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**Re: Council of Europe Convention on preventing and combating violence against women and domestic violence and possible European Union accession to it**

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## Executive Summary

The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) is a comprehensive international treaty, whose main aim is to combat violence against women and domestic violence. It seeks to harmonize parts of national legislation concerning violence against women and domestic violence.

The Istanbul Convention was opened for signature in 2011, but the number of ratifications necessary for it to enter into force was reached only in 2014. For the time being, less than half of the Members of the Council of Europe (22 out of 47) and half of the EU Member States (14 out of 28) have ratified it.<sup>1</sup> On 4 March 2016 the European Commission (EC) proposed the European Union (EU) accession to the Istanbul Convention.<sup>2</sup> On 11 May 2017 the Council adopted two decisions on the signing, on behalf of the EU, of the Istanbul Convention, within the limits of its competence, with a particular focus on asylum, non-refoulement and judicial cooperation in criminal matters.

This contribution scrutinises the content of the Istanbul Convention and the procedural facets of EU accession to the Istanbul Convention. It analyzes whether the conditions for accession are met and what the foreseeable consequences of such an accession are. It comes to the conclusion that domestic violence is still a sad reality in Europe, and the most efficient way to address it is by strengthening and fully implementing the mechanisms in place and the existing obligations under international and national law.

A thorough analysis of the possible EU accession to the Istanbul Convention leads to the conclusion that the accession would remedy very little, but bring with it a large set of new problems, regarding both content and competence. ADF International has therefore recommended Member States to: 1) oppose the accession of the EU to the Convention in the Council, or 2) support EU accession to the Convention *within the limits of its competence*; 3) refrain from ratifying the Istanbul Convention nationally, or if they have already done so, to consider withdrawing from it.

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<sup>1</sup> For the updated list of signatures and ratifications see 'Chart of signatures and ratifications of Treaty 210' (Council of Europe) <<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>> accessed 30 May 2016

<sup>2</sup> European Commission, 'Commission proposes EU accession to international Convention to fight violence against women' (Press Release Database, 4 March 2016) <[http://europa.eu/rapid/press-release\\_IP-16-549\\_en.htm](http://europa.eu/rapid/press-release_IP-16-549_en.htm)> accessed 12 April 2016

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## (a) Introduction

1. ADF International is an alliance-building legal organization that advocates for the right of people to freely live out their faith, with a particular focus on freedom of thought, conscience and religion around the world. ADF International holds special consultative status with the United Nations and accreditation at the European Parliament, the European Union Agency for Fundamental Rights, and Organization for Security and Cooperation in Europe, and has argued, co-counseled and intervened in over 50 significant cases before the European Court of Human Rights.
2. On 4 March 2016 the European Commission (EC) proposed EU accession to the Council of Europe's 'Convention on preventing and combating violence against women and domestic violence' (the Istanbul Convention).<sup>3</sup> The EC put forth and published two proposals: Proposal for a Council Decision – the signing of the Istanbul Convention,<sup>4</sup> and Proposal for a Council Decision – the conclusion of the Istanbul Convention<sup>5</sup> (Decision on signing and Decision on Conclusion or Decisions). The accession proposal will be discussed in the Council of Ministers and the European Parliament. If the EU's accession to the Istanbul Convention is successful, it will be the second human rights treaty to which the EU is a party.<sup>6</sup>
3. This contribution seeks to analyze EU accession to the Istanbul Convention and will be divided into six sections. The first one will be a short introduction into the topic. The second will present the negotiating process of the Istanbul Convention, its goals, scope and language and will highlight a number of problematic aspects, such as the infringement of fundamental rights, and the intricate monitoring mechanism (GREVIO). The third section will outline the external competences of the EU, the legal elements of the EU external action and its general principles. It will apply these principles to EU accession to the Istanbul Convention. The last part of this section will examine the impact of accession on EU Member States. In light of the problematic procedural aspects and the negative consequences of possible accession, the fourth and the fifth sections will investigate avenues to prevent the accession of the EU to the Istanbul Convention, firstly for the European institutions, and secondly for the EU Member States. The sixth section will put forward conclusions.

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<sup>3</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence (adopted 7 April, entered into force 1 August 2014) C.E.T.S. No. 210 (Istanbul Convention). See European Commission, 'Commission proposes EU accession to international Convention to fight violence against women' (*Press Release Database*, 4 March 2016) <[http://europa.eu/rapid/press-release\\_IP-16-549\\_en.htm](http://europa.eu/rapid/press-release_IP-16-549_en.htm)> accessed 12 April 2016

<sup>4</sup> European Commission, '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' COM(2016) 111 final en.pdf

<sup>5</sup> European Commission, 'Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence' COM (2016) 109 final

<sup>6</sup> Currently the only convention to which the EU acceded is the United Nations Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 30 March 2007) 2515 UNTS

## **(b) The Istanbul Convention**

### *Background, process of negotiations, and adoption*

4. The Istanbul Convention is a Council of Europe convention. In December 2008 the Committee of Ministers established an expert group, the 'Ad Hoc Committee for preventing and combating violence against women and domestic violence' or CAHVIO.<sup>7</sup> CAHVIO was mandated to prepare a draft convention on combating violence against women. The draft text of the Istanbul Convention was finalized by the end of 2010.<sup>8</sup>
5. The Istanbul Convention was adopted by the Council of Europe Committee of Ministers on 7 April 2011<sup>9</sup> on the basis of the draft prepared by CAHVIO<sup>10</sup> and was opened for signatures following the 121<sup>st</sup> session of the Committee of Ministers in Istanbul.<sup>11</sup> The Istanbul Convention entered into force on 1 August 2014.
6. The Istanbul Convention was opened for signature in 2011, but the ten required ratifications (8 of which were required to be Council of Europe Member States) necessary to enter into force<sup>12</sup> was reached only in 2014. For the time being, less than half of the Members of the Council of Europe (22 out of 47) and half of the EU Member States (14 out of 28) have ratified it.<sup>13</sup> Five members of the Council of Europe have neither signed nor ratified the Istanbul Convention.<sup>14</sup>
7. The drafting of the treaties and international conventions within the framework of the Council of Europe is based on the Council of Europe's practice and supplemented by Statutory Resolution (93) 27 on majorities required for decisions

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<sup>7</sup> 'The Negotiations - Istanbul Convention: Action against violence against women and domestic violence' (*Council of Europe*) <<http://www.coe.int/en/web/istanbul-convention/cahvio>> accessed 12 April 2016

<sup>8</sup> 'Historical background - Istanbul Convention: Action against violence against women and domestic violence' (*Council of Europe*) <<http://www.coe.int/en/web/istanbul-convention/historical-background>> accessed 12 April 2016

<sup>9</sup> 'Ministers' Deputies CM Documents CM(2011)49-final' (*Council of Europe*) <[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cd162](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cd162)> accessed 8 April 2016

<sup>10</sup> 'Historical background - Istanbul Convention: Action against violence against women and domestic violence' (*Council of Europe*) <<http://www.coe.int/en/web/istanbul-convention/historical-background>> accessed 12 April 2016

<sup>11</sup> 'Draft agenda of 121st Session of the Committee of Ministers (Istanbul, 10-11 May 2011)' (*Council of Europe*)

<[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM\(2011\)OJ1&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM(2011)OJ1&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)> accessed 8 April 2016 and 'CM121 Session of the Committee of Ministers' (*Council of Europe*) <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1770063&Site=CM&direct=true>> accessed 8 April 2016

<sup>12</sup> Istanbul Convention, Article 75 (3)

<sup>13</sup> For the updated list of signatures and ratifications see 'Chart of signatures and ratifications of Treaty 210' (*Council of Europe*) <<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>> accessed 30 May 2016

<sup>14</sup> For the updated list of signatures and ratifications see 'Chart of signatures and ratifications of Treaty 210' (*Council of Europe*) <<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>> accessed 30 May 2016

of the Committee of Ministers.<sup>15</sup> Article 20 (d) of the Statute of the Council of Europe establishes that the adoption of treaties 'require a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee'.<sup>16</sup>

8. Unusually, the Istanbul Convention is the only Council of Europe convention where this requirement was not met. It was adopted *without* a vote due to both the short time available and to the Turkish government's political calculation: Turkey's chairmanship of the Committee of Ministers was coming to an end and it pressed for the adoption of the Istanbul Convention to send a political signal regarding its commitment to women's equality as it seeks accession to the EU.<sup>17</sup>
9. In October 2015 the EC published a Roadmap on '(A possible) EU Accession to the Council of Europe's Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)'.<sup>18</sup> This commitment was further solidified in the 2015 Report on equality between women and men in the European Union, where the EC repeated its intention that the EU as a whole should accede to the Istanbul Convention.<sup>19</sup> This intention was materialized on 4 March 2016, when the EC communicated its proposal to ratify it.<sup>20</sup>

### *Violence against women*

#### a. Definition

10. Violence against women is dealt with in various hard and soft law instruments in international human rights law, especially within the framework of the United Nations (UN). Although the 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)<sup>21</sup> does not expressly speak of violence

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<sup>15</sup> 'Statutory Resolution (93) 27 of the Committee of Ministers of the Council of Europe (14 May 1993)' (CVCE)

<[http://www.cvce.eu/en/obj/statutory\\_resolution\\_93\\_27\\_of\\_the\\_committee\\_of\\_ministers\\_of\\_the\\_council\\_of\\_europe\\_14\\_may\\_1993-en-3da7c44e-8125-4007-aad4-7c50b328e36e.html](http://www.cvce.eu/en/obj/statutory_resolution_93_27_of_the_committee_of_ministers_of_the_council_of_europe_14_may_1993-en-3da7c44e-8125-4007-aad4-7c50b328e36e.html)> accessed 8 April 2016

<sup>16</sup> Statute of the Council of Europe (as amended) (adopted 5 May 1949, entered into force 3 August 1949) C.E.T.S. No. 001 (Statute of the Council of Europe) Article 20(d)

<sup>17</sup> For more information see Francesco Agnello, 'A New "Gender" Approach Definition in International Law: The Convention on Preventing and Combating Violence Against Women and Domestic Violence' [2014] (18) The Spanish Yearbook of International Law 87-114

<sup>18</sup> European Commission, 'Roadmap on (A possible) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)' <[http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_010\\_istanbul\\_convention\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf)> accessed 12 April 2016

<sup>19</sup> European Commission, 'Commission staff working document: 2015 Report on equality between women and men in the European Union' SWD(2016) 54 final 25 <[http://ec.europa.eu/justice/gender-equality/files/swd\\_2016\\_54\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/swd_2016_54_en.pdf)> accessed 12 April 2016

<sup>20</sup> European Commission, 'Commission proposes EU accession to international Convention to fight violence against women' (*Press Release Database*, 4 March 2016) <[http://europa.eu/rapid/press-release\\_IP-16-549\\_en.htm](http://europa.eu/rapid/press-release_IP-16-549_en.htm)> accessed 12 April 2016

<sup>21</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/180 A34/46 (CEDAW)

against women, General recommendation No. 12<sup>22</sup> makes it clear that CEDAW includes violence against women.<sup>23</sup> General recommendation No. 19 defines gender based violence as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’ and lists a number of examples.<sup>24</sup> General recommendation No. 28<sup>25</sup> further elaborates on the obligations of State parties under Article 2 CEDAW. The UN General Assembly has also adopted a number of resolutions specifically focusing on violence against women, such as the Resolution on domestic violence in 1985<sup>26</sup> and the 1993 Declaration on the Elimination of Violence against Women.<sup>27</sup>

11. Violence against women is understood, in the words of the Declaration on the Elimination of Violence against Women, as:

[A]ny act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.<sup>28</sup>

12. Violence against women is generally recognized as a sign of the remaining inequality between sexes. It is a grave manifestation of the enduring inferiority of women towards men and a blatant violation of women’s rights.<sup>29</sup>

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<sup>22</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, ‘General recommendation No. 12: Violence against women’ in ‘IV. General Recommendations adopted by the Committee on the Elimination of Discrimination against Women’ (1989) UN Doc A/44/38

<sup>23</sup> ‘Considering that Articles 2, 5, 11, 12 and 16 of the Convention require the States parties to act to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life’ in CEDAW ‘General Comment 12’ in UN Committee for the Elimination of All Forms of Discrimination against Women, ‘General recommendation No. 12: Violence against women’ in ‘IV. General Recommendations adopted by the Committee on the Elimination of Discrimination against Women’ (1989) UN Doc UN Doc A/44/38

<sup>24</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, ‘General recommendation No. 19: Violence against women’ in ‘IV. General Recommendations adopted by the Committee on the Elimination of Discrimination against Women’ (1992) UN Doc A/47/38, points 1 and 6

<sup>25</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, ‘General recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (16 December 2010) UN Doc CEDAW/C/GC/28 (2010).

<sup>26</sup> UNGA Res 40/36 (29 November 1985) UN Doc A/Res/40/36

<sup>27</sup> Declaration on the Elimination of Violence against Women UNGA Res 48/104 (20 December 1993) UN. Doc A/48/49

<sup>28</sup> Declaration on the Elimination of Violence against Women UNGA Res 48/104 (20 December 1993) UN. Doc A/48/49, Article 1

<sup>29</sup> See, in this respect, ‘the gender-based nature of violence against women and its linkage to subordination, inequality between women and men, and discrimination, led to its categorization as a matter of human rights’ in ‘The United Nations work on Violence against Women’ in ‘Information Note: Division for the Advancement of Women’ <<http://www.un.org/womenwatch/daw/news/unwvaw.html>> accessed 12 April 2016



b. The EU's commitments in this area and current EU situation

13. Equality between men and women is one of the core values on which the EU is built. EU law deals with the issue of violence against women in a number of provisions, either directly or indirectly. For instance Article 8 of the Treaty on the Functioning of the European Union (TFEU) says that '[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.'<sup>30</sup> In the same vein, Article 23 of the Charter of Fundamental Rights of the European Union (EU Charter) stipulates that '[e]quality between men and women must be ensured in all areas, including employment, work and pay.'<sup>31</sup>
14. Declaration No. 19 on Article 8 of the TFEU deals specifically with domestic violence:

The Conference agrees that, in its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence. The Member States should take all necessary measures to prevent and punish these criminal acts and to support and protect the victims.

15. The EC has worked extensively and has published a number of documents on this topic.<sup>32</sup> A specific EU agency, the European Institute for Gender Equality (EIGE), was created in this respect, one of its main tasks being to provide 'access to existing statistical data and information on gender-based violence, aiming to support the institutions and experts engaged in preventing and combating gender-based violence in the European Union and beyond.'<sup>33</sup> In 2014, the EU Fundamental Rights Agency published an EU-wide survey on violence against women.<sup>34</sup> Similar surveys are regularly commissioned by the EC<sup>35</sup> that declares its 'zero tolerance of violence

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<sup>30</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU)

<sup>31</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (EU Charter). Other provisions are, *inter alia*, Article 21 of the EU Charter, Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU) Articles 2 and 3 (3) paragraph 2 and Articles 10 and 19 (1) of the TFEU.

<sup>32</sup> European Commission, 'Documents' (*Justice*) <[http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#ending](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#ending)> accessed 12 April 2016, European Commission, 'Gender Equality' (*Justice*) <<http://ec.europa.eu/justice/gender-equality/>> accessed 12 April 2016

<sup>33</sup> European Institute for Gender Equality, 'A Europe free from gender-based violence' (*EIGE*) <<http://eige.europa.eu/gender-based-violence>> accessed 12 April 2016

<sup>34</sup> European Union Agency for Fundamental Rights, 'Violence against women: an EU-wide survey' (Publication Office of the European Union 2014) <[http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14_en.pdf)> accessed 14 April 2016

<sup>35</sup> See, e.g. 'Special Eurobarometer 344: Domestic violence against Women requested by the European Commission' <[http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_344\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_344_en.pdf)> accessed 12 April 2016

against women’,<sup>36</sup> and regularly publishes strategies on equality between women and men. Such strategies contain a specific chapter on gender-based violence.<sup>37</sup>

### *Goals, scope and language*

16. The Istanbul Convention is a comprehensive international treaty aimed at combating violence against women and domestic violence. It consists of a preamble and twelve chapters. The chapters cover the following topics:

- Purposes, definitions, equality and non-discrimination, general obligations
- Integrated policies and data collection
- Prevention
- Protection and support
- Substantive law
- Investigation, prosecution, procedural law, and protective measures
- Migration and asylum
- International cooperation
- Monitoring mechanism
- Relationship with other international instruments
- Amendments to the Convention
- Final clauses

17. The Istanbul Convention aims at harmonizing parts of national legislation concerning violence against women and domestic violence. The harmonization would include criminal law (e.g. Articles 33 - 39), criminal procedure (e.g. Articles 54, 55, 56), civil procedure (e.g. Articles 52 and 53), migration and asylum (Articles 59-61), and spheres outside the investigation and prosecution of these types of crimes (e.g. Article 13 on awareness-raising and Article 14 on education).

18. Although the Istanbul Convention encourages state parties to apply it to all victims of domestic violence,<sup>38</sup> the text is devoted to violence against women:

“Violence against women” is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.<sup>39</sup>

19. The Declaration on the Elimination of Violence against Women is a clear source of inspiration for the definition of violence against women, employed by the Istanbul Convention. This is also confirmed by the language used in the Istanbul Convention:

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<sup>36</sup> European Commission, ‘Zero tolerance of violence against women’ (*Justice*) <[http://ec.europa.eu/justice/gender-equality/gender-violence/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-violence/index_en.htm)> accessed 12 April 2016

<sup>37</sup> See e.g. European Commission, ‘Strategy for equality between women and men 2010-2015’ (Publications Office of the European Union 2011) <[http://ec.europa.eu/justice/gender-equality/files/documents/strategy\\_equality\\_women\\_men\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/strategy_equality_women_men_en.pdf)> accessed 12 April 2016

<sup>38</sup> Istanbul Convention, Article 2 (2)

<sup>39</sup> Istanbul Convention, Article 3 (a)



gender identity,<sup>40</sup> the empowerment of women,<sup>41</sup> stereotyped roles for men and women,<sup>42</sup> non-stereotyped gender roles,<sup>43</sup> and the gendered understanding of violence.<sup>44</sup>

20. Under close scrutiny, it is clear that the scope of the Istanbul Convention goes well beyond violence against women and domestic violence. The overall general obligation is that parties:

[T]ake the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.<sup>45</sup>

21. Additionally, the general obligations of state parties are linked to a very specific gender mainstreaming mandate, defined in Article 13:

Parties shall promote or conduct, on a regular basis and at all levels, awareness-raising campaigns or programmes, including in cooperation with national human rights institutions and equality bodies, civil society and non-governmental organizations, especially women's organizations, where appropriate, to increase awareness and understanding among the general public of the different manifestations of all forms of violence covered by the scope of the Convention, their consequences on children and the need to prevent such violence.

22. While the Istanbul Convention contains many useful provisions that could effectively help victims of domestic violence (shelters, legal aid, restraining orders, etc.), the vast majority of these positive provisions are already regulated by the national legislation of most EU Member States. However, apart from those, the Istanbul Convention includes problematic aspects related to: a) the introduction of a problematic and non-agreed definition of 'gender', b) the introduction of rules which, if transposed into national legal frameworks, may infringe upon fundamental rights, such as parental rights, c) the stereotypical portrayal of men and boys as aggressors, and d) the monitoring mechanism established by the Convention.

### *Novel 'gender' definition*

23. Prior to the Istanbul Convention, the only legally binding international definition of gender is contained in the Rome Statute of the International Criminal Court, which uses gender in its classical sense, i.e. as a synonym for biological sex:

For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the

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<sup>40</sup> Istanbul Convention, Article 4 (3)

<sup>41</sup> Istanbul Convention, Articles 6 and 18 (3)

<sup>42</sup> Istanbul Convention, Article 12

<sup>43</sup> Istanbul Convention, Article 14 (1)

<sup>44</sup> Istanbul Convention, Article 49 (2)

<sup>45</sup> Istanbul Convention, Article 12 (1)

concept of society. The term gender does not indicate any other meaning different from the above.<sup>46</sup>

24. The Istanbul Convention, however, states that 'gender' and 'sex' are not the same. This is evident from Article 4 (3) which lists the protected grounds, among which the first two are 'sex' and 'gender'.
25. Furthermore, according to Article 3 (c):

"[G]ender" shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.
26. The definition makes it clear that the 'gender' of a person is a social construct and a variable which is, in principle, independent of biological reality (being male or female). As a consequence, this definition carries an ideological burden by building on the belief that a human is born as a neutral being who can determine and/or change his or her gender in the course of life and under the influence of various factors, such as society, education, and self-determination.<sup>47</sup> Accepting this definition requires the identification with certain dogmas of gender anthropology that deny the existence of the natural differences between the two sexes.<sup>48</sup>
27. The inherently subjective nature of 'gender', according to this understanding, has powerful negative effects on the foreseeability and predictability of the Istanbul Convention, and blurs the exact content of the obligations of parties to the Istanbul Convention.
28. The definition of 'gender' provided by the Istanbul Convention runs contrary to the position of parties to the Council of Europe which retain the classical definition of gender as a synonym of biological sex. Hence, as a response to the problematic definition present in the text, they drafted an Explanatory report to the Istanbul Convention. Paragraph 43 of this report provides a definition of 'gender', which stems from the acknowledgment of the two sexes and admits the existence of certain behavioural patterns specific for men and women.<sup>49</sup>

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<sup>46</sup> For the difference between definition contained (and agreed) in treaties, and definitions contained in other international instruments, see Francesco Agnello, 'A New "Gender" Approach Definition in International Law: The Convention on Preventing and Combating Violence Against Women and Domestic Violence' [2014] (18) The Spanish Yearbook of International Law 87-114

<sup>47</sup> See, e.g. Judith Butler, 'Gender Trouble: feminism and the Subversion of Identity' (Routledge, 2011)

<sup>48</sup> For more information see Francesco Agnello, 'A New "Gender" Approach Definition in International Law: The Convention on Preventing and Combating Violence Against Women and Domestic Violence' [2014] (18) The Spanish Yearbook of International Law 87-114

<sup>49</sup> 'Explanatory report on Istanbul Convention: Council of Europe Convention on preventing and combating violence against women and domestic violence' (11 May 2011) 8 point 43 <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090001016800d383a>> accessed 12 April 2016

### *Infringement of fundamental rights*

29. The right of parents to be the primary educators of their children is a fundamental right that cannot be abrogated or otherwise curtailed.<sup>50</sup> This right is codified in a number of international human rights treaties. The Universal Declaration of Human Rights makes it clear that 'parents have a *prior right* to choose the kind of education that shall be given to their children.'<sup>51</sup>
30. In this well-established capacity, parents have both the greatest rights and the greatest responsibility in educating their children. In the educational process, State institutions should assist parents; schools must seek their cooperation and not artificially displace the rights of children and the rights of parents by imposing on children an education contrary to the one they receive from their parents.
31. The UN Convention on the Rights of the Child clearly outlines that among the most important rights of the child are precisely the right to parental love and the right to education. It also explicitly notes that the rights of parents are not juxtaposed to the rights of children.<sup>52</sup>
32. Article 2 Protocol 1 of the European Convention on Human Rights (ECHR) cements the role of parents as the primary educators of their children, stating that:

In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.
33. However, Article 12 of the Istanbul Convention departs from this understanding, by highlighting that:
  1. Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.
  2. Parties shall take the necessary legislative and other measures to prevent all forms of violence covered by the scope of this Convention by any natural or legal person.
34. Furthermore, pursuant to Article 14 (1) of the Istanbul Convention:

Parties shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between men and women, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education.

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<sup>50</sup> *Folgerø and Others v. Norway* App no 15472/02 (ECtHR, 29 June 2007) 84 (e)

<sup>51</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Article 26 (3), emphasis added

<sup>52</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res 44/25 UN Doc A/44/49 (CRC) Articles 5 and 18

35. These provisions could result in a severe infringement of the right of parents to ensure their children receive education and teaching in conformity with their own religious and philosophical convictions.
36. For instance, parents would not be able to oppose controversial sex 'education' classes where children are taught to embrace and explore different sexual orientations and gender identities. They might be accused of violence towards their girl child if they refuse to treat her as a boy, if she so wishes. The same might happen if parents seek medical help for their child who suffers from gender dysphoria. It is unclear what 'stereotyped gender roles' constitute and who should identify and define those. In the light of these controversial definitions and of Article 33 of the Istanbul Convention, such parental conduct might be classified as 'psychological violence' and criminalised.<sup>53</sup>
37. Furthermore, the provisions of the Istanbul Convention are in conflict with the teachings of large religious communities and may encroach upon the fundamental right to freedom of religion. The binary view of mankind and of marriage, held by all major religions, may be stigmatized as a *tradition based on stereotyped gender roles*<sup>54</sup> and thus something that should be opposed in specific teaching materials. This provision is so broad in scope and vague in terminology that it may become a vehicle for substantially redrafting educational materials on the matter, particularly those of ethos-based schools and institutions.
38. The Istanbul Convention would directly violate the duty of professional secrecy for counsellors, therapists, pastors or ministers. Article 28 of the Istanbul Convention reads:

Parties shall take the necessary measures to ensure that the confidentiality rules imposed by internal law on certain professionals do not constitute an obstacle to the possibility, under appropriate conditions, of their reporting to the competent organisations or authorities if they have reasonable grounds to believe that a serious act of violence covered by the scope of this Convention, has been committed and further serious acts of violence are to be expected.
39. Orthodox and Catholic priests, for instance, are bound by an absolute obligation of secrecy about anything a person may confess. The provisions of the Istanbul Convention would force them to break the 'sacramental seal' and fundamentally violate their freedom of religion. No derogations from this rule are allowed.

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<sup>53</sup> Istanbul Convention, Article 33: 'Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats is criminalised.'

<sup>54</sup> See, to that effect, Istanbul Convention, Article 12 (1): 'Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to *eradicating* prejudices, customs, *traditions* and all other practices *which are based* on the idea of the inferiority of women or *on stereotyped roles for women and men.*' (emphasis added)

40. There is no opt-out clause for ethos-based or religious schools.<sup>55</sup> These might be sanctioned for not allowing boys who identify with the female gender to use girls' bathrooms and *vice versa*. The refusal to admit a transgender child of the opposite sex to a single-sex school could be classified, under the Istanbul Convention as violence against women.

*Discrimination against and stereotyped portrayal of men*

41. The aims of the Istanbul Convention are to:

- a) protect *women* against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;
- b) contribute to the elimination of all forms of discrimination against *women* and promote substantive equality between women and men, including by empowering women;
- c) design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against *women* and domestic violence;
- d) promote international co-operation with a view to eliminating violence against *women* and domestic violence;
- e) provide support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against *women* and domestic violence.<sup>56</sup>

42. Although the Preamble of the Istanbul Convention recognizes that men *may be*, and children *are* victims of domestic violence,<sup>57</sup> the text calls for 'particular attention to women victims of gender-based violence in implementing the provisions of this Convention'.<sup>58</sup> In a number of places, the Istanbul Convention privileges women and girl victims. For instance, Article 22 (2) calls for specialist women's support services for all women victims of violence and their children. Male victims of domestic violence are overlooked.<sup>59</sup> Likewise, the Istanbul Convention does not address other vulnerable groups that are affected by domestic violence, e.g. the elderly. Limiting certain rights primarily to only one group – women - implies that others do not enjoy the same protection against domestic violence.
43. Both men and boys are presented as perpetrators of violence, who should be, in particular, educated in preventing this form of violence.<sup>60</sup> The violence against women is described as:

[A] manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women.<sup>61</sup>

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<sup>55</sup> Even the possibility to make reservations is practically non-existent. See Istanbul Convention, Article 78.

<sup>56</sup> Istanbul Convention, Article 1

<sup>57</sup> Istanbul Convention, Preamble

<sup>58</sup> Istanbul Convention, Article 2 (2)

<sup>59</sup> Istanbul Convention, Article 22 (2)

<sup>60</sup> Istanbul Convention, Articles 12 (1) and (4)

<sup>61</sup> Istanbul Convention, Preamble

44. The Istanbul Convention neither clarifies, nor justifies why its text should focus on one sex only. If domestic violence disproportionately affects women, then the assistance to victims of domestic violence would mainly benefit women in any event.
45. Therefore, the Istanbul Convention is built on the presumption that 'women and girls are exposed to a higher risk of gender-based violence than men' without supporting the claim with reliable objective data. In addition, this premise appears to be at least partially incorrect.
46. A prominent study researching 'the prevalence of reciprocal (i.e. perpetrated by both partners) and nonreciprocal intimate partner violence' and aiming to determine whether 'reciprocity is related to violence frequency and injury'<sup>62</sup> has shown that '[i]n non-reciprocally violent relationships, women were the perpetrators in more than 70% of the cases.'<sup>63</sup>
47. This recent three year research project conducted by more than forty scholars and directed by Editor-in-Chief of Partner Abuse, a Springer Publishing Company journal concluded that:

Although women are more impacted by domestic violence ... except for sexual coercion, men and women perpetrate physical and non-physical forms of abuse at comparable rates, most domestic violence is mutual, women are as controlling as men, domestic violence by men and women is correlated with essentially the same risk factors, and male and female perpetrators are motivated for similar reasons.<sup>64</sup>

48. The study also notes that '[r]ates of female-perpetrated violence [are] higher than male-perpetrated (28.3 per cent v. 21.6 per cent).'<sup>65</sup>
49. It appears that the Istanbul Convention unjustifiably overlooks victims of violence other than women. All victims of domestic violence, especially children, should get equal help and assistance, irrespective of their sex or other status.

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<sup>62</sup> Daniel J. Whitaker, Tadesse Haileyesus, Monica Swahn, and Linda S. Saltzman, 'Differences in Frequency of Violence and Reported Injury Between Relationships With Reciprocal and Nonreciprocal Intimate Partner Violence' [2007] 97(5) American Journal of Public health 941-947

<sup>63</sup> Daniel J. Whitaker, Tadesse Haileyesus, Monica Swahn, and Linda S. Saltzman, 'Differences in Frequency of Violence and Reported Injury Between Relationships With Reciprocal and Nonreciprocal Intimate Partner Violence' [2007] 97(5) American Journal of Public health 941-947. See also 'Domestic violence: Not Always One Sided' (*Patient Education Center*) <[http://newscastmedia.com/harvard\\_study.htm](http://newscastmedia.com/harvard_study.htm)> accessed 12 April 2016: 'When the violence was one-sided, both women and men said that women were perpetrators about 70% of the time. Men were more likely to be injured in reciprocally violent relationships (25%) than were women when the violence was one sided (20%).'

<sup>64</sup> 'Unprecedented Domestic Violence Study Affirms Need to Recognize Male Victims' (*prweb*) <<http://www.prweb.com/releases/2013/5/prweb10741752.htm>> accessed 3 May 2016

<sup>65</sup> Partner Abuse State of Knowledge Project, 'Findings At-a-Glance' (*lghhttp*) <<http://lghhttp.48653.nexcesscdn.net/80223CF/springer-static/media/springer-journals/FindingsAt-a-Glance.pdf>> accessed 3 May 2016 For an overview of the The Partner Abuse State of Knowledge Project go to 'The Partner Abuse State of Knowledge Project' (*PRWEB*) <<http://ww1.prweb.com/prfiles/2013/05/16/10741752/PASK%20Overview.pdf>> accessed 3 May 2015



### *Monitoring mechanism – GREVIO*

50. In chapter IX, the Istanbul Convention establishes a strict ‘monitoring mechanism’ – the ‘Group of experts on action against violence against women and domestic violence (GREVIO)’. GREVIO shall have ten to fifteen members elected by the Committee of parties to the Istanbul Convention and will monitor the implementation of the Istanbul Convention by the parties.<sup>66</sup>
51. At first, all parties will submit for examination a report on legislative and other measures giving effect to the Istanbul Convention. The evaluation procedure, conducted by GREVIO, is divided into rounds. Firstly, GREVIO receives information on the implementation of the Istanbul Convention from non-governmental organizations and civil society members at large. GREVIO may then organize country visits and prepare a draft report on the implementation of the Istanbul Convention provisions. In the report, GREVIO formulates suggestions and proposals on how to deal with identified problems and deficiencies. After receiving comments from the parties, GREVIO adopts its report and conclusions, which are made public.
52. In addition to the regular evaluation procedure, GREVIO is entitled to issue special reports if it receives reliable information indicating a situation that requires immediate attention.
53. The described monitoring mechanism warrants caution, for two main reasons: a) it has serious implications for national legislation in the monitored area, and b) it has the potential to undermine the autonomy of EU law (in the event of the EU acceding to the Istanbul Convention).
54. It should be noted that there are a number of other Council of Europe conventions that establish similar monitoring mechanisms. For example, the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, which came into force in 1989, established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). CPT delegations have unlimited access to places of detention. After each visit they write a report and offer recommendations, which are strictly confidential, unlike the reports submitted by GREVIO. But even so, the extensive interpretation by CPT of various rights of prisoners has a tendency to substantially broaden the scope of the original text. The monitoring mechanism creates a life of its own and has a serious impact on national legislation in the monitored area.
55. This is likely to be the case with GREVIO as well, where the publication of the reports can serve as an effective tool to create pressure on a party to the Istanbul Convention to adopt all the measures recommended by it. In the context of education, this can lead to public criticism of some aspects of religious teaching stamped by an official authority of the Council of Europe.

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<sup>66</sup> Istanbul Convention, Article 66 (1)

56. Secondly, since the EU forms an autonomous legal order, EU accession to an international agreement ‘cannot affect the allocation of responsibilities defined in the Treaties’.<sup>67</sup> EU accession to any international agreement cannot result in *de facto* modifications of the allocation of responsibilities as defined in the Treaties. This can be done only by way of a Treaty amendment following the procedure set out in the Treaties. Anything to the contrary, as appears to be the case with the Istanbul Convention, would evade a procedure specifically prescribed by the TFEU.
57. Title II of the TEU contains ‘Provisions on the institutions.’ Article 17 of this title lists the rights and obligations of the EC. One of its tasks is to ‘ensure the application ... of measures adopted by the institutions pursuant to them’, and to ‘oversee the application of Union law under the control of the Court of Justice of the European Union’.<sup>68</sup>
58. Following EU accession to the Istanbul Convention, it will become an integral part of EU law, which is, in accordance with Article 17 (1) TFEU, subject to oversight by the EC. The Istanbul Convention will be classified as a measure adopted by EU institutions within the meaning of Article 17 (1) TFEU. Neither Article 17 TFEU, nor any other provisions of the Treaties discharges the EC from executing these duties. Yet, Article 66 of the Istanbul Convention clearly states that GREVIO ‘shall monitor the implementation of this Convention by the parties’ overtaking the task expressly conferred on the EC. In reality, such modification amounts to the change of the allocation of responsibilities as defined in the Treaties and should only be done by way of Treaty amendment.
59. Another issue of concern triggered by the Istanbul Convention is the relationship between the CJEU and GREVIO. Article 19 (1) TFEU specifies that the CJEU ‘shall ensure that in the interpretation and application of the Treaties the law is observed.’ It follows from Article 17 TFEU that it will control the EC in its task of overseeing the application of EU law. Although the EC is ‘the Guardian of the Treaties,’ it is in fact the CJEU that is the final arbiter on whether EU law has been properly implemented. The reports and conclusions concerning the measures taken by a Member State, issued by GREVIO,<sup>69</sup> or the recommendations on the implementation of the Istanbul Convention<sup>70</sup> may undermine the exclusive position of the CJEU to review the legality of acts by the EU.<sup>71</sup> The CJEU held this even in the case of the much more closely defined and less controversial rights contained in the ECHR. In this regard, the CJEU held that even a review of EU law by a body other than the CJEU ‘would be liable to interfere with the division of powers between the EU and its Member States’.<sup>72</sup>

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<sup>67</sup> Judgment in *Commission v. Ireland*, C-459/03, EU:C:2006:345, paragraph 123

<sup>68</sup> TEU, Article 17 (1)

<sup>69</sup> Istanbul Convention, Article 68

<sup>70</sup> Istanbul Convention, Article 69

<sup>71</sup> See, e.g. Opinion 1/00, EU:C:2002:231, paragraph 24

<sup>72</sup> Opinion 2/13, EU:C:2014:2454, paragraphs 224 and 225

60. In conclusion, the monitoring mechanism put in place by the Istanbul Convention is very problematic, since a) it might have a serious impact on national legislation in the monitored area, and b) it has the potential of undermining the exclusive position of the CJEU to review the legality of EU acts and, more generally, the autonomy of EU law.

### **(c) External competences of the EU and EU accession to international agreements**

#### *Primary law and the jurisprudence of the Court of Justice of the European Union (CJEU)*

61. EU external action is guided by Chapter 1 Title V of the TFEU and general principles of the EU. Article 47 TEU grants the EU legal personality by which the main condition for entering into international agreements is fulfilled.<sup>73</sup> In the area of EU external action, Article 3 (2) TFEU specifies where the EU has an exclusive competence for the conclusion of international agreements:

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

62. This Article does not imply that the EU has exclusive competence to only act externally in areas where the Treaties grant it exclusive competence. Rather, it says that where the EU legislative act provides for a conclusion of an international agreement, the EU has the external competence to do so.<sup>74</sup> The Treaties do not contain a definition of an international agreement, but Article 216 TFEU authorizes the EU to conclude international agreements, where a) it is provided so by the Treaties, b) where the conclusion of an international agreement is necessary in order to achieve an EU objective, c) where the conclusion of an international agreement is provided for in a legally binding EU act, or d) it will 'or is likely to affect common rules or alter their scope'. The process of entering into international agreements is regulated by Article 218 TFEU.
63. Another issue requiring due attention is the principle of conferral, which 'must be respected in both the internal action and the international action of the community'.<sup>75</sup> This entails that 'competences not conferred upon the Union in the Treaties remain with the Member States'.<sup>76</sup> The EU may act only when it is authorized through its legal basis. In this sense, Article 5 TEU states:

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

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<sup>73</sup> Nevertheless, even in the pre-Lisbon era, the CJEU interpreted what was then Article 281 EC as granting the EU (at that time Community), international legal personality. See Judgment in *Commission v. Council*, Case 22/70, EU:C:1971:32, 263

<sup>74</sup> Article 3 (2) TFEU must be necessarily read in conjunction with Article 216 TFEU that specifies when the EU can enter into international agreements.

<sup>75</sup> Opinion 2/94, EU:C:1996:140, paragraph 24

<sup>76</sup> TEU, Article 4 (1)

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

64. As the existence of a legal basis is a *sine qua non* condition for the EU to act, the choice of the correct legal basis is of utmost importance. Apart from the fact that the choice of the legal basis determines the adoption procedure, the choice of an incorrect legal basis may lead to the annulment of the act adopted. For this reason, the following section will outline the relationship and correlation between the proposed EU legal acts and legal bases. Subsequent sections will analyze whether the bases advanced by the European institutions for the accession of the Istanbul Convention are in accordance with the legal requirements.

### Competence

65. As the CJEU explained in *Commission v. Council (ERTA)*,<sup>77</sup> it is important to distinguish ‘capacity’ from ‘competence’ to enter into an international agreement. ‘Capacity’ means that there is *potential* for the EU to act. ‘Competence’ means that there is a specific provision (in accordance with the principle of conferred powers) that enables the EU to act.

66. One of the Declarations annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon, namely Declaration No. 24, codifies this principle that was developed by the CJEU in *ERTA*:

The Conference confirms that the fact that the European Union has a legal personality will not in any way authorize the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.<sup>78</sup>

67. Whether the EU has competence and, if so, the specific type of competence, is clarified by the Treaties. The Lisbon Treaty divided competence into three categories: exclusive,<sup>79</sup> shared,<sup>80</sup> and supporting competences.<sup>81</sup>
68. Firstly, the area of **exclusive competences** is where the EU has an exclusive right of action in legislating and adopting legally binding acts.<sup>82</sup>

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<sup>77</sup> Judgment in *Commission v. Council* EU:C:1971:32, 263

<sup>78</sup> TFEU, Declaration No. 24 concerning the legal personality of the European Union

<sup>79</sup> TFEU, Article 3

<sup>80</sup> TFEU, Article 4

<sup>81</sup> TFEU, Article 6

<sup>82</sup> TFEU, Articles 2 (1) and 3 (1)

69. Second, the EU and its Member States may exercise their competence jointly in the area of **shared competences**.<sup>83</sup> It is important to note that when the EU exercises its competence, in accordance with the so-called principle of pre-emption,<sup>84</sup> Member States cannot act anymore.<sup>85</sup> The nature of the exercise of the shared competence varies from area to area, depending on the scope of powers that have been exercised by the EU. In the case of the so-called mixed agreements,<sup>86</sup> the EU institutions are obliged to work together under the principle of sincere cooperation in the whole process of entering into any international agreement. The CJEU ruled, in this respect, that:

[W]here it is apparent that the subject-matter of an agreement or convention falls partly within the competence of the Community and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community (Ruling 1/78 [1978] ECR 2151, paragraphs 34 to 36, Opinion 2/91 [1993] ECR I-1061, paragraph 36, and Opinion 1/94 [1994] ECR I-5267, paragraph 108). The Community institutions and the Member States must take all necessary steps to ensure the best possible cooperation in that regard (Opinion 2/91, paragraph 38).<sup>87</sup>

70. Third, **supporting competence** means that the EU only has the competence to support the action of Member States.<sup>88</sup> The doctrine of pre-emption is not applicable here and the competences of the EU in this area can never be exclusive.
71. A further distinction is made on the basis of the existence of the provision in the Treaties that expressly grant the EU power to act in a particular area. The CJEU accepted that the power to act should not necessarily flow from an express Treaty provision, but can be implied.<sup>89</sup> It ruled, in principle, that EU external powers mirror EU internal powers, known as the principle of parallelism:

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<sup>83</sup> TFEU, Articles 2 (2) and 4

<sup>84</sup> TFEU, Article 2 (2)

<sup>85</sup> In the area of shared competences, Member States will lose their competence to act only to the extent to which the EU has exercised its competence. Also, if the EU chooses to act by means of minimum harmonization, Member States retain the competence to introduce higher standards. In the event that the EU ceases to exercise its powers in the area of shared competences, Member States will regain the power to act in the area.

<sup>86</sup> We speak of a 'mixed agreement, if the subject-matter of the agreement falls both within the EU and the Member States' competences.

<sup>87</sup> Judgment in *Commission of the European Communities v. Council of the European Union*, C-25/94 EU:C:1996:114, paragraph 48

<sup>88</sup> TFEU, Articles 2 (5) and 6

<sup>89</sup> 'During the oral procedure the applicant maintained that the absence from the Treaty of any provision expressly enabling fixed prices to be imposed precludes recognition of such a power by means of an interpretation which it regards as being wide and unacceptable in law. The Court does not share that opinion in so far as, as it has just observed, the power involved in this instance is one without which equalization cannot operate as provided for in Article 26 of the Convention, that is, on the basis of an immediate and guaranteed reduction in prices. The Court considers that without having recourse to a wide interpretation it is possible to apply a rule of interpretation generally accepted in both international

[A]uthority to enter into international commitments may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provisions. The Court has concluded inter alia that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion.<sup>90</sup>

72. Therefore, the existence of a legal basis is a *sine qua non* condition for the EU to act; the choice of the correct legal basis is of utmost importance. In the words of the CJEU:

The choice of the appropriate legal basis has constitutional significance. Since the Community has conferred powers only, it must tie the Protocol to a Treaty provision which empowers it to approve such a measure. To proceed on an incorrect legal basis is therefore liable to invalidate the act concluding the agreement and so vitiate the Community's consent to be bound by the agreement it has signed. That is so in particular where the Treaty does not confer on the Community sufficient competence to ratify the agreement in its entirety, a situation which entails examining the allocation as between the Community and the Member States of the powers to conclude the agreement that is envisaged with non-member countries, or where the appropriate legal basis for the measure concluding the agreement lays down a legislative procedure different from that which has in fact been followed by the Community institutions.<sup>91</sup>

73. It is also settled by case-law that the CJEU will declare a legislative act invalid if it does not clearly refer to the legal basis on which it is adopted.<sup>92</sup> The CJEU reiterated that:

[T]he choice of the legal basis for a measure, including one adopted in order to conclude an international agreement, does not follow from its author's conviction alone, but must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure.<sup>93</sup>

74. Furthermore:

If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be

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and national law, according to which the rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied ... The result is that the accomplishment of its task in this instance assumes a power ...' in Judgment in *Fédération charbonnière de Belgique v. High Authority*, C-8/55 EU:C:1956:11, paragraphs 299 and 300

<sup>90</sup> Opinion 1/76, EU:C:1977:63, paragraph 3

<sup>91</sup> Opinion 1/76, EU:C:1977:63, paragraph 3

<sup>92</sup> Judgment in *Commission v. Council*, C-370/07, EU:C:2009:590

<sup>93</sup> Judgment in *Commission v. Council*, Case C-269/97, EU:C:2000:183, paragraph 43



founded on a single legal basis, namely that required by the main or predominant purpose or component.<sup>94</sup>

75. Exceptionally, if it is established that the measure simultaneously pursues several objectives and these objectives are inseparably linked to each other while none of the objectives are secondary or indirect in relation to the other, the measure may be founded on more legal bases.<sup>95</sup>
76. The following sections seek to briefly address a) the prohibition on extending the scope of EU competences as a consequence of the EU acceding an international agreement, and b) the effect of the EU entering into an international agreement.

a. No new competences for the EU as a consequence of accession

77. In accordance with the principle of conferral, EU accession to an international treaty cannot result in the undue broadening of EU competences as the EU is authorized to act only within the limits of the competences conferred upon it by the Member States:

The Conference confirms that the fact that the European Union has a legal personality will not in any way authorize the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.<sup>96</sup>

78. Advocate General Kokott, in her opinion on EU accession to the European Convention on Human Rights, recalled that the CJEU:

[H]ad already established that no provision of the then EC Treaty conferred on the EU institutions any general power to enact rules on human rights or to conclude international conventions in this field...The EU still does not have a general competence in the field of fundamental and human rights. Accordingly, it [the EU] may not acquire such a competence by virtue of its accession to the ECHR either.<sup>97</sup>

b. The effect of the EU entering into an international agreement

79. Firstly, if the EU acceded to an international agreement, Member States will be bound by the provisions of this agreement in the area falling within the EU competence, since it becomes an integral part of EU law. This is the so-called 'Haegemann doctrine', which originated in a judgment dating from 1974: *Haegemann v. Belgian State*. Here, the CJEU stated that from the moment that an international agreement comes into force, the provisions of this agreement 'form an integral part'<sup>98</sup> of what is now EU law and that the CJEU 'has jurisdiction to give preliminary rulings concerning the interpretation of this [a]greement.'<sup>99</sup> Furthermore,

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<sup>94</sup> Judgment in *Parliament v. Council*, C-42/97, EU:C:1999:81, paragraphs 39 and 40

<sup>95</sup> See, Judgment in *Parliament v Council*, EU:C:1999:81, paragraph 38

<sup>96</sup> TFEU, Declaration No. 24 concerning the legal personality of the European Union

<sup>97</sup> View of Advocate General Kokott in Opinion 2/13, EU:C:2014:2475, paragraph 46

<sup>98</sup> Judgment in *Haegemann v. Belgian State*, C-181/73, EU:C:1974:41, paragraph 5

<sup>99</sup> Judgment in *Haegemann v. Belgian State*, EU:C:1974:41, paragraph 6

Article 216 (2) TFEU states that '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States.'

80. Second, the EU legal system and the competences of EU institutions cannot be affected by the EU's accession to an international agreement that establishes bodies which may eventually conflict with EU institutions or bodies. In *Commission v. Ireland (Mox Plant)*,<sup>100</sup> the CJEU stressed that:

[A]n international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. That exclusive jurisdiction of the Court is confirmed by Article 292 EC, by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein.<sup>101</sup>

81. In other words, the EU legal system is an autonomous legal order.<sup>102</sup>
82. Third, to a great degree, international agreements to which the EU is a party are capable of having direct effect. Francesca Martines summarizes:

In order to determine such an [direct] effect ... the ECJ has to verify whether the agreement is reproducing those conditions which can be assimilated to those of the EU legal order, and on what basis Member States accepted direct effect of EU law. Direct effect thus does not depend on the existence of a provision explicitly conferring rights to individuals ... but depends on the agreement meeting two interpretative criteria: the spirit, structure, and nature of the agreement, first part of the test, and wording, as second part of the test. Only if the objective and scope and the global analysis of the system established by the agreement can lead to the conclusion that the agreement 'intended' to create individual rights *in the same manner* as the EU legal order creates individual rights, and only in this case can the agreement's provision have direct effect.<sup>103</sup>

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<sup>100</sup> Judgment in *Commission v. Ireland*, C-459/03, EU:C:2006:345

<sup>101</sup> Judgment in *Commission v. Ireland* EU:C:2006:345, paragraph 123

<sup>102</sup> See, in this respect Judgment in *Costa v. ENEL*, Case 6/64, EU:C:1964:66

<sup>103</sup> Francesca Martines, 'Direct Effect of International Agreements of the European Union' [2014] 25 (1) European Journal of International Law <<http://www.ejil.org/pdfs/25/1/2466.pdf>> accessed 12 April 2016

### *Application of the above-mentioned principles to the Istanbul Convention*

83. The current section will apply the outlined provisions and principles to the Istanbul Convention, highlighting that the requirements of EU accession to an international convention have not been met and that the proposed legal bases for the Decisions which will lead to EU accession are manifestly incorrect.
- a. The Istanbul Convention – a mixed agreement
84. The Istanbul Convention covers a broad range of areas: data collection, awareness raising, legal measures on preventing and criminalizing violence against women, for which both the EU and Member States have competence. In EU parlance, the Istanbul Convention would be classified as a mixed agreement. When it is concluded, it will 'have the same legal status in the [EU] legal order as purely [EU] agreements in so far as the provisions fall within the scope of [EU] competence.'<sup>104</sup> If the EU accedes to the Istanbul Convention, this will become binding not only on the EU, but also on all EU Member States, regardless of whether they have ratified the Istanbul Convention or not. In this event, the Member States that have not ratified the Istanbul Convention will be bound only by those provisions of the Istanbul Convention that fall within EU competence.
85. Here is precisely where EU accession to the Istanbul Convention appears most problematic, since this would create multiple pools of legal obligations that will create legal uncertainty and, arguably more importantly, it will endanger the autonomy of EU law.
86. The interplay between EU competence and Member State competence is worth careful analysis. Firstly, the area of EU competence covered by the Istanbul Convention is rather limited. The EC itself admits that 'the Member States remain competent for substantial parts of the Convention',<sup>105</sup> and that 'important parts of the Convention remain under Member States' exclusive competence, particularly in the area of substantive criminal law.'<sup>106</sup> Despite this, the EC concludes that the EU still has a competence for a 'considerable part' of the Istanbul Convention, 'and should therefore ratify the Convention alongside the Member States'.<sup>107</sup>
87. This conclusion is incorrect. The fact that EU competence partially overlaps with the scope of the Istanbul Convention cannot be the sole basis for the accession, as it must comply with requirements flowing from EU law. Therefore, the EU should not and cannot accede to an international convention only if or because competence exists, but also if 'participation of the EU in the agreement in question is *necessary*

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<sup>104</sup> Judgment in *Commission v. France*, C-239/03, EU:C:2004:598, paragraph 25

<sup>105</sup> European Commission, 'Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence' COM (2016) 109 final, 7 point 2.1

<sup>106</sup> Personal email communication from 21 April 2016

<sup>107</sup> European Commission, 'Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence' COM (2016) 109 final, 7 point 2.1

for the attainment of that objective.<sup>108</sup> This is consistent with Article 3 (6) TEU stating that '[t]he Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.'

88. Article 3 (6) TEU is further developed in Article 3 (2) TFEU that specifies when the EU has exclusive competence for the conclusion of an international agreement,<sup>109</sup> and in Article 216 TFEU. This latter Article provides an exhaustive list of scenarios when the EU may conclude an international agreement:

The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or *where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*, or is provided for in a legally binding Union act or is *likely to affect common rules or alter their scope*.<sup>110</sup>

89. The best-known example of the EU attempting to accede to an international agreement is the ECHR.<sup>111</sup> The ECHR is a Council of Europe convention that was opened for signatures in Rome on 4 November 1950 and came into force in 1953.
90. However, the two cases of accession differ significantly. Firstly, unlike the case of ECHR, the Treaties do not provide for EU accession to the Istanbul Convention. Second, the authors of this contribution are not aware of the existence of any legally binding EU act that provides for EU accession to the Istanbul Convention. Therefore, the first and the third option (namely 'where the Treaties so provide' and '[the accession] is provided for in a legally binding Union act') are not applicable to EU accession to the Istanbul Convention.
91. A thorough analysis should be made as to whether EU accession to the Istanbul Convention meets the necessity condition of Article 216 (1), i.e. 'where the conclusion of an agreement is *necessary* in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties.'
92. Any piece of legislation should be carefully scrutinized in the light of its necessity, meaning that a proven need should be identified. This requirement is even more stringent when it deals with EU acts, since the EU is bound by the principle of subsidiarity.
93. In the current case, there is no demonstrated need for such a far reaching convention. The EC failed to demonstrate with objective data that EU accession to

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<sup>108</sup> Paul Craig and Gráinne de Búrca, *EU Law: Texts, Cases and Materials* (fifth edition Oxford University Press 2011) 311

<sup>109</sup> TFEU, Article 3 (2): 'The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.'

<sup>110</sup> TFEU, Article 216 (1) emphasis added

<sup>111</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

the Istanbul Convention will be more than a political declaration or, in the words of the EC, ‘a strong political message’.<sup>112</sup> The EC admits that:

Provided that the EU would accede, alongside Member States, to the full extent of its competences, ratification of the Istanbul Convention would put the EU in a strong position as regards monitoring of *enforcement of the Convention also beyond the EU* and would send a *firm political message*.<sup>113</sup>

94. The EC lists a number of other advantages that would flow from EU accession to the Istanbul Convention, such as ‘the reduction in violence against women and therefore in the improvement of the health and lives of victims’.<sup>114</sup> However, these conclusions are unsubstantiated and unsupported by relevant data. Answering the question on impact assessment, the EC admits that a comprehensive and profound assessment has not been done<sup>115</sup> and recognizes, even on the basis of a limited assessment, that ‘a possible EU accession would require some limited adaptations’.<sup>116</sup> The need to send ‘a strong political message’ does not satisfy the requirement for necessity and proportionality<sup>117</sup> in respect of this legislative proposal.

b. Legal basis

95. In the absence of any express provisions conferring on the EU a general power to conclude international agreements in the field of human rights, or more specifically, in combating violence against women and domestic violence, it is necessary to examine whether there are implied powers for this purpose and to scrutinize the legal bases proposed by the EC. Very importantly, the mere ‘capacity’ does not enable the EU to act in a given area.

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<sup>112</sup> European Commission, ‘Roadmap on (A possible) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)’ 4 <[http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_010\\_istanbul\\_convention\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf)> accessed 12 April 2016

<sup>113</sup> European Commission, ‘Roadmap on (A possible) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)’ 4 <[http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_010\\_istanbul\\_convention\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf)> accessed 12 April 2016, emphasis added

<sup>114</sup> European Commission, ‘Roadmap on (A possible) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)’ 4 <[http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_010\\_istanbul\\_convention\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf)> accessed 12 April 2016

<sup>115</sup> European Commission, ‘Roadmap on (A possible) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)’ 6 <[http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_010\\_istanbul\\_convention\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf)> accessed 12 April 2016

<sup>116</sup> European Commission, ‘Roadmap on (A possible) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)’ 6 <[http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_010\\_istanbul\\_convention\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf)> accessed 12 April 2016

<sup>117</sup> The requirement of the proportionality also requires that ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties,’ as outlined by TEU, Article 5 (4)

96. According to the CJEU:

[T]he choice of the legal basis for a European Union measure, including the measure adopted for the purpose of concluding an international agreement, must rest on objective factors amenable to judicial review, which include the aim and content of that measure. If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component. By way of exception, if it is established that the measure pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the various corresponding legal bases. However, no dual legal basis is possible where the procedures required by each legal basis are incompatible with each other.<sup>118</sup>

97. It is submitted that the proposed legal bases do not authorize the EU legislature to adopt the Decisions for two main reasons. Firstly, the Decisions will ultimately result in harmonising the national law of the Member States, in contradiction to the proposed legal bases which expressly prohibit harmonisation. Second, the TFEU limits the choice of the legal act to directives only, which means that Decisions are excluded from the scope of the legal act.

98. The legal bases proposed by the EC as relevant to the present accession are:

- Article 16 TFEU for data protection;
- Article 19 (1) TFEU for sex discrimination;
- Article 23 TFEU for consular protection for citizens of another Member State;
- Articles 18, 21, 46, 50 TFEU on free movement of citizens, free movement of workers and freedom of establishment;
- Article 78 TFEU for asylum and subsidiary and temporary protection;
- Article 79 TFEU for immigration;
- Article 81 TFEU for judicial cooperation in civil matters;
- Article 82 TFEU for judicial cooperation in criminal matters;
- Article 83 TFEU for the definition of EU-wide criminal offences and sanctions for particularly serious crimes with a cross-border dimension;
- Article 84 TFEU for non-harmonizing measures for crime prevention;
- Article 157 TFEU for equal opportunities and equal treatment of men and women in areas of employment and occupation.<sup>119</sup>

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<sup>118</sup> Judgment in *Commission v. Council*, C-377/12, EU:C:2014:1903, paragraph 34

<sup>119</sup> European Commission, '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' COM(2016) 111 final.en.pdf, 9



99. Although the Istanbul Convention has a broad scope and a number of components, its predominant purpose is the prevention and combating of violence against women and domestic violence. The EC considers that the Council Decision on the signing, on behalf of the EU, of the Istanbul Convention and the Council Decision on the conclusion, by the EU, of the Istanbul Convention should be based 'on the competences of the Union under Title V TFEU and in particular on Article 82 (2) and Article 84 thereof'.<sup>120</sup>
100. Article 82 (2) TFEU authorizes the EU to adopt *directives* in accordance with the ordinary legislative procedure establishing certain rules. The rules adopted 'shall take into account the differences between the legal traditions and systems of the Member States' and provide further specification as to their aim: mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, *the rights of victims of crime* and specific aspects of criminal procedure.<sup>121</sup>
101. Article 84 TFEU authorizes the EU to adopt measures which promote and support the actions of Member States in the field of crime prevention:
- The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.
102. As a preliminary remark, Treaty provisions 'cannot serve as a basis for widening the scope of [EU] powers beyond the general framework created by the provisions of the Treaty as a whole'.<sup>122</sup> Therefore, Article 82 (2) TFEU cannot serve as the legal basis for *any* of the Council Decisions, as it clearly authorizes the EU to adopt *directives only* and not any other legal instruments.
103. It is equally important to note that Article 84 TFEU was designed to promote and support the actions of Member States. It expressly prohibits any harmonization of the laws and regulations of Member States.<sup>123</sup>
104. However, accession to the Istanbul Convention cannot be interpreted by any means as an action of 'promotion' or 'support' within the meaning of this Article. This is because the Istanbul Convention, in the words of the EC, sets 'legally-binding standards'.<sup>124</sup> This is confirmed by the Explanatory Report to the Istanbul

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<sup>120</sup> European Commission, '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' COM(2016) 111 final en.pdf, 9

<sup>121</sup> See, in this sense, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>122</sup> Opinion 2/94, EU:C:1996:140, paragraph 30

<sup>123</sup> Any other interpretation would be contrary to the textual interpretation of Article 84 TFEU. See General rules of interpretation of treaties, Article 31 of the Vienna Convention on the Law of Treaties, 1969

<sup>124</sup> European Commission, 'Roadmap on (A possible) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul

Convention that states: ‘the Convention sets, for the first time in Europe, *legally-binding standards* to prevent violence against women and domestic violence, protect its victims and punish the perpetrators.’<sup>125</sup> The fact that the Istanbul Convention establishes harmonized legal standards is widely accepted,<sup>126</sup> and, to the knowledge of the authors, this has not been contested by the EC. Following accession, the Istanbul Convention would become an integral part of EU law, and Member States become bound by it as by any other instrument of EU law. Hence, accession of the Istanbul Convention will ultimately result in the harmonization that Article 84 TFEU expressly precludes.

105. Treaty Articles cannot be used as a basis for accession to international agreements that would in substance amount to amending the Treaty, by ultimately circumventing the procedure that was established for this purpose.<sup>127</sup>
106. As EU law now stands, harmonization in this area is prohibited. With regard to the Istanbul Convention, it means that the EU cannot sign or conclude the Istanbul Convention on the proposed legal bases. If the EC proceeds with the accession on the proposed legal bases, it runs the risk of annulment. The CJEU can annul the measure on the grounds that it was adopted on incorrect legal bases, if the measure is contested through the action of annulment.

#### *The effects of EU accession to the Istanbul Convention on EU Member States*

107. EU accession to any international agreement inevitably influences the EU legal order and the legal situation in Member States.
108. The consequence of EU accession is that the Istanbul Convention would become an integral part of EU law. All EU Member States, including those which did not ratify Istanbul Convention, will be bound by its provisions and standards that fall under the scope of EU law.
109. For Member States that have already ratified the Istanbul Convention, the consequence of EU accession to the Istanbul Convention will be less intrusive than for those which have only signed it or which have not signed it at all. While the first group of Member States freely accepted the obligations, the last two groups did not do so. However, legally binding obligations will be forcedly imposed on them. The Istanbul Convention will be binding in its entirety for the first group of Member

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Convention)’ <[http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_010\\_istanbul\\_convention\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf)> accessed 12 April 2016

<sup>125</sup> ‘Explanatory report on Istanbul Convention: Council of Europe Convention on preventing and combating violence against women and domestic violence’ (11 May 2011) 4 point 21 <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900016800d383a>> accessed 12 April 2016 emphasis added

<sup>126</sup> See, e.g. ‘it is the first instrument in Europe to set *legally binding standards* specifically to prevent gender-based violence, protect victims of violence and punish perpetrators’ in European Parliament Research Service, ‘The Istanbul Convention: A tool to tackle violence against women and girls’ (2015) <[http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/572785/EPRS\\_ATA\(2015\)572785\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/572785/EPRS_ATA(2015)572785_EN.pdf)> accessed 12 April 2016 emphasis added

<sup>127</sup> See, to this effect, Opinion 2/94, EU:C:1996:140, paragraph 30

States. Conversely, for the second group, only parts of the Istanbul Convention (that fall under the competence of EU law) will be binding. It is unclear if, and/or to what extent, the provisions of the Istanbul Convention will be effective (i.e. capable of attaining the goals and purposes set out) for the last two categories of Member States, given that only parts of the Convention will amount to legally binding obligations.

110. Both groups will be prevented from denouncing obligations flowing from the Istanbul Convention, as the renunciation will not change the fact that the Istanbul Convention will be an integral part of EU law with general applicability. The only way to release Member States from the obligations of the Istanbul Convention is for the EU to renounce the Istanbul Convention.

#### **(d) Possibilities for EU institutions**

111. Given the problematic aspects of the Istanbul Convention related to its scope, its infringement of fundamental rights, such as parental rights, the monitoring mechanism, the defective legal bases upon which it has been proposed, the EU should not complete its accession. There are a number of possibilities for challenging this process which will be explored below.
112. The EU institutions have a number of possibilities to prevent accession. They consist in exercising the EU institutions' powers in the accession procedure and depend on political will.

#### *The Council*

113. The TFEU contains rules that establish a general procedure for negotiation and accession to international agreements. This is conditioned upon the existence of political will, meaning that in any stage of negotiation and accession described below, the Council can block the accession to the Istanbul Convention by not adopting one of the Decisions. The Council shall 'authorize the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude them.'<sup>128</sup> In adopting the decisions, the Council shall act by a qualified majority.<sup>129</sup>
114. The Lisbon Treaty radically changed the voting procedure and established a general 'qualified majority rule': 'The Council shall act by a qualified majority except where the Treaties provide otherwise.'<sup>130</sup> Nevertheless, there are special instances where the requirement of unanimity applies even in the case of the ordinary legislative procedure. This is the case where, in addition to the legal basis which makes the adoption subject to the ordinary legislative procedure, the contemplated act will be adopted on a legal basis that requires unanimity.

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<sup>128</sup> TFEU, Article 218 (2)

<sup>129</sup> TFEU, Article 218 (8)

<sup>130</sup> TEU, Article 16 (3)

115. In the present case, the legal bases proposed by the EC are subject to the ordinary legislative procedure, i.e. the Council shall act through a qualified majority. However there is one possibility where this qualified majority requirement could be replaced by, in effect, a unanimity requirement. This possibility is described in Article 82 (3) TFEU:

Where a member of the Council considers that a draft directive as referred to in paragraph 2 *would affect fundamental aspects of its criminal justice system*, it may request that the draft directive be referred to the European Council. *In that case, the ordinary legislative procedure shall be suspended.* After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.<sup>131</sup>

116. For the time being, this possibility has never been employed by any Member State. Nevertheless, it leaves the door open for a Member State exercising its procedural rights within the Council to block an unwanted proposal.
117. Member States in the Council should support EU accession to the Istanbul Convention *within the limits of its competence* and subject to a reservation or interpretative declaration on the meaning of certain expressions. This would safeguard the division of competence between the EU and Member States on issues such as education, and would limit the legal uncertainty on the part of Member States that have not ratified the Convention domestically.
118. A proposed wording for a reservation / interpretative declaration regarding EU accession:

*The European Union declares that it accedes to the Convention within the limits of its competences.*

*The European Union declares that the definition of 'gender' provided by Article 3 of the Convention shall be interpreted and understood (without prejudice to / subject to / in line with) the ordinary and commonly understood meaning to be given to that term, referring to the two sexes, male and female, within the context of the society, in accordance with the Report of the Fourth World Conference on Women and the Rome Statute of the International Criminal Court.*

#### *The European Commission*

119. Article 17 (2) TEU and Articles 289 and 293 TFEU grant the EC the power to withdraw its legislative proposal.<sup>132</sup> This right, however, does not amount to 'a right of veto in the conduct of the legislative process, a right which would be contrary to the principles of conferral of powers and institutional balance'.<sup>133</sup> Therefore, the EC may exercise its right of withdrawal of legislative proposals provided that the

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<sup>131</sup> TFEU. Article 82 (3) emphasis added.

<sup>132</sup> Judgment in *Council v. Commission*, C-409/13, EU:C:2015:217, paragraph 74

<sup>133</sup> Judgment in *Council v. Commission*, EU:C:2015:217, paragraph 75

conditions specified by the CJEU in *Council v. Commission*<sup>134</sup> are met. Accordingly, the EC ‘must state to the Parliament and the Council the grounds for the withdrawal, which, in the event of challenge, have to be supported by cogent evidence or arguments.’<sup>135</sup> Only if the amendment by the EU legislature ‘distorts the proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its *raison d’être*, the Commission is entitled (in accordance with the principle of sincere cooperation) to withdraw it.’<sup>136</sup>

120. However, it seems politically unlikely that the EC will consider withdrawing the two proposals.<sup>137</sup>

### *The European Parliament*

121. By virtue of Article 17 (2) TEU, ‘Union legislative acts may only be adopted *on the basis of a Commission proposal*, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.’
122. The Istanbul Convention will be adopted following the ordinary legislative procedure, meaning that the consent of the European Parliament is required.<sup>138</sup> The responsible Committee of the European Parliament is the Committee on Civil Liberties, Justice and Home Affairs. Two Committees for opinion are Legal Affairs and Women’s Rights and Gender Equality. For the time being, the procedure in the European Parliament is in the preparatory phase.<sup>139</sup> The lack of consent of the European Parliament would effectively block EU accession to the Istanbul Convention.
123. Considering its previous activity,<sup>140</sup> it is not likely that the European Parliament will block the accession.

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<sup>134</sup> Judgment in *Council v. Commission*, C-409/13, EU:C:2015:217

<sup>135</sup> Judgment in *Council v. Commission*, EU:C:2015:217, paragraph 76

<sup>136</sup> Judgment in *Council v. Commission*, EU:C:2015:217, paragraph 83

<sup>137</sup> European Commission, ‘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’ COM(2016) 111 final en.pdf and European Commission, ‘Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence’ COM (2016) 109 final

<sup>138</sup> The type European Parliament Procedure is ‘Non-legislative enactments’ and the procedure subtype is ‘Consent by the Parliament.’

<sup>139</sup> ‘Procedure file on Council of Europe Convention on preventing and combating violence against women and domestic violence’ (*European Parliament*) <[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2016/0062\(NLE\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2016/0062(NLE))> accessed 12 April 2016

<sup>140</sup> See e.g. ‘The Istanbul Convention: A tool to tackle violence against women and girls’ (*European Parliament Think Tank*) <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_ATA\(2015\)572785](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_ATA(2015)572785)> accessed 12 April 2016 or European Parliament Research Service, ‘The Istanbul Convention: A tool to tackle violence against women and girls’ (2015)

### (e) Possibilities for EU Member States

124. EU Member States have ready access to two procedures that could effectively impact EU accession to the Istanbul Convention, namely a request for an opinion from the CJEU, and an action of annulment.

#### *Opinion of the CJEU*

125. The TFEU authorizes any Member State to request and obtain **the opinion of the CJEU**. Article 218 (11) states that:

A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

126. The procedure for an opinion on the compatibility with the primary law of an international agreement is an *ex ante* control that was established to ensure that ‘in the interpretation and application of the Treaties, the law is observed’.<sup>141</sup>
127. As a result of these proceedings, the CJEU may either give an adverse or favourable opinion. In the event of an adverse opinion, the international agreement may not enter into force in its current form unless the Treaties are amended.<sup>142</sup> A favourable opinion gives a green light for the EU to enter into an international agreement.
128. The deficiency of this procedure is that it does not prevent the signing and the conclusion of the international agreement. As soon as the international agreement is signed and concluded, it is no longer an ‘agreement envisaged’, and the CJEU will lose its jurisdiction to hear the case.<sup>143</sup>
129. Nevertheless, even if the agreement is ultimately concluded or even if the CJEU does not uphold the position of the Member States, there is another channel for judicial review – an action for annulment.

#### *Action for annulment*

130. The action for annulment is a procedure set out in Article 263 TFEU that allows the CJEU to contest the legislative acts of the EU institutions. The CJEU will review the challenged measure in the light of higher ranking, written or unwritten, rules of EU law. If the CJEU finds that the contested measure violates the rules of EU law, it will annul the act.

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<[http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/572785/EPRS\\_ATA\(2015\)572785\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/572785/EPRS_ATA(2015)572785_EN.pdf)> accessed 12 April 2016 emphasis added

<sup>141</sup> Opinion 2/94, EU:C:1996:140, paragraph 6

<sup>142</sup> Koen Lenaerts, Ignace Maselis and Kathleen Gutman and others, *EU Procedural Law* (first edition Oxford University Press 2014) 560 point 12.20

<sup>143</sup> See, in to this effect Koen Lenaerts, Ignace Maselis and Kathleen Gutman and others, *EU Procedural Law* (first edition Oxford University Press 2014) 558 point 12.16



131. This analysis purports to generally examine the prospects of success of an action for annulment in connection with the Istanbul Conventions. In so doing, it does not claim to provide an exhaustive overview. The acts subject to an action for annulment would be, if adopted, two Council Decisions.

a. Admissibility

132. Before going into the substance of the case, the CJEU will scrutinize and examine whether the action (and the applicant) meet the admissibility requirements. In the event that they do not, the CJEU will dismiss the action on procedural grounds.

133. The action for annulment can be used if the conditions specified by the TFEU are met, meaning that the contested act must be 'reviewable', 'binding', and 'intending to produce legal effects' within the meaning of the CJEU's jurisprudence. Generally speaking, where an act is listed among the binding acts in Article 288 TFEU, its binding nature will not be contested and can be subject of the action for annulment. The action can be brought by, *inter alia*, a Member State 'on the grounds of lack of competence, the infringement of an essential procedural requirement, the infringement of the Treaties or of any rule of law relating to their application, or the misuse of powers.'<sup>144</sup> On the basis of the available documents and the legal developments related to the Istanbul Convention, there are solid grounds to believe that an action for annulment could be successful.

134. In the present case, the two proposals of the EC cannot be challenged through an action for annulment as they do not constitute reviewable acts within the meaning of the CJEU's jurisprudence.<sup>145</sup>

135. However, if adopted, they will constitute reviewable acts within the meaning of the CJEU jurisprudence. The CJEU ruled that 'any measures adopted by the institutions, whatever their form, which are intended to have binding legal effects, are regarded as acts open to challenge, within the meaning of Article 263 TFEU.'<sup>146</sup>

136. According to Article 263 (3) Member States, the European Parliament, the Council and the EC - privileged applicants - may always challenge an act they consider unlawful through the action for annulment. In the case at hand, 'decision' is listed among the forms of binding acts in Article 288 TFEU. Hence, its binding nature will not be questioned.<sup>147</sup>

137. The right of a Member State to bring an action for annulment does not depend on the position taken by the Member State in the Council at the time of the adoption of the contested act.<sup>148</sup>

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<sup>144</sup> TFEU, Article 263 paragraph 2

<sup>145</sup> Judgment in *Italy v. Commission*, C-301/03, EU:C:2005:727, paragraphs 21-24

<sup>146</sup> Judgment in *Commission v. Council*, Case C-370/07, EU:C:2009:590, paragraph 42

<sup>147</sup> See, e.g. Judgment in *Deutsche Post and Germany v. Commission*, C-463/10 P, EU:C:2011:656, paragraphs 43 -45

<sup>148</sup> Judgment in *Italy v. Council*, C-166/78, EU:C:1979:195, paragraph 6

b. Substance

138. In support of the action, the second paragraph of Article 263 lists the grounds on which the contested act may be annulled:

- i. lack of competence;
- ii. infringement of an essential procedural requirement;
- iii. infringement of the Treaties or any rule of law relating to their application;
- iv. misuse of powers;

139. The pleas that attack the substantive legality of the contested Decision, i.e. infringement of the Treaties or any rule of law relating to their application, or misuse of powers will be considered by the CJEU only if raised by the applicant.<sup>149</sup> Pleas involving a matter of public policy must be raised by the CJEU on its own motion,<sup>150</sup> namely, lack of standing,<sup>151</sup> whether the time-limit has been observed,<sup>152</sup> lack of competence,<sup>153</sup> and infringement of an essential procedural requirement.<sup>154</sup> However, the CJEU will never raise the plea on its own motion ‘without first having invited the parties to submit their observations on that plea’.<sup>155</sup>

140. The legality of the contested act will be evaluated in the light of the state of law at the time of its adoption, not in the light of the rules which are in force when the CJEU is seized with the action for annulment.<sup>156</sup>

141. In what follows, the possible grounds on which the contested act can be annulled will be reviewed.

i. Lack of competence

142. Firstly, it must be ascertained whether the Council would be correct in adopting the Decision on the legal bases proposed by the EC. The EC advances the following legal bases for EU accession to the Istanbul Convention: Article 82 (2) TFEU and Article 84 TFEU, with conjunction of relevant paragraphs of Article 218 TFEU thereof.

143. It is submitted that the proposed legal bases are not appropriate for the Decisions, as the conditions justifying recourse to them are not met. Article 82 (2) explicitly specifies the permitted legal instruments – *directives only* – that may be adopted ‘to the extent necessary to facilitate mutual recognition of judgments and judicial

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<sup>149</sup> Judgment in *Commission v. Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 67

<sup>150</sup> Judgment in *European Commission v. Ireland and Others*, Case C-89/08 P, EU:C:2009:742, paragraphs 34 and 35

<sup>151</sup> Order in *Cheminova and Others v. Commission*, C-60/08, EU:C:2009:181, paragraph 31

<sup>152</sup> Judgment in *Internationaler Hilfsfonds v. Commission*, T-36/10, EU:T:2011:124, paragraph 1

<sup>153</sup> Judgment in *Société des fonderies de Pont-à-Mousson v. High Authority*, C-14/59, EU:C:1959:31, 229

<sup>154</sup> Judgment in *Commission v. Ireland and Others*, C-89/08, EU:C:2009:742, paragraph 34

<sup>155</sup> Judgment in *Review of Judgment M / EMEA*, C-197/09, EU:C:2009:804, paragraph 57

<sup>156</sup> See, e.g. Judgment in *Germany v. Commission*, C-277/00, EU:C:2004:238, paragraph 39

decisions and police and judicial cooperation in criminal matters having a cross-border dimension'. Article 84 provides that the European Parliament and the Council, acting in accordance with the ordinary legislative may adopt measures to support crime prevention but explicitly excludes 'any harmonisation of the laws and regulations of the Member States'.

144. It should be observed that by using the words '[t]o the extent necessary' and 'tak[ing] into account the differences between the legal traditions and systems of the Member States' in Article 82 (2) and 'excluding any harmonisation of the laws and regulations of the Member States' in Article 84, the Treaty does not confer discretionary powers on the EU legislature to choose the legal instrument.<sup>157</sup> Art. 82 (2) expressly refers to the type of measure that may be adopted on the basis of this provision. The Treaty limits the options of the EU legislature in choosing the means of directives as the legal instrument. The rationale behind it resides in the specificity of directives: they need to be, by their nature, implemented by Member States by means of their choice. The authors of the Treaty intended to limit the powers of the EU and to stress Member States' capacity to be the main actors in this area, the EU having shared or even supportive competences only.
145. Apart from Articles 82 (2) and 84, the EC lists a number of legal bases that are relevant to the present accession.<sup>158</sup> In this respect it must be noted that other Treaty Articles cannot 'be used as a legal basis in order to circumvent the express exclusion of harmonisation'<sup>159</sup> laid down in Article 82 (2) TFEU and the adoption of an internal measure cannot result in the enlargement of EU competences.
146. First of all, it should be recalled that these provisions expressly exclude any harmonisation by the EU legislature. However, the Istanbul Convention is in reality a harmonising measure.<sup>160</sup> The fact that the Istanbul Convention establishes harmonized legal standards is widely accepted<sup>161</sup> and, to the knowledge of the authors, this has not been contested by the EC. The Istanbul Convention would ultimately harmonize the laws and regulations of the Member States in the field of crime prevention, victims' rights (particularly EU acquis which understands gender

<sup>157</sup> Judgment in *Commission v. Council*, C-300/89, EU:C:1991:244, paragraph 10. Such a choice cannot depend on the institutions' convictions as to the objective pursued.

<sup>158</sup> European Commission, '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' COM(2016) 111 final en.pdf, 9

<sup>159</sup> Judgment in *Germany v. Parliament and Council*, C-376/98, EU:C:2000:544, paragraph 79

<sup>160</sup> '[T]he Convention sets, for the first time in Europe, *legally-binding standards* to prevent violence against women and domestic violence, protect its victims and punish the perpetrators' in 'Explanatory report on Istanbul Convention: Council of Europe Convention on preventing and combating violence against women and domestic violence' (11 May 2011) 4 point 21 <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383a>> accessed 12 April 2016 emphasis added

<sup>161</sup> See, e.g. It is the first instrument in Europe to set *legally binding standards* specifically to prevent gender-based violence, protect victims of violence and punish perpetrators.' in European Parliament Research Service, 'The Istanbul Convention: A tool to tackle violence against women and girls' (2015) <[http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/572785/EPRS\\_ATA\(2015\)572785\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/572785/EPRS_ATA(2015)572785_EN.pdf)> accessed 12 April 2016 emphasis added

equality as equality between men and women) with the area of anti-discrimination.<sup>162</sup>

147. Second, it is clear from the actual wording of Article 82 (2) that the *only* permitted legal means are *directives*. This provision is exhaustive.

148. Only in the exceptional case '[w]here the Treaties do not specify the type of act to be adopted,' does the Treaty authorize the EU institutions to select a legal instrument they consider most appropriate:

Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality.<sup>163</sup>

149. To interpret Articles 82 (2) and 84 as vesting power in the EU legislature to harmonize this area and to use legal instruments of their own choice would be contrary to the express wording of these provisions and incompatible with the principle of conferral. In adopting any other legal instrument (in this case: Decisions), the Council would exceed its powers and infringe an express Treaty requirement.

150. The EC submits that '[t]he Union has competence particularly in the area of anti-discrimination and gender equality.'<sup>164</sup> It is however quite clear that a hypothesis, a mere finding of a political need, or a need to send a strong political signal is insufficient to justify the choice of these two provisions as legal bases.

151. Consequently, the contested Decisions cannot be legitimately adopted on the bases of Article 82 (2) and Article 84. These provisions do not constitute appropriate legal bases as they are substantively insufficient to support the content of the Decisions and procedurally insufficient to adopt the Decisions as such. In addition, they circumvent Article 84.

#### ii. Infringement of an essential procedural requirement

152. The process of entering into international agreements is regulated by Article 218 TFEU. The very first step is that '[t]he Council *shall authorize* the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude them.'<sup>165</sup> Following that, '[t]he Council, on the proposal by the negotiator' that has been designated in accordance with preceding provisions, 'shall adopt a decision authorising the signing of the agreement'<sup>166</sup> and subsequently, '[t]he

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<sup>162</sup> See Nousiainen Kevät, Chunkin Christine, Legal implications of EU accession to the Istanbul Convention (Publications Office 2016) <<http://dx.publications.europa.eu/10.2838/15851>> 57-58, accessed 5 October 2016

<sup>163</sup> TFEU, Article 296, 1<sup>st</sup> indent

<sup>164</sup> European Commission, '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' COM(2016) 111 final en.pdf 7

<sup>165</sup> TFEU, Article 218 (2), emphasis added.

<sup>166</sup> TFEU, Article 218 (5)

Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement ... after obtaining the consent of the European Parliament.<sup>167</sup>

153. The EC proposed that the Decision of signing should be adopted pursuant to Article 218 (5) thereof and the Decision on conclusion, to Article 216 (6) (a) thereof. Taking into account that the Council can adopt the Decision only 'on the proposal by the negotiator,' it is the EC that is the negotiator in the present case. Nevertheless, these two steps can take place only if the negotiations are authorized, as it is expressly specified in Article 218 (2) TFEU. To the knowledge of the authors, the Council did not authorize the opening of the negotiations. The word '*shall*' shows that this procedural step does not fall within the discretion of the Council. It is rather a condition *sine qua non*, and the failure to fulfil it amounts to an essential procedural infringement.
154. In this respect, the EC argues that since Article 75 of the Istanbul Convention already provides for an EU accession, 'separate negotiations are not necessary and not part of the Commission's proposals.'<sup>168</sup> This argument is incorrect, as the provisions of an international treaty to which the EU seeks to accede cannot possibly take precedence over the express requirements of the TFEU Treaty.
155. One of the aspects that is covered by the ground of infringement of an essential procedural requirement is the requirement to provide a statement of reasons under Article 296 TFEU.<sup>169</sup>
156. Article 296 TFEU reads:

Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality.

Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.

When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.

157. The aim of this provision is to:

[S]how clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for the measure.<sup>170</sup>

158. The Decisions fail to comply with the requirement to state reasons, according to Article 296 TFEU. The mere reference that the signing and the conclusion 'contributes to the realisation of equality between men and women in all areas,' and

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<sup>167</sup> TFEU, Article 218 (6) (a)

<sup>168</sup> Personal email communication from 21 April 2016: an answer to the question 'When does the Commission expect that the Council adopts a decision authorising the opening of negotiations?'

<sup>169</sup> Other aspects are the requirement to consult, the requirement to hear the addressee, the duty of confidentiality, and the compliance with internal procedural rules.

<sup>170</sup> Judgment in *Germany v. Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 107

‘[b]y committing to the implementation of the Convention, the Union confirms its engagement to combat violence against women and ... reinforces its current political action’<sup>171</sup> is insufficient to justify EU competence. A need for a political declaration or, in the words of the EC, sending ‘a strong political message,’<sup>172</sup> cannot stand as a sufficient statement of reasons or prevail over the general principles of the EU.

159. Furthermore, EU institutions do not clarify the division of competence between the EU and its Member States, when it comes to the Istanbul Convention.
160. With regard to this, the EC proposals are drafted in equally ambiguous terms. According to Article 4 (2) of the Proposal for a Council Decision – the conclusion of the Istanbul Convention states that: ‘the Convention covers also competences not conferred in the Union.’ Additionally, the Proposal for a Council Decision – the signing of the Istanbul Convention and Proposal for a Council Decision – the conclusion of the Istanbul Convention speak in general terms such as: ‘the Union has competence covering most provisions’<sup>173</sup> or ‘with respect to matters falling within the Union’s competence’.<sup>174</sup>
161. There is neither an identification nor an assessment of the specific provisions of the Istanbul Convention that fall under EU competence. Therefore, it is not clear what obligations will be incumbent upon Member States following EU accession to the Istanbul Convention. The legal uncertainty is further aggravated for the Member States that have not ratified the Istanbul Convention. Although they will be bound only by those provisions falling under the scope of EU law, they will, in fact, lack certainty regarding the exact content and span of their obligations.
162. Since essential information regarding the division of responsibilities consequent to the accession to the Istanbul Convention was not given, the requirement to provide a statement of reasons has not been fulfilled.

iii. Infringement of the Treaties or any rule of law relating to their application

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<sup>171</sup> European Commission, ‘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’ COM(2016) 111 final.en.pdf paragraph 4, and European Commission, ‘Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence’ COM (2016) 109 final paragraph 4

<sup>172</sup> European Commission, ‘Roadmap on (A possible) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)’ 4 <[http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_010\\_istanbul\\_convention\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf)> accessed 12 April 2016

<sup>173</sup> European Commission, ‘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’ COM(2016) 111 final, recital 5

<sup>174</sup> European Commission, ‘Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence’ COM (2016) 109 final, Articles 3 and 4



163. This ground covers, *inter alia*, the misapplication of the law. This misapplication may take the form of the wrong legal categorisation of the facts,<sup>175</sup> the misinterpretation of the applicable rule, or of an error in determining the factual basis on which the application of EU law is founded.<sup>176</sup> In the following section, we will examine some of the grounds for an action for annulment of the Decisions that fall under the ground ‘infringement of the Treaties’<sup>177</sup> or any rule of law relating to their application,’ namely: i) breach of the principle of legal certainty; ii) breach of the principle of conferral; iii) breach of the principle of institutional balance; and iv) breach of the principle of proportionality.

#### Breach of the principle of the legal certainty

164. The CJEU has repeatedly held that ‘the principle of legal certainty requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law.’<sup>178</sup>
165. If the Decisions are adopted, the Council will create a situation of legal uncertainty. This is mainly because the Decisions lack a clear delineation of competences between the EU and its Member States and employ vague and novel terminology. As a consequence, Member States would ultimately be unable to identify and fulfil the obligations incumbent upon them.

#### Breach of the principle of conferral

166. The reasoning under this ground for annulment is to a large degree identical with the argumentation for the lack of competence. Generally speaking, if adopted, the Decisions will violate the principle of conferral which is laid down in Article 13 (2) TEU. This is contrary to the principle of conferral given that the legal bases, first, do not authorize the EU to adopt any measures that might have a harmonizing effect on the laws of Member States,<sup>179</sup> and, second, do not allow the EU legislature the discretion regarding the choice of permitted legal instruments. Therefore, by adopting Decisions on these legal bases, the EU legislature would manifestly exceed its powers.

#### Breach of the principle of institutional balance

167. Accession to the Istanbul Convention will infringe on the prerogatives of the EC under Article 17 (1) TEU. It is settled case-law that:

[U]nder Article 13 (2) TEU, each institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. That provision reflects the principle of institutional balance,

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<sup>175</sup> Judgment in *Spain v. Council and Commission*, C-119/86, EU:C:1987:446

<sup>176</sup> Judgment in *Barge v. High Authority*, C-18/62, EU:C:1963:56, 279-81

<sup>177</sup> The ‘Treaties’ are TFEU and TEU, protocols that are annexed to them, the Charter of Fundamental Rights of the European Union and the Accession Treaties Acts.

<sup>178</sup> Judgment in *Parliament v. Council*, C-48/14, EU:C:2015:91, paragraph 45

<sup>179</sup> TFEU, Article 84

characteristic of the institutional structure of the European Union, a principle which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions.<sup>180</sup>

168. Following EU accession, the Istanbul Convention will be classified as a measure adopted by EU institutions within the meaning of Article 17 (1) TEU and will become an integral part of EU law. This will be, in accordance with Article 17 (1) TEU, subject to oversight by the EC. Although neither Article 17 TEU nor any other provisions of the Treaties discharge the EC from executing these duties, Article 66 of the Istanbul Convention clearly states that GREVIO ‘shall monitor the implementation of this Convention by the parties,’ taking over the task expressly conferred on the EC. This will in fact amount to the prohibited change of the allocation of powers as defined by the Treaties. Such a change of the institutional *modus operandi* can only be done through Treaty amendment.
169. Furthermore, it is unclear what the relation and the (possible) compatibility between the CJEU and the dispute settlement procedure established by the Istanbul Convention will be. According to Article 19 TEU, the CJEU ‘shall ensure that in the interpretation and application of the Treaties the law is observed’. Therefore, the CJEU has the final say on whether EU law has been properly implemented. The Istanbul Convention, as an integral part of EU law, will also be subject to the CJEU’s ultimate jurisdiction.
170. However, the Istanbul Convention establishes a dispute settlement in Article 74:
1. The Parties to any dispute which may arise concerning the application or interpretation of the provisions of this Convention shall first seek to resolve it by means of negotiation, conciliation, arbitration or by any other methods of peaceful settlement accepted by mutual agreement between them.
  2. The Committee of Ministers of the Council of Europe may establish procedures of settlement to be available for use by the Parties in dispute if they should so agree.
171. Furthermore, GREVIO can issue reports, conclusions, or recommendations concerning the measures taken by a Member State in order to implement the Istanbul Convention<sup>181</sup> The transposition of these provisions will endanger the exclusive position of the CJEU to review the legality of acts by the EU.<sup>182</sup> In the *Mox Plant* case<sup>183</sup> the CJEU ruled that it ‘has jurisdiction to deal with disputes relating to the interpretation and application of those provisions and to assess a Member State’s compliance with them’<sup>184</sup> and that this jurisdiction is *exclusive*.<sup>185</sup> This

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<sup>180</sup> Judgment in *Council v. Commission*, C-409/13, EU:C:2015:217, paragraph 64

<sup>181</sup> Istanbul Convention, Articles 68 and 69

<sup>182</sup> Opinion 1/00, EU:C:2002:23,1 paragraph 24

<sup>183</sup> Judgment in *Commission v. Ireland*, C-459/03, ECLI:EU:C:2006:345, paragraph 82. This was an infringement case where the EC initiated the action for failure to fulfill obligations against Ireland on the grounds that Ireland instituted proceedings before an arbitral tribunal against another Member State for failure to comply with obligations flowing from an international convention, which was also signed by the EU (at that time Community) and therefore became an integral part of the EU legal order.

<sup>184</sup> Judgment in *Commission v. Ireland*, C-459/03, ECLI:EU:C:2006:345, paragraph 121

<sup>185</sup> Judgment in *Commission v. Ireland*, C-459/03, ECLI:EU:C:2006:345, paragraph 123, 125 and 136

conclusion is supported by *Opinion 2/3* of the CJEU which held that even the review of EU law would be liable to interfere with the division of powers between the EU and its Member States.<sup>186</sup>

172. This is precisely what the Istanbul Convention would result in. The accession to the Istanbul Convention will affect the powers of the EC and will undermine the authority and monopoly of the CJEU in reviewing the legality of EU acts.

Breach of the principle of proportionality

173. The principle of proportionality, one of the general principles of EU law, requires that 'the means employed by a Community provision to be appropriate for attaining the objective pursued and not to go beyond what is necessary to achieve it'.<sup>187</sup>
174. The EU legislature argues that the EU 'should ... ratify the Convention alongside the Member States',<sup>188</sup> as the EU has the competence for a 'considerable part' of the Istanbul Convention'.<sup>189</sup>
175. This line of reasoning cannot be accepted. Article 3 (6) TEU states that '[t]he Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.' The fact that the EU's competence partially overlaps with the scope of the Istanbul Convention cannot form the basis for accession. The EU has not been granted *carte blanche* to enter into any international agreement that is deemed to have certain political effects. The condition for entering into an international agreement is that the 'participation of the EU in the agreement in question is *necessary* for the attainment of that objective'.<sup>190</sup>
176. The inadequacy of other, less intrusive policy options has not been shown. The EC lists a number of advantages that would flow from EU accession to the Istanbul Convention.<sup>191</sup> These conclusions are unsubstantiated and unsupported by relevant data; no less restrictive means are assessed. Besides the problematic legal aspects, the EU legislature does not explain how EU accession to the Istanbul Convention would contribute to the effective prevention of violence against women within areas of competence.

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<sup>186</sup> Opinion 2/13, EU:C:2014:2454, paragraphs 224 and 225

<sup>187</sup> Judgment in *Germany v. Parliament and Council*, C-380/03, U:C:2006:772, paragraph 144

<sup>188</sup> European Commission, 'Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence' COM (2016) 109 final, 7 point 2.1

<sup>189</sup> European Commission, 'Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence' COM (2016) 109 final, 7 point 2.1

<sup>190</sup> Paul Craig and Gráinne de Búrca, *EU Law: Texts, Cases and Materials* (fifth edition Oxford University Press 2011) 311

<sup>191</sup> See, e.g. European Commission, 'Roadmap on (A possible) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)' 4 <[http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_010\\_istanbul\\_convention\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf)> accessed 12 April 2016

177. Although the EC stated that 'EU accession to the Istanbul Convention is the most proportionate instrument to reach the defined objectives,'<sup>192</sup> it is not grounded in objective data or in any impact assessment that would strive to identify causes, effects and possibly less restrictive means.
178. The proposed Decisions are neither necessary nor appropriate; hence, they infringe the principle of proportionality.

#### iv. Misuse of powers

179. According to the settled case-law, a legal act:

[I]s vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken solely, or at the very last chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the FEU Treaty for dealing with the circumstances of the case.<sup>193</sup>

180. This is an exceptional ground for the action for annulment. It is unlikely that the CJEU will annul the Decisions on this ground, largely because of the very strict requirements.<sup>194</sup>
181. In conclusion there are good grounds to believe that the CJEU will ultimately annul the Decisions on the basis of one of these pleas, if the issue is brought before it.

### (f) Conclusion

182. The Istanbul Convention is an international agreement that is problematic for various reasons. It codifies a new, controversial, and non-agreed definition of 'gender' in international law; it stereotypically portrays men and boys as perpetrators of violence; it would infringe parental rights in educational matters. The anticipated EU accession to the Istanbul Convention suffers several deficiencies: unsound or obscure legal bases, infringement of primary law and the basic principles of EU law, and possibly the misuse of powers by the EC.
183. For these reasons, the EU's accession to the Istanbul Convention should be challenged, either through *ex ante* or *ex post* mechanisms, and ultimately prevented.
184. EU procedural law offers the possibility to challenge the EC in its action either by applying for a CJEU opinion on the compatibility of an international agreement (to be concluded by the EU) with the Treaties as an *ex ante* control, or by resorting to an action for annulment as an *ex post* mechanism to challenge the acts that are already in force.

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<sup>192</sup> European Commission, 'Roadmap on (A possible) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)' 5 <[http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_010\\_istanbul\\_convention\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf)> accessed 12 April 2016

<sup>193</sup> Judgment in *Spain v. Parliament and Council*, C-146/13, EU:C:2015:298, paragraph 56

<sup>194</sup> Judgment in *Pellegrini and others v. Commission*, C-23/76, EU:C:1976:174, paragraph 30

185. The action for annulment allows Member States to challenge legislative acts on the basis of the lack of competence, the infringement of essential procedural requirements, the infringement of primary law or of any rule of law that relates to their application, or the misuse of powers. This can be done through an action for annulment within the prescribed time limit.
186. If however EU accession to the Istanbul Convention proceeds, it must respect the division of competence between the EU and Member States. In this sense, EU accession should be only within the limits of EU competence and subject to a reservation or interpretative declaration on the meaning of certain expressions, such as gender.