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Report by Jill Sutherland, Barrister
 Commentary by Karl Laird, University of Oxford; 6KBW College Hill

European Union

SN and SD v Governor of Cloverhill Prison; Attorney General, Governor of Mountjoy Prison, Ireland

Judgment of the Court (Grand Chamber): K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, E. Regan, I. Jarukaitis, N. Jääskinen, I. Ziemele and J. Passer, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, M. Safjan (Rapporteur), F. Biltgen, N. Piçarra, L.S. Rossi and N. Wahl, Judges. Advocate General: J. Kokott: 16 November 2021; C-479/21 PPU

Reference for a preliminary ruling—Urgent preliminary ruling procedure—Article 50 TEU (Treaty on European Union)—Agreement on the withdrawal of the UK from the EU and the European Atomic Energy Community—Article 217 TFEU (Treaty on the Functioning of the European Union)—Trade and Cooperation Agreement (TCA) with the UK—Protocol (No.21) on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice (AFSJ)—Judicial cooperation in criminal matters—European arrest warrant—Continuation under the Withdrawal Agreement, on a transitional basis, of the European arrest warrant regime in respect of the UK—Application to a European arrest warrant of provisions relating to the surrender mechanism established by the TCA with the UK—Regimes binding on Ireland

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This was a request for an urgent preliminary ruling concerning articles relating to the withdrawal of the UK from the EU, the European arrest warrant regime and associated matters before and after the transition period and whether Ireland was bound by the provisions.

On 9 September 2020, SD was arrested in Ireland pursuant to a European arrest warrant issued by the UK on 20 March 2020 seeking his surrender to serve a sentence of eight years' imprisonment.

On 25 February 2021, SN was arrested in Ireland pursuant to a similar warrant issued by the UK on 5 October 2020 seeking his surrender for the purpose of a criminal prosecution.

Each was remanded in custody in Ireland pending a decision on their surrender.

On 16 February 2021 and 5 March 2021, respectively, SD and SN submitted to the High Court (Ireland) that Ireland could no longer apply the European arrest warrant regime in respect of the UK. The High Court determined that the detention of SD and SN was lawful and therefore refused to order their release. SD and SN then brought two separate appeals before the referring court. That court decided

that the European Arrest Warrant Act 2003 (transposing Framework Decision 2002/584 into Irish law) may apply in relation to a third country provided that there is an agreement in force between that third country and the EU for the surrender of persons wanted for prosecution or punishment and that that agreement is binding on Ireland. The lawfulness of SD's and SN's detention depended on whether the provisions of the Withdrawal Agreement and the TCA concerning the European Arrest Warrant regime were binding on Ireland. It was noted that Ireland acceded to the Framework Decision 2002/584 at a time when the UK was an integral part of the regime and the obligations were therefore not new but rather a continuation of the existing obligations, which were also binding on the UK and the EU under international law.

The court referred the issue to the First Chamber of the European Court of Justice, seeking an urgent preliminary ruling. The ECJ acceded to the request for an urgent preliminary ruling because the question whether Ireland was required to execute European arrest warrants fell within the areas to which the Area of Freedom, Security and Justice (AFSJ) applied. Further, SD and SN were in custody and whether they remained in custody depended on the court's decision.

The court had to decide whether (i) the Withdrawal Agreement (art.62(1)(b)), which provides for the continuation of the European arrest warrant regime in respect of the UK during the transition period, and (ii) the Trade and Co-operation Agreement (TCA art.632)), which provides for the application of the surrender regime established by that agreement to European arrest warrants issued before the end of that transition period in respect of persons not yet arrested for the purpose of the execution of those warrants before the end of that period, were binding on Ireland.

SD and SN submitted that, in addition, point (d) of the second subparagraph of art.82(1) TFEU ("shall adopt measures to ... facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions") should have also been included in the substantive legal basis for the conclusion of those agreements, thus triggering the application of Protocol (No.21), which provides that Ireland is not to take part in the adoption by the Council of proposed measures under Title V of Part Three of the TFEU; and that no measure adopted pursuant to that title and no provision of any international agreement concluded by the EU pursuant to that title are to be binding on, or applicable to, Ireland unless Ireland decides to take part in the adoption of such measures or to accept them.

Held, art.50 TEU pursued two objectives: first, enshrining the sovereign right of a Member State to withdraw from the EU and, secondly, establishing a procedure to enable such a withdrawal to take place in an orderly fashion. The EU alone had competence to negotiate and conclude the Withdrawal Agreement which provided, in relations with the UK, for the continued application of a significant part of the EU community of rights and obligations (*acquis*) in order to reduce uncertainty and, to the extent possible, minimise disruption. EU law remained in force in and in relation to the UK throughout the transition period (ending on 31 December 2020). To add point (d) (as submitted on behalf of SD and SN) to the substantive legal basis for the Withdrawal Agreement would give rise to uncertainty since, because of the resulting applicability of Protocol (No.21), Ireland—which had

chosen to be bound by the European arrest warrant regime, including with regard to the UK—would be treated as if it had never participated in it. Such a situation would be difficult to reconcile with the objective of reducing uncertainty and limiting disruption. Likewise, a requirement to add a specific legal basis (point (d)) to the legal bases of the provisions of an association agreement which fell under the EU competence covered by that title also could not be inferred from the court's case law. The conclusion of an agreement such as the TCA did not relate to a single specific area of action but a wide range of areas of EU competence with a view to achieving an association between the EU and a third-party State. The provisions formed part of the general objective of the agreement, to establish the basis for a broad relationship between the parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on co-operation, respectful of the parties' autonomy and sovereignty. The surrender mechanism contributed to the co-operation relating to, inter alia, the investigation, detection and prosecution of criminal offences and the execution of criminal penalties and enabled the security of the UK and the EU to be strengthened. Thus, the rules set out in the TCA concerning the surrender of persons on the basis of an arrest warrant relating to the application of those rules to existing European arrest warrants could be included in that agreement without the provisions of Protocol (No.21) being applicable to them. Ireland was accordingly bound by the provisions.

The Court's formal ruling was:

"Art.50 TEU, Article 217 TFEU and Protocol (No.21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and the TFEU, must be interpreted as meaning that Art.62(1)(b) of 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, read in conjunction with the fourth paragraph of Art.185 thereof, and Art.632 of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, are binding on Ireland."

M. Hanahoe, R. Purcell, S. Guerin, C. Donnelly, M. Lynam and S. Brittain for SN. C. Mulholland, S. Guerin, C. Donnelly, M. Lynam, S. Brittain and E. Walker for SD.

P. Gallagher, A. Morrissey, C. McMahon, M. Gray, R. Kennedy, A. Carroll, L. Masterson and H. Godfrey for Ireland.

L. Teilgård for The Kingdom of Denmark.

A. Stefanuc, K. Pleśniak, A. Antoniadis and J. Ciantar for The Council of the European Union.

H. Leupold, L. Baumgart and H. Krämer for The European Commission.

Commentary

The judgment delivered in the joined cases of *SN and SD* confirms, for the first time, that the surrender regime contained in Pt Three of the Trade and Cooperation Agreement between the EU and the UK of 2021 (TCA) is binding upon Ireland.

This decision originated in two preliminary references lodged by the Supreme Court of Ireland to clarify whether it had to execute two surrender requests issued by the UK during the transition period (1 February 2020–31 December 2020). In essence, the Supreme Court of Ireland asked the Court of Justice of the European Union (CJEU) whether Ireland was bound by the TCA and the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union of 2020 (WA) and, thus, had to surrender SN and SD to the UK.

The CJEU's reply to these preliminary references confirmed that both agreements had been lawfully negotiated and reached, guaranteeing the continuation of Irish-UK co-operation in criminal matters after Brexit. Since 2003, the Framework Decision on the European Arrest Warrant (EAW) has been pivotal to these security agreements, being deemed the "flagship" of EU criminal law. This instrument has been a security priority for the UK and Ireland both before and after Brexit. Since its adoption, the UK has become the main partner of Ireland within this field, receiving more EAW requests from the UK than from any other EU Member State. In 2019, Ireland executed 109 EAWs (43 of these warrants were issued by the UK) and issued 109 warrants (82 of these warrants were addressed to the UK). The position of Northern Ireland within this system is also significant, as the EAW has become the default system of surrender within the island of Ireland. From August 2018 to September 2019, the Police Service for Northern Ireland issued 38 EAWs (26 of these warrants concerned individuals who were located in the Republic of Ireland). The intense co-operation between both countries and the continuing free movement between Ireland and the UK under the Common Travel Area makes robust security agreements vital to tackle cross-border crime. This explains why the Supreme Court of Ireland was the first court in the EU to enquire about the validity and binding nature of post-Brexit surrender arrangements.

In its judgment, the CJEU confirms that post-Brexit law enforcement and judicial co-operation agreements under the WA and TCA were correctly negotiated and agreed under art.50 of the Treaty on European Union (TEU). Despite this decision, there are certain issues within the judgment that deserve a careful analysis, namely: the court's analysis of art.50 TEU; the notion of mutual trust within the new extradition arrangements; and the position of Northern Ireland within the new law enforcement and judicial cooperation agreements.

The Analysis of art. 50 TEU. The surrender requests in question were both issued during the transition period, but the arrests of both suspects occurred at different dates, which affected the instruments applicable. The arrest of SD occurred during the transition period, which meant that it had to be decided under art.62(1)b of the WA. Article 62(1) of the WA establishes that

"Council Framework Decision 2002/584/JHA [on the European arrest warrant] shall apply in respect of European arrest warrants where the requested person was arrested before the end of the transition period".

The CJEU clarified the binding nature of this provision upon Ireland and ruled that the surrender requests had to be executed as if the UK was still an EU Member State (paras. 54–56). On the other hand, the arrest of SN occurred after the UK had left the EU, making art.632 of the TCA and the new UK-EU surrender arrangements included within Pt 3 of the TCA fully applicable. This is the innovative point of the ruling, as it confirms the validity and binding nature of the agreements on law enforcement and judicial co-operation included within the TCA (paras. 68–70).

The ratio of the court hinges on the confirmation that art.50 TEU, which regulates the process whereby a Member State may leave the EU, is the right competence basis to negotiate comprehensive post-Brexit agreements, such as the TCA. This

provision permits several matters—such as security, competition or trade—to be negotiated and adopted by the EU without the participation of the Member States. This decision, nonetheless, affects an area of shared competence (the Area of Freedom, Security and Justice) and a Member State (Ireland), which has a special position within this field, comparable to that enjoyed by the UK as a former Member State. Both states had been traditionally hesitant to integration initiatives within criminal law and refused full supranationalisation of competences in this area. These concerns crystallised in the negotiation of an “à la carte” mechanism that allows Ireland to participate selectively within EU criminal law, in accordance with Protocol No.21 to the Treaty on the Functioning of the European Union on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice (Protocol No.21).

Protocol No.21 permits Ireland to select the criminal law measures that it wants to participate in, with the country having chosen to opt into several of these, including the EAW. This selective participation in EU criminal law raised the issue of whether Ireland had to opt into the provisions set out in Pt 3 of the TCA and Title V of the WA, which regulate law enforcement and judicial co-operation, to be bound by them. The Court clarified, in what seems to be a follow-on from *Wightman* ((C-621/18) EU:C:2018:999), that art.50 TEU provides the EU with exceptional powers to negotiate and conclude withdrawal agreements and future co-operation agreements. This provision displaces Protocol No.21, meaning that the consent of Ireland is not necessary to ensure the full enforceability of both the WA and the TCA within its territory. As the court explains at [69]–[70], this entails that art.62(1)b of the WA and art.632 of the TCA, which regulate the execution of surrender requests during and after the transition period, are fully binding on Ireland since the entry into force of both treaties. Consequently, surrender requests issued during the transition period and after the end of this period should be executed if these comply with the requirements set in those provisions.

This conclusion is consistent with a teleological interpretation of art.50 TEU. This provision, as interpreted by the Council’s negotiating guidelines for the Brexit process in 2017, seeks to guarantee the orderly withdrawal of the UK. This goal would be difficult to achieve if the TCA or WA required the consent of Member States enjoying opt-outs from certain areas or had to be concluded as mixed agreements including all 27 Member States. As Advocate General Kokott mentioned at [54] of her Opinion, the exceptional nature of a withdrawal process requires a complex agreement, which covers several matters (e.g. taxation, criminal law, etc.) and is agreed within a limited time frame. This justifies the use of a comprehensive procedure, which can only be achieved through art.50 TEU.

The Court supported this interpretation at [50] of the judgment, where it establishes that art.50(2) TEU confers on the EU competence to negotiate and conclude an agreement in all areas covered by the treaties. This would mean that, contrary to ordinary association agreements that may cover security arrangements, those concluded with former Member States can be negotiated and agreed under a comprehensive competence that facilitates a swift agreement. The special nature of these treaties and the close legal alignment of the parties would justify the differences established with other association agreements regulated under art.218 of the Treaty on the Functioning of the European Union (TFEU).

Mutual trust and human rights standards. This preliminary reference settles the competence issue regarding the adoption of the TCA and the WA. Nevertheless, this is far from being the end of all litigation concerning Pt 3 of the TCA, as there are preliminary references pending in front of the CJEU concerning citizenship rights, which may challenge the future of bilateral co-operation in law enforcement and criminal matters.

In the long term, human rights standards remain the most relevant obstacle to the implementation of EU-UK agreements on law enforcement and judicial co-operation. The CJEU clarified this point in *Minister for Justice and Equality v RO* ((C-327/18) EU:C:2018:733), a preliminary reference examining the possibility of surrendering individuals under the EAW after the UK triggered art.50 TEU. In this decision, the Court established that the surrender mechanism between the UK and EU Member States relied on the UK's adherence to the European Convention on Human Rights (ECHR), which guarantees the existence of equivalent human rights standards across Europe. These common standards constitute the basis of the mutual trust that sustains co-operation between EU Member States in criminal matters. This point is included in art.524 TCA 2021, which states that shared values—such as democracy, the rule of law and fundamental rights—set the basis for the effective enforcement of the provisions concerning EU-UK judicial cooperation in criminal matters. More precisely, art.524(2) TCE establishes

“the obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights and, in the case of the Union and its Member States, in the Charter of Fundamental Rights of the European Union.”

In other words, shared values, including human rights as interpreted by the ECHR, are the underpinning of the principle of mutual trust upon which Pt 3 of the TCA relies.

Recent initiatives to depart from EU or ECHR human rights and data protection standards may erode this trust. An example of these initiatives is the attempt to reform the Human Rights Act, following the Government's proposal “Human Rights Act Reform: A Modern Bill of Rights”. The proposals tabled by the UK Government in this paper are ambiguous, but if they affect the effectiveness of ECHR's case law domestically or curtail ECHR protections available to individuals, they will breach art.524 of the TCA and constitute a ground to halt criminal law co-operation with the UK, as established by the CJEU in *Minister for Justice and Equality v RO*. This issue was not the object of the preliminary references in *SN and SD*, and further guidance regarding the human rights standards required to guarantee bilateral co-operation will be necessary, whilst the UK de-Europeanises its human rights laws.

The Northern Ireland protocol and EU-UK extradition under the TCA. The EAW became an essential part of the security arrangements between the Northern Ireland and the Republic of Ireland before Brexit. Before the EAW, extradition between both parties was governed by the Council of Europe's Convention on Extradition 1957 (ECE). The provisions of this international treaty were incorporated into Ireland's Extradition Act 1965 (Pt 3) and in the UK's Backing of Warrants (Republic of Ireland) Act 1965. However, extradition under the Convention was more cumbersome and included an exception to the obligation of surrender in cases of political offences (see art.3 ECE). For instance, the Irish Supreme Court's ruling in *Finucane v McMahon* was used to consistently refuse extradition from the Republic of Ireland to Northern Ireland over human rights concerns during the Troubles. The importance of this exception was lessened over the years, but it constituted an important obstacle to bilateral co-operation between the UK (in particular, Northern Ireland) and the Republic of Ireland until the Good Friday Agreement in 1998.

The Good Friday Agreement, together with the creation of the Area of Freedom, Security and Justice in the Treaty of Amsterdam 1997, facilitated the normalisation of security co-operation between Northern Ireland and the Republic of Ireland after the Troubles. The criminal law measures adopted under these treaties expanded in subsequent years, as the consolidation of the AFSJ became an EU objective

with the same status as the internal market with the Treaty of Lisbon of 2008. Within this legal framework, the EAW became the main instrument to extradite individuals across the Irish border. This explains why Pt 3 of the TCA is essential to replace the EAW and set the basis for post-Brexit cooperation across the border. Although this Agreement limits UK access to EU police databases, such as Schengen Information System II, it remains essential to guarantee cross-border security co-operation with Ireland with no alternative bilateral arrangements in place.

The CJEU's decision in *SN and SD* guarantees this co-operation provided that mutual trust between both parties is maintained. However, attempts to renegotiate the Protocol on Northern Ireland attached to the Withdrawal Agreement (Protocol on NI) challenge the effectiveness of both the WA and the TCA and erode this trust. The Protocol on NI does not include specific provisions on security, other than a compromise of both Northern Ireland and the Republic of Ireland to co-operate in justice and security matters under art.11. Additionally, it establishes in art.16 that any attempts to challenge the implementation of the Protocol on either side of the border may limit the applicability of the whole Agreement (the TCA). Today this constitutes a significant threat to the implementation of the TCA within Ireland.

Conclusion. The CJEU's decision in *SD and SN* clarifies the scope and limits of art.50 TEU and confirms the validity and binding nature of both the TCA and the WA. This ensures that surrenders between Ireland and the UK continue in accordance with Title VII of Pt 3 of the TCA. Although the extent of this co-operation is unprecedented for a third country, it presents some limitations if compared with the EAW. For instance, extradition under art.602 of the TCA may be limited in cases of political offences, whilst art.603 of the TCA establishes that states may decide not to surrender their own citizens (a decision that Germany has already implemented). This, together with the limited access to EU law enforcement databases, means that co-operation will be more complex and less speedy than it was under the EAW.

Report by Tom Rees, Barrister

Commentary by Cristina Sáenz Pérez, University of Leeds

Fraudulent Trading

R v. Hunter (Peter); Smith (David Thomas)

Court of Appeal (Criminal Division): Macur LJ, Green LJ and Cheema-Grubb J
DBE: 26 November 2021; [2021] EWCA Crim 1785

Ticket touting—fraudulent trading—Companies Act 2006 s.993—ingredients of the offence—whether a jury needs to be directed that there had to be deception or an intention to deceive either the ticket vendor or consumers

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The case concerned ticket touting, namely the practice whereby individuals or companies acquire tickets for popular sporting and cultural events and then seek