

Polishing the Irish Asymmetric Engagement with the Common European Asylum System: A Look at Case C-616/19

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On 10 December 2020, the CJEU handed down a preliminary ruling concerning the inadmissibility of applications for international protection in Ireland, where subsidiary protection has already been granted by another Member State (Case [C-616/19](#), *Minister for Justice and Equality (Ireland)*). The request was made by an Irish court in three sets of proceedings between M.S., M.W., and G.S and the Minister for Justice and Equality. The applicants were third-country nationals who applied for international protection in Ireland, after having been granted subsidiary protection in Italy. The Irish authorities rejected their applications on the ground that they already benefit from subsidiary protection in another Member State. The applicants thus brought annulment proceedings before the High Court of Ireland, who stayed proceedings and referred three preliminary questions relating to the interpretation of the grounds for inadmissibility set down in Article 25(2) of the Procedures Directive ([Directive 2005/85/EC](#)).

The problem of interpretation of the Directive arises in a very specific context, namely Ireland's opt-in/out choices in the legislative framework of the Common European Asylum System (CEAS). Although this Member State is bound by the Dublin III Regulation ([Regulation 604/2013](#)), it did not opt in the associated recast Procedures Directive ([Directive 2013/32/EU](#)). It remains subject to the Procedures Directive, which was drafted in consideration with the Dublin II Regulation ([Council Regulation 343/2003](#)). The preliminary reference gave thus the opportunity to the Court to interpret a first-phase instrument of the CEAS, which is still applicable in Ireland, in light of a second-phase instrument. The judgment of the Court illustrates the complexity inherent in the Irish asymmetrical participation in the CEAS. From a timing perspective, the judgment is also significant as variable geometry is expected to carry important implications for the negotiations of the legislative proposals that accompany the EU [New Pact on Migration and Asylum](#). After a brief overview of the rules on the Irish engagement with the CEAS (I), this comment will analyse the key points of the judgment (II) and draw some concluding remarks (III).

I. The Irish engagement with the CEAS

The Irish (and previously the British) participation in measures that fall under the scope of the Area of Freedom, Security and Justice (AFSJ) represents [“a test case for differentiated law making ‘in action’”](#). Since the Treaty of Amsterdam, it is governed by two separate sets of rules that apply depending on whether a measure builds upon the Schengen *acquis*. For the measures that are not Schengen relevant, a protocol attached to the EC Treaty granted Ireland and the UK an opt-out from the visas, asylum, immigration, and other policies that were transferred from the JHA pillar to Title IV of the EC Treaty. Amended by the Lisbon Treaty, the relevant provisions are now laid down in [Protocol No. 21](#) “on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice”. As for the measures that build upon the Schengen *acquis*, the specific rules of [Protocol No. 19](#) “on the Schengen *acquis* integrated into the framework of the European Union” apply. It should be emphasized that the legislative framework of the CEAS does not fall within the scope of the latter, even though it is inextricably linked with the establishment of an area without internal borders. Indeed, the 1990 Schengen Convention contained compensatory measures concerning the responsibility for processing applications for asylum. However, as from the date of entry into force of the Dublin Convention in September 1997, those provisions were

replaced by the Dublin Convention and thus ceased to be formally a part of the Schengen *acquis*. The CEAS is therefore covered by the (then) Title IV Protocol (now Protocol No. 21).

In accordance with the provisions of this Protocol, Ireland is not bound to participate in the adoption of measures pursuant to Title V of Part Three of the TFEU but may opt into any if it wishes to. This discretion can be exercised on an *ex-ante* or *ex-post* basis, i.e. either within three months of the publication of the legislative proposal or after the measure has been adopted. Any such participation pre- or post-adoption is subject to the approval of both Houses of the Oireachtas (see Article 29(4)(7) of the [Irish Constitution](#)). The same rule of enhanced parliamentary scrutiny applies in case that, under Article 8 of the Protocol No. 21, Ireland notifies the Council that it no longer wishes to be covered by the terms of the Protocol. However, the faculty to abandon the protocol system has not been used, even though Ireland intended to review its position after the entry into force of the Treaty of Lisbon, in accordance with Declaration (No. 56) annexed to the Final Act of the Treaty.

This Declaration also refers to the Irish intention to participate in the AFSJ measures “to the maximum extent it deems possible”. Still, this intention was not fully confirmed with respect to the adoption of the CEAS secondary legislation. During the enactment of the first phase of the CEAS, Ireland opted into the Eurodac Regulation and the Dublin II Regulation consistently with its previous participation in the Dublin Convention. In addition to the so-called Dublin *acquis*, Ireland also opted into the asylum Directives establishing minimum standards, apart from the Reception conditions Directive. However, during the enactment of the second phase of the CEAS, Ireland declined to opt into the recast asylum Directives. As the following table illustrates, it [later opted into the recast Reception conditions Directive](#), but it is still not bound by the recast Procedures directive:

CEAS instruments	First-phase	Second-phase
EURODAC Regulation	In	In
Temporary protection directive	In	-
Dublin Regulation	In	In
Reception conditions directive	Out	In (2018)
Qualification Directive	In	Out
Asylum Procedures Directive	In	Out
EASO Regulation	-	In
AMIF Regulation	-	In

The Irish choice of opting out of recast legislation is in alignment with Article 4a of Protocol No. 21 (see Recital 58 of the Recast Procedures Directive). This Article, which was inserted by the Lisbon Treaty, granted an express right to the UK and Ireland to opt out of measures amending an existing measure by which they are already bound. However, if the Council, on a proposal from the Commission, determines that UK’s or Ireland’s non-participation in the amended version of an existing measure “makes the application of that measure *inoperable* for other Member States or the Union”, it may “urge” the UK or Ireland to consider opting into the amended version within a period of two months. If at the expiry of that period they have not opted into the amending version, then the existing measure “shall no longer be

binding” on them. This possibility to expel a reluctant Member State from an existing measure was never put into practice because of the high threshold of inoperability required by the Protocol. As [Peers](#) argued, “a British or Irish opt-out from an amending measure would only make that measure inoperable for the other Member States or the Union if it would be *objectively impossible in practice* to continue to apply two separate versions of that measure”.

However awkward might appear to apply different versions of the Procedures Directive to Ireland on the one hand and the other Member States on the other, it is thus not impossible to do so. Nevertheless, as the Advocate General observed in Case C-616/19, the Irish opt-in/out choices can create « an asymmetry with consequences that have not been addressed by the legislature » ([Opinion of AG Saugmandsgaard Øe](#), para. 66). Effectively, under Article 25 (2)(a) of the first-phase Procedures Directive, the Member States had a discretionary power to reject an application for asylum as being inadmissible where the applicant had been granted refugee status in another Member State, whereas the corresponding Article 33(2)(a) of the recast Procedures Directive extends that power to any grant of international protection by another Member State, including subsidiary protection status. The request for a preliminary ruling submitted by the High Court precisely concerned the interpretation of the limited scope of the former provision.

II. The judgment of the Court

Deciding that it was not necessary to answer the second question (para. 55), the Court delivered a composite answer for the first and third questions submitted by the referring court. The latter asked essentially whether, in cases where a Member State is subject to a combined application of the Procedures Directive and the Dublin III Regulation, Article 25(2) of that Directive must be interpreted as meaning that it precludes legislation of that Member State under which an application for international protection is considered to be inadmissible where the applicant has already been granted subsidiary protection in another Member State (para. 27).

At the outset, the Court addressed the uncertainties of the referring court as to the scope of the grounds of inadmissibility laid down in Article 25(2)(d) and (e) of the Procedures Directive. Given the limited scope of Article 25(2)(a) of the Directive, the national court considered that the inclusion of the beneficiaries of subsidiary protection in the scope of the Directive depended on the interpretation of the expression of “the Member State concerned” contained in those provisions. They allow the Member States to consider an application as inadmissible, respectively, if the applicant is allowed to remain in the Member State concerned on some other ground and as a result of this, he/she has been granted a status equivalent to the rights and benefits of refugee status under the Qualification Directive, or if the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement pending the outcome of a procedure for the determination of status pursuant to point (d) of the Directive. In line with the Advocate General, the Court found that these references to “the Member State concerned” could not cover the Member State in which a third-country national was previously granted subsidiary protection. They rather refer to the “Member State in which the third-country national lodged an asylum application and on whose territory he or she may remain, either because that Member State already gave him or her a status equivalent to the rights and benefits of refugee status or because the procedure for determining such status is still ongoing” (para. 38).

The Court addressed next the particular situation that arises from the combined application in Ireland of the Procedures Directive and the Dublin III Regulation. Recalling its previous ruling in *Ibrahim*, the Court held that the combined application of the Procedures Directive and the Dublin II Regulation makes it possible to reject an asylum application as being

inadmissible only where the applicant has been granted refugee status (para. 41; *Ibrahim and Others*, joined cases [C-297/17](#), [C-318/17](#), [C-319/17](#) and [C-438/17](#), paras. 58 and 71). A Member State may therefore not adopt an inadmissibility decision on the basis that the applicant benefits of subsidiary protection in another Member State. Nevertheless, the Member State that granted the subsidiary protection may still initiate a take-back procedure under the Dublin II Regulation. Conversely, under the combined application of the recast Procedures Directive and the Dublin III Regulation, a Member State can reject an asylum application where the applicant has been granted subsidiary protection in another Member State, but it cannot reasonably require that Member State to initiate a take-back procedure (para. 44). The Court has already found that the rejection of such an application has to be made by a decision of inadmissibility rather than by means of a decision to transfer and not to examine the application under the Dublin III Regulation (*Ahmed*, [C-33/17](#), para. 39; *Ibrahim and Others*, para. 78). Thus, given that Ireland is neither bound by the recast Procedures Directive nor the Dublin II Regulation, it may not adopt an inadmissibility decision or initiate a take-back request under Dublin II. Hence, a literal interpretation of the provisions applicable in Ireland would suggest that the competent authorities are required to examine its asylum application when the applicant benefits from subsidiary protection status in another Member State (para. 45).

Even if this solution stems from Ireland's opt-in/out choices, it nevertheless generates inconsistencies that are difficult to admit for the Court as they conflict with the logic of the CEAS and the objectives pursued by both the Procedures Directive and the Dublin III Regulation (para. 47). The Court considered that in both phases of the CEAS the EU legislature did not intend for the Member States to be required to examine an asylum application where the applicant benefits from subsidiary protection in another Member State. Further, it recalled the fundamental importance of the principle of mutual trust between the Member States (para. 48). Given that the Member States may adopt an inadmissibility decision on grounds related to international protection granted by a third country (Art. 25(2)(b) and (c) of the Procedures Directive), forcing Ireland to examine asylum applications brought by applicants who already benefit from subsidiary protection elsewhere in the EU would not be "consistent with the fact that Ireland could reject as inadmissible such an application brought by a third-country national who benefits from protection deemed to be sufficient in a third country" (para. 50). The Court also held that obliging Ireland to examine such applications would risk encouraging third-country nationals who already benefit from subsidiary protection from a Member State to travel to other Member States. Such a situation would undermine the very rationale of both the Procedures Directive and the Dublin III Regulation, namely the limitation of secondary movements (para. 52).

In view of this systematic and teleological interpretation, the Court held that Article 25(2) of the Procedures Directive must be interpreted as not precluding legislation of a Member State subject to the Dublin III Regulation but not bound by the corresponding recast Procedures Directive from considering an application for international protection inadmissible where the applicant already benefits from subsidiary protection status in another Member State. The position of the Irish authorities was therefore not questionable.

III. Concluding remarks

The judgment illustrates the complexity inherent in the asymmetric constitutional arrangements to the benefit of some Member States. This is not the first time that the Court is dealing with opting outs that fall under the AFSJ umbrella. In its *Frontex* and *biometric passports* judgments, the Court upheld the Council's discretion to refuse to allow the UK to take part in the adoption of measures building upon parts of the Schengen *acquis* that the UK

had not previously accepted (Cases [C-77/05](#), UK v. Council and [C-137/05](#), UK v. Council). The Court confirmed this standpoint in the *VIS* judgment (Case [C-482/08](#), UK v. Council), where it also held that the Member States are not obliged to provide for adaptation measures for the Member States that do not take part in a measure within the scope of the Schengen *acquis*. Yet, in the *Eurosur* judgment, it was made clear that the EU legislature can, even if it's not obliged to, establish such limited forms of cooperation with Ireland and/or the UK (Case [C-44/14](#), Spain v. EP and Council). So far, the case law has therefore prevented attempts that would have resulted in “cherry-picking” in the Schengen *acquis* by insisting on the coherence of that *acquis* and the strict demarcation between the Schengen Protocol and the (then) Title IV Protocol (now Protocol No. 21).

A notable difference with the existing case law is that in *Minister for Justice and Equality (Ireland)* the Court was called upon to rule on parts of the EU asylum *acquis* which are not considered as Schengen-building measures. The discretionary exercise of opt-in/out choices in such measures is not less likely to raise thorny questions of interpretation and test the coherence of the EU asylum law. The ruling of the Court suggests, however, that these difficulties can be overcome by departing, when necessary, from the wording of an EU law provision. Indeed, in this case, the Court sought to make sure that the interpretation of the first-phase Procedures Directive makes it possible for the Irish authorities to rule inadmissible an asylum application for a reason not expressly provided for in the Directive. In that regard, the Court focused on the evolution of the normative context in which the Directive should be placed. Just as the different parts of an engine must work together to keep it running, the Court polished the consequences of the Irish “pick and choose” approach by looking at the functional relationship between the Directive and those parts of the second-phase CEAS legislation that apply to Ireland.

Even if the Court thus managed to overcome the constraints of the Irish asymmetric participation in the CEAS, the judgment exposed a brutal reality: differentiated participation in inter-connected legislation comes with the risk of inconsistencies. Given the comprehensive approach provided by the New Pact, the likelihood of such new inconsistencies is anything but a theoretical question. It is still to be seen whether Ireland will exercise its right to opt into all the legislative proposals presented by the Commission in September 2020. It can choose, for instance, to opt into the [AMMR Proposal](#) but not to the associated amended [APR proposal](#). Besides, in an [opinion](#) circulated in the Council on 19 February, the Legal Service examined whether it is legally possible to adopt these proposals in the form presented by the Commission, or whether reorganization is required to enable Ireland to correctly exercise the rights it draws from Protocols 19 and 21. Although a detailed presentation of this lengthy opinion is beyond the scope of this commentary, it is noteworthy that the Council Legal Service found problematic from a variable geometry perspective the merging of provisions that build upon the Schengen *acquis*, the Dublin *acquis*, or the EU asylum *acquis*. It focused on the need to move out certain Schengen-related provisions of the amended APR Proposal, the AMMR Proposal, and the proposed [Crisis Regulation](#), in order to enable Ireland to opt in, should it wish to do so, only to the asylum related provisions. In such a perspective, one may wonder whether the boundaries of an *à la carte* logic can be stretched further...

Further reading

El-Enany, N. (2017), “The Perils of Differentiated Integration in the Field of Asylum”, in B. de Witte, A. Ott and E. Vos, eds, *Between Flexibility and Disintegration. The Trajectory of Differentiation in EU Law*, Cheltenham/Northampton, Edward Elgar, pp. 362-383.

Fletcher, M. (2009), “Schengen, the European Court of Justice and Flexibility under the Lisbon Treaty: Balancing the United Kingdom’s ‘Ins’ and ‘Outs’”, *European Constitutional Law Review*, 5(1), pp. 71-98.

Peers, S. (2008), “In a World of Their Own? Justice and Home Affairs Opt-Outs and the Treaty of Lisbon”, *Cambridge Yearbook of European Legal Studies*, 10, pp. 383-412.

Thym, D. (2018). “Supranational Differentiation and Enhanced Cooperation”, in R. SCHÜTZE, T. TRIDIMAS, eds. *The Oxford Principles of European Union Law. Volume I: The European Union Legal Order*, Oxford, Oxford University Press, pp. 847-883.