

CJEU: Surrender Provisions in TCA also Binding on Ireland

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News

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Do the provisions on the EAW and the surrender regime included in the Withdrawal Agreement (WA) and the Trade and Cooperation Agreement (TCA) between the UK and the EU fall under Protocol No. 21 and are thus not binding on Ireland, because the country had not opted in? Or had the EU a one-off competence to regulate all subject matters contained in the Agreements?

These questions were subject of the CJEU's [ruling of 16 November 2021](#) in Case C-479/21 PPU (*SN and SD / Governor of Cloverhill Prison*). The case concerned the legal basis for the surrender of persons from Ireland to the UK. According to the referring Supreme Court of Ireland, the arrests may have been unlawful because the provisions on surrender in the WA and TCA fall within the Area of Freedom, Security and Justice (AFSJ) and which are therefore, in principle, not binding on Ireland under Protocol (No 21).

According to this Protocol, Ireland is not bound by measures within the AFSJ unless it has expressed its wish to apply one of them (opt-in), but Ireland has not done so either when the UK withdrew from the European Union or when the TCA was concluded.

The judges in Luxembourg, sitting in for the Grand Chamber, had to examine the question whether Art. 50(2) TEU (which provides for the European Union's external competence to conclude a withdrawal agreement) as the legal bases for the WA and Art. 217 TFEU (which lays down the competence to establish an association agreement) as the legal basis for the TCA were themselves appropriate as a basis for the inclusion of those measures in those agreements. Or whether a separate legal basis relating to the AFSJ would have been required, which would trigger the Irish opt-in possibility under Protocol (No 21).

The CJEU found that both the provisions of the WA which provide for the continuation of the EAW regime in respect of the UK during the transition period and the provisions of the TCA which provide for the application of the surrender regime established by that agreement to EAWs issued before the end of the transition period in respect of persons not yet arrested before the end of that period (→ [eucrim 4/2020, 265-271](#)) are binding on Ireland.

As regards Art. 50(2) TEU, the CJEU argued that the EU had the sole competence to conclude an agreement setting out all arrangements for the withdrawal of a Member State; otherwise, there would have been the risk of treating areas in the Treaties inconsistently which would have prejudiced the withdrawal taking place in an orderly manner. Therefore, Protocol (No 21) could not apply.

Similarly, the CJEU argued in relation to Art. 217 TFEU that the TCA aims to have in place a broad relationship between the EU and the UK. The CJEU refers to its case law on acts pursuing several objectives and con-

cludes that since the surrender mechanism introduced by the TCA pursues that objective alone, it is not necessary to add another legal basis. Hence, Protocol (No 21) is not applicable in relation to the TCA as well.

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