Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 2 March 2016[1]

Case C-241/15

Niculaie Aurel Bob-Dogi

(Request for a preliminary ruling from the Curtea de Apel Cluj (Cluj Court of Appeal, Romania))

(Reference for a preliminary ruling — Police and judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrant — Article 8(1)(c) — No prior national arrest warrant that is separate from the European arrest warrant — Effect)

1. Does national legislation which provides that the scope of the European arrest warrant extends to the Member State where the warrant was issued and consequently authorises the issue of such a warrant for the purpose of conducting a criminal prosecution without a separate national arrest warrant having previously been issued comply with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,[2] as amended by Council Framework Decision 2009/299/JHA of 26 February 2009?[3]

2. That is the question raised by this request for a preliminary ruling on the interpretation of Articles 3, 4 and 8 of the Framework Decision, which was formulated in response to an application for enforcement in Romania of a European arrest warrant issued on 23 March 2015 by the Mátészalkai járásbíróság (District Court, Mátészalka, Hungary) against Mr Bob-Dogi, a Romanian national who was arrested in his home country on 2 April 2015, prior to being placed under judicial supervision.

3. The Curtea de Apel Cluj (Appeal Court, Cluj) is essentially asking whether the 'arrest warrant', evidence of which must be provided in the European arrest warrant pursuant to Article 8(1)(c) of the Framework Decision, is a national arrest warrant distinct from the European arrest warrant and issued prior to it, and, in the event that it is, whether the absence of a national arrest warrant meeting that requirement must be regarded as constituting an implied ground for non-execution of the European arrest warrant.

4. The apparently technical nature of these questions belies how essential they are to the future of instruments of mutual recognition, and thus to the creation of a European judicial area. This requires that the guarantees put in place to ensure the observance of fundamental rights in the context of the European arrest warrant, enforcement of which necessarily entails depriving a person of his or her liberty, for lengthy or short periods, be defined.

1 — Original language: French.

2 — OJ 2002 L 190, p. 1.

3 — OJ 2009 L 81, p. 24, 'the Framework Decision'.

5. I have no hesitation as to the reply, once it has been established, first, that the Hungarian legislation at issue in the main proceedings must be examined in light of the requirements of the protection of fundamental rights and, secondly, that that legislation does not provide a guarantee of the effectiveness or speed of the European arrest warrant mechanism.

6. In this Opinion I shall, first of all, argue that a European arrest warrant can be issued only to enforce a separate national arrest warrant, or other enforceable judicial decision having the same effect, which orders the arrest of the accused person and was adopted in accordance with the rules of criminal procedure of the Member State in which it was issued.

7. Secondly, I shall argue that as the absence of a separate national arrest warrant constitutes the omission of an essential procedural requirement underlying the very existence of the European arrest warrant, the executing judicial authority must refuse to enforce the act as a European arrest warrant.

I – **Legal framework**

A – *EU law*

8. Recitals 5 to 8 and 10 of the Framework Decision are worded as follows:

‘(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the “cornerstone” of judicial cooperation.

(7) Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 [EU] and Article 5 [EC]. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.

(8) Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which mean that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.

…

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States …’

9. Article 1 of the Framework Decision, entitled ‘Definition of the European arrest warrant and obligation to execute it’, provides:

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

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

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

10. Articles 3, 4 and 4a of the Framework Decision set out the grounds for mandatory and optional non-execution of the European arrest warrant.

11. Article 8 of the Framework Decision, entitled ‘Content and form of the European arrest warrant’, provides in paragraph 1 thereof:

‘The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

…

(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;

…’

12. Article 15(2) of the Framework Decision provides:

‘If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.’

B – *Hungarian law*

13. Article 25 of Law no CLXXX. of 2012 on cooperation between the Member States of the European Union in criminal matters (az Európai Unió tagállamaival folytatott bűnügyi együttműködésről szóló 2012. évi CLXXX. törvény)[4] provides:

‘(1) Where it is necessary to commence criminal proceedings in respect of a suspected person, the court shall issue immediately a European arrest warrant with a view to that person’s arrest and surrender in any Member State of the European Union, provided that this is warranted by the seriousness of the offence …

…

(7) The scope of application of the European arrest warrant also extends to the territory of Hungary.

4 — *Magyar Közlöny* 2012/260.

…’

II – **The main proceedings and the questions referred for a preliminary ruling**

14. On 23 March 2015, the Mátészalkai járásbíróság (District Court, Mátészalka) issued a European arrest warrant against Mr Bob-Dogi, a Romanian national, in the context of criminal proceedings brought against him for offences committed in Hungary on 27 November 2013 which are classifiable as ‘serious bodily harm’.

15. The offences relate to a road traffic accident on the public highway which caused multiple fractures and injuries to Mr Katona, a Hungarian national who was riding a moped for which Mr Bob-Dogi was responsible by reason of the fact that the lorry he was driving was travelling at excessive speed.

16. On 30 March 2015, an alert concerning the European arrest warrant was filed in the Schengen Information System (SIS).

17. On 2 April 2015, Mr Bob-Dogi was arrested in Romania and, having been placed in detention, was brought before the Curtea de Apel Cluj (Appeal Court, Cluj) with a view to his surrender to the Hungarian authorities.

18. By an order of the same day, the court rejected the request that Mr Bob-Dogi be remanded in custody, ordering his immediate release, subject to judicial supervision, and directing the public prosecutor’s office to file a translation into Romanian of the European arrest warrant within a stated period.

19. At the hearing of 15 April 2015, a copy of the European arrest warrant translated into Romanian was served on Mr Bob-Dogi.

20. The national court has doubts as to whether the Hungarian legislation in question complies with the Framework Decision. It observes that section (b) of the European arrest warrant — headed ‘Decision on which the warrant is based’ — states ‘Public Prosecutor’s office at Nyíregyházi járásbíróság (Court of Nyíregyháza) K.11884/2013/4’ and that section (b)(1) of the warrant — which requires the arrest warrant or judicial decision having equivalent effect to be identified — refers to ‘European arrest warrant no 1.B256/2014/19-II issued by the Mátészalkai járásbíróság (District Court, Mátészalka), which is also valid in Hungary and thus constitutes at the same time a national arrest warrant’. The national court is therefore uncertain whether the European arrest warrant may validly be based on itself, without any reference to a separate prior national arrest warrant.

21. In that regard, it notes that there have been differences of interpretation between the Romanian courts.

22. The majority view is that, in such a situation, the request for execution of the European arrest warrant must be dismissed on the essential ground that it cannot compensate for the lack of a national arrest warrant or enforceable judicial decision. Other courts have, however, allowed execution of the European arrest warrant on the ground that the statutory requirements were satisfied, since the issuing judicial authorities expressly indicated that the European arrest warrant issued constituted the judicial decision on which the application to the Romanian judicial authorities was based, clarifying, in certain cases, that under Hungarian law the European arrest warrant also constituted the national arrest warrant.

23. The national court considers that, in the procedure for the execution of a European arrest warrant, the decision recognised by the executing judicial authority is the national judicial decision delivered by the competent authority in accordance with the rules of criminal procedure of the issuing Member State before the procedure for issuing the European arrest warrant was commenced.

24. That court observes that there are fundamental differences between a European arrest warrant and a national arrest warrant. Accordingly, the European arrest warrant is issued for the purposes of arresting and surrendering a person who has been charged or convicted and is in the territory of the executing Member State. The national arrest warrant, on the other hand, is issued for the purposes of arresting a person in the territory of the issuing Member State. Furthermore, the issue of the European arrest warrant is based on an arrest warrant or decision relating to the execution of a custodial sentence, whereas the national arrest warrant is issued on the basis of conditions and circumstances expressly governed by the criminal procedure of the issuing Member State. Finally, there are many differences between European and national arrest warrants with regard to their content, form and period of validity.

25. The national court concludes that a person cannot be arrested or detained in the absence of a national arrest warrant and nor can it be accepted that the European arrest warrant is 'transformed' into a national arrest warrant after the person sought has been surrendered. That interpretation would, furthermore, be contrary to the fundamental rights guaranteed by EU law.

26. The national court is also of the view that judicial practice shows that there are other implied grounds for refusal, in addition to the optional or mandatory grounds for refusal provided for in the Framework Decision. That is true where the substantive or formal requirements of the European arrest warrant are not met, inter alia, where no national arrest warrant has been issued in the issuing Member State, which is the situation in the main proceedings.

27. In those circumstances, the Curtea de Apel Cluj (Appeal Court, Cluj) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) For the purposes of the application of Article 8(1)(c) of the Framework Decision, must the expression "the existence of a[n] … arrest warrant" be understood to refer to a national … arrest warrant issued in accordance with the criminal procedural rules of the issuing Member State, and therefore distinct from the European arrest warrant?

(2) If the first question is answered in the affirmative, may the non-existence of a national … arrest warrant constitute an implied reason for non-execution of the European arrest warrant?'

III – **Assessment**

A – *First question*

28. By its first question, the national court essentially seeks to ascertain whether Article 8(1)(c) of the Framework Decision must be interpreted as meaning that the arrest warrant whose existence must be verified on the form contained in the annex to that decision may be construed as a national arrest warrant that is distinct from the European arrest warrant and was issued in accordance with the rules of criminal procedure of the issuing Member State.

29. The national court is asking this question as it has before it a European arrest warrant which contains, at section (b)(1) of the form, only a reference to itself, became, where the Hungarian judicial authorities have a sound body of evidence entitling them to assume that a person being sought in connection with a prosecution is in another Member State, they issue a European arrest warrant directly, on the basis of Article 25 of Law no CLXXX of 2012 on cooperation in criminal matters between the Member States of the European Union, which states that the scope of the European arrest warrant includes Hungary.

30. Before answering that question, it seems to me important to emphasise that the European arrest warrant form on the basis of which the Hungarian judicial authorities requested their Romanian counterparts to surrender Mr Bod-Dogi not only contains, in section (b)(1), a reference to the warrant issued by the Mátészalkai járásbíróság (District Court, Mátészalka), but also, in section (b), under the heading 'Decision on which the warrant is based,' the words 'Public prosecutor attached to the Nyíregyházi járásbíróság (Court of Nyíregyháza) K.11884/2013/4'. I note that these two indications render the European arrest warrant ambiguous in regard to the originator of the decision. Who took the decision to issue an arrest warrant against Mr Bob-Dogi? Was it the public prosecutor attached to the Nyíregyházi járásbíróság (Court in Nyíregyháza), whose decision was merely implemented by the Mátészalkai járásbíróság (District Court, Mátészalka), or was it the latter court upon application by the public prosecutor? I do not know and have serious doubts as to whether the national court received any clarification on this point.

31. Even on the assumption that the decision was taken by the court, I consider that Article 8(1)(c) of the Framework decision must be interpreted as requiring the European arrest warrant to be based on a distinct national arrest warrant ordering the arrest of the accused person in the territory of the issuing Member State.

32. Three conjunctive considerations appear to me to militate in favour of that view. First of all, a system such as that provided for by Hungarian law is inconsistent with the conception of the European arrest warrant as self-standing. Secondly, the Hungarian system deprives the person sought for the purposes of criminal prosecution of the procedural safeguards associated with the issue of a national judicial decision ordering the arrest of that person. Thirdly, in Member States such as Hungary in which the principle of mandatory prosecution applies, deeming the European arrest warrant equivalent to a national arrest warrant would preclude any review of proportionality when the European arrest warrant was issued.

33. I shall consider each of those questions in turn.

1. Equating the European arrest warrant with a national arrest warrant is inconsistent with the conception of the European arrest warrant as self-standing

34. The solution applied by Hungarian law is based on equating the European arrest warrant with a national arrest warrant, which does not appear consistent with either the letter or the spirit of the Framework Decision.

35. First of all, the reference to itself which occurs if the issue of a European arrest warrant is deemed equivalent to the issue of a national arrest warrant is contrary to the very letter of Article 8(1)(c) of the Framework Decision, which provides that the European arrest warrant must contain 'evidence' presented in accordance with the form appearing in the annex to that decision 'of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2'.

36. It should be observed that neither the terms 'arrest warrant' nor the term 'enforceable judicial decision having the same effect' are defined in the Framework Decision.

37. In that regard it must be recalled that, in the absence of such a definition in Union law, the meaning and scope of those concepts must be established, according to the settled case-law of the Court, taking account both of the wording of the provision of Union law concerned and of its context. [5]

38. First, the wording of Article 8(1)(c) of the Framework Decision uses the expression 'arrest warrant', whereas the words used in its title, recitals and the headings and body of the articles [6] to designate the surrender mechanism governed by the decision are 'European arrest warrant'.

39. The wording of paragraph (b) of the form annexed to the Framework Decision supports the interpretation that the decision distinguishes between the concepts of 'arrest warrant' and 'European arrest warrant', since it indicates that mention must be made therein of the decision on which the European arrest warrant 'is based', clearly implying that there is a decision distinct from the arrest warrant itself which serves as its basis.

40. In the light of that distinction, the term 'arrest warrant' must be regarded, not as a generic term covering under the same name both the European and national arrest warrants, but as a distinctive term which designates only the national arrest warrant.

41. Therefore, contrary to the assertion of the Hungarian Government, it is clear from the wording of the Framework Decision and the form annexed thereto that the issue of a European arrest warrant is subject to the existence of a national arrest warrant on which the European arrest warrant is based and which constitutes its legal basis.

42. Secondly, it is in my view fundamentally inconsistent with the concept of the judicial cooperation mechanism instituted by the Framework Decision and the definition in Article 1(1) thereof to equate of the European arrest warrant with a national arrest warrant.

43. In this connection it should be recalled that the purpose of the Framework Decision is, as the Court has repeatedly stated on the basis of Article 1(1) and (2) and recitals 5 and 7 thereof, '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 conducting prosecutions, that system of surrender being based on the principle of mutual recognition'. [7]

44. To this end, the Framework Decision institutes a new, simplified and more effective surrender system in order 'to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice, founded on the high level of confidence which should exist between the Member States'. [8]

45. The European arrest warrant was therefore conceived as a system intended to replace the extradition system in order to facilitate the surrender of a requested person who is in a Member State other than that in which the warrant was issued. That concept, which forms the basis of the Framework Decision, emerges very clearly from the definition set out in Article 1(1) thereof, which establishes that the European arrest warrant is aimed solely at the arrest of the requested person in a Member State other than the issuing Member State with a view to his surrender to the latter state.

5 — See judgment in *West* (C-192/12 PPU, EU:C:2012:404, paragraph 49 and the case-law cited).

6 — Whereas the French version of Article 3(1) of the Framework Decision uses the words 'mandat d'arrêt' when it is more likely to be intended to refer to the European arrest warrant, the adjective 'European' nonetheless appears in several other language versions (see, inter alia, the Bulgarian, Spanish, German, Greek Hungarian and Dutch versions).

7 — See, to that effect, judgment in *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 27 and the case-law cited).

8 — See, to that effect, judgment in *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 28 and the case-law cited).

46. As is apparent, inter alia, from recitals 5 and b thereto, the Framework Decision replaces a traditional system of cooperation between sovereign states, entailing intervention and assessment by the executive, with a cooperation mechanism between national judicial authorities intended to ensure the free movement of decisions in criminal matters within a common judicial area having the principle of mutual recognition as its 'cornerstone'.

47. Although the Framework Decision contains various elements clearly distinguishing the European arrest warrant from the traditional concept of extradition, such as, in particular, rendering the procedure entirely judicial, abandoning the rule concerning non-extradition of nationals and partially rejecting the doctrine of double jeopardy, the Union legislature has nevertheless not abolished all mechanisms for surrender between the Member States by creating a system for the automatic recognition of national arrest warrants which may thus circulate freely within the entirety of the European judicial area.

48. The Framework Decision represents, lastly, an intermediate stage in the gradual implementation and strengthening of the principle of mutual recognition, which is reflected in particular in the fact that a European arrest warrant is conceived as an instrument in national proceedings, the issue of which remains dependent on there being a pre-existing enforceable order at national level. [9]

49. It is significant in that regard that, during the legislative process leading up to the adoption of the Framework Decision, the words '*whether* there is a final judgment or any other enforceable judicial decision, [10] which appeared in Article 6(c) of the Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, [11] were replaced by the words 'evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect', so that the text no longer asks a question but requires the submission of evidence.

50. Finally, the expression 'European arrest warrant' in my view designates the original instrument created by the Framework Decision, by which the issuing judicial authority requests execution of the national decision within the area of freedom, security and justice and which, by means of the mandatory information which it contains, enables the executing judicial authority to verify that the warrant actually exists and that it complies with the formal requirements of the Framework Decision.

51. As the instrument by which the judicial authority of a Member State requests the judicial authority of another Member State to surrender the requested person, the European arrest warrant is not to be confused with the request for arrest for the enforcement of which it is issued. In other words, it constitutes an act enabling an enforceable court decision ordering the arrest of the requested person to be enforced within the European judicial area. Therefore, far from agreeing with the Austrian Government's view that the European arrest warrant 'is … also an arrest warrant', I consider, on the contrary, that the specific nature of this instrument of judicial cooperation precludes any possibility that extending the scope of that instrument to the territory of the issuing Member State under the national law of that Member State may compensate for any failure to issue a national arrest warrant or other enforceable act having the same effect, which deprives the European arrest warrant of any legal basis.

52. The lack of a legal basis is all the more unacceptable because it deprives the requested person of the procedural safeguards attaching to the issue of a national judicial decision and are additional to the safeguards connected with the European arrest warrant procedure.

9 — Moreover, the final stage of this process would not be to abolish the national arrest warrant, as provided for under Hungarian law, but to ensure that the national arrest warrant is able to circulate freely throughout the European judicial area.

10 — Emphasis added.

11 — COM(2001) 522 final.

2. Extending the scope of the European arrest warrant to the territory of the issuing Member State deprives the requested person in criminal proceedings of the procedural safeguards associated with the issue of a national judicial decision

53. At the hearing, in reply to the question put by the Court specifically dealing with the issue whether the 'simplified' procedure at issue in the main proceedings is not liable to limit the safeguards under national law protecting the requested person, the Hungarian Government claimed that there was no risk of those safeguards being limited; it argued, on the one hand that, unlike a national arrest warrant, which can be issued not only by a court but also by the police or public prosecutor, the European arrest warrant can be issued only by a court and, on the other hand, that the conditions for its issue are stricter than those governing the issue of a national arrest warrant.

54. Far from reassuring me, those explanations increase my concerns, which I have already set out, as to the risks of weakening the rights of the defence where there is no national judicial decision on which the European arrest warrant is based.

55. In my view, the strict terms in which the grounds for non-execution of the European arrest warrant have been framed presuppose that there must, by way of counterweight, be specific and effective procedural safeguards of the rights of the defence in the Member State issuing the European arrest warrant. If not, the essential balance between the requirements of an effective criminal justice system and the need to safeguard fundamental rights, which forms an integral part of the creation of a European judicial area, will be lost.

56. The condition relating to the existence of a national arrest warrant distinct from the European warrant, far from constituting a pedantic and pointless formality, in fact represents an essential safeguard to preserve that balance in the system established by the Framework Decision.

57. It is essential to mutual confidence, and to the observance of the rights of the requested person, that that condition should be fulfilled.

58. It is, first, a prerequisite of mutual confidence that there be a national arrest warrant.

59. The principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence which, according to the wording of the judgment in *West*,[12] 'should exist' between the Member States.[13] In the case of *F.*,[14] the Court stated that mutual recognition between the Member States relates to the fact that their respective national legal systems are capable of providing 'equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter (of Fundamental Rights of the European Union ('the Charter'))'.[15]

60. The process of mutual recognition is therefore based on the idea that it is not necessary for a judicial decision the execution of which is sought in a Member State to comply with all the procedural and substantive conditions imposed in that Member State provided that it complies with the equivalent rules of the Member State in which it was issued. As the European Commission correctly observed, under the surrender system provided for in the Framework Decision, mutual recognition is based on the premiss that any European arrest warrant is based on a national arrest warrant or on an enforceable judicial decision having the same effect, adopted in compliance with the rules of criminal procedure applicable in the Member State concerned.

12 — C-192/12 PPU, EU:C:2012:404.

13 — Paragraph 53.

14 — C-168/13 PPU, EU:C:2013:358.

15 — Paragraph 50.

61. The fact that there is a national arrest warrant for the execution of which the European arrest warrant is issued therefore guarantees to the judicial authorities of the other Member that all the national statutory requirements have been met for an order for the arrest and detention of the requested person for the purposes of criminal proceedings. If there were no such minimum guarantee, far from encouraging the mutual confidence which should prevail in relations between the issuing and executing judicial authorities, the simplified surrender system would give rise to mutual mistrust.

62. The reason for the condition that there must be a national judicial decision is not, therefore, to achieve compliance with a purely formal requirement stemming from a literal interpretation of the Framework Decision. By imposing a requirement that the European arrest warrant be based on a common procedural foundation comprising a national judicial decision guaranteeing the involvement of an independent and impartial court when a coercive measure is imposed, the condition endows the principle of effective and equivalent protection with a minimum level of substantive content and therefore represents the concrete judicial embodiment of the principle of mutual confidence which cannot, if it is actually to exist, be reduced to a mere empty formula.

63. In that regard, it should be noted that, while the principle of mutual confidence is primarily directed at the Member States which are thereby required to place trust in each other notwithstanding the differences between their respective national laws, the principle also provides the courts with an additional tool, namely a rule for the interpretation of the obligations of the Member States under instruments designed for the gradual creation of an area of freedom, security and justice.[16] In my view, mutual confidence demands that the requirement that a national judicial decision serve as the basis for a European arrest warrant under Article 8 of the Framework Decision be given substantial scope.

64. Secondly, respect for the rights of the requested person presupposes that a national arrest warrant is in existence.

65. The arrest warrant, by definition, comprises not only an order for arrest but also an order for detention. It cannot be treated in the same way as a custodial detention measure in the context of an investigation, for example. Indeed, owing to time limits that cannot be reduced that are imposed inter alia by the legal and substantive conditions governing implementation of the warrant, its execution will, by definition, entail a period of detention, which the relevant provision equates either to the beginning of the serving of the sentence or to the period of detention on remand prior to sentencing, as the period thus served must be deducted from the sentence for which execution is sought or, depending on the case, from the sentence to be handed down following judgment.[17]

66. The fact that there is a national arrest warrant serving as the basis of a European arrest warrant must therefore be understood as an expression of the principle of legality, which implies that the coercive power under which an order for arrest and detention is made cannot be exercised outside the legal limits determined by the national law of each Member State and within which the public authority is authorised to search for, prosecute and try persons suspected of having committed an offence.

67. The legal regime applicable to the execution of a European arrest warrant such as that at issue in the main proceedings does not comply with that fundamental requirement.

16 — See in particular, to that effect, De Schutter, O., 'La contribution du contrôle juridictionnel à la confiance mutuelle', *La confiance mutuelle dans l'espace pénal européen/Mutual Trust in the European Criminal Area*, Institut d'études européennes de l'Université libre de Bruxelles (ULB), Brussels, 2005, p. 79, especially p. 103, which regards the principle of mutual recognition as a principle which plays a role equivalent to that played by the principle of sincere cooperation.

17 — See Article 26(1) of the Framework Decision.

68. It must first of all be noted that that regime is characterised by great ambiguity. What does the provision which states that the scope of the European arrest warrant 'also extends to the territory of Hungary' actually mean?

69. Interpreted literally, it means that the European arrest warrant is applicable to Hungary while at the same time continuing to be subject to its own legal regime. Let us imagine, which is not a purely hypothetical scenario, that a person on the run, against whom the Hungarian judicial authorities have, in the belief that he is abroad, issued a European arrest warrant which is deemed equivalent to a national arrest warrant, is finally arrested in Hungary. Which rules should apply? If we follow the letter of the national provision, the act which serves as the basis for the arrest retains the legal nature of a European arrest warrant whose effects are only 'extended' to national territory. It follows that the legal regime specific to that warrant should apply on Hungarian territory as it would apply on the territory of another Member State. Does that mean that the Hungarian judicial authorities must be deemed to be both issuing authorities and enforcing authorities, and that the requested person may, once arrested, avail himself of the rights conferred by the Framework Decision and thus decline to consent to his surrender, or express renunciation of or entitlement to the speciality rule? Must the time limits applicable to the execution of a European arrest warrant be observed? Those different questions show that extending the scope of a European arrest warrant to the territory of the issuing Member State creates a legal regime whose contours are particularly vague, which in no way satisfies the requirement of legal certainty.

70. It is only by straining the terms of the Hungarian provision extending the scope of the European arrest warrant to Hungarian territory that it can be construed consistently with the interpretation of the Hungarian Government, to the effect that the European arrest warrant is a national arrest warrant in Hungary, whilst being a European arrest warrant in the other Member States.

71. Nonetheless, even if the Hungarian Government's interpretation were accepted, the legal regime applicable to that warrant, which, Janus-like, appears to be at the same time a national arrest warrant in the territory of the issuing Member State and a European arrest warrant in the territory of the other Member States, remains shrouded in considerable ambiguity.

72. First, since, as I have previously stated, the European arrest warrant is an instrument of legal cooperation which does not constitute an order for the arrest of the person concerned in the territory of the issuing Member State, such a regime would distort the purpose of the European arrest warrant, as well as robbing it of its legal basis.

73. Secondly, and consequently, because there is no act other than the European arrest warrant that may be challenged, the requested person is deprived of the possibility of challenging his arrest in the issuing Member State on the ground that it is unlawful and thus his detention under the provisions of that State. Inasmuch as the executing judicial authority has jurisdiction only to rule on the grounds of non-execution provided for in the Framework Decision, a whole facet of the lawfulness of the arrest and detention is thus unlikely to be subject to judicial scrutiny.

74. It is true that the criminal prosecution procedure remains outside the scope of the Framework Decision and of Union law. Nonetheless, the Member States remain subject to the obligation to respect the fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 or in national law,[18] including the right to an effective remedy referred to in Article 13 of the Convention and Article 47 of the Charter. The issue of a European arrest warrant cannot exempt the Member States from observance of the procedural safeguards provided for by their national law where a decision is made to deprive a person of his liberty.

18 — See judgment in *F.* (C-168/13 PPU, EU:C:2013:358, paragraph 48).

75. It was, in my view, specifically to avoid the risk of depriving a person of the safeguards associated with the intervention of a court, as the guardian of individual freedoms, that the Union legislature provided that the European arrest warrant should be based on the existence of a judicial decision adopted in compliance with the procedural rules of the issuing Member State.

76. Furthermore, issuing a single warrant constituting both a European arrest warrant and a national arrest warrant would mean that executing Member States have no guarantee that the issuing Member State has reviewed proportionality.

3. The issue of a European arrest warrant deemed equivalent to a national arrest warrant is likely to mean that no review of proportionality is carried out when the European arrest warrant is issued

77. The question of the review of proportionality is one of the major difficulties which has faced the European arrest warrant system since its inauguration.

78. In its report on implementation since 2007 of the Framework Decision,[19] the Commission noted that confidence in the application of the European arrest warrant has been undermined by the systematic issue of European arrest warrants for the surrender of persons sought in respect of very minor offences.[20] It also indicated that there is a disproportionate effect on the liberty of requested persons 'when [European arrest warrants] are issued concerning cases for which (pre-trial) detention would otherwise be felt inappropriate'.[21]

79. The European Parliament, in its resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant,[22] recommended that, when issuing a European arrest warrant, the competent authority should 'carefully assess the need for the requested measure based on all the relevant factors and circumstances, taking into account the rights of the suspected or accused person and the availability of an appropriate less intrusive alternative measure to achieve the intended objectives'.[23]

80. The Council, in its final report on the fourth round of mutual evaluations entitled 'The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States' adopted on 4 and 5 June 2009,[24] examined the question of the introduction of a proportionality test 'understood as a check additional to the verification of whether or not the required threshold is met, based on the appropriateness of issuing a European arrest warrant in the light of the circumstances of the case'.[25] In recommendation No 9, addressed to the Member States, the Council tasked its preparatory bodies with pursuing discussions on the establishment of a requirement for proportionality, the objective being to work out a coherent solution at Union level.

81. Then, at its session on 3 and 4 June 2010, the Council decided to amend the European Handbook on how to issue a European arrest warrant[26] in order to include, in section 3 of the Handbook, criteria to be applied when issuing such a warrant.

19 — Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (COM(2011) 175 final).

20 — See Section 5 of the report.

21 — Idem.

22 — Document T7-0174/2014.

23 — See the annex to that resolution.

24 — Document 8302/4/09 REV 4 — Crimorg 55 COPEN 68 EJN 24 Eurojust 20.

25 — See Section 3.9 of that report.

26 — Document 17195/1/10 REV 1 — COPEN 275 EJN 72 Eurojust 139, 'the Handbook'.

82. That section now states that 'considering the severe consequences of the execution of a [European Arrest Warrant] with regard to restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant consider proportionality by assessing a number of important factors' such as 'the seriousness of the offence, the possibility of the suspect being detained, … the likely penalty imposed if the person sought is found guilty of the alleged offence [and] ensuring the effective protection of the public and taking into account the interests of the victims of the offence'. In addition it states that '[t]he [European Arrest Warrant] should not be chosen where the coercive measure that seems proportionate, adequate and applicable to the case in hand is not preventive detention'.

83. I would add that the Council expressly included the requirement of proportionality in Decision 2007/533/JHA, of 12 June 2007, on the establishment, operation and use of the second generation Schengen Information System (SIS II),[27] Article 21 of which provides that, before issuing an alert, Member States are to determine whether the case is 'adequate, relevant and important enough to warrant entry of the alert in SIS II'. Since the SIS alert may, under Article 9 of the Framework Decision, be deemed to be a European arrest warrant, that provision thus has the effect of bringing review of the proportionality of the warrant within the realm of positive law.

84. However, the Framework Decision does not itself expressly require the issuing judicial authorities to conduct a review of proportionality and it is, moreover, stated in Section 3 of the Handbook that '[i]t is clear that the Framework Decision … does not include any obligation for an issuing Member State to conduct a proportionality check and that the legislation of the Member States plays a key role in that respect'. A proportionality check by the issuing judicial authority would therefore be the result of an 'interpretation … *consistent* with the provisions of the Framework Decision … and with the general philosophy behind its implementation'.[28]

85. Review of proportionality by the issuing judicial authority is based, not on the binding nature of the Framework Decision, but simply on a broad consensus between the Member States that is shared by the Parliament, Council and Commission. It would simply be 'consistent' with the Framework Decision without being imposed by it.

86. As much as I dispute that assertion, which seems to me incorrect, I am equally persuaded by the fact that the Handbook states that it only sets out 'comments' which enjoy the status of '[mere] recommendations'.[29]

87. To my mind, the Framework Decision is binding both in as much as it requires a proportionality check to be conducted when the European arrest warrant is issued, and in as much as it forbids such a check, in principle, when the warrant is executed, subject to exceptional circumstances.

88. The principle of proportionality, as a general principle of Union law now enshrined in Article 5 TEU, is mentioned in recital 7 of the Framework Decision, which states that, in accordance with that principle, the decision does not go beyond what is necessary in order to achieve the objective of replacing the multilateral system of extradition based on the European Convention on Extradition of 13 December 1957.

89. Moreover, Article 1(3) of the Framework Decision states that it is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU and reflected in the Charter.

27 — OJ 2007 L 205, p. 63.

28 — Emphasis added.

29 — See footnote 1 of the Handbook.

90. Under Article 52(1) of the Charter, limitations may be imposed on the exercise of the rights and freedoms recognised by the Charter only if '[s]ubject to the principle of proportionality … they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'. [30]

91. In criminal matters, that principle of proportionality finds specific expression in the principle of proportionality between offences and penalties enshrined in Article 49 of the Charter.

92. Over and above those general references to the principle of proportionality, Article 2(1) of the Framework Decision, in defining the substantive scope of the European arrest warrant, addresses, albeit obliquely but specifically, the matter of the appraisal of the proportionality of the decision issuing such a warrant by providing that it may be issued for the purpose of prosecution only for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months and, in regard to the execution of such measures, for sentences of at least four months.

93. Nonetheless, the issue of a European arrest warrant in accordance with the requirements of that provision does not necessarily mean there has been no infringement of the principle of proportionality. As demonstrated by the non-exhaustive list of factors to be taken into account in the Handbook, in order for a proportionality check to be conducted effectively, it is necessary to carry out a concrete assessment in light of the specific circumstances of each case.

94. In my view, the Framework Decision lays down an obligation to conduct such a check at the time when the European arrest warrant is issued, and it cannot legitimately be objected that the issuing conditions are a matter for the exclusive competence of the Member States in regard to criminal matters.

95. First, that objection ignores the distinction which needs to be made between a European arrest warrant and the national arrest warrant on which it is based. While the conditions governing the issue of the national arrest warrant fall within the competence of the Member States in criminal matters, the European arrest warrant is, on the contrary, an instrument created and governed by Union law, in particular as regards the conditions for its issue, as illustrated by Article 2(1) of the Framework Decision, which establishes the cases in which a European arrest warrant 'may be issued'. Under the Framework Decision, a decision to extend the territorial scope of a national arrest warrant to the European judicial area by issuing a European arrest warrant would be an act of a court, coming under Union law. A provision of a Member State laying down, pursuant to the Framework Decision, the conditions under which a European arrest warrant will be issued cannot therefore fall outside the scope of Union law on the sole basis that it comes under the criminal law of that State. [31]

96. Secondly, I would recall that the Framework Decision is intended to replace extradition by a system of surrender as between judicial authorities based on mutual confidence between the Member States in their respective penal systems. That confidence is based on the idea that each Member State must accept the application of the criminal law in force in the other Member States, even if the implementation of its own national law would lead to a different outcome. Since the system established by the Framework Decision is based on inter judicial cooperation, it is the common and uniform conduct by all the courts within the European judicial area of a proportionality check which

30 — Emphasis added.

31 — I note by analogy that it is clear from the settled case-law of the Court that Union law imposes limits on the competence of the Member States in criminal matters; legislation in this field cannot, inter alia, restrict the fundamental freedoms guaranteed by Union law (see judgment in *Dickinger and Ömer*, C-347/09, EU:C:2011:582).

enables those differences to be accepted. In other words, the confidence that the executing judicial authority is required to have is based on the fact that the surrender system provides it with the reassurance that the issuing judicial authority has already conducted a proportionality check without its jurisdiction being bound by the decision of the executive power, or of an administrative authority.

97. I therefore conclude that it must be possible for the judicial authority issuing the European arrest warrant to conduct a proportionality check. I do not accept the idea that this weakens the effectiveness of the European arrest warrant, enabling suspected offenders to remain unpunished by crossing borders. On the contrary, imposing a requirement for review reinforces the effectiveness of the system by avoiding a multiplicity of European arrest warrants in connection with criminal proceedings for which other less costly procedures could be envisaged, thus enabling the police and courts to concentrate their efforts on combating more serious offences.

98. A system such as that under Hungarian law, which is based on the issue of a single decision constituting both a European and a national arrest warrant, deprives the issuing judicial authority, which is bound by the mandatory prosecutor principle, of the ability to conduct its own proportionality check, thus reducing that authority to a mere conveyor belt for the police or public prosecutor.

99. In that regard, it should be noted that, in the table appearing in Part VIII of the Commission working document of 11 April 2011,[32] on the question whether there is a proportionality test, the reply given by Hungary was: 'No (principle of legality)'.

100. The case in the main proceedings is a perfect illustration of the difficulties which might be avoided as a result of the application the principle of proportionality.

101. It is apparent from the information contained in the order for reference that Mr Bob-Dogi had an address in Romania, which was known to the Hungarian judicial authorities which sent him a summons to appear on 2 December 2014 by registered letter. Mr Bob Dogi did not deny having received the letter but said he did so only on 5 December 2014. Moreover, the indictment issued by the Hungarian public prosecutor's office shows that the Mátészalkai járásbíróság (District Court, Mátészalka) was requested to impose a fine on Mr Bob-Dogi and ban him from driving motor vehicles on the public highway. There is serious reason to doubt that the decision to issue a European arrest warrant was proportional in such circumstances, in which the warrant was, moreover, issued more than thirteen months after the offences with which the person concerned was charged occurred.

102. In any event, I can only observe that that the simplified system of surrender provided for by Hungarian law, which fails to provide any assurance that the issuing judicial authority has carried out a review of proportionality, does not comply with the Framework Decision.

103. I should like to clarify the scope of my analysis. In observance of the principle of subsidiary, it calls in question the principle of mandatory prosecution only where a decision is made to extend the geographical scope of a national arrest warrant to the European judicial area by the issue of a European arrest warrant. In my view, only in this situation, namely one in which Union law must be implemented, is the Framework Decision to be interpreted as requiring the issuing judicial authority to carry out a proportionality check, in order to ensure the effectiveness of the surrender mechanism introduced by that decision.

32 — Commission staff working document accompanying the third Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [SEC(2011) 430 final].

104. For all of the reasons set out above, I propose that the Court's answer to the first question should be that the Framework Decision authorises the issue of a European arrest warrant only for the execution of a separate national arrest warrant, or other enforceable judicial decision having the same effect, which orders the arrest of the prosecuted person and was adopted in accordance with the rules of criminal procedure of the issuing Member State.

B – *The second question*

105. By its second question, the national court is essentially asking whether the absence of any indication as to whether there is a national arrest warrant on which the European arrest warrant is based constitutes a ground for non-execution of the latter warrant.

106. As the Court has repeatedly stated, the structure of the Framework Decision is underpinned by the principle of mutual recognition, which, as it constitutes the 'cornerstone' of judicial cooperation, means that, in accordance with Article 1(2) of the Framework Decision, Member States are, in principle, obliged to give effect to a European arrest warrant. The latter may therefore refuse to execute such a warrant only on the grounds for non-execution laid down in Articles 3, 4 and 4a of the Framework Decision, and its execution may be made subject only to the conditions laid down in Article 5 thereof. [33]

107. Although the structure of those provisions leaves no room for any other ground of non-execution, it should nonetheless be pointed out that their objective is simply to set out the circumstances in which the judicial authority of the executing Member State to which a European arrest warrant, which when duly issued produces its effects, has been forwarded, is nonetheless exempted from executing it. In other words, those provisions are based on the premise that the act for which execution will be refused meets the definition of a European arrest warrant set out in Article 1 of the Framework Decision and the requirements as to content and form in Article 8 thereof.

108. That will not apply in the case of a European arrest warrant which was not issued for the execution of a national arrest warrant or other enforceable judicial decision having the same effect.

109. The absence of a national legal basis does not constitute a formal irregularity that may be regularised by the use of the cooperation framework provided for in Article 15(2) of the Framework Decision, but a substantive irregularity which disqualifies the act from being a European arrest warrant.

110. I conclude from the above that the executing judicial authority cannot execute an act described as a European arrest warrant where it has not been issued for the execution of a national arrest warrant or other enforceable judicial decision having the same effect.

33 — See, to that effect, judgments in *West* (C-192/12 PPU, EU:C:2012:404, paragraph 55); *Melloni* (C-399/11, EU:C:2013:107, paragraph 38); and *F.* (C-168/13 PPU, EU:C:2013:358, paragraph 36).

IV – **Conclusion**

111. In light of the foregoing considerations, I propose the following reply to the questions referred by the Curtea de Apel Cluj (Appeal Court, Cluj):

Article 8 of 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, read in the light of the principle of legality and the principle of proportionality, must be interpreted as meaning that:

— a European arrest warrant may be issued only for the execution of a separate national arrest warrant, or other enforceable judicial decision having the same effect, which orders the arrest of the prosecuted person and was adopted in accordance with the rules of criminal procedure of the issuing Member State;

— if that is not the case, the executing judicial authority must refuse to execute the act as a European arrest warrant.