Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 6 September 2018 [1]

Case C-514/17

Ministère public
v
Marin-Simion Sut

(Request for a preliminary ruling from the cour d'appel de Liège (Court of Appeal, Liège, Belgium))

(Reference for a preliminary ruling — Judicial cooperation in criminal matters — Principle of mutual recognition — Framework Decision 2002/584/JHA — European arrest warrant and surrender procedures between Member States — Article 4(6) — Ground for optional non-execution of the European arrest warrant — Implementation — Offence punishable by a custodial sentence in the issuing Member State but punishable only by a fine in the executing Member State — Article 2(4) — Scope of the double criminality condition — Framework Decision 2008/909/JHA — Article 8(3) — Adaptation of the sentence)

I. Introduction

1. Can the ground for optional non-execution set out in Article 4(6) of Framework Decision 2002/584/JHA [2] be invoked by the court responsible for ruling on the execution of a European arrest warrant if the offence for which that warrant was issued has incurred, in the issuing Member State, a custodial sentence whereas, under the law of the executing Member State, that offence is punishable only by a fine?

2. That is, in essence, the question referred by the cour d'appel de Liège (Court of Appeal, Liège, Belgium), concerning the execution of a European arrest warrant issued more than seven years ago, on 26 August 2011, by the Romanian authorities against Mr Marin-Simion Sut, a Romanian national residing in Belgium, for the purposes of execution of a custodial sentence of one year and two months for driving a vehicle without a licence.

3. Under Article 4(6) of Framework Decision 2002/584, the judicial authority of the executing Member State may refuse to execute a European arrest warrant issued for the purposes of execution of a custodial sentence where the requested person is staying in or is a national or a resident of the executing Member State and that State undertakes to execute the sentence in accordance with its domestic law.

1 Original language: French.

2 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('Framework Decision 2002/584').

4. According to settled case-law, that provision is to enable the executing judicial authority to assess, within the margin of discretion accorded to it, the extent to which enforcement of the sentence in the executing Member State may increase the requested person's chances of reintegrating into society when the sentence imposed on him expires. [3]

5. In the present case, it is not disputed that the person concerned did not consent to his surrender and expressed a wish to serve his sentence in Belgium. In its order for reference, the cour d'appel de Liège (Court of Appeal, Liège) points out that Mr Sut has connections with Belgium so that, in his specific situation, enforcement of the sentence on Belgian territory might increase his chances of social rehabilitation.

6. The cour d'appel de Liège (Court of Appeal, Liège) is nevertheless faced with the fact that the offence for which Mr Sut was given a custodial sentence in Romania, is punishable, under Article 30(1) of the loi relative à la police de la circulation routière (Law relating to the regulation of road traffic), [4] of 16 March 1968, in the version applicable to the facts in the main proceedings, by a fine.

7. In the indictment lodged before the cour d'appel de Liège (Court of Appeal, Liège), the public prosecutor (Belgium) considers that the executing judicial authority cannot invoke the ground of optional non-execution referred to in Article 4(6) of Framework Decision 2002/584, in so far as, under Article 8(3) of Framework Decision 2008/909/JHA, [5] the executing judicial authority may not commute a custodial sentence imposed by the issuing judicial authority to a pecuniary sanction. In those circumstances, the public prosecutor is of the view that the executing judicial authority cannot therefore undertake to enforce, under Belgian law, the sentence imposed on Mr Sut in Romania.

8. The cour d'appel de Liège (Court of Appeal, Liège), which raises questions about the interpretation of EU law advanced by the public prosecutor in the indictment, has therefore decided to stay proceedings in the case before it and to refer the following question to the Court for a preliminary ruling:

'Can Article 4(6) of Framework Decision 2002/584 be interpreted as being inapplicable to acts for which a custodial sentence has been imposed by the court of the issuing Member State, when those same acts are punishable in the territory of the executing Member State only by a fine, which means, in accordance with the domestic law of the executing Member State, that the custodial sentence cannot be executed in the executing Member State, which would be to the detriment of the social rehabilitation of the person sentenced and of his family, social and other ties?'

9. In the observations which it has lodged before the Court, the Belgian Government supports the view of the public prosecutor, because it considers that the executing judicial authority cannot in fact invoke the ground of optional non-execution referred to in Article 4(6) of Framework Decision 2002/584, since, in accordance with Article 8(3) of Framework Decision 2008/909, it may not commute the custodial sentence passed by the Judecătoria Carei (Court of First Instance, Carei, Romania) to a pecuniary sanction.

3 See judgments of 17 July 2008, *Kozłowski* (C-66/08, EU:C:2008:437, paragraph 45); of 6 October 2009, *Wolzenburg* (C-123/08, EU:C:2009:616, paragraphs 62 and 67); of 21 October 2010, *B.* (C-306/09, EU:C:2010:626, paragraph 52); of 5 September 2012, *Lopes Da Silva Jorge* (C-42/11, EU:C:2012:517, paragraph 32); and of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503, paragraph 21).

4 *Moniteur belge* of 27 March 1968, p. 3146, ('the Law on road traffic').

5 Council Framework Decision of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27), as amended by Framework Decision 2009/299 ('Framework Decision 2008/909').

10. In fact, the Belgian Government's argument, as I understand it, is that the application of the principle of mutual recognition requires that the offence for which it is invoked is punishable by penalties which are, if not identical, at least similar in the law of the issuing Member State and that of the executing Member State. The Belgian court would then be faced with two problems, the first linked to the disparity between the national legislations with regard to the penalties applicable to road traffic offences and the second to the impossibility of converting the 'Romanian' custodial sentence into a 'Belgian' fine.

11. This request will therefore allow the Court to define the meaning of the principle of mutual recognition as implemented by Framework Decision 2002/584. It will also give the Court the opportunity, in line with the judgments of 17 July 2008, *Kozłowski*,[6] of 6 October 2009, *Wolzenburg*,[7] of 11 January 2017, *Grundza*,[8] and of 29 June 2017, *Popławski*,[9] to give further clarification regarding the circumstances in which the court responsible for ruling on the execution of a European arrest warrant may invoke the ground of optional non-execution set out in Article 4(6) of Framework Decision 2002/584 and regarding the manner in which the European arrest warrant mechanism established by that framework decision must be coordinated with the rules and principles laid down by Framework Decision 2008/909.

12. In this Opinion, I shall explain why I do not share the view expressed by the Belgian Government in this case.

13. Accordingly, I shall propose that the Court rule that, in a situation such as that at issue in which the offence for which the European arrest warrant has been issued has incurred, in the issuing Member State, a custodial sentence, Article 4(6) of Framework Decision 2002/584 is to be interpreted as precluding the executing judicial authority from verifying and requiring, for the purposes of implementing the ground of optional non-execution set out in that provision, that the facts to which the conviction relate are also punishable by a custodial sentence in the executing Member State.

II. EU legal framework

A. Framework Decision 2002/584

14. The aim of Framework Decision 2002/584 is to abolish, as between the Member States, the formal extradition procedure provided for under the various conventions to which those Member States are parties and to replace it with a system of surrender as between judicial authorities.[10] It is founded on the principle of mutual recognition of judicial decisions in criminal matters, which is the 'cornerstone' of judicial cooperation,[11] and on the 'high level of confidence' between the Member States.[12]

15. Article 1 of Framework Decision 2002/584 is entitled 'Definition of the European arrest warrant and obligation to execute it'. 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.

6 C-66/08, EU:C:2008:437.

7 C-123/08, EU:C:2009:616.

8 C-289/15, EU:C:2017:4.

9 C-579/15, EU:C:2017:503.

10 See recitals 1 and 5 of the Framework Decision.

11 See recital 6 of the Framework Decision.

12 See recital 10 of Framework Decision 2002/584.

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.

…'

16. Where a European arrest warrant is issued for the purposes of execution of a custodial sentence or detention order it must, under Article 2(1) of Framework Decision 2002/584, relate to a sentence of at least four months.

17. Article 2(2) of the Framework Decision sets out a list of 32 offences for which, if they are punishable in the issuing Member State by a custodial sentence for a maximum period of at least three years, the European arrest warrant must be executed even where the acts in question are not penalised in the executing Member State.

18. For other offences, the executing Member State may make the surrender of a person who is the subject of a European arrest warrant subject to the condition of their double criminality. Article 2(4) of the Framework Decision provides:

'For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.'

19. Articles 3 and 4 of Framework Decision 2002/584 deal, respectively, with the grounds for mandatory non-execution and the grounds for optional non-execution of the European arrest warrant.

20. Article 4, point 6 of that framework decision states:

'The executing judicial authority may refuse to execute the European arrest warrant:

…

(6) if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.'

B. Framework Decision 2008/909

21. Framework Decision 2008/909, which was adopted after Framework Decision 2002/584, seeks to implement the principle of mutual recognition of judgments and judicial decisions in criminal matters, a principle enshrined in Article 82(1) TFEU, which replaced Article 31 TEU, on the basis of which that framework decision was adopted. [13] It seeks, in accordance with Article 3 thereof, to ensure the recognition and enforcement of judgments imposing a custodial sentence in a Member State other than the issuing Member State, so as to facilitate the social rehabilitation of the sentenced person. [14]

22. Article 7 of Framework Decision 2008/909, entitled 'Double criminality', provides, in paragraph 1 thereof, a list of 32 offences in respect of which, if they are punishable in the issuing Member State by a custodial sentence of a maximum of at least three years, the executing Member State is to recognise the judgment and execute the sentence without verification of double criminality.

13 See recitals 1, 2 and 5 of Framework Decision 2008/909.

14 See Recital 9 and Article 3(1) of that framework decision.

23. For other offences, Article 7(3) of that framework decision provides:

'For offences other than those covered by paragraph 1, the executing State may make the recognition of the judgment and enforcement of the sentence subject to the condition that it relates to acts which also constitute an offence under the law of the executing State, whatever its constituent elements or however it is described.'

24. Article 8 of Framework Decision 2008/909, entitled 'Recognition of the judgment and enforcement of the sentence', is worded as follows:

'1. The competent authority of the executing State shall recognise a judgment which has been forwarded … and shall forthwith take all the necessary measures for the enforcement of the sentence, unless it decides to invoke one of the grounds for non-recognition and non-enforcement provided for in Article 9.

…

3. Where the sentence is incompatible with the law of the executing State in terms of its nature, the competent authority of the executing State may adapt it to the punishment or measure provided for under its own law for similar offences. Such a punishment or measure is to correspond as closely as possible to the sentence imposed in the issuing State and therefore the sentence is not to be converted into a pecuniary punishment.'

25. Finally, Article 25 of Framework Decision 2008/909 provides:

'Without prejudice to Framework Decision 2002/584, provisions of this Framework Decision shall apply, *mutatis mutandis* to the extent they are compatible with provisions under that framework decision, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that framework decision.'

III. Preliminary observations

26. Before examining the question referred for a preliminary ruling by the cour d'appel de Liège (Court of Appeal, Liège) it is necessary to make a preliminary remark concerning the amendment that the Belgian legislature has very recently introduced to the provisions relating to penalties for road traffic offences.

27. The loi relative à l'amélioration de la sécurité routière (Law on the improvement of road safety) [15] of 6 March 2018 has made significant amendments to the provisions of the Law on road traffic, imposing stiffer penalties for those infringements. Under Article 7 of the law on the improvement of road safety, Article 30(1) of the Law on road traffic now provides that a person driving a motor vehicle without the required driving licence is liable to a term of imprisonment of between eight days and two years and a fine of between EUR 200 and EUR 2 000 or to only one of those penalties.

28. Consequently, it seems that, at the present time, the offence for which the European arrest warrant was issued is punishable in the issuing Member State and in the executing Member State by a sentence of the same nature, namely a custodial sentence, which means that the legal obstacle preventing the Belgian authorities from enforcing, in Belgium, the sentence imposed on Mr Sut in Romania now appears to be completely removed.

15 *Moniteur belge* of 15 March 2018, p. 23236.

29. That said, and since the cour d'appel de Liège (Court of Appeal, Liège) did not withdraw its request for a preliminary ruling following the legislative amendment at issue, I propose that the Court nevertheless reply to the question referred.

IV. My assessment

30. By its question, the referring court asks the Court, in essence, whether, in a situation such as that at issue, in which the execution of the custodial sentence in the executing Member State would enhance the possibility of social rehabilitation of the requested person, Article 4(6) of Framework Decision 2002/584 is to be interpreted as meaning that the executing judicial authority cannot invoke the ground for optional non-execution referred to in that provision and is thus obliged to execute the European arrest warrant where the acts for which that penalty has been imposed in the issuing Member State are punishable only by a fine in the executing Member State.

31. Before turning to the analysis of that question, it is necessary to note a key point concerning the coordination of the two framework decisions referred to by the cour d'appel de Liège (Court of Appeal, Liège) in its order for reference, namely, Framework Decision 2002/584 which establishes the mechanism of the European arrest warrant, and Framework Decision 2008/909, which seeks to facilitate the execution of custodial sentences in the Member State in which execution is likely to enhance the possibility for social rehabilitation of the sentenced person.

32. It is true that, under Article 25 of Framework Decision 2008/909, the provisions of that decision apply, *mutatis mutandis*, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of Framework Decision 2002/584 in so far as they are compatible with the provisions of the latter decision.

33. The coordination provided for by the EU legislature between Framework Decision 2002/584 and Framework Decision 2008/909 should help to ensure the implementation of a fundamental principal of sentencing law, namely the social rehabilitation of the sentenced person by means of an individualisation of the penalty, which is here a fundamental aspect common to those two Framework Decisions.

34. However, the Belgian Government errs in its interpretation, by invoking the provisions of Article 8(3) of Framework Decision 2008/909 to limit the application of Article 4(6) of Framework Decision 2002/584.

35. The Belgian Government does not take into account the fact that, between the two texts, application of Framework Decision 2002/584 takes precedence over that of Framework Decision 2008/909, which, in Article 25, expressly states that this is so.

36. The EU legislature thus clearly demonstrated its intention not to undermine the spirit and strength of the European arrest warrant mechanism established by Framework Decision 2002/584, by stating, in Article 25 of Framework Decision 2008/909, that, '*without prejudice to Framework Decision 2002/584*, provisions of [Framework Decision 2008/909] shall apply *mutatis mutandis to the extent that they are compatible with provisions of [Framework Decision 2002/584*]'.[16]

37. Furthermore, the Belgian Government fails to take account of the very different areas of application of those two instruments.

16 Emphasis added.

38. Framework Decision 2002/584 seeks the enforced transfer from one Member State to another of an accused or sentenced person who has absconded or whose whereabouts are unknown and who it is feared seeks to evade the consequences of his acts. Framework Decision 2002/584 thus seeks to prevent that person enjoying impunity owing to geographical remoteness.

39. However, Framework Decision 2008/909 is not governed by the notion that the offender, or presumed offender, has absconded and that it is therefore necessary to arrange for his enforced transfer. Its objective is to establish a harmonised system of enforcement of judicial decisions in the area of freedom, security and justice, in order to ensure a common method for enforcing convictions, as happens in each Member State, thus promoting the social rehabilitation of the sentenced person. Framework Decision 2008/909 is, in fact, the extension, within that single area, of the everyday practices of the national courts. In each Member State, the court responsible for the execution of the sentence takes into account the personality of the convicted person, his family circumstances and employment situation and his place of residence in order to determine where he shall be imprisoned and to prevent the mere fact of that imprisonment exacerbating his desocialisation. Accordingly, a person convicted by the judicial authorities of Brest (France), but established in Strasbourg (France), will serve his sentence in a prison near Strasbourg. By adopting Framework Decision 2008/909, the EU legislature ensures that this can be so even if that person is established in Frankfurt-am-Main (Germany).

40. The objective of Framework Decision 2008/909 is therefore to further the social rehabilitation of the person on whom a custodial sentence has been imposed in a Member State by allowing him to serve his sentence or the remainder of it in his own social environment, that is to say on the territory of another Member State. It is therefore a matter, for the executing Member State, of giving effect to a legal decision made by the judicial authority of the issuing Member State, in the same way as it typically acts in respect of its own sentences, that is to say, by ensuring that all the arrangements relating to the execution and adjustment of that sentence are individualised. [17]

41. That said, it is now necessary to examine whether or not, in the light of the fundamental principles of criminal judicial cooperation laid down by the Treaties, but also the relevant provisions of Framework Decision 2002/584, the competent Belgian judicial authority may enforce the custodial sentence imposed on Mr Sut by the Judecătoria Carei (Court of First Instance, Carei).

42. For the reasons I shall now explain, I consider that the view expressed by the Belgian Government is contrary to Framework Decision 2002/584 in so far as it is not consistent with the definition of the concept of 'mutual recognition' and reintroduces a system comparable to that of extradition which the EU legislature specifically and expressly intended to abolish between the Member States.

A. Mutual recognition

43. Judicial cooperation within the European criminal area is based, as is clear from Article 82(1) TFEU, on the principle of mutual recognition. That principle constitutes the 'cornerstone' of that cooperation [18] and, in the view of the Court, is of 'fundamental importance' in EU law, in so far as it allows the creation and maintenance of an area without internal borders, together with the principle of mutual trust on which it rests. [19]

17 It would be a grave mistake to imagine that, in each of those Member States, enforcement of a custodial sentence imposed by a court of another Member State required the issue of a national arrest warrant.

18 See recital 6 of Framework Decision 2002/584.

19 See judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)* (C-216/18 PPU, EU:C:2018:586, paragraph 36), and *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* (C-220/18 PPU, EU:C:2018:589, paragraph 49).

44. Pursuant to the principle of mutual recognition, as soon as a decision is taken by a judicial authority in compliance with the law of its home State, it takes full and direct effect throughout the European Union, so that the competent authorities of all the other Member States are under an obligation to assist its execution as if it originated from one of their own judicial authorities. [20]

45. It follows that, where the judicial authority of a Member State undertakes to ensure the enforcement of a sentence imposed by a court in another Member State, it must, in accordance with the principle of mutual recognition, enforce that sentence as imposed by that court and in the same way as if it were its own decision.

46. It is apparent from the judgment of 11 February 2003, *Gözütok and Brügge*, [21] concerning the *ne bis in idem* principle, that the principle of mutual recognition necessarily implies that, regardless of the way in which the penalty is imposed, the Member States have mutual trust in their criminal justice systems and each of them recognises the criminal law in force in the other Member States even if the outcome would be different if its own national law were applied. [22]

47. The scope of a judicial decision is therefore no longer limited to the territory of the issuing Member State but now extends throughout the European Union.

48. In those circumstances, the principle of mutual recognition must itself ensure that the judgment given on 8 June 2011 by the Judecătoria Carei (Court of First Instance, Carei) will be recognised and the custodial sentence of one year and two months to which Mr Sut was sentenced will be enforced by the tribunal de première instance de Liège (Court of First Instance, Liège, Belgium) in the same way as if that judgment had been given and the sentence pronounced by the tribunal de première instance d'Arlon (Court of First Instance, Arlon, Belgium).

49. That having been established, it is now necessary to consider the extent to which the Belgian judicial authorities may, within the framework of the European arrest warrant mechanism established by Framework Decision 2002/584 and, in particular, in the context of the implementation of the ground for optional non-execution set out in Article 4(6), waive that principle because of the absence of identity of the constitutive elements of the offence and, in particular, of the punishment in the law of the issuing Member State and that of the executing Member State.

B. The wording, scheme and objectives of Framework Decision 2002/584

50. Framework Decision 2002/584 is based on the principle of mutual recognition and on a 'high degree of confidence' between the Member States. [23] As stated in recital 6 thereof, it is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council, which was held in Tampere on 15 and 16 October 1999, referred to as the 'cornerstone' of judicial cooperation.

51. Framework Decision 2002/584 has the explicit aim, as is apparent in particular from recital 5 and Article 31 thereof, of abolishing, as between Member States, the extradition procedure and of replacing it with a system of surrender, under which the executing judicial authority can oppose that surrender only by a decision based specifically on one of the grounds for mandatory or optional non-execution exhaustively listed in Articles 3 and 4 of that framework decision.

20 See, in that regard, the Communication from the European Commission to the Council and the European Parliament of 26 July 2000 on the mutual recognition of final decisions in criminal matters (COM(2000) 495 final, particularly p. 8).

21 C-187/01 and C-385/01, EU:C:2003:87. See also judgments of 9 March 2006, *Van Esbroeck* (C-436/04, EU:C:2006:165); of 28 September 2006, *Van Straaten* (C-150/05, EU:C:2006:614); of 28 September 2006, *Gasparini and Others* (C-467/04, EU:C:2006:610); of 18 July 2007, *Kraaijenbrink* (C-367/05, EU:C:2007:444); and of 16 November 2010, *Mantello* (C-261/09, EU:C:2010:683).

22 See paragraph 33 of that judgment.

23 See recital 10 of that framework decision.

52. Under Article 4(6) of Framework Decision 2002/584, the judicial authority of the executing Member State may therefore refuse to execute a European arrest warrant issued for the purposes of executing a custodial sentence where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence in accordance with its domestic law.

53. I would point out that that provision is to enable the executing judicial authority to assess, within the margin of discretion accorded to it, the extent to which enforcement of the sentence in the executing Member State would enhance the possibility of social rehabilitation of the requested person at the end of the sentence imposed on him.[24] That provision thus illustrates perfectly how the court must coordinate the principle of mutual recognition, which implies, in principle, the surrender of the requested person, and the principle of individualisation of the sentence, which presupposes, on the other hand, that, in certain circumstances, that court makes an exception to the principle of surrender of that person so as to ensure his social rehabilitation.[25] I should clarify that this is an exception to the principle of surrender of the sentenced person and not an exception to the principle of mutual recognition. By implementing the ground for optional non-execution set out in Article 4(6) of Framework Decision 2002/584, the executing judicial authority clearly recognises the decision of the issuing judicial authority, since it proposes to implement the decision in its place.

54. That attitude, which is based on the aim of ensuring the rehabilitation function of the sentence, reflects the reality of the area of freedom, security and justice in which, including in the context of the execution of a European arrest warrant and after impunity has been ruled out by the fact that the convicted person has been arrested, the fundamental principles of sentencing law are implemented.

55. Like any exception to the principle of surrender, the ground for optional non-execution set out in Article 4(6) of Framework Decision 2002/584 must be interpreted strictly,[26] which means that the executing judicial authority is required to ascertain, in order to eliminate any risk of impunity, that it may actually enforce the sentence in accordance with its domestic law before refusing to surrender the person concerned.[27]

56. In the main proceedings, the court responsible for ruling on the execution of the European arrest warrant is unsure whether it can actually enforce the sentence under its domestic law, in so far as the offence for which that warrant was issued has incurred, in the issuing Member State, a custodial sentence, whereas, under its national law, that offence is punishable only by a fine. That court wonders whether, in that case, the fact that the sentence passed under the law of the issuing Member State and the sentence for which the law of the executing Member State provides are not the same might constitute an obstacle to the implementation of the ground for optional non-execution set out in Article 4(6) of Framework Decision 2002/584.

24 See judgments of 17 July 2008, *Kozłowski* (C-66/08, EU:C:2008:437, paragraph 45); of 6 October 2009, *Wolzenburg* (C-123/08, EU:C:2009:616, paragraphs 62 and 67); of 21 October 2010, *B.* (C-306/09, EU:C:2010:626, paragraph 52); of 5 September 2012, *Lopes Da Silva Jorge* (C-42/11, EU:C:2012:517, paragraph 32); and of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503, paragraph 21).

25 The case-law of the Court cited above, in the same way as that of the European Court of Human Rights (see, inter alia, ECtHR, 30 June 2015, *Khoroshenko v. Russia*, CE:ECHR:2015:0630JUD004141804, § 121), stresses the importance to be given to the objective of social rehabilitation of the convicted person in connection not only with the individual assessment of the trial court concerning the conditions for enforcement of a custodial sentence but also with the criminal justice policies of the Member States; the Court has quite recently pointed out, in the judgment of 17 April 2018, *B and Vomero* (C-316/16 and C-424/16, EU:C:2018:256, paragraph 75 and the case-law cited), that the social rehabilitation of the EU citizen in the State in which he has become genuinely integrated is not only in his interest but also in that of the European Union in general.

26 See judgments of 25 July 2018, *AY (Arrest warrant — Witness)* (C-268/17, EU:C:2018:602, paragraph 52 and the case-law cited), and *Minister for Justice and Equality (Deficiencies in the judicial system)* (C-216/18 PPU, EU:C:2018:586, paragraph 54 and the case-law cited).

27 See judgment of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503, paragraph 22).

57. An examination of the wording of that provision and an analysis of the scheme and objective of that framework decision reveal that, in a situation such as that at issue where the offence for which the European arrest warrant has been issued has incurred a custodial sentence in the issuing Member State, the EU legislature did not intend to make the implementation of the ground for optional non-execution set out in Article 4(6) of Framework Decision 2002/584 subject to the condition that the facts to which the conviction relates are also punishable, in the executing Member State, by a sentence which, if not identical, is at least similar.

58. First, I would point out that it is apparent from the wording of Article 4(6) of Framework Decision 2002/584 that it provides for a ground for non-execution of a European arrest warrant issued for the purposes of execution of a custodial sentence where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute '[that] sentence' in accordance with its domestic law.

59. As the use of the demonstrative adjective '[that]' indicates, the executing Member State is therefore required to enforce the custodial sentence imposed by the issuing Member State. Otherwise, the reference to the length of the custodial sentence imposed or the reference to the time remaining to be served which must be stated in paragraph (c) of that warrant loses some of its practical effect. [28]

60. As for the statement that the executing Member State must undertake to execute that sentence 'in accordance with its domestic law', this merely reflects the principle that measures for the enforcement of the sentence are governed by the law of the executing Member State. [29] Those are measures that have to ensure the physical enforcement of the sentence and the social rehabilitation of the sentenced person. [30] That principle is based on the principle of territoriality of criminal law, which is a principle common to all the Member States, and also on the principle of the individualisation of the penalty, which is one of the functions of the sentence.

61. That statement is therefore intended to settle conflicts of laws and jurisdictions which may result from the execution of the custodial sentence in a Member State other than the sentencing State and it cannot therefore be interpreted as authorising the executing judicial authority to adapt or commute the custodial sentence imposed by the issuing Member State so that it corresponds to the sentence which would have been imposed for the same offence under the law of the executing Member State.

62. Second, as I have pointed out, the view of the Belgian Government amounts to reintroducing a procedure based on the extradition procedure.

63. Framework Decision 2002/584 clearly marks the renunciation of the extradition procedure between the Member States, which enabled them, owing to the lack of trust they might feel in respect of a foreign criminal system, to require, for the purposes of extradition, not only that the facts in respect of which it was requested constituted an offence under the law of the requested Member State, but also that the constituent elements of the offence were identical.

28 See the standard format of the European arrest warrant annexed to Framework Decision 2002/584.

29 That principle is also stated in Article 17(1) of Framework Decision 2008/909, which was the subject of a preliminary ruling delivered by the Court on 8 November 2016, *Ognyanov* (C-554/14, EU:C:2016:835).

30 In points 70 to 73 of my Opinion in *Ognyanov* (C-554/14, EU:C:2016:319), I stated that, in that context, the competent judicial authorities will establish the details of how the sentence is to be served and organised, deciding, for example, on placement in the community, on permitted absences and day release, on the serving of the sentence in instalments, on the suspension of the sentence, on the early or conditional release of a prisoner or on his being placed under electronic surveillance. I also stated that the laws governing the enforcement of sentences may also include measures that apply after the sentenced person has been released, such as placement under judicial supervision or participation in rehabilitation programmes, or measures for the compensation of victims.

64. Under the principle of mutual recognition on which Framework Decision 2002/584 is based, when a decision is taken by a judicial authority in accordance with the law of the Member State to which it belongs, it has full and direct effect throughout the European Union, so that the competent authorities of any other Member State must assist in its execution as if it originated from a judicial authority of their own State. As is apparent once again from the judgment of 11 February 2003, *Gözütok and Brügge*,[31] the principle of mutual recognition necessarily implies that the Member States have mutual trust in their respective criminal justice systems and each of them recognises the criminal law in force in the other Member States.

65. Within the framework of the European arrest warrant mechanism, that trust was expressed in the decision of Member States to dispense with verification of double criminality for the 32 offences referred to in Article 2(2) of Framework Decision 2002/584.[32]

66. What is more, such verification is extremely limited as regards the 'other offences' referred to in Article 2(4) of that framework decision, which includes the offence at issue in this instance. In that case, the executing judicial authority can verify only that 'the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing State, whatever the constituent elements or however it is described'.

67. However, the sentence does reflect the constituent elements of the offence.

68. The offence refers to an act that the law defines and prohibits on pain of criminal penalties. The offence therefore has two elements: the criminal act and the penalty. The criminal act is the description of the prohibited conduct. The penalty is the punishment corresponding to commission of the prohibited act. That is why, for the purposes of adopting rules of criminal law, and in compliance with the fundamental principle of the legality of criminal offences and penalties, the law that punishes must describe precisely the nature of the prohibited act, including its intellectual, that is to say, intentional dimension, and the nature and severity of the penalty for infringement of the law.

69. The Court interpreted the scope of verification of double criminality for those 'other offences' in the context of Framework Decision 2008/909 in the judgment of 11 January 2017, *Grundza*,[33] and that analysis seems to me to be perfectly applicable in the context of the European arrest warrant mechanism.

70. Framework Decision 2008/909, which was adopted after Framework Decision 2002/584, transposes, in Article 7(3), in completely identical terms, the wording of Article 2(4) of Framework Decision 2002/584, which shows the firm intention of the EU legislature to limit, as far as possible and in accordance with the principle of mutual recognition, any comparative approach which the executing judicial authority might use, whether in connection with the European arrest warrant mechanism or with the mechanism established by Framework Decision 2008/909.

71. In paragraphs 33 to 38 of the judgment of 11 January 2017, *Grundza*,[34] the Court therefore held that the assessment of double criminality by the executing judicial authority must be confined to ascertaining that the factual elements underlying the offence, as reflected in the judgment handed down by the issuing judicial authority, would also, per se, be subject to a criminal penalty under the national law of the executing Member State if they were present in that State. According to the Court,

31 C-187/01 and C-385/01, EU:C:2003:87.

32 In those circumstances, the executing judicial authority must ensure the enforcement of the penalty imposed on the person concerned, even if the facts at issue are not punishable in the executing Member State. The definition of those offences and the penalties applicable are, as the Court has stated, those which follow from the law of the issuing Member State, since Framework Decision 2002/584 does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract. See, in that regard, the judgment of 3 May 2007, *Advocaten voor de Wereld* (C-303/05, EU:C:2007:261, paragraphs 52 and 53).

33 C-289/15, EU:C:2017:4.

34 C-289/15, EU:C:2017:4.

that is the 'necessary and sufficient' condition for the purposes of assessing double criminality, since there does not have to be an exact match between the constituent elements of the offence — of which the penalty is part — or between the name given to or the classification of the offence under the national law of the respective States.

72. In those circumstances, the condition of double criminality referred to in Article 2(4) of Framework Decision 2002/584 cannot be interpreted as allowing the executing judicial authority to verify and require, for the purposes of implementing the ground for optional non-execution set out in Article 4(6) of that framework decision, that the facts to which the conviction in the issuing Member State relates are punishable, in the executing Member State, by a penalty which, if not identical, is at least similar. The comparative approach adopted by the executing judicial authority therefore has limits and cannot extend to the nature of the sentence passed in the issuing Member State and in the executing Member State.

73. In a situation such as that at issue, to require such identity therefore manifestly disregards the wording of Article 2(4) of Framework Decision 2002/584 as interpreted by the Court.

74. Moreover, allowing a Member State to require that the matters to which the conviction in the issuing Member State relates are punishable by a penalty which, if not identical, is at least similar in its own law clearly reduces the effectiveness of the principle of mutual recognition of judgments given within the framework of the European arrest warrant mechanism, since that approach would result in the re-establishment of a procedure based on the extradition procedure. That approach would manifestly run counter to the clearly stated intention of the EU legislature of replacing the extradition procedure which existed between the Member States by a surrender procedure based on their mutual trust.

75. Next, an interpretation such as that advocated by the Belgian Government would amount to depriving the ground for optional non-execution set out in Article 4(6) of Framework Decision 2002/584 of all practical effectiveness where the European arrest warrant concerns an offence which is punishable in the executing State only by a fine. That situation can arise frequently, particularly when the offence for which the warrant is issued is not contained in the list of 32 serious offences referred to in Article 2(2) of that framework decision and for which national laws differ because of the lack of harmonisation at EU level. That approach, by significantly reducing the scope of that ground, necessarily has a negative impact on the objective of social rehabilitation pursued by the legislature in the context of Article 4(6) of that framework decision.

76. Allowing a Member State to make implementation of the ground for optional non-execution set out in Article 4(6) of Framework Decision 2002/584 subject to the condition that the infringement is punishable in the issuing and executing Member States by a penalty which is, if not identical, at least similar would undermine the harmonisation of the grounds for non-execution of a European arrest warrant, which reflects the consensus reached by all the Member States regarding the scope to be accorded to the objective of social rehabilitation of the convicted person. That approach was formally prohibited by the Court in the judgment of 26 February 2013, *Melloni*,[35] concerning the ground for non-recognition of decisions rendered following a trial at which the person concerned has not appeared in person set out in Article 4a of Framework Decision 2002/584.

35 C-399/11, EU:C:2013:107.

77. The present situation requires us to give the foreign judgment the same effect as a national judgment, even if national law would have led to a different solution, in accordance with the force of the principle of mutual recognition and to the expression given to it by the Court by that which it used in respect of the *ne bis in idem* principle in the judgment of 11 February 2003, *Gözütok and Brügge*.[36]

78. In the light of all those factors, I therefore consider that, in a situation such as that at issue, in which the offence for which the European arrest warrant has been issued has incurred a custodial sentence in the issuing Member State, Article 4(6) of Framework Decision 2002/584 is to be interpreted as precluding the executing judicial authority from verifying and requiring, for the purposes of implementing the ground of optional non-execution set out in that provision, that the facts to which the sentence relates are also punishable by a custodial sentence in the executing Member State.

79. In those circumstances and to the extent that the execution of the sentence imposed by the Romanian judicial authority relates to acts which constitute an offence under Belgian law, there is nothing to prevent the Belgian judicial authority undertaking to ensure the execution of that sentence by invoking the ground for optional non-execution set out in Article 4(6) of Framework Decision 2002/584 if it considers that, in view of the ties which Mr Sut has with Belgium, the execution of the sentence in that State might increase his chances of social rehabilitation.

C. The scope and limits of the application of the provisions of Framework Decision 2008/909

80. The provisions of Framework Decision 2008/909 cannot, in my view, alter that interpretation of the wording of Article 4(6) of Framework Decision 2002/584.

81. In the first place, I would point out that the EU legislature has clearly demonstrated its intention not to affect the spirit or even to lessen the effect of the European arrest warrant mechanism by adopting Framework Decision 2008/909.

82. On the one hand, although, under Article 25, the provisions of Framework Decision 2008/909 apply, *mutatis mutandis*, to the enforcement of sentences in cases where a Member State undertakes to enforce the sentence pursuant to Article 4(6) of Framework Decision 2002/584, the EU legislature expressly provided that those provisions apply only 'to the extent they are compatible with the provisions [of the latter Framework Decision]'.

83. Consequently, no provision of Framework Decision 2008/909 can affect the scope or even the detailed rules for application of the ground for optional non-execution set out in Article 4(6) of Framework Decision 2002/584 and no provision of that piece of legislation can be interpreted in a way contrary to Framework Decision 2002/584.

84. On the other hand, the EU legislature has included in Framework Decision 2008/909 provisions similar to those set out in Framework Decision 2002/584, reflecting its concern to ensure that the European arrest warrant mechanism will be neither contradicted nor undermined.

85. Secondly, and in the event that the Court were to consider that Article 8(3) of Framework Decision 2008/909 is a relevant provision, the interpretation proposed by the Belgian Government with regard to the scope thereof should be rejected.

36 C-187/01 and C-385/01, EU:C:2003:87.

86. Article 8 of Framework Decision 2008/909, as its title indicates, lays down the principle of recognition of the judgment and enforcement of the sentence imposed by the issuing judicial authority in accordance with the principle of mutual recognition.

87. Article 8(1) of Framework Decision 2008/909 therefore excludes, in principle, any adaptation of the sentence imposed by the issuing judicial authority.[37] In the judgment of 8 November 2016, *Ognyanov*,[38] the Court interpreted the wording of that provision as an obligation of principle since the executing judicial authority is, indeed, required to recognise the judgment forwarded to it and to enforce the sentence, which is to correspond in its length and nature to the sentence imposed in the judgment delivered by the issuing judicial authority.[39] The principle of mutual recognition therefore precludes the executing judicial authority from adapting the sentence imposed by the issuing judicial authority, even if the implementation of the law of the executing Member State would have led to the imposition of a penalty of a different length or nature.

88. As the Commission pointed out in its report on the implementation of Framework Decision 2008/909, 'as the framework decisions are based on mutual trust in other Member States' legal systems, the decision of the judge in the issuing State should be respected and, in principle, there should be no revision or adaptation of this decision'.[40]

89. In those circumstances, it therefore seems clear to me that application of Article 8 of Framework Decision 2008/909 is inappropriate in the present case.

90. If we remain to be convinced, I would add that the Belgian Government also misunderstands the scope and the meaning of the limit which the EU legislature has placed on the power of adaptation of the executing judicial authority in Article 8(3) of Framework Decision 2008/909.

91. I note that the Belgian Government relies on the terms of that provision to maintain that, in view of the provisions of the Law on road traffic which impose a fine for driving without a licence, the executing judicial authority is denied the opportunity to adapt the custodial sentence imposed by the issuing judicial authority, so that it therefore cannot undertake to execute the sentence imposed on Mr Sut.

92. In Article 8(3) of Framework Decision 2008/909, the legislature expressly forbids the executing judicial authority from converting a custodial sentence imposed by the issuing judicial authority into a financial penalty, so as to ensure that the sentence will generally retain the coherence it had when it was imposed and, in particular, that it will be proportionate and will constitute a satisfactory solution to the disturbance to public order caused in the issuing Member State and thus ensure the mutual trust which the judicial authorities must have for each other.

37 The EU legislature provided for two exceptions to that obligation of principle. Under Article 8(2) and (3) of Framework Decision 2008/909, the executing judicial authority may therefore adapt the length or nature of the sentence imposed by the issuing judicial authority in order to ensure enforcement of the sentence in accordance with the law of the executing Member State.

38 C-554/14, EU:C:2016:835.

39 See paragraph 36 of that judgment.

40 Report from the Commission to the European Parliament and the Council, of 5 February 2014, on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention (COM(2014) 57 final, in particular paragraph 4.2, pp. 7 and 8).

93. However, the provisions laid down in Article 8(3) of Framework Decision 2008/909 for the purposes of adapting the sentence are applicable only in so far as the sentence imposed by the issuing judicial authority is, by reason of its nature, 'incompatible with the law of the executing State'. As the Court pointed out in the judgment of 8 November 2016, *Ognyanov*,[41] the conditions laid down by the EU legislature for the adaptation of the sentence are therefore particularly 'strict'.[42]

94. It must be stated that the Belgian Government is here comparing the nature of the sentence imposed by the Judecătoria Carei (Court of First Instance, Carei) not in relation to its own legal system, taken as a whole, but in relation to Article 30 of the Law on road traffic, that is to say, its own legislation specifically punishing the road traffic offence at issue. By making such a comparison and by thus assessing Romanian public order in the light of its own — which, as I have pointed out, has changed, bringing it closer to that of Romania —, the Belgian Government is once again arguing by assimilation with extradition law and thus departs from the area of Framework Decision 2008/909 and also from that of Framework Decision 2002/584.

95. Belgian law has custodial sentences — so that the nature of the sentence imposed by the Romanian authorities on Mr Sut cannot be considered incompatible with Belgian law — and the Belgian judicial authorities are familiar with the principle of social rehabilitation, which is precisely what has generated the question referred by the national court.

96. In those circumstances, and in so far as the judicial authority responsible for ruling on the execution of the European arrest warrant issued against Mr Sut were to consider that he has sufficient ties to Belgium, so that enforcement of the sentence on Belgian territory might increase his chances of social rehabilitation, I see no obstacle to that authority undertaking to enforce the sentence imposed on the person concerned in Romania.

97. In the light of all those considerations, I consider that, in a situation such as that at issue in which the offence for which the European arrest warrant has been issued has incurred in the issuing Member State a custodial sentence, Article 4(6) of Framework Decision 2002/584 is to be interpreted as precluding the executing judicial authority from verifying and requiring, for the purposes of implementing the ground for optional non-execution set out in that provision, that the facts to which the sentence relates also be punishable by a custodial sentence in the executing Member State.

V. Conclusion

98. In the light of the foregoing considerations, I propose that the Court should reply to the question referred by the cour d'appel de Liège (Court of Appeal, Liège, Belgium) as follows:

In a situation such as that at issue, in which the offence for which the European arrest warrant has been issued has incurred, in the issuing Member State, a custodial sentence, Article 4(6) 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, is to be interpreted as precluding the executing judicial authority from verifying and requiring, for the purposes of implementing the ground for optional non-execution set out in that provision, that the facts to which the sentence relates also be punishable by a custodial sentence in the executing Member State.

41 C-554/14, EU:C:2016:835, point 36.

42 The cases in which the sentence imposed in the issuing Member State is such that it is incompatible with the law of the executing Member State are, in my view, rare, since the sentencing regime, although it is not subject to harmonisation with the EU, nevertheless has significant similarities between the Member States.