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THE JUDICIAL COOPERATION REGARDING THE CRIMINAL LAW BETWEEN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE EUROPEAN UNION AFTER THE BREXIT AGREEMENT

Marcel ŞIMONCA
Bihor County Police Inspectorate
E-mail: simonca_m@yahoo.com
ORCID: 0000-0002-4280-7510

Abstract

The withdrawal of the United Kingdom from the European Union had a powerful impact, regardless the position one has when looking at this issue. Therefore, whether this issue is approached socially, legally, economically or cultural, one cannot not notice a change in approaching the relevant domains, both at the EU and UK level.

This paper proposes to reveal a few main elements that characterize the cooperation between the two parties from a judicial point of view, in general and the criminal law point of view, in particular.

Keywords: *The withdrawal agreement, The commercial and cooperation agreement, union Acts, tempus regit actum.*

INTRODUCTION

This paper proposes itself to be a short presentation of the judicial cooperation - from the criminal law point of view - between the United Kingdom and the European Union, by pointing out, when it is necessary, a parallel with other related domains that are set by The withdrawal Agreement of the United Kingdom of Great Britain and Northern Ireland from the European Union (which I will call alongside this paper as *The withdrawal agreement* – Official Journal of European Union, C 384I/01 from 12.11.2019), on one side, and The Commercial and cooperation Agreement between the United Kingdom and the European Union (which I will call alongside this paper as the *Commercial agreement* - Official Journal of European Union, L 149/10 from 30.04.2021).

In order to better understand the current situation, I consider that a short review of the facts that lead to this moment in time, especially the relevant situations that happened in the last decade is necessary.

Thus, following a consultative referendum initiated by the Government from the Downing Street no. 10 regarding the issue of remaining within the European Union or leaving it, the British people expressed themselves in favor of leaving the EU (by a fragile majority, truth to be told). Article 50 from the TEU, the Lisbon version, gives the possibility to every member state to take action as the UK did.

As a result of the referendum, negotiations were initiated between the two parties, that were given power to establish an adequate legislative frame regarding the new situation. These negotiations resulted in the signing of both parties of the Withdrawal Agreement (O.J.E.U. C 384I/01 from 12.11.2019).

I. THE WITHDRAWAL AGREEMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FROM THE EUROPEAN UNION

Art. 50 TEU gives the right to the representative institutions of each member state to negotiate the terms to follow if they want to separate themselves from the European Union. The United Kingdom's Government has notified the European Council (document XT 20001/17 sent for the European Council in March, 29, 2019) regarding its intent in this matter after the referendum results. This was the moment that triggered the start of the negotiations regarding the withdrawal of the United Kingdom from the EU.

The negotiations lasted almost three years, a period characterized by a multitude of meetings between two delegations, one for each party, all the meetings held having a sole purpose: to apply the referendum result from 2016 organized in the UK.

I.1 The first stipulations regarding the judicial cooperation between the two parties after the withdrawal of the UK from the EU

The Withdrawal Agreement sets rules that govern a variety of domains: from border crossing and its re-installation (part II, title II of the Withdrawal Agreement) up to the economic and commercial relations between the two parties (part III titles I-IV from the Withdrawal agreement), from the social relationships between the UK and EU citizens (part II title II chapters 1-3 from the Withdrawal Agreement) up to the participation and contribution of the United Kingdom to the EU budgets in the upcoming period after Brexit (part V from the Withdrawal Agreement, chapter 2, "*The contribution and participation of the United Kingdom to the EU budgets*").

The judicial cooperation received a special attention from the two parties. This special attention resides in the fact that it can be found stipulated in a different section of the Withdrawal Agreement. In order to be more accurate, the judicial cooperation can be found in Part III of the Withdrawal Agreement, titles V and VI, whilst title X of Part III of the same Agreement stipulates the judicial and administrative procedures of the European Union. Following this train of thoughts, the judicial cooperation is stipulated by the 3rd Part of the Commercial and cooperation Agreement between the EU and UK, articles 522-701. another thing worth to be mentioned here is that the stipulations found within the Withdrawal Agreement are succeeded by the ones in the Commercial and Cooperation

Agreement signed by the two parties. Later on, in this paper, I will explain why does this fact is relevant.

The judicial cooperation, in general, and the judicial cooperation regarding the criminal law in particular, represent important pillars for the two parties involved (but not limiting to them) given the globalization context, especially considering the fact that, given the technological evolution, physical borders, territorial borders can be easily neglected when certain crimes are to be taken into consideration. Without wanting to claim that I will be presenting them all (because that is not the topic of this paper), a few examples are to be made here. Thus, money laundering, hijacking certain specific funds given by the state, or through its institutions, or hacking are only a few of the crimes that know no physical border. The main distinction between the judicial cooperation in general and judicial cooperation regarding the criminal law, resides in the fact that a crime has as in its core an increased social danger in comparison with other misdemeanors, on one side, and on the other side the penalty for committing crimes is the utmost severe punishment, ultima ratio, for the committed crimes. Regarding the fact that the criminal law's tools are the most severe means of punishment in the law system, both the doctrine (Cristinel Ghighineci in Abuz în serviciu comis de judecători, published in Universul Juridic magazine, available at the following address: *http://revista.universuljuridic.ro/abuz-serviciu-comis-de-judecatori/*) and the jurisprudence, both national (the Constitutional Court of Romania's Decision no. 405/2016, published in the Official Monitor no. 517/2016, para. 61,68 and 80) and international (the Decision of the Latvia's Constitutional Court, from 10.11.2005, pronounced in case no. 01/04, the Constitutional Tribunal of Portugal POR-201-1-008, Codices, and so on) backup this concept.

II.2 The Withdrawal Agreement's stipulations regarding the judicial cooperation in regards to the criminal law

Regarding the Withdrawal Agreement's stipulations concerning the judicial cooperation in the criminal law area, these are approached by the two parties from the actions that are still into play in the time-frame from before the transition period is over. In other words, if the committed crime took place before the end of the transition period, the law to be applied is the EU law, this being a transgression of the roman law principle *tempus regit actum.* Thus, the Convention regarding mutual assistance regarding the criminal law cooperation between the EU member states [OJ C 197/3 of 12.07.2000, 19/Volume 11, 42000A0712(01)] applies regarding the mutual assistance requests received within that instrument before the end of the transition period, the Council's Framework Decision no. 2002/584/JHA (OJEU no. L 190/1 from 13 June 2002, 19/volume 06, no. 32002F0584) finds its applicability regarding the european arrest warrants in which the wanted person was arrested before the end on the transition period in order to execute a european arrest warrant - even if the authority that must carry out the execution of the warrant decided the temporary release of the person in the matter, and the Council's Framework Decision no.2008/909/JHA (OJEU L 327/27, of 05.12.2008)

applies concerning the Courts' decisions received before the end of the transition period by the relevant authority of the recipient state. Likewise, the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 (OJEU L 338/2 of 21.12.2011) applies in regards of the European protection orders received before the end of the transition period by the central authority or the competent authority of the recipient state, and Directive 2014/41/EU of the European Parliament and of the Council (OJEU L 130/1) applies in regards with the European investigation orders received before the end of the transition period by the central authority or the competent authority of the recipient state. Nonetheless, there are other EU Acts that can be applied given the circumstances that the committed facts at hand took place before the end of the transition period (art. 62 from the Withdrawal Agreement).

However, it does not suffice that only the incriminated action/inaction to have taken place before the end of the transition period. With the competent authorities also resides the task of creating the necessary judicial paperwork in such a manner that the EU's stipulations will not be tampered with. In other words, it is not enough that the action/s or inaction/s took place before the end of the transition period, but is also mandatory for it/them to be discovered before the end of the transition period as well and the procedure must also be started. Otherwise, the Withdrawal Agreements' stipulations do not apply anymore, but other stipulations in other laws are to be applied. Following the same train of thoughts, of great importance is not only the timing of the action(s)/inaction(s), but also the period in which the paperwork was made that stays at the core of the criminal law solicitations in the matter in-between the states. Thus, according to the Withdrawal Agreement's stipulations, at task is not to EU as a whole, but each and every member state for itself. In other words, in regards with the judicial criminal law cooperation, it is regulated by the EU law and the member state's law, the member state at task, on one hand, and on the other hand by one of the two Agreements: the Withdrawal Agreement, or the Commerce and Cooperation Agreement. What lies at the core of this matter is, to the same extent, both the time when the action(s)/inaction(s) took place and the time of the issue of the paperwork by the competent authorities, times that are crucial regarding the application of one or the other of the two Agreements.

On the same note, the Court of Luxembourg, previous to the signing of the Commercial and Cooperation Agreement, had the opportunity to decide in a preliminary action, regarding the consequences of the notification of a member state regarding its intention to withdraw from the EU, in the situation that this member state issues a European arrest warrant and stated that in case file C 327/18 the sentence pronounced on 19.09.2018, that the member state cannot deny the execution of the same European arrest warrant as long as the issuing member state is part of the EU.(M. Pătrăuș, Cooperarea judiciară în materie penală. Compendium. Legislație. Doctrină. Jurisprudență europeană și națională, 2021, p. 217).

II. The Commercial and Cooperation Agreement's stipulations between the United Kingdom of Great Britain and Northern Ireland on one side and the European Union on the other

The two Agreements signed by the two state entities create a whole, being, basically, two sides of the same judicial situation that is in an ongoing process. The first Agreement was the Withdrawal Agreement, as stated above; due to the fact that the Withdrawal Agreement was enforced for a limited period of time, a new Act needed to be drafted and set in accordance to the two parties negotiation teams, in order to avoid a legislative void for this situation. This new Act was meant to set the ground rules for the new legislative framework. Thus, the Withdrawal Agreement stipulations apply, basically, within the time-frame also known as *the transition period*, and the Commercial and Cooperation Agreement's stipulations apply, mainly, from the end of the transition period onward. However, this rule knows quite a few exceptions, and we are about to see a few of them. The transition period is the time between 1 February 2020 and 1 January 2021, according to the Withdrawal Agreement's 126 article. Within this period, the UK was no longer a member state, but continued to be part of the single market and customs union (Eurojust opinion, *Background and purposes,* para. 2).

There is no denial, however, to the fact that both Agreements signed with the UK share a few joint *rationae materiae* elements thus the created situation being able to lead to a few challenges regarding the stipulations to be applied. However, as I stated above, the *rationae temporis* competence rules are the ones to be applied, in most cases, when one must apply one or the other Agreement's stipulations. According to art. 62-65 from the Withdrawal Agreement, there are certain exceptions from the aforementioned rule that show some situations in which the Withdrawal Agreement's stipulations continue to apply even after the transition period is over.

As one can observe, para. 1 of art. 62 from the Withdrawal Agreement contains a list with EU Acts that continue to apply to both the UK and member states in situations that imply the UK, during the unfolding of the transition period, para. 2 1st thesis reveal a general rule according to which the started investigations continue in mixed teams that are formed from both, the UK and the member state investigative agents. The 2nd thesis of para. 2 contains one exception from the *before the end of the transition period* rule, that is found so often in the Withdrawal Agreement's stipulations and that is that the UK authorities continue to have acces to the web application that sets the secured information exchange, but this granted access comes with a follow-up condition: the UK must pay back to the EU the related costs to its use for maximum one year after the transition period has ended. Given this particular stipulation, as well as other resembling stipulations, I opinate that the Withdrawal Agreement contains stipulations that apply prior to the ones set into the Commercial and Cooperation Agreement, in this area and regarding to the information exchange within the joint investigation teams. However, as we are about to observe in the following pages, the Commercial and Cooperation

Agreement also contains provisions that apply to certain situations that are previous to its approval by the two parties.

Regarding a misunderstanding that involves the stipulations within the Withdrawal Agreement, according to art. 5 and considering art. 167-168 of the same Agreement, the misunderstanding or the litigation between the two parties is to be resolved by the Withdrawal Agreement's stipulations, and not by the Commercial and Cooperation Agreement. Following the same train of thoughts, it is my opinion that given a certain litigation regarding the way or the intelligibility of the Withdrawal Agreement's stipulations even if the misunderstanding appears after the end of the transition period, if it is about a situation that is stipulated in art. 62-65 of the Withdrawal Agreement, to that situation will be applied the Withdrawal Agreement's stipulations and not the Commercial and Cooperation Agreement's ones, even if, *rationae temporis*, one would be inclined to apply the stipulations of the 2nd Agreement, thus being applied the Latin adage *specialia generalibus derogant.* In case of a possible litigation concerning the Withdrawal Agreement's stipulations that appears after the end of the transition period, or if the litigation is not about a situation covered by the art. 62-65 of the Withdrawal Agreement, broadly speaking, the Commercial and Cooperation Agreement's stipulations will be applicable, and, if not, the international law in the matter will apply.

In regards to crimes, if these were committed during the transition period, the laws in force at that time will apply, with all of their rules and exceptions, if it is not stipulated otherwise in the Agreements' provisions.

II.1 The Commercial and Cooperation Agreement's structure

The first step after the official withdrawal of the UK from the EU was the coming into force of the Withdrawal Agreement. This direction had to be maintained by the two parties because it was the British people's decision revealed by the referendum's polls result to leave the EU. Thus, given the context created by the Withdrawal Agreement and the premises created by this Act, a need to initiate and apply a new act that continues to "guide" the two parties in establishing common grounds in strategical areas emerges.

The Commercial and Cooperation Agreement is structured in 7 parts, which, in turn, are structured in titles, headings, chapters and articles.

Given the fact that the two parties are no longer forming a joint market, as well as the fact that during the time they were a joint market there were some connections made, connections that can not be that easily overruled just by signing documents (emerging as a must the fact that a certain period of time would be wise to pass in order for the people to get used to the new created situation), given, among other things, their sensitivity, the process of inventing new institutions within the UK, institutions that should either be equivalent to the EU institutions, either to cooperate or collaborate with the EU institutions according to the rules enforced by the two parties throughout the two Agreements reveals itself as being a necessity.

An eloquent example regarding this matter could be the stipulations of para. 4 of the art. 568 from the Commercial and Cooperation Agreement (OJEU L,

no. 149/10 of 30.04.2021) that provides that in order for the cooperation between the Europol and the competent authority from the UK to be smoother, the UK **detaches (a.n.)** one or more connection officers within the Europol, whilst the Europol *can detach (a.n.)* one or more connection officers within the UK. Also, we can notice that, when the Agreement was signed, the UK did not still had an equivalent authority for the Europol, situation revealed by the way the document stipulates: *the cooperation between Europol and the* ***competent authority of the UK*** *(a.n.).*

Worth to be mentioned is also the fact that, even though the Agreements signed by the EU and UK are, basically, Acts that deviate from the EU law rules, given the status that the UK has now, one can notice that there are also exceptions from this principle. In other words, situations can be met where the EU law prevails over the Agreements' stipulations, thus continuing to be applied and so highlighting themselves as real exceptions from the rules. An example can be found in the art 579 stipulations, that has the following marginal designation: "Powers of Europol" and shows that "*Nothing in this Title shall be construed as creating an obligation on Europol to cooperate with the competent authorities of the United Kingdom beyond Europol's competence as set out in the relevant Union law." (*O.J.E.U. 149/10).

One cannot oversee that the stipulations of Title VII of Part III of the Commercial and Cooperation Agreement, respectively art. 596-632 set as their goal to ensure that the extradition is made based on a surrender mechanism that is met when an European Arrest Warrant is to be applied. As such, the arrest warrant in the matter must meet a few criteria and, if those criteria are not met, can result in the inefficiency of the arrest warrant.

The basic rule is that the person stipulated within the arrest warrant is to be surrendered. However, as any other general rule, this rule also knows a few particularities. This being the case, para. 3 of art. 599 reveals the exceptions from the rule (1st thesis), followed by the statement of the general rule that is to be applied by both parties.

The exceptions are stated *ad literam* within para. 3 of art. 599 and are as follows: art. 600 ("*Grounds for mandatory non-execution of the arrest warrant"*), art. 601 ("*Other grounds for non-execution of the arrest warrant"*), but only the stipulations of para. 1 let. b)-h), art. 602 ("*Political offence exception"),* art. 603 *("Nationality exception")* and art. 604 *("Guarantees to be given by the issuing State in particular cases").*

Para. 4 of art. 599, imposing an exceptional legal norm, brings into light the cases where is not necessary for the double incrimination prerequisite to be met. This prerequisite is stipulated in para. 2 and the crimes that are an exception to it are listed in para. 5 of the same article.

Title VII of Part III of the Commercial and Cooperation Agreement is to be applied even when an European Arrest Warrant is issued by a member state before the end of the transition period, that is, before 31.12.2020, but only if the wanted person was not arrested to execute the warrant in the topic before the end of the transition period. This being the case, one can sustain without being wrong that in

order to apply an EWA, one must consider the laws and regulations in force when the warrant is to be applied, and not when it was issued, thus leading to the situation where art. 632 states a genuine exception from the *tempus regit actum* principle. This even if the warrant was issued previous to the appliance of the Commercial and Cooperation Agreement's stipulations, being generated by a situation that, also, happened before the existence of the Commercial and Cooperation's stipulations, according to art. 632.

CONCLUSIONS

The cooperation between the EU and UK, regardless the domain at hand, was always atypically, ever since the EU was formed.

However, when the negotiations were about fundamental things like criminal law cooperation, the two parties left their differences apart. In my opinion, this fact reveals that, in key-moments, when the situation dictates, a close and effective cooperation between the two state entities is possible. This is because, as stated above, regardless the law system in the matter (continental or the common-law), a crime represents a dangerous action/inaction that can and has to impose the criminal liability of its author and the cooperation between different states regarding this matter is crucial to be clear, accurate, precise, thorough and mainly, not to be susceptible of interpretations. This is, in my opinion, one of the reasons why both of the Agreements are structured the way they are so that even in case of a litigation, the issues should be dealt with in an optimal and predictable term.

As one can observe, basically, the *tempus regit actum* principle represents the main rule when applying the stipulations of the Agreements, regardless the domain at hand. Nonetheless, this rule also knows exceptions that are *expressis verbis* within their texts.

Once the UK's withdrawal was done, one can notice a difference in the cooperation the two state entities had, a normal change, given the situation. Thus, the UK must create institutions that have to cooperate with the EU institutions in the key domains, in order to maintain, at least at an official level, a collaboration and cooperation relation that was before the Brexit, and the EU is held to respect the principle of loyal cooperation, the principle of legality and the other EU principles it imposed itself (Patraus, M., *Drept instituțional european,* 2018 p. 55-95).

From the criminal legislation politics point of view of the two contracting parties, considering the protected values we are safe to say that major changes did not occur.

The cooperation between the EU and the UK, however, in my opinion, has registered a recoil.

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