Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 7 August 2018[1]

Case C-327/18 PPU

Minister for Justice and Equality
v
R O

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

(Reference for a preliminary ruling — Article 50 TEU — Withdrawal from the European Union — Judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrant)

Introduction

1. We know that we know next to nothing about the future legal relationship between the EU and the United Kingdom of Great Britain and Northern Ireland ('United Kingdom' or 'UK').

2. But does that matter for the purposes of the execution of a European arrest warrant (EAW) sent from the United Kingdom to Ireland which was issued before the default Brexit date? No, it does not matter. An EAW should continue to be executed. Just as before.

3. This is, in a nutshell, my proposed solution in the case at issue, which has its origins in a request for a preliminary ruling from the High Court (Ireland).

Legal framework

EU law

4. As pointed out in recital 6 of Council Framework Decision 2002/584/JHA,[2] the EAW provided for in that decision 'is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council[3] referred to as the "cornerstone" of judicial cooperation'.

1 Original language: English.

2 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), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24, 'the Framework Decision').

3 See Conclusions of the Tampere European Council of 15 and 16 October 1999, referred to in recital 1 of the Framework Decision.

5. Recital 10 of the Framework Decision affirms that 'the mechanism of the [EAW] is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [TEU], determined by the Council pursuant to Article 7(1) [TEU] with the consequences set out in Article 7(2) thereof.'

6. Article 1 of the Framework Decision, headed 'Definition of the [EAW] and obligation to execute it', reads as follows:

'1. The [EAW] 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 [EAW] on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU].'

7. Chapter 3 of the Framework Decision, comprising Articles 26 to 30, addresses the 'Effects of the surrender'.

8. Article 26(1) of the Framework Decision, headed 'Deduction of the period of detention served in the executing Member State', provides:

'The issuing Member State shall deduct all periods of detention arising from the execution of [an EAW] from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.'

9. Article 27(2) of the Framework Decision on 'Possible prosecution for other offences' contains what is generally known as a 'specialty rule'. That paragraph is worded as follows:

'… a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.'

10. Article 28 of the Framework Decision deals with 'Surrender and subsequent extradition' (to a third State).

Irish law

11. The European Arrest Warrant Act, 2003, as amended, has transposed the provisions of the Framework Decision into Irish law.

United Kingdom law

12. The Extradition Act 2003 has transposed the provisions of the Framework Decision into United Kingdom law.

Facts and procedure before the referring court

13. The UK judicial authorities have requested the surrender of R O on the basis of two EAWs issued on 27 January and 4 May 2016 and endorsed by the High Court (Ireland) for execution on 1 February and 10 May 2016 respectively, for the purposes of conducting prosecutions in respect of the offences of murder, arson and rape, all of which carry a potential maximum penalty of life imprisonment.

14. R O was arrested in Ireland on the basis of the first EAW on 3 February 2016 and has been in custody there since that date. He was arrested on the basis of the second arrest warrant on 4 May 2016 and was remanded in custody.

15. R O has raised objections to his surrender to the UK with respect to issues that arise from the withdrawal of the UK from the EU and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), related to potential inhuman and degrading treatment which he alleges he would suffer were he to be imprisoned in Maghaberry Prison in Northern Ireland. He argues that there is no clarity as to how his rights under the Framework Decision will be guaranteed after the withdrawal of the UK from the EU.

16. Due to his medical condition, R O's case could not be heard until 27 July 2017.

17. In a judgment of 2 November 2017, the High Court (Ireland) considered R O's claim that he would be subjected to inhuman and degrading treatment if surrendered to Northern Ireland, and expressly deferred the Brexit issue for judgment on a later date. The High Court noted the similar tests to be applied under Article 3 ECHR[4] and under Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter').[5] The High Court held that there was specific and updated information concerning the conditions of detention in Maghaberry prison that gave rise to concern that there was a real risk that R O, by virtue of his vulnerabilities, would be subjected to inhuman and degrading treatment. In light of the abovementioned provisions, as interpreted by the Irish Supreme Court and the Court of Justice, and an analysis of the evidence in the case, the High Court sought further information from the UK as to the conditions in which R O would be held were he to be surrendered to the UK.

18. On 16 April 2018, the issuing judicial authority, the Laganside Court in Belfast (Northern Ireland), provided information as to how the Northern Irish Prison Service will address risks to R O of being subjected to inhuman or degrading treatment in Northern Ireland.

19. The High Court has ruled against R O on all points of objection raised, other than the deferred issue of the consequences of Brexit in connection with Article 3 ECHR.

20. The High Court recalls that on 29 March 2017 the United Kingdom notified the European Council, pursuant to Article 50(2) TEU, of its intention to withdraw from the EU. Subject to other arrangements, the effect of this notification is to cause the UK to withdraw from the EU, in accordance with the provisions of Article 50 TEU, as of 29 March 2019.

21. The High Court considers that it is highly probable that, if surrendered, R O will remain in prison in the UK after 29 March 2019, i.e. after the UK has withdrawn from the EU. Transitional arrangements may be put in place to govern the situation which is to apply immediately thereafter, and ultimately there may be agreed arrangements between the EU and the UK governing the future relations between these parties in areas such as those covered by the Framework Decision.

4 Set out by the Irish Supreme Court in *Minister for Justice* v *Rettinger* [2010] IESC 45.

5 See judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198).

22. However, currently, there is no clarity as to whether such arrangements will be entered into and, if so, the nature of the relevant measures which will be adopted. In particular, there is no clarity as to whether the entitlement of an EU citizen who is within the jurisdiction of the UK, to have relevant issues of EU law, in the event of dispute, ultimately determined by the Court, will continue to be in place after the withdrawal of the UK.

23. In its request for a preliminary ruling, the High Court also indicates that, in the context of the present case, it essentially refers the same questions as the Irish Supreme Court has done in March 2018 in *KN* v *Minister for Justice and Equality*,[6] which is currently pending before the Court of Justice,[7] but that it needs a more expeditious answer, given that R O is in custody.

Questions referred to the Court

24. It is against this background that, by order of 17 May 2018, received at the Court on 18 May 2018, the High Court referred the following questions for a preliminary ruling:

'Having regard to

(a) The giving by the United Kingdom of notice under Article 50 TEU;

(b) The uncertainty as to the arrangements which will be put in place between the European Union and the United Kingdom to govern relations after the departure of the United Kingdom; and

(c) The consequential uncertainty as to the extent to which [R O] would, in practice be able to enjoy rights under the Treaties, the Charter or relevant legislation, should he be surrendered to the United Kingdom and remain incarcerated after the departure of the United Kingdom,

(1) Is a requested Member State required by European Union law to decline to surrender to the United Kingdom a person the subject of a European arrest warrant, whose surrender would otherwise be required under the national law of the Member State,

  (i) in all cases?

  (ii) in some cases, having regard to the particular circumstances of the case?

  (iii) in no cases?

(2) If the answer to Question 1 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether surrender is prohibited?

(3) In the context of Question 2 is the court of the requested Member State required to postpone the final decision on the execution of the European arrest warrant to await greater clarity about the relevant legal regime which is to be put in place after withdrawal of the relevant requesting Member State from the Union

6 Case C-191/18.

7 The request for a preliminary ruling was made by decision of 12 March 2018. KN, who has been found guilty, in the UK, of tax fraud offences and sentenced there to prison sentences, absconded to Ireland while on bail waiting sentence. Subsequently, a UK court issued an EAW against him. As in the present case, the Supreme Court would like to know, in essence, whether the implications of Brexit are such as to compel it to alter its legal examination of the case. A request by the referring court that the Court apply an expedited procedure pursuant to Article 105(1) of its Rules of Procedure was refused by order of the President of the Court. In the order it was held that the fact that the UK may, in the near future, no longer form part of the EU and, as the case may be, no longer be subject to EU law, in particular to the provisions of the Framework Decision, does not in itself create a situation of urgency for the parties in the main proceedings. See order of the President of the Court of 30 May 2018, *KN* (C-191/18, not published, EU:C:2018:383, paragraph 21).

(i) in all cases?

(ii) in some cases, having regard to the particular circumstances of the case?

(iii) in no cases?

(4) If the answer to Question 3 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether it is required to postpone the final decision on the execution of the European arrest warrant?'

Urgent procedure

25. By the same order of 17 May 2018, the referring court requested that this reference for a preliminary ruling be dealt with under the urgent procedure provided for in Article 107 of the Court's Rules of Procedure.

26. The referring court stresses that the reference raises questions in an area covered by Part Three, Title V, of the FEU Treaty, i.e. judicial cooperation in criminal matters (Chapter 4), that R O is currently in custody solely on the basis of the EAWs issued by the United Kingdom, and that a ruling of the Court is necessary to enable it to give final judgment in this case.

27. The reason stated for urgency is the fact that the use of the ordinary, or even the expedited, preliminary reference procedure would significantly add to the period that R O – who enjoys a presumption of innocence in respect of EAWs issued for the purpose of conducting criminal prosecutions – will spend in custody.

28. The referring court also underlines that there are another eight cases in which individuals remain in custody in Ireland solely on the basis of EAWs issued by the United Kingdom and where 'a Brexit point' has been raised as a basis for submitting that the Court should not order surrender. The referring court also notes that other individuals are in custody serving domestic sentences which will expire shortly and who could thereafter be remanded in custody pending surrender to the United Kingdom, but whose cases must be adjourned pending the determination of the Brexit point. Moreover, there are a number of other individuals who have been arrested on the basis of EAWs issued by the United Kingdom but who are on bail pending a determination on surrender and who have also raised this Brexit point. Finally, a 'significant number' of EAWs received in Ireland from the United Kingdom remain to be executed, which is why further arrests of 'requested persons' are extremely likely.

29. The First Chamber of the Court decided, on 11 June 2018, on the proposal of the Judge-Rapporteur and after hearing the Advocate General, to grant the referring court's request that the reference for a preliminary ruling be dealt with under the urgent procedure. The parties to the main proceedings submitted written observations, as did the United Kingdom and the European Commission. The same parties, as well as Romania, took part in the hearing on 12 July 2018.

Assessment

30. The question put to the Court is essentially whether, in a situation in which a Member State has, (1) in accordance with Article 50(2) TEU, notified the European Council of its intention to withdraw from the EU and (2) in accordance with the relevant provisions of the Framework Decision, issued an EAW with a view to surrender by another Member State of a requested person, the legal assessment to be carried out by that other Member State when executing the EAW is altered, and if so, to what extent, by virtue of the abovementioned withdrawal notification.

31. It will therefore be for the Court to determine whether the EAW system is to continue to apply for as long as the United Kingdom acts as issuing Member State, even though the rights which the person concerned derives from the Framework Decision will probably no longer be protected in the same way after 29 March 2019, particularly if the preliminary reference mechanism is no longer open to the courts of that State.

Admissibility

32. At the outset, it should be stressed that there is no issue as to the admissibility of this case.

33. The Court's jurisdiction to give preliminary rulings pursuant to Article 267 TFEU relates to the interpretation of the Treaties and the validity and interpretation of the acts of the institutions.

34. The questions themselves refer to Article 50 TEU. Together with the clear explanations and outline of the legal issues the referring court sees itself faced with,[8] this is enough for the case to be admissible. In particular, the case at issue is not hypothetical in the sense of the Court's relevant case-law,[9] given that Article 50 TEU already displays legal effects.

35. Moreover, should matters stay exactly as they are at present, as shall be seen in more detail below, as a consequence of Article 50(3) EU law will cease to apply to the United Kingdom as of 29 March 2019. This date lies in the foreseeable future and, at any event, at a moment when the post-surrender provisions of the Framework Decision still deploy their effects.

36. Therefore, while the request for a preliminary ruling, such as the present one, is not hypothetical in nature, this does not mean that we cannot work on assumptions, even if these assumptions are that, in legal terms, things will stay as they currently are.

37. The referring court is seeking an answer from the Court which it considers necessary[10] in order to determine whether to execute an arrest warrant. An answer should be given.

Substance

38. The assessment as to the substance shall be structured as follows: as a first step, the standard surrender procedure between two Member States under the Framework Decision will be recalled. Then, I shall turn to the possible implications of Article 50 TEU on a surrender procedure, where the issuing authority is located in the UK. Subsequently, I shall address specific issues raised by R O in the context of the surrender procedure before, finally, turning to the question of jurisdiction of the Court of Justice.

8 Which fully comply with Article 94 of the Rules of Procedure of the Court of Justice.

9 See, by way of example, judgment of 28 September 2006, *Gasparini and Others* (C-467/04, EU:C:2006:610, paragraph 44).

10 Cf. Article 267(2) TFEU. See also my Opinion in *AY (Arrest Warrant - Witness)* (C-268/17, EU:C:2018:317, points 25 and 26).

Standard surrender procedure between two Member States

39. As the Court has consistently stressed, the purpose of the Framework Decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of criminal proceedings based on the principle of mutual recognition.[11] More recently, the Court has specified that that multilateral system of extradition was 'based on the European Convention on Extradition [12] of 13 December 1957'.[13]

40. The basic features of the Framework Decision when it comes to grounds for non-execution of an EAW are well known to the Court already:[14] Article 1(2) of the Framework Decision lays down the rule that Member States are required to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision. The executing judicial authorities may therefore refuse to execute such a warrant only in the exhaustively listed cases of non-execution provided for by the Framework Decision[15] and the execution of the EAW may be made subject only to one of the conditions listed exhaustively therein.[16] Accordingly, while the execution of the EAW constitutes the rule, a refusal to execute is intended to be an exception which must be interpreted strictly.[17]

41. Article 3 of the Framework Decision provides for grounds for mandatory non-execution of the EAW, while Articles 4 and 4a of the Framework Decision list grounds for optional non-execution of the EAW.[18] Moreover, the execution of an EAW may be made subject only[19] to one of the conditions laid down in Article 5 of the Framework Decision.[20]

42. The Framework Decision is based on the principle of mutual recognition, a concept initially developed in the context of the internal market freedoms,[21] which itself, as a 'cornerstone' of judicial cooperation, is based on the mutual trust[22] between Member States with a view to achieving the objective set for the Union to become an area of freedom, security and justice.[23] That principle generally requires, particularly with regard to the area of freedom, security and justice, Member States to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.[24] It is safe to assert that mutual recognition is probably the

11 Since judgment of 3 May 2007, *Advocaten voor de Wereld* (C-303/05, EU:C:2007:261, paragraph 28).

12 Of the Council of Europe. See European Convention on Extradition. Text available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024.

13 See judgments of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 75); of 10 November 2016, *Kovalkovas* (C-477/16 PPU, EU:C:2016:861, 25); and of 10 November 2016, *Poltorak* (C-452/16 PPU, EU:C:2016:858, paragraph 24).

14 See, moreover, my Opinion in *AY (Arrest Warrant - Witness)* (C-268/17, EU:C:2018:317, point 42).

15 Save in exceptional circumstances, as explained in point 43 below.

16 See judgments of 1 December 2008, *Leymann and Pustovarov* (C-388/08 PPU, EU:C:2008:669 paragraph 51), and of 16 November 2010, *Mantello* (C-261/09, EU:C:2010:683, paragraph 37).

17 See judgment of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503, paragraph 19 and the case-law cited).

18 For more details, see my Opinion in *AY (Arrest Warrant - Witness)* (C-268/17, EU:C:2018:317, point 45 et seq.).

19 The conditions listed in Article 5 of the Framework Decision are exhaustive, see judgments of 16 July 2015, *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 36); of 28 June 2012, *West* (C-192/12 PPU, EU:C:2012:404, paragraph 55); and of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 38).

20 See also judgment of 10 August 2017, *Tupikas* (C-270/17 PPU, EU:C:2017:628, paragraph 51).

21 Since judgment of 20 February 1979, *Rewe-Zentral* (120/78, EU:C:1979:42, paragraph 14, 'Cassis de Dijon').

22 It appears that the English language versions of the Court's cases sometimes refer to 'mutual confidence' instead of 'mutual trust'. See, by way of example, judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 77). I understand that these terms have exactly the same meaning and can be used in an interchangeable manner.

23 See, by way of example, judgment of 10 August 2017, *Tupikas* (C-270/17 PPU, EU:C:2017:628, paragraph 49).

24 See, to that effect, judgments of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80), and of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraphs 37 to 63).

EU's most distinct contribution to judicial cooperation between EU Member States' authorities and that the flagship instrument in this domain is the Framework Decision.[25] Given that mutual trust is not blind trust,[26] the Court has recognised that limitations on the principle of mutual trust and, as a consequence, mutual recognition, can be made in exceptional circumstances.[27]

43. In particular, with respect to the Framework Decision, as follows from the landmark judgment in *Aranyosi and Căldăraru*,[28] such limitations can come into play where there is a real risk of inhuman and degrading treatment within the meaning of Article 4 of the Charter[29] because of the detention conditions in the issuing Member State. To that end, the executing judicial authority must, initially and as a first step, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention.[30] As a second step, whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.[31]

44. Turning to the case at issue, it is apparent from the order for reference that none of the mandatory or optional grounds for non-execution of the EAW are present. Moreover, with respect to the detention conditions, it appears that the referring court has carefully carried out the two-step analysis as outlined in the preceding point of this Opinion and come to the conclusion that – with the exception of the consequences of Brexit – there was no separate issue with respect to Article 4 of the Charter.[32]

45. This is, moreover, directly reflected in the way in which the referring court has worded its first question, when it states that the surrender of the requested person would *otherwise* be required. Were it not, therefore, for the withdrawal notification, the referring court would rule that Ireland must proceed to an execution of the EAWs with respect to R O.

25 See also Jeney, P., 'The European Union's Area of Freedom, Security and Justice without the United Kingdom: legal and practical consequences of Brexit', *ELTE Law Journal*, 2016, pp. 117-137, at pp. 126-127. That author goes on to add that the EAW 'also proved to be the most problematic mutual recognition instrument', the proportionality of its use, the lack of fundamental rights guarantees and the absence of fundamental rights-based grounds for refusal remaining recurring issues of concern in its application and interpretation.

26 See Lenaerts, K., 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', 54 *Common Market Law Review* 2017, pp. 805-840, at p. 806.

27 See Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454, paragraph 191).

28 Judgment of 5 April 2016 (C-404/15 and C-659/15 PPU, EU:C:2016:198). On a normative level, this results for the Court from Article 1(3) of the Framework Decision, pursuant to which that decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU: see, in particular paragraphs 74 and 83 et seq. as well as the grounds of the judgment. See also judgments of 25 July 2018, *ML (Detention conditions in Hungary)* (C-220/18 PPU, EU:C:2018:589, paragraph 117); of 25 July 2018, *LM (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraphs 47, 59, 73 and 79); and Advocate General Tanchev's Opinion in that case (C-216/18 PPU, EU:C:2018:517, points 5, 55, 59 and 121).

29 This is an absolute provision from which no derogation is possible: see judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 85 and 86, with express reference to Articles 3 and 15(2) of the ECHR). It is central to the rule of law.

30 See judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 89). Apart from judgments (national or international, in particular the European Court of Human Rights), such information can be obtained from decisions, reports and other documents of international organisations, the leading body being the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe, which administers the corresponding convention.

31 See judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 92).

32 It thus raised issues relating to the risk that R O might be subjected to inhuman and degrading treatment in detention if surrendered, pursuant to which the issuing judicial authority had provided information as to how that risk was to be addressed. I gather that the referring court is satisfied with this information, given that it does not refer a separate question on the issue of Article 4 of the Charter but only addresses it incidentally in the question on the withdrawal of the UK from the EU.

Implications of Article 50 TEU

46. Next, consideration should be given to whether the notification by the UK, in accordance with Article 50 TEU, to the European Council of its intention to leave the EU has any bearing on the above in the sense that the legal assessment to be carried out by the executing judicial authority should in any way be altered by virtue of that notification.

– *Article 50 TEU*

47. Article 50 TEU, which constitutes a corollary to Article 53 TEU, pursuant to which the Treaty is concluded for an unlimited period, clarifies that a Member State may decide to withdraw from the EU[33] and recalls that the EU is based on voluntary participation.[34] Article 50(2) TEU establishes a procedure for doing so: first, the Member State in question must notify the European Council of its intention to withdraw. Then, in the light of the guidelines provided by the European Council, the Union is to 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.[35] That agreement is then to be concluded on behalf of the Union by the Council of the European Union, acting by qualified majority, after obtaining the consent of the European Parliament.

48. Article 50(3) TEU specifies that the Treaties (which is to say: EU law as a whole) are to 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 Article 50(2) TEU, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

49. In the absence of a withdrawal agreement in general,[36] and detailed rules on surrender or extradition procedure between the EU and the UK in particular, this leaves us with the two-year period after notification, which is to say that, things being as they are, on 29 March 2019 the UK will leave the EU. This is the assumption we must work on, since it is the default position. All else may be written in the stars. And it does not look as if the stars are those of the European flag.

– *No abstract test*

50. R O contends that the UK's withdrawal notice of 29 March 2017 in itself constitutes an exceptional circumstance which entails non-execution of the EAWs in question.[37] In his submission, the principle of mutual trust has been 'fatally eroded'[38] by the withdrawal notification. R O claims that this leads to the EAWs issued by the UK no longer being enforceable.

33 Obviously, as pointed out in Article 50(1) TEU, in accordance with its own constitutional requirements.

34 See also Hillion, Chr., 'Withdrawal under Article 50 TEU: an integration-friendly process', 55 *Common Market Law Review* 2018, Issue 2/3, pp. 29-56, at p. 53.

35 The agreement is to be negotiated in accordance with Article 218(3) TFEU. Many legal aspects concerning the actual process remain unclear, see e.g. Łazowski, A., 'Be Careful What You Wish for: Procedural Parameters of EU Withdrawal', in C. Closa (ed.), *Secession from a Member State and Withdrawal from the European Union*, Cambridge University Press, Cambridge, 2017, pp. 234-256, at p. 241, and Eeckhout, P., Frantziou, E., 'Brexit and Article 50 TEU: a constitutionalist reading', 54 *Common Market Law Review*, 2017, pp. 695-734.

36 There is merely the text of a draft agreement, issued by the European Commission Task Force for the Preparation and Conduct of the Negotiations with the UK under Article 50 TEU. It was sent to the 'EU27 Member States', to the Brexit Steering Group of the European Parliament and published on the task force website on 19 March 2018 so as to 'highlight … the progress made in the negotiation round of 16-18 March 2018'. It is available at: https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf. It is clear that this is a working document and a progress report which has been published for reasons of transparency. It is also subject to the caveat that 'nothing is agreed until everything is agreed'. Both these principles are laid down as 'core principles' in point 2 of the 'Guidelines following the United Kingdom's notification under Article 50 TEU' (EUCO XT 20004/17), adopted by the European Council on 29 April 2017 on the basis of Article 50(2) TEU, available at: http://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf.

37 Presumably, in his argument R O relies on Article 1(3) of the Framework Decision, just as the Court did in its judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198).

38 In the wording employed by R O.

51. I do not agree with such reasoning, which pushes the interpretation of the legal effects of a withdrawal notification beyond the limits of any possible legal interpretation.

52. Withdrawing from the EU, though perhaps not too palatable an option for anyone concerned,[39] is a possibility specifically recognised in Article 50 TEU. While in the context of the history and objectives of the Treaties,[40] which are based on common values,[41] Article 50 TEU certainly constitutes an exception, the fact remains that this article exists and that a Member State can resort to it.

53. If the withdrawal notification itself were to be classified as an exceptional circumstance which would fatally erode any mutual trust, that would prejudge a Member State's motives for withdrawing and would deprive that provision of any usefulness.

54. In addition, it appears arbitrary to decide categorically that the situation of the present case should be treated differently from that of an EAW issued just before the date of the withdrawal notification.[42]

55. The approach proposed by R O would, in effect, lead to a general unilateral[43] suspension of the provisions of the Framework Decision as of the date of the withdrawal notification. This would stand in contradiction to the principle underlying the Framework Decision, as described in its recital 10, that the implementation of the EAW mechanism may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) TEU, determined by the Council pursuant to Article 7(1) TEU, with the consequences set out in Article 7(2) thereof.[44] It would also not be compatible with the general principle of EU law that Member States cannot suspend the application of provisions of EU law.

56. The mere issuing of the withdrawal notification does not, therefore, constitute an exceptional circumstance giving rise to the non-execution of an EAW.

Specific issues after surrender

57. The High Court refers to four points of EU law raised by R O, which theoretically[45] arise after the surrender and, crucially, after 29 March 2019. These are: first, whether he may be entitled to credit for the period spent in custody in accordance with Article 26 of the Framework Decision; second, compliance with the rule of specialty, enshrined in Article 27 of the Framework Decision; third, the prohibition on his further surrender to a third State[46] by the UK and fourth, respect for his fundamental rights, as enshrined in the Charter. As a general point, R O adds that, though he would undoubtedly have access to the UK courts to obtain an order in respect of those four points should they arise, he would be deprived of the opportunity of having those matters of EU law definitively determined by the Court of Justice.

39 Starting with the Member State in question, its economic operators and citizens, through to the Union of the other Member States with their economic operators and citizens, not to speak of third-country nationals enjoying rights derived from EU law, whatever their form.

40 Which strive to create an ever closer union among the peoples of Europe (recital 13 of the EU Treaty), are based on common values (Article 2 TEU) and which have a number of objectives (Article 3 TEU – the four primary objectives being the creation of an area of freedom, security and justice, an internal market, economic and monetary union and a common external presence) which are achieved by the range of policies enumerated in the FEU Treaty.

41 Article 2 TEU.

42 Let us imagine that the execution of the EAW in respect of R O occurred on 28 March 2017. In the absence of a withdrawal notification, the referring court would have executed the EAW. But as regards the situation post surrender for the individual concerned, the situation would be no different from that in the present case.

43 Even if, as in the case at issue, unintentional, as far as the UK is concerned.

44 See, in this connection, judgment of 25 July 2018, *LM (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 72).

45 'Theoretically' is also the view of the referring court, it should be stressed.

46 *Another* third State, dare I specify, given that R O refers to the period post 29 March 2019.

58. In contrast, the Irish Minister, the UK Government and the Commission do not see any obstacle to the execution of the EAW. Neither does the Romanian Government.

– *Brexit means Brexit*[47]

59. Once a Member State leaves the EU, and in the absence of any rules on the matter, the Framework Decision ceases to apply for that Member State.[48] The natural consequence is that neither is a State bound by the obligations resulting from it, nor can it benefit from the rights enshrined therein. Another natural consequence is that individuals can no longer rely on rights conferred upon them in the Framework Decision vis-à-vis the Member State to which the Framework Decision no longer applies.[49]

60. This is a general phenomenon inherent in a Member State leaving an organisation, a convention or any other form of cooperation. Together with membership of an organisation, rights and obligations that are associated with that membership come and go. As EU membership is, in principle, conceived for an unlimited period,[50] the duration of rights (and obligations) stemming from EU law is, in principle, the same as that of EU membership. Thus, for instance, natural and legal persons can no longer invoke the fundamental freedoms of the internal market against the former Member States in question. They can no longer trade, nor work, nor travel as before. Indeed, this is arguably the whole point for a Member State leaving an organisation such as the EU: of no longer being bound by obligations. The other side of the coin is, inevitably and potentially irretrievably, that rights are lost.

61. The Framework Decision constitutes no exception to this general phenomenon.[51]

– *Mutual trust not undermined*

62. Conversely, as long as a State is still a Member of the European Union, EU law applies. As regards the case at issue, I see no reason why the provisions of the Framework Decision and, in particular, the duty to surrender should not apply.

63. Here, I should like to stress at the outset that the points made by R O are not supported by concrete evidence. It is not possible to establish whether the concerns are real or hypothetical. This is recognised by the referring court itself.

64. The legal situation between the UK and Ireland when it comes to surrender continues to be governed by the Framework Decision which, as has been made sufficiently clear above and repeatedly stated by the Court is based on mutual trust.[52] Only if that mutual trust were undermined, would the position be different.

47 Neither do I purport to have initially coined this expression nor do I, as will be seen in this passage, attribute quite the same meaning to it as is habitually being done.

48 And yet, as the case may be under national criminal law, the authorities of the *issuing* Member State (*in casu* the UK), in their assessment post surrender, may be compelled to apply, in a specific case, those provisions (under the Framework Decision or national law) which are more favourable to the person surrendered.

49 It should be pointed out, however, that by virtue of Clause 2(1) of the European Union (Withdrawal) Act 2018, which has received Royal assent on 26 June 2018, 'EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect *in domestic law* on and after exit day'. My emphasis. The text of the European Union (Withdrawal) Act 2018 is available at http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf.

50 See Article 53 TEU.

51 Obviously, this is not to say that the legal reality of the post-Brexit relationship, whatever its form, between the EU and the UK in the criminal justice field, of which the Framework Decision forms part, will not be complex: see in this connection Mitsilegas, V., 'Cross-border criminal cooperation after Brexit', in: M. Dougan (ed.), *The UK after Brexit. Legal and policy challenges*, intersentia, Cambridge, Antwerp, Portland 2017, pp. 203-221, at p. 217.

52 Mutual trust is widely – and rightly – seen as forming part of the DNA of the area of freedom, security and justice: see Labayle, H., 'Faut-il faire confiance à la confidence mutuelle ?', in K. Lenaerts (ed.), Liber Amicorum *Antonio Tizzano, De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, G. Giappichelli Editore, Turin 2018, pp. 472-485, at p. 479.

65. There are no tangible indications that the political circumstances preceding, giving rise to, or succeeding the withdrawal notification are such as not to respect the substantive content of the Framework Decision and the fundamental rights enshrined in the Charter.[53] As the Irish Minister correctly argues, the UK has decided to withdraw from the EU, not to abandon the rule of law or the protection of fundamental rights. There is, therefore, no basis to question the UK's continued commitment to fundamental rights.[54]

66. Moreover, if a State has ceased to be a member of the EU and is no longer bound by the terms of the Framework Decision, this does not mean that other rules do not apply. The provisions of the Extradition Act 2003[55] will continue to apply as (purely) domestic law.[56] In addition to this, the UK is, for instance, a party to the 1957 Council of Europe Convention on Extradition[57] and, moreover, bound by the ECHR. The Convention on Extradition contains a rule on specialty[58] as well as a provision prohibiting in principle, re-extradition to a third State.[59]

67. In this context, it should not be forgotten that, empirically, the provisions of the Framework Decision which relate to the situation post surrender have but rarely been subject to a request for a preliminary ruling from a national court.[60]

68. It should, moreover, be stressed that, also in the case of extradition to a State outside the Union[61] the Court applies the same principles as in *Aranyosi and Căldăraru*[62] when interpreting the Treaty provisions on citizenship and non-discrimination and those of the Charter.[63]

69. Applying a stricter test to the case at issue would inevitably imply that R O enjoyed a stronger protection than he would if he were to be extradited to a State outside the Union. This would not be coherent.

53 Quite to the contrary. In the UK's withdrawal notification of 29 March 2017, the Prime Minister, in her letter to the President of the European Council, stressed her desire for a 'deep and special partnership' between the EU and the UK once the UK left. She added that '[w]e want to make sure that Europe remains strong and prosperous and is capable of projecting its values, leading in the world and defending itself from security threats. We want the United Kingdom, through a deep and special partnership with a strong European Union, *to play its full part in achieving those goals*.' My emphasis. Moreover, she specifically stressed that the EU and UK 'should continue to work together to advance and protect our European values. Perhaps now more than ever, the world needs the liberal and democratic values of Europe.' The letter containing the withdrawal notice is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf. Since the withdrawal notification, it cannot be said that the UK's position has shifted in this respect.

54 Moreover, during the hearing, the representative of the United Kingdom took care to remind the Court that the UK is a founding member of the Council of Europe and was one of the first states to ratify the ECHR. I may be forgiven for adding that while as recently as 2016, the then UK Home Secretary pleaded for the UK to leave the ECHR (see https://www.bbc.co.uk/news/uk-politics-eu-referendum-36128318 and https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum), the current government policy does not seem to be endorsing such a position (see https://www.thetimes.co.uk/article/uk-would-not-leave-human-rights-court-if-conservatives-re-elected-3rpblw9zp).

55 Which has, as seen in the Legal framework above, transposed the provisions of the Framework Decision into United Kingdom law.

56 See Clause 2(1) of the European Union (Withdrawal) Act 2018. Obviously, this clause is to be seen in context and is subject to all the other clauses of that act (on issues such as supremacy, the status and interpretation of retained EU law and the implementation of the withdrawal agreement, to name but a few).

57 European Convention on Extradition. Text available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024.

58 Article 14 of the European Convention on Extradition.

59 Article 15 of the European Convention on Extradition. This is not to deny that this convention may be considerably less effective than the Framework Decision (see, with respect to Council of Europe conventions in general, Davidson, R., 'Brexit and criminal justice: the future of the UK's cooperation relationship with the EU', in *Criminal Law Review* 2017, pp. 379-395, at p. 385). But this is inherent in the process of withdrawing, as it goes without saying that that convention as an instrument of public international law does not have the effect of an act of EU law.

60 See judgments of 1 December 2008, *Leymann and Pustovarov* (C-388/08 PPU, EU:C:2008:669), and of 28 June 2012, *West* (C-192/12 PPU, EU:C:2012:404).

61 In EU law, surrender under the Framework Decision refers to a situation between two Member States, whereas extradition in general refers to a situation between a Member State and a third country. However, when the third countries are closely linked to the EU, such as in the case of Member States of the European Economic Area, the term resorted to is 'surrender procedures'. See e.g. Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, OJ 2006 L 292, p. 2. This agreement is not yet in force (see footnote 79 of this Opinion).

62 Judgment of 5 April 2016 (C-404/15 and C-659/15 PPU, EU:C:2016:198).

63 See judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraphs 56 to 58).

70. The test which I propose should be applied is therefore the following: at the moment of executing the EAW, the judicial authorities of the executing Member State can *expect* the issuing Member State, with respect to the person actually being surrendered, to abide by the substantive content of the Framework Decision, including for post surrender situations after the issuing Member State has left the EU. Such a presumption can be made if other international instruments will continue to apply to the Member State that has left the EU. Only if there is tangible evidence to the contrary can the judicial authorities of a Member State decide not to execute the arrest warrant.

71. It is incumbent on the judicial authorities of the executing Member State to carry out the abovementioned assessment. From the clear information submitted by the referring court in its request for a preliminary reference, as regards the case at issue, there appears to be no reason not to execute the EAW in question.

On the Court's jurisdiction

72. Finally, we should examine the implications of there being no jurisdiction of the Court of Justice when it comes to interpreting the provisions of the Framework Decision.

73. This issue is relatively straightforward, as it is best analysed by looking not into the future,[64] but to the past.

74. The Framework Decision was adopted, on 13 June 2002, under the relevant legal provisions of the EU Treaty,[65] as last amended by the Treaty of Amsterdam,[66] that is to say in what used to be known as the 'Third Pillar'. The procedures under this pillar were predominantly intergovernmental in nature. Thus, compared to the Treaty establishing a European Community, the role of the Commission was greatly reduced, unanimous voting prevailed in the Council and the jurisdiction of the Court was curtailed and, moreover, by virtue of the then applicable Article 35 TEU, with respect to every single Member State subject to a declaration as to whether it was accepted.[67] Neither the UK, nor, incidentally Ireland, had made such a declaration.[68]

75. Ergo, before the entry into force of the Treaty of Lisbon, this case could not have reached the Court of Justice.[69] Nor could a UK court have made a request for a preliminary ruling. And yet, even in that not too distant past, the EU was firmly anchored on the rule of law, including access to justice.

64 On possible scenarios regarding judicial review in the area of freedom, security and justice after Brexit, see Curtin, D., 'Brexit and the EU Area of Freedom, Security', in F. Fabbrini, *The law and politics of Brexit,* OUP, Oxford, 2017, pp. 183-200, at pp. 186 and 187, and Weyembergh, A., 'Consequences of Brexit for European criminal law', *New Journal of European Criminal Law,* 2017, pp. 284-299, at pp. 295-296. As regards preliminary references stemming from the UK, see Knaier, R., Scholz, M., 'Rechtsschutz in Großbritannien und der EU nach dem "Brexit"', *Europäisches Wirtschafts- und Steuerrecht*, 2018, pp. 10-17, at pp. 15-16. Concerning dispute-settling between the EU and the UK in general, see Fennelly, N. 'Brexit: legal consequences for the EU. Dispute-settling between the EU and the UK', 18 *ERA Forum*, 2018, pp. 493-511.

65 Articles 31(a) and (b) and 34(2)(b).

66 The 'Amsterdam' legal regime was applicable between 1 May 1999 and 31 January 2003. For a concise overview of this regime see Peers, S., *EU Justice and Home Affairs Law (Volume II: EU Criminal Law, Policing, and Civil Law)*, 4th ed., OUP, Oxford, 2016, pp. 14-22.

67 See former Article 35(2) TEU: 'By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.' See also former Article 35(3) TEU, pursuant to which such a declaration had to specify whether only courts of last instance or all courts could refer questions to the Court.

68 See *a contrario* list provided for in OJ 2010 L 56, p. 14. Indeed, 19 Member States had, over the years pursuant to its entry into force made a declaration: 12 of the (15 Amsterdam) Member States at the time (all bar UK, Ireland and Denmark) and 7 of the 12 Member States that joined the Union in 2004 and 2007 (all bar Estonia, Poland, Slovakia, Bulgaria and Malta). See also, Grzelak, A., 'Aspekty prawne jurysdykcji Trybunału Sprawiedliwości WE do orzekania w trybie prejudycjalnym w III filarze UE (interpretacja art. 35 ust. 1-4 TUE)', in J. Barcz, A. Gajda, A. Grzelak, T. Ostropolski (eds), *Postępowanie prejudycjalne w Przestrzeni Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej*, LexisNexis, Warsaw 2007, pp. 19-42, at p. 29.

69 Nor in the five years after the entry into force of that Treaty, see point 76 of this Opinion.

76. It was only with the entry into force of the Treaty of Lisbon,[70] or to be more precise, five years after that entry into force,[71] i.e. primary law as it currently stands, that the Court obtained full jurisdiction with regards to the interpretation of the Framework Decision. As is well known, that treaty did away with the three pillar structure and constitutionalised[72] – in the sense that now fundamental, supranational principles apply in this domain, such as the ordinary legislative procedure[73] and the full jurisdiction of the Court[74] – the area of freedom, security and justice.

77. In summary, I do not see that the issue of a lack of jurisdiction of the Court after 29 March 2019 constitutes an impediment to R O's surrender to the UK.

Concluding remarks

78. It is apparent from the assessment above that the execution of an EAW from the UK on the basis of the Framework Decision should go ahead just as it would if the UK had not, pursuant to Article 50 TEU, notified the European Council of its intention to leave the EU. The case at issue is not, therefore, about the possible intricacy of a transitional or implementation period, simply because there is not (yet) such a period in the law as it stands. Ergo, the EU's rich experience in transitional periods which, in many forms,[75] are nothing new to Union law,[76] cannot be resorted to at this moment in time.[77]

70 On 1 December 2009.

71 As a result of Article 10(1) and (3) of Protocol (No 36) on transitional provisions, the jurisdiction of the Court continued to be governed, for all Member States except the UK, until 30 November 2014 by former Article 35 TEU. See in more detail, Lenaerts, K., 'The contribution of the European Court of Justice to the area of freedom, security and justice', 59 *International and Comparative Law Quarterly* 2010, pp. 255-301, at pp. 269-270. Regarding the UK, the situation is governed by Article 10(4) and (5) of Protocol (No 36). Pursuant to that provision, the UK exercised its right to an opt-out and, by letter of 24 July 2013, notified the President of the Council that it did not accept the powers of the EU institutions regarding the EU acts adopted in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon (see Council Document 12750/13, 'UK notification according to Art. 10(4) of Protocol No 36 to TEU and TFEU', 26 July 2013). Subsequently, the UK opted back into 35 of the measures it had previously opted out of (see Council Document 15398/14, Notification of the United Kingdom under Article 10(5) of Protocol 36 to the EU Treaties', 27 November 2014 and Council Decision 2014/857/EU of 1 December 2014 concerning the notification of the United Kingdom of Great Britain and Northern Ireland of its wish to take part in some of the provisions of the Schengen *acquis* which are contained in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters and amending Decisions 2000/365/EC and 2004/926/EC (OJ 2014 L 345, p. 1). The Framework Decision is one of these measures. Consequently, since 1 December 2014, the Court has jurisdiction with respect to the Framework Decision for preliminary references stemming from the UK. On the rather intricate procedure of opting in and out, see Mitsilegas, V., 'European criminal law after Brexit', 28 *Criminal Law Forum*, 2017, pp. 219-250, at pp. 224-226, and Ambos, K., 'Brexit und Europäisches Strafrecht', *Juristenzeitung* 14/2017, pp. 707-713, at p. 710.

72 On the constitutionalisation brought about by the Treaty of Lisbon, see Mitsilegas, V., *EU criminal law after Lisbon*, Hart Publishing, Oxford and Portland, Oregon, 2016, pp. 4-52.

73 Subject to a few exceptions such as Article 86 TFEU on the European Public Prosecutor's Office or Article 87(3) TFEU on operational police cooperation.

74 With the exception of the limitation of Article 276 TFEU, which is, however, not of relevance in the case at issue.

75 Be it in the context of primary (e.g. accession Treaties) or secondary (cardinal example: transposition of directives under Article 288(2) TFEU) law.

76 See, in the specific context of Brexit, Dougan, M., 'An airbag for the crash test dummies? EU-UK negotiations for a post-withdrawal "status quo" transitional regime under Article 50 TEU', 55 *Common Market Law Review* 2018, Issue 2/3, pp. 57-100, at p. 83.

77 On transitional periods in EU law, see Kalėda, S.L., *Przejęcie prawa wspólnotowego przez nowe państwo członkowskie. Zagadnienia przejściowe oraz międzyczasowe*, Prawo i Praktyka Gospodarcza, Warsaw, 2003, pp. 237-240.

79. Brexit constitutes *terra incognita* in terms of EU law.[78] Little is known about the arrangements to be put in place between the EU and the UK after 29 March 2019, neither in general nor regarding the system of the EAW in particular.[79] What is sure is that after withdrawal from the EU, at some point the tide will be receding. EU law will be flowing down the rivers and out of the estuaries.[80]

80. But as regards the case at issue, it is still business as usual.

81. It should also be added that the Cour de cassation (France), in a decision of 2 May 2018, saw no reason to stay proceedings pending a reply from the Court in a(nother) request for a preliminary ruling on the consequences of Brexit for the Framework Decision.[81]

82. I do not, therefore, see any reason why the referring court should alter its legal assessment in any way, by mere reason of the UK's withdrawal notification of 29 March 2017.

Conclusion

83. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the High Court (Ireland) as follows:

In a situation in which a Member State has, (1) in accordance with Article 50(2) TEU, notified the European Council of its intention to withdraw from the European Union and (2) in accordance with the relevant provisions of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, issued a European arrest warrant (EAW) with a view to surrender by another Member State of a requested person, the legal assessment to be carried out by the judicial authorities of that other Member State when executing the EAW is not altered by virtue of the abovementioned withdrawal notification.

78 See Müller-Graff, P.-Chr., 'Brexit – die unionsrechtliche Dimension', in M. Kramme, Chr. Baldus, M. Schmidt-Kessel (eds), *Brexit und die juristischen Folgen*, Nomos, Baden-Baden, 2017, pp. 33-56, at p. 33.

79 Many scenarios are imaginable in this respect, for instance that of a special agreement between the EU and the UK, such as the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway mentioned in footnote 61 of this Opinion, approved on behalf of the EU first by Council Decision of 27 June 2006 (OJ 2006 L 292, p. 1) and, subsequent to the entry into force of the Treaty of Lisbon which necessitated another approval, by Council Decision of 27 November 2014 (OJ 2014 L 343, p. 1). However, to the best of my knowledge, that agreement has not, as yet, entered into force. Incidentally, that agreement, in its Article 36, provides for an *intergovernmental* dispute settling procedure, as opposed to a judicial one. On other possible scenarios, see House of Lords, *Brexit: future UK-EU Security and Police Cooperation*, *Report*, points 124-140, published on 16 December 2016, available at: https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/77.pdf.

80 These words are to be understood as a nod to the late Lord Denning who commandingly affirmed, in *HP Bulmer Ltd & Anor v. J. Bollinger SA & Ors* [1974] EWCA Civ 14 that 'when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.' Available at: http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/1974/14.htm.

81 See Cour de cassation, chambre criminelle, judgment of 2 May 2018, Pourvoi No 18-82167, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000036900182&fastReqId=1561028715&fastPos=1.