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Accession of the EU to the Istanbul Convention and Opinion 1/19 of the CJEU

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Istanbul Convention & Avis 1/19

Outline

- Istanbul Convention – content
- Istanbul Convention – state of play
- Istanbul Convention – mixed agreement
- The EP's reference to the Court in Avis 1/19

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Istanbul Convention - content

Four pillars (see CoE [Brochure](#)):

I. Prevention of violence against women

Education

Media

Training of professionals

Programmes for empowerment of women

Programmes for perpetrators

Istanbul Convention - content

Four pillars:

II. Protection of victims of violence against women

Information rights for victims

Support services for victims

Shelters

Telephone hotline

Judicial and administrative remedies

Istanbul Convention - content

Four pillars:

III. Prosecution of perpetrators of violence against women

Effective sanctions

Criminalizing certain acts

Protection of witnesses

Right to privacy for victim

Istanbul Convention - content

Four pillars:

IV. Coordinated and coordinating policies

Ensure cooperation between administration, police, judicial branch

Involve civil society

Holistic oversight

Gather data on phenomenon

Istanbul Convention - content

Chapter I – Arts 1-6

Purposes, definitions, equality and non-discrimination, general obligations

Chapter II – Arts 7-11

Integrated policies and data collection

Istanbul Convention - content

Chapter III – Arts 12-17

Prevention

Chapter IV – Arts 18-28

Protection and support

Istanbul Convention - content

Chapter V – Arts 29-48

Substantive law – eg criminalization of acts

Chapter VI – Arts 49-58

Investigation, prosecution, procedural law and protective measures

Istanbul Convention - content

Chapter VII – Arts 59-61

Migration and asylum – eg victims retain residence rights if they separate from perpetrator, gender based violence recognized as form of persecution to file asylum

Chapters VIII-IX – Arts 62-65 & 66-70

International co-operation & Monitoring mechanism

Istanbul Convention - content

Chapters X-XI-XII – Arts 71 & 72 & 73-81

Relationship with other international instruments,
Amendments to the Convention & Final clauses

Istanbul Convention – State of Play

Entered into force on 01/08/2014

EU and all its MS have signed

AU, BE, CY, HR, DA, DE, EE, ES, FI, FR, EL, IE, IT, LU, MA, NL, PL,
PO, RO, SI, SW have ratified

EU, BU, CZ, HU, LT, LV, SK have not ratified

Istanbul Convention – State of Play

EU has not ratified because of political *convention* in relation to *mixed agreements*:

International agreements like the Istanbul Convention are called mixed agreements when they are (to be) concluded by EU and its MS jointly

Unlike other political systems, the EU is not exclusively competent to conduct foreign policy – instead the usual (internal) competence question remains relevant

Istanbul Convention – State of Play

But should the Istanbul Convention be a mixed agreement to begin with?

If the significant Trade and Cooperation Agreement with the UK can be concluded by the EU on its own why not the Istanbul Convention as well?

I.e. is the Istanbul Convention obligatory mixed or facultative mixed?

Question

A.
Obligatory

B.
Facultative

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Mixity

Agreement covers	Parties	Type
EU excl. competence	EU	Compulsory EU only
EU excl. competence + MS excl. competence	EU + MS	Compulsory mixity
EU excl. competence + shared competence	EU or EU + MS	Facultative EU only Facultative mixity
Shared competence	EU or MS or EU + MS	Facultative EU only Facultative MS only Facultative mixity
Shared competence + MS excl. competence	MS or EU + MS	Facultative MS only Facultative mixity
MS excl. competence	MS	Compulsory MS only

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Istanbul Convention – State of Play

EU has not ratified because of political *convention* in relation to mixed agreements:

For mixed agreements (EU&MS parties to agreement) EU will wait for the MS to ratify

Sometimes exception, e.g. Paris Agreement in climate change

Commission proposal to conclude Istanbul Convention ‘stuck’ in Council – Commission proposal to sign Istanbul Convention has evidently been adopted by Council

EP unhappy about conclusion decision being stuck – has referred question to the Court of Justice – Avis 1/19

But why are some MS holding up ratification?

Istanbul Convention – State of Play

Convention is controversial because it includes prohibition of discrimination based on **gender** (i.e. not biological sex but ‘socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men’ (Art. 3(c) of the Convention))

Under Convention, gender therefore does not necessarily equate biological sex

Istanbul Convention – State of Play

[Bulgarian Constitutional Court](#) 27/07/2018:

The Constitution and the entire Bulgarian legislation is built on the understanding of the binary existence of the human species

Convention incompatible with BU Constitution

[Slovak Parliament](#) (29/03/2019)

Resolution calling on Government to cease procedure to become party

Istanbul Convention – State of Play

[Hungarian Parliament](#) (05/05/2020)

Calls on Government not to proceed with ratification and not to allow EU to ratify

Reasons related to union of man and woman (Constitution) and Hungarian anti-migration policy which conflicts with the Convention's provisions on asylum

[Polish proposal](#) to withdraw (pending)

Istanbul Convention & Avis 1/19

Questions in Avis 1/19

!based on Article 218(11) TFEU: procedure which allows the Court to assess the compatibility of an envisaged agreement with the Treaties

Not an annulment procedure (Art. 263 TFEU) or preliminary ruling procedure (Art. 267 TFEU)

Istanbul Convention & Avis 1/19

Opinion procedure can be used not just to check material compatibility of an agreement with Treaties

Also issues of legal basis or ratification procedure can be put to the Court

Istanbul Convention & Avis 1/19

1. Correct legal basis for signing and concluding Istanbul Convention?
2. Did/do the decisions on signature and conclusion need to be split in light of Protocol 21? (which allows Ireland to opt-out from EU asylum law)
3. Does EU accession depend on common accord between MS?

Istanbul Convention & Avis 1/19

These three issues are not arcane external relations problems

Question

The EU and the MS that have ratified the Istanbul Convention are bound by it pursuant to EU law

True or False

Istanbul Convention & Avis 1/19

These three issues are not arcane external relations problems

1. Legal basis question is intertwined with the question in how far the EU will bind itself and its MS (cf. Article 216 TFEU)

Istanbul Convention & Avis 1/19

1. For all the issues not covered by the EU legal basis, the MS will act and bind themselves under PIL

! Only for those parts covered by the EU can we make use of the EU's enforcement mechanisms (cf. *Mox Plant*, *Etang de Berre*, *Lesoochránárske zoskupenie*)

Istanbul Convention & Avis 1/19

2. Same for issue of splitting: if splitting was not allowed, Ireland has no opt-out and will be bound through the EU rather than as a sovereign state > EU enforcement mechanisms can be used in/against Ireland

Istanbul Convention & Avis 1/19

3. If common accord among MS is a requirement before EU can conclude in its own name, every MS becomes a veto player even if the Council, in principle, can decide with QMV

Istanbul Convention & Avis 1/19

Opinion Procedure 1/19 is pending

AG delivered Opinion in March 2021

Avis 1/19 - Key clarifications

AG on **legal basis**:

Does not depend on the content of the Convention as such but on the commitments which the EU will enter into

Which those are is not clear yet, but they must include issues coming under EU exclusive competences

For those issues coming under EU shared competence, AG Hogan accepts that this is up to the Council to decide

Avis 1/19 - Key clarifications

! Differently from AGs Wahl (3/15) and Kokott (AMP Antartique), AG Hogan accepts unfettered political choice of Council to decide on exercise of shared competence

Choice of legal basis informed by objective factors? – not entirely in external sphere since Council subjectively chooses whether to exercise shared competence (most of Istanbul Convention is shared competence)

Avis 1/19 - Key clarifications

AG on **splitting**:

EP claims no separate decision on commitments in asylum needed, since Ireland agreed to internal EU legislation and ERTA effect applies

AG finds there is no rule against splitting [~ doesn't splitting circumvent the single legal basis rule?]

AG finds that splitting was in any event *required* under Protocol 21

AG reads Art. 4a of Protocol as prevent *ERTA* effect from arising

Avis 1/19 - Key clarifications

Art. 4a: opt-in also applies when measures to which IE agreed are being modified or amended

<> ERTA effect is triggered by the rules to which Ireland already agreed

Avis 1/19 - Key clarifications

AG on **common accord**:

Council does not manifestly err when waiting for common accord

Good reasons to wait for common accord, since no reservations and/or declaration of competences possible

Legally however, Council can still go ahead – incomplete mixity will simply result in practical problems

Avis 1/19 - Key clarifications

According to AG, EU could thus go ahead, but

Political reality in Council of consensus & Council cannot be forced to decide to conclude

If Council sticks to the limited scope of the EU's accession, most of the Istanbul Convention will not be binding on the MS (also those that did not ratify) by virtue of EU law

Avis 1/19

Court to decide in a couple of months!

Thank you for your attention!