

BlogDUE

Extradition from Ireland to the UK: the first judgment on the effects of Brexit

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SUMMARY: 1. The facts of the case and the legal background. - 2. The Advocate General's Opinion. - 3. The CJEU ruling. - 4. Future legal and political implications.

1. On 16th of November 2021, the Court of Justice of the European Union (CJEU) released a [judgment](#) on the extradition regime between the United Kingdom (UK) and Ireland during the so called 'transition period', which started after the UK left the EU on 31 January 2020 and lasted until 31st of December 2020. During this period, the UK was no longer a member of the EU but remained a member of the single market and customs union and, thus, continued to be subject to EU provisions.

More specifically, the facts of the case concerned the extradition of two individuals, SD and SN, from Ireland to the UK under a dual regime, the [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community \(Withdrawal Agreement\)](#) and [the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland \(TCA\)](#). Both individuals were arrested in Ireland pursuant to two different [European arrest warrants](#) (EAW) issued by the UK judicial authorities. While SD was supposed to serve a prison sentence of 8 years, the UK authorities requested to surrender SN with the purpose of conducting a criminal prosecution. Both persons remained in custody of the Irish authorities pending the decisions to surrender them to the UK.

On 16 February 2021 and 5 March 2021, respectively, SD and SN brought proceedings before the [High Court](#) in Ireland claiming that their detention was unlawful because, following to Brexit, Ireland could no longer apply the EAW regime in respect of the UK. The High Court rejected the applicants' claims and refused to release them. SD and SN decided to separately appeal against this decision to the Supreme Court.

As matter of Irish law, the legal issue related to the scope of application of the [European Arrest Warrant Act 2003 \(EAWA 2003\)](#), which transposed the [EU Framework Decision 2002/584](#) into Irish law. From the end of the transition period, the UK is not subject to the general application of EU law. Thus, it qualifies as a ‘third country’. In that regard, the EAWA 2003 establishes that these measures apply in relation to a third country only if two conditions are met. First, there should be an agreement in force between that third country and the European Union for the surrender of those individuals and, second, this agreement is binding on Ireland.

The scope of the agreement and the competence of the EU, and/or alternatively of Ireland, to conclude any agreement on the matter became the object of the legal dispute. The continuation of the EAW regime between Ireland (and the EU, broadly speaking) and the UK after Brexit is covered by the Withdrawal Agreement, whose legal basis is [Article 50 TEU](#), and the TCA, whose legal basis is [Article 217 TFEU](#). Respectively, Article 50 TEU establishes the EU’s external competence to conclude a withdrawal agreement, while Article 217 TFEU sets the exclusive competence of the EU to conclude association agreements, i.e. bilateral agreements between the EU and a third country.

Ireland agreed to both treaties in the EU Council, but this legal pattern is further complicated by the fact that the EAW falls within Ireland’s competence relating to the area of freedom, security and justice (AFSJ), which is regulated by [Protocol 21 to the TEU and TFEU adopted in the context of the Treaty of Lisbon in 2007 \(Protocol No. 21\)](#). It establishes that Ireland is not bound by EU provisions related to AFSJ, unless it expressly opts-in to the measure in question. In the specific context of the UK after Brexit, Ireland had not opted in. Thus, it was necessary to establish whether an express opt-in was necessary for the continuance of the EAW during the transition period and after that.

The applicants claimed that neither Article 50(2) TEU nor Article 217 TFEU could be used to suggest that Ireland is bound by the EAW. They argued that the national measures, which guaranteed the continuation of that EAW regime towards the UK are invalid and, consequently, their continued detention was unlawful. Conversely, a separate legal basis was necessary given that the issue revolved around AFSJ and Ireland had not specifically opted into the mechanisms as established by Protocol No. 21 to TFEU. Thus, the Irish authorities should have released them.

Following to that, the [Supreme Court of Ireland](#) decided to stay the proceedings and that referred the issue for preliminary ruling to the CJEU as an urgent matter, according to Article 107 of the Rules of Procedure of the Court of Justice.

More specifically, it asked whether the provisions of the Withdrawal Agreement and the TCA (which constitute legal basis for the continuance of the EAW regime in respect of the UK during the transition period) are binding on Ireland considering that both measures relate to ASFJ, which Ireland is ordinarily required to opt-in in order to be bound. In other words, the CJEU had to rule on interpretation of complex legal analysis relating to Article 50 TEU, Article 217 TFEU, Protocol No. 21, the Withdrawal Agreement and the TCA.

2. On 9th November 2021, the Advocate General Kokott issued her [opinion](#) in relation to the case. She clarified that the CJEU needed to determine whether Ireland is still obliged to execute EAW issued by the UK, notwithstanding its withdrawal from the EU.

The key legal matter revolved around the fact that that the two surrender regimes (Article 50(2) TEU and Article 217 TFEU) did not create a new obligation for Ireland – as this obligation resulted directly from Framework Decision 2002/584 - but they extended the existing ones. In other words, the former two provisions cover the execution of the EAW but it was uncertain whether Ireland needed to have expressly opted in for those provisions to apply according to Protocol No. 21 after the UK's withdrawal from the EU.

For this reason, she explored the relevance and the scope of Protocol No. 21 and whether it applies to the provisions in the Withdrawal Agreement 2020 and TCA and concluded that the current EAW does not fall within the scope of Protocol No. 21. Conversely, it is possible to find a legal justification for this regime under both Article 62(1)(b) of the Withdrawal Agreement ongoing judicial cooperation proceedings in criminal matters or Part Three Title VII of TCA on extradition regime between the EU Member States and the UK.

As far as the Withdrawal Agreement is concerned, the AG argued that the specific policy of cooperation in criminal matters is “necessarily ancillary to the predominant overarching objective of providing a comprehensive regime for the transition from membership of the European Union to third-country status” (para 50). Thus, given that Article 50 gives the EU broad powers to shape a new relationship with the departing state, this provision could be used as a legal basis for the EAW.

This ancillary character of the surrender regimes is particularly evident since the EU adopts this kind of agreements by unanimous voting. However, using this legislative procedure for the Withdrawal Agreement would have been created additional problems because Article 50 TEU only requires a qualified majority. The latter procedure finds its justification in “the exceptional situation of a withdrawal” as “the withdrawal of the United Kingdom has demonstrated such broad arrangements have to be made under intense political pressure and within a very short time frame. Requiring

unanimity in the Council or excluding certain matters from the general procedure would add complexity to that process and increase the risk that no agreement is reached” (para 54). In different words, the AG intended that “specific matters cannot alter the characterisation of the agreement as a whole” (para 56).

With regards to Article 217 TFEU, she endorsed a similar view. She suggested that the power to conclude association agreements is broad and includes many policy areas. Thus, the TCA essentially continues the EAW system that was already in place between Ireland and the UK and does not create any new or additional obligation.

In the end, she concluded that it was not necessary to combine that competence of Article 50(2) TEU and Article 217 TFEU with a competence relating to the AFSJ.

3. The CJEU ruled that EAW regime is binding on Ireland stating that the only appropriate legal bases for this legal obligation are Article 50(2) and Article 217 TFEU. Conversely, the provisions contained in Protocol No. 21 cannot be applied in this context. It reached this conclusion following a convoluted analysis of the EU constitutional order, the external powers of the EU and the obligations of Ireland with regards to the AFSJ.

First, the CJEU focused on Article 50 of the TEU to establish whether both states, the UK and Ireland were bound by EAW regime during the transition period. More specifically, the CJEU explored the aims and objectives that Article 50 wants to achieve. Using a purposive interpretative approach, the CJEU established that Article 50 gives the right to a member state to exercise its sovereignty and withdraw from the EU and, on the other, it sets a procedure which allows the withdrawal to take place in “an orderly fashion” ([judgment of 10 December 2018, *Wightman and Others*, case C-621/18](#), para 56). This competence of the EU permits to reduce legal uncertainty and minimise any adverse effects following such a withdrawal since the Treaties will no longer apply to the departing State. With specific reference to the UK and the case of Brexit, Article 127 of the Withdrawal Agreement achieves this goal stating that EU law is applicable to and in the UK during the transition, period unless otherwise provided for in that agreement. Considering that Framework Decision 2002/584 is EU law, it is binding for the UK. In addition to this, the very same Withdrawal Agreement makes specific reference the ongoing judicial cooperation proceedings in criminal matters stating the application of the Council Framework Decision 2002/584 on the EAW regime during the transition period (Article 62(1)(b)).

Further to this, the CJEU relied on arguments developed by the Advocate General Kokott in her opinion. Using a purposive approach to interpret the entire Withdrawal Agreement, she argued that the Withdrawal Agreement

provides a comprehensive framework for the transition from membership of the European Union to third-country status. Thus, any other rule which relates to a specific policy, such as the EAW, for instance, is only ancillary to the predominant overarching objective of the agreement itself (paras 50-53). Furthermore, a different interpretation would also circumvent the procedural legislative requirements for the EU Council to reach an international treaty, which require a unanimous vote. Conversely, Article 50, which was used to conclude the Withdrawal Agreement with the UK, only require a qualified majority.

With regards to the obligations of Ireland, the CJEU noted that the Withdrawal Agreements establishes which provisions are binding for Ireland too. Ireland had agreed to participate in the EAW system with the UK. Thus, arguing now that Ireland can decide on its own autonomous legal basis (under Protocol No. 21) whether it wants to surrender those individuals to the UK would assume that Ireland had never participated to this regime. This absurd outcome would clash with the objectives of minimising the uncertainty and reducing the disruption following to Brexit. This would also be inconsistent with the idea that the Withdrawal Agreement should facilitate the withdrawal of the UK in an orderly manner.

The second part of the decision focused on the interpretation of Article 217 TFEU, which constitutes the legal basis for the TCA. Once again, using a purposive approach, the CJEU explored the broad scope of this provision, which authorises the EU to “guarantee commitments towards third countries in all the fields covered by the TFEU” (para 58). After 31st of December 2021, extraditing those individuals falls within the obligation to guarantee a commitment towards a third country. Recalling its case-law on association agreements, the CJEU suggested that they can be only used when they pursue a specific competence of the EU. According to the CJEU association agreements only require a qualified majority without the further requirement of the participation of the European Parliament. If the agreement relates to a broader scope, it requires more stringent legislative procedures to ensure that the concerned provisions would not be circumvented. Thus, the CJEU needed to verify whether the extradition mechanism within the TCA would require an additional legal basis. The CJEU concluded that the TCA only contributes to the pursuit of one objective, the surrender of a person under a EAW, and it should be distinguished from the mentioned case-law. Thus, it can be included within the scope of the Article 217 TFEU and does not require the EU to resort to additional provisions of Protocol No. 21 (paras 68-69).

The broad overarching principle of this decision is that the EAWs issued by the UK authorities prior or during the transition period are valid for Ireland notwithstanding the UK’s withdrawal from the EU.

4. Beyond settling these points of law, this dispute represents the first occasion after Brexit for the CJEU to identify the nature and the scope of the EU competence with regards to the agreements under Article 50 TEU and 217 TFEU.

First, the CJEU clarified that the exit of the UK from the EU should not complicate further the extradition regime and, more in general, any subsequent form of criminal cooperation between the EU and the exiting state. In addition to this, this judgment has broader legal ramifications which extend beyond the cooperation regime between Ireland and the UK. Indeed, it also shapes the extraction framework between Denmark, which has a similar [opt-in Protocol](#), and the UK.

Second, in line with its previous case-law on the interpretation of the scope of Article 50 TEU, the CJEU reiterated its interest in pursuing an orderly withdrawal from the EU. The CJEU concluded that the Withdrawal Agreement has a wide application, which covers all the areas contained in the TEU and TFEU. A narrower approach on the scope of this Article could lead to inconsistent solutions. On the one hand, it would not guarantee a uniform application of the EU legislation towards the UK but, ultimately, it would open the door to possible abuses of the EU Members States to the detriment of any third-party, the very same EU and its institutions.

Although there is no explicit reference to the Northern Ireland protocol, some commentators ([here](#)) argue that this judgement lends itself to be interpreted as affirming the competence of the CJEU on the Ireland protocol. It is very likely that the EU and the UK will continue to debate on their respective areas of expertise on this matter. However, it would be interesting to understand whether the CJEU will rule that it has only competence on the mere transitional provisions – which will lead to ending up the relationship between the UK and the EU – or, alternatively, whether it will claim its competence on the potentially permanent system set up by the Northern Ireland protocol.

The wording used by the CJEU and the AG tend to lean towards the latter view. The CJEU argued that “that agreement is intended to regulate, in all the areas covered by the Treaties, all questions relating to the separation between the European Union and the State withdrawing from it” (para 50) “for the continued application of a significant part of the EU acquis” (para 51). Similarly, the terminology used by the AG, who refers to a “the full range of matters covered by EU law” and a “comprehensive regime”, seems to point out in that direction (para 50). Both concur that, in order to extend the EU’s competence, it seems it is only necessary to verify whether the withdrawal agreement will guarantee an orderly withdrawal from the EU and, in this context, the Northern Ireland protocol satisfies this test.