Facing and embracing the consequences of mixity

Kübek, Gesa

Published in:
Common Market Law Review

Common Market Law Review **59**: 1465–1500, 2022.

Facing and embracing the consequences of mixity: Opinion 1/19, *Istanbul Convention*

Opinion 1/19, *Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*, Opinion of the Court (Grand Chamber) of 6 October 2021, EU:C:2021:832

1. Introduction

Opinion 1/19 is the latest in a series of recent case law[1] of the Court of Justice concerning international agreements concluded by the European Union and its Member States with third States or international organizations (so-called mixed agreements[2]). It "provide[d] ample evidence that the relationship between the Member States and the Union in respect of [mixed agreements] is apt to present some of the most difficult and complex questions of European Union law".[3] The questions raised by the request for Opinion 1/19 concerned the very purpose of mixity as a procedural tool to enable external action.[4] What can the EU do when its Member States no longer agree on common foreign policy objectives? Can law be used to solve the resulting political decision-making deadlock? What are the consequences of enabling the EU to exercise its limited external competence without all of its Member States? And should these consequences be avoided at all costs, or be embraced as a matter of principle?

Opinion 1/19 deals with the EU's accession to the Council of Europe Convention on Preventing and Combating Violence against Women and

1. See e.g. Opinion 2/15, *EU-Singapore FTA*, EU:C:2017:376; Opinion 3/15, *Marrakesh Treaty*, EU:C:2017:114; Case C-389/15, *Commission* v. *Council (Revised Lisbon Agreement)*, EU:C:2017:798; Case C-600/14, *COTIF I*, EU:C:2017:935; Case C-620/16, *COTIF II*, EU:C:2019:256; Joined Cases C-626/15 & 659/16, *Commission* v. *Council (Antartica MPAs)*, EU:C:2018:925. Although some of the agreements at stake here ended up being concluded by the EU alone, the question of mixity played an important role in all these cases.

2. On mixed agreements see e.g. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Brill, 2002); O'Keeffe and Schermers (Eds.), *Mixed Agreements* (Kluwer, 1983); Koutrakos and Hillion (Eds.), *Mixed Agreements Revisited, The EU and its Member States in the World* (Hart, 2010); Chamon and Govaere (Eds.), *EU External Relations Law Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill, 2020).

3. Opinion of A.G. Hogan in Opinion 1/19, *Istanbul Convention,* EU:C:2021:198, para 1.

4. Heliskoski, op. cit. *supra* note 2.

Domestic Violence (Istanbul Convention). The EU and the Member States sought to ratify the Convention jointly as a so-called mixed agreement. After all Member States completed their respective signatures,[5] the EU signed the Istanbul Convention in 2017[6] – somewhat ironically, as Sacha Prechal remarked, the year in which the #MeToo movement ignited.[7][8] To date, seven Member States have still not ratified the Convention: Bulgaria, Czech Republic, Hungary, Latvia, Lithuania, Poland, and Slovakia. Some of these Member States have signalled that they no longer intend to ratify the Convention or that they wish to withdraw from the Convention.[9] In 2018, the Bulgarian Constitutional Court found that the Istanbul Convention violates the Bulgarian Constitution.[10] In 2019 and 2020, respectively, the Slovakian and Hungarian Parliaments called on their governments to terminate the ratification process.[11] Most recently, in 2021, the Polish Parliament proposed its country's withdrawal from the Convention.[12]

The increasingly conflicting views of the Member States have so far prevented the EU from acceding to the Istanbul Convention in its own right. The Commission's proposal for a Council decision on the conclusion of the Istanbul Convention has been on the table since 2016.[13] Since then, the European Parliament (EP) has repeatedly called on the Council to conclude

5. A chart of signatures and ratifications of the Istanbul Convention is available at <www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=210> (all websites last visited 5 July 2022).

6. Council Decision (EU) 2017/865 of 11 May 2017, O.J. 2017, L 131/11, and Council Decision 2017/866 of 11 May 2017, O.J. 2017, L 131/13.

7. Prechal, "The European Union's accession to the Istanbul Convention" in Lenaerts, Bonichot, Kanninen, Naômé and Pohjankoski (Eds.), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Alan Rosas* (Hart Publishing, 2019), p. 279.

8. See further Chamon, "Negotiation, ratification and implementation of the CRPD and its status in the EU legal order" in Ferri and Broderick (Eds.), *Research Handbook on EU Disability Law* (Edward Elgar, 2020), p. 52.

9. See also Chamon, "Op-Ed: The Court's Opinion in Avis 1/19 regarding the Istanbul Convention", *EU Law Live* (2021), available at <eulawlive.com/op-ed-the-courts-opinion-in-avis-1-19-regarding-the-istanbul-convention-by-merijn-chamon/>.

10. For a concise analysis in English see Vassileva, "Bulgaria's constitutional troubles with the Istanbul Convention", *Verfassungsblog* (2018), available at <verfassungsblog.de/bulgarias-constitutional-troubles-with-the-istanbul-convention/>.

11. See <www.nrsr.sk/web/Default.aspx?sid=schodze/uznesenie&MasterID=11415> and <www.parlament.hu/irom41/10393/10393.pdf>.

12. See <www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=915>.

13. COM(2016)0109 final, 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, 2016/062 (NLE).

the Convention.[14] Due to the lack of a common accord between the Member States, the Commission's proposal has, however, remained "stuck" in the Council. Against this background, the EP requested Opinion 1/19, asking the Court to clarify the correct choice of legal basis and procedure for the EU's accession to the Istanbul Convention.[15] The EP further enquired whether the EU could conclude the Convention in the absence of a common accord between the Member States in the Council.

Opinion 1/19 addressed matters of fundamental importance for the theoretical conception and practical management of the EU's and the Member States' co-existence in international treaty systems. It questioned the extent to which the EU can act independently from its Member States when concluding an international agreement that binds them both and, by inference, the extent to which the EU's external relations capacity remains subject to the will of individual Member States. These questions are so central to the very idea of mixity that it is indeed surprising that they have never been addressed before.[16] Politically, Opinion 1/19 was about much more than mixity. The fact that an international agreement aiming at combating violence against women and children continues to cause conflict between EU institutions and between Member States illustrates that the EU's internal crisis of values has spilled over to the external sphere. Yet, the legal questions brought before the Court naturally had to be examined "in a detailed and dispassionate manner".[17]

Opinion 1/19 was a landmark decision in EU external relations law.[18] It answered a series of novel legal questions about EU treaty-making power and procedure. In addition, it suggested some practical solutions for overcoming the non-ratification of mixed agreements. Opinion 1/19 may therefore become an important precedent for other international agreements stuck in the Council, such as the Council of Europe Convention on the Manipulation of Sports Competitions (Macolin Convention), or the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention).

14. See European Parliament Resolutions of 25 Feb. 2014 (P7_TA(2014)0126); 9 June 2015 (P8_TA(2015)0218); and 12 Sept. 2017 (P8_TA(2017)0329).

15. See European Parliament Resolution of 12 Dec. 2017; and Opinion 1/19: Request for an opinion submitted by the European Parliament pursuant to Art. 218(11) TFEU, O.J. 2019, C 413/19.

16. Koutrakos and Soņeca, "The future of the Istanbul Convention before the CJEU" in Levrat, Kaspiarovich, Kaddous and Wessel (Eds.), *The EU and its Member States' Joint Participation in International Agreements* (Hart, 2022), p. 204; Koutrakos, "Confronting the complexities of mixed agreements – Opinion 1/19 on the Istanbul Convention", 47 EL Rev. (2022), 247.

17. Opinion of A.G. Hogan, para 2.

18. On landmark cases in EU external relations law see Butler and Wessel (Eds.), *EU External Relations Law: The Cases in Context* (Hart Publishing, 2022).

2. Setting the scene

Opinion 1/19 is a difficult read for anyone not specialized in EU external relations law, as it concerns several loosely connected technical legal questions. Before diving into legal details, the present section provides some context and explanations of the main legal issues and questions at stake.

2.1. *The Istanbul Convention*

Opinion 1/19 is about the EU's accession to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, which opened for signature on 11 May 2011 in Istanbul, Turkey (Istanbul Convention), and entered into force on 1 August 2014. As the first legally binding and gender-specific treaty on violence against women, the Istanbul Convention is naturally of high political significance.[19] In accordance with its Article 1, the Convention aims to:

a) protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;
a) contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;
b) design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;
c) promote international co-operation with a view to eliminating violence against women and domestic violence;
d) provide support and assistance to organizations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.

To achieve its purpose, the Istanbul Convention provides a range of substantive and procedural measures that are grouped around four key pillars: prevention (Chapter III), protection (Chapters IV and VI), prosecution (Chapter V and VI), and co-ordinating policies (Chapter VIII).[20] It includes rules on data protection, education, civil remedies, substantive criminal law,

19. Prechal, op. cit. *supra* note 7.

20. As illustrated by the Council of Europe's Infographic, available at <rm.coe.int/coe-istanbulconvention-infografic-en-r04-v01/1680a06d0d>. See also Grans, "The Istanbul Convention and the positive obligation to prevent violence", 18 H.R.L. Rev. (2018), 133.

and the prosecution of various forms of violence, as well as a separate chapter on migration and asylum (Chapter VII). Moreover, Chapter XI of the Convention establishes a monitoring mechanism for the implementation of the Convention, which may result in recommendations to the individual parties by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). Pursuant to Article 74 of the Convention, the Committee of Ministers of the Council of Europe may also establish dispute-settlement procedures if the parties so agree.

The EU did not participate in the negotiations of the Istanbul Convention and could, consequently, not influence the text of the Convention.[21] Indeed, the Istanbul Convention, as per its text, does not account for the special status of the EU as a regional economic integration organization (REIO) with limited external power and capacity.[22] Nonetheless, pursuant to Article 75(1) Istanbul Convention, the EU may accede to the Convention. So far, the EU has only acceded to one international human rights treaty in its own right, namely the United Nations Convention on the Rights of People with a Disability (UNCRPD).[23] It remains to be seen whether the Istanbul Convention will become the second one. As will be explained below, Opinion 1/19 paved a legal way for the EU's independent accession to the Convention.[24]

2.2. *The special case of mandatory mixity*

The EU and the Member States resort to mixity when none of them can or wants to conclude an international agreement alone. There are two main types

21. According to the Council, the EU did not participate in the negotiations of the Istanbul Convention because "the Commission *never* submitted to the Council a recommendation whereby the Council would decide to open negotiations and nominate the Commission to negotiate on behalf of the Union and thus allow the EU to participate – as the case may be, through the intermediary of EU Member States – in the negotiations of the Istanbul Convention on behalf of the Union". See *Written Observations lodged by the Council of the European Union pursuant to Article 196(3) of the Rules of Procedure of the Court of Justice* (version with clerical errors corrected), 18 Dec. 2019, on file with author, para 17 (original emphasis).

22. See, by contrast, Art. 44 UNCRPD which, in its definition of a REIO, mentions its conferred – and thus limited – competences.

23. See further Chamon, "Negotiation, ratification and implementation of the CRPD and its status in the EU legal order" in Ferri and Broderick (Eds.), *Research Handbook on EU Disability Law* (Edward Elgar, 2020), p. 52.

24. Kübek, "Opinion 1/19, the practice of 'common accord', and incomplete mixity: Paving a way for concluding the Istanbul Convention", *EU Law Live* (2021), available at <eulawlive.com/analysis-opinion-1-19-the-practice-of-common-accord-and-incomplete-mixity-paving-a-way-for-concluding-the-istanbul-convention-by-gesa-kubek/>.

of mixed agreements:[25] facultative mixed agreements and mandatory mixed agreements. Facultative mixed agreements fall within the realm of shared competence. The ECJ has confirmed that in areas of shared competence, mixity is an option, but not a legal requirement. Ultimately, the choice for or against mixity is at the political discretion of the Council. If the Council decides to exercise the shared competence, the EU concludes the agreement alone (so-called EU-only agreement). If the Council decides not to exercise (part of the) shared competence, the Member States may exercise the competence and consequently become parties to the mixed agreement.[26] Conversely, mandatory mixed agreements fall within the exclusive competence of the Union and within the exclusive competence of the Member States. Here, mixity is required as a matter of law because the EU does not possess the requisite power to conclude the agreement alone. If the EU were to conclude a mandatory mixed agreement alone, it would breach the principles of conferral and sincere cooperation and would risk acting ultra vires under international law.[27]

Mixed agreements, irrespective of their type, are usually concluded by the EU and all of its Member States jointly. In very few instances, they have been concluded by the EU and only some of its Member States as so-called incomplete mixed agreements. In the literature, incomplete mixity has been discussed as one solution for the non-ratification of mixed agreements by one or more Member States.[28]

The Istanbul Convention is a rare example of a mandatory mixed agreement. Indeed, in the course of the Opinion 1/19 proceedings, it remained largely uncontested that "the Member States remain competent for substantial parts of the Convention, and particularly for most of the provisions on substantive criminal law and other provisions in Chapter V".[29] There was likewise little doubt that the EU had obtained exclusive competence for parts of the Convention, such as for matters relating to asylum and non-refoulement

25. See further Heliskoski and Kübek, "Typology of mixed agreements revisited" in Levrat et al., op. cit. *supra* note 16, pp. 27 et seq.

26. Case C-600/14, *COTIF I*, paras. 66-68; see further Kübek and Van Damme, "Facultative mixity and the European Union's trade and investment agreements" in Chamon and Govaere, op. cit. *supra* note 2, p. 137.

27. See also Heliskoski and Kübek, op. cit. *supra* note 25.

28. See further Van der Loo and Wessel, "The non-ratification of mixed agreements, legal consequences and solutions", 54 CML Rev. (2017), 735; and Kübek, "The non-ratification scenario: Legal and practical responses to mixed treaty rejection by Member States", 23 EFA Rev. (2018), 21. For a critical view on incomplete mixity see Rosas, "Mixity past, present and future: Some observations" in Chamon and Govaere, op. cit. *supra* note 2, p. 17.

29. COM(2016)0111 final, Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, 2016/063 (NLE).

and judicial cooperation in criminal matters.[30] It was thus clear at the outset that neither the EU nor the Member States have the competence to accede to the entire Istanbul Convention in their own right.

2.3. *The request for Opinion 1/19*

In its request for Opinion 1/19, the EP raised three main legal questions.[31] Although these questions broadly related to the EU's accession to the Istanbul Convention, they did not follow a common thread. Instead, they concerned separate and technical points in law, which is why the Opinion is such a complex read.

The EP's first question concerned the correct choice of legal basis for the Council decision on the conclusion of the Istanbul Convention on behalf of the EU (hereafter: conclusion decision). The Commission had proposed to sign and conclude the Istanbul Convention on the basis of Article 82(2) TFEU (judicial cooperation in criminal matters) and Article 84 TFEU (crime prevention).[32] For its decisions on the signature of the Istanbul Convention on behalf of the EU (hereafter: signature decisions), the Council had however amended the Commission's proposal and used Article 78(2) TFEU (asylum), Article 82(2) TFEU (judicial cooperation in criminal matters) and Article 83(1) TFEU (cross-border crimes) as legal bases instead.[33] Essentially, this inter-institutional conflict was not about the choice of legal basis, but about the scope of the EU's accession to the Istanbul Convention. While the Commission and the EP favoured a "broad accession", i.e. for the EU to exercise its exclusive and shared competence to the fullest extent, the Council favoured a more "narrow accession", i.e. for the EU to only exercise its exclusive competence. The latter option would leave more scope for the Member States to accede to the Convention in their own right. Against this background, the EP asked the Court whether Articles 82(2) and 84 TFEU constitute appropriate legal bases for the conclusion decision, or whether that Decision must be based on Articles 78(2), 82(2) and 83(1) TFEU.

The EP further enquired whether it would be "necessary or possible" to split the decisions on the signature and conclusion of the Istanbul Convention

30. For a more detailed competence analysis, see Prechal, op. cit. *supra* note 7, p. 285.

31. Request for Opinion 1/19, cited *supra* note 15. To be more precise, the EP raised two questions, but the first question contained two issues which the Court dealt with separately. For the sake of clarity, the present annotation therefore speaks of three questions. For an analysis of the request and the broader issues at stake see also Koutrakos and Soņeca, op. cit. *supra* note 16.

32. Proposal for a Council Decision, cited *supra* note 29; Proposal for a Council Decision cited *supra* note 13.

33. Signature decisions, cited *supra* note 6.

into two separate legal acts.[34] The Council had issued two signature decisions in order to allow Ireland to opt out, in accordance with Protocol 21 TEU, from the EU's conclusion of the Convention insofar as it concerned asylum and non-refoulement.[35] Ireland had neither participated in internal EU decisions on asylum and non-refoulement, nor indicated its wish to be bound externally in that field through the EU. The EP wanted to know whether Protocol 21 confers the right for Ireland to opt out of only part of the conclusion decision, and whether EU procedural law allows or requires the splitting of a single decision into two separate decisions.

Lastly, the EP asked the Court to clarify whether the conclusion of the Istanbul Convention by the EU is "compatible with the Treaties in the absence of mutual agreement between all the Member States concerning their consent to be bound by that convention".[36] Notably, as explained above, the Istanbul Convention qualifies as a mandatory mixed agreement, as the EU does not possess the power to accede to all parts of the Convention in its own right. The Court was thus asked to determine whether EU law permits the EU to accede only to parts of an international agreement, even if some of the Member States do not assume the legal obligations for the remaining parts of that agreement.

3. Admissibility

The present annotation will not only examine the Advocate General's and the Court's respective Opinions, but also the arguments of the parties. That is because Opinion 1/19 itself – in stark contrast to previous Opinions of the Court – devoted significant space to the arguments of the parties.[37] As the parties' written observations are not automatically made public, this is a very welcome development, allowing the reader to obtain a more nuanced picture of the proceedings. Opinion 1/19 revealed a high degree of divergence between the parties' legal views. The divergence between the intervening Member States'[38] positions is particularly striking, and illustrates, aside from controversy about the specific legal issues at stake, a broader disagreement about the scope and capacity of the EU as an external actor.

34. Request for Opinion 1/19, cited *supra* note 15.

35. Signature decisions, cited *supra* note 6.

36. Request for Opinion 1/19, cited *supra* note 15.

37. More than one-third of Opinion 1/19 concerned the parties' observations (129 out of 338 paras.). Prior post-Lisbon Opinions devoted at most 15% to the parties' arguments (c.f. Opinion 2/13 (35 out of 258 paras.); Opinion 1/15 (22 out of 232 paras.); Opinion 2/15 (11 out of 305 paras.) and Opinion 1/17 (34 out of 245 paras.)).

38. Notably, some of the larger and/or usually active Member States, such as Germany, Italy, or the Netherlands, refrained from intervening in Opinion 1/19.

3.1. *The parties' observations*

The broad divide between the legal and political views of the EU institutions and the Member States already surfaced during the debate on the admissibility of the request for Opinion 1/19.

The Council disputed the admissibility of every question brought by the EP, and thus the request for Opinion 1/19 as a whole. According to the Council, the EP's first and second question were out of time. In its first question, the EP essentially used the legal bases of the signature decision (Arts. 78(2), 82(2) and 83(1) TFEU) as a baseline, questioning whether the conclusion decision can be validly based on these Treaty provisions. The EP's second question expressly referred to splitting the signature *and* conclusion decisions. The signature decision, however, had been final for over two years when the proceedings started. The Council maintained that a signature decision that has become final can neither serve as a baseline[39] nor as the subject of an Opinion procedure.[40] In its view, the Opinion procedure could not be used to circumvent the time limits for an annulment action under Article 263 TFEU. Conversely, the Commission and Finland considered the EP's first and second questions fully admissible. The first question would only concern the correct choice of legal bases for the conclusion decision and was therefore not outdated. As for the second question, they argued that the Court had the power to examine the necessity for splitting the signature and conclusion decisions in light of Protocol 21 TEU, because its reply could have important legal ramifications (and thus forestall serious legal problems) with regard to the application of the Istanbul Convention to and in Ireland.

Lastly, the Council and some Member States claimed that the EP's third question was "purely hypothetical" because it was based "on the assumption that the Council will act in a certain manner".[41] While the Council accepted that the Istanbul Convention qualified as an agreement envisaged within the meaning of Article 218(11) TFEU, it contested that neither the working procedures within the Council nor the time schedule of the decision-making process could be subject to an Opinion procedure.[42] On the other hand, the Commission and Finland argued that the practice of common accord can be subject to the Opinion procedure, because the conclusion of the Istanbul Convention by the EU "without the 'common accord' of the Member States

39. Written Observations, cited *supra* note 21, para 46. See also Opinion of A.G. Hogan, para 27.

40. Written Observations, cited *supra* note 21, para 45.

41. Ibid., paras. 50 and 51.

42. Ibid., para 60.

would be liable to be invalidated if such an accord were required by the Treaties".[43]

3.2. *Advocate General Hogan's Opinion*

The Advocate General first assessed the Council's claim that the first two questions put forward by Parliament were untimely and thus inadmissible. In doing so, he applied the logic of *TWD Textilwerke Deggendorf* by analogy.[44] In *TWD*, the Court found that the applicant could not plead that the EU measure at issue was unlawful before a national court because it had not brought proceedings under what is now Article 263 TFEU within the prescribed time limits. The Court further elaborated that the time limits for triggering Article 263 TFEU are intended to preserve the principle of legal certainty by preventing EU measures that have legal effects from being called into question indefinitely.[45] The Advocate General argued that this logic is "fully transposable" to the Opinion procedure.[46] He recalled that in the present case, the EP did not contest the validity of the signature decisions and that they had become final. As a result, he found that the EP's second question "should be declared inadmissible, but only in so far as it relate[d] to the decisions to sign the Istanbul Convention".[47] The Advocate General, however, considered the EP's first question fully admissible because it expressly related to the choice of legal basis for the conclusion and not the signature decision, which remained open for challenge.[48] He also considered the EP's third question admissible precisely in the way it was worded, namely "as relating to whether the decision to conclude the Istanbul Convention would be compatible with the Treaties if it were to be adopted before that convention had been concluded by all Member States".[49]

3.3. *The Court's Opinion*

The Court fully agreed with the Advocate General in terms of outcome but partially used a different reasoning. Like the Advocate General, it concluded that the EP's request was admissible except for the second question insofar as

43. Opinion 1/19, para 89.
44. Case C-188/92, *TWD Textilwerke Deggendorf,* EU:C:1994:90.
45. Ibid., paras. 16, 17 and 25.
46. Opinion of A.G. Hogan, para 40.
47. Ibid.
48. Ibid., para 42.
49. Ibid., para 58.

it concerned the decision to sign the Istanbul Convention.[50] In contrast to the Advocate General, the Court did not, however, build its reasoning on *TWD*. Rather, it assessed the rationale of the Opinion procedure and specifically its preventive purpose.[51] The Court underlined that treaty signature decisions may in principle form the subject of an Opinion procedure; but the preventive purpose of Article 218(11) TFEU could not be achieved as regards signature decisions that have already been adopted.[52] The Court thus clarified that the Opinion procedure can only be used to review the compatibility of signature decisions that have not yet become final and of future conclusion decisions with EU law.[53]

As the EP's second question also related to the decision concluding the Istanbul Convention, the Court could ultimately assess the three main substantive issues of the EP's request: the practice of common accord, the correct choice of legal basis for concluding the Istanbul Convention, and the legality of splitting the conclusion decision. The following sections will discuss these three issues in turn.

4. The practice of common accord

The Court considered it "appropriate" to examine the EP's third question first, without further explaining why.[54] As the theme of common accord is central to Opinion 1/19, one may speculate whether the Court, by changing the order of the EP's request, sought to underline the importance of the legal issues raised by the EP's third question. The present annotation follows this logic and therefore starts with a discussion on the practice of common accord[55].

50. Opinion 1/19, para 228.

51. Ibid., paras. 194 et seq. On the purpose and function of the Opinion procedure, see further Cremona, "The Opinion procedure under Article 218(11) TFEU: Reflections in the light of Opinion 1/17", 4 *Europe and the World: A law review* (2020), 1; and Butler, "Pre-ratification judicial review of international agreements to be concluded by the European Union" in Derlén and Lindholm (Eds.), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart Publishing, 2018), p. 53.

52. Opinion 1/19, para 218.

53. Notably, the failure to bring an action for annulment does not generally preclude the admissibility of a request for an Opinion procedure. See e.g. Opinion 2/00, *Cartagena Protocol*, EU:C:2001:664, para 12.

54. Opinion 1/19, para 229.

55. The practice originated under the former Art. 133(6) EC, which stipulated that the negotiations of certain trade agreements required the common accord of Member States, and that they were to be concluded jointly by the (then) Community and the Member States. The practice was subsequently expanded to all types of mixed agreements and carried on even after the Lisbon Treaty reform.

4.1. *The parties' observations*

According to the Council, "it is necessary to ensure that all the Member States concerned consent to being bound [by a mixed agreement] before proceeding to adopt . . . the Council decision pursuant to the competence of the Union".[56] The Member States are free to decide on the practicalities for expressing their individual consent. Past practice ranges from separate decisions by Government Representatives at Council meetings, or joint entries in the Council or COREPER minutes, to implicit consents.[57] If a single Member State objects to the mixed agreement in question, the file on signature and/or conclusion will not go through the Council.[58] Although the practice of common accord does not formally constitute a voting rule, it therefore de facto establishes a unanimous voting requirement, because the Member States' consent is sought *before* an action is taken in the Council.[59] For the Istanbul Convention, the Council publicly acknowledged that it considered a common accord to be *required* for the signature and the conclusion decision.[60]

The EP, the Commission, Austria, and Finland argued that the EU has the capacity to exercise its external competence independently and separately from its Member States. They asserted that the practice of common accord breaches EU law because it adds an extra step to the decision-making procedure that is not foreseen by the Treaties.[61] Although the Istanbul Convention could *de jure* be concluded by a qualified majority in the Council (Art. 218(8) TFEU, first subparagraph), the search for a common accord would de facto establish a unanimous voting requirement. The practice of common accord therefore creates a hybrid decision-making process in breach of the Court's decision in *Hybrid acts*.[62] They contended that the Istanbul Convention could be concluded in the absence of a common accord as an incomplete mixed agreement, i.e. by the EU and only some of the Member

56. Written Observations, cited *supra* note 21, para 184.

57. Ibid., para 186.

58. See also Boelaert, "Mixity versus unity: A view from the other side of the Rue de la Loi" in Chamon and Govaere, op. cit. *supra* note 2, p. 270.

59. To be precise, there is a (marginal) difference: unanimity voting allows Member States to abstain without blocking an action, whereas common accord requires agreement between all Member States. See Boelaert, ibid., p. 270) and Written Observations, cited *supra* note 21, para 185.

60. Council doc. 8594/18, p. 13. This document was also cited by the Commission in its written observation to demonstrate that the Council understands the need for a common accord as a legal necessity for the ratification of mixed agreements. See further *Observations de la Commission Européenne sur la demande l'Avis de la Court 1/19,* 23 Dec. 2019, on file with author, pp. 12–13, esp. footnotes 34 and 35.

61. Opinion 1/19, paras. 155 et seq.

62. Case C-28/12, *Commission* v. *Council* (*Hybrid acts)*, EU:C:2015:282.

States, acting strictly within their respective spheres of competence. In the Commission's view, the EU could adopt a declaration of competence that specifies the areas where the EU has no competence.[63]

Conversely, the Council and the remaining Member States argued that a common accord is legally required for the conclusion of the Istanbul Convention. Due to the Istanbul Convention's mandatory mixed character, it could only be concluded by the EU and the Member States jointly. In their view, the procedures stipulated in Article 218(6) and (8) TFEU remained unaffected because the search for a common accord precedes the adoption of a treaty conclusion decision by the Council.[64] Furthermore, the practice would not generate hybrid decisions, because the establishment of a common accord would not merge the EU's and the Member States' respective ratification acts into a single (or hybrid) legal instrument.

The Council further drew attention to the fact that the Istanbul Convention does not account for the division of competence between the EU and the Member States, for instance through an REIO clause[65] or by expressly allowing the EU to submit a declaration of competence. It further recalled that, pursuant to Articles 27 and 46 Vienna Convention on the Law of Treaties (VCLT), a party to an international treaty may not invoke internal grounds as a reason for non-compliance. As a result, the Council insisted that the EU cannot conclude the Istanbul Convention as an incomplete mixed agreement.[66] As the full implementation of the Convention could only be guaranteed, in law and in fact, with the participation of all Member States, all the Member States would have to consent to these commitments. Otherwise, the EU could face international liability for the non-implementation of the Convention by those Member States that refused to ratify the Convention in fields where they remain exclusively competent.

4.2. *Advocate General Hogan's Opinion*

Advocate General Hogan noted at the outset that the signature of an international agreement does not commit an entity to concluding that agreement, nor even to invoking its constitutional procedures for initiating the treaty conclusion process (Art. 18 VCLT).[67] In addition, he observed that EU law does not set a time limit for taking a conclusion decision, which in his view implied that the "Council may postpone its decision for as long as it

63. Opinion 1/19, para 169.
64. Ibid., paras. 164 et seq.
65. See the example of the UNCRPD, cited *supra* note 22.
66. Written Observations, cited *supra* note 21, paras. 192 et seq.
67. Opinion of A.G. Hogan, para 199.

deems necessary in order to take an informed decision".[68] In contrast to the EP, the Commission, Austria, and Finland, the Advocate General did not consider that the practice of common accord transforms the conclusion decision into a hybrid act. Like the Council, the Advocate General argued that the search for a common accord did not result in merging national and EU ratification acts into a single hybrid decision. As a result, the procedure stipulated in Article 218 TFEU would remain intact.[69] The Advocate General therefore considered the practice of common accord "fully legitimate".[70]

The Advocate General, however, did not consider that a common accord between the Member States is legally required to conclude the Istanbul Convention.[71] One may infer from that consideration that the Advocate General found the conclusion of the Istanbul Convention as an incomplete mixed agreement to be valid under EU law. Yet, the Advocate General saw "strong practical reasons" for the EU to wait for the Member States' common accord before concluding the Istanbul Convention.[72] The Advocate General reiterated the Council's concern that incomplete mixity entails a risk for the EU of incurring international liability for the non-implementation of the Istanbul Convention by a non-ratifying Member State in a field where the EU is not competent to act. In contrast to the Commission, the Advocate General argued that it is not possible, under public international law, for the EU to submit a declaration of competence. Because EU declarations of competence aim to "limit the risk of the Union's liability being incurred as a result of the non-execution of a mixed agreement by a Member State", they would essentially "exclude or modify the legal effect of certain provisions of the treaty" within the meaning of Article 2(1)(d) VCLT (reservations).[73] The Istanbul Convention, however, does not generally permit reservations.[74] It would therefore be impossible for the EU to limit the scope of its accession to the Istanbul Convention to the scope of its limited competence.

Arguably, there is a key conceptual difference between reservations and declarations of competence: reservations imply that a legal entity possesses the power to commit to all parts of a treaty, but makes a choice not to. Conversely, declarations of competence denote the limits of a legal entity's powers and hence imply that that entity cannot legally commit to all parts of that agreement even if it wanted to. The Advocate General, however, did not further elaborate on that conceptual difference. Instead, he voiced his strong

68. Ibid., para 200.
69. Ibid., para 201.
70. Ibid., para 202.
71. Ibid., para 222.
72. Ibid., para 218.
73. Ibid., para 211.
74. Art. 78(1) Istanbul Convention.

disagreement with a declaration of competence: "Any such statement would not only be irrelevant from the standpoint of international law, but, viewed from that perspective, such a statement could also be regarded as apt to mislead."[75] He ultimately concluded that it would be "exclusively for the Council to decide" whether to forge ahead with treaty conclusion with all its risks, or to await the common accord of the Member States.[76]

4.3. *The Court's Opinion*

The parties' observations and the Advocate General's Opinion raised four interconnected legal questions: Does the practice of common accord result in hybrid actions? Is incomplete mixity generally permitted under EU law? Is incomplete mixity permitted for mandatory mixed agreements such as the Istanbul Convention? And is the risk of the EU incurring international liability as a result of Member States' incomplete participation in a mixed agreement a legally relevant concern? The following sections analyse these four questions in turn. In doing so, they also examine the Court's reply to the EP's main question: Can the EU conclude the Istanbul Convention in the absence of a common accord between the Member States?

4.3.1. *Hybridity*

The Court admitted at the outset that the practice of common accord does not lead to two distinct legal acts – one adopted by the Member States, and one by the EU – being merged into a single hybrid decision, as was the case in *Hybrid acts*. Yet, the Court noted that the practice of common accord can have very similar effects to hybrid decisions. Should the initiation of a signature or conclusion decision in the Council be made contingent on prior consent amongst Member States, and therefore their unanimous agreement, an additional procedural step would be added that is not foreseen in Article 218 TFEU, possibly circumventing the explicit voting rules laid down in that provision.[77] The Court, therefore, concluded that the practice of common accord, if perceived as a *legal prerequisite*, establishes a "hybrid decision-making process" that is incompatible with the Treaties.[78] In doing so, the Court clarified that the notion of "hybridity" as set out in *Hybrid acts*[79]

75. Opinion A.G. Hogan, para 215.
76. Ibid., para 226.
77. Opinion 1/19, para 245.
78. Ibid., para 246.
79. In Case C-28/12, *Hybrid acts*, the decisive element of hybridity was the fact that EU and national acts were adopted under a single procedure (see e.g. para 52).

is not confined to the form of an act but extends to the decision-making process: EU decision-making as foreseen by the Treaties, in both process and outcome, cannot be subjected to additional elements of an intergovernmental nature. That finding is in line with the Court's established case law,[80] which unequivocally demonstrates that the procedural rules of the Treaties, and in particular Article 218 TFEU, cannot be overridden by practice.[81]

At first sight, the ECJ's conclusions seem to differ significantly from Advocate General Hogan's Opinion that the principle of common accord is "fully legitimate".[82] In the course of its reasoning, the Court however aligned its Opinion more closely with that of the Advocate General. After acknowledging that the Treaties leave the choice and time to act on a proposed signature or conclusion decision fully at the discretion of the Council, it held that nothing precludes the Council from seeking the greatest possible majority in favour of concluding a mixed agreement, "which may involve waiting for a common accord".[83] The Court thus significantly relativized its previous findings: the search for a common accord is only contrary to EU law if the Council understands it as a legal requirement for taking a signature or conclusion decision. Presumably, that conclusion will change very little in practice. The Council is only precluded from (publicly) acknowledging – as it had done for the Istanbul Convention[84] – that the absence of consent between Member States precludes it from acting on a proposed signature or conclusion decision, but not from searching for a common accord as such.[85] In a remarkably political move, the Court however reminded the EU institutions and the Member States that, in accordance with Article 11 of the Council's rules of procedure,[86] the President of the Council is required to open a vote upon the request of a Member State or the Commission, provided that a qualified majority of Member States in the Council agree.[87] In this way, the Court emphasized that the EU's accession to the Istanbul Convention is a

80. See, in addition to Case C-28/12, *Hybrid acts*, e.g. Case C-658/11, *Parliament* v. *Council*, EU:C:2014:2025; Case C-263/14, *Parliament* v. *Council*, EU:C:2016:435; Case C-687/15, *Commission* v. *Council*, EU:C:2017:803; or Case C-244/17, *Commission* v. *Council*, EU:C:2018:662.

81. See also Koutrakos, op. cit. *supra* note 16.

82. Opinion of A.G. Hogan, paras. 200–202.

83. Opinion 1/19, para 253.

84. See *supra* note 60.

85. See also Chamon, op. cit. *supra* note 9.

86. Decision 2009/937/EU adopting the Council's rules of procedure, O.J. 2009, L 325/35.

87. Opinion 1/19, para 255. See further also Verellen, "Opinion 1/19: No common accord among the Member States required for the Council to conclude a mixed agreement", *European Law Blog* (16 Dec. 2021), available at <europeanlawblog.eu/2021/12/16/opinion-1-19-no-common-accord-among-the-member-states-required-for-the-council-to-conclude-a-mixed-agreement/>.

political and not a legal choice. Provided that, in accordance with the Treaties, a qualified majority of the Member States support the EU's accession to the Istanbul Convention, it is up to those Member States, the Commission, and the European Parliament to ensure a timely adoption of a conclusion decision.

4.3.2. *The general case for incomplete mixity*

The Court underlined that the Istanbul Convention could be ratified by the EU and only some of its Member States as an incomplete mixed agreement.[88] In doing so, the Court – for the first time[89] – acknowledged the legality of the practice of incomplete mixity. In the context of (incomplete) mixity, the Court conceived the EU's and the Member States' respective ratifications of the same mixed agreement as strictly separate processes and instruments. When concluding a mixed agreement, the EU and the Member States may only act within their own sphere of competence, without encroaching on the competence of one another.[90] The fact that the Court in principle acknowledged the practice of incomplete mixity is an important step in finding legal solutions to the non-ratification scenario. The possibility for the EU to go ahead and conclude a mixed agreement with only some of its Member States implies that a few non-ratifying Member States can no longer hold the EU hostage by incapacitating external action supported by a qualified majority of Member States in the Council.

The Court paid little regard to the Council's and the Advocate General's concerns about the negative consequences of incomplete mixity. It refrained from engaging with any of the arguments brought by the Advocate General on the basis of public international law. Instead, it advanced three EU-internal and predominantly political arguments. First, the Court held that:

> "by the choice of legal bases for the decision concluding the international agreement, the European Union . . . 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".[91]

88. Opinion 1/19, para 260.

89. In the pre-Lisbon era, the Court facilitated incomplete mixity in specific circumstances, but it did not acknowledge the general conformity of the practice with (then) Community law outside these specific circumstances. See e.g. Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, EU:C:1977:63, para 7. See further Heliskoski and Kübek, op. cit. *supra* note 25, p. 37.

90. Opinion 1/19, para 259.

91. Ibid., para 262.

Second, it considered that "it appears" that the EU can submit a declaration of competence.[92] Third, the Court stressed that the Council of Europe "is aware" of the EU's limited competence and that there is hence "no reason to assume that Article 75 [Istanbul Convention …] envisages an accession of the European Union exceeding its competences".[93]

This reasoning is far from convincing. First, the view that the legal bases of conclusion decisions, i.e. EU internal legal acts, can be invoked by the EU *vis-à-vis* third parties as a reason for not implementing part of an international agreement can arguably not be squared with Articles 27 and 46 VCLT. Second, the Court refrained from engaging with the Advocate General's claim that EU declarations of competence and reservations are practically the same thing under public international law. It accepted at face value the Commission's claim that the EU may submit declarations of competence, without explaining why these declarations ought to have legal validity under the terms of the Istanbul Convention. Third, the Council of Europe's political "awareness" of the EU's limited external competence clearly does not constitute a legal argument. It is true that the Council of Europe previously accepted EU declarations relating to either competence or disconnection clauses as instruments made in connection with the conclusion of a treaty, pursuant to Article 31(2)(b) VCLT.[94] Yet, the Court did not engage with past practice, and the proceedings did not clarify whether a similar solution is legally possible for the EU's ratification of the Istanbul Convention.

4.3.3. *The specific case against incomplete mandatory mixity*

The fact that the Istanbul Convention qualifies as a mandatory mixed agreement elevates concerns about the potential international liability of the EU. Large parts of Chapter V of the Istanbul Convention on substantive criminal law fall completely outside the scope of the EU's competence; the EU could thus not exercise that competence when acceding to the Convention. Indeed, the Court underlined in Opinion 1/19 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."[95] In the EU law narrative, incomplete mixity thus leaves a "gap" in the assumption of international responsibility for the parts of the Convention that fall within the exclusive competence of the Member States, such as large parts of Chapter

92. Ibid., para 263.

93. Ibid., para 261.

94. See esp. Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, paras. 279 and 280.

95. Opinion 1/19, para 259.

V. In an international law narrative, however, the EU assumes, in principle, responsibility for the entire Convention upon accession. In the absence of a valid declaration of competence, the EU could thus be held liable under international law for the non-implementation of the Convention by a non-ratifying Member State in a field that falls within exclusive national competence.

In such a scenario, the EU would have no internal competence to rectify the breach of international law. In fields where the EU has no competence, it cannot legislate. As such, it cannot adopt common internal rules that ensure compliance with the Convention. It can also not adopt a legislative act that divides liability internally between the EU and the Member States[96] because such an act could not govern areas in which the Member States remain exclusively competent. Any other interpretation would imply that the EU acts ultra vires under EU law (Art. 5(2) TEU) by practically forcing the Member States to implement an international agreement in fields that fall within exclusive national competence. The same reasoning applies to invoking the duty of sincere cooperation. While it is true that that duty applies irrespective of the division of competences, it cannot be invoked as a tool to remedy internally external EU ultra vires action. Indeed, as Koutrakos argues, extending the interpretation of the principle of sincere cooperation to the ratification of an international agreement in fields where the Member States are exclusively competent would interfere with their fundamental rights as sovereign subjects of international law.[97]

The situation would be different if the Istanbul Convention qualified as a facultative mixed agreement. In such a scenario, the Member States in the Council could simply agree to exercise shared competence at the EU level and conclude the Convention as an EU-only agreement. If the Council nonetheless decided to conclude the Convention as a mixed agreement, it could harmonize EU law in hindsight, thereby binding the non-ratifying Member States indirectly to the terms of the Convention via common EU rules.[98] Lastly, the duty of sincere cooperation might play a role in the facultative scenario. In light of the case law on the "duty to remain silent",[99] one could at least think of a duty for the Member States to refrain from exercising their retained shared

96. See, by comparison, Regulation (EU) 912/2014, establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, O.J. 2014, L 257/121.

97. Koutrakos, op. cit. *supra* note 16, 263.

98. Presuming that the Council could vote by a QMV. That is likely in cases where the agreement itself can be adopted by a QMV, as is the case for the Istanbul Convention.

99. Delgado Castelleiro and Larik, "The duty to remain silent: Limitless loyalty in EU external relations?", 36 EL Rev. (2011), 524.

competence in such a way as to impede the EU's objectives, including the objective to strictly observe international law (Art. 3(5) TEU).

Whether the Istanbul Convention qualifies as a mandatory or a facultative incomplete mixed agreement thus makes a decisive difference when considering the EU's potential international liability. For incomplete facultative mixed agreements, the EU has sufficient internal instruments to address the risk of international liability. Conversely, the EU lacks the power to do so in case of incomplete mandatory mixity. The Court, however, remained silent on the difference between mandatory and facultative mixity, and the fact that incomplete mandatory mixity could cause more serious problems than incomplete facultative mixity. Instead, it treated the Istanbul Convention *as if it were* a facultative mixed agreement and embraced incomplete mixity as a solution to the non-ratification dilemma.

In practice, it is possible for the EU or a Member State to be held liable for the non-implementation of the Istanbul Convention. As explained above,[100] the Convention provides for a monitoring mechanism under the auspices of the GREVIO. Dispute settlement is optional and requires the consent of the parties concerned. The consequences of the non-implementation of the Istanbul Convention would thus likely be reputational and not financial. That difference, however, was not decisive in Opinion 1/19. The Court's general embrace of incomplete mixity implies that the technique can be used for any type of mixed agreement (mandatory or facultative) and irrespective of the type of dispute settlement mechanism (soft or sanctions-based mechanism). It remains at the discretion of the EU institutions to balance the costs and benefits of incomplete mixity as a solution to the non-ratification dilemma.

4.3.4. *Compliance with international law and the Opinion procedure*

The ECJ ultimately dismissed the concerns about international liability on procedural grounds, finding that the Opinion procedure cannot be used to raise concerns about the "potential liability which the European Union might incur at the international level".[101] The Court stressed that Article 218(11) TFEU, as per its wording, concerns the compatibility of an international agreement with EU law, and not vice versa. As was observed by Chamon, that conclusion is puzzling on several grounds.[102] First, the Court appears to understand questions about the EU's compliance with international law as

100. See *supra* section 2.1.
101. Opinion 1/19, para 272.
102. Chamon, op. cit. *supra* note 9.

purely "external" to the EU's own legal order, thereby disregarding the fact that the Treaties themselves oblige the EU to strictly observe international law (Art. 3(5) TEU) whenever it "decides to exercise its powers".[103] Second, the Court's conclusions are inconsistent with prior case law: in *Antarctic MPAs*, the Court found that international law may preclude the EU from exercising its competence without the Member States in the context of a mixed agreement.[104] It is almost paradoxical that compliance with international law can be invoked as a ground for challenging the mixed nature of an EU external act under the annulment procedure (*Antarctic MPAs)*, but not be used as a ground for reviewing the validity of a planned EU external act under the Opinion procedure, as here. Third, the Court's conclusions appear counterintuitive to the express purpose of the Opinion procedure, which is to "forestall serious difficulties" and "adverse consequences for all interested parties".[105] The Opinion procedure may certainly not be used for purely hypothetical questions. But when the EU concludes an incomplete (mandatory) mixed agreement, questions about international liability are "pre-ordained by the way in which the EU accedes to [that] agreement".[106] A possible finding of an international body to the effect that the EU is liable for a matter that falls within the Member States' exclusive competence would inevitably cause serious difficulties, both internationally and internally *vis-à-vis* the Member States, that could have been forestalled at the outset.

5. The correct choice of legal basis

The Court subsequently turned to the first question raised by the EP, on the correct choice of legal basis for concluding the Istanbul Convention. As explained above, the question originated from a simmering inter-institutional dispute between the EP and the Commission, on the one hand, and the Council, on the other hand, about the scope of the EU's accession to the Istanbul Convention ("narrow" vs. "broad" accession). Methodologically, the request for Opinion 1/19 raised more general concerns about determining the correct legal basis for a "partial" accession of the EU to mixed agreements. The present section will explain the Court's choice of legal bases and the broader legal and practical relevance of its answer.

103. See esp. Joined Cases C-402 & 415/05 P, *Kadi*, EU:C:2008:461, para 291.
104. Joined Cases C-626/15 & 659/16, *Antarctic MPAs*.
105. Opinion 1/75, *Local Cost Standard,* EU:C:1975:145, p. 1360.
106. Chamon, op. cit. *supra* note 9.

5.1. *The parties' observations*

The Council recalled at the outset that in accordance with the ECJ's case law, the choice to exercise a shared external competence remains largely within the political discretion of the Council.[107] In contrast to the situation of the UNCRPD, where the Council decided to exercise EU exclusive and shared competence, there was insufficient support in the Council for a "broad accession" of the EU to the Istanbul Convention. Therefore, the Council decided to confine the scope of the signature decisions to the realm of exclusive EU competence alone, leaving out shared competence ("narrow accession"). The written observations of the Council contained a meticulous analysis of the scope of the EU's (exclusive) competence regarding the Istanbul Convention.[108] According to that analysis, only two provisions of the Istanbul Convention were fully covered by the EU's exclusive competence: Articles 60 and 61 on asylum and non-refoulement. As a result, the Council considered that Article 78(2) TFEU was one of the legal bases required for the conclusion decision. The Council further claimed that some provisions of Chapters IV–VI of the Convention fell within the realm of EU exclusive competence, but only with regard to certain categories of victims covered by EU secondary law (children and trafficking in human beings).[109] Accordingly, the conclusion decision would further have to be based on Articles 81(1) and 82(2) TFEU (judicial cooperation in civil and criminal matters).

A closer look at the Council's submissions reveals that the scope envisaged by its "narrow accession" comprises less than 20 percent of the Istanbul Convention.[110] Against that background, Finland doubted whether "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".[111] Finland thus proposed a "broad accession" of the EU to the Istanbul Convention. The Commission and the EP contended that such a "broad accession" would in fact be needed to ensure that the EU is not only

107. Case C-600/14, *COTIF I*, paras. 66–68. See also Joined Cases C-626/15 & 659/16, *Antarctica MPAs*, para 126.

108. Written Observations, cited *supra* note 21, paras. 84 et seq.

109. On the basis of Art. 3(2) TFEU, read in conjunction with Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children, of 13 Dec. 2011, O.J. 2011, L 335, and Directive 2011/36/EU preventing and combating trafficking in human beings, of 5 April 2011, O.J. 2011, L 101/1.

110. The Council's position was difficult to quantify because the Council considered that the EU's and the Member States' exclusive competence for some provisions of Chapters IV–VI were inextricably linked. For the sake of simplicity, the calculation above attributed 50% of the "inextricably linked provisions" to the EU, and 50% to the Member States.

111. Opinion 1/19, para 99.

bound by the protective elements, but also by the preventive elements of the Istanbul Convention.[112] In their view, Article 84 TFEU (crime prevention) would be required as a substantive legal basis of the conclusion decision, in addition to Article 82(2) TFEU (judicial cooperation in criminal matters). By contrast, the EP and the Commission argued that Article 78(2) TFEU (asylum) and Article 81(1) TFEU (judicial cooperation in civil matters) would be merely ancillary to the objective of crime prevention, and therefore not needed as legal bases for the conclusion decision.

The Commission further contested the limited scope of the EU's exclusive competence as indicated by the Council. In its view, the EU's exclusive powers would encompass Chapters I–IV and VI, as well as the procedural obligations of Chapter VII of the Istanbul Convention.[113] In the Commission's view, the EU would thus be empowered to accede to large parts of the Convention as a matter of law and not by political choice.

5.2. *Advocate General Hogan's Opinion*

Before answering the EP's question, the Advocate General advanced a complex methodological analysis of the Court's legal basis test in the context of mixed agreements. He recalled that from an EU law perspective, mixity implies that the EU and the Member States accede to a mixed agreement in parallel: the EU accedes only to the parts of the agreement that fall within its competence, while the Member States accede to the parts of the agreement that fall within their competence.[114] As a result, the Advocate General argued that the legal basis test works differently for mixed agreements than for agreements that the EU concludes alone. For EU-only agreements, the choice of legal basis is determined on the basis of the objective and content of the *entire* agreement. Conversely, for mixed agreements, the legal basis of the signature and conclusion decisions relates only to the *part of the mixed agreement* the EU commits to.[115] The idea that for mixed agreements the "agreement envisaged" by the EU within the meaning of Article 218 TFEU does not correspond to the entire agreement is novel and will be further discussed in the next section.

For the legal basis test ("centre of gravity test"), the "partial" conclusion of a mixed agreement by the EU implies that the main objective and purpose ("centre of gravity") of the EU conclusion decision of a mixed agreement may

112. *Observations de la Commission* cited *supra* note 60, para 69.

113. The Commission here relied on a variety of different EU directives and regulations. See further Opinion 1/19, paras. 101–107 and, in more detail *Observations de la Commission* cited *supra* note 60, section 5.1.2, paras. 41 et seq.

114. Opinion of A.G. Hogan, paras. 81–82.

115. Ibid., paras. 83–85.

be different from the "centre of gravity" of that agreement in its entirety.[116] Indeed, the Advocate General observed that if the EU were to conclude the Istanbul Convention alone, the legal basis of the EU conclusion decision would simply be Article 3(3) TFEU in conjunction with Article 19 TEU, which enable the EU to "take appropriate action to combat discrimination based on sex".[117] The Advocate General, however, underlined that an "EU-only" conclusion would not be possible for the Istanbul Convention because "a significant number of obligations under that convention will fall within the competence of the Member States".[118] He therefore concluded that 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 within the EU's competence. That led the Advocate General to a tricky methodological problem. The Court previously held that the scope of the EU's accession ("narrow" or "broad") largely remains at the political discretion of the Council.[119] Yet, the Opinion procedure naturally precedes the Council's conclusion decision. At the point of time of the Opinion 1/19 proceedings, the Council had thus not finally determined the scope of the EU's accession to the Convention ("narrow" or "broad"). How can the Court then determine the correct choice of legal basis for concluding the Istanbul Convention without knowing which parts of the treaty the EU wants to commit to?[120]

The Advocate General circumvented that problem by presuming, as the Council indicated in its submissions, that the EU will only exercise its exclusive competence ("narrow accession").[121] He then proceeded to analyse: i) which fields of the Istanbul Convention fall within exclusive EU competence; ii) which of these provisions are ancillary to the main purpose of the "EU exclusive part" of the Convention; and iii) which legal bases in EU law correspond to the exclusive non-incidental parts of the Istanbul Convention. On that basis, the Advocate General identified Article 78(2) (asylum), Article 82(2) (judicial cooperation in criminal matters), Article 84 (crime prevention) and Article 336 (conditions of employment of EU staff) TFEU as correct legal bases for the EU conclusion decision of the Istanbul Convention.[122] Notably, Article 336 TFEU was not suggested as an applicable legal basis by either one of the parties. The Advocate General, however, considered Article 336 TFEU relevant because some of the provisions of the Istanbul Convention that fall within the exclusive competence of the Member

116. Ibid., paras. 83–84.
117. Ibid., para 129.
118. Ibid., para 206.
119. Case C-600/14, *COTIF I*.
120. Opinion of A.G. Hogan, paras. 85–89.
121. Ibid., para 91.
122. Ibid., paras. 152, 159, 162, 163.

States will simultaneously concern EU staff. Considering the narrow scope of the EU's accession to the Convention, he found the way in which the EU treats its own staff to "be comparatively just as important as the objectives and components covered by Articles 78(2), 82(2) and 84 TFEU".[123]

5.3. *The Court's Opinion*

The parties' and the Advocate General's legal views showed that the EP's second question, which related to the outcome of the legal basis test, can only be answered by first clarifying the methodology for choosing the correct legal basis in the context of mixity.

5.3.1. *Methodology*

Like the Advocate General, the ECJ first considered the methodology for determining the correct choice of legal basis for mixed agreements. It confirmed Advocate General Hogan's legal view that the "agreement envisaged" by the EU within the meaning of Article 218(11) TFEU does not encompass the Istanbul Convention in its entirety, but only the parts for which the EU exercises competence.[124] At first sight, the idea that an "agreement envisaged" does not correspond to the entire agreement may appear odd. But in an EU-internal narrative, it concurs with the logic of mixity. When concluding a mixed agreement, the EU can only adhere to the parts of the agreement that fall within a competence exercised by the EU; the Member States conclude the remaining parts of the agreement. Any other logic would contradict the principles of conferral (preventing the EU from acting in the realm of Member State competence) and exclusivity/pre-emption (preventing the Member States from acting in the realm of EU exclusive and exercised shared competence).

By accepting the legal view that the EU only adheres to part of a mixed agreement, the Court was confronted with the same methodological conundrum as Advocate General Hogan – because the Opinion procedure predates the Council decision on treaty conclusion, the scope of the "envisaged agreement" was unclear at the time of the Opinion 1/19 proceedings. How can the choice of legal basis be determined "on the basis of *objective* factors amenable to judicial review"[125] *before* the Council has exercised its discretion and definitely demarcated the scope of the "agreement envisaged" by the EU?

123. Ibid., paras. 163–164.

124. Opinion 1/19, para 278.

125. See e.g. Case C-244/17, *Commission* v. *Council (Agreement with Kazakhstan)*, para 36 (emphasis added).

The Court approached that problem differently from the Advocate General. Instead of confining its legal basis test to the scope of the EU's exclusive competence ("narrow accession"), the Court used the substantive legal bases of the signature decisions as a baseline for determining the scope of the "agreement envisaged".[126] That approach is surprising, as the Court had earlier noted that a treaty's signature and conclusion decisions constitute "*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".[127] Apparently, that is ultimately not the case, as the content of the signature decision may predetermine the scope of the act concluding the agreement.[128] Whether the Court's approach results in an objective legal basis test is also doubtful. As the Court refrained from subjecting the Council's discretion over the scope of the EU's ratification of a mixed agreement to any legal limits, for example by requiring at least some overlap between the "centre of gravity" of the entire agreement and the "centre of gravity" of the "agreement envisaged" by the EU, it cannot evaluate the Council's political choices in light of objective legal factors.

Opinion 1/19 may be viewed as a missed opportunity to limit further the Council's political discretion over the exercise of shared external competence. As mentioned above, the Court held in *Antarctic MPAs* that the conclusion of a facultative mixed agreement was legally required on grounds of international law.[129] It thus limited the Council's political discretion to exercise shared competence at EU level on the basis of international law.[130] By analogy, one could argue that in cases where the conclusion of an EU agreement is "incomplete" from the outset, the Council should be required to exercise shared competence at EU level in order to ensure compliance with international law. Incomplete mixed agreements entail the inevitable risk of the EU incurring international liability for the non-implementation of the agreement by a non-ratifying Member State. For incomplete facultative mixed agreements, that risk is completely avoidable as it is brought about by the political decision in the Council to opt for mixity. If, as the Court proclaimed in *Antarctic MPAs,* the Council can only exercise its political choice against mixity in conformity with international law, it should by inference only be able to exercise its choice in favour of mixity in conformity with international law. For mandatory incomplete mixed agreements, the clash between EU and

126. Opinion 1/19, para 282.
127. Ibid., para 201 (emphasis added).
128. See also Chamon, op. cit. *supra* note 9.
129. Joined Cases C-626/15 and C-659/16, *Antarctic MPAs,* paras. 127–128.
130. For an excellent and critical annotation see Chamon and Cremona, "The representation of the EU and its Member States in multilateral fora: The AMP Antarctique effect" in Levrat et al., op. cit. *supra* note 16, p. 97.

international law is not fully avoidable as it is caused by legal limits to the EU's competence. But an obligation to exercise shared competence at EU level would at least lower the risk of the EU incurring international liability for the non-implementation of the agreement by Member States. The Court, however, did not make such an analogy and refrained from further interfering with the Council's political choices.

5.4. *Application and outcome*

In light of the content of the signature decisions, the Court continued its analysis on the premise that the EU will accede 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".[131] Subsequently, the Court applied a three-step test to determine the correct legal bases for the conclusion decision.[132] First, it assessed which provisions of the Istanbul Convention govern judicial cooperation in criminal matters, asylum and non-refoulement, and the public administration of the EU, respectively. Second, it determined the corresponding substantive legal bases in the Treaties. Lastly, it considered whether these legal bases would be a "main" component of the agreement envisaged by the EU or, alternatively, "extremely limited in scope".[133] On that basis, the Court, like the Advocate General, concluded that the correct substantive legal bases for the EU's conclusion decision should be Articles 78(2), 82(2), 84 and 336 TFEU.

There are a couple of striking elements to the Court's application of the legal basis test in Opinion 1/19 and the resulting outcome. First, the Court, in contrast to the parties and the Advocate General, did not consider whether the applicable legal bases of the conclusion decision correspond to exclusive EU competence. Because it took the signature decisions as a baseline for determining the fields covered by the conclusion decision, the nature of the EU's competence in these fields, whether exclusive or shared, did not play a role in its analysis. Indeed, the Court stated at the outset of its analysis that the exclusive nature of the EU's competence was not relevant for answering the EP's first question.[134] As a consequence, the "agreement envisaged", as delineated by the Court, has a much broader scope than the "narrow"

131. Opinion 1/19, para 294.
132. Ibid., paras. 295 et seq.
133. On the "extremely limited in scope" criterion of the "centre of gravity" test see e.g. Opinion 1/08, *GATS Schedules of Commitments*, EU:C:2009:739, para 166.
134. Opinion 1/19, para 280.

accession originally envisaged by the Council. The Court considered that the scope of the EU's accession comprised approximately 65 percent of the substantive obligations of the Istanbul Convention, which stands in stark contrast to the original 20 percent set out by the Council.[135] Second, by pinpointing every individual treaty provision falling within a competence exercised by the EU, the Court clarified the precise material scope of the EU's future accession to the Istanbul Convention. In doing so, the Court shed some light on the internal division of competence between the EU and the Member States. The Court's Opinion could form an authoritative, clear, and comprehensive basis for an EU declaration of competence, provided that such a declaration could be lawfully annexed to the EU's ratification instrument for the Istanbul Convention.

6. The legality of splitting decisions

Third and finally, the Court turned to the EP's second question, concerning the legality of the Council's intention to split the conclusion decision so as to allow Ireland, in accordance with Protocol 21 TEU, not to be bound via the EU to the Istanbul Convention in the fields of asylum and non-refoulement. The interpretation of Protocol 21 has recently become a disputed subject matter before the ECJ.[136] Opinion 1/19 showed that scope, application, and effects of the Protocol still remain unclear for EU external relations.

6.1. *The parties' observations*

To understand the legal views of the parties, the Advocate General and the Court respectively, we must first understand the system of opt-out and opt-in rights established by Protocol 21 TEU. Article 1 of the Protocol establishes the general presumption that Ireland "[does] not take part in the adoption by the Council of proposed measures under Title V of Part Three [TFEU]" concerning the Area of Freedom Security and Justice (AFSJ). Article 2 of the Protocol underlines that Article 1 also applies to the conclusion of international agreements under the AFSJ. Article 2 further demonstrates that Article 1 is subject to the "opt-in" rights stipulated in Articles 3 and 4 of the

135. The Court listed 43 provisions of the Istanbul Convention as being covered by Arts. 78(2), 82(2), 84 and 336 TFEU (Opinion 1/19, paras. 295, 297, 302, and 305). The Istanbul provision contains a total of 78 provisions, 12 of which prescribe ancillary obligations (cf. Chapters IX–XII Istanbul Convention), amounting to a total of 66 provisions covering substantive obligations.

136. See esp. Opinion 1/15, *EU-Canada PNR agreement*, EU:C:2017:592, paras. 107 et seq.; and Case C-479/21 PPU, G*overnor of Cloverhill Prison and others*, EU:C:2021:929.

Protocol. Accordingly, Ireland may decide to participate in the adoption of new AFSJ measures (Art. 3) or to accede to already existing AFSJ measures (Art. 4). With the Lisbon Treaty reform, Article 4a was added to the Protocol. According to the first paragraph of Article 4a, the provisions of the Protocol also apply to proposed or adopted AFSJ measures amending an existing measure by which Ireland is bound.

The Council and Ireland recalled that while Ireland had decided to participate in relevant EU directives on judicial cooperation in criminal matters,[137] the same did not hold true for the relevant EU acts in the field of asylum and non-refoulement.[138] The Council considered that Ireland was accordingly bound by the parts of the conclusion decision that concern judicial cooperation in criminal matters and for which the EU had acquired exclusive competence under the *ERTA* doctrine (now enshrined in Art. 3(2) TFEU). Yet, Ireland would retain opt-out rights under Article 3 of Protocol 21 for the parts of the conclusion decision that relate to asylum and non-refoulement. As Ireland had not indicated a wish to "opt in", there would be a legal need to split the conclusion decision.[139] Ireland emphasized that the splitting of the conclusion decision would be essential for it to exercise its rights enshrined in Article 1 Protocol 21.[140]

Parliament and the Commission advanced a broader reading of the *ERTA* doctrine based on older versions of EU secondary law in the field of asylum for which Ireland had chosen to opt in.[141] On that basis, they argued that the EU had acquired exclusive competence via Article 3(2) TFEU for the entire AFSJ part of the conclusion decision. The application of Protocol 21 could not affect the choice of legal basis or the allocation of external power between the EU and the Member States.[142] According to the EP and the Commission, there was hence no legal reason supporting Ireland's opt-out from (part of) the conclusion decision.

137. Directives 2011/36/EU and 2011/93/EU, cited *supra* note 109.

138. Council Directive 2003/86/EC of 22 Sept. 2003, on the right to family reunification, O.J. 2003, L 251/12; Council Directive 2003/109/EC of 25 Nov. 2003, concerning the status of third-country nationals who are long-term residents, O.J, 2004, L 16/44; Directive 2008/115/EC of 16 Dec. 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals, O.J. 2008, L 348/98; Directive 2011/95/EU of 13 Dec. 2011, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, O.J. 2011, L 337/9; Directive 2013/33/EU of 26 June 2013, laying down standards for the reception of applicants for international protection, O.J. 2013, L 180/96.

139. Written Observations, cited *supra* note 21, paras. 121–123.

140. Opinion 1/19, para 143.

141. Ibid., para 139.

142. *Observations de la Commission* cited *supra* note 60*,* paras. 88–90; referring to the Court's case law in Opinion 2/15, *FTA with Singapore*, para 218, Case C-137/12, *Commission* v. *Council (Conditional Access Convention)*, EU:C:2013:675, paras. 74–75.

6.2. *Advocate General Hogan's Opinion*

In contrast to the parties, Advocate General Hogan considered the proposed conclusion decision as an amending act of existing measures by which Ireland is bound within the meaning of Article 4a of Protocol 21.[143] Irrespective of the exclusive nature of the EU's competence for judicial cooperation in criminal matters, he therefore deemed it necessary for Ireland to agree to be bound by the conclusion decision (Art. 4a in conjunction with Art. 3 Protocol 21). In terms of outcome, the Advocate General thus largely sided with the legal views of the Council and Ireland. In terms of process, however, he advanced a different reading of the *ERTA* doctrine from the intervening parties. According to the Advocate General, "the fact that Ireland has already agreed to participate in the adoption of certain items of EU legislation does not oblige it to do so in respect of the conclusion of an international agreement which would have the same object". Otherwise, "Article 4a of Protocol No 21 would be devoid of any real meaning".[144] In simpler terms, the Advocate General considered that Article 4a of Protocol 21 TEU prevents an *ERTA* effect from arising. Ireland could opt out externally from common rules it had agreed to participate in internally. The Advocate General therefore considered that the adoption of two separate conclusion decisions was *legally required* by Article 4a of Protocol 21 if Ireland agreed to be bound only by certain parts of the EU's conclusion of the Istanbul Convention.[145]

6.3. *The Court's Opinion*

The Advocate General's Opinion highlighted that the ECJ's reply to the EP's question may affect the way the *ERTA* doctrine functions for Ireland. This section therefore reviews the Court's answer to the EP's question and its legal implications for the *ERTA* doctrine.

6.3.1. *Protocol 21 and splitting decisions*

The Court agreed with the first part of the Advocate General's findings. It too considered the conclusion decision as an amending measure within the meaning of Article 4a of Protocol 21, and therefore held that Ireland had to consent to being bound by it.[146] In contrast to the Advocate General, however,

143. Opinion of A.G. Hogan, para 186.
144. Ibid., para 188.
145. Ibid., para 191.
146. Opinion 1/19, para 321.

the Court excluded the possibility for Ireland to participate only in some AFSJ parts of the conclusion decision, while opting out of other AFSJ parts. Ireland would have to decide to opt in or opt out of the entire AFSJ part of the conclusion decision. The Court followed a systematic reading of Protocol 21, emphasizing the "intrinsic links" between Articles 1 and 2 of Protocol No 21, as well as the fact that "none of the provisions of that protocol envisage partial participation in a single measure [relating to the AFSJ]".[147] As a result, the Court held that Protocol 21 "does not authorize a division of the act concluding the envisaged agreement into two decisions".[148]

In a surprising twist, the Court partially reversed this finding by concluding that in exceptional circumstances, the decision would have to be split after all. This would be the case where an international agreement is only partially covered by the AFSJ. In such a scenario, different voting rules apply to the AFSJ part and the non-AFSJ part of the conclusion decision as a result of the application of Protocols 21 and 22.[149] As the envisaged conclusion decision of the Istanbul Convention will not only be based on AFSJ provisions but also on Article 336 TFEU, the Court found that the decision will have to be divided – just not in the way the Council originally intended.[150] Instead, there will be one conclusion decision based on Articles 78(2), 82(2), 84 TFEU, to which Ireland has to either opt in or opt out, and one conclusion decision based on Article 336 TFEU.

The Court's findings will have practical relevance beyond the conclusion of the Istanbul Convention. For example, in its recent proposal on the EU's accession to the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, the Commission considered that Ireland's participation is legally required because it agreed to be bound by relevant common rules.[151] Such pending decisions will have to be revised, with Ireland having to choose to either be a part of or to fully remain outside the EU's external action in the field of the AFSJ.

6.3.2. *Repercussions for the ERTA doctrine*

In contrast to the Advocate General, the Court did not further elaborate on how its reading of Protocol 21 can be reconciled with its long-standing *ERTA*

147. Ibid., para 327.
148. Ibid., para 328.
149. Ibid., paras. 332–334.
150. Chamon, op. cit. *supra* note 9.
151. See e.g. COM(2021)388 final, Proposal for a Council decision on the accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, Recital 12.

line of case law,[152] which is now (partially) codified in Article 3(2) TFEU.[153] Yet, the Court appeared to share the Advocate General's Opinion that the application of Protocol 21 precludes the *ERTA* pre-emptive effect. Although Ireland had agreed to participate in EU common rules on judicial cooperation in criminal matters, and the EU's conclusion of the Istanbul Convention may affect or alter these common rules within the meaning of Article 3(2) TFEU, the Court found that Ireland may still decide to opt out of the entire AFSJ part of the EU conclusion decision.

The Court's and the Advocate General's understanding of the relationship between Protocol 21 and Article 3(2) TFEU is arguably difficult to square with the original telos of the *ERTA* doctrine.[154] In its foundational *ERTA* judgment, the Court established implied exclusivity because in "the implementation of the provisions of the Treaty the *system of internal Community measures may not ... be separated from that of external relations*".[155] If EU internal and external measures on the same subject matter were to diverge, the "uniform application" and ultimately the "full effectiveness" of EU law could no longer be guaranteed.[156] Yet, the application of Protocol 21 by the Advocate General and the Court in Opinion 1/19 will precisely have the effect of separating the implementation of internal and external EU measures in the field of the AFSJ. For Ireland, the adoption of common AFSJ rules does not lead to the creation of an external exclusive competence for the EU under Article 3(2) TFEU. The Advocate General opined that the disapplication of the *ERTA* doctrine is necessary, suggesting that the EU could otherwise use its implied exclusive

152. See esp. Case 22/70, *Commission* v. *Council (ERTA)*, EU:C:1971:32; Opinion 1/03, *Lugano Convention*, EU:C:2006:81; Case C-114/12, *Commission* v. *Council (Broadcasting Organisations)*, EU:C:2014:2292; Opinion 1/13, *The Hague Convention on international child abduction*; EU:C:2014:2303; Case C-66/13, *Green Network*, EU:C:2014:2399; Opinion 3/15, *Marrakesh Agreement*.

153. See e.g. Verellen, "The ERTA Doctrine in the post-Lisbon era: Note under Judgment in Commission v. Council (C-114/12) and Opinion 1/13", 21 CJEL (2015), 383; Chamon, "Implied exclusive powers in the ECJ's post-Lisbon jurisprudence: The continued development of the *ERTA* Doctrine", 55 CML Rev. (2018), 1101; Kuisma and Larik, "The continuing contestation of *ERTA*: Conferral, contestation, and the Member States' participation in mixed agreements" in Levrat et al., op. cit. *supra* note 16, p. 43; and Govaere, "Implied powers of the EU, limits to political expediency and internationally inspired pragmatism: Commission v. Council (ERTA)" in Butler and Wessel, op. cit. *supra* note 18.

154. See also Chamon, op. cit. *supra* note 9.

155. Case 22/70, *Commission* v. *Council (ERTA)*, para 19 (emphasis added). See also Butler and Wessel, "Happy Birthday ERTA! 50 years of the implied external powers doctrine in EU Law", available at <europeanlawblog.eu/2021/03/31/happy-birthday-erta-50-years-of-the-implied-external-powers-doctrine-in-eu-law/>.

156. Opinion 1/03, *Lugano Convention*, para 128.

powers to effectively disapply the Protocol. That line of reasoning, however, disregards that Ireland chose, in accordance with Articles 3 or 4 of Protocol 21, to opt into common rules in the field of the AFSJ. Once Ireland exercised its choice, common AFSJ rules should arguably have the same effect in all Member States – both internally and externally. Otherwise, there is a risk of separating the system of internal and external AFSJ rules. Ireland could unilaterally undermine, actually or potentially,[157] the common rules it expressly agreed to be bound by through independent external action.

7. Conclusion

Opinion 1/19 was special. It concerned an agreement of high political relevance that laid bare deep-seated conflicts of values within the EU, while raising legal questions that are central to the EU's independent international actorness. In times where EU action is frequently in the hands of a vocal minority of Member States, the Opinion questioned whether and how the law can be used as a means of last resort for overcoming the resulting decision-making deadlock.

Mixity was designed as a formula to enable EU external action. The mixed procedure allows the EU and the Member States to become joint parties to an international agreement. In doing so, mixity shifts disputes between the EU and the Member States about the allocation of treaty-making power from the treaty ratification to the implementation stage, where such disputes can be more easily resolved.[158] In recent years, mixity has however lost some of its usefulness and purpose, as more and more disputes between the EU and some Member States arise *before* a mixed agreement's ratification. The initial rejection of CETA by the Walloon parliament, the negative Dutch referendum on the EU-Ukraine Association Agreement, or the failure to find a common accord in the Council for the Macolin Convention, the Mauritius Convention, and the Istanbul Convention are just some examples of recent political dilemmas. Opinion 1/19 questioned whether the political discretion of national actors can in some way be confined by EU law.

Opinion 1/19 raised a variety of loosely connected technical legal questions and issues. In response to the EP's request, the Court determined the correct choice of legal basis for the EU conclusion decisions and with it the prospective scope of the EU's accession to the Convention. Moreover, the

157. Note that a mere risk of EU law being affected is sufficient for triggering *ERTA*-type exclusivity. See e.g. Case C-66/13, *Green Network*, para 29.

158. Heliskoski, op. cit. *supra* note 2.

Court explained the reach of Ireland's opt-out and opt-in rights under Protocol 21, how Ireland must exercise these rights, and what the Irish opt-out entails for the "splitting" of signature and conclusion decisions for agreements falling partially within the AFSJ, such as the Istanbul Convention. Finally, the Court underlined that the procedure stipulated in Art. 218 TFEU cannot be overridden by practice. Although it largely treated the search for the greatest possible majority in the Council as a political question, it highlighted that the Council's discretion is confined by its own rules of procedure. In doing so, the Court paved a way for the EU to accede to the Istanbul Convention in the absence of a common accord between Member States. In particular, the Court confirmed that incomplete mixity – i.e. the conclusion of a mixed agreement by the EU and only some Member States – remains a valid political choice of, ultimately, the Member States in the Council.

Opinion 1/19 illustrated that the Court continues to embrace mixity despite its complexity and problems. By accepting incomplete mixity as a solution to the non-ratification dilemma, the Court makes clear that mixity cannot impede the EU's power and capacity as an independent external actor. The ease with which the Court embraced incomplete mixity is nonetheless striking, especially when considering the Istanbul Convention's character as a mandatory mixed agreement. In its reasoning, the Court appears to make no difference between mixed agreements that are fully covered by EU exclusive and shared competence (facultative mixity) and mixed agreements that fall partially outside the EU's conferred powers (mandatory mixity). Yet, that difference it important, especially when considering the negative consequences of incomplete mixity. When concluding a mixed agreement without some of its Member States, 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. For facultative mixed agreements, such consequences are avoidable as they are brought about by the Council's political choice in favour of mixity. For mandatory mixed agreements, these consequences result from the limited scope of the EU's conferred power and are therefore much more difficult to resolve.

In Opinion 1/19, the Court arguably missed an opportunity to set some legal limits to the Council's political discretion to exercise shared external competence in the context of incomplete mixity and to use incomplete mixity as a ratification technique for mandatory mixed agreements. The Court's conclusions imply that it is purely up to the EU institutions – and ultimately the Council – to balance the benefits of escaping the non-ratification trap through selective participation in a mixed agreement against the potential costs of incurring international liability for the selective non-implementation

of that agreement. It remains to be seen how that balance will be struck for the Istanbul Convention. Opinion 1/19 demonstrated that there is a legal route for the EU to accede to the Convention without some of its Member States. Yet, that route is not risk-free.

Gesa Kübek*

* Assistant Professor in European Law at the University of Groningen, Netherlands. The author would like to thank the participants of the workshop "Opinion 1/19, *Istanbul Convention*: Exploring legal themes and consequences", held at the University of Groningen on 17 Dec. 2021, for the rich and valuable discussions. The author further thanks the anonymous reviewers for helpful comments and suggestions.