The European Parliament's role in concluding international agreements

SUMMARY

The roles of the EU institutions in negotiating and concluding international agreements, and the procedural steps, are set out in the Treaty on the Functioning of the European Union. The European Parliament's role corresponds to its law-making competences under the Treaties. If an international agreement falls exclusively under common and foreign security policy (CFSP), Parliament has no active role, but must still be informed at all stages by the Council, the European Commission or the High Representative of the Union for Foreign Affairs and Security Policy.

If an international agreement does not fall exclusively within the CFSP, Parliament's specific powers depend on whether the agreement's substantive legal basis corresponds to an area of competence covered by the ordinary legislative procedure or a special legislative procedure (SLP) requiring Parliament's consent; if so, Parliament has the power to give or refuse consent to the conclusion of the agreement. If the agreement falls within the scope of an SLP where Parliament does not need to give consent, its role is limited to giving an opinion. Parliament is also entitled to call on the Court of Justice to verify ex ante whether an envisaged agreement is compatible with the EU Treaties.

The 2010 framework agreement on relations between the European Parliament and the European Commission was a key step in developing Parliament's role in the negotiation and conclusion of international agreements. The agreement provides for Parliament to be informed from an early stage on negotiations on an international agreement, and for Members of Parliament to participate as observers in negotiations. The Commission undertook to keep Parliament informed on the entire negotiation process, with particular emphasis on agreements that fall within Parliament's power of consent. Parliament's Rules of Procedure lay down detailed procedural arrangements for the exercise of Parliament's competences in concluding international agreements, in particular for verification of the legal basis of an envisaged agreement that would impact on Parliament's powers.

IN THIS BRIEFING

- EU power to conclude international agreements
- Overview of the EU institutions' roles under Article 218 TFEU
- Analysis of Parliament's involvement in adopting international agreements
EU power to conclude international agreements

By virtue of Article 47 of the Treaty on the Functioning of the European Union (TFEU), the EU enjoys legal personality and is a subject of public international law.\(^1\) In this vein, Article 216 TFEU provides the general legal basis for the conclusion of international agreements by the EU. According to the first paragraph of this article, the EU may conclude such an agreement with one or more third countries or with international organisations either when there is an explicit legal basis for in the Treaties, or – in the absence thereof – 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.\(^2\)

The Treaties provide expressly for the possibility of concluding international agreements in a number of areas, which does not limit the Union's competence to conclude them in other areas of its competence. As Professor Piet Eeckhout notes, this means that the conclusion of international agreements cannot be excluded in any of the competence areas \([\text{of the EU}], \text{be they exclusive, shared, or supportive, coordinating, or complementary}\).\(^3\)

Within the Treaty on European Union (TEU), Article 6(2) TEU provides for the EU's duty to accede specifically to the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, in 2014, the Court of Justice of the EU (CJEU) found an agreement originally negotiated by the European Commission to this effect to be incompatible with EU primary law. Since then, the European Commission has stated its strong commitment to the accession process and worked in close cooperation with the relevant Council working party to address objections raised by the CJEU. Most recently, in March 2023, the 46+1 Group (Council of Europe member states plus EU) provisionally approved a consolidated version of the new draft Accession Instruments, which seek to address the issues identified as problematic in the CJEU opinion from 2014. For the procedure to go forward, the EU still needs to resolve internally an outstanding issue of EU acts within the common and foreign security policy (CFSP), not subject to CJEU jurisdiction.

Under the TFEU, the EU is expressly granted the competence to conclude international agreements in nine areas:\(^4\)

- Article 79(3) TFEU – migration policy (re-admission of illegal immigrants);
- Article 186 TFEU – cooperation in research and technological development;
- Article 191(4) TFEU – environmental policy;
- Article 207 TFEU – common commercial policy;
- Article 209(2) TFEU – development cooperation;
- Article 212(2) TFEU – economic, financial, and technical cooperation with third countries;
- Article 214(4) TFEU – humanitarian aid;
- Article 217 TFEU – association agreements;
- Article 219(1) and (3) TFEU – European monetary union.

A further five TFEU provisions mention the EU's competence to foster cooperation with third countries and the competent international organisations, without expressly mentioning the conclusion of international agreements, although the competence to do so is implied:\(^5\)

- Article 165(3) TFEU – education and sport,
- Article 166(3) TFEU – vocational training,
- Article 167(3) TFEU – culture,
- Article 168(3) TFEU – public health,
- Article 171(3) TFEU – trans-European networks.

Article 216(2) TFEU expresses the principle of the binding force of international agreements, which are 'binding upon the institutions of the Union and on its Member States'. According to Article 3(2) TEU, the EU's '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. As Piet Eeckhout explains, this means that the EU enjoys exclusive competence to conclude an agreement, even if the area in question does not as such belong to its exclusive competence.

Importantly, EU law accepts the monist approach to the place of public international law in the EU legal order – the provisions of internal agreements become an integral part of the EU legal order from the moment they enter into force, without any necessity of transposition by way of additional provisions of EU law. As regards the place of international agreements within the hierarchical order of EU law, the CJEU takes the view that they rank higher than acts of EU institutions (Case C-308/06, Intertanko), but do not have primacy over the provisions of EU primary law, that is the EU Treaties, including the Charter of Fundamental Rights (joined cases C-402/05 P and C-415/05 P, Kadi). Thus, within the hierarchy of law binding in the EU, international agreements concluded by the EU rank below primary law, but above secondary law. Furthermore, Article 351(1) TFEU provides that the rights and obligations arising from international agreements concluded before 1 January 1958 or, for acceding states, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, are not affected by the provisions of the Treaties; however, if they are incompatible with the Treaties, the Member States must take all possible steps to remove such incompatibility.

The procedure for concluding international agreements by the EU is laid down in Article 218 TFEU. This Article applies only to international agreements 'establishing legally binding rights and obligations', but does not apply to international agreements concluded under the Euratom Treaty (which has its own legal basis in Article 101) nor to accession treaties envisaged in Article 49 TEU. Article 218 TFEU attributes specific roles in the conclusion of EU treaties to the Council, the Commission, the High Representative of the Union for Foreign Affairs and Security Policy, the European Parliament, the Court of Justice of the EU, as well as the Member States. The role of Parliament in the conclusion of international agreements should be seen in the broader context of the EU's constitutional principles, notably the principle of representative democracy (Article 10(1) TEU), whereby EU citizens 'are directly represented at Union level in the European Parliament' (Article 10(2) TEU).

In mixed agreements, in light of the principle of conferral (Article 5(2) TEU), whenever the Union's competence is only deemed to cover a part of the international commitments deriving from an international agreement, it is ... legally necessary for the Member States to assume the rest of the treaty obligations. This is because 'without the participation of the Member States in a given agreement, the principle of conferral would be infringed, with the risk of the Union acting ultra vires under international law'.

Overview of the EU institutions' roles under Article 218 TFEU

Article 218 TFEU provides for specifically defined roles for each of the EU institutions and other bodies involved in the process of negotiating, signing and verifying the compatibility of an (envisaged) agreement with EU law. It also provides for an EU negotiator or head of the EU's negotiating team (see Table 1). According to the case-law of the Court of Justice, the scope of Article 218 TFEU is limited to binding international agreements, whereas non-binding ones do not fall within its scope (Case C-233/02 France v Commission, paragraph 45; see also Case C-660/13 Council v Commission).
# EU institutions' and other bodies' roles under Article 218 TFEU

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<tr>
<th>Institution</th>
<th>Role(s)</th>
<th>Legal basis</th>
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<tr>
<td><strong>Commission</strong></td>
<td>✓ Submits recommendations to the Council, requesting the Council to adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the EU negotiator or the head of the EU's negotiating team.</td>
<td>Article 218(3) TFEU</td>
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<td>✓ Signs the agreement, once authorised to do by the Council, unless the agreement belongs to the CFSP (Case C-551/21, paragraph 81).</td>
<td>Article 17(1) TEU</td>
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<td>✓ Authorises the opening of negotiations (including the nomination of the EU negotiator or head of the EU's negotiating team).</td>
<td>Article 218(2) TFEU</td>
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<td></td>
<td>✓ Adopts negotiating directives.</td>
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<td>✓ Authorises the signing of agreements (although the act of signing should be done by the Commission, unless the agreement belongs to the CFSP – see Case C-551/21, paragraph 81).</td>
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<td></td>
<td>✓ Concludes agreements.</td>
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<td>✓ May address directives to the negotiator.</td>
<td>Article 218(4) TFEU</td>
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<td>✓ May designate a special committee in consultation with which the negotiations must be conducted.</td>
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<td>✓ On a proposal from the negotiator, adopts a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.</td>
<td>Article 218(5) TFEU</td>
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<td></td>
<td>✓ On a proposal from the negotiator, adopts a decision concluding the agreement, after obtaining the European Parliament's consent or after consulting it, unless the matter relates exclusively to the CFSP</td>
<td>Article 218(6) TFEU</td>
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<td>✓ By way of derogation from paragraphs 5, 6 and 9, it may authorise the negotiator to approve on the EU's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement; it may attach specific conditions to such authorisation.</td>
<td>Article 218(7) TFEU</td>
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<td>✓ On a proposal from the Commission or the High Representative, it adopts a decision suspending application of an agreement and establishing the positions to be adopted on the EU's behalf in a body set up by an agreement, when that body is called on to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.</td>
<td>Article 218(9) TFEU</td>
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<td><strong>High Representative</strong></td>
<td>✓ Within the CFSP, submits recommendations to the Council, requesting the Council to adopt a decision authorising the opening of negotiations and, depending on the subject of</td>
<td>Article 218(3) TFEU</td>
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The European Parliament's role in concluding international agreements

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<tr>
<th>Institution</th>
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<tr>
<td><strong>Negotiator</strong></td>
<td>Makes a proposal to the Council to adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force</td>
<td>Article 218(5) TFEU</td>
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<td><strong>European Parliament</strong></td>
<td>Gives consent to the Council to adopt a decision concluding the agreement if it does not relate exclusively to the CFSP, in the following cases: (i) association agreements; (ii) agreement on EU accession to the ECHR; (iii) agreements establishing a specific institutional framework by organising cooperation procedures; (iv) agreements with important budgetary implications for the EU; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required</td>
<td>Article 218(6) TFEU</td>
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<td>Is consulted by the Council in all other cases of agreements that do not relate exclusively to the CFSP</td>
<td>Article 218(6) TFEU</td>
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<td>May request an opinion of the CJEU as to whether an agreement envisaged is compatible with the Treaties</td>
<td>Article 218(11) TFEU</td>
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<td><strong>Member States</strong></td>
<td>May request an opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties</td>
<td>Article 218(11) TFEU</td>
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<td>In the case of mixed agreements, ratify them in accordance with their domestic constitutional provisions</td>
<td>Cf. Article 5(2) TEU</td>
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<td><strong>CJEU</strong></td>
<td>Gives an opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties on request of a Member State, the European Parliament, the Council or the Commission.</td>
<td>Article 218(11) TFEU</td>
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<td></td>
<td>If the opinion is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised</td>
<td>Article 218(11) TFEU</td>
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Source: Compiled by the author.

Under Article 218(3) TFEU, Parliament 'has no formal say in either the decision to launch an international negotiation, the directives issued to the negotiator, or the supervision of the negotiator's conduct of the negotiations'. This has been partly remedied in the 2010 Framework Agreement on relations between the European Parliament and the European Commission, which provides for a close involvement of Parliament, particularly when its powers of consent are at stake.

**Analysis of Parliament's involvement in adopting international agreements**

**Right to be informed (Article 218(10) TFEU)**

Although Parliament's role in the conclusion of international agreements - as laid down in Article 218 TFEU - generally pertains to the last stage (after negotiations, but before their conclusion), Article 218(10) TFEU nonetheless provides that Parliament must be immediately and
fully informed at all stages of the procedure, i.e. as early as from the stage of the Commission proposing to the Council to open negotiations on a given agreement. This applies even to those situations in which Parliament is not actively involved at all. As the CJ EU underlined in a judgment of 24 June 2014, Parliament v Council, Case C-658/11 (paragraph 54):

...Article 218(6) TFEU covers three types of procedure for concluding international agreements, each one prescribing a different role for the Parliament. Thus, the Parliament may be called upon to consent to the conclusion of an agreement, or it may only be consulted in that regard, or it may even be excluded from the process of concluding the agreement, without prejudice, however, to its right to be immediately and fully informed at all stages of the procedure, in accordance with Article 218(10) TFEU.

Concerning the rationale of the information requirement provided for in Article 218(10), the CJ EU explained in C-658/11 (paragraph 79) that it is linked to democratic scrutiny:

[...the information requirement arising under Article 218(10) TFEU is prescribed in order to ensure that the Parliament is in a position to exercise democratic scrutiny of the European Union's external action and, more specifically, to verify that its powers are respected precisely in consequence of the choice of legal basis for a decision concluding an agreement. Therefore, the requirement is of essential procedural importance – the CJ EU found that 'the procedural rule laid down in that provision constitutes an essential procedural requirement within the meaning of the second paragraph of Article 263 TFEU and its infringement leads to the nullity of the measure thereby vitiated' (paragraph 80). On a more general note, the CJ EU linked the principle of informing the Parliament with the EU's democratic principles (paragraph 81):

That rule is an expression of the democratic principles on which the European Union is founded. In particular, the Court has already stated that the Parliament's involvement in the decision-making process is the reflection, at EU level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly ...

Parliament's right to be informed is further developed in the Framework Agreement, specifically in points 23-25 and Annex III on the 'Negotiation and conclusion of international agreements'.

Point 23 of the Framework Agreement provides that 'Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives'. It stresses that the Commission must 'act in a manner to give full effect to its obligations pursuant to Article 218 TFEU, while respecting each Institution's role in accordance with Article 13(2) TEU'.

Point 24 provides that the Commission must transmit information to Parliament 'in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament's views as far as possible into account'. As regards the channels for transmitting information, Point 24 specifies that this should be done 'as a general rule ... through the responsible parliamentary committee and, where appropriate, at a plenary sitting', whereas in 'duly justified cases', the information will be 'provided to more than one parliamentary committee'.

Annex III provides further details concerning the practical aspects of Parliament's right to be informed about the negotiating process (points 1-4).

- The Commission informs Parliament about its intention to propose the start of negotiations at the same time as it informs the Council.
- When the Commission proposes draft negotiating directives with a view to their adoption by the Council, it presents them at the same time to Parliament.
- The Commission takes due account of Parliament's comments throughout the negotiations.
- The Commission keeps Parliament regularly and promptly informed about the conduct of negotiations until the agreement is initialled, and explains whether and
The European Parliament’s role in concluding international agreements

how Parliament’s comments were incorporated in the texts under negotiation and if not, why.

For international agreements for which Parliament’s consent is required, the Commission is obliged to provide detailed information (see section ‘Power to give consent’ below). For all other international agreements, the Commission ensures that ‘Parliament is immediately and fully informed, by providing information covering at least the draft negotiating directives, the adopted negotiating directives, the subsequent conduct of negotiations and the conclusion of the negotiations’ (Annex III, point 6).

Concerning **timetables**, point 7 of Annex III to the Framework Agreement provides that the Commission:

shall give thorough information to Parliament **in due time when** an international agreement is initialled, and shall inform Parliament **as early as possible** when it intends to propose its provisional application to the Council and of the reasons therefor, unless reasons of urgency preclude it from doing so.

Parliament is also to receive – in parallel to Council – any information about the Commission’s intention to propose to the Council to suspend an international agreement (Annex III, point 8).

**Observer status during negotiations (point 25 of the Framework Agreement)**

Point 25 of the Framework Agreement provides for **Parliament’s involvement as observer** at EU delegations participating in international conferences. At Parliament’s request, the Commission facilitates ‘the inclusion of a delegation of Members of the European Parliament as observers in Union delegations, so that it may be immediately and fully informed about the conference proceedings’, and undertakes to ‘systematically inform the Parliament delegation about the outcome of negotiations’. However, the Members of the European Parliament ‘may not participate directly in these negotiations’. Nonetheless, they may be granted **observer status**, subject to ‘the legal, technical and diplomatic possibilities’. In addition, the Commission undertakes to ‘facilitate the participation of Members of the European Parliament as observers in all relevant meetings under its responsibility before and after negotiation sessions’.

**Monitoring the opening of negotiations and legal basis (Rule 117(1)-(3) RoP)**

Rule 117(1) of the European Parliament’s **Rules of Procedure** (RoP) provides for a pro-active role of Parliament already at the early stages, envisaging that the committee responsible may decide to draw up a report or otherwise monitor the preparatory phase. Rule 114(2) RoP provides for the **evaluation of the legal basis** chosen by the Commission, and the committee responsible is to verify that legal basis following the procedure laid down in Rule 41 RoP. According to Rule 41(2) RoP, if the committee responsible for the subject matter disputes the validity or the appropriateness of the legal basis, it is to request the opinion of the committee responsible for **legal affairs**. The latter committee may, at any stage, also take up the issue of the legal basis on its own initiative, informing the committee responsible for the subject matter (Rule 41(3) RoP). If the committee on legal affairs indeed disputes the correct choice of legal basis, an **exchange of views with the Council and the Commission** should take place on the basis of paragraph 25 of Interinstitutional Agreement on Better Law-making, following which the Committee on Legal Affairs reports its conclusions to Parliament (Rule 41(4) RoP). Rule 117(3) RoP provides that Parliament may, on a proposal from the committee responsible, a political group or Members reaching at least the low threshold, **ask the Council not to authorise the opening of negotiations until Parliament has stated its position on the proposed negotiating mandate** based on a report from the committee responsible.
Issuing recommendations (Rule 117(4) RoP)

Rule 117(4) RoP provides that Parliament may – at any stage of the negotiations and from the end of the negotiations to the conclusion of the international agreement – adopt recommendations to the Council, the Commission or the High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the European Commission and require them to be taken into account before the conclusion of that agreement. Such recommendations are to be adopted based on a report from the committee responsible, drawn up by that committee on its own initiative or after considering any relevant proposal tabled by a political group or Members reaching at least the low threshold, i.e. one twentieth of Parliament’s component Members or a political group (Rule 186 RoP). For instance, Parliament adopted a recommendation on 22 November 2023 concerning negotiations on a status agreement between the EU and Mauritania on operational activities carried out by the European Border and Coast Guard Agency (Frontex) in Mauritania.

Power to give consent (Article 218(6) TFEU)

Article 218(6) TFEU lists in an exhaustive manner those international agreements with regard to which Council must seek Parliament's consent in order to conclude them. Parliament's consent is therefore sought only at the last stage, when an agreement has already been negotiated and is to be concluded. Giving consent does not entail the power to propose amendments – it is merely a power of veto or approval. By contrast, Parliament is not consulted and does not need to give its consent to the opening of negotiations. Furthermore, Parliament’s role of giving consent is excluded if a given agreement relates exclusively to the CFSP. In those cases, Parliament does not have any say – it is neither asked for consent nor consulted. Concerning international agreements that do not pertain exclusively to the CFSP, Parliament needs to give its consent with regard to five types of agreements:

- association agreements
- agreement on EU accession to the ECHR
- agreements establishing a specific institutional framework by organising cooperation procedures
- agreements with important budgetary implications for the EU
- agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

In an urgent situation, Parliament and the Council may agree on a time limit for consent, with the lapsing of the deadline considered as tacit consent (Article 218(6)(b) TFEU).

The scope of Parliament’s power to give consent has been interpreted in CJ EU case-law. Thus, in the above-mentioned Case C-658/11 concerning the EU-Mauritius Agreement, Parliament sought the annulment of Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the EU-Mauritius Agreement on the conditions of transfer of suspected pirates and associated seized property from the EU-led naval force to Mauritius and on the conditions of suspected pirates after transfer, but at the same time to the maintenance of the effects of that decision (and thereby, of the agreement). Parliament argued that the Council was wrong to consider that the contested decision concerned an agreement relating ‘exclusively’ to the CFSP and therefore, that the decision in question could not have been adopted without the Parliament's involvement. More specifically, Parliament argued that in view of the aim and content of the EU-Mauritius Agreement, it relates not only to the CFSP but also to judicial cooperation in criminal matters, police cooperation and development cooperation. Parliament, supported by the Commission, pointed out that, since the ordinary legislative procedure applies to those fields of EU action, Council should have sought Parliament's consent to conclude the agreement.

In Case C-658/11, the CJ EU pointed out that the powers of the Parliament under Article 218(6) TFEU should reflect the internal balance of powers between the institutions (paragraph 55):
The European Parliament's role in concluding international agreements

As may be inferred in particular from Article 218(6)(a)(v) TFEU, that distinction is designed to reflect externally the division of powers between institutions that applies internally. The Treaty of Lisbon required the Parliament's consent for the conclusion of international agreements specifically in the case of agreements covering areas to which, in the internal field, the ordinary legislative procedure laid down in Article 294 TFEU applies, or the special legislative procedure, but only where that procedure requires the consent of the Parliament. Moreover, the Parliament is precluded from participating in the conclusion of such an agreement only where the agreement relates exclusively to the CFSP, in relation to which the Treaty of Lisbon conferred a limited role on the Parliament ...

Thus, the Parliament's powers of consent under Article 218(6) TFEU correspond to the ordinary legislative procedure and to special legislative procedure with Parliament's consent. As the Court explained, this is based on a principle of symmetry (paragraph 56):

Article 218(6) TFEU establishes symmetry between the procedure for adopting EU measures internally and the procedure for adopting international agreements in order to guarantee that the Parliament and the Council enjoy the same powers in relation to a given field, in compliance with the institutional balance provided for by the Treaties.

In order to ascertain whether the Parliament needs to give consent or be consulted, it is therefore necessary to verify the substantive legal basis in the Treaties (paragraph 59). If such a substantive legal basis is to be found in the rules on the CFSP, Parliament will have no active role in the procedure. This was the case with the EU-Mauritius Agreement.


Annex III, point 5 of the Framework Agreement lays down that, with regard to international agreements whose conclusion requires Parliament's consent, the Commission:

- provides to Parliament during the negotiation process all relevant information that it also provides to the Council or to the special committee appointed by the Council; this information includes draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement and the text of the agreement to be initialled;
- transmits to Parliament, as it does to the Council (or to the special committee appointed by the Council), any relevant documents received from third parties, subject to the originator's consent;
- keeps the responsible parliamentary committee informed about developments in the negotiations and, in particular, explain how Parliament's views have been taken into account.

Furthermore, point 9 of Annex III obliges the Commission to 'keep Parliament fully informed before approving modifications to an agreement which are authorised by the Council, by way of derogation, in accordance with Article 218(7) TFEU'.

Rule 117(7) RoP provides that, where the Council requests that Parliament give its consent to the conclusion, renewal or amendment of an international agreement, Parliament decides by a single vote in accordance with Rule 107 RoP on consent procedure. The second sub-paragraph of Rule 117(7) provides that, if Parliament declines to give its consent, the President informs the Council that the agreement in question cannot be concluded, renewed or amended. According to the third sub-paragraph, Parliament may decide, based on a recommendation from the committee responsible, to postpone its decision on the consent procedure for no longer than one year.

Right to be consulted (Article 218(6) TFEU)

If an international agreements does not relate exclusively to the CFSP, and if it does not fall into any of the five categories, mentioned above, for which Parliament's consent is necessary, Parliament is
consulted by the Council before concluding the agreement. This means, however, that Parliament cannot block conclusion of the agreement, as opposed to areas where it needs to give its consent.

Right to request an ex-ante opinion from the CJEU (Article 218(11) TFEU)

Article 218(11) TFEU provides that a Member State, the European Parliament, the Council or the European Commission may obtain the **opinion of the CJEU as to whether an envisaged agreement is compatible with the Treaties**. This task includes verifying whether the conclusion of the agreement in question remains within the scope of EU competence and the powers of its institutions ([Opinion 2/91](#), International Labour Organization). Furthermore, the agreement may not impair the autonomy of the EU legal order in any way, particularly by a system of judicial control provided by that agreement ([Opinion 1/00](#), European Common Aviation Area). The Member States and the EU institutions mentioned in Article 218(11) TFEU (i.e. Parliament, Council and Commission) may submit an envisaged agreement for verification by the CJEU, but are not under a duty to do so. Importantly, the CJEU may not examine such an agreement on its own motion (ex officio), but must receive a question to this effect, based on Article 218(11) TFEU. Where the opinion of the CJEU is adverse, the agreement envisaged may not enter into force unless it is amended or the EU Treaties are revised (following the applicable procedures).

The CJEU's powers envisaged in Article 218(11) TFEU are described as 'preventive ex ante control' of international agreements. The scope of the CJEU's power of control includes: (i) the compatibility of the envisaged agreement's content with the Treaties; (ii) the EU's competence to enter into an agreement; and (iii) the compatibility of the procedure for the conclusion with the Treaties.

Article 218(11) TFEU does not provide explicitly for a deadline, but uses the expression 'agreement envisaged', which means that 'the request is inadmissible where the agreement has already entered into force'. In [Opinion 2/94](#), ECHR, the CJEU pointed out that it may issue an opinion on the EU's competence to enter into a possible international agreement before negotiations begin or a text of that agreement is drafted.

As the CJEU explained in [Opinion 2/13](#) of the Court (Full Court) of 18 December 2014 (Accession of the EU to the ECHR (paragraph 147):

> In order to enable the Court of Justice to rule on the compatibility of the provisions of an envisaged agreement with the rules of the Treaties, the Court must have sufficient information on the actual content of that agreement ...

It follows from the above that an opinion of the CJ EU regarding the compatibility of an envisaged international agreement with the Treaties may be sought from the moment the content of that agreement is known (otherwise the question would be hypothetical) until the moment the Treaty has actually entered into force. In particular, the ECJ does not require that the content of the future agreement is already finally negotiated and has even accepted to give an Opinion of an agreement for which the negotiations have not yet even started. Indeed, in accordance with standing case law, a request for an Opinion may be submitted to the Court when an agreement is envisaged by the EU, which implies that it is envisaged by one or more EU institutions on which powers are conferred for the purposes of the procedure provided for in Article 218 TFEU.

Right to submit an ex-post action for annulment (Article 263 TFEU)

The Council act ratifying an international agreement can be the subject of an **action for annulment** brought under Article 263 TFEU, according to which the CJEU reviews the legality of not only legislative acts but also 'acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties', among other acts. It is
the Council act ratifying an international agreement that is directly subject to the CJEU's review under Article 263 TFEU, rather than the agreement itself.18

According to Article 263 TFEU, second paragraph, Parliament is among the 'privileged applicants' who may bring an action for annulment without proving any kind of interest in the outcome of proceedings (other privileged applicants are the Member States, the Council and the Commission). An action for annulment must be based on one or more of the following grounds:

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

Of note, the action for annulment can usually only eliminate the effects occurring within the Union, while it does not affect the international legal effects (vis-à-vis the treaty party as a third party), i.e. the effects of the CJEU's decision have an effect within the EU legal order, but do not affect the EU's rights and duties under public international law.

Therefore, once an international agreement has entered into force, a CJEU decision on its incompatibility with the EU Treaties would not have an automatic effect of setting aside the EU's obligations vis-à-vis the other parties to the agreement existing under public international law.20 An argument in favour of this arrangement is the text of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Although it has not yet entered into force (only 31 of a minimum of 35 states having ratified it), it may be considered as reflecting general principles of international law, as it adapts the 1969 Vienna Convention on the Law of Treaties – itself a codification of customary international law,21 and ratified by 17 EU Member States – to international organisations. Article 27(2) of the 1986 Convention sets out: 'An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty'. Furthermore, in accordance with Article 46(2) of that Convention: 'An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance'. However, it should also be noted that the EU has not acceded to the 1986 Vienna Convention, and its accession could be subject to the CJEU's preventive control.

Right to intervene in action for annulment submitted by a different party (Article 40 CJ EU Statute)

Article 40 of the Statute of the CJ EU gives the Parliament the right to intervene in any action (save for preliminary references, where interventions are not allowed). Parliament may thus use this right to intervene in an action brought by a different party (e.g. a Member State) to question the validity of an international agreement.

Right to participate in preliminary reference procedure concerning validity or interpretation of an international agreement (Article 267 TFEU)

Parliament has the right to submit statements of case or written observations in all those preliminary reference procedures, which – in Parliament's view – are of particular interest to it (Article 23 CJ EU Statute, as modified by the recent reform). Given that international agreements concluded by the EU are considered acts of the institutions, they may be subject to interpretation by the CJEU in the preliminary reference procedure.22 This jurisdiction is deemed to exist even if an agreement pertains to CFSP matters.23 The preliminary reference procedure may be used not only to seek interpretation of EU law, but also to ascertain whether an EU act is compatible inter alia with the EU Treaties (including the Charter of Fundamental Rights), and with general principles of EU law.24
MAIN REFERENCES

ENDNOTES
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3 ibid., p. 122.
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12 K. Lenaerts and P. Van Nuffel, EU Constitutional Law, p. 605.
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14 ibid., p. 1671.
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16 ibid., p. 1671.
17 ibid., p. 1671.
19 ibid.
21 International Court of Justice (ICJ) case concerning the Gabčíkovo-Nagymaros Project, ICJ Reports 1997, p. 38.
22 Case 181-73, Haegeman; Case C-321/97, Andersson.

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