contracting party.

259 It follows that the conclusion of a mixed agreement by the European Union and the Member States in no way implies that the Member States exercise, in that event, competences of the European Union or that the European Union exercises competences of those States; rather, each of those parties acts exclusively within its sphere of competence, without prejudice to the power of the Council, referred to in paragraph 248 above, to decide that the European Union should exercise alone a competence that it shares with the Member States in the field of activity concerned, provided that the required majority to do so is obtained within the Council.

260 That is also the case where some Member States decide not to conclude a mixed agreement which the European Union decides to conclude, solely on the basis of the competences conferred on it.

261 As regards the Istanbul Convention, as the Czech Republic, the Kingdom of Denmark, the Kingdom of Spain, the Republic of Austria and the Commission have submitted, and as the Advocate General noted in point 217 of his Opinion, the Council of Europe is aware of the limited nature of the European Union's competences, with the result that there is no reason to assume that Article 75 of that convention, where it states that the convention is open for signature by, inter alia and specifically, the 'European Union', envisages an accession of the European Union exceeding its competences.

262 In that respect, the Court has held that, by the choice of legal bases for the decision concluding the international agreement, the European Union also gives indications to the other parties to that agreement as regards, first, the legal scope of that decision, secondly, the extent of EU competence in relation to that agreement and, lastly, the division of competences between the European Union and its Member States, a division which must also be taken into account at the stage of implementation of the agreement at EU level (see, to that effect, judgments of 10 January 2006, Commission v Council, C-94/03, EU:C:2006:2, paragraph 55; of 1 October 2009, Commission v Council, C-370/07, EU:C:2009:590, paragraph 49; and of 25 October 2017, Commission v Council (WRC-15), C-687/15, EU:C:2017:803, paragraph 58).

263 Furthermore, as the Kingdom of Belgium, the Czech Republic, Ireland, the Hellenic Republic, the Republic of Austria, the Republic of Finland, the Parliament and the Commission submitted at the hearing before the Court, it appears that the Council and the Parliament can opt to submit a declaration concerning the competences of the European Union at the time of its accession to the Istanbul Convention, which would make it possible, should such a declaration be made, to further specify, on an indicative basis, the limits of its competences.

264 Accordingly, it has in no way been established, in the present proceedings, that the conclusion of the Istanbul Convention by the European Union in the absence of a 'common accord' of the Member States to be bound by that convention in the fields falling within their competences would be such as to impinge upon the competences of those Member States.

265 In the second place, the same is true of the arguments, in particular those of the Republic of Bulgaria, Hungary and the Slovak Republic, that such an accession of the European Union would entail a breach by the European Union of its duty of sincere cooperation and of the obligation, set out in Article 4(2) TEU, to respect the national identity of the Member States, inherent in their fundamental political and constitutional structures, in that it may give rise to a situation in which those Member States must, in order to ensure compliance with the European Union's international commitments, implement measures contrary to their Constitutions.

266 It must be noted that, by that line of argument, those Member States seek to call into question the compatibility of the European Union's conclusion of the Istanbul Convention with the European Union's obligations referred to in the preceding paragraph. Any incompatibility between that conclusion and those obligations could be established only after a specific examination of the obligations which the European Union might assume following the conclusion of the Istanbul Convention, which is not covered by the present request for an Opinion and therefore does not fall within the scope of the present proceedings.

267 In the third place, the French Republic and the Council maintain that the conclusion of the Istanbul Convention by the European Union in the absence of a 'common accord' of the Member States to be bound by that convention in the fields falling within their competences is not compatible with the autonomy of EU law, since it would entail externalising, inter alia to GREVIO, an internal EU issue relating to the division of competences between the European Union and its Member States.

268 It is true that the Court has held that it may be incompatible with the Treaties to entrust an international court with the task of assessing the rules of EU law governing the division of powers between the European Union and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the European Union (Opinion 2/13

(Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 224, 231 and 234). However, it should be noted that the Court made that finding specifically in relation to decisions of an international court which are final and binding on the European Union and its Member States and in the context of a detailed examination of the substantive compatibility of the envisaged agreement with the Treaties, envisaging the situation in which both the European Union and all its Member States are bound by the agreement in question.

269 It follows that the question whether, as the French Republic and the Council maintain, that finding can be transposed to a situation in which, first, the European Union, but not one of its Member States, is bound by the Istanbul Convention and, secondly, a body such as GREVIO is involved, exercising the powers set out in paragraph 35 above, requires a precise examination of the substantive compatibility of the Istanbul Convention with the Treaties, which is not covered by the present request for an Opinion and does not therefore fall within the scope of the present proceedings.

270 In the fourth place, the Republic of Bulgaria, the Czech Republic, the Kingdom of Spain, the French Republic, Hungary and the Council submit that the full implementation of the international commitments that the European Union would take on by concluding the Istanbul Convention is possible, in law and in fact, only where all the Member States participate in those commitments and infer from this that, in the absence of a 'common accord' of the Member States, the European Union would not able to guarantee the proper fulfilment of its commitments which would relate to the entirety of that convention, with the result that the European Union would risk incurring liability at the international level for an act or omission in respect of which it has no competence.

271 In that regard, it is true that, in accordance with settled case-law, when the European Union decides to exercise its powers they must be exercised in observance of international law (judgment of 20 November 2018, Commission v Council (Antarctic MPAs), C-626/15 and C-659/16, EU:C:2018:925, paragraph 127 and the case-law cited).

272 However, it follows from the very wording of Article 218(11) TFEU that the opinion procedure concerns the compatibility with the Treaties of international agreements that the European Union intends to conclude. It follows that that procedure does not concern the compatibility with public international law of the conclusion of an international agreement by the European Union or, accordingly, the consequences that might arise from a future infringement of that law in the implementation of that agreement. In particular, the potential liability which the European Union might incur at the international level when implementing the Istanbul Convention, because it could not properly fulfil its commitments, would not, as such, be capable of calling into question the validity of the decision by which the Council concluded that convention on behalf of the European Union.

273 In addition, as pointed out in paragraphs 258 and 264 above, it has not been established that, by concluding the Istanbul Convention in the absence of a 'common accord' of the Member States to be bound by that convention in the fields falling within their competences, the European Union would take on commitments exceeding the scope of its own competences.

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

C. The appropriate legal bases for the conclusion of the Istanbul Convention

275 By part (a) of its first question, the Parliament asks, in essence, whether the appropriate legal bases for the adoption of the Council act concluding the Istanbul Convention on behalf of the European Union are Article 82(2) and Article 84 TFEU or whether that act should be based on Article 78(2), Article 82(2) and Article 83(1) TFEU.

276 In view of the arguments put forward by the parties to the proceedings in the context of part (a) of the first question, it is necessary at the outset to clarify the subject matter and the scope of the examination that must be carried out in order to answer that question.

277 As noted in paragraphs 234 to 239 above, in accordance with Article 218(2), (6) and (8) TFEU, the decision concluding the Istanbul Convention must be adopted by the Council, acting by a qualified majority, after obtaining the consent of the Parliament.

278 Consequently, within the limits of the questions raised in the present request for an Opinion, it is, in the first place, for the Council and the Parliament to specify to the Court the scope of the 'agreement envisaged', within the meaning of Article 218(11) TFEU, which is the subject matter of the present proceedings and in respect of which it is necessary to identify the legal basis on which any Council act concluding that agreement on behalf of the Union must be based.

279 In that regard, it is common ground, first of all, that neither the Council nor the Parliament envisages an accession of the European Union to the parts of the Istanbul Convention which do not fall within the competences of the European Union.

280 Next, although the Council has stated that it wished to limit the accession of the European Union to that convention solely to the aspects thereof for which the European Union has exclusive external competence and that signature decisions 2017/865 and 2017/866 reflected the legal bases it had identified in that context, it must be noted that part (a) of the first question in the request for an Opinion does not present such a limitation, since, in that question, the Parliament envisages a conclusion of that convention founded on the legal bases referred to in that question, irrespective of whether or not the European Union has exclusive competence in that regard, under Article 3(2) TFEU.

281 Lastly, in so far as the Parliament and the Commission refer to the possibility of an accession to the Istanbul Convention covering all the parts of that convention falling within the European Union's competences, the Council has maintained that the majority required within the Council for such an accession could not be achieved. It follows that such an accession is at this stage hypothetical and cannot therefore serve as a reference for the purpose of defining the 'agreement envisaged' in the light of which part (a) of the first question in the request for an Opinion must be answered.

282 In those circumstances, it is for the Court to examine part (a) of the first question in the request for an Opinion by starting from the premiss that the scope of the 'agreement envisaged', within the meaning of Article 218(11) TFEU, is defined by the terms of that question and by the content of signature decisions 2017/865 and 2017/866.

283 As regards the arguments of the Commission and several Member States that such an envisaged agreement, which entails a partial accession of the European Union to the Istanbul Convention, limited to only some EU competences, would run counter to the objectives and the very wording of that convention, and in particular Article 78 thereof, it has been noted in paragraph 272 above that the opinion procedure concerns the compatibility of an envisaged agreement with the Treaties and not the compatibility of such an agreement with public international law, in particular as regards the conditions laid down in that agreement concerning accession thereto.

284 In accordance with settled case-law of the Court, the choice of the legal basis for an EU act, including one adopted in order to conclude an international agreement, must rest on objective factors amenable to judicial review, which include the aim and the content of that measure (Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 76;

judgments of 4 September 2018, Commission v Council (Agreement with Kazakhstan), C-244/17, EU:C:2018:662, paragraph 36, and of 20 November 2018, Commission v Council (Antarctic MPAs), C-626/15 and C-659/16, EU:C:2018:925, paragraph 76).

285 If the examination of an EU act reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the act must be founded on a single legal basis, namely, that required by the main or predominant aim or component. Exceptionally, if it is established, however, that the act simultaneously pursues a number of objectives, or has several components, which are inextricably linked without one being incidental to the other, such that various provisions of the Treaties are applicable, such a measure will have to be founded on the various corresponding legal bases (Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 77, and judgment of 4 September 2018, Commission v Council (Agreement with Kazakhstan), C-244/17, EU:C:2018:662, paragraph 37).

286 As regards, in particular, an international agreement which pursues several purposes or has several components, it is necessary, therefore, to verify whether the provisions of that agreement which pursue an objective or which constitute a component of that agreement are a necessary adjunct to ensure the effectiveness of the provisions of those agreements which pursue other purposes or which constitute other components or whether they are 'extremely limited in scope' (see, to that effect, Opinion 1/08 (Agreements modifying the Schedules of Specific Commitments under the GATS) of 30 November 2009, EU:C:2009:739, paragraph 166). In each of those cases, the existence of that objective or component does not justify it being specifically reflected in the substantive legal basis of the decision to sign or conclude that agreement on behalf of the European Union.

287 In addition, the criteria in respect of which the incidental nature of a purpose or component of an act may be determined include the number of provisions devoted to it, in comparison with the act's provisions as a whole, and the nature and scope of those provisions (see, to that effect, judgments of 11 June 2014, Commission v Council, C-377/12, EU:C:2014:1903, paragraph 56, and of 4 September 2018, Commission v Council (Agreement with Kazakhstan), C-244/17, EU:C:2018:662, paragraphs 44 and 45).

288 However, recourse to a dual legal basis is precluded where the procedures laid down for each legal basis are incompatible with each other (Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 78).

289 In the present case, as regards the context of the act concluding the envisaged agreement, as identified in paragraph 282 above, it is apparent from recitals 1 to 3 of signature decisions 2017/865 and 2017/866 that the European Union participated alongside the Member States as an observer in the negotiation of the Istanbul Convention, that the latter is, in accordance with Article 75 thereof, open for signature by the European Union and that it creates a comprehensive and multifaceted legal framework to protect women against all forms of violence. With regard to the latter point, it is stated in those recitals that that convention:

– seeks to prevent, prosecute and eliminate violence against women and girls and domestic violence;

– covers a broad range of measures, from data collection and awareness raising to legal measures on criminalising different forms of violence against women;

– includes measures for the protection of victims and the provision of support services;

– addresses the gender-based violence dimension in matters of asylum and migration, and

– establishes a specific monitoring mechanism in order to ensure effective implementation of its provisions by the parties thereto.

290 That analysis is confirmed by the content of the Istanbul Convention, as summarised in

paragraphs 15 to 40 above.

291 As regards the purpose of the act concluding the envisaged agreement, recitals 4 of signature decisions 2017/865 and 2017/866 state that the conclusion of the Istanbul Convention by the European Union:

– will contribute to the realisation of equality between women and men in all areas, which is a core objective and value of the Union to be realised in all its activities in accordance with Articles 2 and 3 TEU, Article 8 TFEU and Article 23 of the Charter of Fundamental Rights, and

– will allow the European Union to confirm its engagement in combating violence against women within its territory and globally, and reinforces its current political action and existing substantial legal framework in the area of criminal procedural law, which is of particular relevance for women and girls.

292 However, it follows from recitals 6 and 7 of those signature decisions that the act concluding the envisaged agreement will seek to achieve those cross-cutting objectives only as regards the provisions of the Istanbul Convention which both fall within the competences of the European Union and relate to (i) judicial cooperation in criminal matters, (ii) asylum and non-refoulement or (iii) institutions and public administration of the European Union. Although Article 1 of those signature decisions does not refer to the latter aspect relating to the institutions and public administration of the European Union, the Council nevertheless stated, in response to a question from the Court, that it is still envisaged that the act concluding that convention will relate to that aspect.

293 That limited purpose of the act concluding the envisaged agreement is confirmed by the substantive legal basis referred to both in signature decisions 2017/865 and 2017/866, namely Article 78(2), Article 82(2) and Article 83(1) TFEU, and in part (a) of the first question in the request for an Opinion, which mentions those same provisions and Article 84 TFEU.

294 It is therefore appropriate to take as a premiss, in answering part (a) of the first question in the request for an Opinion, that the content of the act concluding the envisaged agreement will relate to the provisions of the Istanbul Convention which are linked to judicial cooperation in criminal matters, asylum and non-refoulement and the obligations of the institutions and public administration of the European Union, in so far as those provisions fall within the competence of the European Union ('the part of the Istanbul Convention covered by the envisaged agreement').

295 As regards, in the first place, judicial cooperation in criminal matters, first, it should be recalled that Articles 44, 47 and 48 in Chapter V, Articles 49, 50 and 54 to 58 in Chapter VI, and Articles 62 to 65 in Chapter VIII of the Istanbul Convention, as is apparent in particular from the summary of those chapters in paragraphs 25 to 29, 33 and 34 above, concern territorial jurisdiction in relation to the criminal prosecution of offences referred to in that convention; the taking into account of convictions handed down in the territory of another party to that convention; the prohibition of alternative dispute resolution processes; the need for effective, swift and, if necessary, ex officio or ex parte investigations, prosecutions and judicial proceedings, taking into consideration the rights of the victim at all stages; appropriate protection, information, assistance and legal aid for victims; admissible evidence, the right of the victim to be heard and the protection of witnesses; the statute of limitation for offences; cooperation in criminal matters for the purposes of preventing, combating and prosecuting all forms of violence, protecting and assisting victims, conducting investigations or proceedings concerning offences and enforcing criminal judgments; the possibility for victims of an offence committed on the territory of a party to the Istanbul Convention to make a complaint before the competent authorities of their State of residence; mutual legal assistance in criminal matters; extradition or enforcement of criminal judgments; the sharing of information which might be of assistance in preventing criminal offences or in initiating or carrying out investigations and

information that a person is at immediate risk of being subjected to acts of violence; and respect for the protection of personal data.

296 As submitted by the Parliament, the Council and the Commission, as well as several Member States which are parties to the present proceedings, those provisions fall to a large extent within the competence of the European Union referred to in Article 82(2) TFEU, under which the European Union, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, may establish minimum rules concerning, inter alia, admissibility of evidence between Member States, the rights of individuals in criminal proceedings and the rights of victims of crime. In view of the number and scope of those provisions, it must therefore be concluded that Article 82(2) TFEU should be one of the legal bases of the act concluding the envisaged agreement.

297 Secondly, Articles 7, 8, 10 and 11 in Chapter II, Articles 12 to 16 in Chapter III, Articles 18 to 28 in Chapter IV, Articles 51 to 53 in Chapter VI and Articles 62 and 63 in Chapter VIII of the Istanbul Convention oblige the parties to that convention, inter alia, to implement effective, comprehensive and coordinated national policies to prevent and combat all forms of violence, to allocate adequate financial and human resources; to designate official bodies responsible for the coordination, implementation, monitoring and evaluation of policies; to collect statistical data; to support research on the root causes, effects, frequency and conviction rates of violence; to promote changes to eradicate all practices based on the idea of the inferiority of women or on stereotyped roles for women and men; to prevent all forms of violence covered by that convention; to place the specific needs of vulnerable persons and victims at the centre of their measures, ensure that culture, custom, religion, tradition or so-called ‘honour’ are not considered as justification for any acts of violence; to conduct awareness-raising programmes; to establish programmes aimed at teaching perpetrators of domestic violence to adopt non-violent behaviour; to take the necessary measures to protect all victims from any further acts of violence, including mechanisms for effective cooperation between all relevant state agencies, adequate and timely information on available support services and legal measures, legal and psychological counselling, financial assistance, health and social services, information on individual/collective complaint mechanisms, appropriate, easily accessible shelters in sufficient numbers, free-of-charge telephone hotlines, crisis centres for victims of rape and sexual violence, age-appropriate psychosocial counselling for child witnesses of violence; to take the necessary measures to ensure that the confidentiality rules do not constitute an obstacle to the reporting of a serious act of violence committed or anticipated; to provide for preventive operational measures; to carry out a risk assessment for victims; to ensure that barring orders and restraining orders may be adopted; to provide for appropriate protection, information, assistance and legal aid for victims; to ensure cooperation in criminal matters for the purpose of preventing, combating and prosecuting all forms of violence, protecting and assisting victims, conducting investigations or proceedings concerning offences and enforcing criminal judgments; to provide for the sharing of information which might be of assistance in preventing criminal offences or in initiating or carrying out investigations and information that a person is at immediate risk of being subjected to acts of violence.

298 As submitted by, inter alia, the Parliament and the Commission, those obligations fall, to a large extent, within the field of crime prevention in respect of which Article 84 TFEU confers on the European Union the power to establish measures to promote and support the action of Member States. In view of the number and scope of the provisions cited in the preceding paragraph, which include, as the Advocate General observed in point 158 of his Opinion, obligations which are, to a large extent, independent of those summarised in paragraph 295 above, it must be concluded that that aspect of the envisaged agreement is not purely incidental to those obligations and is not ‘extremely limited’ in scope. It follows that Article 84 TFEU should also be one of the legal bases of the act concluding the envisaged agreement.

299 Thirdly, Articles 33 to 48 in Chapter V of the Istanbul Convention concern, in particular, the contracting parties' undertaking to ensure that the following conduct is criminalised and punishable by effective, proportionate and dissuasive sanctions: the commission, attempt to commit, aiding or abetting the commission of impairing a person's psychological integrity through coercion or threats, threatening conduct directed at another person, causing her or him to fear for her or his safety, acts of physical violence, non-consensual acts of a sexual nature, forcing an adult or a child to enter into a marriage, excising, infibulating or performing any other mutilation to a woman's genitals, performing an abortion on a woman without her prior consent, performing surgery which terminates a woman's capacity to naturally reproduce without her consent and any form of unwanted verbal, non-verbal or physical conduct of a sexual nature which violates the dignity of a person, in particular when it creates an intimidating, hostile, degrading, humiliating or offensive environment.

300 In that regard, Article 83(1) TFEU confers on the European Union the competence to establish minimum rules concerning the definition of criminal offences and sanctions in, inter alia, the area of trafficking in human beings and sexual exploitation of women and children,

301 As the Commission, inter alia, has argued and as the Advocate General noted, in essence, in point 155 of his Opinion, the overlap between, on the one hand, the obligations laid down in the Istanbul Convention, as set out in paragraph 299 above, and, on the other hand, the scope of action open to the European Union under Article 83(1) TFEU is so narrow that it must be concluded that the obligations set out in that part of the convention which fall within that scope of action are 'extremely limited' in scope for the European Union and that, accordingly, that provision should not be one of the legal bases of the act concluding the envisaged agreement.

302 In the second place, as regards asylum and non-refoulement, referred to in Chapter VII of the Istanbul Convention, it follows from the summary of Articles 59 to 61 of that convention, set out in paragraphs 30 to 32 above, that those provisions provide, in essence, obligations relating to the grant of autonomous and renewable residence permits; the recovery of residence status lost as a result of a forced marriage; the suspension of expulsion proceedings; the grant of subsidiary protection; the application of a gender-sensitive interpretation to each of the grounds of the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, vol. 189, p. 150), in assessing whether to grant refugee status, and the prohibition of refoulement in certain circumstances.

303 As is common ground between the participants in the present proceedings, those obligations fall within the scope of Article 78(2) TFEU.

304 As the Advocate General observed in points 160 to 162 of his Opinion, although the Istanbul Convention contains only three articles relating to the matters mentioned in paragraph 302 above, they form a separate chapter of that convention and lay down specific and substantive obligations requiring, where necessary, the amendment of the law of the parties to that convention on those matters. In those circumstances, that aspect cannot be regarded as being incidental or 'extremely limited' in scope, within the meaning of the case-law cited in paragraphs 285 and 286 above, with the result that Article 78(2) TFEU should be one of the legal bases for the act concluding that envisaged agreement.

305 In the third place, it is common ground, first of all, that a significant part of the obligations relating to the adoption of preventive measures, established by Articles 7, 8, 10 and 11 in Chapter II, Articles 12 to 16 in Chapter III, Articles 18 to 28 in Chapter IV, Articles 51 to 53 in Chapter VI and Articles 62 and 63 in Chapter VIII of the Istanbul Convention, as summarised in point 297 above, are, in essence, binding on the European Union as regards the staff in its administration and as regards the members of the public visiting the premises and buildings of its institutions, agencies and bodies. Next, the same is true of a number of obligations arising from Articles 49, 50 and 56 in Chapter VI and from Articles 63 to 65 in Chapter VIII of that convention, as summarised in paragraph 295 above. Lastly, it appears that additional obligations, such as those set out in Article 30 of that convention, relating to the payment of

adequate compensation to victims of violence, may be binding on the European Union with regard specifically to its public administration.

306 As was, in essence, envisaged by the Council in recital 7 of signature decisions 2017/865 and 2017/866, such obligations fall within the scope of Article 336 TFEU.

307 As the Advocate General observed in point 164 of his Opinion, unlike the fields covered by Article 82(2) and Article 84 TFEU, as regards its public administration, the European Union should not confine itself to establishing minimum requirements or supporting measures, but should itself ensure that the obligations described in paragraph 305 above are fully satisfied.

308 It follows that, in the light of the number of provisions concerned and the scope of the obligations assumed in that respect by the European Union with regard to its public administration and the limited number of matters covered by the envisaged agreement, that component of the envisaged agreement is neither purely incidental nor 'extremely limited' in scope and that Article 336 TFEU should, consequently, be one of the legal bases for the act concluding that agreement.

309 In the fourth place, as regards the obligations imposed on the European Union, which follow from Articles 66 to 70 in Chapter IX and Article 74 in Chapter XII of the Istanbul Convention, relating to the monitoring mechanism and the dispute settlement mechanism, it is sufficient to note that the competence of the European Union to enter into international commitments includes competence to couple those commitments with institutional provisions. Their presence in the agreement has no effect on the nature of the competence to conclude it. Those provisions are of an ancillary nature and therefore fall within the same competence as the substantive provisions which they accompany (see, to that effect, Opinion 2/15 (Free Trade Agreement with Singapore) of 16 May 2017, EU:C:2017:376, paragraph 276 and the case-law cited).

310 It must also be stated, as the Advocate General noted in point 165 of his Opinion, that the identification of multiple appropriate legal bases in the present Opinion does not conflict with the case-law mentioned in paragraph 288 above, given that the procedure for adopting the decision concluding the envisaged agreement is the same, under Article 218 TFEU, for all of those legal bases, all of which provide, internally, for the use of the ordinary legislative procedure.

311 In the light of all the foregoing considerations, the answer to part (a) of the first question in the request for an Opinion is that the appropriate substantive legal basis for the adoption of the Council act concluding, on behalf of the European Union, the part of the Istanbul Convention covered by the envisaged agreement, within the meaning of Article 218(11) TFEU, is made up of Article 78(2), Article 82(2) and Articles 84 and 336 TFEU.

D. Division of the act concluding the Istanbul Convention into two separate decisions

312 In the light of the conclusions in paragraphs 228 and 294 above, it must be considered that, by part (b) of the first question in the request for an Opinion, the Parliament asks, in essence, whether it is necessary or possible to divide the act concluding, on behalf of the European Union, the part of the Istanbul Convention covered by the envisaged agreement into two separate decisions.

313 As is apparent from the request for an Opinion and the observations submitted to the Court, that question is linked to the applicability of Protocol No 21 as regards Ireland, as a result of the identification, inter alia, of Article 78(2), Article 82(2) and Article 84 TFEU, in Title V of Part Three of the TFEU, as appropriate legal bases for the conclusion of that agreement. In addition, although the Republic of Bulgaria referred to the potential relevance to that question of Protocol No 22 also, the Council submitted that the application of that protocol did not give rise to any particular difficulty in the present case.

314 As regards Protocol No 21, it can be seen from signature decisions 2017/865 and 2017/866 that, on the basis of that protocol, Ireland intended not to take part in the conclusion, by the European

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

315 As is apparent from recital 10 of signature decision 2017/865 and from the arguments of Ireland and the Council, that distinction between those different parts of the Istanbul Convention arises from the fact that Ireland is bound by Directives 2011/36 and 2011/93, whereas it is not bound by Directives 2011/95 and 2013/32.

316 In that regard, it should be noted that, under Article 1 of Protocol No 21, Ireland '[does] not take part in the adoption by the Council of proposed measures under Title V of Part Three of the [TFEU]'.

317 Under Article 2 of that protocol, 'none of the provisions of Title V of Part Three of the [TFEU], no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in' Ireland and 'no such provision, measure or decision shall in any way affect the competences, rights and obligations' of that Member State. In addition, 'no such provision, measure or decision shall in any way affect the Community or Union acquis nor form part of Union law as they apply' to Ireland.

318 However, under Article 3 of that protocol, Ireland 'may notify … that it wishes to take part in the adoption and application of any such proposed measure, whereupon that [Member] State shall be entitled to do so'.

319 Under Article 4 of Protocol No 21, 'Ireland may at any time after the adoption of a measure by the Council pursuant to Title V of Part Three of the [TFEU] notify its intention … that it wishes to accept that measure'.

320 Article 4a(1) of Protocol No 21 specifies that its provisions 'apply for … Ireland also to measures proposed or adopted pursuant to Title V of Part Three of the [TFEU] amending an existing measure by which [it is] bound'.

321 As the Advocate General observed in points 186 to 189 of his Opinion, it follows from Articles 1 to 4a of Protocol No 21 that it cannot be considered that Ireland's participation in Directives 2011/36 and 2011/93 automatically implies that that Member State is obliged to participate in the conclusion by the European Union of the corresponding part of the Istanbul Convention. Subject to the procedure laid down in Article 4a(2) of that protocol, the application of which is not envisaged in the present procedure, those provisions unequivocally state that, unless it notifies its wish to participate in the adoption and application of the proposed measure, Ireland participates neither in initial measures falling under Title V of Part Three of the TFEU nor in measures, falling under that same title, amending an existing measure by which it is bound.

322 That interpretation is supported by a systematic reading of Protocol No 21, from which it is clear that Article 2 thereof cannot be read or applied independently of Article 1 of that protocol. The rule laid down in Article 2 of Protocol No 21, that, in consequence of Article 1 and subject to Articles 3, 4 and 6 of that protocol, Ireland is not bound by the measures, provisions and decisions referred to therein is intrinsically linked to the rule laid down in Article 1 that that Member State is not to take part in the adoption of measures pursuant to Title V of Part Three of the TFEU, and therefore neither of those rules can be understood without the other (see, by analogy, Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraphs 115 and 116).

323 It would therefore be contrary to the objective of Protocol No 21 both to allow Ireland to take part in the adoption of an EU act without being bound by that act and to accept that that Member State should be bound by such an EU act without having participated in its adoption (see, to that effect and by analogy, Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 116).

324 The Court has also held that Protocol No 21 is not capable of having any effect whatsoever on

the question of the correct legal basis for the adoption of the decision concerned (Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 108).

325 The rule identified by the case-law of the Court – that it is the substantive legal basis of a measure that determines the procedures to be followed in adopting that measure – applies not only to the procedures laid down for adopting an internal act but also to those applicable to the conclusion of international agreements (judgment of 24 June 2014, Parliament v Council,C-658/11, EU:C:2014:2025, paragraph 57).

326 Consequently, the appropriate legal bases for the conclusion of the envisaged agreement determine the applicability of Article 1 of Protocol No 21 and, by virtue of that provision, whether or not Ireland participates in the adoption of the act concluding that specific agreement. That in turn determines, under Article 2 of that protocol, whether that act concluding the agreement is to be binding on Ireland and, accordingly, whether the provisions of the Istanbul Convention covered by the envisaged agreement are applicable to that Member State.

327 Those intrinsic links between Articles 1 and 2 of Protocol No 21 and the fact that none of the provisions of that protocol envisages partial participation in a measure precludes selective participation in a single measure covered by those articles. That finding is supported by the wording of Article 3 of that protocol, which envisages only the possibility for Ireland to notify its wish to take part in the adoption and application of the ‘proposed measure’.

328 It follows that Protocol No 21 does not authorise a division of the act concluding the envisaged agreement into two decisions in order to enable Ireland to participate in the adoption of one of the two decisions but not in the other, even though, like signature decisions 2017/865 and 2017/866, each of the decisions concluding the agreement would concern measures falling within Title V of Part Three of the TFEU and which therefore fall within the scope of that protocol.

329 Such a division of an act concluding an envisaged agreement into two or more decisions would, moreover, run counter both to the case-law referred to in paragraphs 285 to 287 above and to the wording of Article 13(2) TEU, according to which the institutions must act, inter alia, in conformity with the procedures, conditions and objectives set out in the Treaties, and with the case-law mentioned in paragraph 232 above, according to which the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves.

330 That being said, as the Advocate General pointed out in point 182 of his Opinion, if it is established that the act concluding an international agreement pursues several objectives or has several components which are inseparably linked, without one being incidental to the other, with the result that different legal bases are applicable to that act, a difference in the voting rules within the Council may result in the incompatibility of those legal bases (see, to that effect, Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 109).

331 In such a situation, it may be necessary to adopt two or more decisions for the purpose of adopting an act concluding an envisaged international agreement (see, to that effect, judgment of 2 September 2021, Commission v Council (Agreement with Armenia), C-180/20, EU:C:2021:658, paragraph 40).

332 It follows that there may be situations which give rise to an objective need to divide a measure concluding an envisaged agreement into two or more decisions.

333 That may be the case, inter alia, if such a division is intended to take account of the circumstance that Ireland is not taking part in the measures envisaged in respect of the conclusion of an international agreement which fall within the scope of Protocol No 21, whereas other measures envisaged in respect of that conclusion do not fall within that scope.

334 That may also be the case if such a division is intended to take account of the circumstance that the Kingdom of Denmark is not taking part in the measures envisaged in respect of the conclusion of an international agreement which fall within the scope of Protocol No 22, whereas other measures envisaged in respect of that conclusion do not fall within that scope.

335 It should be borne in mind, in that regard, that Protocol No 22 is intended, as is apparent from the third to fifth recitals of the preamble thereto, to establish a legal framework which allows Member States to pursue the development of their cooperation in the area of freedom, security and justice through the adoption, without the Kingdom of Denmark taking part, of measures which do not bind that Member State, whilst affording that Member State the option of participating in the adoption of measures in that area and of being bound by them under the conditions set out in Article 8 of that protocol. To that end, the first paragraph of Article 1 of Protocol No 22 states that the Kingdom of Denmark is not to take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the TFEU, while Article 2 of that protocol provides that the Kingdom of Denmark is not bound by such measures (see, to that effect, Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraphs 111 and 112).

336 In the present case, it follows from the answer to part (a) of the first question that the substantive legal basis for the act concluding the envisaged agreement includes Article 336 TFEU, which does not fall under Title V of Part Three of the TFEU nor, accordingly, within the scope of Protocols No 21 and No 22. In those circumstances, an objective need to divide the act concluding that agreement may be established, in order to take account of the circumstance that Ireland or the Kingdom of Denmark is not participating in that conclusion, in so far as it entails the exercise by the European Union of its external competences under Article 78(2), Article 82(2) and Article 84 TFEU.

337 Consequently, the answer to part (b) of the first question in the request for an Opinion is that Protocols No 21 and No 22 justify the division of the Council act concluding, on behalf of the European Union, the part of the Istanbul Convention covered by the envisaged agreement into two separate decisions only in so far as that division is intended to take account of the circumstance that Ireland or the Kingdom of Denmark is not participating in the measures adopted in respect of the conclusion of that agreement which fall within the scope of those protocols, considered in their entirety.

VII. Answer to the request for an Opinion

338 It follows from all the foregoing considerations that:

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

– The appropriate substantive legal basis for the adoption of the Council act concluding, on behalf of the European Union, the part of the Istanbul Convention covered by the envisaged agreement, within the meaning of Article 218(11) TFEU, is made up of Article 78(2), Article 82(2) and Articles 84 and 336 TFEU.

– Protocols No 21 and No 22 justify the division of the Council act concluding, on behalf of the European Union, the part of the Istanbul Convention covered by the envisaged agreement into two separate decisions only in so far as that division is intended to take account of the circumstance that Ireland or the Kingdom of Denmark is not participating in the measures adopted in respect of the conclusion of that agreement which fall within the scope of those protocols, considered in their entirety.

Consequently, the Court (Grand Chamber) gives the following Opinion:

1. Subject to full compliance, at all times, with the requirements laid down in Article 218(2), (6) and (8) TFEU, the Treaties do not prohibit the Council of the European Union, acting in conformity with its Rules of Procedure, from waiting, before adopting the decision concluding the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) on behalf of the European Union, for the 'common accord' of the Member States to be bound by that convention in the fields falling within their competences. However, the Treaties do prohibit the Council from adding a further step to the conclusion procedure laid down in that article by making the adoption of the decision concluding that convention contingent on the prior establishment of such a 'common accord'.
2. The appropriate substantive legal basis for the adoption of the Council act concluding, on behalf of the European Union, the part of the Istanbul Convention covered by the envisaged agreement, within the meaning of Article 218(11) TFEU, is made up of Article 78(2), Article 82(2) and Articles 84 and 336 TFEU.
3. Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to the TEU and the TFEU and Protocol (No 22) on the position of Denmark annexed to the TEU and the TFEU justify the division of the Council act concluding, on behalf of the European Union, the part of the Istanbul Convention covered by the envisaged agreement into two separate decisions only in so far as that division is intended to take account of the circumstance that Ireland or the Kingdom of Denmark is not participating in the measures adopted in respect of the conclusion of that agreement which fall within the scope of those protocols, considered in their entirety.

Lenaerts

Silva de Lapuerta

Arabadjiev

Prechal

Vilaras

Ilešič

Bay Larsen

Kumin

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Jürimäe

Rossi

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Jääskinen

Delivered in open court in Luxembourg on 6 October 2021.

A. Calot Escobar

Registrar

K. Lenaerts

President