

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 9 November 2021([1](#))

Case C-479/21 PPU

SN,

SD

joined parties:

Governor of Cloverhill Prison,

Ireland,

Attorney General,

Governor of Mountjoy Prison

(Request for a preliminary ruling from the Supreme Court (Ireland))

(Preliminary reference – Protocol (No 21) to the TEU – Judicial cooperation in criminal matters – Framework Decision 2002/584/JHA – European arrest warrant – Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – 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 – Legal bases – Article 50 TEU – Article 217 TFEU)

I. Introduction

1. The Court is asked to determine whether Ireland is obliged to execute European arrest warrants issued by the United Kingdom, notwithstanding that State's withdrawal from the European Union.
2. At first sight, it appears that the provisions of the Withdrawal Agreement ([2](#)) of 2020 and of the Trade and Cooperation Agreement ([3](#)) of 2021 between the European Union and the United Kingdom cover the execution of the arrest warrants at issue.
3. However, Protocol No 21 to the TEU and the TFEU, ([4](#)) adopted within the context of the Treaty of Lisbon of 2007 and in force since 1 December 2009, provides that Ireland is not bound by EU measures related to the area of freedom, security and justice, unless that Member State expressly opts in to the measure in question. Ireland did not opt in to the relevant provisions of the two agreements concerned. Therefore, it will be necessary to examine whether, as a consequence of the United Kingdom's withdrawal from the European Union,

Ireland needed to have opted in to the provisions relating to the European arrest warrant in order for those provisions to apply. That in turn depends on whether Protocol No 21 applies to those provisions.

4. Protocol No 21 does not apply, however, if the European Union correctly based those agreements on its external powers to conclude a withdrawal agreement (Article 50(2) TEU) and an association agreement (Article 217 TFEU), rather than on a competence relating to the area of freedom, security and justice. A central element in that regard is the fact that those two surrender regimes do not create new obligations, in particular for Ireland, but merely extend existing ones.

II. Legal background

A. TEU

5. Article 50 TEU lays down the rules for the withdrawal from the European Union:

‘1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) [TFEU]. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) [TFEU].

5. ...’

B. TFEU

6. Article 217 TFEU is the legal basis to conclude association agreements:

‘The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.’

7. Article 218(6) and (8) TFEU sets out the procedural requirements to conclude international agreements and in particular association agreements:

‘6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

(i) association agreements;

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements ...'

C. Protocol No 21

8. According to Article 1 of Protocol No 21, Ireland does not participate in measures adopted with regard to the area of freedom, security and justice:

'Subject to Article 3, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union. ...'

9. Article 2 of Protocol No 21 specifies the effects of Article 1:

'In consequence of Article 1 and subject to Articles 3, 4 and 6, none of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the Community or Union *acquis* nor form part of Union law as they apply to the United Kingdom or Ireland.'

10. However, under Article 3 of Protocol No 21, Ireland may notify the Council that it wishes to take part in the adoption and application of such a measure and, under Article 4, that Member State can accept such a measure after it has been adopted.

D. Framework Decision 2002/584

11. The Council adopted Framework Decision 2002/584 (5) and the amending Framework Decision 2009/299 (6) unanimously under the Treaty on European Union, and in particular by reference to Articles 31(1) (a) and 34(2)(b), before the modifications of the Treaty of Lisbon and Protocol No 21 entered into force on 1 December 2009. Therefore, both framework decisions are binding on Ireland even though Ireland had not explicitly notified the Council that it wished to take part in their adoption and application or that it accepted them.

12. Article 1(1) and (2) of Framework Decision 2002/584 lays down the basic obligations of Member States with regard to the European arrest warrant:

'1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.'

13. Since the United Kingdom was no longer a Member State at the time when its authorities issued the arrest warrants in question, Framework Decision 2002/584 cannot directly serve as the basis for their execution.

E. The Withdrawal Agreement

14. The Withdrawal Agreement is based on Article 50(2) TEU. (7) It entered into force on 1 February 2020. (8)

15. According to Article 126 of the Withdrawal Agreement, there was a transition period, which started on the date of entry into force of the Withdrawal Agreement and ended on 31 December 2020. Article 127 provides that EU law should be applicable to and in the United Kingdom during the transition period unless the Withdrawal Agreement provides otherwise. Since the Withdrawal Agreement does not provide for a derogation from Article 127 for the provisions relating to the European arrest warrant, those provisions continued to apply during the transition period.

16. Article 185 of the Withdrawal Agreement provides, inter alia, that ‘Parts Two and Three, with the exception of Article 19, Article 34(1), Article 44, and Article 96(1), as well as Title I of Part Six and Articles 169 to 181, shall apply as from the end of the transition period’.

17. Part Three of the Withdrawal Agreement includes Article 62(1) covering ongoing judicial cooperation proceedings in criminal matters, which provides:

‘In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts shall apply as follows:

(a) ...

(b) Council Framework Decision 2002/584/JHA ... shall apply in respect of European arrest warrants where the requested person was arrested before the end of the transition period for the purposes of the execution of a European arrest warrant, ...;

...’

18. Article 185 of the Withdrawal Agreement also provides that Member States may decide that they will not surrender their nationals to the United Kingdom. The Federal Republic of Germany, the Republic of Austria and the Republic of Slovenia have availed themselves of this possibility. (9)

F. The Trade and Cooperation Agreement

19. 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, is an association agreement based on Article 217 TFEU. (10) On 1 May 2021, after ratification by the European Union and the United Kingdom, it entered into force. (11)

20. Title VII in Part Three of the Trade and Cooperation Agreement (Articles 596 to 632) establishes an extradition regime between the Member States and the United Kingdom.

21. Article 632 of the Trade and Cooperation Agreement provides that Title VII ‘shall apply in respect of European arrest warrants issued in accordance with Council Framework Decision 2002/584/JHA ... by a State before the end of the transition period where the requested person has not been arrested for the purpose of its execution before the end of the transition period’.

III. Facts and request for a preliminary ruling

22. Mr Sd is the subject of a European arrest warrant dated 20 March 2020, issued by a judicial authority of the United Kingdom, which seeks his surrender to the United Kingdom to serve a prison sentence of eight years. Mr Sd was arrested in Ireland on 9 September 2020. On 8 February 2021, the High Court (Ireland) made an order for Mr Sd’s surrender to the United Kingdom and a consequential order committing him to prison pending his surrender.

23. Mr Sn is the subject of a European arrest warrant dated 5 October 2020, also issued by a judicial authority in the United Kingdom, which seeks his surrender for the prosecution of 14 offences. Mr Sn was arrested in Ireland on 25 February 2021 and remanded in custody pending the hearing of the application for his surrender.
24. On 16 February 2021, an application was made to the High Court on behalf of Mr Sd seeking an inquiry under Article 40.4.2 of the Constitution of Ireland into the legality of Mr Sd's detention. It was argued that Mr Sd was not lawfully imprisoned on the ground that the European arrest warrant regime no longer applied between Ireland and the United Kingdom. On 5 March 2021, a similar application was made on behalf of Mr Sn.
25. The High Court determined that both Mr Sd and Mr Sn were lawfully held in custody and, therefore, refused to direct their release. Both were given leave to appeal directly to the Supreme Court (Ireland), but were to remain in custody pending the result of their respective appeals to the Supreme Court.
26. The Supreme Court considers it possible that the arrangements contained in the Withdrawal Agreement and the Trade and Cooperation Agreement, in so far as they relate to the European arrest warrant regime, are not binding on Ireland. If that were the case, the national measures adopted by Ireland for the purposes of retaining the European arrest warrant regime in respect of the United Kingdom would be invalid and, consequently, the continued imprisonment of the appellants would also be unlawful.
27. Against that background, the Supreme Court has referred the following questions to the Court of Justice:
- ‘Having regard to the fact that Ireland has the benefit of retaining sovereignty in the [area of freedom, security and justice] subject to Ireland’s entitlement to opt into measures adopted by the Union in that area made pursuant to Title V of Part Three TFEU;
- Having regard to the fact that the stated substantive legal basis for the Withdrawal Agreement (and the Decision on the conclusion of same) is Article 50 TEU;
- Having regard to the fact that the stated substantive legal basis for the Trade and Cooperation Agreement (and the Decision on the conclusion of same) is Article 217 TFEU; and
- Having regard to the fact that it followed that it was not considered that an opt in was required or permitted from Ireland so that no such opt in was exercised:
- (a) Can the provisions of the Withdrawal Agreement, which provide for the continuance of the [European arrest warrant] regime in respect of the United Kingdom, during the transition period provided for in that agreement, be considered binding on Ireland having regard to its significant [area of freedom, security and justice] content; and
- (b) Can the provisions of the Agreement on Trade and Cooperation which provide for the continuance of the [European arrest warrant] regime in respect of the United Kingdom after the relevant transition period, be considered binding on Ireland having regard to its significant [area of freedom, security and justice] content?’
28. The referring court requested that the present reference for a preliminary ruling be dealt with under the urgent preliminary ruling procedure pursuant to Article 107 of the Rules of Procedure of the Court of Justice. On 18 August 2021, the First Chamber of the Court decided to accede to that request. On 7 September 2021, the General Assembly of the Court referred the case to the Grand Chamber.
29. Written observations were submitted by Mr Sd and Mr Sn, Ireland, the Council of the European Union and the European Commission. Those parties and the Kingdom of Denmark also participated in the hearing of 27 September 2021.

IV. Legal assessment

30. The issue in the present case is whether the provisions on the execution of European arrest warrants that are included in the Withdrawal Agreement and in the Trade and Cooperation Agreement are binding on Ireland.

31. The Supreme Court explains that, under Irish law, the execution of a European arrest warrant issued by the United Kingdom and the detention of the requested person is permissible only if there is a corresponding obligation under EU law that is binding on Ireland.

32. Before the United Kingdom's withdrawal from the European Union took effect on 31 January 2020, that obligation resulted directly from Framework Decision 2002/584. During the ensuing transition period, which ended on 31 December 2020, the framework decision continued to apply by virtue of Article 127 of the Withdrawal Agreement. However, the cases of Mr Sd and Mr Sn are not covered by those rules because they had not been surrendered to the United Kingdom before the end of the transition period.

33. As Mr Sd was arrested before the end of the transition period, his situation falls within Article 62(1)(b) and Article 185 of the Withdrawal Agreement. According to those provisions, Framework Decision 2002/584 is to continue to apply in respect of his European arrest warrant.

34. By contrast, the Irish authorities arrested Mr Sn after the end of the transition period, although the United Kingdom authorities had issued the European arrest warrant during the transition period, in accordance with Framework Decision 2002/584. In respect of that situation, Article 632 of the Trade and Cooperation Agreement provides that the new extradition regime established by Part Three, Title VII, of that agreement is to apply.

35. Mr Sd and Mr Sn oppose the application of those provisions of the two agreements. They claim that those provisions create new obligations relating to the area of freedom, security and justice. According to Protocol No 21, such obligations would only be binding for Ireland if that Member State explicitly agreed to be bound by them (that is, exercised its opt-in). In the absence of an opt-in by Ireland, Mr Sd and Mr Sn argue that there is no EU competence to adopt the relevant provisions with effect for Ireland because that Member State did not transfer that competence to the European Union.

36. I will examine this position in two steps. First, I set out the conditions for the application of Protocol No 21 as stated in the Court's case-law, namely that its application depends on the legal basis of the measure in question (A). Secondly, I discuss whether the relevant provisions, namely Article 62(1)(b) and Article 185 of the Withdrawal Agreement and Part Three, Title VII, of the Trade and Cooperation Agreement, in particular Article 632 thereof, should have been based on a competence relating to the area of freedom, security and justice (B.1 and B.2).

A. Conditions for the application of Protocol No 21

37. According to Protocol No 21, Ireland does not participate in measures adopted pursuant to Title V of Part Three of the FEU Treaty, which covers the area of freedom, security and justice, unless it explicitly opts in to such measures.

38. Yet, as I have already explained in two earlier Opinions, the material scope of Protocol No 21 is expressly limited to the area of freedom, security and justice. Furthermore, as an exception, that protocol must be given a strict interpretation. It is not the spirit and purpose of that protocol to give Ireland free discretion as regards its participation in measures adopted by the EU institutions or as to the binding effect of such measures on it in other areas of EU law. (12)

39. Consequently, the Court has held that it is the legal basis for a measure which determines whether the protocol is to be applied, and not vice versa. (13) In other words: Protocol No 21 only applies in respect of measures that have been, or should have been, based on a competence derived from Title V of Part Three of the FEU Treaty. Conversely, a measure that touches on the area of freedom, security and justice will not be covered by the protocol if it is not necessary to base it on such a competence.

B. The legal bases of the agreements

40. The two agreements are not based on competences relating to the area of freedom, security and justice, but rather, respectively, on the competence relating to the arrangements for a withdrawal (Article 50(2) TEU) and on the competence to conclude an association agreement (Article 217 TFEU).

41. Hence, it is necessary to determine whether Article 62(1)(b) of the Withdrawal Agreement or Part Three, Title VII, of the Trade and Cooperation Agreement and in particular Article 632 thereof should – instead or additionally – have been based on a competence relating to the area of freedom, security and justice, namely Article 82(1)(d) TFEU.

42. In accordance with the Court's settled case-law, the choice of the legal basis for an EU act, including one adopted in order to conclude an international agreement, must rest on objective factors amenable to judicial review, which include the aim and the content of that measure. If an examination of an EU act reveals that it pursues a twofold purpose or that it comprises two components and if one of those is identifiable as the main one, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component. Exceptionally, if it is established, however, that the act simultaneously pursues a number of objectives, or has several components, which are inextricably linked without one being incidental to the other, such that various provisions of the Treaties are applicable, such a measure will have to be founded on the various corresponding legal bases. Nonetheless, recourse to multiple legal bases is not possible where the procedures laid down for each legal basis are incompatible with each other. (14)

43. Moreover, the Court has repeatedly held that Protocol No 21 cannot affect the identification of the correct legal basis for the adoption of international agreements. (15) That line of authority corresponds to the general principles set out in the preceding paragraph, and the protocol itself does not support any other approach. Therefore, the argument of Mr Sd and Mr Sn that the predominant purpose test cannot be applied when measures touch upon Protocol No 21 must be rejected.

44. In the light of those considerations, I will now examine the legal bases of the rules on arrest warrants in the two agreements.

1. The legal basis of Article 62(1)(b) of the Withdrawal Agreement

45. The Withdrawal Agreement, including Article 62(1)(b) thereof, is based on Article 50(2) TEU. According to the second sentence of Article 50(2) TEU, the European Union is to negotiate and conclude an agreement with a withdrawing State which sets out the arrangements for its withdrawal and takes account of the framework for its future relationship with the European Union. Its fourth sentence provides that the agreement is to be concluded on behalf of the European Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

46. To that end, as the Commission in particular explains, Article 50(2) TEU provides for the competence to conclude a single, comprehensive agreement, based on a single specific procedure, which encompasses all areas covered by the Treaties that are relevant to the withdrawal. Such an agreement covers the bringing to a conclusion of procedures conducted on the basis of EU law, which are ongoing at the time of withdrawal, as regards the withdrawing State. That requires detailed rules and arrangements in a vast number of different areas falling within the EU *acquis*. In order to ensure an orderly withdrawal in the interests of the European Union, its Member States and indeed the withdrawing State, those rules and arrangements may include transition periods during which, for limited periods after the withdrawal takes effect, EU law continues to apply to the withdrawing State.

47. Therefore, as a first stage of the withdrawal of the United Kingdom from the Union, the Withdrawal Agreement provides in Article 127 that most EU law continued to apply to and in the United Kingdom between the date of withdrawal and the end of the transition period.

48. As a second stage of the withdrawal, specific rules laid down in the Withdrawal Agreement are to apply thereafter, that is to say from the end of the transition period, in accordance with the fourth to seventh paragraphs

of Article 185 of the Withdrawal Agreement.

49. It is true that those specific rules for the second stage, in the same way as the continued application of most EU law during the transition period, cover many different policies, including, in particular, the surrender regime in criminal cases pursuant to Article 62(1)(b) of the Withdrawal Agreement. Ordinarily, to conduct those policies the European Union would act under specific powers and would be required to respect restrictions on those powers, such as Protocol No 21.

50. However, in the light of the aim of the Withdrawal Agreement all of those specific policies are 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. This is an extremely broad objective in the sense that it must be possible for the measures required for its pursuit to concern a very wide variety of specific matters. (16) Indeed, the agreement must be able to deal with the full range of matters covered by EU law.

51. The procedures laid down in the legal bases of the specific policies covered by the Withdrawal Agreement confirm their ancillary character in the context of the withdrawal of a Member State.

52. This is particularly evident in the case of policies normally requiring unanimity in order for the Council to act, such as indirect taxation, which is the subject of Articles 51 to 53 of the Withdrawal Agreement. Pursuant to Article 113 TFEU, the Council is to adopt provisions for the harmonisation of indirect taxation by unanimity, but unanimity cannot be combined with the qualified majority (17) provided for in Article 50(2) TEU. Moreover, under Article 113 TFEU the Council is required only to consult the European Parliament, whereas under Article 50(2) TEU the Parliament's consent is required.

53. This incompatibility of legislative procedures cannot be resolved by excluding from a withdrawal agreement matters requiring incompatible procedures because Article 50(2) TEU does not provide for any exceptions to the arrangements for a withdrawal.

54. The comprehensive approach of Article 50(2) TEU and the legislative procedure foreseen are necessary because of the exceptional situation of a withdrawal, as the Council has stressed. 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.

55. Therefore, to require a withdrawal agreement also to be based on provisions other than Article 50(2) TEU whenever the agreement touches on a specific area would in practice be liable to render devoid of substance the competence and procedure prescribed in Article 50(2) TEU. (18)

56. Consequently, the fact that a withdrawal agreement contains clauses concerning various specific matters cannot alter the characterisation of the agreement as a whole, which must be determined having regard to its essential object and not in terms of individual clauses. (19)

57. The Court has adopted a similar approach with regard to development cooperation agreements, but has added a qualification, namely that clauses on specific matters may not impose such extensive obligations that those obligations in fact constitute objectives distinct from those of development cooperation. (20)

58. Irrespective of whether that qualification applies to withdrawal agreements, the surrender regime of Article 62(1)(b) of the Withdrawal Agreement does not in any case create extensive obligations that constitute a distinct objective from the aim to ensure an orderly withdrawal process. It merely extends and modifies existing obligations in the light of the withdrawal for a limited transition period.

59. The application of Article 62(1)(b) of the Withdrawal Agreement is a perfect example of such an extension since the resulting obligation depends on the fact that Ireland participates in the European arrest warrant regime and therefore could receive such warrants from the United Kingdom before the end of the

transition period. Conversely, Ireland does not participate in the European protection order (21) regime and, therefore, it could not receive any such orders that would result in obligations under Article 62(1)(k).

60. In particular, it cannot successfully be argued that Article 62(1)(b) of the Withdrawal Agreement creates new obligations for Ireland, because that Member State was subject to similar obligations under Framework Decision 2002/584 before the agreement became effective.

61. Contrary to the submissions of Mr Sd and Mr Sn, the reasoning of Advocate General Hogan (22) with regard to the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) (23) is not relevant to the present case. The European Union considers concluding that convention with reference to specific powers relating to the area of freedom, security and justice. Advocate General Hogan agrees with that approach. (24) Under that premiss, the Istanbul Convention squarely falls within the scope of Protocol No 21.

62. Mr Sd and Mr Sn submit that that means that the Withdrawal Agreement should also have been concluded under such powers and be subject to the protocol. However, the Istanbul Convention is a completely different agreement and the legal bases under consideration reflect that. In particular, Advocate General Hogan does not address the interpretation of Article 50(2) TEU or the appropriate legal basis of the Withdrawal Agreement.

63. Therefore, Article 62(1)(b) of the Withdrawal Agreement is correctly based on Article 50(2) TEU alone. It is not necessary to combine that competence with a competence relating to the area of freedom, security and justice.

2. The legal basis of Part Three, Title VII, of the Trade and Cooperation Agreement, and in particular Article 632 thereof

64. The European Union concluded the Trade and Cooperation Agreement on the basis of Article 217 TFEU. That provision permits the conclusion of agreements with third countries establishing an association involving reciprocal rights and obligations, common action and special procedure.

65. That competence empowers the European Union to guarantee commitments towards non-member countries in all the fields covered by the Treaties. (25) Its broad scope is justified by the objective of creating special, privileged links with a non-member country, which must, at least to a certain extent, take part in the EU system. (26) That wide-ranging, horizontal objective is distinct from the objectives of specific agreements providing for rules on clearly defined issues. Nonetheless, the Court has found that that general power under Article 217 TFEU does not allow the European Union, in the light of the principle of conferral enshrined in Article 5(2) TEU, to adopt, in the framework of an association agreement, measures exceeding the limits of the powers that the Member States have conferred on it in the Treaties to attain the objectives set out therein. (27)

66. In the present case, taking part in the EU system means participating in the surrender regime established for the European arrest warrant by Framework Decision 2002/584. That regime applies to Ireland.

67. To preserve the legitimate interests of the Member States and to ensure a high level of democratic legitimacy for such potentially far-reaching commitments, Article 218(6) and (8) TFEU requires unanimity in the Council and the consent of the European Parliament for the conclusion of association agreements.

68. Incidentally, the requirement of unanimity means that Ireland agreed to be bound by the surrender regime laid down in the Trade and Cooperation Agreement. In view of the absence of any exception for Ireland, the binding effect on that Member State must have been clear.

69. It is true that the Court has also found that the Council is entitled, on the basis of Article 217 TFEU, to adopt a measure in the framework of an association agreement on condition that that measure relates to a specific area of EU competence *and is also founded* on the legal basis corresponding, in the light in particular of its aim and content, to that area. (28) Mr Sd and Mr Sn therefore claim that the Trade and Cooperation

Agreement should have been based on Article 82(1)(d) TFEU as an additional legal basis and that, consequently, Protocol No 21 applies. That is why, in their view, the surrender regime of the agreement would only be binding on Ireland if that Member State had opted in to that regime.

70. However, the Court's finding on the need for an additional specific legal basis concerns only the decision on the position of the European Union in bodies set up by an association agreement – in that case, the position to be taken on the coordination of social security systems within the Association Council set up by the EEC-Turkey Agreement. (29) Under Article 218(8) and (9) TFEU, the Council decides such matters by qualified majority without the participation of the European Parliament. The addition of a specific internal legal basis would guarantee that more stringent procedural requirements for EU action in the respective field are not circumvented.

71. In contrast to positions on specific issues in the framework of an association agreement, the conclusion of the Trade and Cooperation Agreement was not related to a specific policy field that would have required a combination of a specific competence with Article 217 TFEU. In the same way as the Withdrawal Agreement, the Trade and Cooperation Agreement deals with many fields covered by the Treaties. The surrender regime of Part Three, Title VII, of the Trade and Cooperation Agreement is only one of those many fields.

72. In that regard, the power to conclude association agreements under Article 217 TFEU is, at least to a certain degree, similar to the powers to conclude withdrawal agreements under Article 50(2) TEU or agreements on development cooperation under Article 209(2) TFEU. They are all characterised by an overarching objective that is served by specific measures that could be adopted by reference to specific competences.

73. However, to require the addition of all relevant competences as legal bases would be liable to render devoid of substance the respective general competence and procedure to conclude the international agreement. (30) Moreover, to require the addition of all relevant competences as legal bases of the Trade and Cooperation Agreement would also be unworkable because of the different and often incompatible (31) procedural requirements. (32)

74. It should also be noted that, at least in the context of the relationship between Ireland and the United Kingdom, the surrender regime set up in the Trade and Cooperation Agreement would not create materially new obligations, but merely continue most of the obligations that existed under the previous regime provided for by Framework Decision 2002/584 and the Withdrawal Agreement. Therefore, if the abovementioned qualification to the competence in respect of development cooperation (33) were also applicable to the competence in respect of association agreements, it would not apply in this specific case.

75. Therefore, Part Three, Title VII of the Trade and Cooperation Agreement, and in particular Article 632 thereof, is correctly based on Article 217 TFEU alone. It is not necessary to combine that competence with a competence relating to the area of freedom, security and justice.

V. Conclusion

76. The preceding considerations show that Protocol No 21 does not cover the surrender regimes of the two agreements and therefore those regimes are binding on Ireland, without the need for a specific opt-in.

77. I therefore propose that the Court of Justice give the following ruling:

Article 62(1)(b) and Article 185 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 and Part Three, Title VII, 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, and in particular Article 632 thereof, which provide for the continuation of the European arrest warrant regime in respect of the United Kingdom, are binding on Ireland.

[1](#) Original language: English.

[2](#) Article 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 (OJ 2020 L 29, p. 7; ‘the Withdrawal Agreement’).

[3](#) Articles 596 to 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 (OJ 2021 L 149, p. 10; ‘the Trade and Cooperation Agreement’).

[4](#) Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice (‘Protocol No 21’).

[5](#) Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

[6](#) Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009 L 81, p. 24).

[7](#) Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion 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 (OJ 2020 L 29, p. 1).

[8](#) Notice concerning the entry into force 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 (OJ 2020 L 29, p. 189).

[9](#) Declaration by the European Union made in accordance with the third paragraph of Article 185 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 (OJ 2020 L 29, p. 188).

[10](#) Council Decision (EU) 2021/689 of 29 April 2021 on the conclusion, on behalf of the Union, 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, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (OJ 2021 L 149, p. 2).

With regard to Euratom, the Council approved it by Decision (Euratom) 2020/2253 of 29 December 2020 approving the conclusion, by the European Commission, of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy and the conclusion, by the European Commission, on behalf of the European Atomic Energy Community, 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 (OJ 2020 L 444, p. 11) on the basis of Article 101 of the Treaty establishing the European Atomic Energy Community.

[11](#) Notice concerning the entry into force 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, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (OJ 2021 L 149, p. 2560).

[12](#) My Opinions in *United Kingdom v Council (EEA)* (C-431/11, EU:C:2013:187, points 73 and 74), and in *Commission v Council (European Convention on the legal protection of services based on, or consisting of, conditional access)* (C-137/12, EU:C:2013:441, point 84).

[13](#) Judgment of 22 October 2013, *Commission v Council (European Convention on the legal protection of services based on, or consisting of, conditional access)* (C-137/12, EU:C:2013:675, paragraph 74). See also Opinion 2/15 (EU-Singapore Free Trade Agreement) of 16 May 2017 (EU:C:2017:376, paragraph 218), and the Opinion of Advocate General Sharpston in that case (EU:C:2016:992, point 203).

[14](#) Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, paragraphs 76 to 78), and judgment of 2 September 2021, *Commission v Council (Agreement with Armenia)* (C-180/20, EU:C:2021:658, paragraphs 32 and 34).

[15](#) Judgments of 27 February 2014, *United Kingdom v Council (Switzerland)* (C-656/11, EU:C:2014:97, paragraph 49); of 22 October 2013, *Commission v Council (European Convention on the legal protection of services based on, or consisting of, conditional access)* (C-137/12, EU:C:2013:675, paragraph 73); of 18 December 2014, *United Kingdom v Council (Turkey)* (C-81/13, EU:C:2014:2449, paragraph 37); as well as Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, paragraph 108).

[16](#) See, to that effect, judgments of 3 December 1996, *Portugal v Council (India)* (C-268/94, EU:C:1996:461, paragraph 37); of 11 June 2014, *Commission v Council (Philippines)* (C-377/12, EU:C:2014:1903, paragraph 38); and of 2 September 2021, *Commission v Council (Agreement with Armenia)* (C-180/20, EU:C:2021:658, paragraph 50).

[17](#) Judgment of 29 April 2004, *Commission v Council (Recovery of claims)* (C-338/01, EU:C:2004:253, paragraph 58).

[18](#) See, to that effect, judgments of 3 December 1996, *Portugal v Council (India)* (C-268/94, EU:C:1996:461, paragraph 38); of 11 June 2014, *Commission v Council (Philippines)* (C-377/12, EU:C:2014:1903, paragraph 38); and of 2 September 2021, *Commission v Council (Agreement with Armenia)* (C-180/20, EU:C:2021:658, paragraph 51).

[19](#) See, to that effect, judgments of 3 December 1996, *Portugal v Council (India)* (C-268/94, EU:C:1996:461, paragraph 39), and of 11 June 2014, *Commission v Council (Philippines)* (C-377/12, EU:C:2014:1903, paragraph 39).

[20](#) See, to that effect, judgments of 3 December 1996, *Portugal v Council (India)* (C-268/94, EU:C:1996:461, paragraph 39), and of 11 June 2014, *Commission v Council (Philippines)* (C-377/12, EU:C:2014:1903, paragraph 39).

[21](#) Recital 41 of Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (OJ 2011 L 338, p. 2).

[22](#) Opinion of Advocate General Hogan in Opinion 1/19 (*Istanbul Convention*) (EU:C:2021:198, point 181 et seq.).

[23](#) *Council of Europe Treaty Series* – No 210.

[24](#) Opinion of Advocate General Hogan in Opinion 1/19 (*Istanbul Convention*) (EU:C:2021:198, point 166).

[25](#) Judgments of 30 September 1987, *Demirel* (12/86, EU:C:1987:400, paragraph 9), and of 18 December 2014, *United Kingdom v Council (Turkey)* (C-81/13, EU:C:2014:2449, paragraph 61).

[26](#) Judgments of 30 September 1987, *Demirel* (12/86, EU:C:1987:400, paragraph 9). See also judgment of 26 September 2013, *United Kingdom v Council (EEA)* (C-431/11, EU:C:2013:589, paragraph 49).

[27](#) Judgment of 18 December 2014, *United Kingdom v Council (Turkey)* (C-81/13, EU:C:2014:2449, paragraph 61).

[28](#) Judgment of 18 December 2014, *United Kingdom v Council (Turkey)* (C-81/13, EU:C:2014:2449, paragraph 62).

[29](#) Judgment of 18 December 2014, *United Kingdom v Council (Turkey)* (C-81/13, EU:C:2014:2449, paragraph 12).

[30](#) *Supra*, points 57 and 58.

[31](#) See, in addition to the references in footnote 14, judgments of 11 June 1991, *Commission v Council (Titanium dioxide)* (C-300/89, EU:C:1991:244, paragraphs 18 to 21), and of 10 January 2006, *Commission v Parliament and Council (export and import of dangerous chemicals)* (C-178/03, EU:C:2006:4, paragraph 57).

[32](#) Cf. *supra*, points 51 to 53.

[33](#) *Supra*, point 57.