

# Europska unija i ratifikacija Istanbulske konvencije: međudjelovanje prava i politike

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University of Zagreb  
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Master Thesis

**The European Union's Ratification of the Istanbul Convention:  
The Interplay Between Law and Politics**

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## **Authenticity Statement**

I, ALIX UZELAC VEDRIŠ, declare under full moral, material, and criminal responsibility that I am the sole author of the master's thesis and that no parts of other people's works were used in the thesis in an illegal manner (without proper citation), and that during the preparation of the thesis I did not use sources other than those cited in the thesis.

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## **LIST OF ABBREVIATIONS**

**EU – European Union**

**GBV – gender-based violence**

**CoE – Council of Europe**

**EP – European Parliament**

**MEP – Member of the European Parliament**

**TFEU – Treaty on the Functioning of the European Union**

**TEU – Treaty on European Union**

**CAHVIO – Committee for preventing and combating violence against women and domestic violence**

**GREVIO – Group of experts on action against violence against women and domestic violence**

**Istanbul Convention – Council of Europe Convention on preventing and combating violence against women and domestic violence**

**ECJ – Court of Justice of the European Union**

**UNHCR – United Nations High Commissioner for Refugees**

**NGO – non-governmental organization**

**AG – Advocate General**

**AFSJ – Area of Freedom, Security and Justice**

**VCLT – Vienna Convention on the Law of Treaties**

## **SUMMARY**

Istanbul Convention is one of the first legislative acts of the Council of Europe that addressed the problem of gender-based violence. It has, however, since its beginnings, been controversial. It also serves as a notable illustration of a mixed agreement in EU law, since its scope falls both within the Member States' competences and those of the EU. In 2017, the EU as an international actor signed the Convention, thereby signaling its intent to develop a more comprehensive legislative framework on the issue of gender-based violence. However, many Member States expressed their opposition when the EU started to consider the next step of the accession to the Convention – its ratification. Therefore, the European Parliament has decided to ask the Court of Justice of the EU for a formal Opinion on the procedure of the EU accession to the Convention. In the Opinion 1/19, the Court of Justice has, in principle, given a clear green light to the EU's ratification of the Istanbul Convention by delivering a ruling according to which mixed agreements can be ratified by the EU without a common accord of its Member States. Following the delivery of the Opinion 1/19, the EU ratified the Convention in 2023. This is why the Opinion may have significant impact in the future, particularly in the development of EU's capacity to act in an international context. This thesis aims to describe the characteristics of mixed agreements in EU law and the main features of the Istanbul Convention, analyze Opinion 1/19 of the Court, as well as to outline the key legal implications of the recent EU's ratification of the Convention.

Key words: Istanbul Convention, EU law, mixed agreements, EU ratification of the Istanbul Convention, Opinion 1/19, Court of Justice, EU as an international actor.

## SAŽETAK

Istanbulska konvencija jedan je od prvih zakonodavnih akata Vijeća Europe koji se bavio problemom rodno uvjetovanog nasilja. Međutim, od svojih je početaka bio kontroverzan. Također služi kao primjer mješovitog ugovora u pravu EU-a jer njegove odredbe spadaju i pod nadležnost država članica i pod nadležnost EU-a. Godine 2017. EU je kao međunarodni akter potpisala Konvenciju, signalizirajući time svoju namjeru da razvije sveobuhvatniji zakonodavni okvir za pitanje rodno uvjetovanog nasilja. Međutim, mnoge države članice izrazile su svoje protivljenje kada je EU počela razmatrati sljedeći korak pristupanja Konvenciji – njezinu ratifikaciju. Stoga je Europski parlament odlučio zatražiti od Suda Europske unije službeno mišljenje o postupku pristupanja EU-a Konvenciji. U Mišljenju 1/19, Sud je načelno dao jasno zeleno svjetlo ratifikaciji Istanbulske konvencije, držeći da Unija može ratificirati mješovite sporazume bez prethodne suglasnosti svojih država članica. Nakon donošenja Mišljenja 1/19, EU je ratificirala Konvenciju 2023. Zbog toga bi Mišljenje Suda moglo imati značajan utjecaj u budućnosti, posebno u razvoju kapaciteta EU-a za djelovanje u međunarodnom kontekstu. Cilj ovog rada je opisati ključne značajke mješovitih ugovora i Istanbulske konvencije, analizirati Mišljenje 1/19, kao i prikazati ključne pravne implikacije nedavne ratifikacije Konvencije od strane EU-a.

Ključne riječi: Istanbulska konvencija, pravo Europske unije, mješoviti ugovori, ratifikacija Istanbulske konvencije od strane EU-a, Mišljenje 1/19, Sud Europske unije, EU kao međunarodni akter.

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## 1. Introduction

The interplay between law and politics is omnipresent in every legal system. The European Union (EU) is no exception. In the area of EU external relations, a prime example is the process of the EU's ratification of the Istanbul Convention. The EU's ratification of the Istanbul Convention is only the second time that the EU decided to accede to an international treaty in parallel with its Member States – the first ratification was that of the Convention on the Rights of Persons with Disabilities (CRPD), which the EU signed in 2007 and ratified in 2010.<sup>1</sup>

The ratification of the Istanbul Convention has divided the EU both nationally and institutionally. National division concerns the division between the Member States coming from the West, South and North, who are strongly endorsing the EU's ratification, and a few of them from Eastern and Central Europe who are strongly opposing it. This division has in a way translated to an institutional division, as the Member States' representatives are seated in multiple EU institutions, like the European Parliament (EP) and the Council. This is why the EP requested a formal opinion from the Court of Justice of the EU (ECJ) regarding the compliance of the accession procedure with the EU primary law. The Opinion confirmed the EU's competence to conclude mixed agreements even when not all Member States are on board. EU federalists would say that the practice of the overwhelming majority (in opposition to the practice of common accord) could lead to a more efficient policymaking of the EU. However, sovereigntists would predict an increase of euroscepticism in the opposing Member States.

In any case, in June 2023 the EU has finally ratified the Istanbul Convention, thereby expanding the much-needed European legislative framework concerning gender-based violence (GBV) and domestic violence.

This thesis aims to provide answers to three important research questions: firstly, what are procedural, political, and material aspects of the EU's ratification of the Istanbul Convention? Secondly, what are legal implications of the EU's ratification of the Convention? And lastly, to what extent is the resistance to the EU's ratification of the Istanbul Convention rooted in legitimate legal arguments, and to what extent is it a matter of politics?

The research will consist of qualitative analysis of both legal and political science literature and political commentaries, as well as analysis of the legal reasoning of the ECJ and the EP's plenary session discussion preceding its formal voting on the ratification.

In conclusion, EU ratification of Istanbul Convention has many legal implications, both in terms of EU external powers, EU legislation and Member States' legal framework concerning GBV. It could, however, bring about many challenges for the EU as a party of the Istanbul Convention, in terms of implementation and international liability.

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<sup>1</sup> Uldry, M (2016): The Ratification of the UN Convention on the Rights of Persons with Disabilities by the European Union, LL.M Thesis, Maastricht University, p. 1.

## 2. Mixed agreements

Mixed agreements typically concern either agreements where certain matters fall exclusively within EU competence and others exclusively within Member State competence, or matters where competence over the subject matter of the agreement is shared between the Member States and the EU.<sup>2</sup> They can also be defined as “agreements to which both the EU and the Member States are contracting parties”.<sup>3</sup> According to Weiler, some regard them as “necessary evil” while others consider them “a near-unique contribution to true federalism”.<sup>4</sup> Maresceau highlights that “mixity is one of the defining characteristics of the constitutional life of the European Union”, as it outlines the ways the EU organizes its relations with third countries and international organizations, thereby affecting the Member States and their external relations.<sup>5,6</sup> Heliskoski elaborates on three parameters that effectively tackle legal challenges associated with mixed agreements – “participation, for the Member States; certainty, for the other contracting parties; and autonomy, for the [EU].”<sup>7</sup>

Even though the notion of *mixed agreements* has not been defined in the original EEC Treaty, it has been present in practice from the very beginnings of the Community, namely from 1961, when the Association Agreement with Greece was signed.<sup>8</sup> Surprisingly, mixed agreements remain to this date undefined in the EU primary legislation. Nonetheless, the notion has been mentioned in EU primary law on several occasions. For instance, Article 133(3) of the Treaty of Nice briefly mentions mixed agreements in the context of commercial policies, as it states the possibility of negotiating agreements with one or more States or international organizations.<sup>9</sup> Craig and de Burca explain that the Court has still not attempted “detailed delineation of areas of competence in the context of mixed agreements.”<sup>10</sup> Heliskoski highlights that this notion has been used in a wide range of European policy areas, spanning from commercial policy to protection of the environment, from development cooperation to the management and conservation of the resources of the sea.<sup>11</sup>

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<sup>2</sup> Craig, P, de Burca, G (2020): EU Law. Texts, Cases and Materials, Oxford University Press, p. 386.

<sup>3</sup> *Ibid.*

<sup>4</sup> Weiler, JHH (1999): The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle, in JHH Weiler, The Constitution of Europe: Do the New Clothes Have an Emperor? Cambridge University Press, p. 130.

<sup>5</sup> Maresceau, M (2010): A Typology of Mixed Bilateral Agreements in Hillion C, Koutrakos, P (2010): Mixed Agreements Revisited. The EU and its Member States in the World, Bloomsbury Publishing, p. 11.

<sup>6</sup> It remains unclear as to how and by whom will the commitments taken by the mixed agreements before Brexit be fulfilled.

<sup>7</sup> Heliskoski, J (2001): Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States, Kluwer law international, p. 9.

<sup>8</sup> Maresceau, M (2010): A Typology of Mixed Bilateral Agreements in Hillion, C, Koutrakos, P (2010): Mixed Agreements Revisited. The EU and its Member States in the World, p. 11.

<sup>9</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, February 2001.

<sup>10</sup> Craig, P, de Burca, G (2020): EU Law, Texts, Cases and Materials, p. 386.

<sup>11</sup> Heliskoski, J (2001): Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States, p. 2.

It is important to observe mixity in bilateral and multilateral agreements separately. According to Maresceau, bilateral mixed agreements are “an evolving phenomenon”, and therefore, “what is mixed competence today may be exclusive [EU] competence tomorrow”.<sup>12</sup> Nonetheless, there are a few categories of bilateral agreements where mixed agreements typically emerge, namely, in association agreements, cooperation agreements of a general nature, cooperation agreements with political dialogue, and sectoral cooperation agreements without political dialogues.<sup>13</sup>

Hillion highlights three key decisions of the Court relating to the EU system of external relations – *ERTA*, *ECHR accession* and *Open Skies*. According to him, *ERTA* judgment introduces famous implied powers doctrine. Implied powers are “powers that have not been explicitly conferred upon the EU in the treaties but derive either from the explicitly conferred powers or the objectives of the EU”.<sup>14</sup> This doctrine enables the EU to negotiate and conclude external agreements over a wide range of matters. Hillion also argues that due to the *ERTA* doctrine, notions of conferred powers, subsidiarity and proportionality have been more present in organizing principles of EU legal order and in creating power-conferring provisions.<sup>15</sup> Moreover, building up on the *ERTA* judgment, Opinion 2/94 on the EU accession to the ECHR, explicitly refers to the TEU principle of conferred powers to limit the reach of both the EU’s implied and residual powers based on Article 352 TFEU.<sup>16</sup> Finally, in the *Open Skies* judgment, the Court recalled that, when they act within the remit of powers, the Member States are bound to ensure that their international commitments are consistent with EU law in general.<sup>17</sup>

#### *a) Typology of mixed agreements*

To this date, there is no common typology of mixed agreements. Some authors, like Maresceau, argue that there should not be one as it is “preferable to look at the practice on its own merits and not to base oneself on a preconceived typology.”<sup>18</sup> According to Rosas, mixed agreements should be divided “on the basis of the nature of the competence involved”, which can be “parallel” and “shared”. Shared competence is further subdivided into “co-existent” and “concurrent” competence.<sup>19</sup> Others argue that there are two main types of mixed agreements: facultative mixed agreements and mandatory mixed agreements.<sup>20</sup>

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<sup>12</sup> Maresceau, M (2010): A Typology of Mixed Bilateral Agreements in Hillion, C, Koutrakos, P (2010): Mixed Agreements Revisited. The EU and its Member States in the World, p. 16.

<sup>13</sup> *Ibid.*, p. 17.

<sup>14</sup> EUR-Lex official online glossary, available at: <https://eur-lex.europa.eu/EN/legal-content/glossary/implied-powers.html>.

<sup>15</sup> Hillion, C (2010): *ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of External Relations*, Assets Publishing Service of the UK government, p. 225.

<sup>16</sup> Opinion 2/94 ECHR, ECLI:EU:C:1996:140, para 23.

<sup>17</sup> Hillion, C (2010): *ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of External Relations*, p. 230.

<sup>18</sup> Maresceau, M (2010): A Typology of Mixed Bilateral Agreements in Hillion, C, Koutrakos, P (2010): Mixed Agreements Revisited. The EU and its Member States in the World, p. 17.

<sup>19</sup> Rosas, A (2020): *The European Union and Mixed Agreements*, Dashwood and Hillion, EU External Relations Post-Lisbon, p. 36.

<sup>20</sup> Heliskoski, J, Kubek, G (2010): *Typology of Mixed Agreements Revisited*, Modern Studies in European Law, Hart Publishing Ltd. p. 27.

Facultative mixed agreements fall within the shared competence between the EU and the Member States.<sup>21</sup> To this end, the ECJ has clarified that in cases of facultative mixed agreements, it is at the political discretion of the Council to decide whether the EU will exercise its shared competence or not. If it decides not to conclude such an agreement, Member States remain free to adhere to the mixed agreement in question completely independently of the EU.<sup>22</sup> Facultative mixity was also confirmed by the ECJ which stated that in areas of shared competence, mixity is an option, but not a legal requirement.<sup>23</sup> By contrast, mandatory mixed agreements concern the exclusive competence of the Union and of the Member States. As a result, both the Union and the Member States are obliged to conclude such agreements.

Heliskoki also proposes that mixed agreements can be either incomplete or complete. Incomplete agreements are those where one or several Member States have not become parties to an agreement whereas complete agreements are those where all the Member States are considered parties to the agreement.<sup>24</sup>

#### *b) Mixed agreements in trade*

Mixed agreements are often used in the context of trade. This is because the EU has exclusive competence in that area, as stated in Article 28 TFEU (ex-Article 23 TEC). The problem, however, with mixed trade agreements is the delay in its implementation due to a long ratification procedure. According to Wouters, investment agreements can enter into force only after all the Member States have ratified it. This is why they often may provisionally apply pending their entry into force.<sup>25</sup> The pending period may last five years, as was the case with Free Trade Agreement with Korea or even more than ten years, with European Economic Community's (EEC) Agreement on Cooperation and Customs Union with San Marino. Sometimes, mixity may even result in a failure to comply with negotiated agreements. Conconi et al. suggest that this was almost the case with the agreement between the EU and Canada called Comprehensive Economic and Trade Agreement (CETA), which was threatened by the parliament of the Belgian region of Wallonia representing less than one percent of EU's population.<sup>26</sup> A question is, therefore posed: is there space for mixed agreements in trade? Conconi et al. argue that the answer to this question depends on the objective of the agreement – if the main motivation for negotiating a trade agreement consists of reciprocal reduction of trade barriers, such as tariffs, “the EU should avoid the legal and political risks of mixity, leaving out of the trade deal policy areas that would require national ratification procedures”.<sup>27</sup> If the main motivation is to obtain concessions on non-trade policy issues, such as

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<sup>21</sup> Kubek, G (2022): Facing and Embracing the Consequences of Mixity: Opinion 1/19, Istanbul Convention, Common Market Law Review, 2022 Kluwer Law International, p. 1470.

<sup>22</sup> Case C-600/14, COTIF I, ECLI:EU:C:2017:935, paras 66–68.

<sup>23</sup> Kubek, G (2022): Facing and Embracing the Consequences of Mixity: Opinion 1/19, Istanbul Convention, p. 1470.

<sup>24</sup> Heliskoski, J (2001): Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States, p. 206.

<sup>25</sup> Wouters, J, Suse, A (2018): The Provisional Application of the EU's Mixed Trade and Investment Agreements, p. 4.

<sup>26</sup> Conconi, P, Herghelegiu, C, Puccio, L (2021): EU Trade Agreements: To Mix or Not to Mix, That is the Question, Journal of World Trade, p. 233.

<sup>27</sup> *Ibid.*

security, human rights or trade and environmental standards, mixity is “a necessary evil” to achieve non-trade policy objectives.<sup>28</sup>

### *c) Mixed agreements in areas other than trade*

The procedure for concluding international agreements in areas other than trade is defined in Title V of the TFEU, notably Article 218. Accordingly, the Council shall authorize the opening of negotiations, adopt negotiating directives, authorize the signing of agreements, and conclude them. It may also, if proposed by the negotiator,<sup>29</sup> adopt a decision authorizing the signing of the agreement and, if necessary, its provisional application before entry into force. The Council shall, in principle, act by a qualified majority throughout the procedure.<sup>30</sup> The European Parliament must be fully informed in a timely manner at all stages of the procedure. Nonetheless, “a Member State, the European Parliament, the Council, and the Commission may obtain the opinion of the Court of Justice, as to whether an agreement is compatible with the Treaties”.<sup>31</sup> If the Court’s opinion is negative, the agreement may not enter into force unless it is amended, or the Treaties are revised. These provisions will be relevant regarding the EU’s accession to the Istanbul Convention, as will be explained in the following chapters.

## **3. The Istanbul Convention**

### *a) About the Convention*

The Convention on preventing and combating violence against women and domestic violence (also known as the Istanbul Convention) is the most comprehensive legal framework that touches upon violence against women and girls, domestic violence, rape, sexual assault, female genital mutilation, forced marriage and many other important issues.<sup>32</sup>

According to Jurazs, it is a treaty of dual nature, which contains both human rights and criminal law provisions relevant to violence against women and domestic violence, while also representing a victim-centered approach to preventing and combatting violence against women, all the while considering the core principles of the Istanbul Convention – the principle of equality and the principle of non-discrimination.<sup>33</sup> It is composed of a preamble, 81 articles which are divided into

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<sup>28</sup> *Ibid.*

<sup>29</sup> Negotiator is a person authorized to lead the negotiations on behalf of the EU. Usually, it is appointed by the Commission or the High Representative of the Union for Foreign Affairs and Security Policy (see Article 218(3) TFEU).

<sup>30</sup> “However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 TFEU with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements” (Article 218 (8) TFEU (ex-Article 300 TEC).

<sup>31</sup> Article 218(11) TFEU.

<sup>32</sup> IC Change official website for the campaign calling on the UK Government to ratify the Istanbul Convention.

<sup>33</sup> Jurazs, O (2015): The Istanbul Convention: a new chapter in preventing and combating violence against women, p. 4.

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).

The four pillars of the Istanbul Convention, as established by the Council of Europe, are Prevention, Protection, Prosecution and Monitoring. In terms of Prevention, the signatories of the Convention are bound to ensure regular awareness-raising campaigns, close cooperation with NGOs, adequate training for the professionals in close contact with victims, close cooperation with the media and private sector in eradicating gender stereotypes and promoting mutual respect, and to set up treatment programs for perpetrators of domestic violence and for sex offenders. As regards the Protection, countries that ratify the Convention must ensure that women and girls who experience violence receive proper protection and support by setting up shelters and enough “rape crisis or sexual violence referral center” as well as by ensuring free of charge country-wide 24/7 telephone helplines and by ensuring that survivors get access to the services they need, like legal and psychological counselling, financial assistance, housing, education, etc. Prosecution as a key pillar of the Convention implies defining and criminalizing different forms of violence against women and girls, ensuring effective investigation of any allegation, and ensuring that culture, custom, religion, tradition and “honor” is not considered as justification for such acts. Finally, Monitoring concerns implementing strong systems for verifying whether States are living up to their obligations. This includes reporting to an independent monitoring body (GREVIO) and organizing states meetings to share best practice.

Negotiated by 47 member states of the Council of Europe and adopted by the Committee of Ministers on 7 April 2011, it is one of the first regional agreements concerning the violence against women. However, it is not the first of its kind – almost 17 years before the introduction of the Istanbul Convention, the General Assembly of the Organization of American States adopted the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women. In addition to this, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (known as the Maputo Protocol) was adopted by the African Union in 2003 and entered into force in 2005. A short comparison outlining the key similarities and differences between the Istanbul Convention and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women and the Maputo Protocol can be found in Appendix 1.<sup>34</sup>

The Istanbul Convention entered into force three years after its adoption, on 1 August 2014 following its tenth ratification. To this date, 34 member states of the Council of Europe have ratified the Istanbul Convention while 45 countries have signed it. In 2021, Turkey has, however, withdrawn from the convention after denouncing it on 20 March 2021. Many other countries in the European Union that have signed the Convention but have not yet ratified it, have in different ways expressed their potential withdrawal from the Convention. In Bulgaria, for example, the constitutional court ruled the Convention unconstitutional, while in Hungary the parliament refused to ratify the Convention after the government’s claims that the Convention is “promoting destructive gender ideologies” and “illegal migration”. Finally, Poland which has ratified the text

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<sup>34</sup> McQuigg, RJA (2017): *The Istanbul Convention, Domestic Violence and Human Rights*, Routledge Research in Human Rights Law, p. 6.

in 2015, is now questioning its content due to the use of the term “gender”.<sup>35</sup> According to Politico, the Istanbul Convention “has unexpectedly become a proxy fight for the larger culture wars brewing between East and Western Europe”, especially in regard to the Eastern European “family values”.<sup>36</sup> At the same time, on the 28 June 2023 the EU ratified the Istanbul Convention. For the EU, it has officially entered into force on 1 October 2023.<sup>37</sup> Therefore, it remains to be seen how the European Union’s ratification of the Istanbul Convention will be accepted and implemented in the five EU Member States which have not yet ratified the Convention, namely in Bulgaria, Czech Republic, Hungary, Lithuania, and the Slovak Republic.<sup>38</sup>

Istanbul Convention is an act that should be concluded both by the EU and the Member States as it consists of diverse provisions, some of which fall within the competence of the EU while the others touch upon the Member States’ competence. For instance, the Member States are competent for substantive criminal law provisions and other provisions in Chapter V (substantive law) while the EU is competent for legislation regulating rights of crime victims, third-country nationals and stateless persons.<sup>39</sup> The EU ratification is also a useful mechanism for speeding up Member States’ legislative adoption of acts concerning GBV. This can be supported by statistical data concerning the policy responses to the ratification of the Istanbul Convention in EU Member States. Accordingly, following the ratification, 14 Member States have adopted a national action plan addressing the issue of GBV. In addition to this, the research showed advances in support services for victims.<sup>40</sup>

#### *b) Procedural aspects*

##### *i) The background to the adoption of the Istanbul Convention*

It is estimated that between 12 and 15 percent of women in Europe have been in a relationship involving domestic violence after the age of 16.<sup>41</sup> Therefore, it has been clearly established that domestic violence should be considered as a major problem present Europe-wide. However, according to McQuigg, it was not until the 1990s, that the Council of Europe undertook real actions to tackle this issue. This shows that, as McQuigg explains, “it is only relatively recently that domestic violence was recognized as being an important issue of social and legal concern, let alone an issue falling within the ambit of human rights law that should be addressed by a body such as the Council of Europe.”<sup>42</sup>

The first substantive legal act passed by the Council of Europe in this respect was, however, in 1985, when the Committee of Ministers of the Council of Europe passed a Recommendation on

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<sup>35</sup> Politico Official Website (April 2021): How the Istanbul Convention became a symbol of Europe’s cultural wars.

<sup>36</sup> *Ibid.*

<sup>37</sup> Official website of the CoE, available at: <https://www.coe.int/en/web/portal>.

<sup>38</sup> EP’s official website, available at: <https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-eu-accession-to-the-istanbul-convention>.

<sup>39</sup> Opinion 1/19, ECLI:EU:C:2021:198, para 41.

<sup>40</sup> The Added Value of and Resistance to the Istanbul Convention: A Comparative Study in 27 European Member States and Turkey, Policy and Practices Reviews, p. 12.

<sup>41</sup> McQuigg, RJA (2017): The Istanbul Convention, Domestic Violence and Human Rights, Chapter 3: The background to the adoption of the Istanbul Convention, p. 7.

<sup>42</sup> *Ibid.*



Violence in the Family.<sup>43</sup> In the following decades, significant development has been made in regards to domestic violence policy-making, notably the adoption of Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence and the adoption of the Resolution 1582 on domestic violence against women in 2002, composing a report titled “Combating Violence against Women: Stocktaking study on the measures and actions taken in CoE member states” in 2006, and establishing a Task Force to Combat Violence against Women, including Domestic Violence, also in 2006.

All this led to the need to adopt a comprehensive binding legal act at the European level that would tackle the issue of domestic violence in an efficient and concrete manner. The act will later become known as the Istanbul Convention.

## ii) Negotiations

According to the official CoE information, the negotiations for the Istanbul Convention started in December 2008, when an ad hoc expert committee was composed (Committee for preventing and combating violence against women and domestic violence (CAHVIO)). The members of CAHVIO consisted mostly of governmental representatives of CoE member states. However, a contribution was also made by various NGOs,<sup>44</sup> UNHCR,<sup>45</sup> and the European Union.<sup>46</sup> According to the synopsis of the First Meeting which was held from 6 to 9 April 2009, Ms Dubravka Šimonović (Croatia) and Mr Eric Ruelle (France) were appointed as Co-chairs.<sup>47</sup> Dubravka Šimonović is a Croatian lawyer, expert in the field of human rights and visiting professor in the Center for Women, Peace, and Security at the London School of Economics. She was also one of the leading proponents of the Istanbul Convention in Croatia, claiming that it does not contain a single provision concerning gender ideology.<sup>48</sup> Mr Eric Ruelle is a French judge, General Inspector of the Judicial Services, Former President of the Lanzarote Committee (from 2011 to 2014) and former legal adviser in military criminal matters for former Yugoslavia. His professional path is, according to certain French media outlets,<sup>49</sup> not typical but extremely rich.<sup>50</sup> The two were elected as co-chairs, primarily because it was deemed important that both experts representing the Ministry of Justice and the Ministry of Social Affairs/Gender Equality/Human Rights “be represented by the chair on an equal footing”.<sup>51</sup> After nine meetings, CAHVIO finalized the draft of the Istanbul Convention in December 2010. Additionally, ad hoc expert group composed an overview of relevant ECtHR case law, typology protection of women, legal protective provisions or protection

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<sup>43</sup> *Ibid.*

<sup>44</sup> NGOs call on the Council of Europe to move towards a strong instrument on Violence against Women – European Policy Action Centre on Violence Against Women, website article.

<sup>45</sup> UNHCR comments to the first Meeting of the Ad hoc Committee on preventing and combating violence against women and domestic violence, 6–8 April 2009.

<sup>46</sup> The European Union’s main instruments and actions to combat violence against women (2009), official document issued by CAHVIO.

<sup>47</sup> Report of the 1st Meeting, Ad hoc Committee on Preventing and Combating Violence Against Women and Domestic Violence, Strasbourg 6–8 April 2009, p. 1.

<sup>48</sup> Dubravka Šimonović: *Istanbulska konvencija nema odredbu o rodnoj ideologiji*, Večernji list.

<sup>49</sup> Eric Ruelle, *la concentration en action*, website article.

<sup>50</sup> *Ibid.*, fr. *Le parcours d’Eric Ruelle est “atypique”, mais aussi très riche.*

<sup>51</sup> Report of the 1st Meeting, Ad hoc Committee on Preventing and Combating Violence Against Women and Domestic Violence, Strasbourg 6–8 April 2009, p. 1.

orders and other relevant documents. The text was later adopted by the Committee of Ministers and opened for signatures on 11 May 2011. It has entered into force after its tenth ratification by Andorra, on 22 April 2014.

The EU did not participate in the negotiations of the Convention and could therefore not influence the text of the Convention.<sup>52</sup> This is probably why the Istanbul Convention does not recognize the special status of the EU as “a regional economic integration organization with limited external power and capacity.”<sup>53</sup>

### iii) EU accession to the Istanbul Convention

The Istanbul Convention was officially signed by the EU on 13 June 2017 – on behalf of the EU by Commissioner for Justice, Consumer and Gender Equality Vera Jourova, and on behalf of the Presidency-in-office of the CoE, by the Permanent Representative of Malta to the Council of Europe, in the presence of CoE Secretary General Thorbjorn Jagland. This was preceded by the EU Council’s adoption of two decisions for the signature: one concerning the articles of the convention dealing with asylum, refugees and refoulement (2017/866) and another regarding articles dealing with cooperation in criminal matters (2017/865), both adopted in May 2017. In 2019, the Parliament adopted a resolution condemning campaigns against the convention based on “deliberate misinterpretations” and called for adoption of a comprehensive EU legal act on GBV.

Next, on 9 July 2019, the European Parliament submitted a request for an opinion of the ECJ regarding compatibility of the EU ratification of the Istanbul Convention with the Treaties under 218(11) TFEU. After the positive response issued by the Court issued on 6 October 2021, on 21 February 2023 the Council requested the EP’s consent to proceed with ratification. On 25 April 2023, Committee on Women’s Rights and Gender Equality (FEMM) and Committee on Civil Liberties, Justice and Home Affairs (LIBE) jointly recommended the Parliament to give its consent. The MEPs voted for the EU’s ratification on 10 May 2023. 607 MEPs voted, of which 472 voted for, 62 against, and 73 abstained. Finally, the Council of the EU officially ratified the Convention on 28 June 2023, when Secretary General Marija Pejčinović Burić, Ambassador Marten Ehnberg, Permanent Representative of Sweden to the CoE and Helena Dalli, European Commissioner for Equality, together deposited the instrument of approval. The Convention entered into force for the EU on 1 October 2023. It remains to be seen in what ways will it affect the Member States that have not yet ratified the Convention as well as the problem of domestic violence in Europe.

As regards the EU Member States, by 2016 all the Member States had signed the Convention, among which five of them failed to ratify it. Nonetheless, there are still many concerns raised by social movements and the Church throughout Europe against the Convention, states Balogh.<sup>54</sup>

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<sup>52</sup> Kubek, G (2022): Facing and embracing the consequences of mixity: Opinion 1/19, Istanbul Convention (2022), p. 1469.

<sup>53</sup> *Ibid.*

<sup>54</sup> Balogh, L (2020): The Ratification Status of the Council of Europe’s Istanbul Convention Among EU Member States, p. 1.

On 18 November 2019, the European Parliament adopted a non-legislative resolution calling on the Member States that have signed, but not yet ratified the Convention, to do so urgently. By the same token, on 13 February 2020, the European Parliament adopted a resolution on the priorities set by the EU for the next session of the UN Commission on the Status of Women, calling again for the accession of the non-ratifying member states and the EU to the Istanbul Convention.<sup>55</sup>

It is also important to note that several Member States expressed reservations and made declarations whilst signing or ratifying the Convention, mostly because of compatibility of certain provisions of the Convention with their national constitutions. For example, Croatia put a reservation on Article 29 and 30 which regulate civil lawsuits and remedies as well as compensation.<sup>56</sup> Under Article 30, “adequate state compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by the sources such as the perpetrator, insurance or State-funded health and social provisions. This does not preclude Parties from claiming regress for compensation awarded from the perpetrator, if due regard is paid to the victim’s safety.”<sup>57</sup> Croatian reservation altered the Article by ensuring compensation only in relation to victims who are entitled to claim compensation in accordance with national legislation governing compensation to victims of crime.<sup>58</sup> In addition to this, the Croatian parliament also adopted an interpretative statement, stating that the purpose of the Convention is protection of women against GBV, and its provisions do not impose any obligation to introduce “gender ideology” in Croatia’s legal and educational system, and that the Convention is in line with Croatian constitutional provisions.<sup>59</sup>

#### iv) Backlash in Europe

The main reason why the remaining Member States have not yet ratified the Convention are anti-gender movements, argues Balogh.<sup>60</sup>

When you look at the Istanbul Convention, the notion “gender” is mentioned 27 times, for instance, in the context of stressing gender equality, ensuring gender-based asylum and defining GBV. According to Article 3(c) of the Istanbul Convention, “gender shall mean the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women or men”.<sup>61</sup> In addition to this, GBV is defined as “violence directed against the woman because she is a woman or that affects women disproportionately”.<sup>62</sup>

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<sup>55</sup> *Ibid.*

<sup>56</sup> Total Croatia News: Istanbul Convention Reservations should be lifted, says SDP Women’s forum (2023), website article.

<sup>57</sup> Article 30 of the Istanbul Convention.

<sup>58</sup> Željko, D (2021): Procjena prvih deset godina Konvencije Vijeća Europe o sprječavanju i borbi protiv nasilja nad ženama i nasilja u obitelji, p. 386–387.

<sup>59</sup> Total Croatia News: Government Supports Interpretative Statement on Istanbul Convention (2023), website article.

<sup>60</sup> Balogh, L (2020): The Ratification Status of the Council of Europe’s Istanbul Convention Among EU Member States, p. 8.

<sup>61</sup> Article 3c of the Istanbul Convention.

<sup>62</sup> *Ibid.*, Article 3d.

The main problem with these definitions is of political nature. In a nutshell, conservative forces consider that states are pressured to implicitly accept the notion of “gender” throughout the framework of a Convention dealing with a completely different topic.

Balogh further suggests that from the 2000s, there has been a strong social movement present in Europe against the so-called gender ideology. This is why we have witnessed, from 2000s onwards, multiple marches for life, protests aiming to discharge same-sex marriages, and demonstrations against sexual education reforms in schools around Europe.

Balogh explains that one of the main sources of the anti-gender discourse were “the entry on ‘Gender’ by Jutta Burggraf, a German Catholic theologian, and Gabriele Kuby’s antigender literature, such as ‘The Gender Revolution – Relativism in Action’”. She also argues that gender ideology is used “to address a series of issues conservatives are uncomfortable with, such as euthanasia, abortion, in vitro fertility or same-sex relations. This is why anti-gender promoters often argue that gender ideology implies ‘the culture of death’.”<sup>63</sup>

In a brief issued by ADF International, an influential Christian legal interest group based in the US, main concerns relating to the Istanbul Convention are outlined. Firstly, ADF International argues that the notion of gender as a social construct independent from a biological reality is not compatible with the notion of gender equality, as defined and outlined by EU primary law. Secondly, ADF suggests that the traditional view of marriage may be “stigmatized as a tradition based on stereotyped gender roles and thus something that should be opposed at all levels”. Finally, ADF International highlights the fact that the Istanbul Convention and its notion of gender might threaten “the parental right to direct the upbringing of their children in accordance with their moral and religious convictions”.<sup>64</sup>

#### v) A brief overview of MEPs’ discourse on the EU ratification of the Istanbul Convention

To give further insight into how the EU ratification of the Istanbul Convention is perceived in the Member States, MEPs’ discourse in the EP Plenary Session will be analyzed. The analyzed speeches were delivered by MEPs in Strasbourg on 9 May 2023, right before the voting (the voting took place on 10 May 2023 during the Plenary Session in Strasbourg).

Rapporteurs for this topic were European People Party’s Arba Kokalari from the FEMM Committee and Socialists and Democrats’ Lukasz Kohut from the LIBE Committee. At the outset, Arba Kokalari argued that EU ratification of the Istanbul Convention raises the standard in combatting and preventing gender-based violence across the EU. She also established that the ratification brings better coordination in implementing necessary measures, better collection of data, stronger judicial cooperation, and sends a clear political message that EU has zero tolerance on violence against women.

Lukasz Kohut suggested that the vote on EU ratification is a matter of pure human decency, as it concerns a black and white issue. He highlighted that by not voting for ratification, one chooses to

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<sup>63</sup> Balogh, L (2020): The Ratification Status of the Council of Europe’s Istanbul Convention Among EU Member States, p. 3.

<sup>64</sup> The Istanbul Convention. An Overboard and Unnecessary Treaty (2019): ADF International Brief.

simply tolerate gender-based violence, the biggest unsolved problem in Europe. He also outlined a shocking statistical data, according to which every third woman in the EU experiences sexual or physical violence. In his speech, he explained that the Istanbul Convention is about health and security, not about politics, and if it is to be ratified, it will ensure the highest standard of protection of women's rights and reach the EU Member States that have not yet ratified it. At the end, he nonetheless called those Member States to ratify the Convention.

Representatives of Renew (Yana Toom, Karen Melchior, Samira Rafaela, Irene Tolleret and others) strongly welcomed the EU's accession to the Convention, highlighting the danger of the anti-gender movements and the need to push back firmly to fight it (Samira Rafaela), and seeing the Convention as a very useful tool in the fight against GBV (Irene Tolleret).

European Conservatives and Reformists' (ECR) representatives (Margarita de la Pisa Carrion, Ladislav Ilčić, Cristian Terhes) were one of the two political groups who strongly opposed the Convention, stating that violence against women has not decreased in any of the countries that have ratified the Convention, making the Convention solely a legal cornerstone for promotion of gender ideology (Ladislav Ilčić). They also argued that in this way, the EU tries to force the hand of those countries that have not yet ratified it because it opposes their constitutions (Margarita de la Pisa Carrion). They even implied that the Convention is "a dream come true to male perverts" as it lacks the definition of women and thereby undermines all women (Cristian Terhes).

Identity and Democracy (ID) (Alessandra Basso, Angelo Ciocca, Christine Anderson) was the second political group that expressed strong opposition to the ratification, stating that handling GBV should be left to Member States to regulate as they see fit, and that by ratifying the Convention, the EU hampers their sovereignty (Christine Anderson). Anders Vistisen even implied that GBV is related to mass immigration of Muslim community to the EU, and for this statement he earned a warning for hate speech.

In conclusion, the EU ratification of the Convention in the EP was strongly endorsed by a great majority of political groups, both on the right and left wing of the political spectrum, who also called for the Member States to ratify it on the national level. There were, however, a few radical parties (far right ID and ECR) who argued that it is for the Member States to tackle GBV and to form their legislation in accordance with their proper definition of "women" as "biologically predetermined".

#### **4. Opinion 1/19**

##### *a) Introduction*

In Opinion 1/19, observations have been submitted to the ECJ by numerous stakeholders, namely, Bulgaria, the Czech Republic, Ireland, Greece, Spain, France, Hungary, Austria, Poland, Slovakia, Finland, the Council, and the Commission.<sup>65</sup> According to Kubek, "Opinion 1/19 itself – in stark contrast to previous Opinions of the Court – devoted significant space to the arguments of the

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<sup>65</sup> Opinion 1/19, ECLI:EU:C:2021:198, para 62.

parties.”<sup>66</sup> In terms of statistical data, observations submitted to the Court usually take up around 10 percent of the entire Opinion while in Opinion 1/19, they take up more than a third of the entire Opinion, which “effectively adds greater transparency to the Court’s rulings” since neither the hearings nor the submissions of the EU institutions and Member States are usually made public.<sup>67</sup>

The Istanbul Convention is, without a doubt, a rare example of a mandatory mixed agreement, as on one hand side, the Member States are competent for substantive law provisions, while the EU has exclusive competence for matters relating to asylum and non-refoulement as well as judicial cooperation in criminal matters.<sup>68</sup> After the Convention was signed by all Member States, it was signed by the EU in 2017. However, in the years that followed, many Member States (that have previously signed the Convention) indicated their intent not to ratify it or to fully withdraw from it. Namely, in 2018, the Bulgarian Constitutional Court ruled that the Istanbul Convention is contrary to the provisions of the Bulgarian Constitution, while in 2019 and 2020, the Slovakian and Hungarian national parliaments called on their executive power to terminate the ratification process.<sup>69</sup> Other examples of the opposition movements in the EU are that of Poland, where in 2021, the Polish parliament put forward a proposition to withdraw from the Convention, and Lithuania, where in September 2023, Lithuanian parliament turned to the Constitutional Court to question whether Istanbul Convention is compatible with national constitution.<sup>70</sup>

On 9 July 2019, the EP requested, under Article 218(11) TFEU, the opinion of the Court of Justice regarding the accession of the EU to the Istanbul Convention. The Court of Justice delivered the Opinion 1/19 in EU external relations law two years later, on 6 October 2021, in which the legal dispute is about the decision to sign and conclude the Istanbul Convention.<sup>71</sup> It all boiled down to the three main questions put forward by the EP, notably regarding the legal basis used to proceed with the EU ratification of the Convention, the split decision concerning the signature thereof, and the relationship between the Member States’ ratification and the EU ratification of the Convention.<sup>72</sup>

It should also be added that since the Opinion 1/19 addressed many issues revolving around EU treaty-making power and procedure, it may become “an important precedent for other international agreements stuck in the Council, such as the CoE Convention on the Manipulation of Sports Competitions (Macolin Convention), or the UN Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention)”.<sup>73</sup>

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<sup>66</sup> Kubek, G (2022): Facing and embracing the consequences of mixity: Opinion 1/19, Istanbul Convention, p. 1472.

<sup>67</sup> Chamon, M (2021): The Court’s Opinion in Avis 1/19 regarding the Istanbul Convention, p. 1–2.

<sup>68</sup> Kubek, G (2022): Facing and embracing the consequences of mixity Opinion 1/19, Istanbul Convention, p. 1471.

<sup>69</sup> Chamon, M (2021): Accession of the EU to the Istanbul Convention and Opinion 1/19 of the CJEU (ppt), slides 19 and 20, Maastricht University.

<sup>70</sup> Lithuanian parliament turns to Constitutional Court over Istanbul Convention, BNS, accessed December 2023, <https://www.lrt.lt/en/news-in-english/19/2087686/lithuanian-parliament-turns-to-constitutional-court-over-istanbul-convention>.

<sup>71</sup> Koutrakos, P (2022): Confronting the Complexities of Mixed Agreements – Opinion 1/19 on the Istanbul Convention, *European Law Review*, 47(2), p. 266.

<sup>72</sup> Chamon, M (2021): The Court’s Opinion in Avis 1/19 regarding the Istanbul Convention, *EU Law Live*, Op-Ed, p. 1.

<sup>73</sup> Kubek, G (2022): Facing and embracing the consequences of mixity: Opinion 1/19, Istanbul Convention, p. 1467.

### *b) The request*

In Opinion 1/19, three main legal questions were raised. The first question was the question of legal basis for the Council decision on the conclusion of the Istanbul Convention on behalf of the EU. This question was, in fact, not a question of pure legal basis, but a question of a narrow or broad accession to the Convention, as the Commission and the EP favored “a broad accession” while the Council proposed a “narrow accession”, allowing the Member States to ratify the Convention in their own right.<sup>74</sup> A broad accession makes the EU a party to the Convention “to the full extent of its exclusive or shared competences, whether exercised or potential.”<sup>75</sup> By contrast, with a narrow accession the EU would accede only to those provisions that fall within the exclusive competence of the EU.<sup>76</sup>

The second question raised by the EP was the question on splitting of decisions. The reason why this question was raised was because of “the Council’s intention to split the decision on conclusion to allow Ireland, pursuant to Protocol No 21, not to be committed through the EU to the Convention’s provisions on asylum since Ireland has not opted into the Directives for which an ERTA effect results in exclusive EU competence.”<sup>77</sup>

Finally, the third question was raised in relation to the issue of common accord. According to Chamon, in mixed agreements the Council does not vote in accordance with the majority rule provided in Article 218 TFEU, but rather first tries to find a consensus, and only then, once a consensus is reached, proceeds with the voting procedure envisaged by the Treaties (i.e. qualified majority voting, if applicable).<sup>78</sup>

### *c) AG Hogan’s Opinion*

AG Hogan delivered his Opinion in Avis 1/19 on 11 March 2021. In his Opinion, he first addressed the question of legal basis. He suggested that “the legal basis test” differs if we consider EU-only agreements or mixed agreements. Accordingly, he considers that for EU-only agreements, the choice of legal basis depends on the objective and content of the entire agreement. By contrast, the legal basis for signature and conclusion decisions regarding mixed agreements depends only on the main objective and purpose of the part of the mixed agreement to which the EU adheres.<sup>79</sup> Indeed, “the main objective and purpose (‘centre of gravity’) of the EU conclusion decision of a mixed agreement may be different from the ‘centre of gravity’ of that agreement in its entirety.”<sup>80</sup>

AG Hogan further highlights that in the case of the Istanbul Convention, “EU-only” conclusion is not possible since multiple obligations under that convention fall within the competence of the Member States.<sup>81</sup> Therefore, as stated by Kubek, “the choice of legal basis for the EU conclusion decision of the Istanbul Convention should only relate to the parts of the Convention that fall

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<sup>74</sup> *Ibid.*, p. 1471.

<sup>75</sup> Opinion 1/19, ECLI:EU:C:2021:198, para 68.

<sup>76</sup> *Ibid.*, para 99.

<sup>77</sup> Chamon, M (2021): The Court’s Opinion in Avis 1/19 regarding the Istanbul Convention, EU Law Live, p. 4.

<sup>78</sup> *Ibid.*, p. 5.

<sup>79</sup> Opinion AG Hogan, ECLI:EU:C:2021:198, paras 83–85.

<sup>80</sup> *Ibid.*, paras 83–84.

<sup>81</sup> *Ibid.*, para 206.

within the EU's competence".<sup>82</sup> Even though at the time of the writing of AG Hogan's Opinion (as well as the Opinion issued by the ECJ) it has not been confirmed that the EU accession to the convention would be broad (as suggested by the Commission and the EP) or narrow (as suggested by the Council), AG Hogan decided to presume that the EU shall only exercise its exclusive competence and will thus opt for a narrow accession.<sup>83</sup>

After carefully evaluating the provisions of the Convention and whether they fall under EU's exclusive competence, AG Hogan concluded that "the decision authorizing the EU to proceed to that conclusion must be based on Articles 78(2) (asylum), 82(2) (judicial cooperation in criminal matters), 84 (crime prevention) and 336 TFEU (EU staff regulation)".<sup>84</sup>

In relation to the question on the splitting of decisions, AG Hogan has adopted a position like that of the Council and Ireland. In a nutshell, AG Hogan's point of view is that "the effect of Protocol No 21<sup>85</sup> is that, judged from the perspective of EU law, Ireland will not be bound by that convention in respect of all the competences exercised by it at the time of the conclusion of the convention unless it also manifests its intention to be so bound."<sup>86</sup> Conversely, if Ireland decided to agree on the decision of the EU to authorize the conclusion of the Convention, two separate decisions will have to be adopted.

Finally, AG Hogan found that the Council has a large margin of discretion when deciding whether to conclude an international agreement. In the case of the Istanbul Convention, the Council can but is not obliged to wait for a unanimous decision of the Member States. In other words, if the EU would decide to conclude the Convention without having a clear unanimity among the Member States, such decision would be compatible with the EU primary legislation. By contrast, if the EU decided to wait for unanimity prior to the accession to a treaty, such decision is also in accordance with the Treaties.<sup>87</sup>

#### *d) The Court's opinion*

##### *i) Legal basis*

Concerning the first question, the EP asked the ECJ whether Articles 82(2) and 84 TFEU constitute appropriate legal bases for the conclusion decision, or whether the Decision must be based on Articles 78(2), 82(2) and 83(1) TFEU.<sup>88</sup>

As stated by Chamon, "behind this disagreement on legal bases lies a disagreement on the extent to which the EU should leave a legal space to the Member States to be parties in their own right to

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<sup>82</sup> Kubek, G (2022): Facing and embracing the consequences of mixity: Opinion 1/19, Istanbul Convention, p. 1488.

<sup>83</sup> Opinion AG Hogan, ECLI:EU:C:2021:198, para 91.

<sup>84</sup> *Ibid.*, para 166.

<sup>85</sup> Protocol No 21 is an annex to the Treaty of Lisbon that exempts Ireland from the Council's adoption of proposed measures pursuant to Title V of the TFEU concerning the area of freedom, security, and justice. It, however, allows Ireland to opt-in to individual proposals in these areas within three months after a proposal or initiative has been presented to the Council.

<sup>86</sup> Opinion AG Hogan, ECLI:EU:C:2021:198, para 191.

<sup>87</sup> *Ibid.*, para 223.

<sup>88</sup> Opinion 1/19, ECLI:EU:C:2021:198, para 1.



the Convention”.<sup>89</sup> The Council argued that according to the ECJ’s settled case law, the choice to exercise a shared external competence is at the political discretion of the Council.<sup>90</sup> Given the fact that there was no sufficient support for “a broad accession”, unlike the case of the accession to the UNCRPD, the Council opted for a narrower accession, by exercising exclusive competence and leaving out shared competence.<sup>91</sup> To this end, the Council argued that only two provisions of the Istanbul Convention fall within the EU’s exclusive competence – Articles 60 and 61 TFEU on asylum and non-refoulement.<sup>92</sup>

Narrow accession proposed by the Council would encompass less than 20 percent of the Istanbul Convention. In relation to this, Finland and Poland questioned whether it would be possible to accede in that way and proposed a broader approach. They further argued that since the EU secondary law lays down only minimum requirements in relation to Articles 60 and 61 TFEU on asylum and non-refoulement, the EU cannot have exclusive competence for the ratification based on these articles.<sup>93</sup>

The ECJ finally concluded, like AG Hogan, that the correct legal bases for the EU’s conclusion decision should be Articles 78(2) (asylum), 82(2) (judicial cooperation in criminal matters), 84 (crime prevention) and 336 TFEU (staff regulation of officials of the EU and the conditions of employment of other servants of the EU). This decision was based on a standard test, according to which “if the examination of an EU act reveals that it pursues to a number of objectives, or has several components, which are inextricably linked without being incidental, such a measure will have to be founded on the various legal bases.”<sup>94</sup> It is therefore, somewhat odd that the ECJ included Article 336 TFEU regarding staff regulation of the EU officials as a legal basis which is “inextricably linked” to the Istanbul Convention, rather than merely “incidental”.

## ii) Splitting of decisions

The question of the legality of the Council’s intention to split the conclusion decision was posed by the EP to allow Ireland, in accordance with Protocol No 21 to the TEU, not to be bound by EU legislation relating to asylum and non-refoulement.

EP and the Commission argued that the EU had exclusive competence via Article 3(2) TFEU (EU exclusive competence for the conclusion of international agreement) for the entire area of freedom, security and justice (AFSJ) of the conclusion decision. Therefore, in their view, there was no need for splitting of the conclusion decision.<sup>95</sup>

The ECJ concluded that all things considered, the decision would have to be split. However, the splitting will not be as envisaged by the Council. Instead, one decision will be based on Articles 78(2) (asylum), 82(2) (judicial cooperation in criminal matters) and 84 TFEU (crime prevention),

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<sup>89</sup> Chamon, M (2021): The Court’s Opinion in Avis 1/19 regarding the Istanbul Convention, p. 2.

<sup>90</sup> Case C-600/14, COTIF I, ECLI:EU:C:2017:935, paras 66–68.

<sup>91</sup> Kubek, G (2022): Facing and embracing the consequences of mixity: Opinion 1/19, Istanbul Convention, p. 1486.

<sup>92</sup> Opinion 1/19, ECLI:EU:C:2021:198, para 120.

<sup>93</sup> *Ibid.*, para 134.

<sup>94</sup> *Ibid.*, para 37.

<sup>95</sup> Kubek, G (2022): Facing and embracing the consequences of mixity: Opinion 1/19, Istanbul Convention, p. 1493.

where Ireland must decide whether it would like to opt in, and one decision based on Article 336 TFEU (staff regulation of the EU and the conditions of employment of other servants of the EU).<sup>96</sup>

### iii) Practice of a common accord

As Koutrakos eloquently stated regarding the question of common accord, “this question is underpinned by a paradox.”<sup>97</sup> On the one hand, Article 218 TFEU lays down the voting procedure in the Council for the conclusion of the Convention, determining that qualified majority is needed. On the other hand, “the absence of a common accord among Member States to be bound by the Convention may cast doubt on the ability of the EU to conclude the Convention”.<sup>98</sup>

Even though the issue of a common accord concerned the third question posed by the EP, the ECJ decided to address it first, thereby highlighting its importance in the context of EU law.

In response to the question concerning the practice of a common accord, the ECJ ruled that “even though the Treaties do not prohibit the Council from waiting before adopting the decision concluding the Istanbul Convention, the Treaties do prohibit the Council from adding a further step to the conclusion procedure”.<sup>99</sup>

This approach, as explained by Chamon, is somewhat like the approach the ECJ primarily took in *Hybrid acts*, where the Court decided that the Council and the Member States cannot jointly adopt a single decision to conclude mixed agreements on behalf of the EU and its Member States. The main reason for this approach taken in *Hybrid acts* is that “EU decision-making foreseen by the Treaties, in both process and outcome, cannot be subjected to additional elements of an intergovernmental nature.”<sup>100</sup> Similarly, Kubek explains that in Opinion 1/19 the ECJ “clarified that the notion of “hybridity” as set out in *Hybrid acts* is not confined to the form of an act but extends to the decision-making process.”<sup>101</sup>

Many authors disagree with the ECJ’s ruling on the question of common accord. Chamon highlighted that by having confirmed a wide range of the Council’s political discretion, the ECJ automatically rejected arguments outlined by Member States and the Council itself stating that “pushing ahead with the conclusion in the absence of a common accord would be illegal under EU law or result in the liability of the EU under international law”.<sup>102</sup>

At the same time, Niedzwiedz regrets that three points raised by the parties to the proceedings have not been considered in the ECJ’s Opinion. Firstly, the argument relating to national identities of Member States which have not ratified the Convention, stating that EU ratification would lead to a breach of duty of sincere cooperation and of obligation, set out in Article 4(2) TEU, in that it

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<sup>96</sup> Opinion 1/19, ECLI:EU:C:2021:198, para 337.

<sup>97</sup> Koutrakos, P (2022): *Confronting the Complexities of Mixed Agreements – Opinion 1/19 on the Istanbul Convention*, p. 13.

<sup>98</sup> *Ibid.*

<sup>99</sup> Opinion 1/19, ECLI:EU:C:2021:198, para 338.

<sup>100</sup> Case C-28/12, *Hybrid acts*, ECLI:EU:C:2015:282, para 51.

<sup>101</sup> Kubek, G (2022): *Facing and embracing the consequences of mixity: Opinion 1/19, Istanbul Convention*, p. 1479–1480.

<sup>102</sup> Chamon, M (2021): *The Court’s Opinion in Avis 1/19 regarding the Istanbul Convention*, EU Law Live, p. 6.

may give rise to a situation in which those Member States must, in order to ensure compliance with the Union's international commitments, implement measures contrary to their constitutions.<sup>103</sup> Secondly, the Court failed to assess the question regarding the functioning of the GREVIO. This is problematic as it could lead to a lack of supervision over the implementation of the Convention. As already explained, a few of the Member States found the Convention incompatible with their Constitutions. In this context, the Court failed to clarify in what ways will GREVIO fulfill its role and consequently, enforce the Convention. Lastly, the Court did not address the consequences that might arise from an infringement of the law in the implementation of that agreement.<sup>104</sup> In other words, the Court did not consider potential EU liability because of failure to comply with its obligations stated under the Istanbul Convention. The ratification of the Istanbul Convention is only the beginning as the EU becomes obliged to regulate numerous issues in the areas of its competence upon the ratification.

Finally, the fact that the ECJ did not consider EU's potential liability could also be problematic from the point of view of actions for damages under Article 340 TFEU. To this end, EU nationals who suffered damages due to non-implementation of the Convention in the areas of its competence could initiate compensation proceedings.

## **5. Legal Implications of the EU's ratification of the Istanbul Convention**

EU's ratification of the Istanbul Convention brings many advantages, but also many risks.

Firstly, as flagged by the ECJ in Opinion 1/19, "the EU faces a clear risk of incurring international liability for the non-implementation of the agreement by a non-ratifying Member State in a field where it is not competent to act."<sup>105</sup> While concerning facultative mixed agreements the risks can be circumvented, in cases where an agreement is of a mandatory mixed nature the risks come from the limited scope of EU's conferred power and are hence harder to avoid.<sup>106</sup>

Secondly, given the fact that the EU's competences in criminal law are quite limited, it is hard to imagine that the EU will adopt concrete legislative acts to fight certain crimes. Since the Istanbul Convention presupposes that the signatory creates an adequate legal framework to combat crimes relating to GBV, it is probable that the EU in its today's capacity will not be able "to fulfil some of the substantive law requirements under the Istanbul Convention".<sup>107</sup> It is, however, important to keep in mind that the EU's competences are limited in criminal law, but not in other aspects regulated by the Istanbul Convention. EU ratification of the Convention will lead to an increased work of European institutions, particularly of the Commission who will have to propose Directives

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<sup>103</sup> Opinion 1/19, ECLI:EU:C:2021:198, para 265.

<sup>104</sup> Niedzwiedz, M (2023): Comment on Opinion 1/19 of the Court of Justice of the European Union regarding Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) of 6 October 2021, Polish Review of International and European Law, p. 104–106.

<sup>105</sup> Kubek, G (2022): Facing and embracing the consequences of mixity: Opinion 1/19, Istanbul Convention, p. 1498. See also Opinion 1/19, ECLI:EU:C:2021:198, para 256.

<sup>106</sup> *Ibid.*

<sup>107</sup> European network of legal experts in gender equality and non-discrimination (2015): Legal Implications of EU Accession to the Istanbul Convention, p. 83–84.

and Regulations regarding the scope envisaged by the ratified part of the Convention and monitor their implementation and execution. To this end, on 8 March 2022, the Commission put forward a proposal for a Directive on combating violence against women and domestic violence.<sup>108</sup>

On the other side, the EU ratification of the Istanbul Convention could certainly bring about positive changes. For instance, by ratifying the Istanbul Convention, it becomes an integral part of EU law. Therefore, the EU ratification might influence the legal order of non-ratifying Member States through the principle of direct effect of EU law, provided that certain provisions fulfill the requirements for direct effect, namely, that they are sufficiently precise and unconditional. In that case, individuals could potentially rely on certain provisions of the Istanbul Convention in front of national courts, even though Member States have failed to ratify it.<sup>109</sup> In addition to this, the EU ratification will send a clear political message to the remaining Member States to ratify the Convention as soon as possible.

Furthermore, the Convention will from now on be used as a human rights standard for EU Member States. To this end, if the Convention is “applied and monitored as EU law, it would have greater effectiveness than it might have as a human rights standard for EU Member States.”<sup>110</sup>

The EU ratification of the Convention will also lead to implementation of monitoring procedures and international cooperation which will consequently result in a more comprehensive and coordinated policies.<sup>111</sup>

In the end, even though the EU ratification of the Convention might bring along challenges relating to international liability and implementation of certain substantive provisions of the Convention, it is expected to bring about significant positive changes in relation to the human rights protection standard, the promotion of GBV legislation at the European level, and will send a clear political message to the non-ratifying Member States.

## 6. Conclusion

The EU ratification of the Istanbul Convention certainly stirred many discussions and raised numerous concerns. Procedurally, it has become the first mixed agreement ratified by the EU without a common accord of all the Member States. Politically, it has started a wave of discussions among extreme rightwing politicians at the European and national level, mostly addressing the notion of “gender” and ways to define it. In terms of material law, the EU’s ratification concerned only a small part of the Convention, as the Council opted for a narrow accession.

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<sup>108</sup> Ending gender-based violence. Official European Commission website, available at: [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/ending-gender-based-violence\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/ending-gender-based-violence_en).

<sup>109</sup> Craig, P, de Burca, G (2020): EU Law. Texts, Cases and Materials, p. 217.

<sup>110</sup> European network of legal experts in gender equality and non-discrimination (2015): Legal Implications of EU Accession to the Istanbul Convention, p. 83–84.

<sup>111</sup> *Ibid.*

Regarding the opposition to the EU's ratification of the Convention, it has mostly been argued that the Istanbul Convention opposes national institutions and therefore, cannot be ratified at the European level. There are two reasons explaining why this argument can be considered as political rather than legal. Firstly, all the Member States have signed the Istanbul Convention. Consequently, had there been a danger of breach of their national constitutions, this would probably result in proceedings before their constitutional courts prior to the signing, rather than after it. Secondly, the question of gender is the question of ideology and definition, not a legal question with legal implications.

At the same time, Opinion 1/19 has concluded that there is no need for a common accord between Member States in cases where EU is competent to conclude international agreements. By doing so, a great amount of power has been granted to the Council, as it is now free to decide (mainly) based on its discretion, whether, in cases of absence of a common accord, to accede to a convention. This could lead to a faster and a more efficient accession of the EU to international agreements.

What will happen next – only the time will tell. Even though certain risks relating to the EU's ratification exist, mostly in terms of potential international liability, it brings a higher level of human rights standard regarding the GBV in EU law, sends a clear message to the non-ratifying Member States, and could serve as an initiator for the European policymakers to adopt many GBV-related legislation in the future.

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## **APPENDIX**

*Appendix 1. A Comparison between the Istanbul Convention and Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*

*Appendix 2. A Timeline of CoE's legislation regarding GBV*

*Appendix 3. Ratification and Signature Date for every Member State of the EU*

*Appendix 4. Avis 1/19 and AG Hogan's Opinion – Key Elements*

*Appendix 1. A Comparison between the Istanbul Convention and Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*

CONVENTION NAME	COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE (ISTANBUL CONVENTION)	INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT AND ERADICATION OF VIOLENCE AGAINST WOMEN (CONVENTION OF BELEM DO PARA)
SIGNATURE DATE	12 April 2011	9 June 1994 (first international legally binding treaty that criminalizes all forms of violence against women) <sup>112</sup>
LENGTH	25 Articles divided into 4 Chapters (Chapter I. Definition and Scope of Application, Chapter II. Rights Protected, Chapter III. Duties of the States, Chapter IV. Inter-American Mechanisms of Protection)	81 Articles divided into 12 Chapters (Chapter I. Purposes, Definitions, equality and non-discrimination, general obligations, Chapter II. Integrated Policies and Data Collection, Chapter III. Prevention, Chapter IV. Protection and Support, Chapter V. Substantive Law, Chapter VI. Investigation, Prosecution, Procedural Law and Protective Measures, Chapter VII. Migration and Asylum, Chapter VIII. International Co-operation, Chapter IX. Monitoring Mechanism, Chapter X. Relationship with Other International Instruments, Chapter XI. Amendments to the Convention, Chapter XII. Final Clauses)
ADOPTED BY	Inter-American Commission of Women <sup>113</sup> of the Organization of American States <sup>114</sup>	CoE
SIGNATORIES	32 states out of 35 member states of the Organization of American States (not Canada, Cuba and the USA)	45 states (out of 46 member states of the CoE) + EU
RATIFIERS	32 states	37 states + EU

<sup>112</sup> Persadie, N (2012): A critical analysis of the efficacy of law as a tool to achieve gender equality. Lanham, Md.: University Press of America, p. 199.

<sup>113</sup> Organization established in 1928, formally under Organization of American States.

<sup>114</sup> An international organization that promotes cooperation between the Americas.

WITHDRAWALS	none	Turkey (as of 1 July 2021)
MENTIONS OF THE NOTION OF “GENDER”	Once (Article 1) <sup>115</sup>	27 times <sup>116</sup>
SUPERVISION	Follow-up Mechanism to the Belem do Para Convention (MESECVI); <sup>117</sup> evaluation rounds to monitor and follow up on progress of the implementation of the Convention	Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO); main task to draft reports evaluating legislative and other measures to implement the provisions of the Convention
CONTROVERSIES AROUND THE CONVENTION	US exceptionalism undermining the credibility and legitimacy of the Inter-American Human Rights System <sup>118</sup>	The controversies evolving around the notion of gender (see Chapter 3b. IV)
IMPACT	The Convention significantly contributed to the human rights law; had been cited over 20 times in the cases before the Inter-American Court of Human Rights and before the Inter-American Commission <sup>119</sup>	More efficient policymaking in the field of GBV on a national and supranational level, better monitoring, better coordination between the signatories, implementation of preventative measures

<sup>115</sup> For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.

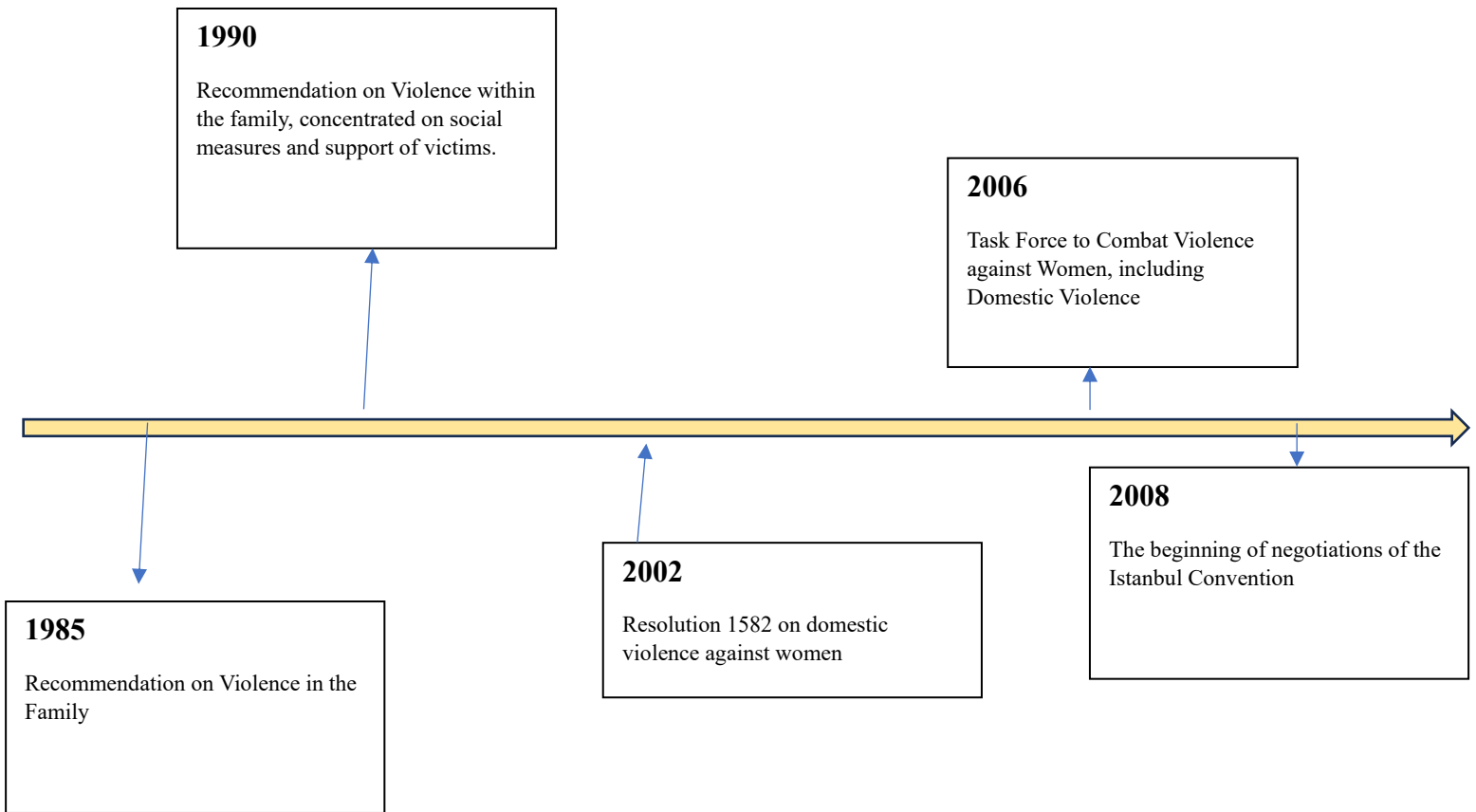
<sup>116</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, known as the Convention Belem do Para.

<sup>117</sup> Established in 2004, its main objective is to contribute to the objectives outlined in the Convention and to develop a system of technical cooperation between the States Parties.

<sup>118</sup> Rivero Juaristi, F (2013): U.S. Exceptionalism and the Strengthening Process of the Inter-American Human Rights System, p. 24.

<sup>119</sup> Manjoo, R, Jones, J (2018): The Legal Protection of Women from Violence: Normative Gaps in International Law, p. 163–164.

*Appendix 2. A Timeline of CoE's legislation regarding GBV<sup>120</sup>*



<sup>120</sup> McQuigg, RJA (2017): The Istanbul Convention, Domestic Violence and Human Rights, p. 6.

*Appendix 3. Ratification and Signature Date for every Member State of the EU*

<b>Member State</b>	<b>Convention signed</b>	<b>Convention ratified</b>
Austria	11 May 2011	14 November 2013
Belgium	11 September 2012	14 March 2016
Bulgaria	21 April 2016	
Croatia	22 January 2013	12 June 2018
Cyprus	16 June 2015	10 November 2017
Czech Republic	2 May 2016	
Denmark	11 October 2013	23 April 2014
Estonia	2 December 2014	26 October 2017
Finland	11 May 2011	17 April 2015
France	11 May 2011	4 July 2014
Germany	11 May 2011	12 October 2017
Greece	11 May 2011	18 June 2018
Hungary	14 March 2014	
Ireland	15 November 2015	8 March 2019
Italy	27 September 2012	10 September 2013
Latvia	18 May 2016	30 November 2023
Lithuania	7 June 2013	
Luxembourg	11 May 2011	7 August 2018
Malta	21 May 2012	29 July 2014
The Netherlands	14 November 2012	18 November 2015
Poland	18 December 2012	27 April 2015
Portugal	11 May 2011	5 February 2013
Romania	27 June 2014	23 May 2016
Slovakia	11 May 2011	
Slovenia	8 September 2011	5 February 2015
Spain	11 May 2011	10 April 2014
Sweden	11 May 2011	1 July 2014
The United Kingdom	8 June 2012	21 July 2022
EU	13 June 2017	28 June 2023

*Appendix 4. Avis 1/19 and AG Hogan’s Opinion – Key Elements*

<b>Opinion</b>	<b>Legal basis (Question 1a)</b>	<b>Splitting of decisions (Question 1b)</b>	<b>Common accord (Question 2)</b>
ECJ’s Opinion 1/19	Articles 78(2) (asylum), 82(2) (judicial cooperation in criminal matters), 84 (crime prevention) and 336 TFEU (EU staff regulation)	One decision based on Articles 78(2) (asylum), 82(2) judicial cooperation in criminal matters, 84 (crime prevention) TFEU while other based on Article 336 (staff regulation of the EU and the conditions of employment of other servants of the EU)	Even though the Treaties do not prohibit the Council from waiting before adopting the decision concluding the Istanbul Convention, the Treaties do prohibit the Council from adding a further step to the conclusion procedure by making the adoption of the decision contingent on the prior establishment of such a common accord.
AG Hogan’s Opinion in Opinion 1/19	Articles 78(2) (asylum), 82(2) (judicial cooperation in criminal matters), 84 (crime prevention) and 336 TFEU (EU staff regulation)	If Ireland decides to agree on the EU decision, 2 separate decisions will have to be adopted	The EU’s decision to accede to the Convention without a common accord compatible with the Treaties as well as the EU’s decision to wait for a common accord between the Member States.